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A Space of Uncertainty

The Relevance of Canon law in the Aftermath of the
Scholastic School.

A Thesis Submitted in Partial Fulfillment of Requirements for the Degree of Master of
Theology

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The candidate confirms that the work submitted is his/her own, that appropriate credit has been given where the work of others has been used/referenced, and that the work has not been submitted for another degree in this or any other university.

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Summary/abstract

The ancient canons are regarded as a collection of texts with almost the same status as the biblical text in the Eastern Orthodox Church. The corpus has therefore a firm position in the identity of this church-tradition and is recognized as how faith, expressed in the gospels should be lived in ecclesial practice. How the ancient canons should be applied or used in contemporary ecclesial practice has been challenged in modernity. This thesis addresses how some scholars have faced this challenge answering how the canons *could be* relevant to contemporary ecclesial practice. More precise, it evaluates some answers to the question of relevance after (what we could regard as the first answer in modernity) the Scholastic school. The Scholastic school is approaching the canons more or less as formalist law. This has stirred justified reactions by a stream of scholars in the field. In the present study three such reactions is considered in the works of John H Erickson, Andrey Shishkov and David Wagschal. The basic argument of the thesis is, to better answer question of relevance, a new paradigm needs to be introduced, distinguishing between social identity and discursive practice. This means to accept “a space of uncertainty” letting go of the ambition to apply the ancient canons and instead give space to contemporary life situations to be informed by them. The tension between the past and the present is managed by an understanding of canon law as a substantive justice system in which the ancient canons belongs a realm of identity, and canon law as an outcome of discursive practice. In the end we could suggest that “the space of uncertainty” needs to be managed by an institution.

Keywords

”Canon law”, “Theory and practice”, “Ecclesiology”, ”Eastern Christian Studies”

Content

Content.....	5
1. Introduction	6
1.1 Locating the Question.....	6
1.2 The Question of Relevance.....	10
1.3 Purpose and Research Question	12
1.4 Method, Material and Limitations	13
2. John H Erickson: The Canon within the Canons.....	17
3. Andrey Shishkov: A Limit to Canon Law	20
4. David Wagschal: A Unique Legal Culture.....	24
4.1 The Critique of the Ecclesiology Approach	24
4.2. A Unique Legal Culture	26
5. Social Identity and Discursive Practice	31
5.1 Hovorun: A Theory of Accidents	31
5.2 Hjälms: Theory of Ontological Difference	34
6. Two Paradigms	41
6.1 The Paradigm of the Ecclesiology School.....	41
6.2 A Unique Legal Culture reconstructed	47
7. Towards a Different Answer	52
7.1 The <i>polis</i> , a Space of Uncertainty.....	52
7.3 Collective Identities and Real Relations.....	56
7.2 Canon Law as an Interface Between Ecclesia and System.....	58
8. Conclusion: Canon law as a Space of Uncertainty.....	61
Bibliography	64

1. Introduction

1.1 Locating the Question

“Regulation is not always the antithesis of freedom; it can be its ally”.¹ These are the words of Geoffrey M. Hodgson when discussing how to define an institution. Today it may seem provocative to some to claim that to institutionalize, organize and regulate has anything to do with freedom and love. Considering Nicholas Berdyaev with his strong emphasis on freedom and love as a fundamental core transcending every category of this world he simultaneously perceives law as protecting a space where the impact of sin is reduced to make room for freedom, love and personality to evolve.² I then believe we can take one step further than Hodgson and together with thinkers like Marx, Hannah Arendt, Jürgen Habermas, Chantal Mouffe and many, many others whose work is based on the understanding that the political realm, the realm of *practice* is the very strata and vehicle for a real change towards freedom and emancipation; where institutions and organizations could play an important role, maybe the most important role in achieving this end. Theology has also been identified with the problem of onto-theology and the effect of oppressing the socio-political realm, but this doesn't make a theological perspective superficial or unnecessary, it depends on how we look at the role of theology. Then, clearly, the issue of how freedom could be achieved in the church is a question that is not possible to solve from the perspectives of theology alone. It needs to be considered from the realm of ecclesial practice; the institutional, legislative and organizational segment of the church and the multitude of individuals, laymen as well as the priesthood, inhabiting the lifeworld of the church.

In the Eastern Orthodox Church we find “the ancient canons” and the field of canon law, aimed at organizing ecclesial practice. The canons occupy a position as “center pillar of Orthodox identity” and is revered on almost the same level as the dogmatic definitions.³ Loyalty to the ancient canons is for example expressed in the consecration of a bishop promising to

¹ Geoffrey M Hodgson, “What are institutions?” *Journal of Economics*, Vol XL, No 1, March (2006): 1-25.

² The purpose of law for Berdyaev is to reduce influence of sin and protect “a place” for love, freedom and personality. At the same time, law is in its very nature its abstraction and generality and as such an external force in which personality can never be subsumed. Man, then seems to require law and is inclined to see law at work everywhere. And equally true is that freedom and love always triumph over law. See for example. Nicholas Berdyaev, *The Destiny of Man*. (New York: Harper and Brothers,1960).

³ See David Wagschal, “Orthodox Canon Law: The Byzantine Experience.” In *The Orthodox Christian World*, ed. Augustine Casiday, (New York: Routledge, 2012), 283-397. p.383

uphold both the dogmatic teaching and “the ancient and holy canons”. But, in spite of this non-questionable position within the Eastern Orthodox Church at large, their relation to contemporary ecclesial practice is today far from obvious. As a corpus of texts with its formative period between the fourth and the ninth century the ecclesial life-situations it addresses, derives from another form of society than its modern version. Attempts have been made to “update” the canons by adding comments or creating handbooks and manuals to access it but instead of making them relevant, they retreated to an arbitrary use of individual churches if used at all. Then, modernity has brought with it a confusion of how to make the canons relevant for contemporary society.

The strong identity factor of this corpus in the Eastern Orthodox Church has led scholars in the field of canon law, since the break of modernity, to face this challenge of how to make sense of these ancient canons – that is how to make them relevant to contemporary ecclesial practice. The school that first took on these challenges was developed in Eastern and southern Europe from the mid 19th century. This school of thought was influenced by the continental *ius commune*, that is Roman law in the form Justinian had given it, as its main source (named *Corpus Iuris* in the middle ages).⁴ Thus, the first attempt to respond to the question of relevance from the Eastern Orthodox Church was to look to the “West”, to the Catholic Church and to contemporary formalist legal theories. Orthodox canon law was then handled in line with these categories, as an independent logical system of formal laws that could relate to ecclesial practice in a similar way law does to a society. All this builds up to the first answer to the question of relevance; for the canons to be relevant to contemporary society they need to be separated from theology. This first school of thought, answering the question of relevance, could then be termed as a scholastic approach to canon law, applying formal logics of law to the texts.⁵

The approach offered by the Scholastic school has been highly criticized. One of the primary critics is Nicholas Afanasiev (1893-1966). In an article “The Canons of the Church:

⁴ It includes not only material as The Digest, the Code, the Institutes and the *Novellae* but also, as a second source, canon law of the Roman Medieval Church, the *Decretum Gratiani* and three official collections of Papal decisions, the *Decretales*. For a brief overview of *ius commune* see Coing, Helmut, “The Sources and Characteristics of the *ius commune*.” *The Comparative and International Law Journal of Southern Africa*, Vol. 19, No. 3 (1986): 483-4

⁵ Helmut Coing, former professor at the Max Planck Institute in Frankfurt, define scholasticism as “a science which interpreted authoritative texts by means of formal logic”. See Coing, Helmut, “The Sources and Characteristics of the *ius commune*.” *The Comparative and International Law Journal of Southern Africa*, Vol. 19, No. 3 (1986): 483-489. p 485

Changeable or Unchangeable?” (1936), he argues that the separation between canon law and theology has the effect of separating *ius divinum* from *ius humanum*, the eternal sphere from the temporal sphere.⁶ He calls this an “ecclesiastic Nestorianism” with the effect of “ecclesiastical institutionalism” transforming church life from a divine-human organism into a legal institution. Afanasiev expresses this clearly: “These errors occur when the decrees do not draw Church life together with its doctrine, but rather separate doctrine from life.”

A similar critique is what Alexander Schmemmann (1921-1983) formulates addressing the situation of the Orthodox Church of America in the 1960’s. He observes a use of canon law as source material claiming authority in the “canonical fights” between competing jurisdictions: “everyone simply claims the fulness of canonicity for his own position and, in the name of it, condemns and denounces as uncanonical the ecclesiastical status of others.”⁷ A change has occurred, according to Schmemmann, where the canons that previously governed the executive powers in the church, the patriarch, the bishops and the holy synod, is now governed by the executive powers themselves. This opposite position, he calls “canonical subordination” which results in a confused and arbitrary state of canon law, and what Schmemmann calls attention to as really alarming is the effect it has on ecclesial practice; it gives unrestricted power to the bishop, destroys the possibility of maintaining mutual agreements and lastly it alienates the people. The cause of the problem of subordination according to him is rooted in nationalism and ethnicism, connected to church organization (as jurisdiction and bishoprics). This “disease” started with the introduction of the alien categories of “Canon Law” (as he writes) into ecclesial life.⁸ This has led to the separation between a “canonical consciousness” and the church’s dogmatic and spiritual context.⁹

There are several scholars who share in this critique, that *law* is not compatible with the essence of the Eastern Orthodox Church. Lewis J Patsavos as example, already in the first pages of his book *Spiritual Dimensions of the Holy Canons* (2003) writes that “Orthodox Canon law is not another human system of law... The uniqueness of Orthodox canonical tradition lies

⁶ See Nicholas, Afanasiev, “The Canons of the Church Changeable or Unchangeable?” *St. Vladimir’s Theological Quarterly* 11, no. 2 (1967): 54-68.

⁷ Schmemmann, Alexander, “Problems of Orthodoxy in America: The Canonical Problem,” *St. Vladimir’s Seminary Quarterly* 8, no. 2 (1964): 67

⁸ Schmemmann writes: “...Canon Law: a system of rules and regulations, juridical, and not primarily doctrinal and spiritual, in their nature and interpreted as such within categories alien to the spiritual essence of the Church.” See Schmemmann, *Problems of Orthodoxy in America*, 75

⁹ Schmemmann, *Problems of Orthodoxy in America*, 74-76

in the fact that it is spiritual in its approach.”¹⁰ Christos Yannaras in *Freedom of Morality* (1984) writes that:

“When the Church is subject to impersonal structures and legal codes... and to charters and constitutions of canons unrelated to the personal adventure of freedom and repentance, then that does distort the truth of the Church; it destroys the possibility of salvation and removes man’s hope of life.”¹¹

Yannaras is here highlighting the danger of approaching the canons as *law*, which will make them comply to “impersonal” structures, with the consequence of salvation becoming a principle instead of a relation.

The approach offered by the Scholastic school as an answer to the question of relevance, leaves a problematic mark on the practical side of the church, according to its critics, leading to oppression rather than emancipation. The effect of their theories is an arbitrary use of the canons effecting inter-church relations, creating an ecclesiastic institutionalism, and endangering the possibility of salvation, causing canonical subordination and the alienation of the laity. In short it seems that the Scholastic approach has failed making the canons relevant (at least according to this group of scholars).

This locates the question of this present thesis to how canon law could be relevant to contemporary ecclesial practice?

“Relevance” is a word with a variety of meanings, but in this case, it refers broadly to what David Wagschal addresses as “squaring a circle”, that is, how to make sense of a pre-modern legal system in the context and categories of a very different modern legal culture.¹² Before we move on, we need to (briefly) frame the question of relevance and how it will be used this thesis.

¹⁰ Lewis J. Patsavos, *Spiritual Dimensions of the Holy Canons*. (Brookline, Massachusetts: Holy Cross Orthodox Press, 2003), XV

¹¹ Christos Yannaras, *The Freedom of Morality*. (Crestwood, New York: St. Vladimir’s Seminary Press, 1984), 193

¹² David Wagschal, *Law and Legality in the Greek East: The Byzantine Canonical Tradition, 381-883*, (Oxford: Oxford University Press, 2015), 12

1.2 The Question of Relevance

In the first centuries of the church canonical legislation was local and diverse practices. This started to change by the end of the fourth century and especially after the reform of Theodosius I in the 380th when interaction between local churches increased within the Byzantine empire.¹³ The new political position of Christianity stirred a “canonical creativity” in which organizational aspects concerning the ecumenical church was addressed and legitimized (also engineered) by the power of the Emperor – a process which was fully established by Emperor Justinian.¹⁴ It is during this time a corpus of canonical material emerge with the ambition to regulate the church within the Byzantine empire which more or less is finalized with the Photian recension of *Nomocanon in 14 titles* in the ninth century. How the canonical collection develops is a rather complex process of adding new canonical sources upon older ones, basically consisting of four categories, canons from the apostles, canons from ecumenical councils, canons from local councils, and canons from the fathers.¹⁵ Further, the redactional history of the finalized collection has also a complex history where we cannot talk about just one single corpus but several different ones sharing a core of the same material.¹⁶

The formative period of the canonical material lasted for about five centuries. After this creative phase legal production was limited to certain areas such as marriage laws and monastic regulations – leaving issues as ecclesiastical structures and organization unaddressed by later councils.¹⁷ The “frozen” state of canonical rules soon created problems in relation to contemporary ecclesial life where they simply lost their practical meaning necessary for application.¹⁸ As a coincidence, this static and finalized state of canonical creativity ceased approximately after the last recognized ecumenical council. Instead of adding more material and incorporate new legislation from councils another trend started. In the twelfth century there was a.

¹³ See for example Susan Wessel, , “The Formation of Ecclesiastical Law in the Early Church.” In *The History of Byzantine and Eastern Canon Law to 1500*, ed. Wilfried Hartmann and Kenneth Pennington, (Washington, D. C: The Catholic University of America Press, 2012), 1-23.

¹⁴ See for example the introduction of Peter L’Huillier, *The Church of the Ancient Councils: The Disciplinary Work of the First Four Ecumenical Councils*, (Crestwood, New York: St. Vladimir’s Seminary Press, 2000), 1-16

¹⁵ For details about this categorization se for example Heintz Ohme, “Sources of the Greek Canon Law to the Qunitisext Council (691/2).” In *The History of Byzantine and Eastern Canon Law to 1500*, ed. Wilfried Hartmann and Kenneth Pennington, (Washington, D.C: The Catholic University of America Press, 2012.), 24-114

¹⁶ For a discussion about the redactional history of the Nomocanon in 14 Titles see for example Troianos, Spyros. “Byzantine Canon Law to 1100.” In *The History of Byzantine and Eastern Canon Law to 1500*, ed. Wilfried Hartmann and Kenneth Pennington, (Washington, D. C: The Catholic University of America Press, 2012), 115-169.

¹⁷ L’Huillier, *The Church of the Ancient Councils*, 2-3

¹⁸ Ibid.

perceived need for authorized commentaries on the canons and in this vacuum the three great canonists (the so called *nomophylax*) – Alexis Aristenos, John Zonaras, Theodore Balsamon – appeared, creating a new trend in handling the canons. As L’Huillier points out, their commentaries has been received as having a quasi-official position of how to interpret the canons since, and ”influenced the canonical praxis of the whole Orthodox Church”.¹⁹ What we can observe is that from this point on, after emerging in the context of a council, canonical praxis became more and more associated with literary exegesis, making sense of a finalized corpus of texts.

An early-modern example could be seen in the revival of canon law through the emancipatory work of Nicodemus the Haghiorite and the *Pedalion* (1800). The living conditions in the late 18th century in the *Rum Millet* under the regime of the Ottomans, entained a dramatic change and turmoil, with a deep financial crisis that caused mass-poverty and illiteracy.²⁰ In the turmoil of the enlightenment movement a new interest emerged, the education of the populace, aspiring to emancipate the masses. For the Haghiorite and his fellows, the Kollyvades, the only hope for the Greek Church and the Greek people was to recover the theology and spirituality of the fathers and to rediscover the authentic source of patristic and Byzantine tradition.²¹ This was a quest to give the people access to the sources of the church, and the chief instrument for this were the canons in the *Pedalion*. By this revival the Haghiorite made the canons relevant by using the same method as the great canonist before him, adding his comments, as a third circle – the canons being to first, the great canonist the second – and relating them to present day issues.

The exegetical approach to the canons could be seen in late modern examples such as Vlasios Phidas classic article the “Principles for the Interpretations of the Holy Canons” (1998).²² David Wagschal broadens the perspective and characterizes this field as centered around three things. As a discipline it is centered around a few professional chairs with no universally recognized methodology or professional qualifications. In practice, it is centered on

¹⁹ L’Huillier, *The Church of the Ancient Councils*, 4

²⁰ For a brief characterization of the socio-political and economic circumstances during this period see for example, Sophia A Xenophonos, “Reading Plutarch in nineteenth-century Greece-classical paideia, political emancipation, and national awareness — the case of Adamantios Koraes.” *Classical Reception Journal* Vol 6, Iss. 1 (2014): 131–157. And the article of Keralis, Vrasidas, “Greek Christianity After 1453.” In *The Blackwell Companion to Eastern Christianity*, ed. Ken Parry, (Chichester, West Sussex: Wiley-Blackwell, 2010), 156-185

²¹ Graham Speake, *A History of the Athonite Commonwealth: The Spiritual and Cultural Diaspora of Mount Athos*, (New York: Cambridge University Press, 2018), 236

²² Vlasios Phidas, “Principles for the Interpretations of the Holy Canons.” *Sourozh* 74, 1998

episcopal and synodal courts where a church official handles canonical issues. But, as a whole he argues, it is centered around the exegesis and application of ancient texts.²³ In the end we have a text that should be applied to ecclesial practice which then is the task of synodal courts and bishops to handle together with an expert on canon law, most often scholar.

The question of relevance could then be placed in the tension of application, that is, how something expressed in a text should be realized in practice.

In modernity the application of canons has reached a new level not previously seen in history. Turning again to Nicholas Afanasiev. In the beginning of the 1930's he identifies a total uncertainty of what he calls a canonical consciousness caused, as we have seen, by the Scholastic school's use of formalist law in approaching the canons. This takes the question of relevance to another level in trying to establish a framework for interpretation, not only for how to address individual canons, but also for grasping the role the canons play in the lifeworld of the church. The question of relevance then relates to "squaring a circle" – namely to relating ancient texts to contemporary ecclesial practice. Because of this I have chosen to use a discussion on how theory and practice relate to each other, where the ambition of applying the canons also relates to the practical realization of freedom and emancipation.

1.3 Purpose and Research Question

The purpose of this thesis is to look at how the question of relevance of canon law could be answered in the aftermath of the Scholastic school. Three contemporary scholars in the field of Eastern Orthodox canon law will be used for this purpose namely the American church-historian John H. Erickson that has gained a wide circle of readers with his book *The Challenges of Our Past* (1991). His theory of "Canons within the Canons" will be offered as a solution to the question at hand. The second is the Russian theologian Andrey Shishkov who could be seen as the younger generation taking over after Erickson producing articles on different canonical topics. His theory of "The Limits of Canon law" will be examined. Lastly the Canadian Byzantinist, or Canon Law-scholar David Wagschal, who has opened up for new insights with his book *Law and Legality in the Greek East* (2014). From this book his theory of the "Unique Legal Culture" will be a contribution to this study.

²³ David Wagschal, "Orthodox Canon Law: The Byzantine Experience," In *The Orthodox Christian World*, ed. Augustine Casiday, (New York: Routledge, 2012) 390

The research question for this study:

How could canon law become relevant to contemporary ecclesial praxis in the Eastern Orthodox Church in the aftermath of the Scholastic School?

1.4 Method, Material and Limitations

The scholarly setting of the present thesis is within the field of ecclesiology and the subfield of canon law. Different to studies of canon law that is focusing on the development of the corpus, councils or individual themes this study is more interested with their aim and function. For instance, how the purpose of the canons is envisioned to be realized or how the canonical material is envisioned to be approached. Turning to method.

My interest is to understand how the “part” of legality relates to the “whole” spectrum of life in the church. This has led me to use a theoretical methodology steaming from pragmatical concerns – contrasted than with empirical methodology. The choice of theoretical approach has to do with my ambition, or foundational perspective to improve a situation by solving a theoretical problem. Already from the outset then, my method is normative aiming for change and improvement which than implies an already given interest or vision of that improvement. For me, this interest adheres in a broad sense to what Critical Theory and the Frankfurt school identified as emancipation where the aim of a theory is to discuss limits – not to create a new wholistic or metaphysic understanding of the social world. In relation to my field of research, the Ukrainian professor Cyril Hovorun and the Swedish theologian Michael Hjälms, both fellow researchers at the Stockholm School of Theology in the field of Ecclesiology has coined the term critical ecclesiology embracing such a perspective – taking a point of departure in a critical evaluation of the human conditions involved in the affairs of the church. This work than follows the path of critical ecclesiology with an foundational interest of emancipation.

By this, my methodology also adheres to normative method, as how Björn Badersten formulates it, with an interest to establish values that are preferred and good more than what kind of values people actually has (which is an empirical interest).²⁴ This makes the method both analytical and constructive, identifying a problem, discussing different solutions and in the end construct a better solution based on a normative starting point (in this case emancipation).

²⁴ See Badersten, Björn, ”Att studera det önskvärda – om värdeanalys och normativ metod,” in *Stadsvetenskaplig tidskrift*, (Vol. 106 nr 3, 2003).

The constructive side to my method could also be what Gordon Kaufman notion of “constructive theology”, where the starting point of a theological enterprise is that all concepts of God (and the church) is constructs of human imagination. This opens up for theology to be a “practical interest”. He writes:

“[W]e must remember that our exploration here is not to be grounded primarily in a speculative interest in the question of what is ultimately real but rather in the practical interest of finding orientation for life in face of the problems and evils of modernity—and in the hope that the central Christian symbols may provide us with such orientation.”²⁵

Kaufman is here identifying theology as an instrument for finding an orientation to life while facing contemporary society. The theologian Veli-Matti Kärkkäinen develops this to an integrative approach where the constructivist theologian makes use of a variety of other scholarly fields to achieve this end.²⁶ I am in one sense doing precisely this – starting in a practical or pragmatic situation “constructing” an answer to a contemporary situation, using other scholarly fields than theology. What I believe my approach differs from constructive theology, is that I don’t believe my methodology is “theological” in the sense of contributing to finding meaning using the Christian symbols. Rather, I want to discuss how these symbols interacts with the practical life of a church to avoid reification and alienation and achieve emancipation. My approach than is “a constructive critical ecclesiology method”, where “ecclesiology” identifies the church as the object of the study, “critical” identifies the normative and emancipational perspective and “constructive” identifies the “answer” to a pragmatic need in contemporary ecclesial life. I am not interested in theological discussion of, for example how deification could be related or used in eco-theology or how Christians values of reconciliation could be practiced in conflict areas. My object is the church and how the segment of “law” internally relates to other parts of the church – in line with Critical Theory this means reflecting over the limits, or the “place” of both theology and ecclesiology in the overall life of the church. This positions my intentions outside of what I believe is an ecclesiological enterprise – that is contributing to an

²⁵ Gordon D. Kaufman, *In Face of Mystery: A Constructive Theology* (Cambridge, MA: Harvard Univ. Press, 1993) 245

²⁶ See for example the series *A Constructive Christian Theology for the Pluralistic World*, Vol 5 (Grand Rapids, Michigan: Eerdmans Publishing Company, 2017) 1-4.

understanding of what the church *is*, instead reflecting on how such creative works (ecclesiologies) relates to ecclesial law and ecclesial practice.

If the method I use is analytical, critical and constructive I also want to place the discussion between the different “solutions” we are going to meet in the field of canon law in a workable framework. The answers to the question of relevance, even if it is only three, my intention is to broaden the discussion relating it to a development of how this particular question of relevance has been answered. For this reason, I have chosen to borrow from the concept of paradigm and paradigm shifts offered by Thomas Kuhn.

A paradigm according to Kuhn is constituted by “normal science” which is basically research established as the normal way of doing it. It is the practice by a research community to which newcomers – the students and PhD candidates learn the way of the paradigm through courses and experiment using and developing theories and methods. Through these communities *normal science* is established committed to the same basic rule and standards for scientific practices.²⁷ A paradigm is changed when new phenomena, or anomalies, are multiplied to the extent that it cannot be ignored. The anomalies push the paradigm into a state of crisis, a creative state where new theories are sought for explaining the anomaly simultaneously as the old paradigm is abandoned more and more. When the new set of theories start to make sense to a research community a new paradigm or paradigms evolve. This makes a paradigm move towards a *paradigm shift* through *anomaly* and *crisis*.²⁸

A paradigm as Kuhn uses it relates to large research communities. Looking at only three scholars, as we will do in this study, will therefore not suffer to show a real paradigm or paradigm shift. In this thesis I will borrow Kuhn’s theory and use it in a limited sense. The scholars Florence Juma and J. M. Vorster has already pointed out a way for this. In their study of how Hans Küng develops Kuhns theory they identifies three levels, macro level, meso level and a micro level relating it to a development in a single question.²⁹ In this study the paradigm theory

²⁷ For more information about how Kuhn develops normal science as constituting a paradigm see Kuhn, Thomas S, *The Structures of Scientific Revolution*, (Chicago and London: The University of Chicago Press, 1996), 10-46

²⁸ For more information about how Kuhn develops anomaly and crisis in relation to paradigm shift see Thomas S Kuhn, *The Structures of Scientific Revolution*, (Chicago and London: The University of Chicago Press, 1996), 52-76

²⁹ According to the authors, Küng first defines paradigms as "an entire constellation of beliefs, values, techniques and so on shared by the members of a given community." As his ambition is to track down patterns and paradigm shifts in church history he distinguishes between three kinds of paradigm shift, macro-paradigms (major changes in history), meso-paradigms (limited paradigms shift in theology, church and society in general) and micro-paradigms (paradigm shift on individual questions). See Juma, Florence and Vorster, J. M., “Küng’s Theory of Paradigm Shifts in Church History: An Evaluation.” *Studia Historia Ecclesiasticae* 24, (2) December (1998): 116-130

will be used in line with the micro level, looking on the development in a singular question. In sum, I will use paradigm for describing a development among the suggested solutions as *normal science* when answering to the problem in line with the present paradigm; *anomaly* when answering to the problem from a different point of view; *crisis* when a field no longer can avoid anomalies and are in a process of a paradigm shift.

Turning to the choice of scholars. My choice of scholars in the field of canon law is motivated by their ability to be examples of a possible paradigm shift. John H. Erickson and Andrey Shishkov represent *normal science* which I will address as the Ecclesiology school. Other scholars could have been chosen, but I believe Erickson is a good example adding an emancipatory core to his enterprise. Shishkov is maybe not an obvious choice but is chosen for identifying a limit to canon law, which could be understood as an attempt to break with the present paradigm he thinks he is operating within. David Wagschal represents an *anomaly* where his approach breaks away from the dominating paradigm creating a kind of *crisis* in the field.

In order to answer the question of the relevance of canon law, I will push the crisis one step further by developing a theory that makes the anomaly of Wagschal a vehicle for a possible paradigm shift. The theory I will employ is the Theory of Social Identity and Discursive Practice, which is built on the research of Cyril Hovorun and Michael Hjälml already mentioned above. Hovorun's "Theory of Accidents" will be used derived from his book *Scaffolds of The Church* (2017) and the "Theory of Ontological Difference" will be used from Hjälml's book *Liberation of the Ecclesia* (2013). Both of these scholars introduce a way of approaching the question of relevance which I believe could be a possible new paradigm for solving the problem. I will treat their theories individually and, in the end, the theoretical model employed is adapted solely for the purpose of this study, joining the two theories into a third thing, the Theory of Social identity and Discursive Practice.

Before vi end this introductory section with an outline of the thesis something needs to be said about term canon. The term "canon" or "the canons" has its own complex history and is differently used by the scholars in this study to designate both an inner meaning behind actual texts, the actual rules or the whole corpus itself. The term "canon law" is also used in different ways but mostly as a synonym to "the canons". My intention is not to define and discuss the correct term or how these terms is conceived in the tradition of the Eastern Orthodox Church in

this study, the interest of this thesis is, as I hope already has been established, rather the system of canon law as such and how the ancient canons relate to ecclesial practice. With this my thesis is introduced. In chapter two, I will look at John H Erickson's theory of the "Canons Within the Canons" and how he envisions an answer to the question of relevance. In chapter three I will do the same with Andrey Shishkov's theory A Limit to Canons Law.

In chapter four, the drama is introduced, where David Wagschal criticizes an "ecclesiology approach" in the field as a reaction to the former Scholastic school's emphasis on approaching the canon as law, in which we can position both Erickson and Shishkov. In this chapter we will also encounter Wagschal's own contribution, the theory of A Unique Legal Culture, establishing a *legal* world in the Eastern Orthodox Church arguing that the canons should be understood as law, but a unique type of law.

In chapter five the theoretical model of Social Identity and Discursive Practice will be introduced and by this establish two paradigms, one old and one new – arguing that the question of relevance is better answered by the new paradigm. This leads to an "analyzing" chapter six in which the Theory of Social Identity and Discursive Practice will be compared with Erickson's, Shishkov's and Wagschal's answers to the question of relevance. Here the discussion will be broadened to include other scholars establishing a paradigm of the Ecclesiology school ending with a reconstruction of Wagschal's theory according to the new paradigm.

In chapter seven an answer based on a new theoretical model will be suggested that may generate a new paradigm to better solve the question of relevance. This chapter is then followed by a concluding summary in chapter eight.

2. John H Erickson: The Canon within the Canons

Working with canon law since the seventies John H Erickson has produced several articles on contemporary canonical issues. Most of them, if not all, manifest that he wants to evoke an awareness of how to approach to the canons in a right way to not obstruct the life of the church. Erickson does this with an interest for emancipation targeting an approach to history that he believes imprisons the church, thereby also obstructing the relevance of the canons. In an interview he highlights the importance of a correct approach to the past for priest candidates,

theological students as well as the laity.³⁰ The past, he explains, is not there for exploitation or to be used to promote our own ideas but should be encountered with love a love that embraces both the limitations and the “enthusiasms” of the writers in the past.³¹ Erickson is here addressing a conceptual way of approaching history that leads to oppression, while another way of relating to the past, which he calls “love”, could instead open up to liberating the church.

In the foreword to his now classical book *The Challenges of Our Past* (1991) this comes to the surface. There he urges Orthodox Christians to be concerned with the church not only as she appears in the scriptures but also as incarnated in space and time of this world.³² He writes that we should “avoid the temptation to consider the Church only in static, atemporal and otherworldly terms and take seriously the challenges posed by historical change.”³³ Erickson is here arguing for a church that cannot be confined to its historical past but has to be open for change. Tradition doesn’t make us prisoners according to him, but “reveals the Spirit at work in both past and present, so that we too, in our own time and place, may be fellow citizens with the saints...”³⁴ There is an empowering and emancipatory call to every generation embedded in the church, to adapt and animate tradition – a task he envisions canon law should achieve.

The question of relevance, for Erickson is then related to a return to tradition, or in an analogous expression, a return to the nature of the church. Inherit in this *nature* is an eschatological conviction that the church is *in via*, on its way to be fully realized in the coming Kingdom. The ecclesial identity is connected to an ecstatic fulfillment in the eschaton and thereby transcends every confinement “this world” could exercise upon her. This gives the church an uniqueness, received from Otherness, that cannot be reduced to a mere institution, association or NGO.³⁵

The eschatological reality is embedded in the church as a “community in communion” and is instrumental for giving it a constitution different from other organizations.³⁶ The nature of the church then inherits two axis, an “horizontal” (community) and “vertical”

³⁰ “Orthodoxy in America is Very Diverse,” Published on November 5, 2013, YouTube video.

<https://www.youtube.com/watch?v=E2h70uIkxts>

³¹ “Saint Vladimir’s Orthodox Theological Seminary,” Published November 25, 2013, YouTube video, 1.45-3.20.

<https://www.youtube.com/watch?v=xSZ8kfwsucU>

³² John Erickson, *The Challenge of Our Past*, (Crestwood, New York: St. Vladimir’s Seminary Press, 1991), 5-7

³³ Ibid.

³⁴ Ibid.

³⁵ See also his critique of the Scholastic school turning the church into an “ordinary” institution. For this see Erickson, *The Challenge of Our Past*, 9-10

³⁶ Erickson, *The Challenge of Our Past*, 13

(communion) which comes together in the eucharistic gathering. This is analogous with what we could call eucharistic ecclesiology, and we will see a similar way of reasoning in both Shishkov and Hovorun below.³⁷

The unique nature of the church changes the pre-conditions for how to approach the canons. Treating them as formalist law separates, according to Erickson, the church as communion from the church as community and consequently confining the church to this world. This is a conceptual way to approach history according to him, Instead, Erickson suggest to view the canons as “necessarily arise from and conform to its (the church’s) nature as the Spirit-filled body of Christ.”³⁸ Erickson basically has the same critique of the Scholastic school as we have seen in the introduction but here, we can add how it effects the very nature of the church – reducing it to an “ordinary” institution. Instead, by integrating the canons with the nature of the church ecclesial life is liberated.

This brings us to Erickson’s theory of the “Canon Within the Canons”. Integrating the canons with the nature of the church is, according to Erickson, not a new idea but rather a return to an earlier practice. In the early church the canons expressed a standard of action and beliefs, that has grow out of the norms of the universal church in conformity with the teachings of the apostles.³⁹ The canons were re-stated or re-formulated, but, according to Erickson, that did not mean that the canons were “made”, they was rather “found”.⁴⁰ The meaning of canons later shifted and instead became rules enacted by a council.⁴¹ This became particularly visible in the fusion between canons and *nomos* which started in *Nomocanon in 14 titles* and found its zenith in

³⁷ Eucharistic ecclesiology could be seen as a reaction to the wake of totalitarian regimes where the idea of freedom and emancipation effected the ecclesial environment. The expression “eucharistic ecclesiology” is coined by Nicholas Afanasiev and builds around the idea that the church is constituted by participation in the eucharist. This thought is dependent on the principle of *sobornost*, and the “calling from within the church” that developed in the Russian school of theology since Sergei Bulgakov (1871-1944). See for example the chapter “Eucharist and Ministry in Ecumenical Dialogue” in *Challenges of our Past*, where he positions himself in this stream of thought. For more information on this stream see for example Hjälms, Michael, Liberation of the Ecclesia, *The Unfinished Project of Liturgical Theology*, (Södertälje: Anastasis Media, 2011) 31-68.

³⁸ Erickson, *The Challenge of Our Past*, 13

³⁹ Erickson mentions here the canonical letters of Basil the Great, as an example, where the canons is understood as “what we have learned from the ancients”, “what we have been thought” or “what the fathers have handed down to us.” See Erickson, *The Challenge of Our Past*, 14-15

⁴⁰ Ibid.

⁴¹ From the late fourth century, Erickson argues, the canons could be “made” instead of being “found”. The reason for this shift is located by him to the new position the Church gained in the Byzantine Empire. This led to the “constitution” of the Church being clearly defined and expressed in terms of law. For this reason, canons were enacted that clarified the older ones and adjusted the *corpus canonum* to the new situation. See Erickson, *The Challenge of Our Past*, 17-18.

the *Rum Millet* system, when the Eastern Orthodox Church was administered under one single authority. The fusion was total and paved the way for an assimilation of church and culture replacing the ancient church with the nation-church, still continuing today. Therefore, in Erickson's view, the original intention of the canons is presently obscured. Erickson writes:

“We Orthodox Christians today need desperately to rediscover the implications of communion for community...In this task of rediscovery, the canonist can play an important role, but only if he learns how to "read" the canons correctly.”⁴²

To read the canons correctly is according to Erickson to go beyond “the canons” and “canon law” to the earlier understanding of the word. The canonist task is then to search out norms for structure and conduct that “necessarily arise from and conform to the very nature of the Church...”⁴³ Erickson's answer to relevance is then to find the *canon within the canons* that arises from and *conforms to nature*. By this we could describe Erickson's answer as reacting to a separation caused by the Scholastic school and instead advocating an integration of canon law with the nature of the church to safeguard emancipation.

3. Andrey Shishkov: A Limit to Canon Law

An additional answer to the question of relevance comes from Andrey Shishkov. His theory could be identified as “A Limit to Canon Law” where he offers a different way of resolving the challenge than Erickson does, but the question is whether his answer really is a different answer.

In an article, “Complexity as an Approach in the Issue of Primacy in the Church” (2012), Shishkov proposes a limit to canon law.⁴⁴ He singles out canon law as the very origin of the primacy-problem itself. Both sides in the debate of primacy interpret the same canons and the same historical facts only to support their own position which has turned the debate into a blind alley leading merely to strengthening of the polemic situation. Therefore, he argues, it is not possible to settle the dispute on primacy on the basis of canon law anymore. To solve this

⁴² Erickson, *The Challenge of Our Past*, 20

⁴³ Erickson, *The Challenge of Our Past*, 21

⁴⁴ For the article this part builds on, see Andrey Shishkov, “Complexity as an Approach in the Issue of Primacy in the Church.” *International Journal of Orthodox Theology* 3:3 (2012): 87-103

problem, other solutions and means need to be considered. His way forward is to recognize the complexities involved as a base for establishing new grounds for mutual agreements and unity *other than canon law*. The area of complexities he raises (where he also believes canon law should not interfere) are three; (1) primacy within a local church contra inter-church relations, (2) primacy of honor contra primacy of authority, and lastly (3) primacy connected to the socio-political context of the church. The limit of canon law points the way for him to suggest a separation between a local level, centered on the eucharistic community of a diocese, and a supra-administrative level, referring to relations between bishops “above” a diocese.

The local level, “the eucharistic assembly” as he calls it, attunes to the model of eucharistic ecclesiology. The field of eucharistic ecclesiology, according to Shishkov, is the major framework for interpreting the church today.⁴⁵ He uses this rationale to accentuate a “public” aspect of the community (contra hierarchical) and therefore manifest itself as a democratic church.⁴⁶ He positions himself in the *sobornost* tradition, associated to this field, emphasizing a development “from below”, with a call from within the community of the church. From this follows that power should be shared with the people constituting the local church in three parts: the eucharist, *the assembly* and the bishop. A bishop governs the ecclesiastical life but receives his legitimacy from the people which is manifested in *the eucharistic assembly*, which then should involve the people in decision making by consensus.⁴⁷

This defines a local church in Shishkov’s account, but eucharistic ecclesiology cannot explain church associations above a local church such as metropolises, exarchates and patriarchates. Neither can it explain hierarchy above the rank of a bishop.⁴⁸ On the level of eucharistic ecclesiology primacy manifests itself in the ruling bishop but, it cannot provide a model which explains the organization between bishops and between jurisdictions. This is the real reason behind the arbitrary use of the canons today according to Shishkov which could be solved by separating “the eucharistic assembly” from “the community of the church” which then

⁴⁵ Shishkov refers to what has been called eucharistic ecclesiology, which he identifies as developed by Nicholas Afanasiev, and then moved into a “church-political theory” in John Zizioulas, identified by the structure of “the one and the many”.

⁴⁶ Shishkov, *The Problematic Issues of Eucharistic Ecclesiology*, 92.

⁴⁶ See Shishkov, *The Problematic Issues of Eucharistic Ecclesiology*, 194-195.

⁴⁷ Ibid.

⁴⁸ For a fuller picture of his position on eucharistic ecclesiology see, Shishkov, *The Problematic Issues of Eucharistic Ecclesiology*, 189-206.

constitutes a supra-administrative level.⁴⁹ The two levels, as Shishkov envisions them, are not totally separated but are united in the ruling bishop of a diocese, engaged in both domains.

Therefore, it becomes apparent that canon law does not settle the problems of unity in today's ecclesial world.⁵⁰ In another article about autocephaly he explains that the canons are simply not intended as a platform for inter-church affairs: "there is no single code of canon law nor instances that monitor church-wide application of law". The reason for the limit to canon law is that each church is free to interpret canonical sources as it finds suitable.⁵¹ Achieving unity between dioceses requires another platform aimed of, solving for example issues such as the inequality of power that now distinguish an ordinary bishop from metropolitans and patriarchs.

Is Shishkov, then, suggesting a different answer to the question of relevance or is it similar to the proposal of Erickson? Erickson is, as I have stated above, also in debt to the legacy of eucharistic ecclesiology. The nature of the church, following the American theologian, is similar to the model of eucharistic ecclesiology as with his Russian colleague. If the freedom of the church and eschatology is the concern of the former, the latter is concerned with democracy and organizational unity between dioceses and jurisdictions. This demonstrate a shift in perspective, which I think distinguishes a previous generation of theologians from a new generation, moving from the "captivity of the West" and the emphasis on eschatology to liberate the church, towards viewing the church in political and public terms.

Despite different emphases and concerns both integrates canon law with the model of eucharistic ecclesiology. For Shishkov canon law is designed to be the concern of a local church, which is contrary to what we have seen L'Hullier argue for in the introduction, where the generating factor in the fourth and the fifth centuries was the opposite, to organize the universal or ecumenical church. Shishkov merely confirms the present state of canon law as failing and accepts this. Even if he doesn't develop his position on how the canons relate to ecclesial practice as clearly as Erickson does, his idea of a "limit of canon law" makes it is possible to deduce an understanding similar to that of Erickson.

⁴⁹ Andrey Shishkov, "Complexity as an Approach in the Issue of Primacy in the Church," *International Journal of Orthodox Theology* 3:3 (2012): 92.

⁵⁰ Shishkov, *Complexity as an Approach*, 102

⁵¹ Andrey Shishkov, "Church Autocephaly as Sovereignty: A Schmittian Approach." *St Vladimir's Theological Quarterly* 60, no. 3 (2016): 383

Further, if Shishkov's answer to the question of relevance is different than *integration*, why doesn't he direct attention to this while discussing the level of eucharistic assembly? If he advocated a Scholastic approach, or envisions canon law to be distinct from the nature of the church in another capacity, he would need to define how canon law should interact with eucharistic ecclesiology. Instead, the model of eucharistic ecclesiology embraces all the aspects of a local church, the eucharist, the assembly and the bishop. It seems that what Erickson addresses as nature (a community in communion) – Shishkov labels as a specific eucharistic ecclesiology model. Then, canon law (it seems) even for him, is an integrated part of the nature of the church.

The limit Shishkov invents attest to this, which will be more apparent later in this thesis. What could be said already now is that the “correct reading” Erickson call for above to interpret the canons, is depending on a definition of what nature is. What follows from definitions are a process of individualization which leads to a multitude of ways of how to understand a canon. The plurality of explanations pushes the need for settling an authoritative interpretation through the power structures ending up with the bishop's interpretation and application. As long as we are within the domain of “simple power”, that is, only one bishop, this rationale could be defended, but the problem arises when the power dynamics are more complex, involving more than one bishop.

This makes it clear that it is *because* of Shishkov's fundamental conviction that canon law should be integrated with the nature of the church, that he also is forced to accept a limit to canon law on supra communal level. To confirm this conclusion, Erickson reach a similar position in his article on collegiality and primacy where primacy is understood as “above” nature, *bene esse*, for the good order in the church, but should not be included in nature, *esse*.⁵² What separates their approaches is that Erickson doesn't develop the consequences of this distinction to the same extent as Shishkov does. Instead, his position here is somewhat ambiguous.

We could then conclude that both scholars, shares a similar pattern in their answer to the question of relevance, namely the integration of canon law and the nature of the church. I do agree with both Erickson and Shishkov that if canon law is integrated with nature they can't handle complexity of power – but not just on the supra communal level but also on local level. I

⁵² Erickson, *The Challenge of Our Past*, 80

will return to this in the next chapter. The answers just displayed by Erickson and Shishkov to the question of relevance is criticized by David Wagschal. This is to what we now shall turn.

4. David Wagschal: A Unique Legal Culture

4.1 The Critique of the Ecclesiology Approach

The Canadian scholar David Wagschal characterizes the modern field of canon law in to two major trends, or two competing positions.⁵³ He deals in length with the Scholastic School we already meet in the introduction and refers to it as a “manual tradition” by their use of tools that explore the canonical material in terms of abstract categories of formalist law. The emphasis in this trend is their conviction that canon law is a valid branch of law. Wagschal criticizes this approach in a similar way to what we have seen above, that is for separating the canons and theology but also to force the canonical material to comply to legal concepts foreign to Byzantine legal culture itself.⁵⁴

The other stream of thought is a reaction against the manual tradition, taking a “non-theory of law” position. We have already met some of the names Wagschal associates with this stream, who are united in their conviction that Eastern Orthodox canon law is not compatible with formalist law.⁵⁵ According to him, their point of departure is an understanding of the canons as “expressions of deeper metaphysical realities”.⁵⁶ In Erickson, we recognize this as looking for the nature, or an original “canon” beyond the actual texts themselves. Scholars such as Afanasiev, Schmemmann, Erickson, Patsavos and Yannaras are all work according to a similar pattern,

⁵³ The book *Law and Legality in the Greek East: The Byzantine Canonical Tradition, 381-883* (2015), was based on his dissertation *The Nature of Law and Legality in the Byzantine Canonical Collections 381-883* (2010). When it comes to the question of relevance these two differ slightly. His dissertation sometimes gives us additional information relating to the field of canon law that has been removed in his later book. This particular part of characterizing the academic field of canon law is more evident in his dissertation.

⁵⁴ He exemplifies this in the effort of establishing economy (οἰκονομία) as a consistent legal concept, and with an overall ambition of codifying canon law, eliminating contradictions and repetitions transforming the texts into a formal legal system. See David Furguson Wagschal, , “The Nature of Law and Legality in the Byzantine Canonical Collections 381-883,” (Durham theses, Durham University, 2010), 3.

⁵⁵ The scholars I refer to are John Erickson, Nicholas Afanasiev, Alexander Schmemmann, Lewis J Patsavos and Christos Yannaras. Other authors who adheres to this trend according to Wagschal are Paul Evodkimov, Vladimir Lossky, and John Meyendorff.

⁵⁶ Wagschal, *The Nature of Law and legality*, 4.

according to Wagschal, “to cast canon law as an appendage of one or another modern ecclesiological formulations or of a generalized pastoral praxis.”⁵⁷

What I believe is one of Wagschal’s contributions to the field of canon law is how he identifies and targets the role of theoretical frameworks in engaging with the material. In this school of thought a framework of formalist-law is substituted for a framework of ecclesiology. The fits with the materials themselves, however, is equally as bad as the former. The reason, according to Wagschal, for this ill fit is that the canons for this tradition are something to be bypassed or transcended.⁵⁸ Wagschal’s critique is that the “ecclesiology tradition” downplays the importance of a real legal-system generated by the Byzantine tradition and later received by the same tradition as a “very central, high-status and even semi-sacral position”.⁵⁹

The attitude of “going beyond” is therefore revealed *above all*, as Wagschal writes, “in the almost complete lack of any attempts by representatives of this tradition to develop workable systems of canonical dispute resolution or ordering or to address even the most basic questions of normative regulation... or even how their theories point to the resolution of contemporary canonical problems.”⁶⁰

A systematical downplaying of a real legal segment in the church, leaves, what we now can call the Ecclesiology school incapable to establish organizational relations in the socio-political realm or developing “workable systems of canonical dispute resolution” which could contribute to solving conflicts. Again, the reason for this is according to the Canadian scholar the downplaying of the legal segment in the church. We can now recognize the rationale we saw in the previous chapter regarding Shishkov. It seems that when we integrate canon law with the nature of the church – or orthodox ecclesiology, we end up with a church incapable to establish relations and solve disputes.

Legality, then, according to Wagschal, could be identified as the very segment in which relations is organized and conflicts handled in the socio political realm of ecclesial practice on both local and supra communal level. The Scholastic school failed in this aspect by using a

⁵⁷ Wagschal, *The Nature of Law*, 4, see also his *Law and Legality*, 12-14

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

framework foreign to the canonical material. What has been missing, according to Wagschal, is an examination of how the Eastern Orthodox canonical tradition *itself* defines and describes law and legality – it is here we will find his answer to question of relevance.

4.2. A Unique Legal Culture

To recapitulate what we have observed so far. The challenging question of how canon law could be relevant to contemporary ecclesial practice that arises in modernity finds its first answer in the Scholastic school. Their intuitive position was to turn towards the realm of law and its inherent capacity to handle the complexities and needs of constant change contemporary ecclesial practice is in the midst of. Employing formalist law to peruse this aim, this stream of thought has, according to me, rightly been criticized by the Ecclesiology school for reducing the church to a mere institution. Erickson and Shishkov’s answer is instead to integrate canon law with ecclesiology thereby safeguarding emancipation by connecting the canons to the uniqueness of the church. I believe the Ecclesiology school is right in reclaiming the uniqueness of the church, but they go too far in advocating integration.

I agree with Wagschal’s critique, that integration with ecclesiology makes this school fail. The segment of legality needs to be acknowledged. The question we now come to is if not formalist law, what kind of legality can we expect to find? In this part of the chapter Wagschal describes a Byzantine legal culture, coherent and unique, but of a very different kind compared to a modern version. In the end of the chapter, I will more clearly outline his answer to our question.

Wagschal introduces his work in *Law and Legality* (2015), as an exploration of the cultural history of Byzantine canon law, focusing on “legal imagination” and the “legal-culture architecture of the system”. For this reason, prologues and introductory texts play a major role in his project where aim and purpose could be detected.⁶¹ Wagschal builds on scholars like Dieter

⁶¹ The most substantial introductory text, Wagschal supports his arguments on, are the Nicæan and Apostolic prefaces, the prologue to the *Coll50*, the first two prologues to the *Coll14*, the Trullo-introductory complex, and II Nicæa 1. He also writes that the contents of the prologues that we may term (loosely) “doctrinal” have been largely overlooked in both Eastern Orthodox canon law and Byzantine legal scholarship. By late antiquity the prologues were quite consciously and explicitly marked as an important and even essential element of legal literature. The roots of this tradition run very deep. See more in Wagschal, *Law and Legality*, 88-90 (and Appendix A, for the prologues in question)

Simon from the Max Planck Institute, viewing Byzantine “civil” law as a different ideal of law.⁶² Similar to this Wagschal argues that Byzantine canon law constitute a unique legal system, but a different kind than a modern lawyer might expect.

Letting the text speak for itself, would entail a problem of method. To solve this, he compares Byzantine legal culture with a modern version caricaturized as legal formalist (or formalism-positivism), which he acknowledges, has no ambition to represent a “real” legal system but is generalized for the purpose of his study.

Legal formalism is characterized as an autonomous realm of written rules, systematic and consistent, with formalized ways of mandating and revising laws with clearly defined legislators and authorities. It also has “secondary rules” that takes precedence when generating new law or handling “gaps” in the system; it builds on the idea of impartiality and “mechanic” application of law; by the fact that the system is not able to consider all possible situations (which then is an accepted “injustice” of the system). In this legal-system the agents is not “truth seekers”, but act more as skilled players of a “rule game,” giving birth to a professional class of legal experts, the layers. This constitutes a professional class as an essential aspect of the system organized with its own realm in society, its own education and career path, its own professional language etc. Law is by this a separate domain in modern society and consider itself to be a distinct field from other normative spheres such as the ethical, moral and religious. This is the type of law Wagschal compares Byzantine legal culture to throughout his book.⁶³

Byzantine legal culture could be described as standing on three pillars; (1) the emphasis on laws (not law), (2) orientation towards substantive justice, and (3) the dominance of tradition.

The emphasis on laws (not law), is the “chief” characteristic of Byzantine legal culture. The legal material evolves as a concrete set of traditional texts that expands and grows with basically no changes – the only changes seem to be related to the process of adding new texts. Once a text from an older tradition is included and accepted as part of the corpus it stays. Wagschal identifies a strong collective awareness of a core corpus when referring to “the canons” but at the same time – precise definitions of the corpus as elusive. Wagschal points to the core of

⁶² Wagschal, *Law and Legality*, 7

⁶³ See how he characterizes this formalist legal system, Wagschal, *Law and Legality*, 17-19

the issue when noticing that this “almost unconscious process of legal definition reflects an aversion to any clear expression of sovereign authority over the tradition”.⁶⁴

The second pillar characterizes the Byzantine legal culture as a substantive justice system. Wagschal borrows the concept from Max Weber expressing that, “the tradition is clearly oriented towards finding the truly just and correct answer to every problem, and not simply a formally correct legal solution”.⁶⁵ The interest conveyed in this legal tradition is not a “mechanical” or “impartial” jurisprudence that springs from a formalist system. Revealed in the prologues and introductory texts is a very different type of legality – a coherent system “intentionally invested in embedding itself in broader narratives by which truly just decisions might be measured”.⁶⁶ To get law right you must get scripture right, doctrine right, disposition and morality right (to paraphrase the Canadian scholar). The focus of substantive justice explains also, according to Wagschal, why a professional class of lawyers is lacking. The system seems to be designed more for “cultural experts” where the ability to find “stories” with bearing on a particular situation is primary. This makes canon law basically rhetorical, which we will return to below.

The third pillar, the dominance of tradition, refers to the entire system, not just its textual life, dominated by the logic of tradition; “tradition legislates, tradition adjudicates, and tradition interprets” as Wagschal expresses it.⁶⁷ The tradition itself is regarded as the vehicle of change, there is no principle above or outside, with the authority to make changes, as we have seen. Instead, it is a “delay” where the past is regarded more authoritative than the present but not in a formalist way, but as a “diffuse consensus”, mandating and modifying canons. Tradition can therefore not be reduced to metaphysics as in the Ecclesiology school or as source of law in the Scholastic school. It simply expresses a love for a cultural past that takes precedent over the present, downplaying anything being done “now”.

In this brief characteristic taken from Wagschal’s introduction and conclusion (other parts will be addressed in chapter 6), we can get a feeling of the legal culture he discloses. To make the contours clearer we shall compare it to (the imagined) formalist law folio he uses as methodology and then look at the role rhetoric plays in this legal world.

⁶⁴ Wagschal, *Law and Legality*, 276

⁶⁵ Wagschal, *Law and Legality*, 279

⁶⁶ Ibid.

⁶⁷ Wagschal, *Law and Legality*, 280

As a whole, Wagschal argues, there is no system in the Byzantine legal culture that resembles a modern legal culture.

There is no autonomous realm of written rules that is distinguished from the realm of moral and religion. Instead, we find a substantive justice system, where the canons are embedded in the stories of Christianity and moral ideals related to these stories.

In such a legal culture, we also find that there are no formalized ways of mandating nor revising laws, and no clearly defined legislators or authorities. Instead, tradition itself is conceived of as “systemizing” the canons by adding new texts.

Also, we find that there is no authority that could claim power *over* tradition. Instead, the authorities are supposed to merely add material with the sole purpose of clarifying and helping others to access the corpus in its fullness and inconsistency.

In the same way there is neither a “mechanical” or “impartial” jurisprudence. Instead the truly just and right must be sought in every individual situation.

Further more, there are no professional lawyers assigned to handle canon law issues. Instead there are cultural experts, amateurs, with a deep knowledge of tradition, using the stories from this tradition, directing it towards the issue.

Further more, there are no “secondary” rules that govern the interpretation and application of canon law. Instead canon law is simply the canon themselves.

For Wagschal all this culminates as a unique legal culture closely identified with its semi-sacral legal material. However, even if this legal culture is unique, it also shows jurisprudence in a formalist-like manner. The majority of canonical disputes were solved in a way close to a modern formalist system. Wagschal exemplifies this with the “conciliar acta” as a legal world also skilled in operating quite technically and in formalist-like ways.⁶⁸ The question then is rather why formalist elements appears at all?

The best explanation for including formalist elements in this unique legal culture, according to Wagschal, (building on Dieter Simon) is the rhetorical character of the substantive justice system, where formalist elements are a tool in the rhetorical toolbox used when deemed necessary.⁶⁹ With “a rhetoric character” Wagschal addresses “a cognitive predilection for understanding the world through a formalized, aesthetic manipulation of a common pool of

⁶⁸ Wagschal, *Law and Legality*, 282

⁶⁹ *Ibid.*

literary authorities, images, and narratives”.⁷⁰ This rhetorical character makes the substantive justice system a discipline of “literary” negotiations of conventional narratives. Byzantine legal culture, according to Wagschal, is then a law system where the narratives included in the canonical corpus play a leading role, and could be applied by different modes, depending on the situation – one of these modes being of formalist-type.

I will conclude this chapter with Wagschal’s answer to the question of how canon law could be relevant to contemporary ecclesial practice. With the unique legal culture Wagschal describes above, he can confirm the central instinct of the Scholastic school – that the Eastern Orthodox Church possesses a law-system and should be handled accordingly. He could also confirm the central instinct of the Ecclesiology school – that law in the Eastern Orthodox Church cannot be separated from the “broader dogmatic narrative” of the Christian story and of moral behaviors.⁷¹ At the end he could confirm both position by stating that “Orthodox canon law is a very different legal phenomenon”, it is law, but with a substantive and rhetorical character, embedding “law” in stories that display the Christian metanarrative. The key to making canons relevant to contemporary society is realizing first that this church has law that makes organization of ecclesial practice possible, and secondly grasping how this legal system works. Wagschal expresses this in his dissertation the *Nature of Law* (2010):

“The only substantial improvement I hope that my work represents is the provision of a more detailed and developed language for identifying and theorizing the legal dynamics present, and *as legal dynamics*. In this I hope to assist in the transformation of many of these ideas from rather vague philosophical and ecclesiological speculations to a more developed theory of Orthodox legal method and practice. I also wish to challenge the more radical assertions that Orthodoxy does not in fact possess a legal life.”⁷² (My italics)

Wagschal’s answer the question of relevance is to acknowledge that the Eastern Orthodox Church has a *legal* practice. By framing canon law as a legal practice he moves beyond both the scholastic and the ecclesiological approaches and develops the field of canon law. However, I will argue that Wagschal doesn’t develop it far enough, only partly. If we want to solve the

⁷⁰ Wagschal, *Law and Legality*, 284

⁷¹ Wagschal, *Nature of Law*, 263

⁷² Wagschal, *Nature of Law*, 264

question of relevance, we need to establish a new paradigm, and actually, the new paradigm could already be seen in Wagschal's theory. Therefore, as a next step I will design a theoretical model with the purpose of establishing this new paradigm and then return in chapter 6 analyzing the Ecclesiology school and a reconstruction of Wagschal's theory.

5. Social Identity and Discursive Practice

5.1 Hovorun: A Theory of Accidents

The ambition of this chapter is to compose a theoretical model of Social Identity and Discursive Practice and by this establish a new paradigm for solving the question in hand. This will be done first by turning to Cyril Hovorun's Theory of Accidents and after this to Michael Hjälms Theory of Ontological Difference.

In the book *Scaffolds of the Church* (2017) Cyril Hovorun forwards a theory I have named "A Theory of Accidents". The name comes from a lecture at Stockholm School of Theology where he explains the approach he uses in this book as an Aristotelian approach, differentiating between commonalties (or substance) and accidents.⁷³ Hovorun applies this concept to the church making it possible for him to distinguish between nature and structure. His basic argument is that structures, here referring to supra-communal structures, are not part of the nature of the church. They are accidents or "scaffolds" that assist the church to realize itself as nature. The problem today is that these structures are approached as if they were part of the nature – which has disabled the church ability to relate to contemporary society. Therefore, he also describes his approach in the terminology of structuralism versus poststructuralism.

"Scaffolds" or the structures as he calls them, refer to administrative structures such as dioceses, metropolises and patriarchates. It also refers to questions as canonical territory, autocephaly, primacy and ministry – summed up as supra-communal, that is, organization above a local community. We could see similarities to Andrey Shishkov (chapter 3) which we will return to later. Hovorun argues that these structures or "scaffolds" originated in order to support the church. They emerged for good reasons to handle specific situations but in other historical periods the same structures have become obstructive, hindering the original purpose they were

⁷³ "Faculty Lectures, - Spring 2021, Scaffolds of the Church," Published on May 7, 2021. YouTube video. https://www.youtube.com/watch?v=8AtMKEE_xSA

intended to support. As Hovorun puts it “these instruments can break down and turn against the church, and must therefore be repaired or possibly even discarded – precisely to further the same ends for which they were originally designed.”⁷⁴

The problem is that these structures have now grown self-sufficient and taken on a life of their own, becoming “sacrosanct”, integrated as an intrinsic part of the nature of the church. According to Hovorun the party which supports this view of canon law is trying to “anchor ecclesial institutions in the Trinity and in the Incarnation and draw parallels between heavenly and ecclesial hierarchies.”⁷⁵ This stream of thought is therefore termed ontological, integrating the structures as “inseparable parts (onta, ὄντα) of the church”.⁷⁶ Hovorun argues that the consequences of such a position is a church turned towards itself, which he identifies as a case of “ecclesiocentrism” making the church incapable to relate to contemporary society.⁷⁷

The party holding this position is not explicitly identified by Hovorun, but we could recognize the same outcome as in the ecclesiology approach, criticized Wagschal, leaving the church incapable of relate to the socio-political realm of ecclesial practice.

If structures (accidents, scaffolds) refer to a supra-communal organization, then Hovorun would define *nature* as something that has always been part of the church (in line with his Aristotelian approach). He identifies communities, sacraments, and ministers as being part of the church from the very beginning and therefore could count as nature.⁷⁸ It seems to me, that this is actually a depiction of a local community gathering for the celebration of the eucharist, practicing baptism and pastoral ministry etc. Hovorun’s concept of nature is therefore very much in line with both Erickson and Shishkov – viewing the local community *as* the nature of the church. The matrix of eucharistic ecclesiology is further visualized on the supra-communal level as being a “problem” while organization within a local community is not questioned at all. This is

⁷⁴ Cyril Hovorun, *Scaffolds of the Church: Towards Poststructural Ecclesiology*, (Eugene, Orlando: Cascade, 2017), 181

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ All abuses of the ecclesial structures are encapsulated in ecclesiocentrism according to Hovorun. It happens when the church is perceived as possessing a self-sufficient value and autonomy with its own purpose, which is not always compatible with the life of God, the breath of the Spirit and diakonia to the community and wider society. This then leads further to a separation between God and the people – impeding the relation between the faithful and God instead of facilitating. An ecclesiocentric church loses its relational character and becomes an island isolated from both people and God. See Hovorun, *Scaffolds of the Church*, 192.

⁷⁸ Hovorun demonstrates in his book how the supra-communal structures has evolved in history and in his conclusion, he reflects over this in the Aristotelian mode of finding commonalities. This is how I think he arrives at his definition of nature. See Hovorun, *Scaffolds of the Church*, 181-183

certainly the case with Shishkov and could be observed in Erickson's, distinctions between *esse* and *bene esse* (chapter 3). They identifies the supra-communal structures as obstructing the flow of life in the community; if Shishkov solves this with limiting canon law to a local community, Hovorun opens up for a more constructive solution.

Hovorun identifies the ontological approach as a structuralist position where social structures are believed to remain invariably across time and space.⁷⁹ He calls this “institutionalism” which reduces the church to its hierarchal orders. In the language of poststructuralism this is a case of *simulacrum*, where the church has lost its prior identity. “The first and best way to get rid of *simulacra* is to refocus on what belongs to its nature and to reframe its structures in accord with their original meaning.”⁸⁰ Hovorun then illustrates in a historical exposé, where the structures have changed in both their form and meaning through history, and cannot be perceived as universal and unchangeable.

Accordingly, he moves towards what he calls a post-structuralist approach where even fundamental social structures are envisioned as changing over time. Hovorun, then, is not critical towards structures per se but rather that they have taken on a life of their own. They need to be continuously adjusted – the question is how?

To answer this, we could observe in Hovorun's book a call for emancipation which aims to empower the present (and by this every) generation to revise or discard temporary structures. Again, the community plays the main role: “Only by focusing on a community are structures of the church made tangible and meaningful.”⁸¹ The community should be the focus of every structure or else they turn against it. Hovorun makes a reference to “relational sociology”, where the church should be perceived not as a “a thing” but as relationships. Therefore, structures should be perceived as accidents, open to change. Here Hovorun presents an opening for a discursive practice as an answer to how the structures should be handled. This is a deviation (in a positive sense) from the paradigm of the Ecclesiology school. Hovorun, than, identifies two parallel realms, nature – associated with ontology, which I will argue is connected to identity, and structures – as an “outcome of conventions” paired with discursive practices.

⁷⁹ See Hovorun, *Scaffolds of the Church*, 185

⁸⁰ Hovorun, *Scaffolds of the Church*, 191

⁸¹ Hovorun, *Scaffolds of the Church*, 190

In the end, Hovorun takes a different road to that of the Ecclesiology school, but he goes too far when defining nature. This tendency will lead his theory to the same incapability of the church to relate to contemporary society as the former school of thought. At the same time, he opens up for handling canon law as a discursive practice instead of emphasizing a “correct reading”. This makes his theory deviating from the former paradigm opening up for a new approach. Hovorun’s Theory of Accident therefore displays an ambiguity. Defining nature makes it suffer from a rational hold of the world, which leads it to “the slippery ice where there is no friction” as Wittgenstein formulates it.⁸² Below, using Hjälms theory, I will argue that Hovorun doesn’t consider the ontological difference enough which consequently leads to this ambiguity.

5.2 Hjälms Theory of Ontological Difference

In the Theory of Accidents, we can see a theoretical model beginning to take form identifying a necessary distinction between structures and nature. In this distinction we have been able to relate the canon law as an outcome of discursive practice.

I will now turn to Michael Hjälms and his book *Liberation of the Ecclesia* (2013) looking more closely on the ontological difference and the implication this have for theology doing a (gentle) reconstruction of Hovorun’s theory. After this, Hjälms distinction between ritual action and communicative action will be addressed and in the final part of the chapter I will formulate the theory of Social Identity and Discursive Practice employed for the purpose of this thesis.

The main issue Michael Hjälms addresses in *The Liberation of the Ecclesia* could be formulated as how otherness and ecclesiality could co-exist.⁸³ The problem is that according to Jürgen Habermas otherness is per definition oppressive towards the sphere of practice. Practice for Habermas is an *ontic* realm which builds on the possibility of being responsible for your own actions and thoughts. Otherness (and consequently ontology) leads towards the opposite; to submission and oppression, projecting responsibility towards arguments that are self-verified and anchored outside of the person. If we want to follow Habermas, we end up separating canon law

⁸² The quote in Chantal Mouffe, “Wittgenstein and the ethos of democracy.” In *The Legacy of Wittgenstein: Pragmatism or Deconstruction*, ed. Ludwig Nagl and Chantal Mouffe, (Frankfurt am Main; Berlin; Bern; Brussels; New York; Oxford; Wien: Lang, 2001) 131-138.

⁸³ See Michael Hjälms, *Liberation of the Ecclesia: The Unfinished Project of Liturgical Theology*, (Södertälje: Anastasis Media, 2011), 23

and theology again. If we instead follow the Ecclesiology school, where canon law is connected to otherness, we will subordinate and oppress the realm of ecclesial practice (as we have seen). Wagschal is therefore right in confirming the position of both schools in suggesting a unique type of legal culture, but then he hasn't really solved the tension between otherness and ecclesiality.

To solve this tension, we need to begin with the ontological difference. The ontological difference originates in Heidegger as a critique of the Western metaphysical tradition as a kind of onto-theology confusing *Being* with *being-in-time* resulting in a "rational hold of the world, which reduces being to manipulable things".⁸⁴ According to Wayne J. Hankey this has challenged theology continuously in history. To avoid ending up with "a rational hold of the world" – the ontological difference needs to be considered.

The ontological difference has two major consequences for theology according to Hjälms. The first is to differentiate between *ontology* and *revelation* and the second is to differentiate between *thinking* and *Being*. The first difference embeds theology in language as "revelation", residing in the community as a communicative capacity. The Trinity viewed from this perspective is a construction of language – a revelation springing from a shared experience inherited through tradition. Following from this, ontology is linguistic, identified by the English theologian John Milbank as *logontic*.⁸⁵ This means that *verbum* becomes a transcendental category which simultaneously reveals and limits our experience of *Being*. Being itself cannot be accessed outside of language only responded to.

This leads us to the second differentiation for theology addressed as a distinction between *thought* and *Being*. Metaphysical constructions cannot reveal the authenticity of God, according to Hjälms, instead we need to "move beyond not just philosophy but also *theoria* towards *poesis* and *praxis*, where *praxis* are the shared practices of the Church and *poesis* are the creative experiences of charity."⁸⁶ In this difference, theology moves from having its point of departure in first philosophy to becoming a "product" based on experience. We will return to the terms *poesis* and *praxis* (in chapter 7), the main point here is that the second differentiation leads

⁸⁴ Hjälms, *Liberation of the Ecclesia*, 142

⁸⁵ See Hjälms, *Liberation of the Ecclesia*, 143. For the ontological difference he builds on Hankey, Wayne J, 'Theoria versus Poesis: Neoplatonism and Trinitarian Difference in Aquinas, John Milbank, Jean-Luc Marion and John Zizioulas,' In *Modern Theology* 15:4, October (1999): 387-415.

⁸⁶ Hjälms, *Liberation of the Ecclesia*, 143

to the church itself. Then, if the first difference makes God a linguistic experience, the church itself is the second difference.⁸⁷

Returning to the Theory of Accidents we are now better equipped to analyze the problem we encountered. Defining “the nature of the church” as something that has always been part of it, is to “take a rational hold of the world” and confuse thinking about Being with Being itself. In this case Hovorun reduce the whole tradition of the church to a few principals subordinated to a first principal derived from the concept (as it seems) of eucharistic ecclesiology. This rationalization will only lead to further definitions and individualization. In one sense the Theory of Accidents seems to criticize the “ontology approach” for elevating a historical period to an ontological status with the elevation of another historical period, namely the early Christian community to the same status.⁸⁸ If we instead approach the nature of the church by making a *distinction* instead of trying to *definine* it, we could observe nature as a different realm than the realm of structures – perceiving it within the logics of a metanarrative creating a sense of belonging in line with Wagschal’s portrait of tradition. This realm works different from structures, established by discursive practice aiming instead for reaching mutual agreement.

From the Theory of Accidents (slightly revised) we could identify the corner stone of our model as the differentiation between two realms; the meta narrative and discursive practice

Moving towards ritual action and communicative action as Hjälml suggest we are able to confirm and expand the perspectives mentioned. I will start by addressing communicative action as a discursive space.

The model of communicative action builds extensively on Habermas Theory of Communicative Action (TCA). As noted, Hjälml works with the conviction that theory and practice should be distinguished, what follows naturally from this is communicative action as “a deliberative mode of existence”, where “we adjust practice as we come across new theories or accept the failure of previous ones”.⁸⁹

⁸⁷ Hankey, *Theoria versus Poesis*, 398

⁸⁸ In the book *Meta-Ecclesiology: Chronicles on Church Awareness*, Hovorun describes how the church’s self-awareness has developed over time. This started as a Christocentric community and then developed to a ecclesiocentric version in post-apostolic times. In this book he basically argues that this Christocentric dimension is distorted in relation to power but as it is the church’s nature it is an unchangeable aspect that should be separated from the changeable. In the book *Scaffolds of the Church* he builds further on this idea.

⁸⁹ Hjälml, *Liberation of the Ecclesia*, 224

The very distinction between theory and practice then generates a dialectical relation – understood now as a deliberative mode. The opposite is also true – a deliberative mode manifests a distinction between theory and practice. Following the distinction between theory and practice, emancipation is conceived as something that can only be solved discursively. Consequently, Hjälm describes the aim of Habermas TCA as establishing a discursive space free enough from distortions and dominion so that discussion and debate could take place solving disputes and reaching consensus.⁹⁰ This type of discursive practice, then becomes the very vehicle for sharing cultural knowledge, for socialization and for internalization. In this way, discursive practice becomes instrumental to the overall process of a “symbolic reproduction” in the lifeworld. Expressed in relation to ecclesiology this is the envisioned idea of a “sobornost tradition”, of a church changing from within, which is precisely this “symbolic reproduction” of the lifeworld.⁹¹ Building on Hjälm, this could only be realized by discursive spaces and communicative action.

Communicative action in Hjälm’s theory could then be characterized as the ambition of reaching for mutual agreement and consensus by establishing a discursive space. It is also a realm where the metanarrative becomes accessible *to us* – and retold *by us*.

Faith, according to the Frankfurt scholar, is beyond “discursive evaluation” but (in his later production) acknowledged as important for establishing “confidence and solidarity to everyday life”.⁹² Otherness, then, stands in opposition to responsibility, emancipation and discursive practice. This is based on the facts that faith is anchored in self-verifying claims about the world beyond the personal capacities of responsibility; that is, without the possibility to verifying it with experience and reasonable arguments.

This is why Habermas positions “faith” outside of discursive practices, within it is an oppressive mechanism that subordinates the realm of practice by making these claims.

The danger with Habermas theory, according to Hjälm, is his strong emphasis on emancipation as responsibility which has two severe consequences. First, it reduces the lifeworld to reasonable arguments which is a “super-reification” affecting the entire lifeworld and

⁹⁰ Hjälm, *Liberation of the Ecclesia*, 149

⁹¹ For the connection between the “sobornost tradition” and TCA see for example Hjälm, *Liberation of the Ecclesia*, 59-69; 190-195.

⁹² Hjälm, *Liberation of the Ecclesia*, 230

endangers the whole inter-subjective project Habermas advocates.⁹³ Secondly, Hjälms also criticizes Habermas to be too functionalistic. A discursive space is not free from the dimension of power and subjectivity. Therefore, a discursive space has to deal with all aspects of human existence, more than just handling reasonable arguments. In the end, according to Hjälms, Habermas is dealing with ideal social systems but is forgetting the broken and complex world of the social actor.⁹⁴

The solution according to Hjälms, to avoid Habermas mistake, is instead a return to otherness in its full capacity – as a realm of freedom and emancipation.

For this he builds on the political thinker Hannah Arendt’s theory of identity. In Arendt’s theory, identity is connected to the uniqueness of a human person and the question of who someone is. Every answer to this question will not fully describe or define that person, and as such a human person transcends the confinement of language and every concept put on her. Identity is therefore connected to *alteritas*, to the ultimate Other, and is what makes every individual specific and unique. In this capacity identity is constituted pre-discursively.

The argumentation so far is in line with what we have seen in Erickson, where emancipation is connected to an eschatological dimension and the uniqueness of the church. But in Arendt this is only half of the solution. When a human person engages in the weave of social interactions she reveals herself, and as soon as she appears, or disclose herself, she is described and generalized incorporated into, what Arendt calls, a reified remembrance. Identity is then a dialectical process between *alteritas* and reified remembrance – at the same time pre-discursive and discursive. A human person is by this simultaneously a subject and an object, as a subject she constantly reveals herself and stir something new, as an object this newness is reified and incorporated in the remembrance of a collective.

With Arendt theory of identity, Hjälms find grounds to connect otherness with responsibility. Instead of how Erickson does, connecting otherness to an eschatological vision (as described by a scholar), Hjälms argues that the dialectic relation between these realms – the tension between *alteritas* and responsibility is contained within a human person. Instead of making theology the domain of emancipation, which we have seen leads to a rational hold of the world, the domain of emancipation is the human person itself. Identity is then of “double nature”,

⁹³ This is particularly obvious according to Hjälms, when Habermas only recognize disclosure in art as a function of language. Hjälms, *Liberation of the Ecclesia*, 288

⁹⁴ Hjälms, *Liberation of the Ecclesia*, 266

it is connected to a process of retelling or re-living a story produced by a collective remembrance. Hjälml describes these dialectics: “the unique has to be transformed into the familiar and general. When the narrative is received by the subject, however, it is once again transformed into the unique”.⁹⁵ By this we could understand the inherent rationale of a metanarrative is to generate and stir identity as a sense of belonging. In the narrative, *receiving it* and *retelling it*, is where a human person finds its home, a space embracing the whole individual. To quote Hjälml summarizing what we have just said: “It is in this open-ended understanding of identity that the emancipatory interest emerges avoiding any determinacy of the human being.”⁹⁶ According to Hjälml, emancipation is generated from otherness and *received* by embracing a narrative but by *retelling it*, identity is also connected to responsibility – a process of communicative action. The human person then stands out as where this dialectical relation is taking place.

Ritual action in Hjälml’s theory has strong connections to identity as Arendt describes it. This realm emanates from participation in the *leitourgia*, the Eucharistic celebration, but as such it is united with the broader metanarrative of tradition expressed in feasts, the veneration of saints and hymnology etc. Through this we can understand ritual action as a reified remembrance, generating an open-ended identity avoiding any determinacy of the human being. This is similar to that of Wagschal, who identifies a tradition that is beyond control. Hjälml formulates it in this way: the “main purpose (of ritual action) is to retell a story and shape cultural heritage, telling us which story we belong to”.⁹⁷

The two realms of communicative action and ritual action have a dialectical relationship and constitutes each other in line with how Hjälml uses Arendt’s theory. Hjälml characterizes ritual action as “belonging” and communicative action as “mutual understanding”. Both re-generates identity, social solidarity, responsibility and emancipation but in different ways. Ritual action unites the participants through social solidarity and through identification with an ancient story. Through communicative action, these ancient stories are “set communicatively aflow; becoming thematized, vindicated and interpreted through the individual or collective”.⁹⁸ In the midst of it all – holding the two realms together, is a human person.

⁹⁵ Hjälml, *Liberation of the Ecclesia*, 281

⁹⁶ Hjälml, *Liberation of the Ecclesia*, 301

⁹⁷ Hjälml, *Liberation of the Ecclesia*, 170

⁹⁸ *Ibid.*

To end this chapter I will formulate the theoretical model of Social Identity and Discursive Practice, based on what we observed above.

Through the realm of social identity we receive and participate in a metanarrative, telling us which story we belong to. As poetry, novels and music this realm is a kind of icon that connect us to otherness as an open-ended understanding of identity “avoiding any determinacy of the human being”. In the Eastern Orthodox Church, the rite, *leitourgia*, plays a constituting part in which the whole lifeworld of the church is reborn, constructed and confirmed. This is how we can understand “the nature of the church” as well as “tradition” that is a world beyond the possibility to control and confine with definitions. Social identity is something that is constructed and constantly re-constructed by retelling or adding stories.

Through a realm of discursive practice, in contrast, we could establish mutual agreements, solve conflicts, coordinating political bodies and conflicting interest. We could regulate and organize the community, as well as to set limits to how power should be handled etc. If Hjälms place a human person in the midst of a dialectics between otherness and responsibility as we have seen, my interest is more political – where a collective of human agents together handles this dialectics in the a created “room” for a purpose of reaching mutual agreements and coordinating actions. What I refer to here is a “discursive space”, understood in line with Hjälms critique of Habermas, that it has to acknowledge all aspects of human existence not only allowing “reasonable argument”, but a full engagement between human persons.

The realms of social identity and discursive practice has different purpose – the first creates a sense of belonging, the second aiming for establish mutual agreements. The first is connected to the question of who we are – the second to how we should coexist and live together. These realms than, consists of different set of logics. Social identity is builds up around “esthetic” claims about the world, while discursive practice is grounded on communication and dialogues.

The dialectics is played out in this “room” where human agents is engaged in establish ways for living together under the influence of a “remembrance” of the unique identity – “retelling” their own version of it.

By this we could end this chapter and advocate a theoretical model of Social Identity and Discursive Practice – operating as a new paradigm built on a distinction between theory and practice, as well as ontology and practice. This gives us a theoretical model that could affirm ontology and at the same time avoid subordinating ecclesial practice. Freedom and

emancipation could then be understood as connected to this foundational condition of making a distinction between social identity and discursive practice. The old paradigm could then be understood as a total mediation of theory and practice – which confuses social identity with discursive practice – resulting in otherness oppressing and subordinating ecclesiality. We will now take a closer look at how these two paradigms relate to our discussion.

6. Two Paradigms

6.1 The Paradigm of the Ecclesiology School

With the theoretical model of Social Identity and Discursive Practice, we can now return to the question of relevance.

The aim of this chapter is to extend the discussion to involve more scholars and establishing a paradigm for the Ecclesiology school in which a *normal science* could be identified. This will allow us to go beyond Wagschal's critique of the Ecclesiology school, and at the same time position his own theory of the Unique Legal Culture as an *anomaly* that breaks with the old paradigm – but which is still not attuned to the new paradigm.

In the end we could identify two paradigms; the old paradigm which works mediate theory and practice and a new paradigm, embedded in the theoretical model of Social Identity and Discursive Practice. In the final part a reconstruction of Wagschal's theory will be attempted and a new theory of relevance may surface.

I will begin with an extended discussion which includes Nicholas Afanasiev, Alexander Schmemmann, Lewis J Patsavos and Christos Yannaras. In the second part of this chapter Wagschal's theory will be reconstructed.

In an article entitled “The Canons of the Church: Changeable or Unchangeable?” (1936) Nicholas Afanasiev argues, as we have already seen, against the separation of canon law from theology brought about by the Scholastic school. Afanasiev expresses this as a “flaw” that occurs when “the decrees do not draw Church life together with its doctrine, but rather separate doctrine from life.” He takes a different approach suggesting that the canons are empirical and historical expressions (*form*) of “the dogmatic teaching of the church” (*essence*). The true essence of the church is attainable then only through its history but at the same time history cannot fully

grasp or contain this fullness.⁹⁹ In this “dialectic” canon law is an outer *form*, destined to be constantly adapted to new historical situations according to an inner *essence*. Afanasiev therefore suggests a “creative canonicity” conforming canon law to the dogmatic teaching of the church, or “truth” expressed in every generation. As a consequence, he draws attention to the necessity of establishing a “correct basis” for a “canonical consciousness” when engaging in reading and interpreting the canons.¹⁰⁰

Turning to Alexander Schmemmann, we get a similar picture. The canons should regulate the life of the church by complying to “the essence of the Church”.¹⁰¹ According to him, this means that in order to be properly understood, interpreted and applied, canonical texts must always be referred to “the *truth* of the church”. A truth which the canons express sometimes for a very particular historical situation not explicit in the canon to a modern reader.¹⁰² There is a historical gap between the situation that generated the formulation of the canons and how this particular canon is understood by a modern reader. The canons then need to be approached by establishing the inner meaning behind the surface of the canonical texts. The inner meaning is then what both Afanasiev and Schmemmann call “essence” or “dogmatic teaching” etc. This places Schmemmann in line with how Afanasiev argues above – conforming the canons to the essence of the church. With Schmemmann we could illustrate this.

Apostolic Canon 1, raises the issue of consecration, stating that all bishops in the area should be present during the act – only under special circumstances would two or three bishops suffice. The intention behind the canon, Schmemmann argues, is not to define valid requirements for a consecration (with two bishops present during a consecration). Instead, the consecration of a bishop should be seen as manifesting the sacrament of the church as *unity*. Therefore, we cannot reduce Apostolic Canon 1, or any canon for that matter, to formal principles – instead they should be understood as expressing the essence of Orthodox ecclesiology.¹⁰³ In this case, the “correct base” for interpreting the canons for Schmemmann seems to be eucharistic ecclesiology.

⁹⁹ See Afanasiev, “Canons and Canonical Consciousness,” Holy Trinity, May 5, 2021, <https://www.holy-trinity.org/ecclesiology/afanasiev-canons.html>

¹⁰⁰ See Afanasiev, “Canons and Canonical Consciousness,”

¹⁰¹ Schmemmann, *Problems of Orthodoxy in America*, 75

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

In Lewis J Patsavos the role of canon law is basically pastoral. Canon law should assist the church in the aim of bringing humanity to salvation, transforming the believer to a *katholikos anthropos* – a saintly version of the human person where individuality is transcended and the discrepancy between dogma and life is united.¹⁰⁴ According to Patsavos, orthodox ecclesiology, has to be the basis for canon law in order not to risk the church conforming to “this world”.¹⁰⁵ In this we could recognize the rationale of Erickson and the two scholars above. Patsavos differs slightly from the others in his strong emphasis on canon law as authoritatively anchored in “the will of God”.¹⁰⁶ This leads him for example to advocate the antinomy of *akribeia* and *oikonomia* (οἰκονομία) interpreting the latter as “exception” from the rule. This is in line with Nikodemus the Haghiorite and the *Pedalion*, which has been the main influence in the field for centuries.

In Patsavos, as in Schmemmann and Afanasiev, we find the same tendency, to connect canon law to orthodox theology, as a reaction to the Scholastic school. The last example is Christos Yannaras ascetic approach.¹⁰⁷

In his book *Freedom of Morality* (1984), Yannaras suggests an ascetic approach to canon law. Yannaras operates within the rationale and framework of what has been called “personalism” based on the idea that man in his ecstatic relationship towards the Other is transformed from an *individual* – trapped by the necessities of biological life (its corruption and death, directed toward existential autonomy) to a *person*, constituting an eucharistic mode of existence characterized by communion, freedom and love. The canons in Yannaras framework, guides the believer toward a transformation of the individual to a person. Through an ascetic approach, Yannaras perceives canon law as connecting the individual to the transforming mode of communion, freedom and love.¹⁰⁸ The canons should therefore be seen as expressing the ontology of the church. However, according to Yannaras, this dimension of canon law has been distorted by a humanistic mindset that lacks necessary knowledge of the unique world of the Byzantines in order to understand the canons. Yannaras suggestion is not to change or adjust the

¹⁰⁴ This “catholic” person transform for example “individualism” to “theocentric communion”, overcomes the antithesis of “conservatism” and “progressivism” and “doesn’t separates doctrine from ethics”. See Patsavos, *Spiritual Dimensions of the Canons*, 17-18.

¹⁰⁵ See for example Patsavos, *Spiritual Dimensions of the Canons*, 31.

¹⁰⁶ See for example Patsavos, *Spiritual Dimensions of the Canons*, 2, 14-15.

¹⁰⁷ He handles the role and function of canon law in chapter 10, In his book Yannaras, Christos, *The Freedom of Morality*, (Crestwood, New York: St. Vladimir’s Seminary Press, 1984) 173-193.

¹⁰⁸ Yannaras, *The Freedom of Morality*, 183

canons, but to change how we understand them, approaching them (again) as the Byzantines saw them – as “mystical” roads leading to communion, freedom and love.

Yannaras approach is similar to Patsavos with the difference that Yannaras seems to suggest a status quo in relation to the canons, unaltered, but inviting a new understanding. Though, both advocate that the canons are supposed to be integrated with orthodox ecclesiology. Even if this is a brief outline, the pattern repeats itself. Both Erickson and Shishkov end up solving the question of relevance by integrating canon law with the nature of the church. In Afanasiev, Schmemmann, Patsavos and Yannaras we have seen the same. Even if they could be distinguished in their perspectives and ways of reasoning, they share the same fundamental pattern of integrating canon law with orthodox ecclesiology to solve the question of relevance.

I have chosen to view the question of relevance through the perspective of how theory and practice relate on which the theoretical model is buildt. We have briefly met this perspective, here I will return to it, deepening a critique of the Ecclesiology school.

The relation between theory and practice has a long philosophical tradition originating in ancient Greece but has been actualized in modern times since Marx.¹⁰⁹ Habermas, has worked with the issue at length, already seen in Michael Hjälm theory above. Habermas identifies the challenge of applying theory onto practice as sublation of philosophy.¹¹⁰ For Hegel sublation (*aufheben*) is a concept associated to his dialectics which Marx radicalizes with a political ambition of emancipation. According to Anders Bartonek, reality is not changed in Hegel’s concept but rather the opposite, it conserves the orders of the bourgeoisie. But in Marx, reality changes, philosophy must lead to a total transformation of reality where theory and reality are rendered as identical.¹¹¹ Sublation of philosophy is then when philosophy is expected to be totally realized as practice, this is also what we can refer to as a total mediation of theory and practice. A total mediation between theory and practice is what Marx and also György Lukács believe could break the captivity of reification and alienation, and instead usher in freedom and emancipation. This view has been criticized by scholars like Habermas, in the case of Habermas

¹⁰⁹ For a brief exposé of how the relation of theory and practice shaped modernity see how Jürgen Habermas, “Modernity: An Unfinished Project.” In *Habermas and the Unfinished Project of Modernity: Critical Essays on the Philosophical Discourse of Modernity*, ed. Maurizio Passarín d’Entrèves and Seyla Benhabib, (Cambridge, Massachusetts: The MIT Press, 1997), 38-58.

¹¹⁰ For the rationale of false sublation of philosophy see Jürgen Habermas, *Modernity: An Unfinished Project*, 38-58.

¹¹¹ See Anders Bartonek, “Karl Korsch: To Make the Right Marx Visible.” In *Hegelian Marxism: The Uses of Hegel’s Philosophy in Marxist Theory from Georg Lukács to Slavoj Žižek*, ed. Anders Bartonek and Anders Burman, (Stockholm: Södertörn Philosophical Studies, 2018), 35-60.

as *false* sublation, oppressing the socio-political realm to an even higher degree (in spite of their intentions).

Alan Howe gives an example of how a total mediation of theory and practice oppresses the everyday realm. It is when the “philosophy of revolution” takes over the consciousness of the proletariat, when popular opinions, not expressed in line with official ideology, is not considered as authentic expression of the working-class consciousness. The Party then has the control of how Marxist theory should be understood and interpreted, not the workers themselves. Consequently, if the proletariat fails to grasp the meaning “it must be disabused of its mistake and told what to think by the Party that represent it and embodies correct theory.”¹¹² Practice is then dominated by theory with reification of everyday life experience as outcome where the proletariat in this case, doesn’t have the possibility of formulating their own consciousness. Habermas was more in line with Lukács in his earlier period but in his mature writings he instead came to the conclusion that there is no single path that could mediate theory and praxis, and later he even renounced the desirability of a complete mediation.¹¹³ Emancipation is instead conditioned by a “gap” between the two, where theory breaks down and is reshaped by the participants in the lifeworld. Philosophy, according to Habermas, therefore operates in a new paradigm and needs to learn “to renounce the question of totality”.¹¹⁴

Two paradigms emerge – one that envisions a total mediation of theory and practice and a new, making a necessary distinction between the two, both are calling for emancipation as an outcome, but according to the newer the old fails.

Through integrating canon law with ecclesiology the pattern of the older paradigm is followed envisioning a total mediation between theory and practice similar to Marx and Lukács. For them it was integrating philosophy with practice that could break the captivity of reification and alienation and bring forth freedom and emancipation. For the Ecclesiology school it is integrate orthodox ecclesiology with canon law that could break the captivity the church and bring forth freedom. Compared to the theoretical model – even if this school of thought affirms the uniqueness of the church as the realm of social identity – they are not making the distinction

¹¹² How, Alan, *Critical Theory*, (New York: Palgrave Macmillan, 2003) 22

¹¹³ Hjälm, *Liberation of the Ecclesia*, 222

¹¹⁴ Hjälm, *Liberation of the Ecclesia*, 225. In this passage Hjälm refers to Jürgen Habermas, *The Theory of Communicative Action*. Vol. 1: Reason and the Rationalization of Society, (Boston, MA: Beacon Press, 1981) 383-399.

between social identity and discursive practice clearly enough. Instead, the focus of their concern becomes how interpretation should be undertaken – establishing “secondary rules” as guides toward a “correct reading” (Erickson) or a “correct base” (Afanasiev).

These readings or bases are not arbitrarily established but they are rather closely attached to various ecclesiological positions, aimed of finding the true “nature” of the canons. The example of Schmemmann illustrates this. When he defines nature as “unity” in relation to the Apostolic Canon 1, he expresses this from what I would call a eucharistic ecclesiological position as we have seen in both Erickson and Shishkov. Therefore, in spite of the intention to take back the unique, these scholars end up with a “super-reification” similar to Habermas. If a “super-reification” is a first conclusion we can also find a second conclusion related to the domain of ecclesial practice.

As already noted, a total mediation of theory and practice leads to a domination of theory. In a total mediation, or a total integration, the realm of the metanarrative will dominate ecclesial practice. This risks confusing identity with discursive practices, adding up to a situation where feudal power structures are strengthened in support of totalitarian management.

I want to return to Yannaras to illustrate this.

Yannaras ascetic approach makes it hard for him to relate to legality. Let us return to the quote we partially analyzed before. Yannaras writes:

“The way the life of the Church is represented and summed up in the person of the bishop follows from the truth of the personal mode of existence which the Church embodies. It is therefore also the ultimate hazard for the Church, her historical adventure. How much the body of the Church has suffered from bishops who were unworthy or had no understanding of their office is well known, from history and present day experience alike... When the Church is subject to impersonal structures and legal codes, however, and to charters and constitutions of canons unrelated to the personal adventure of freedom and repentance, then that does distort the truth of the Church; it destroys the possibility of salvation and removes man’s hope of life.”¹¹⁵

Yannaras is here clearly advocating the bishop as a representation of a “personal mode”. I think Yannaras is right in emphasizing a possibility for the bishop to take a personal

¹¹⁵ Yannaras, *The Freedom of Morality*, 193

responsibility for canon law but goes too far in denying a need for a legality at all. His critique should also be interpreted as a justified reaction to the Scholastic school, but because he operates within the paradigm of total mediation he is unable to discuss any kind of alternative legality in which the canons play a part. The practical outcome of Yannaras way of approaching the canons is a bishop invested with the canons as a personal power to handle as he pleases, where obedience to him, is promoted as a virtue and with salvation as the final reward. This, then, is a situation Schmemmann and Shishkov's observes where the canons are used for legitimizing both sides in a conflict instead of being the segment of which conflicts could be solved.

I support the Ecclesiology school in their critique of a scholastic approach, which reduce the church, but they confuse social identity with discursive practice when integrating canon law with orthodox ecclesiology. The outcome is a "rational hold of the world", incapable of relating to legality, with the consequence that bishops hold all the keys in the church, where the concept of tradition oppresses ecclesiality, alienating and reifying the people, and lastly, fostering a spirituality of obedience. Wagschal's critique, that the Ecclesiology school has not been able to develop workable theories in solving canonical disputes, can now be explained. We could even go beyond his critique and summarize the result of the paradigm as supporting totalitarian structures, which subordinates ecclesial practice and alienates the people of the church.

Concluding this part of the chapter, the Ecclesiology school operates within in the paradigm built on a total mediation between theory and practice. This is what could be decribed as *normal science* in this particular stream. My argument is that we need to shift paradigm to solve the question of relevance. In order to make canon law relevant to contemporary ecclesial practice, a distinction between social identity and discursive practice is required. Wagschal therefore rightly emphasizes a need for a *legal* culture, but I will argue that he doesn't consider the distinction consciously enough. However, in his book, he actually makes a distinction that could be in line with the theoretical model. Therefore, I will attempt to reconstruct Wagschal's theory of a Unique Legal Culture.

6.2 A Unique Legal Culture reconstructed

Let us start where we left Wagschal's theory in chapter four. Wagschal's answer to the question of relevance is to acknowledge "the legal dynamics involved" in the unique legal

culture of the Byzantines – as a *legal practice*. He confirms the importance of a legality in the Scholastic school, but not as legal formalism. He also confirms the importance of the uniqueness of the Eastern Orthodox Church as the Ecclesiology school understands it, but not as a metaphysical dimension beyond legality. He thereby moves further than both schools, advocating the two perspectives at the same time combined in one unique legal culture.

Compared to the two paradigms Wagschal's theory seems, in certain respects, to break out from the old paradigm of integration and total mediation. Firstly, we can say that his theory takes a *logontic* perspective." By identifying tradition as a constructed realm, cumulative and beyond the control of present generations, he thereby avoids taking a "rational hold of the world".

When it comes to the distinction between social identity and discursive practice, we find his theory to be ambiguous. Wagschal clearly identifies a realm of metanarrative and a realm of legality but in his conclusion, as we have seen, he ends up merging them together as one unique legal culture.

The "rhetorical" character actually conveys a distinction. He writes: "the legal "message" of the introductions is precisely that law qua law is supposed to be rhetorically framed, that is, carefully embedded in broader value narratives".¹¹⁶ In this quote law is embedded in a metanarrative – and combining these two aspects reveals the uniqueness of this particular legality. Wagschal concludes that the unique legal culture is a byproduct that joins law and morality. Though, he seems to neglect that this byproduct could be a distinction acknowledging a discursive space as context for generating the texts.

Then, he clearly confirms the realm of social identity by connecting the canons to a broader story of Christ and salvation, of Paschal drama and the eschatological future, as well as the consequences of sin and death, if deviating from this path. Even if canon law in the end comes out as a literary *paideia*, a semi-sacral body of texts almost as an extension to the gospels, continuing the apostles work through the bishops – by being embedded in this broader story of Christianity actually confirms a discursive practice as context. Wagschal doesn't take this into consideration, he rather sees the intention of the Byzantine legal culture as a different kind of law, exegetical and intended as imposing social and cultural control, educational in character

¹¹⁶ Wagschal, *Law and Legality*, 124-125

Wagschal clearly acknowledges the importance of social identity in Eastern Orthodox legal culture but leaves out the discursive process that generates these texts. Instead, we can see, how the authors of the prologues and introductory texts refer to the realm of social identity while introducing the canons in a discursive setting.

Wagschal, then, leaves out the realm of discursive practice from his conclusion, even though they are vividly present in his work, which probably has to do with his aim of comparing the byzantine legal culture with modern legal culture. Characterized against the separation of law and morality, connected with modern legal culture, what “sticks out” is the emphasis of their unity in byzantine legal culture. It is to this Wagschal wants to draw attention.

In the end Wagschal’s theory is an *anomaly* – to connect it to Kuhns theory employed in thesis – as a theory introducing a different path that of *normal science*. He does this by letting the texts “speak for themselves”, revealing the anomaly, but he doesn’t make the distinction between discursive practice and social identity clear enough to fulfill the conditions necessary for making a paradigm shift.

However, as I have argued already, Wagschal makes observations of a discursive practice throughout his book which make a reconstruction possible. The first observation regards a *discursive space* generating canons, the second observation is instead related to the *administration* of canonical issues.

As a unifying theme that runs through Wagschal’s book is that the socio-political context of the canons is councils and that the agents are the bishops. Even if the first centuries display a “fluid pattern” of written and customary law, canon law is established as a conciliar practice in the fourth century.¹¹⁷ The canonical material itself is almost completely based on the acts from the councils (as we saw in the introduction). To further confirm councils as a discursive context of canon law the addition of patristic material in the canonical collection is regarded problematic by one of the introductory text. The problem is that the canonical materia of the patristic fathers is not generated by a council – the canons are produced by a single hand, not discussed or agreed upon in a synod or council. Wagschal observes this in the prologues of the *Coll14*:

“Their acceptance (canons of the Holy fathers) is clearly problematic, and the author admits

¹¹⁷ See for example Wagschal, *Law and Legality*, 32

knowing that both Basil and Gregory forbade canonical regulations from individuals: they should instead be issued by “many holy fathers coming together in the same place,” testing and debating matters at length”.¹¹⁸

The inclusion of patristic material in the collection of canon law is defended on account of their capacity to clarifying synodical decisions – but then, criticized for not being generated and confirmed in a discursive space by a plurality of agents. Here Wagschal actually identifies and observes a discursive practice, generating canons, “testing and debating matters at length”.

In the epilogue of the Apostolic Canon the agents of canonicity are identified as the bishops, both in the act of generating canons and of administering them.¹¹⁹ Being engaged in discursive practice then seems to come with the job. The emphasis is also on the bishops themselves, not only on the legal format of a council, which could be in line with Yannaras “personal mode”, making the bishop personally responsible within a discursive practices with the aim of establishing consensus.¹²⁰ I believe this is in line with the substantive rational Wagschal conveys, revealing a process of discursive practices where truly just solutions are sought for. This could indicate that responsibility is implicit in the acts of embedding the canons in the metanarratives.

The second observation regards the *administration* of canonical issues. As Wagschal’s *Law and Legality* is directed towards the prologues and introductory texts it is rather strange that there are no guidelines as to how the administration of canon law should be executed. Based on that material, the administration of the canons is simply an issue for the bishops and the episcopal offices. In (secular) Constantinople there was a realm of civil law staffed by professional notaries, advocates and private teachers of law.¹²¹ In the world of the Eastern Orthodox Church the situation was different. Instead, we have cultural experts, drawing on canonical diversity and rhetorically motivating the use and application of canons.¹²²

¹¹⁸ See for example the list of canonical materials in Wagschal, *Law and Legality*, 55. For the comment on the prologues of Coll14 and the quote, *ibid*, 106.

¹¹⁹ In a prologue of *Coll50*, for example, the image of the shepherd is used in relation to the bishop’s tasks of handling the canons. See Wagschal, *Law and Legality*, 92, 96-100, 126.

¹²⁰ See for example a comment from a prologue of *Coll50* where the list of participatory bishops in the councils manifest this doubleness. The bishop’s ministry is here both communal and personal at the same time. See Wagschal, *Law and Legality*, 100, 121.

¹²¹ See Wagschal, *Law and Legality*, 80

¹²² This is then a case of “specialization” instead of “professionalization” according to Wagschal. Administration of canon law seems to be handled by amateurs positioned in the administration of a church on a patriarchal or diocesan

It was the duty of a bishop to handle the canons, as an indication of this practice we have Question and Answer texts that seek guidance from a canonical expert in the city. The content in these texts are simple which indicates the lack of a complex legal system according to Wagschal. According to him, this displays, that the “real loci of the system’s operation, must have always been the much more “amateur” structures of the episcopal chanceries, and the figures of the bishops themselves, either individually or in synods...”.¹²³ The episcopal chanceries then seem to be of the same substantive rational as the overall system. What seems to be lacking is a discursive practice within the episcopal chanceries. This could be because of lack of material. How canon law actually worked in episcopal chanceries, is an area in need of further research according to Wagschal.

The reconstruction of Wagschal’s theory shows a discursive practice at the heart of Eastern Orthodox legal culture, which generates canons and confirms additions. Considering the rhetorical character mentioned above, the canons could be perceived as an outcome of a dialectical process between the realm of social identity and discursive practice.

Wagschal’s theory is addressed to an already finalized and produced legal collection. What we now have is therefore a “reified remembrance”, a product. As a living, contemporary church, we now receive this collection of texts as a “rich, multidimensional normative reality that is designed to speak to more than one aspect of human sociocultural ordering.”¹²⁴ For this reason, I am arguing that the canonical material is a product which reveals the dialectics between social identity and discursive practice, and which presents itself as a substantive justice system constituting a unique legal culture.

It could be argued, against the reconstruction I just made, as Wagschal himself writes: “Attempts to separate “law” and “morality”—as is normal today—are almost absurd in this type of tradition: the two are clearly, and intentionally, held together”.¹²⁵ I guess he is right if we are looking for a *separation*. What I am arguing for is a *distinction*. Looking for a separation would lead him to view the legal culture as a unified whole. What he refers to as “intentionally

level where they acquire the knowledge of the canons required for performing their job. At least to some ecclesial offices, such as in Constantinople this could be exemplified by the χαρτοφύλαξ, essentially a chief notary and archival-officer who also became a canonical expert. Balsamon is regarded as the most famous one, but there are others also (See Wagschal, *Law and Legality*, 82).

¹²³ Wagschal, *Law and Legality*, 83

¹²⁴ Wagschal, *Law and Legality*, 218

¹²⁵ Wagschal, *Law and Legality*, 129

held together” could (maybe) be this distinction I suggest. The reconstruction we have done based on Wagschal’s own “facts” is tentative and could be the concern of a thesis of its own, investigating if there was a self-awareness of this distinction in Byzantine legal culture. If this could be substantiated, the “distinction” could be instrumental to how this substantive legal rational operates.

With the theory of A Unique Legal Culture, Wagschal moves far beyond the paradigm of the Ecclesiology school. With his contribution we are on the path towards a new solution and a new paradigm, revealing that the field is in a state of *crisis* – a creative state looking for new solutions, not yet stabilized as *normal science* that is a new paradigm.

I believe, Wagschal’s reconstructed theory could serve as a workable system from which contemporary church-legal theories could be formed. In the two final chapters I will intend to do such a thing and by this formulate an answer to the question of relevance, more observant to freedom and emancipation.

7. Towards a Different Answer

7.1 The *polis*, a Space of Uncertainty

In present chapter we will develop a new answer where we suggest that canon law could be made relevant to contemporary ecclesial practice via an institution, conditioned by a space of uncertainty.

I have argued that the canons, as a collection of texts are an outcome of the dialectics between the realm of social identity and the realm of discursive practice. The socio-political context is, as we have seen, comprised of councils and synods, as well as the episcopal chancelleries, with bishops as agents. A discursive space is therefore already identified as prerequisite for canon law to function as a dialectical legal culture. The quest for this chapter is to characterize how such a dialectical legal culture could safeguard emancipation in the realm of contemporary ecclesial practice – in other words, answering the question of relevance.

The discussion of this chapter will be built on Hanna Arendt, this time her concept of “a space of uncertainty”, the Belgian political theorist Chantal Mouffe’s theory of agonistic pluralism and lastly Michael Hjälms concept of canon law as an interface between Ecclesia and System.

We now turn to Hanna Arendt.

Arendt's concept of "action" is ontologically rooted in *natality*, accentuating the actuality of the present, as well as change and the power to act on that change. It is inherent in the capacity of individuals to appear to each other in "action and speech" rooted in the human condition of plurality. In one sense, the whole world resides in the fragility of social interaction of individuals who share this existence – both the control of the past as well as the unpredictability of the future. What we have identified as a discursive space in this model, could be seen as a *polis*, a space in-between-men in the work of Arendt. This is a space that brings individuals together and at the same time separates them, creating this space in-between-men (as a table would do). A *polis* is an imaginary table, "not the city-state in its physical location; it is the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be."¹²⁶ This gives the *polis* a flavor of a civil rights movement, mobilizing people to make change possible. Though, more precisely, it refers to the organization of people for the purpose of "living together". This space is what she refers to as the *polis* – a deliberative space in which men appear to each other with the purpose of living together.

The freedom of the *polis* is challenged by two strong forces, the established world and the actuality of the present. This challenge could be understood as the dialectical relation of social identity and discursive practice. In Arendt we could connect these to *poesis* and *praxis*, where *poesis* refers to the established world, a "creative experience of grace", as Hjälm expresses it, and *praxis*, the actuality of the present in the "shared practices of the church".

Together with Arendt we could take one step further than Hjälm and Hankey, where we could affirm theology as *theoria* but recognize it as building on *poesis*. Arendt associates *poesis* to the human condition of "work" and the capacity of *homo faber* that has, with "the work of the hands", constructed a world to live in. This capacity of man establishes a world of durability and even immortality and therefore breaks the bonds of the human conditions of "labor" (*animal laborans*) confined to the necessities of survival. The established world of the church is then produced and constructed by human hands. In Arendt's theory of identity (as Hjälm uses it) we could recognize this as a reified remembrance, creating a sense of belonging from which identity is received. We have already connected this realm of social identity to *leitourgia*,

¹²⁶ Arendt, *The Human Condition*, 198

and the fabric of meta narrative. But it is also includes, I will argue, the aspect of how tradition is reflected upon in the works of academic theology – this level of reflection could then be distinguished as *theoria*. According to Arendt, *theoria* refer to a contemplative life which builds on a withdrawal from human interaction and on a solitaire mode of life. By this the thoughts mediately goes to a monastic person or a philosopher of antiquity, but another way to approach *theoria* is to see it as a reflection that builds on *poesis*, the established world of the church. The “withdrawal” then, is not from human interaction but in perspective – taking a “methodologic” distance needed to analyze and thematize, but not disentangled, or cut from the interest of the church. My argument is that theology (and then ecclesiology) belongs to the realm of social identity as a way to create meaning of our existence.

The established world containing with of both *poesis* and *theoria*, is then *irreversible* which threatens to reify life. On the opposite side rooted in *natality*, action is according to Arendt a fragile activity with outcomes leading to the *unpredictability* of the future. This is a dilemma of either being controlled by a past – or lost in an ocean of uncertainty.

It is here that we meet what I have chosen to call a “space of uncertainty” – a space set between the two poles of *forgiveness* and *hope*. Arendt writes: “The possible redemption from the predicament of irreversibility... is the faculty of forgiving. The remedy for unpredictability, for the chaotic uncertainty of the future, is contained in the faculty to make and keep promises.”¹²⁷

The two faculties belong together in Arendt’s way of reasoning, in so far as forgiving serves to undo the deeds of the past, whose “sins” hang over every new generation. The faculty to “make promises” she writes, serves “to set up in the ocean of uncertainty... islands of security”.¹²⁸ The *polis* could then be said to be in the midst of the tension of forgiveness – letting go of the past, and hope – making and keeping promises, building a world together as “islands of security” in the sea of uncertainty. This describes in a rather poetic way how we could understand the dialectics involved. The certainties we might have of a shared world is like an archipelago in the sea of uncertainty. The *polis* is then founded on the two poles of *forgiveness* (letting go) and *hope* (making and keeping promises) setting up “a space of uncertainty”. Without this space

¹²⁷ Arendt, *The Human Condition*, 237

¹²⁸ Ibid.

questions of identity and questions of plurality will be confused. Arendt formulates it like this:

“Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would be the victims of its consequences forever...without being bound to the fulfillment of promises, we would never be able to keep our identities; we would be condemned to wander helplessly and without direction in the darkness of each man’s lonely heart.”¹²⁹

The *polis* is conceived as a space of uncertainty where one does not end up as a victim of the past or stripped of identity. Instead of present reality being dominated by tradition as in the Ecclesiology school or when present reality reduces tradition as in the Scholastic school – present reality and tradition inform each other.

The space of uncertainty is by this token also the condition for how the canons relate to ecclesial practice. The canons, expressing as they do a “rich, multidimensional normative reality” as Wagschal puts it, belongs to the realm of *poesis* and the church’s identity.¹³⁰ In the *polis* – we let go of the ancient canons and allow present life-situations to be informed by them, but received in a deliberative mode, “discussing the issue at length” and establishing common grounds for how to live together as an outcome of these discussions.

This is not separation, nor is it integration – it is a distinction, where canon law operates as dialectical legal practice between forgiveness and hope. The space of uncertainty then safeguards freedom of ecclesial practice and everyday life. Arendt writes:

“Man's inability to rely upon himself or to have complete faith in himself (which is the same thing) is the price human beings pay for freedom; and the impossibility of remaining unique masters of what they do, of knowing its consequences and relying upon the future, is the price they pay for plurality and reality, for the joy of inhabiting together with others a world whose reality is guaranteed for each by the presence of all.”¹³¹

The space of uncertainty is the price we have to pay for freedom, plurality and reality. We can

¹²⁹ Arendt, *The Human Condition*, 237

¹³⁰ Wagschal, *Law and Legality*, 218

¹³¹ Arendt, *The Human Condition*, 244

now see how a substantive justice system as Wagschal envisions it (reconstructed by me) could be administered within the tensions of a space of uncertainty. The dialogues within a *polis* could be characterized as rhetorical negotiations – drawing from the full range of “stories” contained in the canonical collection – but in the end letting go of the past making promises of a shared future together. .

With its epicenter in the *polis* the ambition of handling plurality is a challenge for canon law. We shall now turn to the political theorist Chantal Mouffe to characterize these challenges. This, I believe, will highlight a space of uncertainty instrumental for establishing real relations.

7.3 Collective Identities and Real Relations

The Belgian scholar Chantal Mouffe has criticized both Arendt and Habermas for not acknowledging the influence of power, conflict and antagonism in their recollection of politics.¹³² Instead of aiming at consensus (Habermas) and accentuate a “freedom to appear” (Arendt), she puts forward a Theory of Agonistic Pluralism were she instead starts from the particular life-forms, a concept she borrows from Wittgenstein. Mouffe therefore distinguishes between *politics* and *the political*.

By “political” she addresses a type of antagonism which she believes is constitutive of human societies. Politics on the other hand is a set of practices in which an order is established by organizing the conflictuality provided by the political. The Theory of Agonistic Pluralism is built on Carl Schmitt’s concept of the political as a friend/enemy relation. Always about a *we* opposed to a *they* – grounded on the reality of a co-existence of very different collective identities. The risk with consensus, is that it is based on acts of exclusion which reduce politics to individualism and generate a rational discourse aim at overcoming antagonism.¹³³ This is why she criticizes Neo Liberal democracy for moving towards absolving collective identities by proclaiming a globalized “peace community” established through dialogues and consensus. This is the danger we already observed in Hjälm’s critique of Habermas, and also what we could see at work in the Ecclesiology school. This rationale has the tendency to project an ideal world without being able to relate it to “the grounds”.

¹³² Mouffe, *The Political*, 3, 9

¹³³ Mouffe, *The Political*, 11

According to Mouffe, in order to avoid the meta-word of Neo Liberals, democracy is instead based on tensions and conflicts. Real alternative parties, have an “identity profiling” against a *they* and a sense of belonging that is holistic and hegemonic, that is, based on more than on the rationality of an argument. Building on Freud and Lacan she calls this “passion” and includes all type of things that can motivate someone to belong to a certain group beyond simply sharing a set of opinions to sharing a form of life.¹³⁴ The very milieu of the political then is these strong antagonistic communities with their own concept of hegemonic practices. The challenge for democracy is to transform *antagonistic* pluralism to *agonistic* pluralism. She explains that “the political” has to start by acknowledging that the other groups have legitimacy. Even if they don’t understand each other or agree on a single point, the quest for democracy is to see this conflict within the political arena, sharing a common symbolic space within which the conflict takes place.¹³⁵ This type of plurality of collective identities taking part in the political is what Mouffe calls “the adversary” or “adversary model” and is a crucial category for democratic politics.

Mouffe’s adversary model of agonistic pluralism is aimed at society at large. In one sense we could easily argue for *one* collective identity represented by the whole Eastern Orthodox Church, grounding collective identity only on the story of the church. What I will argue is that even within the Eastern Orthodox Church there is antagonism. Ethnicity, culture, ideologies and different theological positions are present as collective identities within orthodoxy today. The political then constitutes the reality of ecclesial practice making it a plurality of collective identities with their own hegemonic practices. Following Mouffe, conflictuality and antagonism should be acknowledged and transformed into agonistic pluralism – if not a meta-ideology will be elevated as a consensus one is required to affirm, or else be considered “a heretic”. This is basically the same rationale we have already seen as consequence of the Ecclesiology school being unable to establish real relations.

In a *polis* conditioned by a space of uncertainty these meta-ideals have to capitulate to real relations. The transformation of antagonism to an agonistic pluralism – acknowledging the

¹³⁴ Chantal Mouffe, “Wittgenstein and the ethos of democracy.” In *The Legacy of Wittgenstein: Pragmatism or Deconstruction*, ed. Ludwig Nagl and Chantal Mouffe, Frankfurt am Main; Berlin; Bern; Brussels; New York; Oxford; Wien: Lang, 2001), 131-138.

¹³⁵ Mouffe, *The Political*, 20

legitimacy of the Other – could then be seen as a condition for this type of *polis*. The space of uncertainty is then necessary in order to achieve consensus in the midst of “the political”.

Without the *polis* and a space of uncertainty – collective identities will remain antagonistic communities, unable to reach the point of legitimizing the Other. This can be glimpsed in what Schmemmann observes above, when ethnicity and jurisdiction is merged with each other, leading to “canonical subordination” and “canonical fights”. This manifests that collective identities drift apart when real relations are substituted with a meta-ideology.

We have now identified a *polis* conditioned by this space of uncertainty in which a substantive justice system could be administered related to contemporary ecclesial practice. We have also been able to observe how a space of uncertainty could be instrumental in establishing real relations where collective identities is expected to be a major factor in the procedures of “rhetorical negotiations” Byzantine legal culture is characterized by. But the concept of *polis* in Arendt’s thinking is too weak for the quest of turning antagonistic pluralism to agonistic pluralism. When it comes to canon law, I believe we need a more solid solution – a bulwark which breaks the waves and upholds a space of uncertainty.

In short, I believe we need an institution – for this we now return to Michael Hjälms and canon law as an interface between Ecclesia and System.

7.2 Canon Law as an Interface Between Ecclesia and System

In this section the institution comes into focus and the possibility of canon law to be the voice of the people.

In a passage in *Liberation of the Ecclesia*, Michael Hjälms directs attention to how canon law could work. He envisions canon law as having a function similar to civil law in Habermas thinking or more precisely, as being an interface between Lifeworld and System, and thereby by safeguarding emancipation. We will first look at these two terms and then return to canon law.

As Habermas envisions in TCA, a society is constituted by a Lifeworld and a System. A lifeworld should be understood as “the world” beyond the possible definition to be defined but at the same time there is a horizon where “my world” is contrasted to “another

world”.¹³⁶ Grounded in language and inter-subjective communication this world becomes a reality based on the possibilities of a “symbolic reproduction” of my, or our world. The “symbolic reproduction” as we have previously seen, is necessary in order to establish meaning in the lifeworld. Simply put, a healthy lifeworld could be characterized as culturally shared values internalized in personality and institutionalized in the System of the society.¹³⁷

The TCA also states that communicative action is not sufficient in order for a society to function properly. Modern societies have therefore, transformed certain domains of communicative action into “instrumental action” to be handled by the system (then also facilitating the burden of communicative action).¹³⁸ The system is connected to “steering media”, money and power, called *mediatisation*. At lower levels *mediatisation* is not a problem, but steering-media have a tendency to expand and take over, leading to reifying everyday practice which then colonizes the lifeworld and generates pathologies.¹³⁹

Hjälms writes: “When essential areas of social interaction, necessary for the reproduction of the lifeworld, are switched over to steering-media, thereby becoming instrumentalized, lifeworld *pathologies* occur.”¹⁴⁰

Pathologies are then an outcome of colonization and emerge when the system is not anchored in the lifeworld. According to this way of reasoning, the institutional segment of society is necessary in order for safeguard emancipation but under the condition that it is anchored in the lifeworld.

It is when Hjälms discusses “canonical subordination” that he mentions his concept of canon law. Viewing ecclesial hierarchy as a subsystem (part of System), we could interpret the situation Schmemmann identifies as a case of a colonization of the Ecclesia where the hierarchy has taken over important domains of the “symbolic reproduction” by instrumental action. This inflicts pathological marks on to the Ecclesia, such as the alienation identified by Schmemmann in his article. Instead of solving the situation by integrating canon law with orthodox ecclesiology, Hjälms suggests a different approach. For the hierarchy to function properly, this subsystem has to be constrained “by proper institutions like the sobor of the Russian Orthodox Church 1917-1918,

¹³⁶ For the concept of Lifeworld in Habermas and how Hjälms argues for its application to the Eastern Orthodox Church. See Hjälms, *Liberation of the Ecclesia*, 179-195

¹³⁷ Hjälms, *Liberation of the Ecclesia*, 183

¹³⁸ Hjälms, *Liberation of the Ecclesia*, 184, 189

¹³⁹ Ibid.

¹⁴⁰ Ibid.

in order to be anchored in the Ecclesia”.¹⁴¹ Hjälms continues, arguing that canonical regulations could function as an interface – anchoring the System (in this case the ecclesial hierarchy) in the lifeworld of the church. Without this interface, he writes, “the institutionalized Church is not anchored in the Ecclesia and the effect is the colonization of the Ecclesia, which results in certain pathological disturbances.”¹⁴² By this he identifies canon law and canonical regulation as an interface, a breakwater that could balance institution and lifeworld by this safeguard emancipation.

Hjälms solution diverges radically from Schmemmann’s by making canon law a discursive practice – connected to “a proper institution” where canonical regulations are the very vehicle to both restrain power and to anchor the institutional level of the church in the Ecclesia. In Hjälms reasoning the institutionalized church is needed in order to facilitate communicative action, but canon law is the interface to keep *mediatisation* balanced.

We can now see that the conflictuality of “the political” could be handled by a (proper) institution – conditioned by a space of uncertainty – with canon law as interface. The institution could give a solid form to the *polis* Arendt envisioned and the rhetorical character of Byzantine legal culture it implies. With Hjälms concept we can now better understand how agonistic pluralism could be achieved by canon law. In the end we could answer the question of how canon law could be relevant in the aftermath of the Scholastic school by turning the question on its head – the question is maybe not how canon law should be relevant, rather how the institutional church could be relevant to contemporary society. The answer to this question could be, to simply acknowledge the possibilities inherent in canon law.

To answer the question for this thesis, how canon law could be relevant to contemporary ecclesial practice in the aftermath of the Scholastic school: The canons is made relevant by approaching them as a space of uncertainty.

¹⁴¹ Hjälms, *Liberation of the Ecclesia*, 212

¹⁴² Ibid.

8. Conclusion: Canon law as a Space of Uncertainty

To finalize this thesis, a summary will be made ending with a concluding discussion where Wagschal's reconstructed theory will be discussed in relation to the conclusions in the previous chapter.

The question this study aims to answer is how canon law could be relevant to contemporary ecclesial life after the Scholastic School. Three answers have been investigated, John H. Erickson and his theory of the "Canon Within the Canons", Andrey Shishkov and his answer of a "A Limit to Canon Law", and finally David Wagschal and his suggestion of a "A Unique Legal Culture".

In Erickson and Shishkov we saw the same pattern – both identified an important problem in the solutions suggested by the Scholastic school. By approaching canon law as formalist law a separation between the life of the church and its dogmatic reality has occurred. The consequence according to Erickson is a reified and alienated ecclesial practice, the solution for him is to re-connect ecclesiality to eschatology – integrating canon law with orthodox ecclesiology. Shishkov challenges the field by advocating a limit for canon law, but this still follows the same pattern as Erickson.

Wagschal criticizes the use of ecclesiology as a framework to solve the question of relevance. According to him, using ecclesiology pushes us to look for a "real" meaning of the canons behind or beyond the actual texts – distorting the canonical material by not recognizing them as legal texts. For this reason, they fail in developing workable models or contributing to solving canonical disputes.

Wagschal's own suggestion to the question is instead to listen to the canonical material's own voice. In so doing he identifies a unique legal culture – affirming the instinct of the Scholastic school acknowledging a *legal* domain in the church but then not according to the model of formalist law. He could also affirm the Ecclesiology school's emphasizes on the unique – but then as a unique *legal* culture.

By using the scholars from the Stockholm School of Theology, Cyril Hovorun and Michael Hjälms, I developed a theoretical model of social identity and discursive practice. This theoretical model builds on a discussion of how theory and practice are related. By this we could go beyond Wagschal and criticize the Ecclesiology school for promoting a total mediation between theory and practice – which leads to oppression of the realm of ecclesial practice and

supports totalitarian structures. In an enlarged discussion including also Nicholas Afanasiev, Alexander Schmemmann, Lewis J Patsavos and Christos Yannaras, a paradigm is established as *normal science* constituting the Ecclesiology school as working with total mediation of theory and practice.

As a next step Wagschal's theory has been criticized for not adequately emphasizing the distinction between social identity and discursive practice, which also endangers his theory. He actually identifies both realms but doesn't recognize the important implications this has. Wagschal's contribution in answering the question of how canon law could be relevant, was identified as an *anomaly* breaking the pattern of *normal science*. But in relation to the new paradigm set out by the theoretical model his theory is lacking.

The reconstruction of Wagschal's theory shows a discursive practice at the heart of Eastern Orthodox legal culture, generating canons and confirming additions. Considering the rhetorical character of the Byzantine legal culture Wagschal identifies, the canons could be perceived as an outcome of a dialectical process between the realm of social identity and discursive practice, constituting canon law as a dialectic legal culture. I believe that "responsibility" is inherent in this rhetorical character and what Wagschal calls a substantive justice system. A distinction between the realms could therefore be instrumental characterizing the unique legal culture of the Eastern Orthodox Churches.

Building on the dialectical legal culture reconstructed in Wagschal's theory, the final part of this thesis characterized how such a dialectical legal culture could safeguard emancipation in the realm of contemporary ecclesial practice. For this we returned to Hanna Arendt and her concept of action in which we can see the dialectics involved as "a space of uncertainty" based on a *polis* of human inter-action, where the capacity to forgive, of letting go of the past and the capacity to make promises establishes two poles constituting uncertainty as a price for freedom, plurality and reality. In the *polis* we let go of the ancient canons and let present life-situations be informed by them, but resolved in a deliberative mode by "discussing the issue at length", and establishing mutual agreements. This is not separation, nor is it integration; it is a distinction, where canon law operates as dialectical legal practice between forgiveness and hope.

Finally, this thesis argues that institution, conditioned by a space of uncertainty will safeguard emancipation and answer the question of relevance. Such an institution could handle a plurality of collective identities and relate contemporary real-life situations to the fore of

canonical regulations, informed by the ancient canons, but with an outcome conditioned by an uncertainty as the price for freedom, plurality and reality. In the end we can return to Hodgson: “The institution thus offers a link between the ideal and the real.”¹⁴³

The lack of knowledge concerning how the canons are administered in relation to bishops and the chancelleries, as Wagschal mentions may put my suggestion in the same dilemma as he criticizes the Scholastic and the Ecclesiology schools for – to not start my theory by investigating the canonical texts themselves. It would therefore be interesting with a future and a historical study of Byzantine legal system, that could shed some light to how administration of canonical issues has been perceived, and especially if a distinction in line with what this thesis has argued for could be found.

¹⁴³ Hodgson, *What are institutions?* 8

Bibliography

- Afanasiev, Nicholas. "The Canons of the Church Changeable or Unchangeable?" *St. Vladimir's Theological Quarterly* 11, no. 2 (1967): 54-68.
- Afanasiev, Nicholas. "Canons and Canonical Consciousness." Holy Trinity, May 5, 2021. <https://www.holy-trinity.org/ecclesiology/afanasiev-canons.html>
- Arendt, Hannah. *The Human Condition*. Chicago & London: University of Chicago Press, 1998.
- Arendt, Hannah, "On the Nature of Totalitarianism: An Essay in Understanding." In *Hanna Arendt, Essays in Understanding, 1930-1954: Formation, Exile, and Totalitarianism*, edited by Jerome Kohn, 328-360. New York: Schocken Books, 1998.
- Badersten, Björn, "Att studera det önskvärda – om värdeanalys och normativ metod," in *Stadsvetenskaplig tidskrift*, Vol 106 nr 3 (2003): 207-220.
- Bartonek, Anders, "Karl Korsch: To Make the Right Marx Visible." In *Hegelian Marxism: The Uses of Hegel's Philosophy in Marxist Theory from Georg Lukács to Slavoj Žižek*, edited by Anders Bartonek and Anders Burman, 35-60. Stockholm: Södertörn Philosophical Studies, 2018.
- Berdyaev, Nicholas. *The Destiny of Man*. New York: Harper and Brothers, 1960.
- Coing, Helmut, "The Sources and Characteristics of the *ius commune*." *The Comparative and International Law Journal of Southern Africa*, Vol. 19, No. 3 (1986): 483-489.
- Erickson, John. *The Challenge of Our Past*. Crestwood, New York: St. Vladimir's Seminary Press, 1991.
- Habermas, Jürgen. *The Theory of Communicative Action*. Vol. 1: Reason and the Rationalization of Society. Boston, MA: Beacon Press, 1981.
- Habermas, Jürgen, "Modernity: An Unfinished Project." In *Habermas and the Unfinished Project of Modernity: Critical Essays on the Philosophical Discourse of Modernity*, edited by Maurizio Passarín d'Entrèves and Seyla Benhabib, 38-58. Cambridge, Massachusetts: The MIT Press, 1997.
- Hankey, Wayne J, "Theoria versus Poesis: Neoplatonism and Trinitarian Difference in Aquinas, John Milbank, Jean-Luc Marion and John Zizioulas." In *Modern Theology* 15:4, October (1999): 387-415.
- Hodgson, Geoffrey M, "What are institutions?" *Journal of Economics*, Vol XL, No 1, March (2006): 1-25.

- Hovorun, Cyril. *Scaffolds of the Church: Towards Poststructural Ecclesiology*. Eugene, Orlando: Cascade, 2017.
- Hovorun, Cyril. *Meta-Ecclesiology: Chronicles on Church Awareness*. New York: Palgrave Macmillan, 2015.
- How, Alan. *Critical Theory*. New York: Palgrave Macmillan, 2003.
- Hjälmsjö, Michael. *Liberation of the Ecclesia: The Unfinished Project of Liturgical Theology*. Södertälje: Anastasis Media, 2011.
- Juma, Florence and Vorster, J. M., "Kung's Theory of Paradigm Shifts in Church History: An Evaluation." *Studia Historiae Ecclesiasticae* 24, (2) December (1998): 116-130.
- Kaufman, Gordon D. *In Face of Mystery: A Constructive Theology*. Cambridge, MA: Harvard Univ. Press, 1993.
- Kärkkäinen, Veli-Matti. *A Constructive Christian Theology for the Pluralistic World: Hope and Community*. Grand Rapids, Michigan: Eerdmans Publishing Company, 2017.
- Keralis, Vrasidas. "Greek Christianity After 1453." In *The Blackwell Companion to Eastern Christianity*, edited by Ken Parry, 156-185. Chichester, West Sussex: Wiley-Blackwell, 2010.
- Kuhn, Thomas S. *The Structures of Scientific Revolution*. Chicago and London: The University of Chicago Press, 1996.
- L'Huilier Peter. *The Church of Ancient Councils: The Disciplinary Work of the First Four Ecumenical Councils*. Crestwood, New York: St. Vladimir's Seminary Press, 2000.
- Mouffe, Chantal, "Wittgenstein and the ethos of democracy." In *The Legacy of Wittgenstein: Pragmatism or Deconstruction*, edited by Ludwig Nagl and Chantal Mouffe, 131-138. Frankfurt am Main; Berlin; Bern; Brussels; New York; Oxford; Wien: Lang, 2001.
- Mouffe, Chantal. *On The Political*. London and New York: Routledge, 2005.
- Ohme, Heintz, "Sources of the Greek Canon Law to the Quinisext Council (691/2)." In *The History of Byzantine and Eastern Canon Law to 1500*, edited by Wilfried Hartmann and Kenneth Pennington, 24-114. Washington, D.C: The Catholic University of America Press, 2012.
- Patsavos, Lewis J. *Spiritual Dimensions of the Holy Canons*. Brookline, Massachusetts: Holy Cross Orthodox Press, 2003.

- Schmemmann, Alexander, "Problems of Orthodoxy in America: The Canonical Problem," *St. Vladimir's Seminary Quarterly* 8, no. 2 (1964): 67-85.
- Shishkov, Andrey, "Complexity as an Approach in the Issue of Primacy in the Church." *International Journal of Orthodox Theology* 3:3 (2012): 87-103.
- Shishkov, Andrey, "Church Autocephaly as Sovereignty: A Schmittian Approach." *St. Vladimir's Theological Quarterly* 60, no. 3 (2016): 369–395.
- Shishkov, Andrey, "The Problematic Issues of Eucharistic Ecclesiology in the Context of Contemporary Political Theology." In *Political Orthodoxies in Christianity: Common Challenges -Divergent Positions*, edited by Kristina Stoekl, Ingeborg Gabriel and Aristotle Papanikolaou, 189-206. London, New York: Bloomsbury T & T Clark, 2017.
- Speake, Graham. *A History of the Athonite Commonwealth: The Spiritual and Cultural Diaspora of Mount Athos*. New York: Cambridge University Press, 2018.
- Troianos, Spyros, "Byzantine Canon Law to 1100." In *The History of Byzantine and Eastern Canon Law to 1500*, edited by Wilfried Hartmann and Kenneth Pennington, 115-169. Washington, D. C: The Catholic University of America Press, 2012.
- Wagschal, David. *Law and Legality in the Greek East: The Byzantine Canonical Tradition, 381-883*. Oxford: Oxford University Press, 2015.
- Wagschal, David, Furguson. "The Nature of Law and Legality in the Byzantine Canonical Collections 381-883." Durham theses, Durham University, 2010.
<http://etheses.dur.ac.uk/468/>
- Wagschal, David, "Orthodox Canon Law: The Byzantine Experience." In *The Orthodox Christian World*, edited by Augustine Casiday, 283-397. New York: Routledge, 2012.
- Wessel, Susan, "The Formation of Ecclesiastical Law in the Early Church." In *The History of Byzantine and Eastern Canon Law to 1500*, edited by Wilfried Hartmann and Kenneth Pennington, 1-23. Washington, D. C: The Catholic University of America Press, 2012.
- Xenophontos, Sophia A, "Reading Plutarch in nineteenth-century Greece-classical paideia, political emancipation, and national awareness — the case of Adamantios Koraes." *Classical Receptions Journal* Vol 6, Iss. 1 (2014): 131–157.
- Yannaras, Christos. *The Freedom of Morality*. Crestwood, New York: St. Vladimir's Seminary Press, 1984.

Other

- "Faculty Lectures, - Spring 2021, Scaffolds of the Church." Published on May 7, 2021. YouTube video. https://www.youtube.com/watch?v=8AtMKEE_xSA,

“Orthodoxy in America is Very Diverse.” Published on November 5, 2013. YouTube video.
<https://www.youtube.com/watch?v=E2h70ulkxts>

“Saint Vladimir’s Orthodox Theological Seminary.” Published November 25, 2013. YouTube video. <https://www.youtube.com/watch?v=xSZ8kfwsucU>