

Law and the Church Fathers

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Abstract

The present chapter covers aspects related to law and the Church Fathers. It begins with an overview over who the Church Fathers were and how they thought about and dealt with law. It understands ‘Church Fathers’ not merely as a group of people in history (a specific group of early Christians, leading intellectuals and bishops) but also as a quasi-normative entity, a body of teaching, which has shaped legal thinking in the Christian tradition until today. Vice versa, it takes into consideration that law was something early Christians encountered in their secular environment but also something they themselves developed and cultivated, as a form of Christian law, and how these two are connected, and how they differ. The chapter goes on to discuss some relevant concepts developed by Church Fathers, ‘divine law’, ‘natural law’, ‘freedom of religion’, ‘citizenship’, ‘the common good’ and ‘the moral conscience’. It does so considering classical and biblical sources and the late-ancient contexts of these concepts as well as their reception in later periods. It engages in particular with Origen’s concept of a ‘freedom of conscience’ and Augustine’s ideas on citizenship, law and the common good. The chapter finishes by briefly touching upon the relevance of these ideas until today.

Keywords

Church Fathers; Patristics; law; freedom of religion; moral conscience; divine law; natural law; law of the nations; citizenship; common good

Introduction

In the context of the present chapter ‘Church Fathers’ can be understood as a group of people, early Christian authors, but also as a normative concept. From the beginning, Christian teaching was handed down with reference to authoritative teacher-authors. The latter’s personal witness vouched for the trustworthiness of the former and lent it authority. Already the Apostles were referred to as ‘Fathers’ (1Co 4:15; Matt 23:8-9).

Later generations distinguished between Apostles and Fathers. The latter were seen as the legitimate successors of the former.¹ Until today, senior Church leaders (bishops), especially in the Orthodox but also in the Roman Catholic tradition, follow in this vein. Since the early modern era the expression ‘Church Fathers’ is used preeminently for orthodox writers of the formative period of the Church in Late Antiquity. During the time of the Reformation the early Church – as ‘Church of the Fathers’ – was seen by all sides of the debate as a normative phenomenon, a period in which teachings and practices were first introduced and confirmed as orthodox which ought to be continued or appropriately restored in the present time. The stipulation was that ‘the Church Fathers’ collectively represented a normative body of teachings and laws that ought to shape the life and teaching of present-day Christian communities as well.² This view has persisted and even today questions relating to ecclesiastical teachings and practices, or problems of Christian ethics, are approached at least in part with reference to Patristic teachings, teachings of the ‘Church Fathers’.

Present-day study of Patristics as part of early Christian literature is also cognizant of the fact that early Christian teaching cannot be condensed to a homogenous doctrine but extant sources present a plurality and variety of perspectives. To develop a substantive and comprehensive understanding of ‘Patristic thought’ (for example in relation to law) it is necessary to include not only some select, ‘established’, ‘Church Fathers’, but also less central or less prominent voices and even heterodox or ‘heretical’ thinkers.

Concerning law, the second component of the topic of this chapter, it should already have become clear that the Church Fathers, understood as outlined above, are playing a constitutive role in the formation of Church law, be it as authors of early (‘proto-legal’) works such as the *Didache* or the *Didascalia Apostolorum*,³ as constitutive members of Church Councils, in which laws were created, as bishops, who were implementing law in a variety of ways, or as authors of a wide variety of writings that deal with aspects of the law, theoretically and practically. Many of these aspects are dealt with in other chapters of this volume, e. g. the development of ecclesiastical law, Christian dealings with Roman and Byzantine law, or the role of Church Councils. The present chapter will therefore focus more on examples of ‘law-related’ thinking among Church Fathers. Thus, we will look at concepts such as divine, human, and natural law, good and bad

conscience, human freedom, including religious freedom, citizenship and the common good.

Early Christian attitudes to law

When dealing with non-Christian institutions early Christians readily invoked existing law to claim their rights. Famously, the apostle Paul is said in Acts 22:25 to have cited his Roman citizenship to claim fair legal treatment. Apologists protested against unjust and in their view illegal treatment of Christians by Roman authorities.⁴ Tertullian even lectured Romans on how bad some of their legislation was in this regard.⁵

Among themselves, however, Christians avoided the use of legal disputes and sought arbitration instead (cf. 1Co 6:1-8; Matt 18:15-17).⁶ They did so also because they expected a final divine judgement, which they hoped to face with a clear conscience, all earthly affairs settled. This belief fed into their attitude to non-Christian law. Thus, Justin Martyr reminds his intended Roman addressees that they will face divine punishment if they persist in their injustice against Christians.⁷

The second and third centuries saw the emergence of Christian 'law' or 'rule books' such as the *Teaching of the Twelve Apostles* (= *Didache*), the *Didascalia Apostolorum* and others.⁸ But these too were not intended to provide a Christian alternative to secular legislation and secular courts. They were not compilations of laws or legal enactments but may have served communities as associational statutes or church leaders (bishops) as manuals. They focused on Christian discipline, worship and doctrine and drew their authority from Scripture and apostolic tradition, not from an institutional Church. In that regard they differ from later Church law. They were not aimed at producing legal rulings or to feed into a comprehensive legal process but at mediation and (in the case of disputes) healing, reconciliation, with the bishop as chief mediator or 'healer'.⁹

The role of the bishop became more central in the third century and detached from a collective arbitration process. As the aim of mediation was reconciliation, there were no enforced punishments. If mediation failed, expulsion (excommunication) remained the last viable solution. But as the letters of Cyprian of Carthage show, a bishop could also individually assert his right to control the members of his congregation and discipline those who challenged his authority.¹⁰ During the Decian persecution in the middle of

the third century the disciplinary regime of the Christian Church of Carthage proved in fact more effective than the legal setup of the Roman state.¹¹

Still, for the time being the Church's interests remained restricted to Church matters. They did not encroach on areas that were already covered by civil or criminal law. The advice given to bishops by *Didascalia Apostolorum* 2.45.1 to avoid civil law courts, if possible, still made sense during much of the fourth century. When, during that period, Church Councils issued decrees ('canons') that would later become part of Church law, they tended to be restricted to matters regarding church property, consecrated celibates and clergy. Lay people were only referred to in connection with church-related activities (e. g. they were not allowed to employ clergy, or there were restrictions on where they were allowed to take communion).¹²

The relationship between Christian 'self-legislation' and the secular law changed as Christianity became legalised in the fourth century. Its system of arbitration now fell in line with similar systems, for example that which existed for Judaism. A law preserved in the *Theodosian Code* offers Jewish litigants the possibility to solve cases in a Jewish court 'in the manner of an arbitration.'¹³ Another law instructs provincial judges to allow those who wish to refer their case to a Christian episcopal court to do so.¹⁴ Presumably, the case would then be adjudicated according to the 'Christian law'. A law extant in the *Justinian Code* and dated to 398 suggests that a ruling by a bishop was more like an arbitration or mediation (*arbitri more*) than a ruling by a secular judge (*iudicium*).¹⁵ According to Jill Harries¹⁶ the exceptional nature of the role of bishop also plays a role here. While secular judges were appointed for a fixed term and arbiters only for one single case, bishops were in office for longer periods and tended to consider the cases before them more broadly (taking into account particularly pastoral concerns). Theirs was not just a legal perspective.

Nevertheless, in the course of the fourth and fifth centuries a tendency developed to intertwine (or entangle) secular law and Christian law. For example, in 407 a Council at Carthage ruled that husbands and wives who had separated should either be reconciled or remain as they are. They ought not to marry anyone else. And were they found to be in contempt of this ruling, they ought to be brought to penitence. But as if this was not enough, the Council added that the promulgation of an Imperial law be sought on this matter too.¹⁷ Thus, the Council requested that a rule that was originally purely a matter

of inner-Christian discipline become a public law, sanctioned no longer by acts of penitence but by civil injunctions or even criminal convictions.

In a more general remark on this development Harries observes that in the fourth and fifth centuries an odd interaction took place between conservative Roman law-making that resisted innovation, and new, Christian (mainly ethical and religious), ideas being inserted in Roman legislation. One of the consequences of this was that the boundaries between criminality and immorality became blurred.¹⁸ New types of crime were ‘invented’, especially in the areas of religious observation and family life.

It was in this context that Church Fathers also formulated more principal, theoretical ideas on law. Their social situation reflects that outlined at the beginning of this section, of the early Christians who felt that they were accountable to a higher instance than the secular law but who at the same time felt they ought to hold the secular law and secular legal authorities to account as they too would on the day of judgement be judged by that higher, divine, authority. Their ideas on divine law, natural law, individual freedom and conscience can be better understood in this context. At the same time the transformative effect of their thinking was limited, for, as this section may also have indicated in brief, Christian law was more or less absorbed into Roman law. Thus, while Church Fathers formulated potentially revolutionary ideas based on their concept of divine law as laid down in the Gospel, be it on equality before the law (including the equality of men and women), the abolition of slavery, universal rights to social and economic participation, religious freedom and similar ideas, the fact that Church law became increasingly tied in with Roman law to jointly found a conservative and in many respects archaic social order (albeit mitigated to some degree by the ‘Christianisation’ of that order) meant that such ideas could not have the same social or political impact in late Antiquity that they were to have in the modern (Enlightenment) era.

Divine law, natural law, and the moral conscience

The one modern concept that all Church Fathers would have rejected is that of the autonomy of the individual.¹⁹ Like most ancient philosophers they would not have been able to conceive the human being as constituting and determining itself independent of any metaphysical framework. For them, the human being received itself from society, from nature, and, ultimately, from ‘the gods’, or, in the case of Jews, Christians, and

other monotheists, from God. It was only within such a framework that the individual could determine itself, exercise its moral conscience and legislate by and for itself. Ancient philosophy had a variety of ways of explaining this phenomenon.²⁰ Among those who directly or indirectly exerted most influence on the teaching of the Church Fathers were two first-century Jewish-Greek thinkers, Philo of Alexandria and his contemporary Paul of Tarsus. Both are counted by later Church Fathers as belonging to the Christian tradition and their acknowledged achievement lay in combining ancient thought with biblical motifs. Thus, for Philo the foundations of all human law lay in the divine issuing of the Ten Commandments (Ex 20:1-21). Philo interpreted the latter allegorically as ‘universal law’, applying to all humanity. Since its jurisdiction extended to the whole world, each human being, thus Philo, was therefore a ‘citizen of the world’ (*cosmopolítēs*).²¹ And he adds that this law precedes any specific legal tradition. Before it, all humans are equal.

Philo here understands the Ten Commandments allegorically, not as a law issued to a particular people, although he accepts, of course, that they were part of the Jewish law, the Torah, too. But he also interprets them as a universal law underlying all specific laws. In his letter to the Romans 2:14 Paul offers a slightly different take on a very similar idea and adds some specific remarks regarding the Jews and the individual human being: ‘The Gentiles,’ he writes, ‘who do not have “the law” [meaning the Torah, the Jewish law], act by nature according to the law. Since they do not have the law, they are to themselves law.’ – And to explain this last clause he adds in 2:15: ‘They thus demonstrate that what the law demands is inscribed in their hearts. Their conscience (*suneídēsis*) co-testifies to that. Their thoughts accuse each other and defend themselves [as in an inner court of law].’²²

In a similar way as Philo, Paul refers to the Torah as a manifestation of a universal moral law. He finds that the existence of such a law is evidenced by the behaviour of the Gentiles: They act morally, seemingly responding in their conscience to demands that (unlike the Torah) are not written down anywhere. They must therefore be written (metaphorically speaking) in their hearts (meaning their minds), since in their thoughts they argue out (as in an inner court of law) the pros and cons of their actions.

An early Church Father who picks up this passage and develops it further is Clement of Alexandria at the end of the second century. In *Stromata* I 91-96 Clement surmises

that if the universal law allows human beings to distinguish good from evil, it should also enable them to have true insights about religious doctrine.²³ For example, it should enable them to ‘know naturally’, by way of a ‘common mind’, a mind common to all human beings, that there is only one God, who is creator of all. And not only that. For Clement, that ‘inner law’ also enables all human beings to keep those divine (biblical) commandments that are needed for salvation. He believes that he can corroborate this view from Romans 2:26a, where Paul writes that the non-circumcised keep those parts of the Torah that are justifying them (*dikaiōmata*).²⁴

Leaving aside whether Clement’s exegesis of Paul is sound here, he has formulated the concept of a natural moral conscience. The justifying parts of the Torah are those parts that relate to moral behaviour. These parts can be identified by all human beings by natural reasoning, and all human beings have the ability to act according to these prescriptions issued by the natural law, if they follow their conscience.

In Clement’s contemporary Tertullian we find similar thoughts regarding the natural law. Tertullian is not surprised that pagan philosophers have access to true knowledge.²⁵ After all, God’s providence orders nature in accordance with reason,²⁶ and God has bestowed reason on humans to explore nature.²⁷ This includes the moral conscience. It is a ‘gift from God to the soul from the beginning of creation.’²⁸ It may not be in itself sufficient for salvation according to Tertullian. For this, good will and just action first need to be elevated by a Christian way of life.²⁹ Nevertheless, even for Tertullian non-Christian law is founded on a primordial natural order founded by God and therefore intrinsically good.³⁰

Perhaps the most sophisticated and philosophically informed concept of this kind can be found in the work of Origen of Alexandria. Origen argues that divine punishment of sinners could not be deemed just unless all of humanity had access at least to a ‘healthy pre-conception’ of what is good based on ‘common ideas’.³¹ Origen draws on late Stoic thought when he understands these ideas to be ‘implanted’ or ‘in-grown’ (*emphytos*) in the human soul, by nature. In *Commentary on Romans II* 7.9-10³² he relates this to Romans 2:15 (a law inscribed in the human heart) and argues that if we think of this rationally, it may not be an applied rule such as ‘do not murder’ or ‘do not steal’, but a general principle such as the so-called *Golden Rule* (‘do not do to others what you do not want others do to you’).

For Origen, natural law and divine law coincide here. All humans have the ability to perceive this law and act accordingly, not only those who are in possession of its letter (i. e. Gospel and Torah), but (according to Romans 2:13) only those who act according to the law are justified. It is those who follow their conscience who do so. For Origen, the conscience is identical with the divine spirit (Pneuma), who at the point of Creation wrote the law into humans' hearts, who inspired Scripture (i. e. the written law) and who guides those who correctly interpret Scripture. Those who act 'autonomously', following reason, i. e. the law of nature, guided by their conscience, do the same as those who follow the divine law, guided by the divine spirit. At this level there is no difference between theonomy and autonomy. It is the conscience that is in charge. It confirms good deeds as good and repudiates bad deeds. Freedom at this level means freedom of the conscience. Those human beings are free who follow their conscience.

With Origen, Patristic thinking on divine law, natural law and the conscience had reached a climax, although there were further developments in Late Antiquity,³³ particularly in Latin Patristics. One aspect not considered by Origen is the possibility of an 'erring' or 'bad conscience'. In fact, with conscience and reason being fundamentally in agreement, as just outlined in the previous paragraph, such a construct would for him be a contradiction in terms. Not so for Augustine of Hippo. Based on his teaching on Original Sin Augustine can think of at least two ways in which a conscience can be 'bad'. In *On the Sermon on the Mount* 2.32³⁴ he argues that the conscience can be invoked by an evil mind such as the Devil, who denies God and the divine law and thus acts against the natural law asserting that he is doing the right thing. Human beings can spend their entire lives following such a false 'conscience' believing that they are doing good while deceiving themselves and others about the true nature of their intentions.³⁵ But – and this is Augustine's second understanding of a bad conscience – human beings (unlike the Devil) can also be troubled by this and feel guilty about their intransigence against nature and God, although without the help of God's grace they are not able to restore their good conscience and rectify their conduct.³⁶ As already outlined at the end of the last section, this kind of thinking had a profound influence on the development of law in the context of Christianity in Late Antiquity.

Freedom of religion

As indicated earlier, early Christians were quite vocal in claiming their right to freedom of worship and protection from persecution. For them, the foundations of that right were the same as those constituting freedom of conscience. Thus, in the early third century Tertullian writes that it is ‘human justice’ and ‘natural freedom’ that dictate that people ought to be free to worship as they pleased. It is not possible for one religion to coerce another, as worship could only be delivered by ‘free choice’ (Latin *sponte*). It was not possible to compel people ‘by force’ to abandon one religion and take up another, as even offering a sacrifice required a ‘willing mind’.³⁷ Drawing on Tertullian, Lactantius formulated a similar position: Religion cannot be imposed by coercion (*religio cogi non potest*); in fact, nothing is ‘more voluntary’ than religion.³⁸

However, already in Tertullian’s time (early third century) Christians also had to ask themselves how to deal with heterodox (‘heretical’) co-religionists. When Christianity was legalised in the fourth century and thus acquired a status in Roman law, this issue became yet more urgent. How could Tertullian’s stance (outlined above) be reconciled with the fact that Christians put pressure on heterodox fellow Christians to subscribe to official (orthodox) doctrines or be expelled from the Church, or otherwise punished?

The arguments produced were subtle. Already in the mid-third century Origen had pointed out that for Christians the issue was not a purely rational one.³⁹ They were not indifferent in the matter but emotionally invested, as their faith was for them a pathway to salvation. From their point of view it would be wrong for them not to take an interest if fellow believers ‘erred’ in their views. But rather than hostile confrontation or swift exclusion Origen recommended ‘admonition’ (Greek *paraitēin*),⁴⁰ which, he suggested, could transform the naïve credulity of erring dissidents into rationally grounded, true, faith. Origen seems to have been optimistic that empathetic rational discourse could achieve universal consensus regarding what he considered the true faith, but rational discourse was not really what he recommended. His empathy contained an element of emotional pressure (applied by fellow believers) and a social context (a hierarchically structured Christian community) where it had already been decided what true faith was and where leaders (bishops) ‘admonished’ those who disagreed and excluded them, if they were not persuaded.

This latter aspect (accentuating hierarchical authority) gained strength in the fourth and fifth centuries as the role of reason became more and more constrained. In a letter

dating from the early fifth century Augustine writes that he had himself once believed that true faith was best defended using reason and good arguments.⁴¹ However, he had observed that his own hometown was converted from the Donatist schism to Catholic Orthodoxy ‘by fear of imperial laws’. In his view the use of coercion was justified if it created a situation where the teaching and practice of the correct version of Christianity could be implemented.⁴²

Augustine’s statement here also suggests that he initially saw no difference between Pagans and Christian heretics or schismatics but used rational arguments against both groups. With regard to Pagans the intention was not, as Richard Sorabji writes,⁴³ ‘to entice converts (*inclinare*)’ but to ‘prove’ one’s beliefs and to challenge the opponents to do the same. But Pagans were more distant than fellow Christians, whose deviance posed a much more immediate threat to the Church. Initially, therefore, laws against heretics and schismatics (such as the law Augustine alludes to, which made his fellow citizens abandon Donatism) were harsher and more determinedly enforced than laws targeting Pagans (and incidentally also Jews) and their religious practices. In the case of Pagans and Jews it was asserted that they subscribed to erroneous beliefs and practices but no efforts were made to convert them to Christianity apart from rational arguments and prayer, while Christians convicted of heresy were frequently punished, for example with exile.⁴⁴ Late Antiquity did not yet know a death penalty for heretics.⁴⁵ The only Christian in Late Antiquity who was accused of heresy and executed, Priscillian (d. 385), was convicted of sorcery under a secular law unrelated to Christianity.⁴⁶ But even without the death penalty early Christian legal thinking on the limits of the freedom to worship affected many lives, not only through the condemnations of heretics but also through a general rhetoric that justified suppression of perceived false teaching and practice and the persecution of adherents of such teaching and practice as liberation from error and facilitation of promoting the truth, an attitude that affected not only Christians but also Jews and Pagans.⁴⁷

Citizenship and the common good

The question of religious freedom in communities with adherents of different religions also opens the view to wider legal concepts such as citizenship and the common good. Influenced by Classical education, Church Fathers did think in such terms. Augustine,

for example, entitled his main work of political theology ‘The City of God’. The Latin word *civitas* implies citizenship. It is influenced more by a classical Greek and Roman idea of the city than by the more ‘tribal’ Biblical concept of a ‘people of God’.⁴⁸ But as a Christian, Augustine found the classical idea of the city broken. If it had ever really served the ‘public interest’ (*res publica*), it had long ceased to do so.⁴⁹ The republic had been replaced by an empire of domination, which limited freedoms but also guaranteed peace and stability.

To be sure, Augustine did not think of the Roman Empire as a particularly good form of government, even under Christian emperors. He was a world away from the medieval concept of a ‘holy’ Roman empire. If he saw the earthly power wielded in the empire in analogy to divine power, then only in the sense that it was more unlike than like divine power. For him, no form of earthly government, not even one functioning on Christian principles, could deliver the kind of goods that the ‘heavenly city’ promised to deliver.⁵⁰ In this respect his vision was different from that of his contemporary Orosius, who in his *Seven books of history against the Pagans* tried to demonstrate that with the arrival of Christianity conditions palpably improved in the Roman empire and that a Christian empire offered social progress.⁵¹

Augustine would not have entirely disagreed with Orosius. After all, he himself saw the relatively peaceful and stable conditions which the empire had created and sustained over centuries as progress in comparison to what went before, but he would never have considered this to be a substantive change, let alone a conversion in the religious sense. A conversion of such a kind could only take place in the individual human heart, and it would produce an entirely new and different social-political order. Augustine outlined some thoughts in this regard, but his thinking did not set out from the existing political order but from a metaphysical reflection regarding God and the human soul.

Augustine’s starting point is the same as that of the natural-law thinkers introduced earlier: God is the creator of the universe and as such lays down the law of nature. The latter is the divine law as manifest in the universe. It is the law by which ‘God rules all creation.’⁵² This is the law which is also ‘inscribed’ in the human hearts (Romans 2:15) and therefore eternal and unchangeable, unlike positive, human-made, law.⁵³ It is in accordance with human reason, but human reason is not its source; God is. Thus, human beings, by virtue of their freedom of conscience, are responsible to God.⁵⁴ On this basis,

all humans are equal before the law. For Augustine, this is a far more authoritative and just principle than the traditional Roman ‘law by consent’ (*consensus iuris*).⁵⁵ It also extends to the realm of the ‘law of nations’ (*ius gentium*), as it applies to citizens of all nations, not just to Roman citizens. This had far-reaching implications, for example in regard to laws regulating slavery, which could now no longer be simply justified on grounds that foreigners could be treated differently from citizens.

It is sometimes suggested that the Church Fathers generally⁵⁶ or Augustine in particular, in contrast to other Church Fathers,⁵⁷ were resigned to or even supportive of the political and legal status quo and not supportive of causes such as the abolition of slavery, penal reform (e. g. regarding the death penalty), improvement of social care and the reversal of economic injustice. But such verdicts tend to overlook that Augustine in particular offered some very concrete and compelling ideas in his works for improvements in these areas.⁵⁸ At the same time, the influence Church Fathers had in shaping secular policies and law-making were limited. But crucially, as already indicated, the scope of Patristic teaching was different to that of modern social reformers. For Augustine, changes in legislation may improve conditions (e. g. of slaves) marginally (in the way Orosius imagined that a Christian empire would improve people’s lives) but they would not transform humanity at a deeper level, where it ultimately mattered, i. e. where it impacted on people’s belief in an eternal life.⁵⁹

For Augustine, the conflict between private interest and the common good, which lay at the heart of all injustice, could not be successfully tackled if it was only dealt with at the surface level, as a social-political issue involving material goods. ‘The common’, as opposed to ‘the private’ (Latin *proprium*), was for Augustine an entity pertaining in the first instance to the noetic realm.⁶⁰ It was at that, not at the material level, where it had to be tackled first. The problem with material goods is that they are finite. As they are used by some, others are deprived of them, and as some accumulate them, others lack them. This problem, according to Augustine, will never be understood, let alone tackled, if people do not learn to understand and embrace intellectual, spiritual, goods, such as truth or wisdom, which are freely accessible to all, available in abundance, and perceptible through the spiritual senses.⁶¹

No one, Augustine writes in *On Free Will* 2.37,⁶² can securely enjoy goods that can be lost or snatched away. But with a spiritual good, for example truth, this cannot

happen. No one can tear off a piece and have it solely for oneself. Whatever one gains from it, one cannot have it as one's private property. It is always wholly available to everyone.

Augustine's point is not to advocate that we should live off plain air and forget about the just distribution of earthly (material) resources. Only he cannot see how humans can share their resources given the state they are presently in. In his view they suffer from a perversion of their wills, an attachment to their own self-perceived pre-eminence (*amor excellentiae propriae*), which makes them relentlessly pursue their own private interest. They scramble for the finite material resources of the earth, preventing each other from accessing them freely, while spurning the infinite resource of the spiritual goods, which they are invited as God's creatures to share with God and with each other.⁶³ At the core of this aberrant human behaviour, thus Augustine, is not greed, as one might perhaps assume, but pride (*superbia*), a sense of entitlement over against God, creation, and fellow human beings.⁶⁴ This self-centred pride has no particular purpose but itself. It also has no other cause or compulsion but itself. 'No will wills unwillingly,' Augustine says in *On Free Will* 2.37. It is pure will, applied to itself in separation from any 'other', be it God or fellow human beings.

This pervasive pursuit of the private interest creates a false economy and ultimately leads to the erosion of the common good, Augustine observes. It also lies at the heart of the corruption of the law; for the main purpose of the law is no longer the protection of the weaker but of the stronger and wealthier.⁶⁵ It is also based on a false logic; for at the point of creation private property did not exist. All was jointly owned. The ultimate purpose was a shared spiritual good while material goods were only used to support the pursuit of that common (spiritual) good. That order was perfect. It could not be improved, only spoiled. The idea therefore that the common good could be put to a better use by privatizing it was at its very core perverse. It led to the corruption of a perfect order, not to an improvement; for it is contradictory to claim that a perfect order can be improved.⁶⁶ Augustine here takes up a thought formulated by the Neoplatonist philosopher Plotinus, who in *Ennead* 6.5.12 explains that attempts to add to the whole by adding a particular result in a diminution of the whole.⁶⁷ Thus, human avarice caused by a primordial pride does not lead to an increase of overall wealth but to an increase of

inequality and widespread poverty. What is desired is becoming increasingly less accessible for most, as it is owned by increasingly fewer people.

This is how Augustine contrasts the order of the earthly city with that of the heavenly city in his *City of God*.⁶⁸ His vision for a restored social order sets out a situation where the pursuit of private interest comes second behind a pure delight in the common good.⁶⁹ The community he envisages progresses from being many self-interested individuals to ‘becoming one heart and soul.’⁷⁰ This reflects the depiction of the earliest Christian community in Acts 2:44 and 4:32, of which it is said that ‘they had everything in common’ (2:44) and ‘shared everything according to individual need’ (4:32). Augustine interpreted this in terms of the earliest Christians’ desire ‘to attain the fellowship of the angels’ (*pro obtinenda societate angelorum*),⁷¹ that is to restore the conditions that had prevailed in Paradise, at the point of creation.

To what extent Augustine went from mere theorizing to actually working towards implementing such principles, for instance in the ascetic community which he himself founded and led, or ascetic communities which he advised, remains a matter of debate.⁷² His reflections on the contribution of marriage and family to society in his work *On the Good of Marriage*, or his advice to monasteries on the social economics of monastic labour in his work *On the Work of Monks*, for example, suggest that his role may have been more ‘hands-on’ in this regard than he sometimes tends to be given credit for.⁷³

Overall, Augustine’s unique contribution to Patristic legal thinking consists in his drawing together Roman political thought, Biblical theology, theorizing on law, and presenting a political vision of his own the merits of which are studied to the present day.⁷⁴

Conclusion

Just as Origen on natural law and the conscience, thus Augustine represents a climax of Patristic legal thinking in relation to political thought. In his *City of God*, written in the two decades after the sack of Rome by the Visigoths in 410, which also marked the last period that knew a functioning western Roman Empire, he touches upon many aspects that were also discussed in this chapter with a view to early Christianity more broadly: the nature of Christian law and its relationship with secular law and society, the role of senior bishops as makers and administrators of law and their relationship with the state,

and the role of synods and church councils.⁷⁵ Augustine, as we have seen, was of course only one of many Church Fathers, who developed relevant thinking in these areas,⁷⁶ but his reception especially in the West makes him a special case.⁷⁷ Quite apart from the contribution of individual figures, however, as pointed out in the introduction to this chapter, the collective (normative) role of ‘the Church Fathers’ too ought to be taken into account in any overall consideration regarding Christianity and the law, be it in Late Antiquity, in the Middle Ages, or in the modern and contemporary periods.

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¹ See e. g. *1 Clement* 62.2, in ‘First Letter of Clement to the Corinthians,’ ed. Bart D. Ehrman, *The Apostolic Fathers, Volume I* (LCL 24; Cambridge, MA: Harvard University Press, 2003), 146-147.

² See Thomas Graumann, ‘The Conduct of Theology and the “Fathers” of the Church,’ in *A Companion to Late Antiquity*, ed. Philip Rousseau (Chichester: Wiley-Blackwell, 2009), 539-555 at 539.

³ On the latter see Holger Zellentin, *The Qur’ān’s Legal Culture: The Didascalia Apostolorum as a Point of Departure* (Tübingen: Mohr Siebeck, 2013), 1-55, on the former, Alistair Stewart, ‘The Didache as an associational *lex*: reopening the question of the genre/s of the church orders,’ *Jahrbuch für Antike und Christentum* 62 (2019), 29-49.

⁴ E. g. Justin Martyr, *1 Apology* 1; 4, in *Justin, Philosopher and Martyr: Apologies*, ed. Denis Minns and Paul Parvis (Oxford: Oxford University Press, 2009), 81. 87.

⁵ Tertullian, *Apology* 2.7-8, trans. T. R. Glover (LCL 250; Cambridge, MA: Harvard University Press, 1931), 2-227 at 10-11: ‘Trajan issued a rescript that [Christians] ought

not to be searched for, but when caught, they should be punished. How muddled is that...!?' (translation amended); cf. James Corke-Webster, 'The early reception of Pliny the Younger in Tertullian of Carthage and Eusebius of Caesarea,' *Classical Quarterly* 67 (2017) 247-262; John A. McGuckin, *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization* (New York: St. Vladimir's Seminary Press, 2012), 95-108.

⁶ Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999), 192.

⁷ Justin Martyr, *1Apology* 68.2, ed. Minns and Parvis (2009), 262-263.

⁸ See Alistair Stewart, *The Didascalia apostolorum: an English version* (Turnhout: Brepols, 2009); Joseph G. Mueller, 'The ancient Church Order literature: Genre or tradition?' *Journal of Early Christian Studies* 15 (2007) 337-380; McGuckin (2012), 57-76; Stewart (2019).

⁹ Harries (1999), 194.

¹⁰ Cyprian, *Letter 2*; 3.3, in *Thasci Caecili Cypriani Epistulae*, ed. G. Hartel (CSEL 3.2; Vienna: Tempsky, 1877), 467-472.

¹¹ Josef Lössl, *The Early Church: History and Memory* (London: Continuum, 2010), 202-204 (= 2010a).

¹² For these examples see the canons of the Council of Carthage of 345/8, in *Concilia Africae A. 345 – A. 525*, ed. Charles Munier (CCSL 149; Turnhout: Brepols, 1974), 2-10; Harries (1999), 198-199.

¹³ *Codex Theodosianus* 2.1.10, in *Theodosiani libri xvi*, ed. Th. Mommsen and P. M. Meyer (Berlin: Weidmann, 1905), 75-76.

¹⁴ *Codex Theodosianus* 1.27.1, in *Theodosiani libri xvi*, ed. Mommsen (1905), 62.

¹⁵ *Codex Iustinianus* 1.4.7, in *Codex Iustinianus*, rec. P. Krüger (Berlin: Weidmann, 1877), 60.

¹⁶ Harries (1999), 201.

¹⁷ Munier (1974), 218.1230-9; Jill Harries, 'Roman Law and Legal Culture,' in *The Oxford Handbook of Late Antiquity*, ed. Scott Fitzgerald Johnson (Oxford: Oxford University Press, 2012), 789-806 at 804; Caroline Humfress, 'Civil Law and Social Life,' in *The Cambridge Companion to the Age of Constantine*, ed. Noel Lenski (Cambridge: Cambridge University Press, 2006), 205-225 at 208.

¹⁸ Harries (2012), 802.

¹⁹ Josef Lössl, ‘Origenes und die Begriffe “Naturgesetz” und “Gewissen” nach Röm 2.14-16: Exegese-geschichtliche Perspektiven,’ in *Origenes und sein Erbe in Orient und Okzident*, ed. Alfons Fürst (Münster: Aschendorff, 2010), 77-100 at 78 (= 2010b).

²⁰ See Richard Sorabji, *Moral Conscience Through the Ages. Fifth century BCE to the present* (Oxford: Oxford University Press, 2014).

²¹ Philo of Alexandria, *Creation of the World* I 3, in Philo, *On the Account of the World’s Creation Given by Moses*, trans. F. H. Colson and G. H. Whittaker (LCL Philo, vol. 1; Cambridge, MA: Harvard University Press, 1929), 7.

²² Lössl (2010b), 87.

²³ Clement of Alexandria, *Stromata* I 91-96, in *Clemens Alexandrinus, Stromata, Buch I-VI*, ed. Otto Stählin (GCS 12; Clemens Alexandrinus 2; Berlin: Hinrichs, 1906), 58-62.

²⁴ Lössl (2010b), 90; Josef Lössl, “Keeping Closely to Paul:” The Early Use and Exegesis of Romans 2:14-16,’ *Augustiniana* 58 (2008), 11-26 at 17-18.

²⁵ Tertullian, *On the Soul* 2.1, in Tertullianus, *De anima*, ed. J. H. Waszink (CCSL 2; Turnhout: Brepols, 1954), 783.

²⁶ Tertullian, *On penitence* 1.2, in Tertullianus, *De paenitentia*, ed. J. W. Ph. Borleffs (CCSL 1; Turnhout: Brepols, 1954), 321.

²⁷ Tertullian, *On the Crown* 4.1, in Tertullianus, *De corona*, ed. E. Kroymann (CCSL 2; Turnhout: Brepols, 1954), 1046; see also Eric Osborn, *Tertullian: First Theologian of the West* (Cambridge: Cambridge University Press, 1997), 34.

²⁸ Tertullian, *Against Marcion* I 10.3, in Tertullianus, *Adversus Marcionem*, ed. E. Kroymann (CCSL 1; Turnhout: Brepols, 1954), 451.

²⁹ Tertullian, *Against Marcion* IV 16.15, in Tertullianus, *Adversus Marcionem*, ed. E. Kroymann (CCSL 1; Turnhout: Brepols, 1954), 584; Lössl (2010b), 92-93.

³⁰ Further on Tertullian see McGuckin (2012), 95-108.

³¹ Origen of Alexandria, *Against Celsus* I 4, in Origenes, *Contra Celsum I-IV*, ed. Paul Koetschau (GCS 2; Origenes Werke 1; Leipzig: Hinrichs, 1899), 58; Josef Lössl, ‘Der Glaubensbegriff des Klemens von Alexandrien im Kontext der hellenistischen Philosophie,’ *Theologie und Philosophie* 77 (2002), 321-337 at 329-334.

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- ³² Origen, *Commentary on Romans II* 7.9-10, in *Der Römerbriefkommentar des Origenes: Kritische Ausgabe der Übersetzung Rufins*, ed. Caroline Hammond Bammel (Freiburg im Breisgau: Herder, 1990), 135; Lössl (2010b), 97.
- ³³ Sorabji (2014), 39-45.
- ³⁴ Augustine of Hippo, *On the Sermon on the Mount* 2.32, in Augustinus, *De sermone domini in monte*, ed. Almut Mutzenbecher (CCSL 35; Turnhout: Brepols), 122.
- ³⁵ Augustine of Hippo, *City of God* 12.8, in *Sancti Aurelii Augustini Episcopi De Civitate Dei Libri XXII*, ed. Bernardus Dombart et Alfonsus Kalb (Leipzig: Teubner, 1928), vol. 1, 522-523; Augustine of Hippo, *Confessions* 2.11, in Augustinus, *Confessionum libri XIII*, ed. L. Verheijen (CCSL 27; Turnhout: Brepols, 1981), 22.
- ³⁶ Augustine, *Enarration in Psalm* 83.3, in Augustinus, *Enarrationes in Psalmos LI-C*, ed. E. Dekkers, J. Fraipont (CCSL 39; Turnhout: Brepols, 1956), 1142; Josef Lössl, 'How "Bad" is Augustine's "Bad Conscience" (*mala conscientia*)?' *Studia Patristica 86: Papers presented at the Seventeenth International Conference on Patristic Studies held in Oxford in 2015, Volume 12: Augustine on conscientia*, ed. M. Vinzent and D. Stanciu (Leuven: Peeters, 2017), 89-96 at 92-93.
- ³⁷ Tertullian, *To Scapula* 2.2, in Tertullianus, *Ad Scapulam*, ed. E. Dekkers (CCSL 2; Turnhout: Brepols, 1954), 1127.
- ³⁸ Lactantius, *Divine Institutes* V 19.11-13; 20.7, in *L. Caeli Firmiani Lactanti Opera Omnia, Pars I*, ed. Samuel Brandt (CSEL 19; Vienna: Tempsky, 1890), 463-467. 469; Sorabji (2014), 48-51; Maijastina Kahlos, *Forbearance and Compulsion: The Rhetoric of Religious Tolerance and Intolerance in Late Antiquity* (London: Duckworth, 2009), 25-26.
- ³⁹ Origen of Alexandria, *Against Celsus* V 63, in Origenes, *Contra Celsum V-VIII*, ed. Paul Koetschau (GCS 3; Origenes, Werke 2; Leipzig: Hinrichs, 1899), 66-67.
- ⁴⁰ Origen cites here Titus 3:10, where the addressee is advised to 'admonish' a heretic twice but then to avoid contact.
- ⁴¹ Augustine, *Letter* 93.17, in *S. Aureli Augustini Epistulae Pars II*, ed. A. Goldbacher (CSEL 34.2; Vienna: Tempsky, 1898), 461.
- ⁴² See also the discussion in Sorabji (2014), 49-51.
- ⁴³ Sorabji (2014), 51.

⁴⁴ Sorabji (2014), 52; Jennifer Barry, *Bishops in Flight: Exile and Displacement in Late Antiquity* (Berkeley, CA: University of California Press, 2019), 1-25; Paula Fredriksen and Oded Irshai, 'Christian Anti-Judaism: Polemics and Policies,' in *The Cambridge History of Judaism, vol. 4: The late Roman-Rabbinic period*, ed. Steven T. Katz (Cambridge: Cambridge University Press, 2006), 977-1034 at 988-1010.

⁴⁵ Sorabji (2014), 56-58.

⁴⁶ For details see Henry Chadwick, *Priscillian of Avila: The Occult and the Charismatic in the Early Church* (Oxford: Oxford University Press, 1976), 138-148.

⁴⁷ See Kahlos (2009), 108-114 with special references to Augustine, *Letters* 93 and 108 (CSEL 34.2, 461-463. 632); and see now also Rafal Toczko, *Crimen obicere: Forensic Rhetoric and Augustine's anti-Donatist Correspondence* (Göttingen: Vandenhoeck & Ruprecht, 2020), 49-52 on Augustine using forensic rhetoric against Donatists.

⁴⁸ Josef Lössl, 'Augustine and the Common Good,' in *Christianity and Global Law*, ed. Rafael Domingo and John Witte, Jr. (London: Routledge, 2020), 31-50 at 33.

⁴⁹ Augustine, *City of God* 2.21; 3.21-23, in Augustinus, *De civitate Dei*, ed. Dombart and Kalb (1928), vol. 1, 79-83 and 132-135.

⁵⁰ Augustine, *City of God* 5.24-26, in Augustinus, *De civitate Dei*, ed. Dombart and Kalb (1928), vol. 1, 236-239; Lössl (2020), 34.

⁵¹ Peter Van Nuffelen, *Orosius and the Rhetoric of History* (Oxford: Oxford University Press, 2012), 186-206.

⁵² Augustine, *Against Faustus* 22.27, in *Contra Faustum Manichaeum*, ed. J. Zycha (CSEL 25.1; Vienna: Tempsky, 1891), 621; *Diverse questions* 53.2, in *De diversis quaestionibus LXXXIII*, ed. A. Mutzenbecher (CCSL 44A; Turnhout: Brepols, 1975), 87; *Quantity of the Soul* 36.80, in *De quantitate animae*, ed. W. Hörmann (CSEL 89; Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1986), 230; *City of God* 21.8, in *De civitate Dei*, ed. Dombart and Kalb (1928), vol. 2, 503-507.

⁵³ Augustine, *Confessions* 3.7.13, in *Confessionum libri xiii*, ed. L. Verheijen (CCSL 27; Turnhout: Brepols, 1981), 33-34; *On the Trinity* 14.15.21, in *De Trinitate libri xv, libri xiii-xv*, ed. W. J. Mountain and F. Glorie (CCSL 50A; Turnhout: Brepols, 1968), 451; *Letter* 138.1.4 and 8, in *S. Aureli Augustini Epistulae, Pars III*, ed. Goldbacher (CSEL 44; Vienna: Tempsky, 1904), 128. 130; *Diverse questions* 31.1, in *De diversis quaestionibus*, ed. Mutzenbecher (1975), 41-43.

⁵⁴ Augustine, *On Free Will* 1.6.14-15, in *De libero arbitrio*, ed. W. M. Green and K. D. Daur (CCSL 29; Turnhout: Brepols, 1970), 97; *On True Religion* 31.58, in *De vera religione*, ed. K. D. Daur and J. Martin (CCSL 32; Turnhout: Brepols, 1962), 225.

⁵⁵ Robert Dodaro, *Christ and the Just Society in the Thought of Augustine* (Cambridge: Cambridge University Press, 2004), 14.

⁵⁶ Thus Kyle Harper, *Slavery in the Late Roman World AD275-425* (Cambridge: Cambridge University Press, 2016), 213.

⁵⁷ Thus Ilaria Ramelli, *Social Justice and the Legitimacy of Slavery: The Role of Philosophical Asceticism from Ancient Judaism to Late Antiquity* (Oxford: Oxford University Press, 2016), 152-171.

⁵⁸ See for this Eric Gregory, *Politics and the Order of Love: An Augustinian Ethic of Democratic Citizenship* (Chicago and London: University of Chicago Press, 2008), 54.

⁵⁹ Lössl (2020), 35-36.

⁶⁰ Augustine, *Immortality of the Soul* 6, in *De immortalitate animae liber unus*, ed. W. Hörmann (CSEL 89; Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1986), 112-113; Augustine, *Soliloquies* 2.22, in *Soliloquiorum libri ii*, ed. W. Hörmann (CSEL 89; Vienna: Verlag der österreichischen Akademie der Wissenschaften, 1986), 75.

⁶¹ Augustine, *Confessions* 10.8, in *Confessionum libri xiii*, ed. L. Verheijen (CCSL 27; Turnhout: Brepols, 1981), 161.

⁶² Augustine, *On Free Will* 2.37, in *De libero arbitrio*, ed. W. M. Green and K. D. Daur (CCSL 29; Turnhout: Brepols, 1970), 232.

⁶³ Augustine, *On the literal interpretation of Genesis* 11.14.18, in *De Genesi ad litteram libri duodecim*, ed. J. Zycha (CSEL 28.1; Vienna: Tempsky, 1894), 346; *On the Trinity* 12.9.14, in *De Trinitate libri xv, libri i-xii*, ed. W. J. Mountain and F. Glorie (CCSL 50; Turnhout: Brepols, 1968), 368.

⁶⁴ Augustine, *On Free Will* 2.53, in *De libero arbitrio*, ed. W. M. Green and K. D. Daur (CCSL 29; Turnhout: Brepols, 1970), 272.

⁶⁵ Augustine, *City of God* 19.21, in *De civitate Dei*, ed. Dombart and Kalb (1928), vol. 2, 389-392 at 390; Dodaro (2004), 12-13.

⁶⁶ Augustine, *On the Trinity* 12.9.14 (see above n. 64).

⁶⁷ Plotinus, *Ennead* 6.5.12, in Plotinus, *Ennead IV: 1-5*, ed. A. H. Armstrong (LCL 445; Cambridge, MA: Harvard University Press, 1988), 356-357.

⁶⁸ Lössl (2020), 37.

⁶⁹ Augustine, *On the literal interpretation of Genesis* 11.15.19-20, in *De Genesi ad litteram libri duodecim*, ed. J. Zycha (CSEL 28.1; Vienna: Tempsky, 1894), 347-348; *City of God* 14.28, in *De civitate Dei*, ed. Dombart and Kalb (1928), 56-57.

⁷⁰ Augustine, *City of God* 15.3; 15.14, in *De civitate Dei*, ed. Dombart and Kalb (1928), vol. 2, 61-62. 85-87; Lössl (2020), 37.

⁷¹ Augustine, *City of God* 5.18, in *De civitate Dei*, ed. Dombart and Kalb (1928), vol. 1, 223-228 at 227.27-28 and throughout the chapter.

⁷² See for this Goulven Madec, 'Le communisme spirituel,' in *Homo Spiritualis. Festgabe für Luc Verheijen OSA*, ed. Cornelius Mayer and Karl Heinz Chelius (Würzburg: Augustinus Verlag, 1987), 225-239.

⁷³ Lössl (2020), 38-41.

⁷⁴ McGuckin (2012), 127-165, especially 163-165; Lössl (2020), 42-44.

⁷⁵ McGuckin (2012), 127-166.

⁷⁶ McGuckin (2012), 77-126 and 167-236; Ramelli (2016), 152-211.

⁷⁷ Lössl (2020), 42-44.