

MORAL THEOLOGY AND CANON LAW: THE QUEST FOR A SOUND RELATIONSHIP

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THE PROBLEM: alienation. For all disinterested observers, it is a well-known fact that at present the relationship between canon law and moral theology is at best disturbed, at worst downright nonexistent. Yet there should be an organic unity between the two. After all, moral theology defines many of the values canon law is promoting, and canon law creates obligations which have far-reaching consequences in the field of morality. Thus mutual understanding and a well-balanced relationship should be in the interest of both parties.

The origins of this present-day alienation are found in the past history of the two sciences. To listen to the moralists, their theology has suffered badly at the hands of the canonists: they tried to make it into a thinly disguised branch of jurisprudence.¹ To listen to the canonists, the nature of their rules and regulations has been misunderstood by the moralists: they tended to make them into divine precepts with appropriate sanctions, including eternal damnation.²

All such accusations are, of course, simplifications. Nonetheless, among the unfair generalizations there is a grain of truth. Many times in history the two sciences encroached on each other's field, and by the introduction

¹ The historical development of moral theology—certainly in the last 400 years—was closely tied to the administration of the sacrament of penance. Its main aim was to give guidance to confessors, especially for the purpose of assessing the right amount of penance. In this situation theology lost sight of its own scriptural origins, paid relatively little attention to patristic thought, and focused more on vices than on virtues. A positive aspect to the so-called "crisis of the sacrament of penance" is that there is much less preoccupation with "helping the confessors" and there is an effort to return to authentic sources. See the excellent study by John Mahoney, *The Making of Moral Theology* (Oxford: Clarendon, 1987).—When we speak of canon law as looking to moral theology for guidance, it is important to remember that we have in mind a renewed moral theology.

² This happens every time a moral situation is attached to a legal norm; in the ecclesiastical literature such moral sanction is declared when nonobservance is judged sinful. Such judgment normally should come only from moral theology.—It is a historical fact that in post-Tridentine times moral theologians worked by the principle that whenever there was an official rule guiding the Christian community, there had to be a supernatural sanction attached to it in the form of sin. Norms which did not bind under sin were allowed to exist (as far as I know) in the constitutions of some religious communities only. Yet there is no conceivable reason why the Church could not give guidance to the community, to be accepted and followed generously, but never binding under the penalty of sin.

of an unsuitable methodology confused the issues and contributed to wrong conclusions. To avoid such calamities, an effort should be made to determine their mutual relationship so that each may enjoy its proper autonomy, while providing support for the other.

I said an effort should be made: this is precisely what I intend to do, and do it by raising some foundational questions and proposing a few answers. A full explanation may still remain elusive, but if no effort is made to find some insights, the goal will never be attained.

The question "What is the relationship between moral theology and canon law?" sounds simple. After all, who could not tell the difference? Yet, on reflection, the question reveals itself as pointing to bewilderingly complex issues. The two fields do not lend themselves to any easy comparison. Moral theology speaks of virtues and vices, canon law issues ordinances. The former's field of vision is much broader than the latter's field of action. Also, moral theology likes to ascend to sublime principles, while canon law keeps descending to concrete life situations. How can such disparate entities (or disciplines) be compared to each other?³

How locate the problem? Indeed, even at first sight it is clear that moral theology and canon law cannot be compared to each other as two branches of the same science, or as two species of the same genus. Their mutual relationship cannot be explained by such categories: it is of a different type. Another approach is needed. To find it, we must go back to the very source of their existence. This source is in the consciousness of the Church.

By "Church" I do not mean just the theologians and canonists, nor the hierarchy alone. I mean the whole community of believers, which is an organically structured communion. In it every organ, the head and the various members, play their appointed role and contribute to the life of the whole. Indeed, at one time or another in Christian history all made some contribution to the development of ethical doctrine, as well as to the building of structures and customs.

When this Church articulates its beliefs concerning the Christian way

³ The problem of the relationship between morality and laws is not unique to canon law: Socrates already struggled with the same issue, and so do our contemporaries. Legal positivism in its various forms claims full autonomy for the law: it should not depend on any norm or convention of morality. This means that law is not subject to any control: it becomes a norm for itself. If such a theory is accepted by the judges of a nation, it will be enough for a tyrant to issue laws according to his own prevarication; the courts will feel duty bound to uphold them on the principle that "law is law." For a good introduction into the problem of the relationship between values and laws in secular legal systems, see Peter Stein and John Shand, *Legal Values in Western Society* (Edinburgh: University, 1974).

of life and then reflects on them, moral theology is born.⁴ When the Church perceives itself as an organic community and decides to have rules to uphold order and harmony and binds the faithful to observe those rules, canon law is born.⁵ When those who are so bound accept the obligation in conscience and act on it, the law becomes a vital force and shapes the community. Thus we are dealing with three logically distinct moments in the consciousness of the Church. The relationship, therefore, between moral theology and canon law cannot be grasped in any other way than by turning our attention to those three connected moments; they belong to the rhythm of life of the earthly Church. So, the next step in our inquiry should be a brief presentation of those three moments. Before doing it, however, a cautionary remark is in order.

I do not intend to describe in any detail the relationship (or the lack of it) as it exists *de facto* at this point of history between moral theology and canon law. Such a work would be, of course, perfectly legitimate and possibly desirable, but it falls outside the scope of this inquiry. What I intend is a sorely needed study of the ideal, in order to find the normative elements for the real. We cannot even begin to answer the question as to how to establish in practice a sound relationship between moral theology and canon law, if we do not have a well-grounded theory as to what the relationship ought to be. For this reason, this article is a *normative* study.

THREE MOMENTS

Since both disciplines originate in the consciousness of the Church, the initial questions should be: What is the Church doing (1) when it is doing moral theology, (2) when it is creating a system of laws, (3) when it receives the laws? The answers will be found in observing what happens in those three moments.

1. *What is the Church doing when it is doing moral theology?* By speaking of the Church, I shift the inquiry from innumerable manuals to

⁴ The term "theology" is used in a rich sense here, as it was used by the Greek Fathers. It includes not only reflective study on the data of revelation but also the proclamation of the revealed truth. To speak about Christian morality can be indeed *theo-logia*, God-talk, because it proclaims and explains the thoughts of God about the way that leads to Him.

⁵ At this point a warning should be sounded: not all laws are in the Code; nor is the Code all laws. Often enough, canon law is understood as "everything that is found in the Code of Canon Law." This assumption is incorrect on two counts. First, there are laws which are not in the Code, e.g. the particular law that governs the operation of the Roman Curia. Second, there are many canons in the Code which are anything but law, such as dogmatic statements, theological or philosophical positions, and exhortations — the latter ones not a small number. Of course, there are also numerous canons defining with precision rights and duties enforceable in courts. The Code of Canon Law is a practical manual about the life of the Church, mainly but not exclusively in legal terms.

the operations of the Church as I defined it above, the organic communion of believers. This Church *is* doing moral theology, and doing it on several levels.

Receiving the Word. The community of the faithful under the guidance of the Spirit receives the Word of God. The Word tells them about the way they must follow in order to enter the kingdom. The community in its turn proclaims the Word — for all generations to come. To hold and to announce what has been revealed is to do theology in the most ancient and fullest sense of the term: it is to speak of things divine.

Reflecting on the Word. The activity of the Church, however, does not stop there: faith seeks intelligence, *fides quaerit intellectum*. Reflections on the basic beliefs follow, prompted by both a natural desire to penetrate the Word more thoroughly, and through new questions raised by believers and unbelievers. In this process professional theologians play a leading role: they gather the relevant data from the usual theological sources and resources: Scripture, the Fathers, the councils, the various magisterial pronouncements, the consensus of the faithful, and so forth. Thus a systematic exposition of Christian ethics develops, usually with the help of a philosophy, which provides the inquirers with convenient concepts and categories.

All this is well and good, but it seems to apply to any branch of theology. What is specific in the endeavor to create a moral theology? This specificity is in the fact that the inquiry concentrates on the discovery of values. The object of moral theology is to find out the truth about the good. A more positive object does not exist.

It cannot be stressed enough that the proper and primary objects of all ethical inquiries in the Christian Church are the positive values and the equally positive acts for their appropriation, not the disvalues nor the morally deficient actions. In other terms, moral theology is first and foremost the science of the good and not of the evil; of the virtues and not of the sins. Indirectly and secondarily, of course, it deals with those situations where the absence of good or the omission of an action leaves a vacuum, and consequently improper objects and blameworthy acts enter the scene.⁶

2) *What is the Church doing when it is creating a system of laws?* To begin with, the Church perceives itself as an organic community; that is, not just a mass of individual believers who happen to be together at this point of space and time, but a body of believers assembled and held together by the Spirit of God, one person in many persons. The Church recognizes also that this internal unity must express itself externally; the

⁶ This perception of moral theology is in harmony with the classical definition of evil: it is nothing else than the undue absence (privation) of good.

members must form an organized society.

Once the Church has perceived itself as a social body, it must provide for the needs of such a body. It must grow from strength to strength if it is to fulfil its function, which is to gather God's children and to nourish them with the Word and the sacraments. In this process the legal norms play an integral role.

Instinctively and reflectively (both!), through the instrumentality of legal rules, the Church prompts the faithful to establish good social balances which favor the operations and the growth of each and all. The growth takes place through the appropriation of good things, or values, which contribute to the welfare of the community.

Thus canon law, too, is in the service of values, but in a way different from moral theology. The values in which it is interested are defined and circumscribed by the needs of the community — as community, as an organic social body. Moreover, its interest in these values is on the level of decision and action, not on the level of abstract definitions.

3) *What is the Church doing when it receives the laws?* When a law is promulgated and enters into force, those who are bound to the community are bound also to observe its law. But each of the members is an intelligent and free person, and they would not live up to their dignity if their obedience to the law were like the movement of a robot. Their duty is to learn about the value that the law intends to uphold, and then to choose freely to reach out for it. This is to offer a rational sacrifice to God.⁷ The authentic reception of the law is an act of obedience born of an intelligent and free conscience.

Indeed, no human law can go any further than to present itself to the conscience of a person. His or her moral convictions will dictate the response. Thus, at the threshold of that luminous space the law asks to be admitted. Inside, the knowledge gathered from moral theology will give guidance for a response. Ordinarily, this should be the observance of the law; but there will always be situations, perhaps rare and extraordinary, when norms taken from theology will override the claim of the law.⁸

⁷ Such an ideal, however, is not necessarily diminished or destroyed if a person does not personally inquire about the value that is behind the law; many may well decide to trust the judgment of the legislator.

⁸ One of the finest essays written on conscience is by René Carpentier, "Conscience," *Dictionnaire de spiritualité* 2/2 (Paris: Beauchesne, 1953) cols. 1548-75. A passage very much to our point deserves to be quoted: "Or la loi retentit dans la conscience actuelle. C'est dans les jugements *concrets* de ma conscience que je perçois la loi divine avec son caractère essentiel d'obligation. Sans doute des préceptes divins ont été extérieurement formulés par révélation: le décalogue, les lois évangéliques concernant la charité, les sacrements, l'Eglise. D'autre part, toute loi humaine exige une promulgation explicite et

In the crucible of the conscience, moral theology remains the first counselor.

CONTINUITY

There is a continuity between the three moments, between seeing the morally good, binding the community by laws, and accepting the obligation. In all three the acting subject is the same: the Church.

It is the same *persona mystica* which first finds the definition of certain values in the revealed Word of God and proclaims them, then perceives itself as a community in need of binding rules and norms, and finally through the intelligent and free response of the members elevates the law into a vital force for the health and growth of the whole social body.

The primary source of continuity is, then, in the operating subject: the Church that knows, decides, and acts. But there is more. In all three moments the operations of the Church revolve around values. Moral theology speaks of the values by which Christian persons must live. A system of laws binds the people to pursue certain values. When the faithful obey those laws, they personally accept the obligation to reach out for those values. Thus the secondary but no less authentic source of continuity is in the object of the Church's activities: they are about values.

Let us turn now more specifically to the differences which appear in the first two moments: between doing moral theology and creating a system of laws.

DIVERSITY

There are differences on several counts: (1) in the very *purpose* of the operations, (2) in the *nature* of those operations, and (3) in the *result* they produce.

1. *Different purposes.* In doing moral theology the Church is seeking knowledge: *fides quaerens intellectum*. The field of search extends far and wide, to wherever the seeds of truth can be found. It includes all the Christian literature, the grace-filled experiences of Christian communities, and all other sources which may be relevant for forming judgments on values. It embraces also the realm of some auxiliary sciences, such as philosophy, psychology, anthropology, sociology—as needed in any given investigation. The aim is the critical use of the information they can offer, in view of forming ethical judgments. But once those judgments are formulated, moral theology does not go any further; its aim to gather

donc une formulation précise. A vrai dire, cependant, toute obligation repose sur la promulgation intérieure de la loi divine élémentaire, laquelle se fait entendre dans la syndérèse, elle-même ne s'actualisant que dans la conscience" (ibid. 1550).

knowledge is fulfilled. To act on that knowledge is not the task of scientific inquiry: decisions are made by persons.

In doing canon law, the purpose of the Church is action, *fides quaerens actionem*. The initial search is for values, but with a restriction: the legislator is interested in those values only which are necessary or useful for the welfare of the Christian community as community. Thus, while he may well turn his attention to the corpus of knowledge that the moral theologians are able to offer, he will examine it with the view of selecting some values which can be proposed to the community by legislation. His aim is the practical appropriation of those values.

Briefly: in one case the purpose is knowledge, in the other case it is action.

2) *Particular methods*. There is a method to reach knowledge, and there is another to lead a community to action. Knowledge is reached by a process which moves step by step from gathering concrete data to the formulation of abstract principles. If all goes well, it ends with a systematically ordered and cohesive body of science. In substance, this is the method of moral theology.

Canon law works differently. Once the legislator is in possession of the necessary information,⁹ he makes the decision about binding the community to appropriate certain values. The promulgation of the law is really the communication of this decision; through it the members of the community are bound to action. In brief, this is the method of legislation. The picture is not very different in the case of laws created by custom, except that the decision to have a norm is formulated implicitly and by frequent usage out of the collective wisdom of the group.

To sum it up: there is a method for acquiring knowledge, and another for binding people to action.¹⁰

3) *Varying results*. In the case of moral theology, the end result is a body of systematically organized knowledge of the Christian way of life, perhaps all neatly laid out as a treatise. But no matter how well such an exposition is done, it is not completed, and will never be so. After all, no

⁹ That information can come only from theology, in many cases from moral theology. Further, since the legislator intends to impose some action on the community, he must be well informed about its capacity to reach out for the value intended; to ask for too much may lead to nonobservance.

¹⁰ These two paragraphs are no more than brief pointers to the extensive analyses of the method of reaching knowledge and the method of coming to a decision. I assume that the reader is familiar with some major works on the topic, such as Lonergan's *Insight and Method in Theology*, among many others. For an inquiry about the unfolding of a human person through action, an issue closely related to the making and the obeying of the laws (though not directly on that subject), see the excellent work by Joseph de Finance, *L'Affrontement de l'autre* (Rome: Gregorian Univ., 1973).

theologian can ever exhaust the mysteries, and the way to the kingdom is part of those mysteries. It follows that moral theology is open-ended, because the search for the full understanding of the mysteries will never end.

Not so in the case of canon law. Since its goal is to bring God's people to action, in its final formulation it should not contain any mystery, it must be clear, pointing with precision to an action to be performed.¹¹ When a norm is presented to those whom it intends to bind, it must be simple and direct—even if it handles complicated matters. Those qualities are also prime hermeneutical factors in the interpretation of any law: the interpreter must assume that the legislator intends to communicate a well-defined decision. It would be a fallacy to think that the longer and deeper an explanation of the law is, the closer the interpreter comes to its original sense. The opposite may be true: extensive explanations can destroy the directness of the legislator and obscure the action to be performed.

This difference in results can be put in this way: in moral theology there will be always more mysteries to unravel and more questions to answer, while in canon law there comes a point when questions must come to a halt and an action must be performed.¹²

THEOLOGY HAS PRIORITY

We have reached the point where we can return to our quest for the determination of a sound relationship between moral theology and canon

¹¹ The penalty for any law which does not reach this ideal is death, nothing less: *lex dubia lex nulla*, "a doubtful law is no law at all." The Church knows this principle well and keeps honoring it.—When I say that at the final stage the law should not contain any mystery, I do not imply that it should not be, or could not be, formulated in technical language. As a matter of fact, every science develops its own language, mostly incomprehensible to the noninitiated. One purpose of the interpretation of the law is to translate the technical expressions into ordinary language, so that the action can be easily understood and performed. A good interpreter always ends up with a clear definition of the action, or with the admission that the law is not clear, hence there is no law. If an interpreter treats the law as a mystery (method of theology!), the end product of his work is likely to be endless variations on a theme with no clear direction for action: he defeats the very purpose of the law. Clarity, brevity, conciseness, on the model of the great Roman lawyers (e.g., Gaius), are the signs of a competent approach to law—canon law included.

¹² In the practical order this means that dedicated moral theologians will never find themselves at the limit of their science: there is always more to learn about faith, hope, and love. Not so with canon lawyers: when they define the action to be performed, there is no more to be said about the law; the next step is the action itself. If canon lawyers trained in theology are not alert to this fact, they may handle canon law as if they had in hand a theological text. The result will be long disquisitions on many possible meanings and hidden significances of the law—and the directness and simplicity of it will be lost in the process. The wisdom of a canon lawyer is in knowing at what point to stop the explanations.

law. By simple inference we have already a foundational principle, not in need of any further demonstration: moral theology occupies a position of priority vis-à-vis canon law. This priority manifests itself in several ways: (1) in defining values, (2) in setting the parameters for the creation of laws in general, (3) in guiding the making of the laws for particular institutions.

1) *Moral theology has priority in determining the values.* There can be little doubt about this proposition. Moral theology aims for knowledge, canon law for decision and action. Now knowledge always ought to precede decision and action. It follows that there is a genuine relationship of dependence between the two disciplines: the ordinances of the law must follow the confirmed insights of moral theology.

2) *Moral theology sets the parameters for lawmaking.* Legal norms in the Christian community cannot, and must not, operate independently within some kind of self-defined order (*ordo iuridicus*). They must be part of the theological life of the community, which means they must sustain and promote a life of faith, hope, and love. In the *ecclesia*, the gathering of the faithful, the theological virtues give sense and purpose to every single norm.

This is to imply a lot: moral theology has a critical role to play vis-à-vis canon law. It can set the parameters for the lawmakers, can tell them how far to go or not to go. It can give guidance to those who are implementing and interpreting the law: it can guide them in keeping the law in the service of the theological virtues.

Such guidance is all the more necessary because the prudential actions of the legislators are not protected by the charism of infallibility, or for that matter by the charism of the highest degree of prudence. Hence mistakes can occur and the delicate balances of the community can become disturbed. There could be so much law that it overshadows the theological virtues, or there could be so little that it leads to anarchy. The right measure is found only when absolute priority is given to faith, hope, and love—the prime objects of moral theology.

One hears often that the Church is not an absolute monarchy but a “constitutional” one, in reference either to the papacy or the episcopacy. The implication is that the pope or a local bishop is bound to respect certain well-defined structures laid down by divine law. Rarely is it mentioned that the pope and the local bishops, and everybody else who is entrusted with any power in the Church, are bound by a set of moral precepts to use their power the best way they can for the promotion of faith, hope, and love. History leaves no illusion: failures are possible, either by not reaching for the greater good or by omitting action altogether where it is due. Such failures need not be classified as violations

of the constitutional structures of the Church but as failures to live up to the moral principles which guide the use of a sacred trust.¹³

3) *Moral theology must be the guide in the creation and application of the laws of particular institutions.* In Aquinas' theology there is some parallelism between the statutes and the sacraments of the Church: both are (though in different ways) the external signs of God's redeeming grace.¹⁴ The laws are not, of course, the grace-filled signs that the sacraments are; nonetheless they play a major part in creating the right environment for them and provide the rules for their administration.

In creating those laws the legislator appears to be sovereignly free. He is—from a merely legal point of view. From a moral point of view he is not free. He is bound by a trust deed: the deed of our redemption. He has received his power for a purpose: to complete the saving work of the Lord—a theological enterprise, if ever there was one! It is good logic to affirm that theology alone is competent to guide him.

So much for a general theory. The question still remains as to how to find this guidance in the case of particular institutions. There are too many particular institutions in the Church to give a solution which would be suitable for each one of them. Yet a pattern of search can be indicated which is powerful enough to guide the legislator toward conceiving and formulating the theologically best-grounded laws for them. Such a pattern I do propose, in the form of a structured sequence of questions. Hearing them at first, they may sound quite innocent and simple; but their penetrating force will soon be sensed by anyone who tries to answer them.

Collegiality. Here is the pattern of questions conducive to theological guidance:

*What are the values that the practice of collegiality (universal and regional, vertical and horizontal) can bring to the community?

*What are the best means (consultations, synods, councils, etc.) for obtaining those values to their greatest extent?

*Who is morally bound to promote those means in order to let the whole Church benefit from the values of collegial actions?

Once these questions are raised and answered, the legislative project

¹³ To clarify those principles is certainly part of the task of moral theology. Yet, understandably, moral theologians have shied away from writing treatises on "the use of the sacred power." Historians, dealing with the past, are bolder and do not hesitate to judge past popes and bishops not only on the basis of their respect for constitutional structures, but on their moral standards in using the powers entrusted to them; Pastor's *History of the Popes* is filled with such judgments.

¹⁴ On this issue see the remarkable study by Manuel Useros Carretero, "*Statuta ecclesiae*" y "*Sacramenta ecclesiae*" en la *eclesiología* de St. Tomás de Aquino (Rome: Gregorian Univ., 1962).

can get under way. This, too, may sound simple; in practice it may demand many years of sustained effort.

Ecumenism. The same pattern can be used but with other specifications:

*What are the values that unity can bring to the separated churches and communities?

*By what actions can those values be obtained (dialogues, work together for good causes, reducing within our own household practices which unnecessarily alienate the others, etc.)?

*Who has what moral obligation to act?

In the process we may well discover that the theological value of unity is much greater than the preservation of some of our cherished but not essential traditions.

Fundamental rights in the Church. This issue is debated far and wide in the religious and secular press; responsible contributions are certainly needed.¹⁵

*What are the fundamental rights of the faithful? (This question is already answered quite well in the new Code. Note that behind every right there is usually a potential from which the Church can benefit.)

*How can those rights (potentials) be given full scope for the common good? How can they be protected if they are hampered or violated? (The Code offers some weak and mostly ineffective measures, as a matter of fact available to those only who can afford to pursue a long and often expensive process.)

*Who are morally bound to protect those rights (by legislation, judicial action, etc.) and what is the degree of their moral obligation? (An unexplored field in moral theology.)

Sacraments, in particular Eucharist and penance.

*What are the values that a given sacrament brings to the community? (Nourishment for life; forgiveness and healing.)

*By what means can the Church make such values most accessible to those who need them and are fit to receive them?

*Is the Church morally bound to make these sacraments as accessible as dogma allows it? (Dogma should never be wronged: a saying from the East expressing our common tradition.)

Ecclesiastical property. This has been a topic for burning questions throughout the history of the Church.

*What is the nature of the goods owned by the Church? (Sacred, was the answer throughout history; but before the eighth century the prevailing opinion was that since they were sacred, whatever was left over

¹⁵ On this issue we have a well-written and tightly reasoned study by Paul Hinder, *Grundrechte in der Kirche* (Fribourg, Swit.: Universitaetsverlag, 1977).

had to given to the poor; after it, since they were sacred, they had to be kept.) What are the values which church property ought to support?

*What are the ways and means of supporting those values? (Law will play a leading role.)

*Who has what moral obligations in this field? (Again, one could envisage a moral treatise in depth on the use of the assets of the Church.)

Procedures, in particular marriage annulments.

*What are the values the Church is seeking in a judicial procedure? (To redeem and heal the persons who have been hurt—innocently or culpably.)

*What are the best means to achieve such purposes?

*What are the moral duties of the legislator to provide the best means and do away with others—if so warranted?

Enough of the examples: what a program! The same sequence of questions could be repeated for every single institution.¹⁶ My purpose was to show that a fairly simple but searching pattern of questions *on the part of moral theology* could help canon law fulfil its purpose, which is to remain in the service of theological values.¹⁷

SERVICE TO THEOLOGY

By now it may look as if canon law depends altogether on theology, but has very little to contribute to the theological enterprise. This is, of course, not true. Let me mention just two substantial contributions.

One contribution is to help the community, through the light and the

¹⁶ My questions should not be read as if they were affirmations. In the history of theology, perhaps no one has raised more questions than Aquinas, and some of his questions were patently absurd, such as "Is there a God?" This was his method of getting at the truth. Canon law undoubtedly suffered from the fact that after the Council of Trent it contained too many affirmations and too few questions—especially fundamental questions. If it is a true science, it can afford questions—any questions. There has never been a better way of setting out to find the truth. Of course, a rational and responsible inquiry must follow.

¹⁷ Before closing this section, I raise one more question of a somewhat general nature: Would it be profitable to have a critical study of the Code of Canon Law from the point of view of moral theology *as a positive science*? The point would not be to look for faults and failures, but to see if our laws correspond in everything to the highest demands of faith, hope, and love. Note the words "to the highest demands." Obviously the laws and ordinances of the Church are born of faith, hope, and love. But the lawmaker is not divinely guaranteed to act according to the *highest* degree of prudence, or, for that matter, to the *highest* degree of love. Therefore it is legitimate, even necessary, to examine and re-examine those human acts in the Church and expose them to the "mirror of the gospel" in order to ascertain whether they correspond indeed "to the highest demands." Such a study, done by competent persons, cannot but be enriching for the Church. If at the end the answer is yes, our laws do fit the highest demands, we have gained a great deal, because we know how to continue. If the answer is no, the knowledge will help us to make the laws better instruments in supporting the theological virtues.

bond of the law, to appropriate certain moral values; this should be fairly evident from all that has been said. In fact, in many ways canon law supports the moral life of the community. When a canon says that a just wage should be paid to all employees of the Church, the law is imposing with special force on all the employers a minimum standard of charity.

Another contribution is that the law can create structures which provide "free space" for those who are doing theological research and reflection, and can restrain others from interfering with this protected territory. Further, it can provide remedies in case of undue interference. This is no mean service.¹⁸

THE NATURE OF CANONICAL SCIENCE

The dependence of canon law on theology throws some light on the very nature of the science of canon law. It shows (1) that canon law is an ecclesiastical science, (2) that it can be correctly interpreted in an ecclesiastical context only, (3) that it must be an *ordinatio caritatis*.

1) *Canon law proper is essentially an ecclesiastical science.* Because it is in the service of faith, hope, and charity, it takes on a dimension that civil law can never have. The latter remains within the parameters of the temporal welfare of the community; the former has for parameters the theological virtues. It follows that there is an essential difference between the two, and the method of the one cannot be transferred without some substantial accommodations to the other.¹⁹

¹⁸ The issue is really much bigger than the service done by canon law to moral theology. A substantial study would be needed on the service of law (or "order") to the Word of God and to the sacraments. Canon law has a *raison d'être* as far, and only as far, as it is in the service of those two.

¹⁹ Eugenio Corecco (formerly professor of canon law at the University of Fribourg, Switzerland, now bishop of Lugano) distinguishes four stages in the development of the science of canon law: the sapiential, the techno-juridical, the apologetic, and the theological. "Well before the last two decades this science [canon law] had indeed already entered upon the fourth stage of its development despite the resistances of many kinds persisting in a doctrinal approach that can still claim justification in various—outdated—elements of the Code [of 1983]. This fourth phase is the theological phase and is based on the acceptance of theology as co-essential for the development of a general theory of canon law. It was preceded by the sapiential phase of the first millennium, the techno-juridical phase of the golden age that had its origins in Roman law, and the apologetic phase of the *ius publicum ecclesiasticum* that was based on natural law." See "Aspects of the Reception of Vatican II in the Code of Canon Law," in *The Reception of Vatican II*, eds. Giuseppe Alberigo, Jean Pierre Jossua, and Joseph A. Komonchak (Washington, D.C.: Catholic Univ. of America, 1987) 295.

In substance I agree with these divisions, although I would describe them somewhat differently. (1) In the first millennium canon law responded pragmatically to problems of order in the Church; it was a creature of Christian common sense; as yet it was not a science; also, it remained very close to a nonscientific theology. (2) The age of reflection

2) *The ecclesial context is an essential hermeneutical element for authentic interpretation.* As the creation of canon law takes place in an ecclesial context, it follows that its interpretation must move in the same context too. Admittedly, this is not always the case.

The norms can be read by those who are inside the community and their meanings reconstructed in the context in which they were conceived; also, the norms can be read by those who are outside the community and then given meanings without reference to, or at variance with, the doctrinal context in which they were created. In other terms, the laws of the Church can be interpreted within their own religious horizon or without it. The diverse approaches may then generate different conclusions. Nothing surprising in that: the interpreter's field of vision clearly affects the significance of the concepts interpreted.

The important thing to remember is that the interpretation in a religious horizon is more likely to be correct, since it is within the field where the norm was born. The interpretation within a secular horizon is bound to leave out important elements in the meanings, or could conceivably project alien elements into them.

The same considerations apply to the history of canon law. The norms in the Church arose in the context of the Christian mysteries, and they made sense because of the mysteries. It follows that there cannot be a full historical explanation of them except by taking into account the same factors that brought them into existence in the first place. To recall this is not idle speech.

The mysteries which were the reasons for the creation of a law were usually not written into the text; therefore, when centuries later researchers read it, they may fail to give any thought to the theological doctrine which inspired the very law they are reading! How could anyone, for instance, interpret correctly the penitentials of the Early Middle Ages without being familiar with the development of the dogma of forgive-

and abstraction began in the 12th century; canon law developed as a science on the pattern of classical Roman and later Byzantine jurisprudence; initially theology had a strong impact on it, which however decreased gradually. (3) The 16th century was the beginning of a new age marked by lack of creativity in the traditional body of laws (due mainly to the prohibition to comment on the Tridentine decrees) and by the rise of the "public ecclesiastical law," which was marked strongly by late scholasticism; further, legal writings became verbose to an excess and interested in myriads of minutiae, which led also to burdensome impositions on the faithful—a complex period perhaps best called the post-Tridentine age. (4) After Vatican II, canon law no less than other ecclesiastical sciences reached back to its roots, not so much historically as systematically, and increasingly realized its necessary dependence on theology; today there is a strong trend to bring canon law back to where it belongs, but there is perhaps an equally strong effort to keep it in an autonomous "juridical order." It is still too early to name this age the "theological" one in the history of canon law—no matter how much I would like to see it that way. The situation is unsettled.

ness?²⁰

Since canon law is well known and researched inside and outside the Church, we can take it for granted that there will always be two approaches to it: one in a religious context, another in a secular one. They may even produce two sciences, close and distant at the same time.²¹ We have to remember that only the one "within" can do full justice to the texts. Of course, no other interpretation should be used for our own pastoral purposes.

In brief, the proper locus of interpretation of our laws is the redeeming Church, and inside it the overriding finality of redemption must govern the meanings of the norms.

3) *Ordinatio caritatis: a response to Sohm*. Rudolph Sohm (1841-1917) was an outstanding scholar in civil and canon law, as well as an eminent historian. He put forward the opinion that there is a contradiction between the concept of law and the essence of the Church; the Church, therefore, must be free of laws. According to him, this was the case at the beginning of Christianity, but law began to penetrate the communities from the end of the first century and reached its culmination with the "corporation" law of the medieval canonists. The evangelical Church returned to the original purity, but the Catholic Church continues to be a *Rechtsskirche*, a society held together by coercion, i.e. by law, in clear contradiction to the evangelical doctrine.²² His opinion was well received among Protestant divines because it was in harmony with Luther's ideas,

²⁰ The thesis that for the full understanding of laws the doctrine which inspired them must be taken into account is not peculiar to canon law. Civil laws often reflect the social philosophy of the political party which enacted them. When courts speak of the "intention" of the legislator, they often admit the impact of a philosophy on the meaning of the laws. Historians are usually more explicit in these matters, and they discuss at length the impact of a philosophy on the meaning of the laws.

²¹ The secular interpretation is found mostly in universities where canon law is taught in the context of civil law. Then both laws are presented as being part of the same juridical order; from then on it is a small step to applying the principles and methods of civil jurisprudence to canon law. This ramification of the science of canon law can never be impeded; it remains a living demonstration of what happens when the same norms are put into two different horizons, one sacred and the other secular, and interpreted accordingly.

²² Sohm's doctrine is easy to understand if his concept of church and of law are recalled. For him, the Church of Christ is invisible; and there is no such thing as a visible church. Law means a coercive norm, and if a norm is not coercive it cannot be law. Law is the instrument of order in an autonomous visible society, such as the state. Obviously, starting from such premises, there must be a contradiction between the very essence of law and that of the Church. Sohm has reinterpreted the whole history of the Church in the light of these premises of a dogmatic nature. For references in general, see the article "Sohm" in *Die Religion in Geschichte und Gegenwart* 6 (3rd ed.; Tübingen: Mohr, 1962) cols. 116-117. For references to publications in English, see "Sohm" in *The Encyclopedia of Religion* 13 (New York: Macmillan, 1986) 405.

but it was rejected by Catholic theologians and canon lawyers, who argued that the Church was both a spiritual communion and an ordered society, and that both elements belonged to its very nature, complementing each other in harmony. For good measure, the Catholics often invoked the "perfect society" theory to refute Sohm.

Undoubtedly, Sohm was influenced by his own evangelical tradition, which asserted that the Church was a purely spiritual and invisible gathering of God's people. Nevertheless, his exaggerated views (which not even the German evangelicals accept in its original form any more) can serve as a healthy warning that charity should never be overshadowed by the law in a Christian community. Thus in some way Sohm had a point: the Church ought to be a community of love and not of law *as law is understood in the secular society*. But—and this is said in correction to Sohm—the Church can have a legal system in an ecclesial sense, i.e. a system which springs from, and remains under the control of, the theological virtue of charity.

Indeed, law in the Church could be defined as *ordinatio caritatis*; it could be rightly called the "minimum of charity."²³ Unfortunately, we do not have a proper name for ecclesiastical norms to distinguish them from civil law; canon "law" insinuates an analogy too close for comfort. The World Council of Churches prefers the expression "church order" in place of "law"; it certainly puts the emphasis on the ecclesial character of the norms.

A PRACTICAL PROPOSAL

Presently we have a Code of Canon Law which contains not only norms concerning right-and-duty situations, but exhortations and encouragements which belong to the proper domain of moral theology. It would help the community of the faithful if those two themes were physically separated from each other. There could be a "Code" for strictly right-and-duty situations, as are legal relationships concerning contracts, properties, offices, etc.; and there could be a "Book of the Christian Way of Life" exhorting the faithful to show their unity with the community

²³ For the expression "law is the minimum of charity," and even more for the doctrine that is behind it, I willingly give the credit to René Carpentier, once my professor of moral theology at the Faculté St. Albert de Louvain in Belgium. See also n: 8 above. Precisely because law in the Christian Church is both a norm and an act of charity, it must be open to exceptions and accommodations when so warranted. Thus the Church received and developed the legal devices of *epieikeia*, equity, *oikonomia*, and dispensation. The most theological among them is *oikonomia*, "economy," honored in theory and practice in the Eastern Church. For more information on these devices, which can and must keep the law within the sphere of charity, see Ladislav Orsy, "General Norms, Notes," in *The Code of Canon Law: A Text and Commentary*, eds. James A. Coriden et al. (New York: Paulist, 1985) 41–44.

by the devotional reception of the sacraments and by the observance of holy days and seasons. If there is a resentment in the Christian community against canon law, it is not because the Church makes laws for strictly right-and-duty situations, but because spiritual services have been put into the categories of "juridical order" and imposed as such on people. They sense that something has gone wrong, even if they cannot articulate it. In fact, what appears to be a "resentment" may well be the correct sentiment, dictated by nothing less than the *sensus fidelium*, which does not arise without the assistance of the Spirit.

CONCLUSION

If it was not clear in the beginning, it should be clear by now that we are dealing with two sciences which are going through a period of ferment and change; it is all the more difficult to determine their relationship. Moral theology is in the process of shaking off many historical accretions, such as an excessive casuistry and a preoccupation with the negative aspects of morality. It is also surging to a new life, nourished from the authentic sources of Christian spirituality. Canon law is slowly abandoning a false autonomy and a dependence on secular legal philosophy nurtured mainly by the "perfect society" theory. It is also discovering itself as an ecclesiastical science in the service of faith, hope, and love.²⁴

Throughout our study, we have searched for the principles of a sound relationship between the two sciences, for a kind of universal equation that would do justice to both. Such an equation may not be precisely formulated as yet, but some elements of it have emerged with remarkable clarity and strength. The most important among them is that every single piece of the law in the Church must be in the service of values either defined or at least controlled by theological reflection. Such a conclusion engages the legislator to approach his task with the conviction that every legal ordinance ought to be a manifestation of the redeeming action of the Church. There cannot be any room for formality or legality: they have no saving value.

Further, whenever possible, the faithful must be guided to the point where they can see the values the law intends to uphold, so that they can implement it with intelligence and freedom. Then obedience to the law will be a moral act in the best sense of the word, because it will be an act of obedience to the luminous dictate of the conscience.

²⁴ On the impact of Vatican Council II on the development of canon law, see Richard Potz, *Die Geltung kirchenrechtlicher Normen* (Vienna: Herder, 1978). For a study on the evolutionary nature of canon law, see Helmuth Pree, *Die evolutive Interpretation der Rechtsnorm im kanonischen Recht* (Vienna: Springer, 1980).