

Kings and Canons: Regalism and Orthodox Canon Law

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The common Orthodox canonical tradition essentially represents the church law of the Byzantine Empire. This becomes evident when comparing the pre-Constantinian and post-Constantinian canonical orders. Before Emperor Constantine, the canonical order was primarily based on biblical exegesis, charismatic decision-making, customs, the advice of prominent bishops, advisory opinions of local synods, and pseudepigraphic church orders attributed to the apostles or their immediate successors.

After Constantine, the canonical order was instead based on decisions made at synods convened by imperial command, which were then promulgated by the emperor and on imperial secular law. It is important to note that Constantine and several of his successors remained unbaptized until their deathbeds, despite their active involvement in church affairs. The synods relied heavily on norms of Roman law, especially procedural norms, and later synods often enacted canons that contained norms originally formulated in imperial laws.

The Byzantine heritage was influenced by the emperor, and political theology also theologized the role of the emperor. He was viewed as God's legitimate representative on earth, and the Byzantine empire as an icon of the kingdom of God. This Byzantine

heritage made the Orthodox tradition highly susceptible to regalism (*ius circa sacra* and *ius in sacra*) from the early modern period onwards.

The first clear example of regalism in the history of the Orthodox Church is the church reform of Tsar Peter the Great, which combined Byzantine heritage with modern theories of regalism. However, more interesting are examples of regalism in the modern period when the sovereign is not a member of the Orthodox Church. There is an inclination towards—or at least a toleration of—attributing Byzantine-inspired rights to even non-Orthodox monarchs, such as the Habsburg rulers (Catholic), King Ottho of Greece (Catholic), or even the Ottoman sultans (Muslim).

On the one hand, this situation partially anticipates the role of the Orthodox Church as an established or quasi-established church in an atheist communist state, such as the Socialist Republic of Romania. On the other hand, the role and rights of the Byzantine emperor and later sovereigns in church affairs have also been reinterpreted, somewhat anachronistically, as a justification for the participation of the laity in church governance. It is claimed that the Byzantine emperor and later Orthodox monarchs acted in church affairs as representatives of the



laity. However, Byzantium had no real concept of popular sovereignty, and the emperor was a quasi-sacred figure.

Modern Orthodox monarchism (the ideology of kingship and emperorship), as it developed after the reforms of Peter the Great and the establishment of the new Balkan monarchies, is a synthesis of Byzantine and Western post-Reformation political theory.

Byzantine political theory combines elements of late antique political monotheism (one God, one emperor, one empire) and patristic political thinking. There are primarily three types of patristic political thinking, best represented by Augustine, Gelasius, and Eusebius. Augustine viewed power as a consequence of the fall and famously argued that a kingdom is distinguished from a gang of robbers primarily by its capacity for violence. Gelasius developed a dualistic theory of power through the doctrine of the two swords, which saw temporal and spiritual power as

ordained by God to work in harmony with each other.

However, the Byzantine political tradition was primarily influenced by the monistic theory of power developed by Eusebius in his panegyric of Emperor Constantine. This panegyric stands in the tradition of late antique political monotheism and views imperial power as a reflection of God's power. The monarchy of the empire is an icon of the monarchy of God the Father. With the development of Trinitarian doctrine, Byzantine political theory was modified so that the emperor was perceived as an icon of Christ the Pantocrator rather than of God the Father (a similar development can be noted in the theological understanding of the office of bishop from the time of Ignatius of Antioch until the fathers writing in the aftermath of the Arian controversy).

There is an interesting contrast in the development of the theory of power in the East and West. In the West, the doctrine of the two swords made

Patriarch Polyuctus crowns Basil II co-emperor with his father, Romanos II, 960. Miniature from John Skylitzes, *Synopsis of Histories*, c. 1200. National Library of Spain.

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it possible to accept temporal polyarchy in the form of regional monarchies, while the development of the papacy resulted in a universal spiritual monarchy. In the East, Byzantine imperial ideology proclaimed a universal temporal monarchy, while the development of the theologoumenon of pentarchy and the establishment of the Bulgarian, Serbian, and Muscovite patriarchates resulted in a spiritual polyarchy.

The Byzantine political idea of a single universal temporal monarchy prevailed even when it had become a complete fiction. In 1393, Ecumenical Patriarch Anthony IV wrote a letter to Grand Prince Vasili I of Moscow and explained that all Christians are obliged to be subject to the Byzantine emperor, since Christ and the apostles had taught obedience only to the Roman (and, by extension, Byzantine) emperors and not to kings in general. This is also the background of the ideology of a third Rome and the establishment of new patriarchates.

The establishment of the Bulgarian, Serbian, and Muscovite patriarchates are all expressions of imperial ambitions and of some version of the idea of a third Rome. First, some Slavic prince assumed the Byzantine imperial title with the aim of replacing the Byzantine emperor as God's only universal temporal monarch, and then he established a patriarchate to support his imperial ambitions. Since the Byzantine emperor had a patriarch, any imperial pretender worth his salt must also have a patriarch. At the beginning of the thirteenth century, the Bulgarian Tsar Boris Kaloyan explicitly formulated the principle in a letter to Pope Innocent III: *Imperium sine patriarcha non staret*—an empire cannot succeed without a patriarch. It should be noted that the Fourth Crusade was

occupying Constantinople at the time, so the imperial office was up for grabs.

From the eighteenth century onwards, however, modern Orthodox monarchism abandoned the universalism of Byzantine monarchism and instead produced a synthesis of Western temporal polyarchy and Eastern spiritual polyarchy. The modern monarch of an Orthodox country (who did not necessarily need to be Orthodox himself) was no longer an icon of God the Father or Christ the Pantocrator but instead a king (among many) by the grace of God. The early modern Western European political doctrine of the divine right of kings and the patrimony of princes had replaced the divine mimesis of Byzantine political theory.

This modern concept of monarchy is closely related to the development of the political idea of the state. The German political philosopher Ernst-Wolfgang Böckenförde pointed out that it is anachronistic to use the term "state" for premodern power structures. This also becomes apparent when considering the Sixth Novel of Emperor Justinian, in which he laid the foundation of the famous Byzantine theory of *symphonia* between imperial and priestly authority. According to Emperor Justinian, emperorship and priesthood are the two greatest gifts of God to humankind, and they should work together for the common good of the empire. In later Byzantine political theory, the idea was developed that the emperor was in charge of the body of the empire while the patriarch was in charge of its soul. In this political conception, there is no clear border between empire and church. This is far removed from any modern concept of sovereignty and statehood as a distinct territorial absolute power structure!

Although the doctrine of the two swords anticipates the modern concept of the state, Böckenförde argued that the actual concept of the state is a product of key events in Western European political history. The first key event was the investiture controversy, when spiritual power was clearly distinguished from temporal power to subordinate the latter. Next was the Reformation, when spiritual power was subordinated to temporal power in accordance with the principle of *cuius regio eius religio* (whose realm, his religion), which allowed the prince to decide the confession of his country. The last key event consisted of the Enlightenment and the French Revolution, which completely separated spiritual power from temporal power through the separation of Church and state. From that time onward, the Church (spiritual power) and the state (temporal power) became two completely separate entities.

Since the Enlightenment, the power of the state has no longer been by the grace of God but absolute. The state became the foundation of its own legitimacy, and God—or rather the people’s belief in God—became obsolete as a foundation for the legitimacy of the state (sovereignty). Even if the Church happened to remain as an established religion, it was nothing more than a Potemkin village that could be disestablished at any moment without undermining the legitimacy of the state.

In modern political theory, from the Enlightenment onwards, sovereignty became absolute, based on the coercive, non-voluntary community of the state (defined either as the patrimony of the prince or the homeland of the nation) rather than on the grace of God. In many ways, Augustine’s theory of power has been vindicated.

Ultimately, as Mao Zedong said, political power grows out of the barrel of a gun.

The subordination of spiritual power to temporal power following the Reformation led to the doctrine of the *ius circa sacra*, the supervisory power of the state over religious bodies so-called regalism. This political doctrine was upheld by Protestant, Catholic, and Orthodox monarchs alike, with only a difference in degree.

The Swiss political philosopher Emmerich de Vattel, whose work “The Law of Nations” (1758) influenced the jurisprudence of both independent Greece and the United States as well as the international settlement at the Congress of Vienna (1814–15), argued that any jurisdiction exercised by religious ministers is derived from state sovereignty. It follows from this principle that a religious minister is a type of civil servant subordinate to the sovereign. In nineteenth-century Russia, the canonist Nikolai Suvorov invoked the example of the Byzantine emperors, especially the iconoclast emperors, to argue that the sovereignty of the monarch and the *ius circa sacra* granted the Russian emperor the supreme right to modify and dispense from canon law unilaterally.

The modern concept of sovereignty was also central to the Protestant jurist Rudolf Sohm’s critique of canon law. He famously stated that the essence of the Church contradicts the essence of law. According to Sohm, only the non-voluntary coercive community of the state can be a source of true law, since the Church is subordinate to the state. At most, the Church can be a source of by-laws to the degree that the state allows it. Modern concepts of religious freedom and human rights, as well as new insights concerning the

concept of law in legal philosophy, mitigate this position. However, it indicates that the gradual separation of law, morality, and religion that has taken place from the Reformation onward has become self-evident and irrevocable.

Like the modern idea of the state, the distinction between law, morality, and religion is a product of Western European political history. In many ways, it is an unnatural distinction, as the most natural thing in history has been to kill everyone who is different from oneself. But when you can't kill them, you have to figure out a way to live with them. This is what happened after the Reformation when the Catholics failed to kill all Protestants and the Protestants failed to kill all Catholics (although not for lack of trying).

For Protestants and Catholics to co-exist within the same political and international order, it was necessary to make a distinction between law, morality, and religion. In medieval political theory, law was based on the concept of God. But when there was fundamental disagreement about the concept of God, it could no longer function as the foundation of law. Grotius, the father of modern international law, was the first to conceptualize international law as if God did not exist (*etsi Deus non daretur*). Samuel von Pufendorf further clarified the distinction between legal, moral, and religious duties, with the former being binding for all while the

latter was a matter of religious affiliation. Immanuel Kant completed this distinction by clarifying that law is based on external power (heteronomy), while morality and religion are based on internal convictions (autonomy).

While modern Orthodox monarchism does presume Pufendorf's distinction between law, morality, and religion, subordinating the latter two to the sovereign, it does not respect Kant's insight that morality and religion are based on the autonomy of the individual. However, despite its Byzantine appearance, modern Orthodox monarchism is radically different from the political theory and practice of the Byzantine empire. For one thing, it presumes the modern concept of the state, which is alien to Byzantine thinking. Furthermore, it ascribes to the sovereign a power over religion (regalism) that only a few Byzantine emperors would dare to exercise, and even fewer would dare to claim as their legitimate right.

In modern Orthodox monarchies from Tsar Peter the Great until the formal abolishment of the Greek monarchy in 1973, the Orthodox Church, as the established national church, is reduced to a state-run Potemkin village, playing the role of the state's master of ceremonies and provider of religious services to the nation. The Byzantine Empire cannot be revived, and the modern Orthodox monarchies are merely atavistic spectacles. ✱



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