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**GIVEN JUSTICE AND ENACTED  
JURISPRUDENCE**

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**EDILEX**

**Edilex 2011/12**

Artikkeli, versio 1.0

Julkaistu 7.7.2011

[www.edilex.fi/artikkelit/7902](http://www.edilex.fi/artikkelit/7902)

Based on lecture delivered at North European Luther Academy conference at Loimaa in 2007

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### 1 Prolegomena

To begin with, a brief note on terminology. Most dictionaries will translate the German term ‘*Kirchenrecht*’ as ‘Canon Law’. However, the English term, arise as it does from Anglican soil, has Anglo-Roman connotations that are both narrower in their meaning and alien to Lutheran ecclesiology. Therefore, I have opted to forsake linguistic elegance for the sake of precision. Throughout this presentation, I will use the somewhat cumbersome phrase ‘ecclesial justice and ecclesiastical jurisprudence’, to give accurate expression to the full semantic range of ‘*Kirchenrecht*’.

As it is not possible to comprehend the development of Protestant theology in the 20<sup>th</sup> century without assessing the critical, liberal theologies of F.C. Baur (1792–1860), A. Ritschl (1822–1889) and A. von Harnack (1851–1930), similarly it is impossible to discuss Protestant ‘*Kirchenrecht*’, Protestant ecclesial jurisprudence without naming the great German scholar and theorist of jurisprudence, Rudolph Sohm (1841–1917). So towering is the figure of the late professor of Leipzig in Imperial Germany that even a century later he cannot be omitted from discussions concerning ecclesial jurisprudence. Rudolph Sohm honed to perfection the view of ecclesial jurisprudence that is called additive. It means that, in essence, the church and jurisprudence are completely different things, to the extent of being incompatible. Sohm’s war-cry at the opening of the first volume of his textbook on ecclesial jurisprudence in 1892 is a classic: “Ecclesial jurisprudence contradicts the essence of the church. The essence of the church is spiritual; the essence of jurisprudence is worldly” (“*Das Kirchenrecht steht mit dem Wesen der Kirche im Widerspruch. Das Wesen der Kirche ist geistlich, das Wesen des Rechts ist weltlich*”). Thus, Sohm separated religion and jurisprudence from each other. He not only separated them but also considered them as

sharply contrasting. Religion was seen as ethical, whereas the judicial was understood as being coercive, punitive. Therefore, judicature in its entirety can be solely the prerogative and realm of the sovereign state, whereas religion and church attend to morality and the ethics of a nation. Basically, the additive theory of the ecclesiastical jurisprudence is negative.<sup>1</sup>

There were important corollaries to Sohm's thesis. These corollaries also shed light on Sohm's judicial theology.

Later, Sohm's dichotomy came to play important role in the optimistic folk-church designs of the Weimar Republic in the 1920s: the church being the moral force of the nation. The state was expected to provide the nation with justice, the church with morality. This was also the prevailing weather in Scandinavia and in the newly independent Baltic countries where Lutheranism was seeking a new '*modus vivendi*' and '*modus operandi*' with nationalism.<sup>2</sup>

Basically, Sohm operated with the theological concept of the 'invisible church' (*'ecclesia invisibilis'*). He followed closely in the footsteps of the great theologian of German Idealism, Friedrich Schleiermacher (1768–1834).<sup>3</sup> It is self-evident that an invisible actor cannot be connected to societal jurisprudence, which can only acknowledge known, clearly defined and concrete objects of jurisprudence within its limits of jurisdiction, such as persons, corporations, companies, administrative units and property—concrete acts, deeds and negligence of stipulated obligations. The very essence and laudable spiritual virtue of the Protestant churches in the conception of Sohm was invisibility. I sum this up with a maxim: the higher the degree of true spirituality, the higher the degree of ecclesial invisibility. This is naturally an exaggeration, which is nonetheless not far from the truth. In such a conception, the visible, hierarchical Church of Rome was placed in stark contrast to the invisible Protestant churches, i.e. the true church of the Christ. Indeed, anti-Romanism was the Protestant fashion of the day, especially in contemporary Liberal theology. A good number of confessional Lutheran theologians swallowed Sohm's ecclesiology *in bona fide*. Edward Koehler's dogmatics in the United States and even the catechism of the Lutheran Church –

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<sup>1</sup> Sohm, R., Kirchenrecht. 1. Band. Die geschichtlichen Grundlagen. Systematisches Handbuch der Deutschen Rechtswissenschaft hrsg. von K. Binding. Leipzig, 1892, 1–3. Contemporary criticism of Sohm, Kahl, W., Lehrsystem des Kirchenrechts und der Kirchenpolitik. Erste Hälfte. Einleitung und allgemeiner Teil. Freiburg i. B./Leipzig 1894, 70–81. Later Sohm's views were to some extent modified, especially as a result of his debate with Adolf von Harnack who considered the origin of "Kirchenrecht" in the societal justice of Antiquity against Sohm's theory of its inner charismatic beginnings. Maurer, W., Von Ursprung und Wesen kirchlichen Rechts. Die Kirche und ihr Recht. Gesammelte Aufsätze zum evangelischen Kirchenrecht. Hrsg. von G. Müller und G. Seebass. Tübingen 1976, 44–59. Also, Maurer, "Die Auseinandersetzung zwischen Harnack und Sohm um die Begründung eines evangelischen Kirchenrechts", op.cit., 328–387. Schöllgen, G., Kirchenrecht. I, Geschichte. 1. Altkirchlich. RGG 4 Band 4. Tübingen 2001, 1268–1269: Ecclesiastical jurisprudence was born out of practical necessity in the Early Church.

<sup>2</sup> Scholder, K., Die Kirchen und das Dritte Reich. Band 1 Vorgeschichte und Zeit der Illusionen 1918–1934. Frankfurt/M-Berlin-Wien 1980, 42–45, 153–159.

<sup>3</sup> Schleiermacher, F., The Christian Faith. English Translation of the Second German Edition. Ed. by H.R. Macintosh and J.S., Stewart. Reprinted. Edinburgh 1994, 676–683.

Missouri Synod operate with the term “invisible church”. C.F.W. Walther (1811–1887) taught differently.<sup>4</sup> Where invisibility is a virtue, visibility is naturally considered a vice. The hypothetical development in history from assumed charismatic, spontaneous early Christianity towards a visible and organised church was explained with a historico-theological construction called Early Catholicism (*Frühkatholizismus*). At best, it was tolerated as a not genuine, yet inevitable historical excrescence.<sup>5</sup> Karl Holl (1866–1926), though following the trends of his time and refuting all judicial authority of the Gospel, as a historian nevertheless acknowledged that true membership in the invisible church cannot be separated from judicial acts of the visible church.<sup>6</sup>

Sohm’s concept was a fruit of changes that occurred in Western philosophy concerning natural law (*lex naturalis*). Since Hugo Grotius and other thinkers from the 17<sup>th</sup> century onwards, natural law had been seen in the light of human reason rather than in the light of divine revelation: what is reasonable corresponds to natural law. Immanuel Kant taught in 1798 that the source of natural law is human reason. Therefore, the norms of human life cannot be deduced from empirical facts but, rather, *a priori* from reason alone. Since the realm of human activities is the state, there were two opposite alternative ideas concerning the role of the state. On the one hand, the English philosopher Thomas Hobbes (1588–1679) concluded that natural law necessarily leads to the unlimited authority of the state in realising the natural law, whereas Jean Jacques Rousseau (1712–1778) taught the sovereignty of the people.<sup>7</sup> The ideology of the French Revolution and that of the founding fa-

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4 The Evangelical Lutheran Church the True Visible Church of God on Earth. St. Louis MO 1866.

5 The critical, in philosophically atheistic biblical scholar F.C. Baur, operated with the concept of *Frühkatholizismus* in a Hegelian manner: Early Catholicism was the synthesis of the Jewish Christian thesis and its Gentile Christian, Pauline, antithesis. Harris, H., The Tübingen School. A Historical and Theological Investigation of the School of F.C. Baur. Leicester 1990, 249–262. Sohms 1892, 160–164.460–506: The development towards Early Catholicism attested in 1 Clem. There should exist no Canonical Law at all. The term “justice” contains automatically the right to exert punishments. Christian congregations do not know judicial categories since they are believers’ congregations. The ordained ministry must not be understood in categories of justice, since it is a healing ministry, not instituted to exert any punitive authority. Sohms further distinguishes between uniform doctrine in the visible church and ecclesiastical justice which he denies. In the footsteps of Sohms: “Die reformatorische Lehre geht aus von dem Begriffe der *unsichtbaren Kirche*. Darunter wird die einheitliche von Gott gestiftete Anstalt verstanden, welche die Gesamtheit aller an Christus Glaubenden umfasst und äusserlich an dem Worte Gottes und den Sakramenten erkannt wird. Innerhalb ihrer giebt es kein besonderes Priesterthum; vielmehr ist jeder Christ durch seinen schriftgemässen Glauben sich selbst die Seligkeit zu erwirken fähig. Diese Gedanken der unsichtbaren Kirche und des allgemeinen Priesterthums haben zunächst eine destructive Bedeutung gegenüber der kath. Kirche, ...“ Friedberg, E., Lehrbuch des katholischen und evangelischen Kirchenrechts. Fünfte, vermehrte und verbesserte Auflage. Leipzig 1903, 80. An early critical assessment of Sohms’ premisses and method by Kahl, W., Lehrsystem des Kirchenrechts und der Kirchenpolitik. Erste Hälfte. Einleitung und allgemeiner Teil. Freiburg in B. 1894, esp. pp. 71–73. Kahl observed correctly that the history cannot provide with pure facts as Sohms had presumed in the line of historicism but only reflections (interpretations) of facts (p. 73).

6 Holl, K., Die Entstehung von Luthers Kirchenbegriff. Gesammelte Aufsätze zur Kirchengeschichte. I Luther. Sechste, neu durchgesehene Auflage. Tübingen 1932, 288–325.

7 The authority of the sovereign, however, is in his representation the authority of the commonwealth. Every member of the commonwealth is basically in possession of the same rights. Skinner, Q., Vision of Politics. Volume III Hobbes and Civil Science. Cambridge 2005, 196–204.

thers of the United States of America strongly appealed to natural law. The concept of universal human rights stemmed from it.<sup>8</sup> Thus, reason was at hand to be made into the authoritative corrective of the Bible and the Christian faith. The first weak point of this development in the area of natural law was the naïve presumption that natural law as based on reason is common, and accessible, to all of mankind, regardless of culture and religion. Secondly, by appealing to reason, the early modern and post-revolutionary state purported to change the church into an instrument of the state.<sup>9</sup>

Rudolph Sohm's concept, together with the Liberal views of the era, contributed to the erroneous idea that Martin Luther's burning of the Canon Law in 1520 marked his final farewell to ecclesiastical jurisprudence as such. Doctrine and the confession lost their connection to the constitution and justice system of the church. These were considered in strong state-church systems of the time and even later to be purely worldly issues, *adiaphora*, to be received solely from the state. The idea of the judicial monopoly of the state was philosophically motivated by G.W.F. Hegel (1770–1831) and strongly adapted by the Liberal Theology of the 19<sup>th</sup> century. Christianity was supposed to permeate the structures of society and culture to such an extent that this process would dissolve the church as a separate entity and the Kingdom of God would be identified in society and culture.<sup>10</sup> Here, absolutism and Liberalism walked hand in hand. As Hans Dombois has stated with a touch of acerbity, neither absolutism nor Liberalism is neutral or tolerant. The theory of the judicial monopoly of the state was ideal to all totalitarian states. In the classification of Dombois, Rudolph Sohm's view on ecclesiastical jurisprudence is called "additive", something additional to the very essence of the church.<sup>11</sup>

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8 "Natural and divine laws" in the U.S. Declaration of Independence of July 4, 1776. Declaration of Human Rights and the Citizen of August 26, 1789 (*Droits de l'Homme*).

9 Herms, E., *Naturrecht II. Christentum*. RGG 4 6, 132–136. Link, C., *Naturrecht. IV. Juristisch*. Op.cit. 137–139. Schneewind, J.B., *Natural Law. The Cambridge Dictionary of Philosophy*. General Editor R. Audi. Cambridge 1995, 520–521. Wiesel, U., *Geschichte des Rechts Von den Frühnormen bis zum Vertrag von Maastricht*. München 1997, 365–371. Wilhelm Maurer pays attention to this danger in F. Schleiermacher's idealistic concept of spiritual leadership of the church. Schleiermacher's theology does not know any material distinction of the work of "Gemeingeist" between ecclesiastical and public domains. "Geistliche Leitung der Kirche"; Maurer 1976, 109–121.

10 Graf, F.W., Troetsch I, Ernst Peter Wilhelm, RGG4 10 2005, 628–632. Hornig HdDT 3 1989, 204–208. Hakamies, A., *Die Eigengesetzlichkeit der natürlichen Ordnungen als Grundproblem der neueren Lutherdeutung. Studien zu Geschichte und Problematik der Studien zu Geschichte und Problematik der Zwei-Reiche-Lehre Luthers. Untersuchungen zur Kirchengeschichte 7*. Witten 1971. Ritschl, Ritschl, Albrecht, RE 17 1906, 22–34. Niebuhr, H.R., *The Kingdom of God in America* 1937.

11 Kahl, op.cit., distinguishes in the area of church and state between '*sacra externa*', that are in the legislative domain of the church and churches in a state, and '*sacra interna*' which constitute the autonomy of the church in relation to the state such as doctrine and its derivatives in the church life. Sehling, E., *Kirchenrecht*. RE III 10. Leipzig 1901, 463–466: the justice of the state is not born out of the state itself but out of the consciousness of the nation surrounding the state. This consciousness is the premise of all justice, not its consequence. Dombois 1961, 22–24. Friedberg op.cit.pp. 2–3: "The existence of justice cannot be made dependent on its sanctioning by the state. Rather, the state postulates the term 'justice'. Therefore, it cannot be accepted that the ecclesiastical justice exists only to that extent it is being offered or imposed by the state."

The dialectical understanding of ecclesiastical jurisprudence accepted a dichotomy between the justice of the state and ecclesiastical jurisprudence. This dialectical dichotomy or dualism was due to the nature of the church as spiritual, invisible and historical, on the one hand, and as a visible entity on the other hand. Divine justice, '*ius divinum*', was connected to the invisible, essential, spiritual church, and human justice, '*ius humanum*', to the historically existing universal church. These two kinds of justice live together influencing each other and yet being distinguished in their dualism from each other.<sup>12</sup> The purpose of the dialectical understanding of the ecclesiastical jurisprudence was to accommodate the dualistic view on the church born out of European philosophical idealism which operated with opposites such as nature and humanity, material and ideal, visibility and invisibility. Idealism is the child of Greek philosophy and Hellenism, not the heir of the Semitic Bible.

In the course of the 19<sup>th</sup> century, the concept of natural law gave way to historicism and positivism. The historicist school of judicial philosophy repudiated the idea of natural law as abstract and unhistorical. Positivism dismissed all metaphysics and religious knowledge. All necessary knowledge was seen as rational. It can be tested and experienced rather than generated solely in the human mind. Therefore, this knowledge was called positive. In the field of justice, positivism taught that jurisprudence, enacted by a legal authority, is justice in the very meaning of the word (J. Austin 1861). Positive justice is valid by virtue of the will of the authority in question. There are no metaphysical realities behind justice and jurisprudence. This leads to the conclusion that it is only external power and coercion that can generate justice. For this reason, positivism is unable to grasp the inner nature of justice. Consequently, positivist scholars dedicated themselves in the 20<sup>th</sup> century to the study of judicial structures.<sup>13</sup>

By and large, the Protestant churches in Germany sailed with Rudolph Sohm on board towards the great tribulation of Adolf Hitler's Third Reich in 1933–1945. Bitter lessons were in store for them, also in the field of ecclesiastical jurisprudence.

## 2 The Lessons of the Third Reich

The Nazis officially rejected positivism. Nevertheless, they practised extreme judicial positivism by imposing a justice and jurisprudence that was based on the will of the new authority in Germany. The final authority was not the law but the will of the '*Führer*'. The will of the leader surpassed all traditional concepts of the value of human life, what we to-

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12 Holstein, G., *Die Grundlagen des evangelischen Kirchenrechts*. Tübingen 1928. By Holstein, the dualism developed to an episcopal, synodical, and consistorial triad in understanding the constitution of the church. Dombois, op.cit. 26–30.

13 Soper, P., *Jurisprudence*. The Cambridge Dictionary of Philosophy. General Editor R. Audi. Cambridge 1995, 394–395.

day would call human rights. In this respect, Nazi Germany resembled to a growing extent Josef Stalin's Soviet Union. Initially, discussion in Germany focused on whether there was any judicial continuity from the days preceding the '*Machtergreifung*' in 1933. Those who advocated continuity opposed the Nazis who claimed that their revolution had created a totally new state of affairs in the field of jurisprudence and, accordingly, no continuity prevailed between this new situation and the older days. At the beginning, though, judicial continuity more or less prevailed until the war rapidly transformed Germany into a totalitarian police and terror state in the fashion of the Soviet Union.<sup>14</sup>

The churches soon felt the grip of the new antichristian regime. The church struggle ('*Kirchenkampf*'), which concerned the Holy Scriptures, the Christian faith and life, was not felt in a state of invisibility but, instead, most visibly in personal histories and in the structures and the sociology of the churches. The churches could no longer more appeal to the state which appeared hostile and put into effect the policy of the uniformity ('*Gleichschaltung*') of its totalitarian rule in all areas of life. Now there was no invisibility in which Christians could take their refuge. Traditional guarantees of legality and security by the state were gone. Pastors and lay people alike had to turn to purely ecclesial entities, to the Holy Scriptures, to the confessions of faith and to the traditional liturgies in order to maintain their faith and identity, and to formulate their stand against the all-embracing National Socialism. This took place in an apocalyptic atmosphere and with the constant risk of martyrdom. It is highly indicative that ecclesial resistance organised itself as a church within the existing church ('*Reichskirche*'), no more as an invisible church, but as a confessing church ('*die bekennende Kirche*'). In the face of increasing Antichristian legislation and jurisprudence in the country, the Confessing Church soon found that it had to follow even its own emergency justice ('*das kirchliche Notrecht*').<sup>15</sup>

After the fall of National Socialism in Europe, natural law made some sort of a comeback although very weakly. The war-crimes tribunal of Nuremberg in 1947 exemplified this comeback in practise. It was generally acknowledged that there are, after all, supra-positivist foundations of justice, most importantly human rights. No new comprehensive theory of natural law was developed, however, as a corrective to positivism. Consequently, the motivation behind contemporary human rights lacks a solid theoretical foundation. Thus its current extending agenda to reach into ever further areas of public and private life is political rather than philosophical.

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14 General presentation: Wiesel, U., op.cit. 467–486. The struggle of a prominent lawyer, '*Reichsgerichtsrat*', Wilhelm Flor (1883–1938) from Leipzig in the ranks of the Confessing Church to maintain legal continuity in the church affairs in Germany; Scholder 2 1985, 42–43.71–73.98–99.290.350.

15 On this point the Confessing Church also became divided. The Reformed brotherhoods followed Karl Barth's theology in their attempt to develop emergency justice ("*Notrecht*"). The Lutherans leaning on three major Lutheran churches ("*Landeskirchen*") in Bavaria, Wurttemberg and Hanover and other Lutheran entities turned to the Lutheran Confessions and their constitutions. The parting of the ways became final in Bad Oeyenhausen in 1936. Maurer, op.cit. p. 1–9. Besier, G., *Die Kirchen und das Dritte Reich. Spaltungen und Abwehrkämpfe 1934–1937*. Berlin-München 2001, 423–429.

The era of the German Church Struggle 1933–1945 had taught many a lesson. The presumed invisibility of the church would have meant that the church was separated from history. This was not possible. The Christians in Germany had to be part of their contemporary history, even during the darkest, most shameful and most painful moments. The Christian Church in Germany existed only where the congregations and their ministers were clinging to the Holy Scriptures and affirmed their content in word and action according to their faith. The watch-word of the time was ‘confession’. Worship and liturgy had become the particular forum of being a Christian Church. In a water-tight totalitarian state it was worship that voiced the Christian truths that challenged the all-encompassing ideology of the state.<sup>16</sup> Worship and liturgy was also the primary forum for repealing the Church of Cain. Only those ministers have the right to build the church, to lead and represent it, which are faithful to the Gospel, which is being witnessed in the confessions, as an unalterable foundation of constitution and jurisprudence. The external order of the church could not be separated from the confessions. In contrast to die-hard state-church traditions, it was generally realised and later underlined by the existence of the Communist German Democratic Republic (GDR) that it is only the church that can judge and decide upon matters of the church, its doctrine and constitution regardless of the judicial supervision of the state.<sup>17</sup>

### 3 The Post-War and Post-Sohm ‘Kirchenrecht’

In the reconsideration and the necessary revision of views, values and tenets of the past, ecclesial justice and ecclesiastical jurisprudence experienced a strong post-World War II renewal. Rudolph Sohm’s judicial theology and its extensive and deep progeny were seen in a critical light. The discipline of ecclesiastical jurisprudence is extremely rich in Germany. For this reason alone, I am content to refer to only a few representative names.

A completely new element began to dominate the field of ecclesiastical jurisprudence. Since the Third Reich had taught that justice could not be the monopoly of the state, it was seen more clearly in the light of the experiences of the Confessing Church that the church had its own system of justice, “*etsi res publica non daretur*.”<sup>18</sup> This judicial system, *Kirchenrecht*, grows out of the nature of the church. Therefore, this understanding of ecclesiastical jurisprudence is called consecutive.

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16 Scholder 1 1980. 226–227: Scholder’s interpretation of Altona (Berlin) “Blood Sunday” of July 17, 1932 between Nazis and Communists and the liturgical, not political, reaction of the clergy of Altona as a harbinger of the future way of opposition against the totalitarian state.

17 Wiesel, op.cit. 507–510: There were striking similarities between Hitler’s Third Reich and the GDR in the area of justice. Sophisticated civil justice was simplified and reduced to a tool of politics and inner security. The politics of the state controlled justice. Therefore, the GDR was not a state governed by law.

18 Modification of Hugo Grotius’ (1583–1645) famous methodical argument “*etsi Deus non daretur*”, made further known by Dietrich Bonhoeffer in his letter from prison on July 16, 1944 commenting on time come of age.



For historical reasons, Karl Barth was naturally found to be in pole position. He had already clashed with Otto Dibelius in the 1920s over folk-church ideology.<sup>19</sup> Barth had energetically been the man of the resistance, the towering figure behind the 1934 Barmen Declaration. Thus, his theology seemed in many respects to be the right biblical one after silence fell on the European fronts in 1945. The post-war days were the time of a Barthian boom in theology. Faithful to the premises of his kerygmatic theology, Barth repudiated natural law. His point of departure was christocracy, which was to be realised in fraternities of congregations (*'Bruderschaft'*). Ecclesial justice was derived from the doctrine of justification. It is liturgical and consecutive. Consecutive ecclesial justice is derived from the doctrine of the church. Among others, Hans Dombois makes a critical comment on Barth's concept: the christocracy is there, but Barth does not make it clear how this christocracy works in practical terms. There is a chasm between the theology and its realisation in the church. Thus, in the end christocracy is sheer pneumatology and, consequently, all concrete forms of ecclesial justice end up in the court of *'ius humanum'*.<sup>20</sup> The Austrian Lutheran theologian Wilhelm Dantine (1911–1981) was a faithful follower of Barth's intentions, repudiating concepts of natural law and deducing ecclesial justice from justification (*Recht aus Rechtfertigung*)<sup>21</sup>.

Although Dietrich Bonhoeffer (1906–1945) after WW II emerged from his personal endpoint on the gallows at Flossenbürg to his present sainthood, his well-reflected scriptural theology had no practical influence on the discussion of ecclesiastical jurisprudence. On the contrary, Bonhoeffer was after his execution on his way to oblivion while lawyers and church politicians were busy with constructing anew the imperial Protestant church under the umbrella of EKD. Only his friend Eberhard Bethge worked hard on his manuscripts, which were published from 1949. The problem of Bethge's commitment to the memory of Bonhoeffer was his own contemporary interpretation of his late friend. As more material emerged raising more question marks over the picture of Bonhoeffer, a new edition of Dietrich Bonhoeffer's works became necessary in the 1980s. Dietrich Bonhoeffer emerged more and more as a true Lutheran scholar strongly anchored in the Bible, Christology, and ecclesiology, rather than a streamlined, politically correct, ecumenical theologian. In his ecclesial sociology "Sanctorum Communio" in 1930 Bonhoeffer drafted an ecclesiastical jurisprudence that was biblical and sociological, based on the unique body of the Christian Congregation as opposed to traditional institutions (*'Anstalt'*) given from above.<sup>22</sup> All that

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19 Scholder 1 1980, 152–159.

20 Dombois, H., *Das Recht der Gnade. Oekumenisches Kirchenrecht 1. Forschungen und Berichte der evangelischen Studiengemeinschaft Band 20.* Witten 1961, 40–57.

21 Wilhelm Dantine (1911–1981). His collected articles on judicial theology and canonical law were published posthumously in "Recht aus Rechtfertigung. Ausgewählte rechtstheologische und kirchenrechtliche Aufsätze von Wilhelm Dantine hrsg. von A. Stein. Tübingen 1982."

22 Glenthøj, J., *Bonhoeffer-studier. Efterfølgelsens teologi. Artikler og foredrag samlet og udgivet i anledning af sognepræst, Lic.Theol. Jørgen Glenthøjs 60 års dag den 29. November 1982 af Erik H. Bennetzen, Jens S. Krejberg, Søren Ruager.* Hygum 1982, 11–41. H.E. Tödt in, *Zur Neuausgabe von Dietrich Bonhoeffers Werken* in Bonhoeffer, D., *Sanctorum Communio. Eine dogmatische Untersuchung zur Soziologie der Kirche*, Hrsg. Von J. Von Soosten. Dietrich Bonhoeffers Werke 1. München 1986, IX–XXI. An

can be said concerning true post-war Church History is that the traditional bureaucratic institutions triumphed over Bonhoeffer's option of biblical ecclesiastical jurisprudence. Still, this option is worth registering here, even as a lost opportunity.

The Reformed Erik Wolf (1902–1977) was in pursuit of a theological motivation for justice and jurisprudence. He was looking for methods and means of realising biblical neighbourly love in the church. He operated with Barthian terms of 'christocratic brotherhood' and 'brotherly christocracy'. Wolf was credited with overcoming Sohm's legacy, formalism and positivism in ecclesial justice and ecclesiastical jurisprudence. On the other hand, Wolf did not consider the Holy Scriptures and the confessions as sources (*'Rechtsquelle'*) of ecclesiastical jurisprudence. He called them measuring tapes (*'Richtsschnur'*). What the relationship between source and tape measure is, has been a bone of contention.<sup>23</sup>

Johannes Heckel (1889–1965) published his study on ecclesial justice and ecclesiastical jurisprudence in 1954 (*'Lex charitatis'*). Heckel followed Luther and, through the Reformer, the New Testament in order to develop a positive, spiritual justice of the church (*'ius positivum ecclesiae spiritualis'*), which should be the law of love enacted in the church. In Heckel's conception, there were fixed points that were prior to all ecclesial justice, such as preaching, the sacraments, the fundamental justice of brotherly love, Christian freedom and equality, the keys and the office of the ministry. Bearing in mind how Hitler's regime had attempted to overcome the churches, Heckel's primary intention was to close all the loopholes through which secular powers could penetrate into the church. Heckel considered the differences between the church and the state to be so vast that the only reasonable mode of co-existence in the society was a contract, a concordat. Heckel's interpretation of Martin Luther's theology was accepted by some but also strongly criticised by others.<sup>24</sup>

The real giant in terms of the quantity of output among all scholars of ecclesial justice was an outsider to the guild of the academics, namely Hans Dombois (1907–1997) with his tripartite, titanic, and extremely innovative work on ecclesial justice and ecclesiastical jurisprudence called 'The Justice of Grace' (*'Das Recht der Gnade'* 1–3, 1961, 1974, 1983). Dombois adopted a theory of historical eras, in the fashion of Rudolph Sohm's late work, in constructing the legitimate justice of the church universal. Hans Dombois, following in the footsteps of Wilhelm Grewe and Edmund Schlink, rejected the category of compulsion (*'Sollenstruktur'*) as the sole category of justice. In doing so, he repudiated a long tradition in Western jurisprudence as a mere prejudice which had had fatal consequences in judicial

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important turning point was J. Glenthøj's *Dokumente zur Bonhoeffer/Forschung 1928–1945*. München 1969, *Sanctorum Communio* 1986, 140–154.177–179: Christian Congregation is a communion (*'Gemeinschaft'*), not a society (*'Gesellschaft'*).

23 Merkel, F., IV. Kirchenrechtswissenschaft b) Evangelisch. RGG 4 4 2001, 1289. Dombois 1961, 57–60. Stein, A., *Evangelisches Kirchenrecht. Ein Lehrbuch*. 2., überarbeitete Auflage. Darmstadt: Luchterhand 1985, 5–6. Müller, H-M., *Bekenntnis-Kirche-Recht. Gesammelte Aufsätze zum Verhältnis Theologie and Kirchenrecht. Jus Ecclesiasticum Band 79*. Tübingen 2005, 317.

24 Merkel, *ibidem*.

history. Grace realised in amnesty and pardon is also a valid judicial category. In Dombois' system, liturgy was the essential forum of ecclesial justice. Liturgy and confession were seen inseparably together, not only as cultic items, but judicially binding acts that express the presence and reality of the Christian Church.<sup>25</sup>

Generally, in ecclesiastical jurisprudence, the tide was flowing from the low water of the additive concept through the reefs of the dialectical concept towards the high grounds of the consecutive concept. In the additive concept, justice emanated from the judicial monopoly of the state and was added as an alien element to the church. In a sharp contrast to this, the consecutive concept of ecclesial justice means that justice is being derived from the very essence of the church. Ecclesial justice is a consequence of the character of the Christian Church. What remained ambiguous and oftentimes even obscure was the question, how faithfully certain conceived principles of ecclesial justice in reality do conform to the Holy Scriptures and the Lutheran Confessions.

#### **4 Leuenberg Concord 1973**

I put to one side a multitude of remarkable and less remarkable scholars of ecclesial justice and ecclesiastical jurisprudence and, instead, move on to study the motivation of an epochal and binding document in Germany. What I have in mind is the Leuenberg Concord of 1973 in the Evangelical Church in Germany (EKD) between the Lutheran and Calvinist churches as well as the Churches of the Union. This concord was supposed to create ecclesiastical unity and church fellowship between those Protestant churches that were separated by their different historic confessions. The Leuenberg Concord was supposed to be a brain-child of the new understanding of the church in relation to the historical confessions and the New Testament. The end-result was full altar and pulpit fellowship of those German Protestant churches that had been separated for centuries since the Reformation.

The first steps towards Leuenberg were actually taken in Barmen in 1934, where Karl Barth's Calvinistic, actualistic concept of confession triumphed over Hermann Sasse's Lutheran concept. Sasse was even denied the platform to defend the Lutheran doctrine. What is meant by actualism is simply a concept according to which there prevails no necessary continuity between historic confessions. What is essential is the momentary act of confession, rather than a collection of confessional documents. Thus, the historical confessions of the 16<sup>th</sup> century could be labelled as children of their own age, useful, informative but not necessarily binding, whether in detail or in their entirety. This development was accelerated by the consultations that led up to the Arnoldshain Theses on the Eucharist in 1957. The differences concerning the Eucharist were bypassed by appealing to modern exegesis of the New Testament. In other words, the idea was that New Testament scholarship could find

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<sup>25</sup> Merkel, *ibidem*.

biblical solutions that would practically overthrow the exegesis of the Reformers in the 16<sup>th</sup> century as antiquated.<sup>26</sup>

How well, then, did the new generation of the consecutive school of ecclesial justice and ecclesiastical jurisprudence succeed in developing the life of the church from the Holy Scriptures and the confessions of the Reformation? It is eye-opening to read post-Leuenberg articles and studies on ecclesial justice in relation to the Holy Scriptures and the doctrine of the church. I will give the word to Hans-Martin Müller ('Bekenntnis-Kirche-Recht' 2005): For the unity of the church as an outward, visible fellowship, consensus concerning doctrine ('*consensus de doctrina*') is constitutive. When repeating the refrain of the '*magnus consensus*' of the Augsburg Confession of 1530, Müller, however, is here playing the living sermon against documented doctrine (*Evangelium nach dem reinen Verstand/doctrina evangelii* CA 7) as if there prevailed an element of dissonance between these two in Lutheran doctrine. Such a concept of the living voice of the Gospel ('*viva vox evangelii*') is truly far-fetched, inconceivable to the fathers of the Lutheran Reformation who acknowledged no chasm between documents of the true faith and preaching the Gospel. The problem with doctrinal paragraphs for Müller is, that they are supposed become petrified at the expense of the living voice of the Gospel. Just like Karl Barth would, Müller advocates the view that it is not possible to keep the church under perennial, immutable doctrinal formulations. Instead, every generation must define its own words and actions as a church, according to its faith and conscience and before the Gospel. Since the Gospel is the living Word of God in Jesus Christ, it must be passed on to others in a binding manner and in the freedom of the faith without the slavery of certain doctrinal formulations. This is the historical legacy of four witnesses, namely Pietism, Revival ('*Erweckungsbewegung*'), the Enlightenment and German Idealism! What a cloud of witnesses, indeed, comprise as it does A.H. Francke, F.W. Krummacher, Voltaire and J.W. von Goethe!

The popular anti-clerical and anti-theological caricature of petrified doctrines becomes at least problematic when one bears in mind that the Lutheran concept of dogma is Christological throughout. How could the Saviour become petrified, he who according to his promise is risen from the dead and is truly present in his church until the end of the age (Mt. 28, 20)?

Another important criterion for Müller is credibility, which is created before the world by means of Christian unity. Müller further understands doctrine as a *χάρισμα*, since doctrines can be measured and judged only with a particular gift of the Holy Spirit without objective, pre-conceived criteria. The ancient problem of the word and the Spirit surprisingly emerges here. The epistemological problem is aggravated in cases of conflict. Whose spirit, then, is the guarantor of the truth when opinions and people clash? Where Bonhoeffer studied the church in its all dimensions as a Christological and pneumatological entity born of and

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26 Kiviranta, S., (Ed.) Theologische Grundprobleme im Leuenberger Konkordienentwurf. Memorandum der Arbeitsgruppe der evangelische-lutherischen Kirche Finnlands. Hrsg. S. Kiviranta. Schriften der finnischen Gesellschaft für Missiologie und Ökumenik XXII. Helsinki 1973. Mannermaa, T., Von Preussen nach Leueberg. Hintergrund und Entwicklung der theologischen Methode in der Leuenberger Konkordie. Arbeiten zur Geschichte und Theologie Luthertums. Neue Folge Band 1. Hamburg 1981.

maintained by the Word of God, Müller and those like him appeal to the Holy Spirit alone.<sup>27</sup>

There are two further factors that are important for Müller, namely “freedom” and “consensus”. Yet, freedom is interpreted within categories of the Enlightenment rather than along Martin Luther’s teaching in the ‘Freedom of a Christian’. It is for Müller an all-encompassing principle superseding even the doctrine. In understanding the consensus which repeatedly occurs in the Augsburg Confession (*magno consensu*), Müller gives the word a different meaning from the usage of “consensus” in the Augsburg Confession. To him consensus has also a formative, not only a receptive meaning. Consensus in the sense of acceptance by men is what finally makes and, as correctly understood and interpreted, gives all the binding doctrines, to which all those who are to be saved join in faith, doctrine and confession. This is the “great consensus” (*magnus consensus*) of the Book of Concord. When one stands up to criticise the scriptural doctrines as rigid and “petrified”, this is not less than criticising the Word of God itself that has given birth to those doctrines. “As the father, as the son,” applies here. Müller’s assertion does not look as outrageous as the Anglican notion I am quoting next. After all, cautious, elaborate formulations are characteristic of the Leuenberg Concord and its commentaries. Yet, as a matter of fact, the difference between its fundamental approach and the following sentence is only cosmetic: “*Today Anglicanism cannot justify its adherence to the doctrine of the Trinity and incarnation unless it is prepared to accord an authority to the Church as ‘witness and keeper of Holy Writ’ (Article XX). It is on the authority of the Church of the early centuries, not the Bible alone, that Anglicanism upholds them.*”<sup>28</sup> The black hole of such a theological construction can be found in the concept that the Holy Scriptures as true summaries of the Holy Scriptures constitute no true source of justice for the church. The Bible and the Lutheran Confessions are merely advisory approximations, not judicial authorities as such.<sup>29</sup> Stating this, a rift opens up between the norms of faith and any practical application of these norms. This rift is very flexible. If need be, it can swiftly swallow a mosquito or a camel. Thus, the interpretation of a present-day reader with all her ignorance or capricious, vacillating contemporary prejudices finally becomes the very guiding norm to replace the Lutheran doctrine, according to which, this very norm of all and everything is the Word of God, the Holy Scriptures. It is, indeed, supreme norm overriding all human tenets and conventional traditions. All other norms (*norma normata*) are guided by the supreme norm, the Word of God.

Summing up: the sources of ecclesial justice and ecclesiastical jurisprudence are, according to Müller, the Holy Scriptures and the historical confessions insofar as (*quatenus*) they conform to human credibility, consensus, contemporary understanding and the traditions of

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27 Similarly, Pirson, D., *Kirchenrecht 2. Evangelische Kirche*, RGG 4 4 2001. 1276–1279, presents the promise of the Holy Spirit as the normative authority of *Kirchenrecht*. The Holy Scriptures and the confessions have indirect authority.

28 Müller, *Magno consensus docent... Zum Konsensusbegriff nach evangelischen Verständnis*. Op.cit. 64–77. Sykes, S. – Booty, J., Knight, J., *The Study of Anglicanism*. Revised Edition London 1998.

29 Müller, op.cit. 316–318.

German church history and even *Geistesgeschichte*. Who guarantees that all these cultured criteria are not short of another kind of Babylonian captivity of the Word of God as has happened numerous times in the history of the Christian Church?

## 5 Scandinavia and Finland

Before embarking on the final constructive part of this lecture, I want to briefly touch on ecclesial justice in Scandinavia and Finland. Sweden as well as Norway and Denmark have traditionally been countries with a Lutheran state-church. Therefore it is natural that what is called in German '*Staatskirchenrecht*', the question of the public status of the church in society and in relation to the state has been under theological and judicial study and public debate. During the German occupation in 1940–1945, Norway and Denmark also had their own share in '*Kirchekampf*' with Hitler's regime.<sup>30</sup> It was in Sweden that the anomalies of a state-church system became most obvious; hundreds of thousands of unbaptised people could legally be members of the Lutheran church. In all Scandinavian countries the governments have exercised heavy-handed rule over the church. The Lutheran churches have been objects of a continuous government policy of full conformity or '*Gleichschaltung*' with the values of a secular society. It was in Sweden that the church was finally separated from the state in 2000. Despite this radical step, the Lutheran church is still under strict political control. The principle of the democratic 'sovereignty of the people' has been raised to a dominating principle over the church. This 'sovereignty of the people' is the reason why political parties continue their water-tight control the Lutheran church in Sweden.

In Finland, the old state-church system was abolished in 1869, when a new church law was promulgated. After the war of 1808–1809 between Russia and Sweden, Finland had been annexed to Russia as an autonomous grand duchy. The principal separation of the Lutheran church from the state was natural since the Russian Orthodox emperor was the head of the Lutheran church according to the old orthodox Lutheran Swedish church law of 1686. I call the separation "principal" because large areas of ecclesiastical administration still remained in the court of the state. A major step towards fuller ecclesial autonomy was achieved in 1944 when the amendment of the Church Law created the administrative Church Council. Apart from taxation and a rigid parochial structure along municipal boundaries, the remnants of the ancient state-church system were dismantled in 2000.<sup>31</sup>

In the old Swedish Church Law, the state acknowledged the supremacy of the Bible and the Book of Concord. How then was the authority in the church to be formulated in the new

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30 Glenthøj, J., *Kirkelige dokumenter fra besættelsetiden*. Borum 1985.

31 Pirinen, K., *Kirkon oikeudellisen aseman ja järjestysmuodon kehitys. Kirkko suomalaisessa yhteiskunnassa 1900-luvulla*. Toim. M. Heikkilä ja E. Murtorinne. Helsinki 1977, 107–122.

Church Law under Emperor Alexander II (1855–1881)? Hot controversy followed the new Lutheran Church Law of 1869. The chairman of the Church Law committee, Bishop F.L. Schauman (1810–1877) formulated the first paragraph concerning the confessional status of the Church of Finland: the Lutheran confessions are binding insofar as (*quatenus*) they conform to the Holy Scriptures. Finally, confessional and Pietistic opposition to Schauman prevailed. The first paragraph came to stipulate that the Lutheran confessions are binding because (*quia*) they conform to the Holy Scriptures.<sup>32</sup> This formulation survived even the latest reform of church law and church constitution in 1993, even when one of the marks of the church, the power of the keys of heaven—in other words, church discipline—was completely abolished from the new constitution. In Finland, ecclesial justice and ecclesiastical jurisprudence have generally been disciplines with minimal theology. With a few exceptions only, such as Dr. Pekka Leino and Dr. Arto Seppänen, Rudolph Sohm's additive views have dominated continuously and for a long time; recently, they have been mixed with a contemporary Liberal agenda and political theology. The common ground of Sohm's concept, the strong influence of the Biblicist theology of J.T. Beck (1804–1878) that landed Finland from the middle of the 19<sup>th</sup> century, and the High Liberalism of the age meant that ecclesial justice could exist only within the parameters the state was willing to grant to the church. The problems of such a concept were met with the assertion that an outward institutional structure, though indispensable, was only a shell of the true church which is the invisible fellowship of believing souls with Jesus Christ. Further, the Finnish folk-church system was the best shell for the invisible true church in the souls and hearts of the people.<sup>33</sup>

A recent development has introduced even judicial positivism to the field of ecclesial justice. This novelty, apart from a certain degree of ignorance, is indicative of a predominantly secular understanding of the constitution. It belongs to the essence of positivism that it does not acknowledge any supra-positivist source of justice, such as divine revelation. This extraordinary crossbreed, however, has been connected to a new secular concept of consensus: since the Bible is a source of contradicting interpretations, it is synodical majority that can make claims to ecclesiastical consensus. This is a long step further from Müller's Leuenberg concept: now the Bible has been adroitly excluded from jurisprudence. Doctrine and ecclesiastical practise become plainly issues of synodical majority decisions. There is no place for the teaching of the Book of Concord as true interpretation of the Bible. The synodical majority overrides both the Holy Scriptures and the Lutheran Confessions. Majority decisions must conform to changing societal tenets within the legal framework of secular justice. This was exactly what the Nazi German Christians did in the Third Reich. This is exactly, according Wilhelm Maurer, what ecclesial decision-making

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32 Pirinen, K., Schaumanin kirkkolain synty. Zusammenfassung: Die Entstehung des Kirchengesetzes von Frans Ludvig Schauman. Suomen kirkkohistoriallisen seuran toimituksia 132. Helsinki 1985. Pirinen, K., Kirkon oikeudellisen aseman ja järjestysmuodon kehitys. Kirkko suomalaisessa yhteiskunnassa 1900-luvulla. Toim. M. Heikkilä ja E. Murtorinne. Helsinki 1977, 107–122.

33 Bishop Jaakko Gummerus' view (1870–1933) in his lecture on the folk church in 1926 is representative; Mannermaa, T., Eräs kansankirkon teologinen tulkinta suomalaisessa keskustelussa. Kontrapunkteja. Teologisia tutkimuksia ajankohtaisista teemoista. Suomalaisen teologisen kirjallisuusseuran julkaisuja 122. Helsinki 1980, 108–123.

cannot be under any circumstances. And it was the Confessing Church that basically obstructed the fallacious concept of the German Christians.<sup>34</sup>

## 6 Given justice and enacted jurisprudence

Sohm's concept, as I have stated before, has made a great number of scholars blind to even the most obvious issues of ecclesial justice and ecclesiastical jurisprudence in the Lutheran confessions. Whenever this blindness has been more or less cured, the reader of the Book of Concord is amazed to realise how often he comes across statements of justice and jurisprudence when reading the Confessions. This justice is a natural dimension of the pure biblical doctrine.

The foundation is the traditional Christian concept of natural law. There is a long line from Aristotle and Stoic philosophy via St. Augustine and Thomas Aquinas up to G.W. Leibniz (1646–1716), who wrote the systematics of Christian natural justice: God's justice is reconciled with his other perfections and all his actions. Martin Luther adhered to St. Paul in Rom. 1 and 2: God's will as Creator is the natural law (*'lex naturalis', 'ius naturale'*). This law follows its own God-given teleology. For Luther and Lutheran orthodoxy alike, the right understanding of natural law is Christological. It is God's revelation in Christ that finally marks the boundary between the right and false concepts of justice. This is the decisive difference between Luther and the Lutheran orthodoxy on the one hand, and the development that occurred in the early modern era from Hugo Grotius and René Descartes towards full rationalism on the other hand. A rationalistic natural law does not need the Holy Scriptures as a corrective.

Ecclesial justice covers the entire life of the church. Ecclesial justice and ecclesiastical jurisprudence, too, are basically *'creatura verbi'*, created by the Word of God. The Word of God does not only express pious desires and wishes and other high ideals, but teachings with judicial validity. For this reason, issues of ecclesial justice were important in the Early Church. Unlike Dom Gregory Dix in his *magnum opus*, 'The Shape of the Liturgy', Werner

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34 Maurer 1976, 16–21. "Das bedeutet für die evangelische Gemeinde, dass ihr Rechtsprinzip nicht die demokratische Ordnung der politischen Gemeinde bildet. Das bedeutet für die Synode, dass sie nicht wie ein demokratisches Parlament den Willen der Gesamtkörperschaft repräsentiert. Die kirchliche Gemeinde ist keine Genossenschaft von Gleichberechtigten, in der der Mehrheitswille gilt, sondern eine congregatio fidelium, die um Wort und Sakrament sich sammelt und die ihr ganzes Gemeinschaftsleben so einrichtet, das dies Wort gepredigt, gehört, im Glauben und in der Liebe angenommen und der Welt glaubwürdig bezeugt werden kann." Simojoki, A., Tunnustus kirkko-oikeuden lähteenä. Teologinen Aikakauskirja 4 1989, 334–337. Voipio, J.-Träskman, G- Halttunen, M., Ventä, K., Uusi kirkkolainsäädäntö. Kirkkolain, kirkkojärjestyksen ja kirkon vaalijärjestyksen kommentaari. Helsinki 1997. Simojoki, A., Herran Kristuksen seuraaminen. Kuinka eteenpäin Suomen kirkossa? Helsinki 2004. Leino, P., Kirkkolaki vai laki kirkosta. Hallinto-oikeudellinen tutkimus kirkon oikeudellisista normeista ja niiden synnystä. Suomalaisen lakimiesyhdistyksen julkaisuja, A-sarja 231, Helsinki 2002. Leino, P., Kirkon oikeudelliset normit. Johdatus Suomen evankelis-luterilaisen kirkon oikeuteen. Suomalaisen lakimiesyhdistyksen julkaisuja, E-sarja N:o 12. Helsinki 2005. Juntunen, H., Kirkkolaki ja omatunto. Onko kirkon lainsäädäntö pätevää ja sitovaa? Kirkon tutkimuskeskusten www-julkaisuja 9. Tampere 2006.



Elert proved in his study of the Eucharist and church-fellowship in the Early Church that ecclesial justice comprises the office of the ministry, the canon and the doctrine. The celebration of the liturgy was, apart from a cultic ritual, always a question of ecclesial justice as well: What is the authority to decide where liturgy may be celebrated: Rome, Constantinople or a local congregation? What is the authority to decide which form of liturgy is to be followed? By whose authority is the absolution pronounced? Does this absolution cover all kinds of sins? Who can lead the liturgy? Is ordination necessary? What about liturgical acts in emergency situations and their validity? All these questions are religious and judicial at the same time.<sup>35</sup>

The church receives her justice from the Bible, the Word of God. Nothing could be more alien to the Lutheran doctrine than the Roman or Anglican or the positivist concept where the church is the source of ecclesial justice. There is an illuminating example of this in the 28<sup>th</sup> article of the Augsburg Confession: it is the Bible that had abolished the Sabbath, not the church by its own authority as Rome had erroneously boasted. Wherever controversy arises about the authority of the Pope, the bishops or the councils, or where the authority to ordain pastors is being discussed, or wherever the rights of a local congregation are being questioned, the verdict must be biblical. To express it in terms of systematic theology, the Word of God is the supreme norm in all areas of the church. The Holy Scriptures are the norm that regulates church doctrine, church life and practise. This is most apparent in the Lutheran Confessions from beginning to end. Time and again, it was the scriptural argument that the Lutheran reformers employed against various kinds of human, ecclesial traditions, conventions and Canonical Law of Rome. Testimonies of Church Fathers and ancient synods were used in the second place to show how the same biblical doctrine and practice in question in the 16<sup>th</sup> century was to be found already in the writings of the Fathers and in selected canons of the revered synods of the Church. The use of the Word of God as the supreme norm, *norma normans*, is due to its being the living and powerful Word of God, who has spoken his word to men through Moses, the prophets and finally through his Son Jesus Christ (Hbr. 4, 12). His word is clear, comprehensible. The Bible is its own interpreter. It is true and efficacious.<sup>36</sup> In other words: God is the author of the Bible and Christ is its content. All assertions contrary to this are basically atheistic since they, at the outset, exclude God's true existence and his omnipotence. In the classic dogmatic presentation by the giant of the Lutheran Orthodoxy, Johann Gerhard (1582–1637), namely his “Loci Theologici” (1610–1625), the status of the Word of God as the norm is based on its divine qualities. According to chapter XXI, ‘*De Norma ac Regula Dogmatum et Controversiarum in Ecclesia*’, God's word is the sole and unique norm of teaching the faith and ways of life, probing all spirits, and in judging all controversies concerning the (Christian) religion.<sup>37</sup> All

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35 Elert, W., *Eucharist and Church Fellowship in the First Four Centuries*. Transl. from the German by N.E. Nagel. St. Louis MO 1966. Dombois, op.cit. 363–814 “Kirchenrecht als liturgisches Recht”. Dix, G. Dom, *The Shape of the Liturgy*. London 1986. Pelican, J., *The Christian Tradition 1. The Emergence of the Catholic Tradition (100–600)*. Chicago 1971, 339.

36 *Claritas, perfectio, perspicuitas, Scriptura Sacra sui ipsius interpres, efficacia.*

37 437. “Ex Scripturae perfectione et perspicuitate resultat hoc αληθεια, quod ipsa sit sola unica ac perfecta norma et regula, juxta quam de fide et moribus in ecclesia docendum, spiritus omnes probandi et omnes religionis controversiae dijudicandae ...Scriptura sacra vocatur canon et canonica Scriptura, utique ergo erit norma ac regula dogmatum in ecclesia.” Ioannis Gerhardi Loci Theologici Cum Pro Adstruenda Veritate Tum Pro Destruenda Quorum Contradicientium Falsitate etc. Opus Praeclarissimum Novem Tomus Comprehensum Juxta Editionem Principem Accurate Typis Exscribendum. Ed. Preuss. Berlin 1863, 193–201. Cit. p. 193.

other ecclesial norms are *norma normata*, that is, norms guided by the supreme norm, the Word of God. Dietrich Bonhoeffer stated in ‘Sanctorum Communio’ that the church is sociologically a unique type: all authority in the church/congregation belongs to the Word of God. There is no empirical instance in the church that exercises authority over and against the Word of God.<sup>38</sup>

This authority is Christological. It is illuminating to study how Luther in the Smalcald Articles repudiated the claims of the Pope concerning primacy in the church. His teaching was motivated by the biblical promise of Jesus to be always present in his church (Matth. 28, 20). Since the true head of the church, Jesus Christ, is truly present in his church, the claims of the Pope concerning primacy are judicially null and void. The continuity of the church is in the person of the Christ. The doctrine of the true presence of the Christ in his church is thus not only mystical; it is judicial as well.

Church law and constitution as ecclesial justice and ecclesiastical jurisprudence are nothing else but the Bible and the Lutheran Confessions expressed in judicial and constitutional categories and translated into the language of jurisprudence, in the words of Wilhelm Maurer: “Thus, the Lutheran Confessions require a confessing Canon Law, a human justice that acknowledges the divine right.”<sup>39</sup> The Church Law of the Evangelical Lutheran Church in Finland prescribes this ‘*sola Scriptura*’ principle at the outset in the first paragraph.

Ecclesiastical jurisprudence can be under the general control of secular justice, which the appointed state organs execute in the society. The freedom of the church in the society does not imply that the church is exempted from the controllable rules of justice. All external, arbitrary forms of rule such as episcopal dictatorship or populist mob justice are sheer injustice and, consequently, vices that must be corrected by the judicial institutions of the state. This controlling authority, however, has no say on such material issues as whether a dogmatic and judicial premise is acceptable or not. This must be vigorously emphasised in our times when the society is taking alarming steps towards a secular, ‘*Weltanschauungsstaat*’, ideological totalitarianism. Instead, the state authority in question, can examine whether ecclesiastical jurisprudence is genuinely consistent with its valid sources. This is the area of judicial arrangements which are being called in German *Staatskirchenrecht*. The Church and the state follow different judicial prescriptions from very different sources of justice. Still, they are not isolated from each other. A member of the Church is Church and its members in the society.<sup>40</sup> Presently and in the future, the harmonization of laws in the European Union may cause new ideological frictions, even conflicts between faiths and

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38 “Sanctorum Communio“ 1986, 140–154. 177–179.

39 Maurer, W., Bekenntnis und Kirchenrecht. Die Kirche und ihr Recht. Hrs. von G. Müller und G. Seebass. Jus Ecclesiasticum Band 23. Tübingen 1976, 1–21. On p. 21, Maurer writes, “So erfordert das lutherische Bekenntnis ein bekennendes Kirchenrecht, ein menschliches Recht, das das göttliche Recht anerkennt.”

40 Campenhausen, A. Freiherr von, Kirche und Staat. II. Rechtlich. RGG 4, 4. 2001, 1046–1049. Campenhausen, A. Freiherr von, - H. de Wall, Staatskirchenrecht. Eine systematische Darstellung des Religionsverfassungsrechts in Deutschland und Europa. Ein Studienbuch. 4., überarbeitete und ergänzte Auflage. Juristische Lehrbücher München 2006, 39–40. 141–148.

secular authorities. For this reason, profound theological and judicial investigation will be needed to fend off any risk of alien interference in the Church as well as in the society.

What I have stated, thus far, concerns ecclesial justice in its very core meaning as the received and enacted justice of the Bible and of the Lutheran Confessions. This is called 'divine justice' (*'ius divinum'*). This divine justice is the way Christ, who is constantly present in his church, practically exercises his authority in the church let it be a multitude of Christians or where two or three are being gathered together in his name (Matth. 18, 20). Therefore, as Dietrich Bonhoeffer formulated it, there is no valid authority in the church or in the state that can ignore, frustrate or repeal a single point of divine justice of the church since the church is instituted in Christ through God's self-revelation.<sup>41</sup>

Divine justice stipulates what is necessary (*necesse*) in the church. This is not, however, the only category of ecclesial justice. The other category is 'human right' (*'ius humanum'*). *'Ius humanum'* does not stipulate matters of divine necessity but rather what is beneficial and good (*'bene'*) in the church so that it can live and worship as a visible, sociological unit in good order. This distinction between divine right (*'ius divinum-necesse'*) and human right (*'ius humanum-bene'*) is fundamental in the Book of Concord. All things belonging to the category of human right in the church are definitely under, and must be in full conformity with, divine right. Therefore it is more or less misleading to mint areas of positive human right in the church as positivism. Matters of human right are changeable, whereas matters of divine right are perennial; indeed, they are for ever, as Jesus Christ, the Head and the Lord of the church is the same yesterday, today and forever (Hbr. 13:8). Any isolation of these categories from one another is an age-old error. As I stated before, matters of divine right are not only high ideals and wishes, elevated principles, against which the human right would be considered as every-day and down-to-earth ecclesial justice. No, all kinds of practice always practise a theory, a theology, whether right or false. Divine justice is the primary category of justice in the church. Everything else is deduced from it. It was the fatal error of Luther School of Helsinki since the mid-1980s that they adapted an early modern conception of natural law in relation to human reason. The early modern concept was devoid of Christology. Thus, the boundary between the perennial and the contingent in Christian doctrine was erroneously placed between Law and Gospel and not between divine right and human right where it properly belongs to.<sup>42</sup>

Judicial language and presentation follow judicial categories also in the church. Yet, this parlance expresses in judicial language nothing but the meaning of dogmatic, doctrinal truths as applied to ecclesial justice and ecclesiastical jurisprudence, in general as well as in

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41 *Sanctorum Communio*, 90–100.

42 Debate between Prof.Dr. Tuomo Mannermaa and the Revd. Anssi Simojoki in 1985–1986 concerning Mannermaa's argument for the ordination of women: the office of the ministry falls into the category of the Gospel and, thus, is perennial. The sex of the office bearer, instead, falls into the category of Law and, thus, is mutable. Mannermaa, T., *Nykyinen vaihe keskustelussa pappisviran avaamisesta naisille*. TA 90 1985, 46–49. *Idem*, *Keskustelu naisesta ja kirkon virasta jatkuu: Edellisen johdosta*. TA 90 1985, 130–133. *Idem*, *Teksti ja tulkinta: Edellisen johdosta*. TA 90 1985, 299–303. *Idem*, *Luther-tulkinnan todentamisesta: Repliikkipuheen-vuoro Anssi Simojolle* TA 91, 1986, 40–43.

particular. This justice and this jurisprudence are always received from the Word of God, the Holy Scriptures of the Bible, as divine right, '*ius divinum*'. The divine right of the Bible is the binding framework of all human right, '*ius humanum*', in the church. The persecuted church exercised these rights long before Constantine the Great. In times of repeated persecutions and oppression by tyrants, these rights have been followed. Today, as hostility against biblical Christianity is growing and persecutions are commonplace in many parts of the world, Christians must know the true ecclesial justice of the true church. Consequently, they must be ready to follow the right jurisprudence, the justice of divine and human right, whether in well established societal conditions or in emergency situations, even to the point of faithfulness unto death (Rev. 2:10) when all other avenues of justice have been blocked. This was also the extreme situation of the Lord when he commended himself on the cross to his Father, who is also our true Father in heaven.

## Abbreviations:

- RE            Realencyklopädie für protestantische Theologie und Kirche. Begründet von J.J. Herzog. In dritter verbesserter und vermehrter Auflage unter Mitwirkung vieler Theologen und andere Gelehrten herausgegeben von D. A. Hauck. Leipzig 1896–1913.
- RGG 4 1913. Religion in Geschichte und Gegenwart. Handwörterbuch für Theologie und Religionswissenschaft. Vierte, völlig neu bearbeitete Auflage herausgegeben von H.D: Betz, D.S. Browning, B. Janowski, E. Jüngel. Tübingen 1998–2005.
- Jus Ecclesiasticum    Beiträge zum evangelischen Kirchenrecht und zum Staatskirchenrecht. Herausgegeben von A. Frhr. von Campenhausen, G. Grethlein, M. Heckel, K. Obermazer, R. Weber et alii. Tübingen.
- TA            Teologinen Aikakauskirja – Teologisk tidskrift