

THE NATURE OF SIN AND CRIME:  
SPIRITUAL AND CIVIL JURISDICTIONS COMPARED

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Theological discussion among Christians about the nature of sin has traditionally focussed on the category of ‘original sin’ and the causal link between the first sin of Adam and the subsequent sins of humankind. As a result, sin is broader than immorality and embraces violations against the will of God and righteousness, so that it may be defined as ‘any word or deed or thought against the eternal law’ of God (Augustine). While the classical focus of Roman Catholic moral theology has been ‘sins’ (and their categories, mortal and venial), Protestant ethics addresses ‘sin’ as the broken relationship with God, lack of faith rather than of virtue. In turn, theology discusses sin in the context of, variously: the exercise of free will, responsibility and agency; its consequences for the salvation of souls; and its eradication through repentance, forgiveness, atonement, divine grace and mercy. By way of contrast, in the common law tradition, ‘crime’ is narrower: it is classically understood as the violation of the humanly-made criminal law, an act (or omission) which tends to the prejudice of the State or of society (which the criminal law seeks to protect), and an act forbidden by law on pain of punishment inflicted at the instance of the State - thus, a crime is an illegal act, whose elements are defined by statute as interpreted judicially, which is capable of being prosecuted in criminal proceedings in State courts, on the basis of due process and requisite standards of proof and liability (including causation, capacity and voluntariness), and which may result in punishment.<sup>1</sup> This study connects what the laws of churches have to say about these basic elements within the theological category of sin and the civil category of crime by exploring: purposes of penal law; classifying and defining penal offences; courts and their penal jurisdiction; due process in penal cases; and penal sanctions. It examines the laws and other norms on Christian discipline of eight historic churches. It does so in the context of common principles recently articulated by a Panel (meeting in Rome 2013-2016, and in Geneva in 2017) in A Statement of the Principles of Christian Law (Rome, 2016) and induced from the profound

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<sup>1</sup> See e.g. *Proprietary Articles Trade Association v Attorney-General for Canada* [1931] AC 310 at 324 *per* Lord Atkin: ‘The domain of criminal jurisprudence [is] what acts...are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished’; and so, at its core, a crime is an ‘act prohibited with penal consequences’.

similarities between the laws of these churches.<sup>2</sup> It concludes with a general comparison of the key elements of spiritual and civil jurisdictions relating to sin and crime.<sup>3</sup>

## THE PURPOSES OF PENAL LAW

While, needless to say the topic is much debated, it is generally agreed that the core purposes of secular criminal law are to forbid and penalize conduct which is harmful to or otherwise endangers the property, health, safety, and moral welfare of people in society. It serves these purposes by seeking, for example, to: maintain order, provide predictability as to expectations of conduct; to resolve disputes peacefully; to protect persons and their property; to provide for the smooth functioning of society; and to safeguard civil liberties and human rights. In turn, a criminal justice system seeks, typically: to deliver justice for all, by convicting and punishing the guilty and helping them stop offending, while protecting the innocent; to detect and bring crime to justice; and to carry out court orders, such as collecting fines, and supervising the punishment of offenders.<sup>4</sup> The criminal law also limits and controls the State in its use of coercive powers to investigate and prosecute crime, and convict and punish offenders for social (and perhaps moral) ends. There are both similarities and differences between these secular ideas and approaches of the churches to the discipline of the faithful.

Today, all the historic churches recognise both the need, and their own right, to enforce ecclesial discipline – and they commonly weave theological justifications for discipline into their laws. For the Roman Catholic Church ‘the integral development of the human and Christian person...positively includes penal discipline’ as a means of ‘fostering communion’ in the church;<sup>5</sup> ‘judicial power’ is fundamental to sustaining ecclesial discipline - the church has ‘its own and exclusive right to judge’ in cases of ‘the violation of ecclesiastical law and whatever contains an element of sin’, and ‘to determine guilt and impose ecclesiastical penalties’; and this belongs to the church by divine institution. But ‘penal process’ is a last

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<sup>2</sup> M. Hill and N. Doe, ‘Principles of Christian Law’, *Ecclesiastical Law Journal* 19 (2017): 138-155.

<sup>3</sup> This study does not examine juridical treatment of sin in the internal forum e.g. public or private confession.

<sup>4</sup> For the UK, see e.g. [http://www.cjsonline.gov.uk/aims\\_and\\_objectives/](http://www.cjsonline.gov.uk/aims_and_objectives/)

<sup>5</sup> Pope John Paul II, First Address to the Roman Rota, ‘The Church and Protection of Fundamental Human Rights’, in W.H. Woestman, ed., *Papal Allocutions to the Roman Rota (1939-1994)* (Ottawa, 1994) 153-158.

resort - disputants must seek to settle amicably, promptly, and equitably out of court.<sup>6</sup> Similar ideas appear in Orthodox canon law and in laws of Anglican churches worldwide.<sup>7</sup>

By way of contrast, the juridical instruments of Protestant churches contain far richer statements about ecclesial discipline in terms of its importance, underlying authority, and purpose. First, some Protestant churches across the traditions assert their own right to ‘apply discipline’, as well as their own authority to adjudicate on disputes among their members.<sup>8</sup> The competence to discipline is based on the idea that the church is under the ‘rule and authority’ of Christ, or ‘the discipline of the Holy Spirit’.<sup>9</sup> Secondly, therefore, for many churches, disciplinary competence is based on scriptural, or divine, authority; typically: ‘Discipline is an ordinance appointed by the Lord Jesus Christ as King and head of the Church, to be administered by the Church in His name and under His authority by methods in harmony with the constitution of the Church as a spiritual community’. Discipline may also be seen as ‘the process by which the Church seeks to exercise the authority given by Christ, both in the guidance, control and nurture of its members, and [the] correction of offenders’.<sup>10</sup>

Thirdly, the aims of discipline are divine, corporate and personal: discipline is ‘directed to the glory of God, the purity of the Church and the spiritual benefit of members’.<sup>11</sup> For some churches discipline is an aspect of individual discipleship - ‘to sustain and strengthen the members to obey the word of God, to protect them from sin, to uplift those who have fallen and guide them back into the fellowship of the congregation’. As such, it is restorative: ‘Ecclesiastical discipline shall be carried out in an evangelical manner in accordance with scriptural principles and upholding the rules of natural justice. At all stages of the procedure the purpose of all ecclesiastical discipline, to gain a member, is to be observed’.<sup>12</sup> Again: ‘The objectives of church discipline are to sustain the integrity of the church, to protect the innocent

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<sup>6</sup> Code of Canon Law 1983 (*Codex Iuris Canonici*, CIC) cc. 129, 135, 1401, 1446.

<sup>7</sup> See e.g. Russian Orthodox Church: Statutes X.18: ‘canonical order and church discipline’; and: *The Principles of Canon Law Common to the Churches of the Anglican Communion* (London: Anglican Communion Office, 2008), hereafter PCLCCAC: Principles 6, 24-26.

<sup>8</sup> Lutheran Church of Australia: Constitution, Art. VI.7 and X.1-3; Constitution of the Districts, X; Bylaws, X.A.1-3: ‘The Church shall establish a judicial system to deal with discipline’ as to e.g. ‘ungodly life’.

<sup>9</sup> Evangelical Lutheran Church in America: Constitution, Ch. 4.03, and 5.01ff; and United Methodist Church in Northern Europe and Eurasia: Book of Discipline, par. 201.

<sup>10</sup> United Free Church of Scotland: Manual of Practice and Procedure, VI.I-VI: I: discipline is for ‘the maintenance of the Church’s purity, the spiritual benefit of her members, and the glory of the Redeemer’; and Presbyterian Church of Aotearoa New Zealand: Book of Order, 15.1.

<sup>11</sup> Presbyterian Church in Ireland: Code, par. 131.

<sup>12</sup> Evangelical Lutheran Church of Southern Africa: Guidelines, 5; and Lutheran Church of Australia: Constitution, Art. X.1-3; and Bylaws, X.A.1-3.

from harm, to protect the effectiveness of the witness of the church, to warn and correct the careless, to bring the guilty to salvation, to restore to effective service those who are rehabilitated, and to protect the reputation and resources of the church'.<sup>13</sup> For the Methodist Church in Great Britain, discipline 'stems from the imperfect nature of human beings', from the fact that '[t]he Church is a fallible community', and because members' acts may not only be 'damaging to themselves and others' but also 'undermine the credibility of the Church's witness'; in short, discipline seeks 'to enable healing and reconciliation to take place through...accountability', so as to respond to 'the call through Christ for justice, openness and honesty, and the need for each of us to accept responsibility for our own acts'.<sup>14</sup>

Fourthly, 'ecclesiastical discipline must be purely moral or spiritual in its object, and not attended with any civil effects' and 'can derive no force whatever, but from its own justice, the approbation of an impartial public, and the countenance and blessing of the great Head of the Church'. Consequently, discipline is to be administered with mercy and gentleness: it is to be exercised under 'the dispensation of mercy' and in faithfulness, meekness, love and tenderness for 'the condemnation of offences and the recovery of offenders'.<sup>15</sup> Lastly, all the faithful - ministers and laity - are subject to church discipline.<sup>16</sup> The Methodist Church in Ireland captures these themes; it provides: 'Discipline in the Church is an exercise of that spiritual authority which the Lord Jesus has appointed in His Church. The ends contemplated by discipline are the maintenance of the purity of the Church, the spiritual benefit of the members and the honour of our Lord'; moreover: 'All Members and Ministers of the Church are subject to its government and discipline, and are under the jurisdiction and care of the appropriate Courts of the Church in all matters of Doctrine, Worship, Discipline, and Order in accordance with the Rules and Regulations from time to time made by the Conference'.<sup>17</sup>

There are similarities and differences in ideas about the purposes of civil and ecclesial penal law. On the one hand, both seek: to express a right to penalise; to maintain order; to protect the vulnerable; to forbid harmful acts; and to penalise for the reform of the offender. On the

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<sup>13</sup> Church of the Nazarene: Manual, Part VI.I: Judicial Administration.

<sup>14</sup> Methodist Church in Great Britain: Constitutional Practice and Discipline, Standing Orders 1100-56.

<sup>15</sup> Presbyterian Church in America: Book of Church Order, Preface, II.8; Presbyterian Church in Ireland: Code, par. 131; Presbyterian Church of Aotearoa New Zealand: Book of Order, 15.1: 'gentleness, impartiality and faithfulness'; Methodist Church of New Zealand: Laws and Regulations, 8.1: 'grace, forgiveness and reconciliation'; Lutheran Church of Australia: Constitution, Art. X.1 and Bylaws, X.C: 'prerogative of mercy'.

<sup>16</sup> See e.g. Bethel Baptist Church (Choctaw): Constitution, Art. VII: a member who ceases to meet the standards of the New Testament 'will be subject to the discipline of the church'.

<sup>17</sup> Methodist Church in Ireland: Constitution, s. 5.

other hand, the objects of and reasons for these purposes differ: in criminal law, the right to penalise comes from the State - in church law, from God; in the temporal sphere, the order maintained is that of society in general - in church law, it is communion between the faithful and with God; criminal law protects physical persons and property - church law, the spiritual welfare of the faithful; criminal law forbids harm for society to function cohesively - church law forbids harm (and, sometimes, 'sin') to foster Christian discipleship and church integrity; and criminal law seeks punishment and, *inter alia*, retribution - church law, gentleness, reconciliation, and restoration of the offender. The aims of church penal law are summed up in the principles of Christian law. All the churches have a system of discipline, the administration of which is regulated by norms dealing with the purposes of discipline and the processes to enforce it. A church as an institution has the right to enforce discipline among the faithful. This right has various foundations including divine and spiritual authority. A church may exercise discipline over both lay and ordained persons to the extent provided by its own law. The purpose of discipline is to glorify God, to protect the integrity and mission of the church, to safeguard the vulnerable from harm, and to promote the spiritual benefit of its members. Church discipline is exercised by competent authority in accordance with law.<sup>18</sup>

## THE CLASSIFICATION AND DEFINITION OF PENAL OFFENCES

In the civil sphere, determining which conduct is to be criminalised is shaped in part by ideas about the purposes of criminal law itself as well as actual social mischiefs - and there is much debate about, for example, the criteria to determine what concepts of harm, and even of social morality, criminal law should reflect, including one common law view that 'there remains in the courts a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State'.<sup>19</sup> In any event, crimes are generally classified in five ways, namely: offences against the person (fatal and non-fatal offences, including sexual offences) and offences which involve property (such as theft and damage to property); offences of proscribed acts which require proof of a proscribed mental element (such as intention, recklessness or negligence); choate and inchoate offences as well as those of strict liability, vicarious liability, complicity and public office; offences classified according to the defences available; and offences classified according to the mode of trial e.g.

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<sup>18</sup> Principles of Christian Law (Rome 2016) V.1.1-2. The right to discipline is one which a church may assert, variously, against the State, the faithful, and sometimes other churches.

<sup>19</sup> *Shaw v DPP* [1962] AC 220 at 267 *per* Viscount Simmonds.

summary and indictable. Most crimes are established by statute which defines their elements - and it is a principle of law that offences should not be retroactive. The laws of Christians mirror, to some extent, these features of secular crimes.

The churches studied here generally agree about the nature of an ecclesial offence, the requirement that an offence must be set out in legislation enacted by competent ecclesial authority, the definitional elements of the offence, and the classes within the church who may be liable to penal process. However, there is diversity as to defences available to excuse or justify conduct. For the Roman Catholic Church a canonical offence is an external violation, gravely imputable to the person by reason of deliberate intent or culpable negligence, of a law or precept to which a penalty attaches; it is committed in the public life of the church and not in the forum of conscience; penal laws must be interpreted strictly. These include offences against religion and church unity (e.g. apostasy, heresy, schism, blasphemy, perjury, and harm to public morals); those against church authorities (e.g. the use of physical force against the Pontiff, teaching doctrine condemned by him, incitement to hatred against the Apostolic See, and profaning a sacred object); usurpation of ecclesial offices (e.g. seeking to celebrate Mass when not a priest, simony, and the unlawful exercise of sacred ministry); falsehood (e.g. falsely denouncing an offence to a confessor); offences against special obligations (e.g. unlawful clerical engagement in a trade); and offences against human life and liberty (e.g. murder, inflicting bodily harm, and procuring abortion). When an external violation occurs, imputability is presumed – but this may be rebutted; however, an external violation will not be penalised if the person has a recognised defence - for example, the person is under sixteen years of age, is unaware that the action was a violation of law, acted accidentally, lacked the use of reason, acted under duress, or acted in self-defence or in the defence of another.<sup>20</sup>

Orthodox, Anglican and Lutheran laws contain fewer offences than Roman Catholic law - and offences listed are spelt out with a far higher level of generality not least in terms of the *mens rea* required. One Orthodox definition of an ecclesial offence is ‘any transgression by an external action or omission against the ecclesiastical law’; offences include apostasy, heresy, schism, simony, sacrilege, violation of graves, and perjury; those for which only the clergy may be liable include: repetition of a valid ordination, the performance of priestly actions by a deposed cleric, the exercise of ministry outside the jurisdiction, and conspiracy against

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<sup>20</sup> CIC, cc. 18, 1311-1330, 1364-1399.

canonical authorities; and those for which both clergy and laity may be liable include: apostasy, heresy, schism, simony, and sacrilege.<sup>21</sup> With regard to the regulatory instruments of Orthodox churches, therefore, offences for which the faithful may be liable include: ‘infringing the church discipline and teaching’; violation of ‘the doctrinal, canonical or moral norms of the Orthodox Church’; ‘unorthodox belief, [and] breaches of canonical or moral discipline’; and violation of moral standards and the commission of more specified actions.<sup>22</sup>

Anglicanism too is notable for the lack of juridical precision in the definitional elements of its ecclesiastical offences - though the Principles of Canon Law Common to the Churches of the Anglican Communion provide: ‘In disciplinary cases, ecclesiastical offences and defences to them are to be clearly defined and set out in writing’. Thus, under the laws of churches, bishops, clergy, and (in some churches) the laity may be tried for, typically: the commission of a crime under State law; ‘immorality’ or immoral conduct; teaching doctrines contrary to those of the church; violation of church law or of ordination vows; habitual or wilful neglect of duty; conduct unbecoming the office and work of an ordained minister; and disobedience to the lawful directions of a diocesan bishop.<sup>23</sup> These are mirrored, broadly, in some Lutheran lists of ecclesiastical offences for which pastors may be disciplined: preaching or teaching contrary to the faith confessed by the church; conduct incompatible with the character of ministerial office; wilful disregard or violation of church law; wilful disregard or violation of ministerial standards; unlawful disclosure of confidential communications; sexual misconduct; fiscal mismanagement; and divorce and re-marriage. Moreover, lay persons may be disciplined for prescribed offences to the extent that is authorised by law.<sup>24</sup>

The concept of ‘sin’ is more prominent in Reformed and Presbyterian penal laws: again, generally, the elements are not closely defined and explicit defences not spelt out. The Book of Church Order of the Presbyterian Church in America has a well-developed definition of an ‘offence’ as ‘anything in the doctrines or practice of a Church member professing faith in Christ which is contrary to the Word of God’; offences are personal or general, private or public;

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<sup>21</sup> P. Rodopoulos, *Overview of Orthodox Canon Law* (Orthodox Research Institute, Rollinsford, NH, 2007) 173-178.

<sup>22</sup> See, respectively: Romanian Orthodox Church: Statutes, Art. 14, 148-160; Russian Orthodox Church: Statute, X.35; Ukrainian Orthodox Church in America: Statutes, Art. VIII and XII.

<sup>23</sup> PCLCCAC, Principle 24.9; for the laws themselves, see N. Doe, *Canon Law in the Anglican Communion* (The Clarendon Press, Oxford, 1998) 83-85.

<sup>24</sup> See e.g. Lutheran Church in Great Britain: Rules and Regulations, Disciplinary Procedure for Pastors of the Church: failure to observe the rules ‘in a serious and persistent manner’; and Evangelical Lutheran Church in America: Constitution, Ch. 20.21.

being ‘sins’ against God their commission is a ground for discipline; personal offences are violations of divine law involving wrongs to particular individuals, and general offences are heresies or immoralities; private offences are those known to a few people, and public ones those which are notorious (par. 29). By way of contrast, the Presbyterian Church in Wales provides: ‘It is not practicable to draw up a list of transgressions and specify the appropriate discipline for each one. This must be left to the conscience and judgement of the church and it must administer judgement in accordance with the nature of the transgression, taking into consideration...the age, experience, history and circumstances of the transgressor, and...the discipline which would be appropriate. Every act of discipline should be an opportunity for the church to examine itself, to bring its conscience to the light and to strengthen its life and unity’ (Handbook of Order and Rules, 2.5.2). Nevertheless, Presbyterian offences may include: teaching or conduct of a person under its jurisdiction which has been declared censurable by the Word of God or law and practice of the Church; anything among members which gives rise to ‘scandal injurious to the purity or peace of the Church’ (e.g. disobedience to the church courts); ‘conduct unbecoming a minister’; ‘gross crime or heresy’; prolonged absence from the gospel ordinances, and a sin/offence of ‘doctrinal error or grave impropriety of conduct’ especially on account of its public and scandalous nature; and the conviction of a minister in a secular criminal court for ‘any grave criminal charge’.<sup>25</sup>

Methodist lists of offences are generally more extensive; for instance: neglect of the vows of the baptismal covenant and regular absence from worship without valid reason; immorality including but not being celibate in singleness or faithful in a heterosexual marriage; practices declared incompatible with Christian teaching (e.g. practising homosexual, conducting ceremonies which celebrate homosexual unions, or performing a same-sex weddings); the breach of the secular criminal law; failure to perform ministry; disobedience to the order and discipline of the church; dissemination of doctrines contrary to the established standards of church doctrine; relationships and/or behaviour that undermines the ministry of another pastor; child abuse; sexual abuse; sexual misconduct or harassment; racial and/or sexual harassment; gender discrimination - and any professing members may be charged with the same offences or if they undermine the ministry of those serving in a church appointment.<sup>26</sup>

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<sup>25</sup> See, respectively, Presbyterian Church in Ireland: Code, pars. 131-132: (e.g. I Cor. V.9-11); Presbyterian Church of Aotearoa New Zealand: Book of Order, 15.2; Presbyterian Church in America: Book of Church Order, 30.1-5; United Free Church of Scotland: Manual of Practice and Procedure, VI.I-VI: I; United Congregational Church of Southern Africa: Procedure 13 and 15.

<sup>26</sup> United Methodist Church in Northern Europe and Eurasia: Book of Discipline, par. 228(b) and par. 2702.

The secular classification and definition of crimes is broadly mirrored conceptually in church penal laws; for example: offences must in both the State and in churches be set out in enacted law; negligence may generate liability; not all harmful conduct is subject to secular criminal proceedings (only that which is proscribed by law) in the same way that not all sin is subject to ecclesial penal process (only that which is listed in church laws for which disciplinary process is available); and private individuals and those in public office may be liable to penal process – and ecclesial discipline may be pursued when the faithful have committed secular crimes. However: ecclesial offences are defined with far less precision than secular crimes: defences in church laws are generally less well developed than in the secular law; church doctrinal offences applicable to erroneous belief have no obvious secular equivalent; and the category of ‘sin’ in ecclesial offences is absent, unsurprisingly, from the secular criminal law – and ‘sin’ is most explicit in laws of non-episcopal churches. Ideas about the classification and definition of penal offences are summed up in the principles of Christian law. A church may institute a system of ecclesiastical offences. Ecclesiastical offences and defences to them are to be clearly defined in writing and a court, tribunal or other judicial body must give reasons for its finding of breach of discipline (Principles V.5.1-2). Beyond these, however, the principles of Christian law do not offer a compendium of ecclesial offences; but specific offences are included in relation to particular areas of church life – for example: ‘Any person who offends church doctrine may be subject to disciplinary process’ (Principle VI.3.5).

## COURTS AND THEIR PENAL JURISDICTION

In the sphere of the State, generally, it is the constitutional law which provides for the establishment, composition, and jurisdiction of criminal courts – and, in the common law, for the division of trials between distinct courts in relation to different classes of offence. These matters are in the keeping of the legislature but oversight of the administration of the criminal justice system vests in the executive. Yet, judicial independence is fundamental and applies equally to the criminal courts the function of which is to establish guilt, enforce the criminal law, and impose lawful punishments. Likewise, the historic churches have mechanisms to enforce discipline through the judicial resolution of penal cases in a system of courts or tribunals usually ordered hierarchically – and often, they are styled as ‘disciplinary tribunals’.

Roman Catholic tribunals are established on the basis of canon law, are ordered hierarchically and have jurisdiction over cases concerning spiritual matters, the violation of ecclesiastical laws, and all those cases in which there is a question of sin as to the determination of culpability and imposition of ecclesial penalties. In the diocese, the forum of first instance is the diocesan tribunal, presided over by the bishop exercising judicial power personally or through a judicial vicar who may be assisted by adjutant judicial vicars who are priests but lay judges may be appointed to assist. Disciplinary matters dealt with by the tribunal include cases concerning dismissal from the clerical state. The tribunal of second instance is the metropolitan tribunal (of a province) or a regional tribunal hearing appeals from the diocesan tribunal. The Pontiff is supreme judge for the universal church and may judge personally or through tribunals of the Apostolic See. The Roman Rota is the ordinary tribunal constituted by the Roman Pontiff to receive appeals (e.g. third instance) and the Apostolic Signatura is ‘the supreme tribunal’ for e.g. appeals against Rotal judgments - it also functions as the supreme administrative tribunal in disputes about administrative acts and the competence of the inferior tribunals. All the faithful may refer a case directly to the Pontiff – but: ‘There is neither appeal nor recourse against a judgment or decree of the Roman Pontiff’.<sup>27</sup> Orthodox courts are also ordered hierarchically and there are rules on their establishment, composition (which may include laity), and original and appellate jurisdiction (over clergy and/or laity).<sup>28</sup>

In Anglicanism, the relation between courts or tribunals of original and appellate jurisdiction in the judicial hierarchy is to be prescribed by law as is their subject-matter jurisdiction in disciplinary and other causes. Judges are to be duly qualified, selected and appointed by a designated church authority in accordance with a prescribed procedure, and must adjudicate impartially, without fear or favour. Courts and tribunals are independent from external interference and must uphold the rule of law in the church.<sup>29</sup> The power to establish courts and tribunals is generally reserved to the central assembly of a church, but that assembly itself exercises no judicial power (unless the law allows this). A diocesan tribunal, presided over by a judge appointed by the bishop, has original jurisdiction over the discipline of clergy and in some cases over the laity (and the commission of ecclesial offences by them). As to appeals, laws provide for: limitation periods; grounds of appeal; leave to appeal; and powers of the

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<sup>27</sup> CIC, cc. 391, 469, cc. 1401-1457; c. 1405: contentious cases reserved to the pope e.g. judging cardinals and bishops; c. 1417: referral to the pope; c. 333: no appeal against a papal judgment.

<sup>28</sup> P. Rodopoulos, *Orthodox Canon Law* (2007) 170ff; and N. Doe, *Christian Law: Contemporary Principles* (Cambridge University Press, Cambridge, 2013) 166-167.

<sup>29</sup> PCLCCAC, Principle 24: church courts/tribunals should be available as needed to resolve disputes.

appellate tribunal - superior tribunals may also have an original jurisdiction over, for instance, the trial of bishops, and matters relating to doctrinal and liturgical discipline.<sup>30</sup>

The judicial bodies of Protestant churches are ordered similarly. However, the court of first instance is generally at the local rather than regional level. For example, in the Lutheran Church in Australia: ‘The Church shall establish a judicial system to deal with discipline and adjudication. The rules governing such judicial system shall be laid down in the By-laws’; in turn, the District must establish a judicial procedure to deal with discipline, adjudication and appeals.<sup>31</sup> Presbyterian churches have three tiers: Kirk Session (to adjudicate on disciplinary charges against members); Presbytery (with authority over ministers and elders and appeals in cases of lay members); and General Assembly (which may adjudicate through a Judicial Commission), the decisions of which are ‘final and binding’.<sup>32</sup> In the Methodist Church in Ireland, members are under the disciplinary authority of the Church Council. Cases about local preachers are heard by the Circuit Executive (the District Superintendent presides), with appeal to the District Disciplinary Committee (with seven members from the District), and further appeal to the Conference which must appoint a committee to hear the appeal – the President of the Methodist Conference presides at the committee, and only the Conference Ministerial Session may make the final decision on ‘Discipline and Expulsion of Ministers’.<sup>33</sup>

There seems to be far greater convergence between the secular law on criminal courts, their establishment, composition and jurisdiction, and the penal laws of churches than as to the purposes of penal law and classification and definition of penal offences. Secular criminal courts exercise a coercive jurisdiction over citizens - church courts and tribunals have a coercive jurisdiction over the faithful in disciplinary matters to the extent that members of a church voluntarily submit to its disciplinary norms. Like the State and its criminal courts - as summed up in the principles of Christian law: A church may have a system of courts, tribunals or other such bodies to provide for the enforcement of discipline and the formal and judicial resolution of ecclesial disputes. Such bodies may exist at international, national, regional and/or local level to the extent permitted by the relevant law. Their establishment, composition

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<sup>30</sup> See e.g. Scottish Episcopal Church: Canons 52 and 54; Church of Ireland: Constitution, VIII.5-6; Church of England: Ecclesiastical Jurisdiction Measure 1963 and Clergy Discipline Measure 2008.

<sup>31</sup> Lutheran Church of Australia: Constitution, Art. X.1-3.

<sup>32</sup> Presbyterian Church in Ireland: Code, pars. 34-44: Kirk Session; Presbyterian Church of Wales: Handbook of Order and Rules, 2.5.1: Presbytery; Presbyterian Church in Ireland: Code, pars. 104-109: General Assembly.

<sup>33</sup> Methodist Church in Ireland: Regulations, Discipline and Government, 5, 6.4, 10.0.1.

and jurisdiction are determined by the law applicable to them. Church courts and tribunals are established by competent authority, administered by qualified personnel, and may be tiered as to their original and appellate jurisdiction. They exercise such authority over the laity and ordained ministers as is conferred on them by law (Principles V. 3.1-5).

## DUE PROCESS IN PENAL CASES

For the secular world, in the determination of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment must be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security. Everyone charged with a criminal offence must be presumed innocent until proven guilty according to law. Such people have the right, for example, to be informed promptly of the nature and cause of the accusation, adequate time and facilities to prepare their defence, to defend themselves in person or through legal assistance, to examine witnesses against them and to the attendance of their own witnesses.<sup>34</sup> These principles are also found, to varying extents, in church laws – and many expressly invoke the processes set out in Matthew 18.<sup>35</sup>

In Roman Catholic canon law, trial is a last resort: disputants must settle amicably, promptly, and equitably out of court – the Episcopal Conference is encouraged to establish permanent offices in every diocese to resolve disputes without going to trial.<sup>36</sup> The object of a trial is to prosecute or vindicate the rights of physical or juridical persons, declare juridical facts, and pronounce penalties; judicial power must be exercised lawfully. Anyone (whether baptised or not) may bring an action. The faithful have access to the tribunals to vindicate or defend their rights and there is an action to defend every right. Provision is made for oral hearings but proceedings are generally in writing; cases must be concluded within a year.<sup>37</sup> There are special norms on penal cases.<sup>38</sup> The ordinary (e.g. bishop) initiates penal processes when all other pastoral means have failed – the accused must be given the opportunity to be heard and be

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<sup>34</sup> ECHR, Art. 6, which is incorporated into UK law by means of the Human Rights Act 1998.

<sup>35</sup> See N. Doe, *Christian Law* (2013) 171.

<sup>36</sup> CIC, c. 1446: mediation or arbitration; cc. 1717-1720; c. 1733: the Episcopal Conference.

<sup>37</sup> CIC, cc. 135, 221, 1400; c. 1476: right to an action; c. 1453: delays; c. 1455: confidentiality; c. 1456-1457: impartiality; cc. 1458-1475: hearing; cc. 1465-1467: time limits; cc. 1468-1469: place; cc. 1491-1500: actions.

<sup>38</sup> CIC, cc. 1717-1719: investigation; cc. 1720-1728: process; cc. 1729-1731: compensation for harm.

given canonical counsel; if a violation is established, but the person is truly sorry for the offence and promises to make amends, there is no penalty.<sup>39</sup> Anglicanism is not dissimilar.<sup>40</sup>

Among Protestant churches, for process against ministers, the Lutheran Church in Great Britain, for instance, has three stages. First, informal settlement: the bishop (with others) determines whether a pastor's performance, behaviour, practices or beliefs are of sufficient concern as to merit discussion with the pastor; an informal meeting with the pastor follows. If concerns remain an action plan may be instituted to resolve the issue. If unsuccessful, the bishop recommends to the Council withdrawal of the pastor's authority to minister and an interim suspension may be imposed pending investigation by the bishop: reasons must be given. Secondly, there is an investigation. Thirdly, if formal discipline is decided upon there is a hearing before a panel of Council members chosen by the bishop - the pastor is given notice and a right to a hearing (which may be in private). If the bishop and Council decide to withdraw the pastor's authority to minister, there is a right of appeal to a Board of Appeal appointed by Council.<sup>41</sup> Similarly, in the Presbyterian Church in America, if pastoral measures fail, an investigation follows, and, if this results in 'a strong presumption of guilt', there is a trial – of ministers by the Presbytery and of laity by the Session. An appeal lies to the General Assembly a judicial commission of which deals with the matter – it must deliver a summary of the facts, a statement of the issues, and a judgment which affirms/reverses the decision or orders re-trial - this must include the reasoning upon which the decision is based. At trial, the accuser is always the church and the court may appoint a committee to converse privately with the offender to establish guilt before instituting full process by means of an indictment. At trial, the accused may be represented by a communing church member, the moderator charges the court, the indictment is read, witnesses and the accused are examined, and parties must be heard; court members express their opinion and vote, and the verdict announced and recorded – it must be 'equitable' and promote 'the welfare of the church'.<sup>42</sup>

The Methodist Church in Great Britain is similar. A respondent should have an adequate opportunity to respond to the complaint, to meet any charge and deal with the evidence, be treated fairly by the complaints team, and receive 'a fair hearing from any church court which

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<sup>39</sup> CIC, cc. 1341-1349, 1717-1732.

<sup>40</sup> PCLCCAC, Principle 24: due judicial process.

<sup>41</sup> Rules and Regulations, Disciplinary Procedure for Pastors of the Church.

<sup>42</sup> Book of Church Order, 15, 31-42.

is to decide whether any charge is established'. Provision exists for Local Complaints Officers and Support Groups, District Reconciliation Groups, Connexional Complaints Panels and Advocates, and for interim suspension. If at district level a reconciliation fails, the complaint is investigated at connexional level; if a case exists a charge is issued for a hearing by the Connexional Discipline Committee which may find that the charge is established on the balance of probabilities, and a penalty is imposed. There is an appeal to the Connexional Appeal Committee and further appeal to Conference (Ministerial Session).<sup>43</sup>

There are direct parallels between the procedural standards of the secular criminal process and those applicable to ecclesial penal processes. The latter are summed up in the principles of Christian law. Every effort must be made by the faithful to settle their disputes amicably, lawfully, justly and equitably, without recourse in the first instance to church courts/tribunals. Formal process is mandatory if church law or civil law require it. Judicial process may be composed of informal resolution, investigation, a hearing, and/or such other elements as may be prescribed by law including an appeal. Christians must be judged in church according to law applied with equity, and disciplinary procedures must secure fair, impartial and due process. The parties, particularly the accused, have the right to notice, to be heard, to question evidence, to an unbiased hearing, and, where appropriate, to an appeal (Principles V.4.1-5).

## PENAL SANCTIONS

In secular criminal law, there shall be no punishment without law: no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor may a heavier penalty be imposed than the one that was applicable at the time the offence was committed – unless it was contrary to the general principles of law recognised by civilised nations.<sup>44</sup> *Mutatis mutandis*, there are obvious juristic equivalents in the laws of churches studied here.

Ecclesial sanctions are medicinal. Roman Catholic penalties are designed to repair scandal, to restore justice and to reform the offender; however, if a violation of the law is established, a person truly sorry for the offence who seriously promises to make amends, cannot be penalised.

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<sup>43</sup> Constitutional Practice and Discipline, Standing Order 1100-1155.

<sup>44</sup> ECHR, Art. 6, which is incorporated into UK law by means of the Human Rights Act 1998.

Penalties may be imposed by a formal sentence (*ferendae sententiae*) or they may be incurred automatically (*latae sententiae*). They include: penal remedies (used to prevent future violations, such as admonition and rebuke); penances (such as a retreat, alms or fast); expiatory penalties which may be permanent or for a determinate period (to make satisfaction, such as deprivation of office); and medicinal penalties or censures (such as excommunication); provision also exists for the cessation of penalties. Different penalties apply to different offences, e.g. apostasy, heresy and schism attract *latae sententiae* excommunication; participation in prohibited rites attracts a ‘just penalty’; simony attracts suspension; and clerics engaging in unlawful trading are ‘punished according to the gravity of the offence’.<sup>45</sup> Orthodox sanctions are similar; and in Anglican law penalties imposed following judicial proceedings are to be clearly set out in written law - and: ‘Customary censures include deposition, deprivation, suspension, inhibition, admonition and rebuke’.<sup>46</sup>

Protestant juridical instruments provide a similar wide range of sanctions. For example, in the Lutheran Church in Australia, a complainant may issue a ‘personal admonition’ when alleging ‘fault against a member’, or (if this fails) the congregation may admonish that member; if the member remains impenitent the pastor may pronounce excommunication; and if the errant member fails to submit to this the congregation may declare such person to be no longer a member (Constitution, Art. X.1: e.g. for departure from the confession and leading an ungodly life). Similarly in the Evangelical Lutheran Church in Southern Africa, if ‘a brotherly consultation’ with the minister fails, the church committee may require the person to render an account and if this is unsatisfactory the congregation may deny ‘some or all church rights’, such as deprivation of admission to office, rights to vote, or church burial, postponing the baptism of children, and denial of the Lord’s Supper (Guidelines, 5). As to pastors, in the Evangelical Lutheran Church in America, as well as suspension pending a formal investigation or disciplinary hearing, the bishop may impose private censure and admonition, or suspension from office, and ultimately removal from the ordained ministry.<sup>47</sup>

Equivalent arrangements are found in Presbyterian churches. In the United Free Church of Scotland: ‘censures are not in the nature of penance or satisfaction...[nor] punishments or the

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<sup>45</sup> CIC, cc. 1341-1349, 1717-1732: sanctions; c. 1314: automatic excommunication (e.g. for procuring an abortion); cc. 1331-1398: types of penalties; cc. 1364, 1365, 1380 and 1392: penalties for specific offences.

<sup>46</sup> P. Rodopoulos, *Orthodox Canon Law* (2007) 176-178; and PCLCCAC, Principle 24.9, 11 and 15.

<sup>47</sup> Constitution, Ch. 20.

exercise of retributive justice’ but are ‘the means of grace used for the recovery of the erring from sin and peril, for the protection of Christ’s people from occasions of stumbling, and for the edification of the Church’ – and the church should seek to manifest ‘a forgiving spirit in its own community’; moreover, sins or offences not publicly known may be addressed by private admonition, counsel and reproof, and the public censures are admonition, rebuke, suspension, deposition from office, and excommunication – similarly, the Presbyterian Church in America also provides a detailed list of censures with definitions of each of them.<sup>48</sup>

Needless to say, these penal sanctions are very different from those in secular criminal law with its fines and imprisonment. Ecclesial approaches are summed up in the principles of Christian law. A church has a right to impose spiritual and other lawful censures, penalties and sanctions on the faithful provided a breach of ecclesiastical discipline has been established. Sanctions should be lawful and just. They may include admonition, rebuke, removal from office and excommunication. They may be applied to the laity, clergy and office-holders to the extent provided by law. Their effect is withdrawal from some benefits of ecclesial life. Sanctions are remedial or medicinal. A church may enable the removal of sanctions (Principles V.5.3-5). The principles do not deal with the role of forgiveness.<sup>49</sup>

In English common law, the civil process of judicial review is not available to challenge disciplinary process within those churches which have the civil status of voluntary religious associations: they do not perform public functions and are not entangled in the fabric of the State. However, it may be possible that judicial review is available to challenge decisions of the disciplinary tribunals of the established Church of England in so far as they are creatures of statute. Nevertheless, it has not been tested in civil courts whether the disciplinary norms of a church which is a voluntary association may be enforced or challenged on the basis that the internal norms of such associations have been classified by secular courts as the terms of a contract entered into by the members (the doctrine of consensual compact) – yet, the failure of a church to comply with its disciplinary norms in relation to ministers of religion may be the

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<sup>48</sup> United Free Church of Scotland: Manual of Practice and Procedure, V.II: censures generally; VI: private reproof etc; Presbyterian Church in America: Book of Church Order, 30.1-5; 36: infliction of censures; 37.

<sup>49</sup> See N. Doe, ‘A facilitative canon law: the problem of sanctions and forgiveness’, in N. Doe, ed., *Essays in Canon Law: A Study of the Law of the Church in Wales* (University of Wales Press, Cardiff, 1992) 69 at 80-87.

subject of challenge in the civil courts provided that the minister of religion has a contract of employment with the minister in question – this matter is much-debated at the moment.<sup>50</sup>

### Conclusion

There is profound juridical unity between the Christian traditions studied here with regard to ecclesial discipline and penal law. It is in the study of these, and principles of Christian law induced from them, that we are able to compare the spiritual and temporal jurisdictions in terms of their respective treatments of sin and crime. First, all the Christian traditions accept and justify theologically the need and the right of churches to enforce discipline among the faithful – its purpose is to glorify God, to protect the integrity of the church, to safeguard the vulnerable from harm, and to promote the spiritual benefit of its members through just structures. The purposes of secular criminal law are based on similar concepts of order and protection from harm – but unlike spiritual jurisdictions, these protect social cohesion and human dignity. Secondly, penal offences are employed in all the historic churches, but generally offences are expressed with a higher degree of generality than those in secular criminal law, defences are not generally spelt out, and the dominant object of protection is persons and the integrity of the church, not its property, unlike in secular criminal law. Thirdly, all the Christian traditions have a hierarchical system of courts/tribunals to enforce their penal laws: there are norms on the establishment, composition and jurisdiction of these, as is the case in secular law. Fourthly, both secular law and church law provide for standards of due process with norms on formal investigation, an impartial hearing, and rights to notice, to be heard, to question evidence and to silence. There is an obvious need for empirical research into how church penal norms work in practice, and whether retribution, desert, forgiveness, and proportionality are features of the administration and enforcement of church penal law in particular cases determined within churches. In sum, the theological category of ‘sin’ as violation of divine law is wider than ‘crime’ in secular law and it rarely appears in church law lists of penal offences. However, on balance, ecclesial offences and secular crimes share much - but differ somewhat as to the ends they each serve. Finally, church laws provide for disciplinary sanctions, censures or penalties which include withdrawal from spiritual benefits for the remedial or medicinal purpose of the

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<sup>50</sup> M. Hill, R. Sandberg and N. Doe, *Religion and Law in the United Kingdom* (Second edition, Walter Kluwer, Netherlands, 2014) 29-39, 76-80, 117-126. Religious freedom is the civil basis of a church right to discipline; in the UK, the importance of this right is recognised by (the little cited) section 13 of the Human Rights Act 1998.

reform of the offender and the welfare of the church. Secular criminal law is very different with its fines and imprisonment.

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