



Divine Darkness and Legal Darkness: Apophasis, Cataphasis and the Making of Legal Cultures of the First Millennium

Simlen Markov¹ · Rebecca White² · Peter Petkoff³

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Abstract

The article explores the long lost synthesis between apophatic and cataphatic theological strategies and early legal systematizations which shaped the Christian, Jewish and Islamic legal collections in the twelfth century. It argues that the theological possibilities to achieve Divine knowledge have reached out to all normative forms of human existence including law. It focuses specifically on a Christian context where imagining the law involves complex scales of cataphasis and apophasis and parallels other normative forms such as ritual and ascetic practices. The text only hints that parallel trends appear via very different routes but in a very similar ways in the Jewish and the Islamic legal projects and proposes that a comparative interreligious study of the twelfth century legal collections and their hermeneutic strategies is long overdue and critically important.

Keywords Apophatic · Cataphatic · Canon law · Hesychasm · Vagueness of law

The birth of systematic legal thinking in the twelfth century is marked by parallel trends in some of the most important efforts to translate the legal cultures of Judaism, Christianity and Islam formed by the end of the first millennium. Beyond religious and denominational divides, the three major monotheistic traditions shaped their emerging intellectual legal strategies in parallel with major theological trends and married concepts of law with existing patterns deployed in the quest

✉ Peter Petkoff
peter.petkoff@brunel.ac.uk

Simlen Markov
smilenmarkov@gmail.com

Rebecca White
rebecca.white@regents.ox.ac.uk

¹ University of Veliko, Tirnovo, Bulgaria

² Regent's Park College, Oxford, England

³ Regent's Park College, Oxford, Brunel University, London, England

for divine knowledge. While developing legal systematization along parallel theological streams the three traditions made legal vagueness and darkness central to the articulation of their legal cultures, as important as the combination and interplay of apophatic and cataphatic strategies were for constructing their theologies of Divine knowledge. The present text will focus primarily on the deployment of those strategies in some of the Christian collections of the twelfth century and will draw only occasional and discrete parallels with Maimonides and Averroes.

Russell's take on Heidegger's nothingness in a way represents the sceptical distance which modern philosophy has acquired in relation to negative metaphysics:

Martin Heidegger's philosophy is extremely obscure and highly eccentric in its terminology. One cannot help suspecting that language is here running riot. An interesting point in his speculations is the insistence that nothingness is something positive. As with much else in Existentialism, this is a psychological observation made to pass for logic.¹

Apart from an ideological and conceptual departure from the continental tradition Russell's remark demarcates the disconnect from philosophical strategies which deploy what we would describe in this paper as a combination of apophatic and cataphatic turns in philosophical, theological and legal discourses. Among other things this paper will argue that the 'dark side' of the law, approached in Pseudo-Dionysian terms, represents a quality rather than a deficiency of the law and that reclaiming such strategies may reset the legal discourses in areas they currently appear to be rather stuck.

Law and legal rules operate within a complex balance between clarity, certainty and ambiguity. And as in philosophy and theology the distance between the opposing visions, of the negative and the positive, is intended and plays a very important part in the crafting of noetic strategies in the pursuit of justice. In order to understand better the dark side of the law in terms of an illuminated liminality, we need to understand its relationship with parallel and overlapping theological strategies, which legitimise the possibility of any theological discourse, and, through such justification, of any legal discourse. In a period of consolidation of Christian philosophy the two disciplines are not properly emancipated until the end of the medieval period of grand theological projects and experiments. Looking into the inter-dependence and tensions between positive and negative and between darkness and light in this sense bridges the gaps between theology and law and displays the inseparable and fluid overlap between different intellectual tools as far as their purpose is concerned in one domain. It is a tension in which the act of judgement may be considered as clear in a proper sense, whereas concepts such as legal certainty, vagueness, darkness, light, clarity or the absence of clarity, are signs that act as guides on the path towards the act of justice. In this respect it parallels theological and classical metaphysical strategies deployed towards achieving divine knowledge. By understanding what something IS by understanding in the first place what this something IS NOT allows space for our legal intuitions and imaginations which we often otherwise shy away from in the failed attempt to assert the often defeatist position that law is an

¹ [1, p. 303].

evolutionary process of assent from vagueness and arbitrariness towards rationality, legal certainty and a perfect taxis in which we may have a button for rationally resolving every possible legal dispute. Increasingly legal philosophers of the analytical tradition, spearheaded by HLA Hart's works² and his philosophically diverse students, like R Dworkin,³ J, Raz⁴ and J Finnis⁵ and, more recently, by T Endicott, building on L Wittgenstein's philosophy of language,⁶ have reminded us that in law, as much as in other fields, words represent a family of meanings and that legal language is inherently vague and is not and has never meant to be clear or certainly was not intended to develop concepts and technical terms which should not be subject to further interpretation. The very fact that the Oxford school of jurisprudence shaped by HLA Hart blossomed with the contributions of three of his students which represent three distinct and original versions of legal positivism and its engagement with language and meaning only emphasises our original point. At the centre of such a proposal, legal certainty begins to resemble a lot more finding one's way in the darkness of rules, concepts and the interdependence between rules and concepts, to reach a clarity of vision in the act of justice. In this process the combination of darkness and light, assent and dissent are the natural ground of a legal thinker as much as they are the natural ground of philosophers and theologians.

In thinking of the dark side of the law we have departed from the reference points given by more modern classics such as 'Star Wars' and have chosen to revisit the notion of 'enlightening darkness' to be found in classical philosophical and theological texts, such as Dionysius the Pseudo-Areopagite, Maximus the Confessor, Photius, Gregory Palamas, in the East, and Maimonides, Averroes, Augustine, Aquinas in the West. Our interest is driven by the need to recapture the dynamism, relationship and fluidity of these intellectual strategies when engaging with topics of investigation which demand certain, but not simple answers. Reclaiming those strategies within what we today consider more than ever before to be part of 'the domain of the Law' will also confront certain pre-established perceptions about what it is and what it is not.

1 The Making of Legal Cultures in the Twelfth Century – Apophasis and Cataphasis in Imagining the Law

Perhaps we will never be able to find a certain, reasonable answer why and how there was a certain explosion of interest in capturing the law of the previous millennium around about the same time in different contexts, started independently by the work of Gratian in twelfth-century Bologna, Theodore Balsamon in Constantinople, Averroes and Maimonides, Mxit'ar Goš⁷ in Armenia and a century later by Bar

² [2]

³ [3, 4, 5, 6]

⁴ [7, 8, 9, 10, 11, 12, 13]

⁵ [14]

⁶ [15, 16, 17]

⁷ [18]

Hebraeus and Abshido of the Syriac Christian tradition (to name just a few). These projects were very different, but they shaped profoundly the legal thinking of their communities and the texts generated still remain authoritative legal texts for their particular communities. To map fully the complexities of these projects and the different methodological approaches deployed in order to accomplish them is a project long overdue. For the purposes of the present text we will focus on several aspects that these collections have in common in the way they approach ‘the dark side’ of the law, that is the domain of Darkness which make concepts of law transcend their conventional normative domains and relates legal enquiry with the parallel pursuit of Divine knowledge in other theological disciplines.

A comparative reading of the legal projects of Averroes, Maimonides, Gratian and Balsamon will reveal a shared base, that is that in order to determine what law is, it is important to establish, but not necessarily exclude from the picture, what law is not. This is a process which goes beyond sorting out legal contradictions and laws which are in force and which are obsolete or at least dormant. The individual projects dwell on the difference between *nomos* and canon, Divine law, natural law and human law, written law and custom, written law and spoken law. The process of organising texts is also a process of imagining law and legitimising it. This legitimisation reflects patterns established by theology in so far as it sets out to discover how law resolves similar challenges – how law, like theology, can accomplish in a meaningful way a process which approximates to divine knowledge. Different analogies are used for such ascent and descent, especially the mountain and the ladder. In this process the legal ladder is shaped by parallel ascent and descent as much as theology is comprehensively shaped by the ladder of cataphatic and apophatic strategies of divine ascent in Judaism, Christianity and Islam. A critical comparative study of these parallel strategies is of the utmost importance because it will create opportunities to study the formation of legal cultures in the three monotheistic traditions and at the same time examine parallel trends with theology and answer more fundamental questions about the fluid and dynamic relationship between law and theology, questions often overlooked or ignoring the complexities of interdependence between law and theology. For the purposes of the present study we will focus on the intertwining patterns between law and spirituality especially in a Christian context and suggest ways in which overarching themes resonate in some aspects of Jewish and Islamic legal harmonizations in the twelfth century.

2 Law and the Sense of Wonder

On one level there is a very strong perception of the law as a sense of wonder, as a transformative moment experienced through a Dark Cloud. The Biblical narratives of Moses receiving the Law on Sinai and the event of the Transfiguration of Jesus on Mount Tabor appearing between Moses and Elijah both involve ascent of and descent from the mountain. Both events represent visually and as a narrative two noetic strategies which have dominated philosophy and theology. The first, the cataphatic approach to Divine knowledge, thrives on positive signs and it is by ascent through the steps of the positive signs that we are brought closer to the object of our

enquiry. The second, the negative way approaches through unknowing. Neither of the two strategies will take us to the object of our noetic pursuit, but the dynamic interdependence between the two might. In the Christian East these intellectual strategies are firmly grounded in the tradition of Pseudo-Dionysius and connect an intellectual trajectory of praxis and contemplation, of ascent and descent, towards knowledge of God from Evagrius through Maximus the Confessor to Gregory Palamas with parallel currents in the legal projects from Justinian through to Photius and Theodore Balsamon which strive not at defining what something is, but at experiencing the sense of wonder that occurs when we leave behind our constructs of God and are transformed by participation in divine being, a movement on this model not only from ignorance and darkness to knowledge and light, but to the possibility of transformation in an experience of dazzling darkness. In this context Law is not perceived as a separate world but is deployed to pursue very specific agendas which lead towards human perfection.

There are different contexts and different levels of application of apophatic and cataphatic, but a starting point is the use of negation (apophasis) and affirmation (cataphasis) in our ways of talking about God. The pair do not correspond in a narrow way to ascent and descent and Dionysius shows this by matching them with the parallel pair of procession and return, apophatic theology corresponding to return and cataphatic theology to procession.⁸ Dionysius also emphasizes, as Proclus does, that negations applied to God do not mean that God lacks some quality or another, but that he transcends it. The further we descend with cataphatic theology, following the way of procession, the more verbose our explanations become, whereas when we trace the way of return, the way of apophatic theology, “the more we take light upward, the more our words are confined to the ideas we are capable of forming; so that now as we plunge into that darkness which is beyond intellect, we shall find ourselves not simply running short of words but actually speechless and unknowing.”⁹

Dionysius grounds the nature of apophatic and cataphatic theology as a noetic strategy in the Divine Names:

God is therefore known in all things and as distinct from all things. He is known through knowledge and through unknowing. Of him there is conception, reason, understanding, touch, perception, opinion, imagination, name, and many other things. On the other hand he cannot be understood, words cannot contain him, and no name can lay hold of him. He is not one of the things that are and he cannot be known in any of them. He is all things in all things and he is no thing among things. He is known to all things from all things and he is known to no one from anything... This is the sort of language we must use about God, for he is praised from all things according to their proportion to him as their Cause. But again, the most divine knowledge of God, that which comes through unknowing, is achieved in a union far beyond mind, when mind turns away from all things, even from itself, and when it is made one with

⁸ [19], p. 137ff].

⁹ Pseudo-Dionysius, *The Mystical Theology*, in [20], ch. 3, p. 139].

the dazzling rays, being then and there enlightened by the inscrutable depth of Wisdom.¹⁰

According to Louth this expresses very clearly two aspects of Dionysius's theology: the complementarity of apophatic and cataphatic theology and the more fundamental truth expressed by the way of negation. In virtue of this, any attribute applied to God must be denied of him: he does not belong to the realm from which our concepts and images are derived.

The denial and affirmation of images and concepts of God are equally radical: all are affirmed, all are denied. It follows that conceptual images are not privileged.¹¹ The experience of God as light, of which the Transfiguration of Christ on Mount Tabor is a preeminent type, is thus an experience that can be understood as combining the cataphatic and apophatic, both revealing and withdrawing beyond comprehension – or revealing precisely as unknowable mystery, as Dionysius himself interprets the Incarnation. The experience of light borders on – or rather clearly transgresses – the paradoxical, as in the widespread imagery and experience of a “dazzling darkness.”¹²

Relating law to the rich tradition of apophatic and cataphatic theology helps to ground its early intellectual strategies, which see forms, which we may identify as legal today, closely linked with liturgy, spirituality and memory, as conventions which through repetitive pattern, legal and non-legal, affirm the shape of a community of faith; they are also powerful gateways towards individual spiritual perfection, drawing on the full arsenal of law, dogmatic theology, mysticism, liturgical forms and sacred art in a unity between dogma and spirituality, between the normative and the trans-normative. In order for law to work it has to be compliant with the appropriate theological forms. And in turn, if we are to make mystical patterns of human transformation work, there is a complex range of ascetic tools which are to be used which on the one hand have normative rigour and on the other hand deny it. This rich arsenal which defines at different levels a human community also displays a rich diversity of means to fulfilment. And again these different paths are paved by constantly shifting strategies of clarity and darkness, spoken and unspoken, strict and liberating patterns of expression, application of rules and ascetic praxis. In this respect the normative Christian community is not elitist, there are different paths.

The Dionysian tradition of divine darkness speaks volumes to the current topic of the dark side of the law presenting several trajectories for deepening understanding rather than dark areas we would need to remove or transform. In Christian theology shaped by Dionysius's strategies darkness and light form a part of a litugico-biblical emphasis: God transcends our affirmations, but also our negations. On this paradigm darkness is rather the unapproachable light.

For Maximus the Confessor, who represents an important continuation of Dionysius, the *via negativa* is not so much an intellectual theory as a necessary experience,

¹⁰ Pseudo-Dionysius, *The Divine Names*, in [20], ch, pp. 108–9, n. 3].

¹¹ [19], p. 141].

¹² [19], p. 146].

indeed, the characteristic expression of the Christian life.¹³ Denial and affirmation are antithetical yet complementary registers, not a movement between different kinds of logic, but the movement of God towards his creation and in turn creaturely apprehension of Him. God reveals himself by the removal of every illusion of what he is not. Maximus refers to the 'double' character of divine revelation and human apprehension which is demonstrated most concretely and paradigmatically in the transfiguration of Christ, whose garments both conceal and reveal. In Christian theology hidden and revealed is a permanent existential tension which shapes the nature of the human person and intellectual strategies can be seen as perfectly appropriate but external forms of intellectual life. Applied to law, and in a holistic sense including law as ritual, prayer, ascetic life, any normative forms shape the process of perfection and calibration of the human person.

3 Apophatic and Cataphatic and the Mystery of the Cross

Hidden and revealed and darkness and light as creative intellectual strategies in law are not seen as a mannerism which imitates theological and philosophical strategies.¹⁴ Quite the opposite, these strategies are seen as formational for the human person as a whole. Intellectual rigour in this process is as formational as the ascetic intellectual rigour. In the fourteenth century Gregory Palamas highlighted that hidden and revealed, negative and affirmative, ambiguous and clear are strategies deployed in ascetic techniques for unlocking the intellect but they also bear relevance to all other aspects of speculative thought.

Palamas is particularly known for his theology of divine light experienced by hesychast monks in prayer and in his defence of their practice of prayer. He relates the cataphatic and apophatic not only to the intellect but to our very bodily existence and shows how the incarnation and in particular Christ's death on the cross is constitutive for human being, thus adding another layer to our theme of the dark side of the law. Arguing theologically in support of certain bodily methods in a form of prayer that aims at *hesychia*, that is inner stillness, he explains that after the fall our inner being naturally adapts itself to outward forms.¹⁵ Bodily posture helps the intellect to reverse this tendency and by 'the return to itself' in prayer it recovers its natural state, in the positive sense of rightly ordered, in its concentration on the divine. The intellect in its usual state is constantly in motion and the aim of hesychast prayer is unified concentration of body and soul through the intellect in a single direction. This concentration is not on some object but the attention of the whole human being on the person of Jesus Christ. Palamas follows the theory of Dionysius

¹³ See Maximus' double knowledge of divine things in [21, 60.3-76].

¹⁴ In fact the reality of the Incarnation, of the Word taking a body, is only truly known in the light of Christ crucified and exalted according to Behr: 'it is only as the crucified and exalted one that we know the Word of God to have taken a body, and that the life now demanded of us in the body, appropriate to its union with the mind, is that of taking up the cross.' [22, p. 157].

¹⁵ [23, Triads 1.2.8 p. 346] The critical edition of Gregory Palamas with the Greek text is published in [24]

the Areopagite that the most appropriate movement of the intellect is not linear, not a straight forward upward movement, an escape of the intellect from the body, but circular and inward, involving the body and connected to the presence of Christ in matter, penetrating all structurally organised matter with his energy and power. The outward posture, although not necessary, reflects an inward attitude of prayer.¹⁶ This relationship of hesychast prayer to the cross is also dramatically illustrated by John Climacus, the author of a spiritual manual commonly known as the Ladder of Divine Ascent, which was an important monastic source in the fourteenth century: ‘Fix your intellect like an anvil to your soul as to the wood of the cross, with blow upon blow of the hammers.’¹⁷ The body’s use in prayer is not an end in itself and Palamas’ preoccupation is to demonstrate the difference between the body as ‘materialistic’ and the body as matter sanctified through the action of divine grace upon it: ‘For Just as those who cleave to the perishable pleasures of the senses expend all the soul’s desire in satisfying their fleshly proclivities and become so entirely materialistic that the Spirit of God cannot abide in them (cf. Gen. 6:3), so in the case of those who have elevated their intellect to God, and who through divine longing have attached their soul to him, the flesh is also transformed, is exalted with the soul, communes together with the soul in the divine, and itself likewise becomes the possession and dwelling-place of God, no longer harbouring any enmity towards Him or any desires that are contrary to the Spirit (cf. Gal. 5:17).’¹⁸

Palamas contextualises apophatic theology in a life of prayer and the vision of divine light to which it tends is not seen by him as a process of negation understood as a linear spiritualisation but as an inward movement rooted in a theology of the cross which involves transfiguration of the whole person, soul and body. Interpreting Old Testament theophanies from this perspective, he announces the new possibilities for the human being wrought by Christ and now made manifest in the vision in God of the cross.¹⁹ Palamas develops the theme of the cross before the cross,²⁰ pre-figurations of the mystery of the cross now to be understood as revealing the glory of Christ: ‘The cross of Christ was mysteriously proclaimed in advance and foreshadowed from generations of old and no one was ever reconciled with God except

¹⁶ The crouching position practiced by some hesychast monks and referred to by Palamas is not to be considered as an exclusive way of praying to God.

¹⁷ It should be nailed to the cross, on which Christ was nailed Ladder [25, 4.31 (700B-1B)]. Cf. also [25, 31.11 (977CD), 26, iii, 2 (1084CD)]. Other e.g.s [25, 5. (765B) and 4.88 (13D); 5.5 (B) and [23] 4.88 (13D)]. ‘Hold your arms motionless in the form of a cross’ [25, 15.76 (900C) cf. also 25.54 (1000D-1A) and 28.25 (133B)].

¹⁸ [23, Triads 1.2.9 p. 348].

¹⁹ [22, 21-44, p. 35], see in particular his chapter ‘Through the Cross’ 21-44 in which he argues that the source of all theology for the early church was Christ crucified and exalted on the cross. All scripture to be viewed in the light of the what was achieved on the cross, not from the perspective of the historical event of the passion alone, but from the perspective of what was achieved by Christ in the trampling of death by death on the cross: the manifestation of divine power, in weakness, (in the flesh, in darkness, in death) is simultaneously a transformation. ‘Christ, the form of a servant, shows us the image of God; darkness and death become light and life; and the flesh assumed by the Word, becomes flesh of the Word-and becomes Word. ... The Passion remains as the locus for contemplating the transforming power of God, the “God revealed through the Cross.” (p. 35).

²⁰ [26, Homily 11, 9, p.77].

by the power of the cross.²¹ He speaks of two mysteries of the cross and implies two levels. Referring to Moses' vision in the burning bush he writes: 'The vision in God of the cross is a mystery greater than that earlier mystery.'²²

The transfiguration of Christ therefore becomes meaningful in the light of the redemptive work of Christ on the cross and points forward to his death and resurrection and the greater manifestation of his glory in the age to come. This connection between the cross and transfiguration shows how Tabor and Golgotha constitute a single event as demonstrated in the striking language of the fourth century Macarian Homilies: 'The Lord shows himself to the soul in two aspects (*prosopois*) with his wounds and in the glory of his light. The soul contemplates the sufferings which he suffered for it; but it also contemplates the dazzling glory of his divine light and is transfigured from glory to glory in this same image, according to [the action of] the Spirit of the Lord, and grows in both aspects in that of the sufferings and in that of glorious light ...'.²³

The cataphatic and apophatic interplay is embodied and enriched by this interplay of death and resurrection, cross and glory. By imitation of Christ the experience of death and resurrection must be played out dramatically in the life of every Christian so that the human being, as an image of God might grow more like Christ, the archetypal image revealed at the transfiguration. It constitutes both an internalization of the Transfiguration glory and its externalization in the materiality of the body. The double aspect of the cross, both negative and positive, is explored within the notion of two mysteries of the cross. Palamas explains in an extended commentary on the biblical text: 'The world is crucified unto me and I to the world' (Gal. 6:14) that the first mystery of the cross is renunciation of the world.²⁴ This idea of the cross as renunciation exists on two levels, firstly on the external level, as flight from the world and ascetic training of the body, and secondly, on the internal level, as renunciation of the passions.²⁵ He goes beyond the negative definition of the cross as withdrawal from the world and includes the positive aspect of contemplation *theoria* and elaborates its effects.²⁶ This is the cross as the positive acquisition of virtues and the vision of God. The greater mystery of the cross is identified as the vision of God 'through which a person is more perfectly crucified to sin, dies to it and lives to virtue.'²⁷

Palamas' contributes in a particular way to the tradition of cataphatic and apophatic approaches to God, with the idea of the spiritual life involving different levels of the cross, which might be working simultaneously, for while the level

²¹ 'The cross existed in the time of our ancestors, even before it was accomplished ... Christ's cross was among our forefathers before it came into being, because its mystery was working in them'. [27, 11:1,3 pp. 74-5].

²² [27, 11:6 p. 76].

²³ [28, III 3..2].

²⁴ Renunciation or withdrawal from the world is a primary step in the search for *hesychia* or inner stillness, a theme of central importance in the context of fourteenth-century hesychasm.

²⁵ [27, Hom. 11:4 p. 75].

²⁶ [27, Hom. 11:7 p. 76].

²⁷ [27, Hom. 11:2 p. 74].

of contemplation and vision must be considered higher there is not necessarily a straightforward chronological movement one to the other.²⁸

The complex currents of Christian anthropology linked with the rich concept of deification and transformation of humanity draw an important link between mystical ascetic practices and the imagining of any other normative projects including imagining the law. Through the synthesis between Christian dogma and spirituality the legitimation of any normative landscape becomes possible, imaginable and legitimated as long as it facilitates the paths towards deification as a possibility open to humanity.

4 Theory and praxis between theology and law

The contrast of ascent and descent, of darkness and light, in which darkness is constitutive for light—death and undignified execution to divine glory and eternal life – is a dichotomy central to the self-fulfilment of the human being. Its existential and intellectual forms of self-understanding represent a continuity from Biblical law into the ascetic tradition of Christianity and resonate at every level of social and contemplative life and resonates also in some of the intellectual strategies of the great Aristotelian systematic Islamic and Jewish legal collections of Averroes and Maimonides in the twelfth century. In such a way the negative and positive strategies for knowing God in a rather complex way reflect every pattern of engagement with the outside world and its multiple normative frameworks. The memory of the Cross and the Divine light shape one's understanding of what it means to be a human person and then what it means to be a social creature and what may be considered the third level – the ultimate synthesis of the two. It is not incidental that law in Byzantium contains similar ascending and descending strategies. There is a concerted effort to collect and systematise laws which are in force, and those which are obsolete, with distinctions between civil law and ecclesiastical laws and monasteries' constitutions drafted almost like small countries' constitutions. This clarity and ambiguity on one level seem extremely confusing to the eyes of some contemporary perspectives on modern law concerned with legal certainty. And yet a number of modern legal scholars have renewed the discourse of the inherent vagueness of legal language. Translated in a Byzantine context the 'vagueness' or what we have chosen to describe here as the dark aspects of the law is not arbitrariness, normative blind spots, or *lacunae legis*. They are interdependent with the understanding of the human person who operates at a personal and social levels having as their reference points almost simultaneously the cross, the tomb, the resurrection and the second coming and this interdependence activates memory as well as real engagement with rules in real time. In the same ways ascetic life is conditioned by this existential and noetic ascent and descent, darkness and yet light, other normative forms such

²⁸ He also suggests a connection between this ascetic practice and liturgy, when in same work he refers to the 'word of the cross', the 'mystery of the cross', and finally the 'sign of the cross': the word of the cross precedes the mystery of the cross and the sign of the cross refers to the final veneration of the cross in the liturgy.

as liturgical life, organisation of texts, and legal texts in particular and speculative philosophy, theology and legal reasoning also follow those patterns.

It is critical to emphasise the interdependence between the above intellectual strategies and parallel currents deployed through the process of legal systematization in Byzantium which resonates in similar themes and approaches in the other great systematic collections in the twelfth century developed by Averroes, Maimonides and Gratian. While they sometimes start from a different doctrinal and theological base they do have in common their reliance on forms of *apophasis* and *cataphasis* in their process of imagining their legal cultures in the twelfth century.

Ambiguity and therefore fluidity between rules and their understanding, interpretation and application permeates the evolution of the legal tradition in the East and reflects a lot of the questions which we confront today in order to deal with legal blind spots – law and its enforcement, commitment to law and anti-nominalism, legal proceduralism and normative enthusiasm (represented by adherence to rules by way of belonging rather than by way of their capacity to be enforced on the ground), law which speaks and law which is to be found in a particular text which can then be enforced. These ambiguities in Byzantium are reflected in the complex process of collecting the volumes of obsolete law as carefully as the volumes of laws which are in force, creating opportunities to produce liminality between law and non-law and at the same time fluid and endless opportunities to move rules across the boundaries of these two textual domains.²⁹ This vibrant engagement with the text reflects the adherence to parallel intellectual strategies already deployed in theology and capturing the unique sense of wonder where two different realities meet and this meeting is a process which constantly renews itself. Reflecting on the dynamism of the decretal tradition S Kuttner declares his opposition to the revision of CIC1917 to reflect better the theological revolution of Vatican II by proposing an urgent process of de-codification and a return to the medieval decretals and a different sense of law with vagueness, an indeterministic one with ambiguities which embrace the complexity of human and religious life and deconstruct too rigid and oversimplified legal and social conventions. Kuttner's main criticism of CIC1917 was focused on the fact that in pursuit of legal clarity the Code has adopted the structure of the Justinianic legislation organised around the headings of Persons, Actions and Things.³⁰ This in his view has broken the fluidity of the decretal tradition and has limited the scope of looking at the canonical tradition through the ambiguous overlapping aspects which transgress between the different aspects of law. These dark aspects of the law, the

²⁹ Similar challenges and patterns emerge in Jewish and Islamic law in the collections of Averroes and Maimonides demarcating the tension between systematic principles and particular authorities, law in force and dormant law, Divine law, Scriptural and human law and religious law and civil law. Capturing similar tensions Bar Hebraeus attempted to capture the tension between ecclesiastical law and shariah in his Canon law Code which remains the authoritative legal source for the pre-Chalcedonian Syrian Orthodox church.

³⁰ Revisiting this fluidity Medieval canon law during the process of revision of the CIC (Codex Juris Canonici)1917 S Kuttner made a sharp statement, a caveat that a reform of canon law should return to the pre-codified corpus of canon law as an authentic source of 'theological jurisprudence, that the process of codification should undergo a 'de-codification.' See [29], pp. 13- 23]; [30].

move from persons to action or things, the overlap between them, is what makes the medieval collections so powerfully adaptable.

5 Law as a dark discordant

Gratian, the father of medieval canon law, proposed in his *Decretum* to reconcile unreconciled canons.³¹ He did not achieve this but proposed that what could be recognised as a normative tradition in the twelfth century speaks different languages, provides solutions differently and that there must be something dialectics could do to resolve such contradictions. In this respect *Decretum* is a teaser rather than a solution. Gratian's *causae*, whether we read the first or the second recension, emphasises further the multiple ways we can approach one case or interpret existing rules. Many passages in the commentaries end with a beginning. Rather than concluding, his reconciliation actually ends with *sed* or *autem*, or 'but, then' and starts an alternative take on the same subject. Setting the scene for the glossators, the most important canon law text of the Middle Ages only reminds us that while law becomes more visible in terms of technical sources and a clearer understanding of what is and what is not law by the production of *Liber Extra*, its dark side remains the most creative aspect for finding paths to reconcile noetic contradictions and deploy this reconciliation in specific cases. In the same way, medieval glossae expanded the range of these voices through commentaries and commentaries on commentaries, legal spats or even bouts in the margins.

Examining the diverse legal systematisation projects of the twelfth century reveals that the dark side of the law (in terms of *ambigua*) is a quality of the law rather than a shortcoming and we will argue that reclaiming some of the intellectual strategies developed by the apophatic and cataphatic theology of the first Millennium may help to do that, particularly in the area of culture wars and an unprecedented conservative challenge to human rights and liberal internationalism today. Such vagueness of the normative base may in fact be perceived as a genuine route to an act of judgment. Vagueness of law is in fact considered a central feature of law and preoccupies the work of some legal theorists from Anglo-American analytical jurisprudence. In exploring law and language Endicott proposes that:

Law is very commonly vague, so that the requirements of the law in particular cases are frequently indeterminate...vagueness and reluctant indeterminacies, are essential features of law. Although not all laws are vague, legal systems necessarily include vague laws. When the law is vague, the result is that people's legal rights and duties and powers are indeterminate in some (not in all) cases. That conclusion requires us to account for the resolution of unresolved disputes as an important and independent duty of judges – a duty that is itself an essential component of the ideal of the rule of law...We cannot say in general that even a very vague legal rule represents a deficit in the rule of law. But vagueness is a deficit when it enables authorities to exempt their actions from

³¹ [31, 32, 33, 34, 35, 36, 37]

the reasons of the law, or when it makes it impossible to conceive of the law as having any reason distinguishable from the will of the officials.³²

Connecting the imagining of law of the first Millennium towards the twelfth century across the interreligious and interdenominational divides with some of the more fascinating developments in the area of philosophy of law and language today helps us to reclaim some of the dynamics of legal discourse which seem to be missing in some of the key challenges to the rule of law posed by culture wars and the contestation of liberal internationalism. Reclaiming the philosophical tools in these early collections strongly inspired by the theological strategies of *apophasis* and *cataphasis* would invite a more dynamic engagement with legal concepts which we have begun to imagine as rather static reference points. We take for granted presuppositions such as state neutrality v state duties, *forum internum* and *forum externum*, rights and limitations, sovereignty v human rights, universality and subsidiarity, context and teleology of treaty interpretation and are reluctant to concede that the 'dark side' of the law or, to borrow Endicott's terminology, the vagueness of law is a powerful tool which enables us to capture better the dynamic tensions within those powerful dichotomies. What is regularly referred to as a blind spot is in fact a refusal to engage in a meaningful way with the inherent vagueness of legal rules.

This challenge that law speaks to us in a polyphony both in terms of a grammar of consent and the meaning of particular rules and terms which contain families of meanings connects the premises of legal positivism with tensions in understanding Christian, Jewish and Islamic law in the twelfth century. These tensions are also captured through the original intuitions of Biblical law wrestling with the search of meaning, sources and their legitimation through the deployment of a series of positive and negative intellectual strategies as an attempt to pierce the cloud of the indeterminable.

Fokkelman and Josipovici speak of the polyphony between God and humanity in Biblical law, that is neither monolithic nor uniform. "The enactments of God are purposefully embedded; they stand in fruitful interaction with the narrative mass ... and share their themes with it."³³ Biblical law, and in many ways canon law and Islamic law, shape concepts of normativity which relate law with parallel normative undercurrents of a wider intellectual tradition (literary texts, images, memory, landscape). One could argue that these different forms of normativity cannot be simply compartmentalised, read or interpreted selectively or in isolation. Lapsed laws are often as important, constitutive and relevant as the law which is in force. In some way normativity (or law in a wider sense) never lapses due to the complex relationships between multiple normative undercurrents which bind the community together in different ways and beyond the equivalent of a positive legal enactment. Josipovici reminds us that an authentic reading of the Bible and the normative strategies it represents would require reading what could be considered to be law books in the strict sense together with other parallel normative undercurrents:

³² [38, pp. 1–5].

³³ [J.P. Fokkelman, 'Exodus', in 39, p. 62].

“The Israelites placed their laws within a narrative context, in a book along with stories, genealogies, poems and prophecies, and even, in Exodus, within the same portion of the book. Are we good readers when we split up what has been put together this way? Is it not up to us to try to understand what that putting together might imply?”³⁴

Stahl contends that the continuity between the different Biblical genres do represent complex normativity which goes beyond what is traditionally perceived as ‘Biblical Law Books’ and connects different genres of biblical discourse, or biblical poetics in general.³⁵ It appears that the legal instructions are purposefully embedded in the “narrative mass” with many voices and genres “put together”.³⁶ This is a form of normativity born of the biblical mixture of genres and voices and articulates a series of underlying tensions, an expression of a complex, even contradictory, ideology.

“Law, perhaps more than any other discursive practice in the Bible, plays a crucial role in articulating and highlighting these tensions... The laws echo the destabilizing themes implicit in the narrative and work to further undermine the message of healing and renewal at the very moment it is articulated. In addition to highlighting the tension inherent in moments of major transition, law also serves to temper the mythopoeic overtones of these narratives, in which God is such a dramatized, active character. The law in the Bible does not so much replace myth as neutralize it ... Through law, the Bible undercuts (or perhaps more accurately cuts down to size) not only mythic materials borrowed from the surrounding cultures but also the mythopoeic potential of its own narratives.”³⁷

Biblical law is the grammar of reconciling the different threads, undercurrents which shape and bind the Israelite community in different contexts and through different normative forms which are not necessarily legal but through which Biblical legal genre acquires new life and new dimensions. This demarcates a legal praxis different from the modern legal praxis based on the Rule of Law, that is, the belief that adjudication should be governed by laws and not by people.³⁸ The normative landscape which demarcates and shapes the identity of the Israelite community resembles a theological manifesto, a map which distinguishes one religious culture from another and seems to have very little to do with law enforcement:

This legislative model of law, based upon the application of statutes in court, holds that general normative propositions laid down in advance are normally sufficient to deal with every human situation that may arise. The role of the judge is to apply general rules laid down by a higher authority, whether the

³⁴ [40, p. 92].

³⁵ [41, p. 11 (quoting two previous authors)].

³⁶ [*Idem.*].

³⁷ [*Ibid.* pp. 12, 14, 15].

³⁸ [42, pp. 10–1, 43, 10].

legislature itself or superior courts in a system of precedents. Jackson argues that this Western conception of law is culturally-contingent and does not reflect biblical legal praxis. In other words, the idea that judges should see their role as the application of general rules laid down by authority was not the dominant conception of the relationship between legislator and judge in biblical law.³⁹

Reflecting the presence of such strategies Fransen argues that the ecclesiastical judge in the Western Christendom “is not, at least until the twelfth century, a professional; he does not apply a positive law issued by authority. With his advisers he seeks out the just solution to the problem before him.”⁴⁰ In doing so a medieval ecclesiastical judge has to work with ‘law’ which was not to be found in any defined corpus of texts and which might be found anywhere throughout the inherited Mosaic and Christian tradition with relevant passages which often appeared to speak in ‘discordant voices’ reflected differently in numerous local normative compendia which have gradually acquired authority and have become applicable for particular local communities.⁴¹

The more the texts deployed, the greater the likelihood of different answers. The ultimate authority of the law of the Church rested on the continuous operation of a Legislator whose purposes were beyond judicial reasoning, and whose judgments could not be identified precisely with those of any of His ministers. His supreme command, constantly re-asserted, was to love one’s neighbour as oneself. The authority of God’s agents derived from the invisible operation of grace, which had to be supposed to underpin their formal competence but in practice might not... Correspondingly, authoritative guidance on the divine will in particular circumstances was not readily to be identified with any single category of text, or even with any text at all. To find God’s law then, one might search across a boundless sea of texts, of customs or sacred narrative, yet ended in the unknowable depths of His will.⁴²

This form of relating to textual sources will be familiar territory for Eastern canon law and theology. Relating to a wider normative landscape which is not confined to a fixed text, engaging with a fluid normative tradition where the Justinianic corpus and loosely determined conciliar tradition overlap, interplay and inter-depend and where theological conventions (Biblical, Patristic and conciliar texts), legal and rhetorical strategies and ritual mark a departure from any established or monolithic understanding of the law.⁴³

³⁹ [*Ibid.*, pp. 10–11 (references omitted)].

⁴⁰ [44, p. 8].

⁴¹ [45, pp. 51–5].

⁴² [45, p. 55].

⁴³ [46]

5.1 'Dark side' of the law in the development of Byzantine legal philosophy

The vagueness of law in the Christian East is captured further in the tensions of developing a Christian political and legal project calibrating the foundations of Roman law with Christian theology fundamentals in an effort to build a bridge between Divine and human law through political institutions and their rule-making activities. This is a project which dominates the great legal systematisations in Christianity, Judaism and Islam in the twelfth century and legal darkness is again deployed as a way of creating a dynamic tension between these seemingly different normative domains dealing in different and yet related ways with questions of hierarchy, domains and the rule of law and teleology.

The imperative of orientating the secular order towards the Kingdom of God presupposes certain transformations in the legal intuitions of antiquity. For the Ancient tradition the **emperor is the source of all legislation**. This does not mean that he is exempt from the law that he has established, but that it is up to him to recognize the true law. The Christianised version of this model, which matured in the times of Justinian and Theodosius, relies on the generality of the law. The generality of the law, established by these emperors, does not mean equality before the disposition of a legal norm. It means **equality in respect of the purpose of the law**.⁴⁴ The emperor is not exempt from the law (*ennomos epistasia*), but his subordination towards the law is not constituted by the norm of the positive law, nor is it a formal consequence of the general applicability. Equality is an element of teleology, having to do with divine economy. The law of the state acknowledges this equality, articulates its manifestation when it is being darkened, and maintains the common ground between the subjects, possessing the equality defined in this way.

Another concept, intertwined with that of the equality before the law, is the **generality of law**. Law is applicable to all branches and spheres of society. However, as Simon notes, the model of Justinian does not imply any separation of functions between the different branches of authority. Here one can see parallels with Plato's idea of the ideal state, in that there is one character of the common good, namely, the philosophical intellect of the rulers. Just as the members of the body and the parts of the soul should be subordinate to the intellect, which is the general principle determining the being of all parts. The law is one for all and the parts are not subjects of subsidiarity.

The model of legislative legitimation established by Justinian has certain strategic areas relevant to the concept of vagueness of law. Even scholars who are ready to read into the Justinianic model a precursor of a modern constitutional system do admit that the normative bond between positive norm and social practice is loose.⁴⁵ There is a fundamental conceptual ambiguity: the aim of legislation is the establishing of justice and building the state in the image of God considering the full range of the theological strategies we have already considered earlier in the text.

The areas of vagueness, mentioned above, become more distinct during the period of Byzantine iconoclasm. Iconoclasm is generally described as a

⁴⁴ Simon, Dieter. "Legislation as both a World Order and a Legal Order", in [47, p. 8].

⁴⁵ [47]

downfall of Byzantine legal culture. Of course, the codifications of Justinian were not denounced, but their status, their meaning, changes. Although Justinian introduces law as a theoretical discipline, after the sixth century one can notice a lack of scholars who can teach it.⁴⁶ Among other reasons, it becomes clear that the context of Justinian's legislation has changed. The legislative framework begins to look obsolete, disconnected from the reality of a Christian society, alien to its agenda.

Patriarch Photius represents a major corrective to the iconoclastic approaches to law and theology both in terms of Justinianic revision and legal innovations and introduces a different concept of law driven by a different concept of the image, which refers to a different aspect of Christology. According to it, the image is not an indication that someone is saved or belongs to the realm of salvation, but that it is eligible for salvation. To be a true image of Christ implies to affirm that the world can be saved. This critique of iconoclasm also springboards Photius's philosophical concept of law and legal ambiguities.

In article three of the *Epanagoge*, a legal text published by the Byzantine Emperor Basil I in 886, we read: "The state consists of members and parts in analogy to the human person, the mightiest and most important parts being the emperor and the patriarch. Therefore, the peace and well-being of their subjects, consists in the concord (homofrosyny) and agreement (symphonia) between the empire and the priesthood in analogy to the soul and body".⁴⁷

This text shows that concord and agreement between the heads of the Church and the state are the precondition for achieving the societal goals that vary from peace to utilitarian happiness. The nature of this concord and agreement is revealed through an analogy from the field of physiology, namely the function of bodily parts.

The studies of Troianos and Chitwood have demonstrated that the systematizing legislative project, denoted by its protagonists as "purification of law" has a dual nature. On the one hand, an attempt is made to transfer the norms and principles of canon law into the secular legislation. Given that the corpus of canon law has significantly grown since the epoch of Justinian, this is a complex and painstaking task. On the other hand, the purification of law means an alignment of the legislation to the old Roman law, from which the Byzantine state had drifted apart during the time of Iconoclasm, but the question arose what was to be the principle of coherence between the two tasks and what is the pattern of co-existence of secular and canon law in Byzantium.

Concord becomes a criterion for the correction of the legislation undertaken. Photius' concept of peace has to do with the new spiritual dimension of society brought by Christ. The specificity of this peace is illustrated by the concord of soul and body.⁴⁸ Photius comments on the concept of peace of the Gospel. This peace is juxtaposed to secular peace understood as absence of war or lack of hostility among human persons. It is beyond human intellect and it amounts to the protection of the heart.⁴⁹ This peace pertains to the reality of the self; it is a *radical manifestation of*

⁴⁶ [Cf. 48, pp. 276–80, esp. 9].

⁴⁷ [49, Photius, *Epanagoge*, III, 8].

⁴⁸ [50, 222, 03b, pp. 35–40].

⁴⁹ [Cf. 50, In 14, 27; Phil. 4, 4–9].

the selfhood, its subjectivity being guaranteed and brought to salvation by God.⁵⁰ From this radical, and indeed supernatural, subjectivity follows Photius' concept of autonomy. Photius defines the personal free will as cured by Christ, and enabling the person to interact freely in the social organism.⁵¹ This subjectivity has two dimensions both of which constitute the content of the hypostatic being of the human person. The first one is strictly existential and has to do with the ability of the human person to refer to the reality of being. The second aspect pertains to the social dimension; it has to do with the ability of the person to take responsibility of the circumstances of its social being. The recognition of the social aspects of human subjectivity, which is founded in the Christological speculation of the period, leads to a specific concept of social consensus, understood as a common path of faith and of social interaction.⁵² In this perspective Photius develops his idea of equality before the law (*isonomia*). Equality is the ability to affirm the common path as a unique hypostatic entity. Because the goal of this common politeia is to preserve and save the subjectivity of the unique person.

Consensus is a principle to affirm everyone's subjectivity in view of Christ's economy, consensus developed through the use of the theoretical understanding of the principles of physiology. Consensus, as a societal principle, does not impose a literal incorporation of canon law in secular legislation. On the contrary the legal grammar of social life remains fluid and not dependent on a normative distribution of powers between Church and state, or between different actors in society. The agreement is not about the division of powers, but about the common ground in which each social entity can manifest its subjectivity. Law is 'blessed' but also contains the potential to 'save the world'.⁵³ And this is what is and should drive purification and renewal of legislation. The "old law", meaning the law given by God in the epoch of the Old Testament, corresponds to the status of the law to preserve and maintain creation, including humanity, as good. The systematization of the new law brings salvation, as well as benefit to the soul.⁵⁴ One can undoubtedly see this analogy as a rhetorical tool to suggest that the emperor and his political activity is an impersonation of Christ. But in view of the perspective of economy and personology, this analogy suggests a systemic criterion to understand the function and meaning of legislation.

Photius reiterates in a transformative way some ideas expressed in John Damascene's Treatises on the Divine Images (II, 16). At first glance the author does advocate for a demarcation of domains of competence for the emperor and for the Church, constituted by the apostolic succession and charismatic communion. But the implied antinomy is more complex than the mere opposing of two structures of legitimacy: the charismatic tradition of the church and the institutional power. The antinomy contains a temporal element as well. The emperor, shows the Damascene, is not an autonomous possessor of his power, because he lacks prophetic

⁵⁰ [50, 222, 04a, 1–8]

⁵¹ [51, VI (63, p. 7)].

⁵² [52, 629, pp. 29–30].

⁵³ [Epanagoge Proem. 49, pp. 29–30].

⁵⁴ [Epanagoge Proem. 49, pp. 39–40].

charisma. The ecclesial constitution relies on the prophetic ministry, which is validated, underlines John Damascene, within the framework of the historical tradition of the Church. So, the demarcation between ecclesial constitution and imperial power should not be interpreted in light of the anachronistic dichotomy secular/public versus sacred.

In Byzantium there is certainly a strict differentiation between the Kingdom of God and the Kingdom of the world, but the principle of their differentiation, as well as the *topoi* of the overlapping of the two spheres have a specific regime of articulation.

The semiotic regime at stake is laden with the meaning of the economy, as is the entire image concept of John Damascene. In the chapter in which he particularly criticizes the politics of the iconoclast emperor the Damascene shows that, by overstepping his legitimate authority, the emperor reverts the markers of the historicity of salvation. So, the clash is not so much between spheres of competence, it is also, and in a deeper sense, a clash between the contingent and the eschatological:

We submit to you, o Emperor, in the matters of this life, taxes, revenues, commercial dues, in which our concerns are entrusted to you. For the ecclesial constitution we have pastors who speak to us the word and represent the ecclesiastical ordinance. We do not remove the ancient boundaries, set in place by our fathers, but we hold fast to the traditions, as we have received them. For if we begin to remove a tiny part of the structure of the Church, in a short time the whole edifice will be destroyed.⁵⁵

For the Damascene, the overturning of the historical tradition of the Church in favour of practical necessities of life amounts to the oblivion of the economy of salvation. The latter sets as an ultimate criterion for truth the hypostasis of the Son, as the hypostatic Truth.⁵⁶ By distorting the eschatological perspective, by overstepping his legislative competence and replacing the markers of the hypostatical Truth that are recognized and developed by the Tradition, the Emperor introduces Idolatry, veneration of a created being of his own. At stake is something much more fundamental than fragmentation of “canon law.”⁵⁷

Photius uses this perspective as a centrepiece of his critique of the concept of law of the secular of the iconoclastic Isaurian dynasty. The abolitions of what the iconoclast emperor considered to be obsolete legislation is in fact an attempt to distort the perspective of the economy, by ascribing prophetic meaning to the political concerns of the current affairs and removes the prophetic dark side of the law.

Photius contrasts this approach with something he describes as a monarchical and Trinitarian principle of law outlined by a legislative project complying with the *historical revelation of the Trinity and the personal participation in the revelation through the unity of soul body*.

⁵⁵ [53, Imag. II, 12].

⁵⁶ Cf. The respective place in Damascene’s oeuvre, which speak of Christ as the hypostatic Truth.

⁵⁷ The existence of Canon law in the Orthodox tradition has been disputed in different contexts. Very often there is a polemical overtone, which denounces.

In this scheme law is *autokratikos te kai pantokratorikos* over all believers who live under his rule. So the emperor is a reference point for the gift of the law. Just as he should not erase old legislation, he should also be keeper of the family tradition. And just as the imperfect offspring follows the example of the ancestor without being determined by it, so also the law sets the framework that enables a new mode of existence of human nature. In that sense the legislative acts of the emperor have also a pedagogical scope. The law makes our nature stronger and at the same time adds dignity to it.

There is an obvious tension between the protological and eschatological dimensions of the law. The history of legal development is orientational and is not comprehensible in normative terms, because the final eschatological stasis of the law is not a normative model which determines the current condition. Photius underlines that the leap of society towards law is disparate and pluralistic; the personal dispositions of the legal subjects are of different existential and axiological value, a single orientation with a plurality of dispositions. The pluralistic perspective drawn by Photius suggests that the logos of the divine law does not determine a practical application; rather it gives it a horizon – which is not only a teleological cause of lawful act, but a source of love and hope for salvation.

The great twelfth century canonist Theolore Balsamon (+ 1195) was among other things given the task to review the Nomocanon of 14 Titles and in a way to reassert the trajectories and the approaches developed in the ninth century and to capture in a systematic fashion the legal intuitions of the first Millennium.⁵⁸ His commentaries underline the importance of the vagueness of law in the making of the legal culture of Byzantium. In doing so he grapples with strictness of the law and *oikonomia*, law and custom, legal texts and legal practice, general and particular, *nomos* and *kanon*, universal and particular, centre and periphery. His systematic approach to the synthesis of canon and civil law captures the complex intuitions of theology and law in Byzantium and the complex deployment of apophatic and cataphatic strategies which law borrows from theology to articulate in a more coherent way the theological horizons of legal institutions. In this process legal vagueness or the dark side of the law performs a complex integration between theological vision and legal institutions.

The great twelfth century Islamic Aristotelian philosopher Averroes (14 April 1126 – 11 December 1198) captured earlier Islamic legal systematisations and produced a legal systematisation of Islamic law. His Legal Primer (*Bidāyat al-Mujtahid*) attempted to explore and systematise the differences between the different Islamic schools of law.⁵⁹ His text attempts among other things to address difficult points of contention such as the relationship between written law and legal opinion, law and rhetoric, Divine law and human law. Apart from being an excellent exposition of Islamic law within an Aristotelian philosophical shell the text addresses the central theme of legal vagueness in the complex area of written and spoken law.

⁵⁸ [54, 55, 56] Standard edition of Balsamon's commentaries of the Nomocanon of 14 Titles and the Chronological Syntagma is [57]

⁵⁹ [57]

[58] See also [59]

Alongside Maimonides, Averroes presents a compelling and at the same time challenging and controversial model of an Aristotelian capture of the legal intuitions of the First Millennium. What is particularly significant in this collection from a comparativist way is building a common framework to explore the relationship between Divine, natural, scriptural and human law across the interreligious divide and the importance of apophatic and cataphatic strategies in doing so.

At approximately the same time Maimonides (1138–1204) attempted to capture the legal culture of Judaism with his *Mishneh Torah*⁶⁰ which like the *Nomocanon* of 14 Titles offers a systematic overview of the entire legal tradition of Judaism through a conceptual synthesis following Aristotelian systematics. With reference to a very different textual base Maimonides extracts the principles of Biblical and Talmudic law and creates a synthesis between law and philosophy, rule and narrative, text and rhetoric, Divine law, Biblical law and human law, between the law in force and the dormant law in anticipation of the expectation of the Messiah and the hidden and revealed law.⁶¹ The text offers a challenging analogy with *forum internum* and *forum externum* and invites the reader to be perplexed and encounter the inner depths of a legal culture shaped by Revelation and driven into submission to exist in hostile historical contexts. The ‘dark side’ of the law in Maimonides is a process of bringing legal and ritual religious observance together with a philosophical quest developing through the influence of Averroes and Al-Ghazali a series of apophatic and cataphatic strategies to do so.⁶²

What all these diverse legal projects have in common is the rich use of apophatic and cataphatic strategies deployed in the context of legal studies, strategies largely lost in subsequent Christian, Jewish and Islamic legal collections. In many ways what makes those texts so interesting is that they (with a very few exceptions) never became mainstream legal collections. In the process of imagining the legal cultures of Judaism, Christianity, and Islam in the twelfth century they raised the bar too high and overemphasised the rather obvious synthesis between law, theology and philosophy and set an example which was very hard to follow in practical terms. What they have nevertheless achieved is a notion that in the process of imagining the legal cultures of the First Millennium they did not seek simple solutions and pursued an intellectual synthesis we are often ill-equipped or unprepared to appreciate. Using those texts as a gateway to comparative study of religion is likely to show these parallel threads in a new light and identify new bridge-building opportunities.

The metaphysical strategies that law is and at the same is not what we think it is haunt us through the intellectual and cultural trajectories of the Abrahamic traditions.

Law as spoken transforms into law of the tablets and yet remains more of a mental landscape rather than a law with teeth, enforceable on the ground, as we imagine modern rule of law. In this process the reception of Biblical law in the Halakhic tradition as a ‘walking with God’ is represented by a formidable textual corpus of Talmudic law where the Jerusalem and the Babylonian Talmud do not speak with each

⁶⁰ [60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70]

⁶¹ [71, 72]

⁶² [73]

other on a textual level and the mainstream Babylonian Talmud thrives on dissent, disagreement as a creative means of finding legal solutions to disputes, making the hard notion of the law less clear and the only clear thing that appears to be agreed in the path to reaching an agreement. The rich textual tradition which celebrates disagreement makes law less clear but reminds us that the intergenerational reception of the Talmudic tradition thrives on the resilience of the mental map which offers and identifies multiple solutions to similar legal problems. The four schools of law of the Sunni tradition represent a continuity in this direction and the only occasions when an attempt to resolve ambiguities and make the concepts of law clearer and more systematic and unambiguous following the Aristotelian method of systematisation by Averroes and Maimonides had one thing in common – they were largely rejected by their contemporaries which did not buy into the harmonization project.

Some of these collections drawing heavily on Aristotelian categories draw on a relationship between law and rhetoric, between stable written text and voice and the ways the indeterministic aspect of the law which speaks is often the source of stability of the written law. In a very similar vein but via a very different route Theodore Balsamon, a contemporary of Gratian and perhaps the most important Byzantine canonist, engages with the very Roman distinction between law and custom and comes to a surprising, or perhaps not so surprising, conclusion that while we could kick against written law we cannot kick against custom. This is not simply a realisation that law of custom is more important than written law but an acknowledgment that the fluidity and that vagueness of custom often captures stable practices of interpretation which emerge in concepts such as *aequitas*, *oikonomia*, justice beyond very narrowly defined legal formalism (although concepts such as equity, justice and *oikonomia* are inevitably related to legal formalism in a more holistic sense). The vagueness, or, as I have chosen to relate to it, the dark side of the law, through the act of judgement, in many of the traditions which suddenly decided to begin to think legally at the end of the first millennium and came up with fairly robust texts which demonstrate how this works, placed a very important emphasis on the law in the shadows, the spoken law which written text does not necessarily capture, the deeper, often hidden meaning which generations of glossators, civilian as well canonical, tried to penetrate from the margins of the text.

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