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THEOLOGY AND CANON LAW:

THE THEORIES OF KLAUS MÖRSDORF AND EUGENIO CORECCO

by

Myriam Wijlens

A dissertation submitted to the
Faculty of Canon Law, Saint Paul University,
Ottawa, Canada, in partial fulfilment
of the requirements for the
Degree Doctor of Canon Law



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BIOGRAPHICAL NOTE

Myriam Wijlens was born in Losser, The Netherlands on December 1, 1962. She completed her high school at the Twentsch Carmellyceum in Oldenzaal in 1982. Subsequently, she studied theology at the Katholieke Universiteit in Nijmegen, where she obtained the SThL in 1986. In that same year she started studies in canon law at Saint Paul University in Ottawa, Canada, where she received her MCL and JCL in 1988.

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*If we value the pursuit of knowledge, we must be free
to follow wherever that search may lead us*
(Adlai E. Stevenson)

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ABBREVIATIONS

<i>AA</i>	<i>Apostolicam actuositatem</i>
<i>AAS</i>	<i>Acta Apostolicae Sedis</i>
<i>AfkKR</i>	<i>Archiv für katholisches Kirchenrecht</i>
<i>AG</i>	<i>Ad gentes</i>
<i>CIC/1917</i>	<i>Codex iuris canonici, 1917</i>
<i>CIC/1983</i>	<i>Codex iuris canonici, 1983</i>
<i>CD</i>	<i>Christus Dominus</i>
<i>DDC</i>	<i>Dictionnaire de droit canonique</i>
<i>DE</i>	<i>Il Diritto Ecclesiastico</i>
<i>Denz.</i>	<i>Denzinger</i>
<i>DS.</i>	<i>Denzinger-Schönmetzer</i>
<i>GS</i>	<i>Gaudium et spes</i>
<i>HdbKathKR</i>	<i>Handbuch des katholischen Kirchenrechts</i>
<i>LG</i>	<i>Lumen gentium</i>
<i>LThK</i>	<i>Lexikon für Theologie und Kirche</i>
<i>ME</i>	<i>Monitor ecclesiasticus</i>
<i>MThZ</i>	<i>Münchener theologische Zeitschrift</i>
<i>NCE</i>	<i>New Catholic Encyclopedia</i>
<i>ÖAKR</i>	<i>Österreichisches Archiv für Kirchenrecht</i>
<i>OT</i>	<i>Optatam totius</i>
<i>PO</i>	<i>Presbyterorum ordinis</i>
<i>Periodica</i>	<i>Periodica de re morali canonica liturgica</i>
<i>PJR</i>	<i>Praxis juridique et religion</i>

ABBREVIATIONS

x

<i>RDC</i>	<i>Revue de droit canonique</i>
<i>RSPhTh</i>	<i>Revue des sciences philosophiques et théologiques</i>
<i>SC</i>	Sacrosanctum concilium
<i>ThGl</i>	<i>Theologie und Glaube</i>
<i>ThQ</i>	<i>Theologische Quartalschrift</i>
<i>TThZ</i>	<i>Trierer theologische Zeitschrift</i>
<i>TS</i>	<i>Theological Studies</i>
<i>ZevKR</i>	<i>Zeitschrift für evangelisches Kirchenrecht</i>

INTRODUCTION

The understanding of the relationship between theology and canon law has captured the attention of several canon lawyers, especially during the past fifty years. Among them different schools of thought developed, all intent on investigating that relationship. Moreover, both Pope Paul VI and John Paul II have stressed the need for a healthy influence of theology on the interpretation of canon law.

The first part of the dissertation will present a short historical survey of the development of the relationship between theology and the science of canon law, followed by a concise description of the current developments in the understanding of that relationship. Among the schools that emerged it is the German school which forms the main object of investigation in this dissertation, for the following reasons. First of all, this school and the Second Vatican Council seem to have had some reciprocal influence on each other. Second, this school of thought is, due to its language of publications, accessible only to a small group of people in the English speaking world; hence, research, published in English, could enlarge the acquaintance with its position. Third, in my studies in theology and canon law I developed an interest in foundational studies. I find it, therefore, enriching to acquire a familiarity with the German approach.

As my research progressed it became clear that it was better to study a few scholars in depth than several superficially. So, the analysis was limited to two scholars: Klaus

Mörsdorf and Eugenio Corecco. The reason for that choice is that Mörsdorf was the founder of this German school. He had a great influence on contemporary canon law, both through his teachings and through his numerous students, some of whom became influential canonists themselves. Among them is Eugenio Corecco, who worked officially on the final draft of the 1983 Code and also continues to publish.

The analysis of the work of these two scholars is to answer the questions: What is their understanding of the relationship between theology and canon law? How and where do they discuss this relationship? What are the consequences of their theories?

The report on each scholar starts with a biographical introduction of the scholar, followed by a report on his theory. The primary sources will be the scholar's writings and references will be given to comments by others on the scholar. In order to put the theory into a historical, systematic context, recognized scholars will be used. In the presentation in general, the scholar himself will 'speak:' the theory as such will be presented in a systematic way, i.e., by way of principal themes. Such an approach will also take into account any developments the scholar has made in his thinking over the years.

The method underlying the research is in fact the method of any mental operation. A brief reflection on method seems therefore appropriate.¹ The aim of any method is discovery. A good way of discovering something is by raising a question. The purpose of the question is to determine as far as possible the extent of the search itself. A good question

¹ "Method is a normative pattern of recurrent and related operations yielding cumulative and progressive results" (B. Lonergan, *Method in Theology*, paperback ed., Minneapolis, MN, Seabury Press, 1979, p. 4). Method thus understood is really applicable to any mental operation. In Lonergan's understanding the human spirit operates in the same way, be it in theology or canon law. For more information on this last understanding of method, see Lonergan, *Method in Theology*, pp. 3-25.

will therefore start from the known data, but will point toward the unknown. Once the question is raised adequately, the process of discovery begins. Then, four steps will follow:

1. The question raised turns the researcher toward the object of the research (the objective world) and towards collecting the necessary information. The question to be asked is: what are the relevant data? At this stage the researcher must be alert, diligent and critical in locating the data, in representing them faithfully, and selecting them judiciously. The result of the collected data is a gathering of dispersed information, marshalled together by the power of the question, but--as yet--without clear unity.
2. After collecting the data, the researcher brings in the power of the mind to understand (*intellegere*) the data. The question at this step is: what is the significance of these data in view of the final resolution of the question? The mind searches for a unifying meaning behind the data through insights which can unite them into an intelligible whole; a creative activity. At this stage various hypotheses are created, all attempting to explain what the data symbolize. For success at this stage not only creative intelligence is needed but also a great deal of discipline to use all the available information and yet remain within the limits of the information. The result is insights (possibly several or many).
3. The researcher takes the hypotheses and checks them out against the objective world. The question to be asked is: is the hypothesis true? It is true if it
 - * remains within the parameters of the question
 - * accounts for all the data
 - * does not go beyond the data

* by doing all this, excludes other understandings.

For success at this stage an impeccable critical reasoning is needed and a capacity to surrender to the truth no matter what it may bring. The result is a rational judgement or affirmation surrendering to truth.

4. Often enough the process of discovery leads to the determination of a value: something that can contribute to the development of the researching person, and/or other persons. The person then can bring into play the capacity to opt for this value. The options concern the objective world and are meant to change it. For success the person has to be responsible: he or she proceeds from rational knowledge and accepts all the consequences of the option. The result is a decision or action.

With the help of this critically demanding method the theory of the scholars can be evaluated. The results of such an evaluation should present both the benefits and the shortcomings--if any--of the theories.

This is in a nutshell the meaning of any operation of the mind. To sum it up: the main question of the dissertation is: what is the relationship between theology and canon law according to K. Mörsdorf and E. Corecco? In order to answer this question, the necessary data is collected (step one): the work of both authors is read and, in the light of the question, the relevant material selected and reported on. Subsequently, the task is now to formulate hypotheses (step 2) and to check the accuracy of those against the

obtained data (step 3).² So this implies that these hypotheses should follow from the data obtained. This should bring forward an answer, that can be acceptable or unacceptable (indeed this is truly an evaluation). The discovery is completed and the new knowledge can and will point to further questions (conclusion).

² The reader should not confuse this with the method that either Mörsdorf or Corecco applied: they use 'method' as a particular pattern of operation (action) in a given field to get results. The method as, e.g., Mörsdorf applies it is determined by the content. Strictly speaking these scholars should also operate according to the method as described by Lonergan, but whether they do that or not is not the concern now. At this point the concern is the method of this dissertation itself.

PART 1 - THE DEVELOPMENT OF THE SCIENCE OF CANON LAW

The history of the relationship between theology and the science of canon law shows a changing development in that relationship. This first part will present that development, which resulted in the appearance of different schools of thought on that relationship in present times.

Before presenting such an overview it is appropriate to clarify some terms, because that will provide for a better communication between the writer and the reader. These terms then, are 'theology,' 'canon law,' and the 'science of canon law.'

The understanding of theology as 'faith seeking understanding' seems an agreeable definition. Theology is primarily knowledge and consists of accumulated judgements--often with the help of philosophical categories and principles--concerning God, His self revelation and His deeds in human history. It is rooted in the acceptance of beliefs. On a very practical level, theology helps to clarify values that the community should reach out for. These values should bring about and manifest a (closer) relationship with God.

Canon law consists primarily of norms of action. These norms are determined by the values that theology has helped to identify and clarify. Canon law singles out certain values (mostly of social significance) and formally binds the community to pursue them by action.¹

¹ L. Örsy presents an understanding of canon law that is highly determined by values. In his theory he is able to bring theology and canon law in a close, if not interwoven, relationship. He has published numerous articles on this relationship. The most recent ones, dealing explicitly with this relationship, are "The Relationship between Values and Laws,"

The scholarly interpretation and reflection on these norms, according to a special method, forms the science of canon law. Although the science of canon law can be very widely defined, for the purpose of this dissertation it refers to the science of norms, and to the history and method applied by canon lawyers in interpreting the norms.²

1 - THE HISTORICAL DEVELOPMENT OF THE SCIENCE OF CANON LAW

The history of the science of canon law in the Western Church allows for an identification of several periods.³ The criterion for a division in these periods is the method

in *The Jurist*, 47 (1987), pp. 471-483 and "Integrated Interpretation; or, The Role of Theology in the Interpretation of Canon Law," in *Studia canonica*, 22 (1988), pp. 245-264. He applies this theory in the article "Moral Theology and Canon Law: The Quest for a Sound Relationship," in *TS*, 50 (1989), pp. 151-167.

² A.M. Stickler identifies the subject-matter of the science of canon law as the work and life of canon lawyers, the rules of canon law, the canonical educational establishment, the methods of research and systematization, the literary collections of the canonical writings, the canonical schools, and the relationship of canon law towards other sciences, especially civil law and theology (A.M. Stickler, art. "Kanonistik," in *LThK*, Bd. 5, col. 1289). This is really not a definition, but it is an enumeration of topics.

³ The data for this section on the history of the science of canon law is obtained from the following sources: J. Gaudemet, "Théologie et droit canonique: Les leçons de l'histoire," in *RDC*, 39 (1989), pp. 3-13; A. van Hove, *Commentarium Lovaniense in Codicem iuris canonici*, vol. 1, *Prolegomena*, Mechliniae, Romae, H. Dessain, 1945, 671 p.; P. Huizing, art. "Canon Law," in *The New Encyclopaedia Britannica, Macropaedia*, 15th ed., vol. 3, Chicago, Encyclopaedia Britannica, 1984, pp. 773-780; R. Naz, art. "Droit canonique, VII. Histoire de cette science," in *DDC*, vol. 4, cols. 1472-1478; W.M. Plöchl, *Geschichte des Kirchenrechts*, 5 Bd., Wien, Herold, 1953-1969; A.M. Stickler, art. "Kanonistik," in *LThK*, Bd. 5, cols. 1289-1302; A.M. Stickler, "Teologia e diritto canonico nella storia," in *Teologia e diritto canonico*, Studi giuridici, vol. XII, Città del Vaticano, Libreria Editrice Vaticana, 1987, pp. 17-32; C. Vogel, et al., art. "Canon Law, History of," in *NCE*, vol. 3, pp. 34-50; I. Zeiger, *Historia iuris canonici*, vol. 1, *De historia fontium et scientiae iuris canonici*, Romae, Apud Aedes Universitatis Gregorianae, 1947, 132 p.

that is applied.⁴ It is, however, impossible to demarcate these periods precisely: history itself was not tidy and neat, since various tendencies converged and diverged. This description of the main trends in the development of the science of canon law then is divided in four timespans:

1. from the early Church to Gratian;
2. from Gratian to the council of Trent;
3. from the council of Trent to the Second Vatican Council;
4. from the Second Vatican Council to the present.

The following sections will show the development of the science of canon law in light of the relationship to theology. The development will show that people have moved from one horizon into another or, as others would say, from one paradigm into another.⁵

⁴ The division in timespans in the history of canon law can easily differ, depending on the criterion applied for such a division. One can, e.g., use important canonical sources as criterion: the 1917 Code would then certainly be a relevant marking point, because it introduces a codified system into canon law. Or the influence of the secular society could be a criterion, or a division could be made purely based on dates: Then 1140 would be important, and so would 1983. Since, however, the object of investigations is the history of the science of canon law, the methodology forms the criterion for demarcating the timespans.

⁵ The theory of horizons, as for example applied in canon law by L. Örsy, permits one to think in terms of expanding and growth; it shows a linear development in thinking (see e.g., "The Meaning of *Novus habitus mentis*: The Search for New Horizons," in *The Jurist*, 48 (1988), pp. 429-447).

The theory of shifting paradigms is of a more dramatic nature. This theory, as proposed by the philosopher of natural sciences T. Kuhn (*The Structure of Scientific Revolutions*, International Encyclopedia of Unified Science, 2nd enlarged edition, vol. 2, no. 2, Chicago, University of Chicago Press, 1970, xvi, 210 p.) and applied to theology, for example by H. Küng (*Theologie in Aufbruch: Eine ökumenische Grundlegung*, München, Piper, 1987, 320 p. [English translation: *Theology for the Third Millennium: An Ecumenical View*, New York, Doubleday, 1988, xvi, 316 p.]), speaks in terms of crises and revolutions. (Küng says that instead of the term 'paradigm' he would equally prefer to speak of 'models' of interpretation, explanation, or 'understanding,' p. 132.) My major objection to this theory is that in its view 'truth' depends on the position that one takes: every position is valid in

1.1 - From the early Church to Gratian

The first period, then, lasted until Gratian and is mainly characterized by the collection of accumulated pragmatic wisdom, and the general absence of a critical and systematic scientific approach towards canon law. During the first eleven centuries canon law consisted mainly of norms that emerged from practical solutions to problems. The canonical norms resulted especially from councils, popes, and customs as well. Canon law was not an independent discipline, but still part of the whole of theology and was considered 'practical theology.'

The Fathers and ecclesiastical writers, however, composed various treatises concerning particular ecclesiastical institutions. These treatises were the forerunners of the scientific commentaries. They formed an historical and literary exposition of Church discipline.

Toward the end of the first millenium some ordering of the existing norms appeared in the form of collections. These collections were the result of attempts to formulate some rules on interpretation in order to deal with contradictory norms. During this time, significant persons were Bernold of Constance (1054-1100),⁶ Ivo of Chartres (1040-1116), and Abelard (1079-1142). With Ivo of Chartres this period reached its highest point: he

itself. The notion of 'horizon,' on the other hand permits one to say that a previous belief was incorrect, since new data and new insights have revealed a new understanding.

⁶ Bernold of Constance was an important source for Ivo of Chartres; "He urged canonists to reject apocryphes, analyze each fragment according to circumstances of time, place, and persons that occasioned its composition; then to determine the nature of the rule laid down, its permanent or temporary character" (C. Munier, art. "Canon Law, History of: 3. False Decretals of Gratian," in *NCE*, vol. 3, p. 40).

gave several rules for interpretation,⁷ based on the genuinity of the sources, the evaluation of the norms, and the identity of the author, and he took into consideration the question about the reception of the text.⁸

At the same time Abelard developed in his *Sic et non* a dialectic method for reconciling texts, by listing arguments that were for or against a certain theological position.⁹ At the school of Bologna the first writers of glosses on the *pandecta* of Justinian, which was rediscovered around 1070, applied these methods. These methods were put into a systematic work by the famous monk Gratian (around 1140).¹⁰

In summary, the first timespan of both theology and canon law is mainly characterized by a pragmatic and practical approach in solving problems. The two disciplines are not distinguished from each other; there is virtually no critical science for either of them.

⁷ Ivo of Chartres proposed some rules for interpretation in his *Prologe* to his *Panormia* or his *Decretum*. See Stickler, "Kanonistik," col. 1290.

⁸ Plöchl, *Geschichte des Kirchenrechts*, Bd. 2, pp. 409-410.

⁹ Abelard's method became known in scholastic theology as the *sic et non* method. It entailed that, for the understanding of a problem, words, ideas, and realities had to be examined from all sides. The recognition of a problem implied an appreciation of all arguments *sic et non*, i.e., for and against, a specific question. Such questions could arise from texts, conflicting interpretations, doubtful solutions, or new insights. See J.A. Weisheipl, art. "Scholastic Method," in *NCE*, vol. 12, pp. 1145-1146.

¹⁰ Huizing, "Canon Law," p. 776.

1.2 - From Gratian to the council of Trent

The patristic period of a pragmatic approach ended with Gratian, who became known as the 'Father of canon law.' Many themes were the same in theology and canon law, viz. sacramental law, ecclesial order and discipline. In dogmatics, Abelard's dialectical method became widely used. This method had, because of the relationship between dogmatics and canon law, an impact on the canonical thinking. This became especially noticeable in the great enterprise undertaken by Gratian, who published around 1140 a systematic work or application of norms for interpretation in his *Concordia discordantium canonum*,¹¹ in which he applied the scholastic method of *sic et non*. Since the science of canon law was practised in the monastery and cathedral schools, the relationship with theology continued to be very close. This close relationship implied that the values which he was upholding came from a theological vision.

¹¹ The *Concordia discordantium canonum* is also known as the Decretum of Gratian. This *Decretum* is a composition of texts of different origin: apostolic constitutions, canons of the councils, decretals and patristic texts. These all constitute the *auctoritates*. Gratian did not simply collect texts, but he accompanied them with a commentary. The *auctoritates* also have commentaries. Since these *auctoritates* often contradicted each other, Gratian attempted to reconcile these oppositions. In general, Gratian's comments underline the particular features of the various opinions presented and draw the conclusion to which they lead. Moreover, Gratian tried to show that the oppositions in the doctrines are merely apparent, not real; he frequently attributes the contradictions to different interpretations of terms. Finally he attempted to formulate a general conclusion. The *Decretum* was the object of commentaries from the middle of the 12th century. Although it is one of the most important canonical collections in the history of canon law, it was never adopted as an authentic source of canon law. Plöchl, *Geschichte des Kirchenrechts*, Bd. 2, pp. 411-415.

The impact of Gratian's work was far reaching and it implied for the science of canon law the arrival of a new era.¹² The canonists who followed him upheld also the values coming from theological ideas and principles.

The first part of the new period lasted until the last Glossator John Andrea (1348). In this period foundations were established and structures were laid for centuries to come.¹³ This is the reason why this period is called 'classical canon law.'

This classical period is characterized especially by the writings and studies on the masterpiece of Gratian and on the Decretals.¹⁴ The causes for the development of the science of canon law were threefold: (a) in the quarrels between emperor and pope the Church enjoyed a supereminence in the twelfth and thirteenth centuries. The history of

¹² Authors differ in determining the start of the classical period. For some Gratian is not part of the new era (for example, Stickler, "Kanonistik," col. 1290), while others include Gratian in the new era (for example, G. May, A. Egler, *Einführung in die kirchenrechtliche Methode*, Regensburg, Pustet, 1986, p. 46).

¹³ J. Gaudemet says that the *Decretum* of Gratian and the *Sentences* of Lombard form the point of departure for the distinction between the sciences of theology and canon law. It implied that both had their own domain, vocabulary, method, and way of approaching problems. But this, however, did not imply that they ignored each other or that there was a break. In fact, as Gaudemet mentions, between the 12th and the 16th century canon law and theology related to each other on three points: (1) they had to deal with common problems especially in the domain of baptism, orders, marriage and penance; (2) the canon lawyers provided the theologians with texts; (3) the theologians provided questions, concepts (especially philosophical ones), and ways of reasoning for the canon lawyers (e.g., hierarchy of texts). See Gaudemet, "Théologie et droit canonique," pp. 8-12.

¹⁴ "The science of canon law was developed by the writers of glosses, the commentators on the Decree of Gratian (decretists), and the commentators on the collections of decretals (decretalists). Their notations, or glosses, were based on the system used by Gratian: next to the texts of canons, parallel texts were noted, then conflicting ones, followed by a *solutio* ('solution'), again with text references" (Huizing, "Canon Law," p. 776). For an overview of the impact of several decretists and decretalists see Plöchl, *Geschichte des Kirchenrechts*, Bd. 2, pp. 434-455.

Europe shows how the Church in the twelfth century enjoyed an increasing authority in civil society; the Holy See was frequently consulted on matters of justice. The Church was envisioned as a protector of justice and as the way of salvation. (b) Throughout Europe universities were established in the thirteenth century. These universities became the workplace for canon law.¹⁵ (c) Of great significance for canon law was the university of Bologna (Italy), where in the 11th century Roman law was rediscovered by the civil lawyers. The canon lawyers realized how much they had used Roman law, and at the same time the civil lawyers realized how much they had 'borrowed' the canonical norms.¹⁶ This discovery of Roman law and the revival of classical legal science introduced canon lawyers to the art of using abstraction.¹⁷ Besides the relationship with the legal science, the relationship with theology also continued during this time. This relationship existed not only in dogmatics and practical theology, but also in methodology--both in teaching and applying--, in foundations, and in literary forms. The prevalent method applied was the scholastic method of *sic et non*.

¹⁵ The most relevant universities for canon law were Bologna, which was important from Gratian until Johannes Andrea (+1348) and Paris, which lost most of its significance in the beginning of the 13th century, because the canon lawyers working from that time on were more orientated towards Bologna and the Curia. See Stickler, "Kanonistik," col. 1293.

¹⁶ In a booklet, G. Le Bras describes some examples of the mutual influence of Roman law and canon law in the 13th century. G. Le Bras, *Droit Roman et droit canon au XIIIe siècle*, Comunicazione letta nella seduta ordinaria del 16 aprile 1966, Accademia nazionale dei Lincei, Problemi attuali di scienza e di cultura, no. 92, Roma, Accademia nazionale dei Lincei, 1967, 17 p.

¹⁷ In writing glosses canon lawyers imitated those who worked on Roman law. Many students studied canon law with the same zeal as civil law. This enabled them to obtain a degree in civil as well as in canon law. Hence, the term *doctor utriusque iuris*.

This method together with the newly acquired knowledge of Roman law brought forward new systematic explanations.¹⁸

In summary, up to Gratian, the relationship between theology and canon law was very close, but once his work was produced, canon law became an autonomous science distinct from theology. One can say that there is a turning from pragmatic canon law in case decisions to a critical approach through the practice of abstraction.

The newly developed methodology led to new literary collections, like *glossae*, *quaestiones*, and *distinctiones*.

This classical period was followed by what is called the 'post-classical' period, which started in the middle of the 14th century and lasted until the middle of the 16th century. Due to the location of the papacy in Avignon, France, and the Great Schism (1378-1417), when there were two popes--and eventually three--claiming the right to reign, there was no new significant legislation. The canon lawyers continued to apply the scholastic method, inherited from the classical period, but scholasticism was in decadence. The scholarly level attained in the past two hundred years could not be kept up. Scholastic terms were increasingly built into the legal system and obtained a permanent status there. Under the influence of humanism, an interest was awakened for history and criticism.

In summary, the interest for history and criticism brought about a change from being a practical discipline to being reflective in theology and scientific in canon law.

¹⁸ Stickler, "Kanonistik," col. 1291.

1.3 - From Trent to the Second Vatican Council

The reformation and the council of Trent on the one hand, and the impulses of other sciences (civil jurisprudence in France with its emphasis on history and criticism of sources) on the other hand, brought about a new period in the science of canon law. Humanism was not content with verbose commentaries, but was interested in the original texts, the source-material of law. Antiquity was of interest to all subjects, but especially to the study of law. A school of historical research and scientific criticism was established for the legal sciences, but the canon lawyers did not follow: they did little work on the sources and focused completely on the *Decretum* of Gratian.

Since the teaching of canon law became less important in the civil law faculties, and since there were, in the theological faculties, fewer studies of civil law, decline followed. This development resulted in the teaching of canon law in moral theology. That in its turn led to a mixing of methods: the juridical method of formal text-interpretation invaded moral theology.

The counter reformation, however, had led to a strong defensive attitude. The interpretation of the council became a matter for the Apostolic See and publications of commentaries, glosses, or remarks were forbidden.¹⁹ At the same time Aquinas'

¹⁹ Pius IV published the constitution *Benedictus Deus* on January 26, 1564 by which he forced the canonists to change their method and provided them at the same time with a new object of study: the jurisprudence of the Roman Curia. The Pope reserved to himself the execution and interpretation of the council. He established on August 2, 1564 the Congregation of the Council for that purpose. Plöchl sees two effects of this: the positive effect was that the canonists had to focus on the sources; the negative effect was that the exegetical method declined. Plöchl, *Geschichte des Kirchenrechts*, Bd. 5, pp. 349-350. See also Naz, "Droit canonique: Histoire de cette science," col. 1475.

understanding of law as an *ordinatio rationis*, reason bringing order into the community, was mostly replaced by *lex est ordinatio voluntatis legislatoris*, law is the will of the legislator, as articulated by Suarez. For interpretation, this implied that there was less room for rational explanation: the meaning of the law was located in the will of the authority who enacted it. The decline of critical (*sic et non*) explanation resulted in an almost unchangeable system. The effect it had was an incapacity to respond adequately to the changes in the secular society (for example the French Revolution and the adaptation of the *Code Napoléon*). The science of canon law deteriorated.

Another important factor in this deterioration was the theory of the Church as a 'perfect society.' The Church had to be seen in the same way as the state was. Örsy indicates that the problem was not so much with this theory as such; of greater significance was the univocal and uncritical application of this secular model to the Church. The univocal concept of the perfect society became the vehicle of transporting ideas from civil law into canon law. This was also possible due to the poor state of theology (in particular the ecclesiology of the Church). This implied that elements of secular organization and jurisprudence were imported into the Church.²⁰

Due to the development of history in legal science an interest in the history of canon law was awakened especially in Germany in the 19th century.²¹

²⁰ Örsy, "The Meaning of *Novus habitus mentis*," p. 437.

²¹ Relevant scholars in this are on the Protestant side: P. Hinschius (+1898), F. Friedberg (+1910), U. Stutz (+1938), and on the Catholic side: F. Walter (+1879), G. Phillips (+1872) and E. Eichmann (+1946).

This interest is especially present in Germany, because there, a strong interest in national history emerged, and German national history is strongly bound up with Church history including canon law.

The promulgation of the *Codex iuris canonici* in 1917 marked in a sense a new period in that it adopted a codified system of laws and, at the same time, a new systematic approach to the laws.²² At the time of the promulgation of this Code, the exegetical and analytical method were urged by the Holy See, but systematic expositions were discouraged. Presentations of juridical institutions were recommended, for which a genetic historical method was suggested. The purpose of this was to disclose the origin, development, and changes of the institute in order to clarify the presence of the existing norms. Students could use other books than the Code for this, but the systematic of those books should possibly be adapted to the systematic of the 1917 Code.²³ In 1931 a change was permitted in the sense that the use of the historical philosophical method was acknowledged,²⁴ but most commentaries continued to apply the exegetical method. The attitude vis-à-vis the Code was a practical one and academic treatises were rare.

This third timespan, then, is characterized by a generally defensive attitude and a certain lack of creativity in theology; canon law is explained with little regard for anything else.

²² Gaudemet remarks about the 1917 Code, "Le code de 1917 fut le reflect de ces tendances. La théologie en est à peu près absente" (Gaudemet, "Théologie et droit canonique," p. 13).

²³ The Congregation for the Seminaries and University Studies communicated twice about the method to be used in canon law. Both times the analytical method was urged and free systematic treatises were forbidden. See Sacred Congregation for the Seminaries and University Studies, "Cum novum iuris," in *AAS*, 9 (1917), p. 439 and ID., Decree, "Legum canonicarum," in *AAS*, 11 (1919), p. 19.

²⁴ Pius XI, Apostolic Constitution, "Deus scientiarum Dominus," in *AAS*, 23 (1931), p. 253-254.

In summary, after the council of Trent, even if there was some development of theology, there was also much stagnation and lack of creativity. Canon law was a tool to hold on to the familiar.

This timespan does not really end at a precise moment. Around the Second World War a renewed understanding of ecclesiology started forcefully;²⁵ it brought about a gradual rethinking of the foundations of canon law and its method.

2 - CONTEMPORARY UNDERSTANDING OF THE SCIENCE OF CANON LAW

There is a strong trend in the present understanding of the science of canon law to show its dependence on theology, especially ecclesiology. The following section will describe the developments in ecclesiology and the response to that by both Paul VI and John Paul II, and the canonists. The description of the canonists will show that their reply is far from unanimous; on the contrary, several schools of thoughts have appeared.

2.1 - The development of ecclesiology

The historical development of the theological methodology showed that after the council of Trent there was little interest for empirical or historical data. The bible was scarcely used, unless to prove theses. During the 1940s, however, many Catholics, especially in France, studied the ecclesiologies of the Fathers.²⁶ Closely related to this interest in

²⁵ Already in the nineteenth century a renewed understanding started. Relevant names are Johann Adam Möhler (1796-1838) and John Henry Newman (1801-1890).

²⁶ This new approach started already before the Second World War, but it was not widespread. Among the relevant theologians are Emile Mersch (1890-1940), Marie D. Chenu (1895-1990), Henri de Lubac (born 1896), and Yves Congar (born 1904).

patristics was the revival of the theology of the Mystical Body.²⁷ The studies of the Fathers led to the publication of the encyclical *Mystici Corporis Christi* by Pius XII.²⁸ A very important aspect of the encyclical was the idea that no one could be truly (*reapse*) a member of the Mystical Body without being a member of the Roman Catholic Church. If non-Catholic Christians were living by the grace of Christ although living in errors, while in good faith, they could belong to the Body in desire and resolution (*in scio quodam desiderio ac voto*). These statements brought about a discussion among exegetes and canon lawyers, who said that baptism constituted one a person in the Church of Christ.²⁹ In 1947

The major sources for this section are A. Dulles, "A Half Century of Ecclesiology," in *TS*, 50 (1989), pp.419-442; J. Frisque, "L'ecclésiologie au XXe siècle," in R. Vander Gucht, H. Vorgrimler (dirs.), *Bilan de la théologie du XXe siècle*, vol. 2, Tournai, Casterman, 1970, p. 412-456; G. Martina, "The Historical Context in Which the Idea of a New Ecumenical Council was Born," in R. Latourelle (ed.), *Vatican II: Assessment and Perspectives: Twenty-Five Years After (1962-1987)*, vol. 1, New York, Mahwah, Paulist Press, 1988, pp. 3-73; T. Schoof, *Aggiornamento: de doorbraak van een nieuwe Katholieke theologie*, Ingeleid door E. Schillebeeckx, Baarn, Het Wereldvenster, 1968, 287 p. (English translation: M. Schoof, *A Survey of Catholic Theology: 1800-1970*, Glen Rock, Paulist Newman Press, 1970, 275 p.).

²⁷ Of great importance were the historical studies of Emile Mersch, who turned especially to Cyril of Alexandria, who emphasized the physical and organic union between the Head and the members. The Church consequently was seen as the prolongation of Christ. Also relevant were the studies of the Fathers by Sebastian Tromp (1889-1975). He claimed that for the Fathers the Catholic Church was the Mystical Body. See Dulles, "A Half Century of Ecclesiology," pp. 421-422.

²⁸ Pius XII, Encyclical letter, "Mystici Corporis Christi," in *AAS*, 35 (1943), pp. 193-248.

²⁹ Klaus Mörsdorf argued for example that the theory should be brought into harmony with c. 87 of the 1917 Code, which stated, "Baptismate homo constituitur in Ecclesia Christi persona cum omnibus Christianorum iuribus et officiis, nisi ad iura quod attinet, obstat obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura" [Benedicti XV, *Codex iuris canonici*, PII X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, Romae, Typis Polyglottis Vaticanis, 1917, hereafter referred to as CIC/1917 with the canon number]. See K. Mörsdorf, "Die Kirchengliedschaft im Lichte der Kirchlichen Rechtsordnung," in *ThGl*, 36 (1944), pp. 115-131.

Pius XII published a new encyclical letter *Mediator Dei et hominum*,³⁰ in which he taught that by baptism one became a member of the Mystical Body.

At the same time there was a group of scholars that decided to go 'back to the sources.' One of the best known representatives of the movement was Y. Congar. He characterized the first millenium as a more spiritual, prayerful listening to Christ with an openness to conversion and reform and the second millenium as being more attracted to power and domination. Congar was of the opinion that, since the present Church had lost domination over secular society, the first millenium could serve as a model for the new time. He investigated Paul's metaphor of Body of Christ, whose central meaning Congar saw not so much in the visibility of the Church, but more in unity in plurality.

In the fifties, the theology of the Church as sacrament developed, promoted by the studies of Henri de Lubac, Otto Semmelroth (born 1912), Karl Rahner (1904-1984), Marie-Joseph le Guillou (born 1920), and others.

The Second Vatican Council itself did not make any sharp break with recent trends in ecclesiology: the concepts of society and institution were subordinated to the ideas of mystery, sacrament, and communion of grace, but nevertheless the image of the people of God was developed in such a way as to imply institutional structures. In this the hierarchy was envisioned as a service to the people of God.³¹

³⁰ Pius XII, Encyclical letter, "Mediator Dei et hominum," in *AAS*, 39 (1947), pp. 521-600.

³¹ G. Baraúna (dir.), *L'Église de Vatican II: Études autour de la constitution conciliaire sur l'Église*, Unam Sanctam, nos. 51a-51c, Paris, Cerf, 1966; H. Vorgrimler (ed.), *Commentary on the Documents of Vatican II*, vol. 1, New York, Herder, 1967, pp. 105-305.

The newness of the council, then, was not only a new understanding, but even more so a new approach or a new attitude. The Fathers reflected on the old, but understood it in a renewed way.³² Paul VI applied the term *novus habitus mentis* to refer to this change of attitude. Örsy, in inquiring what Paul VI could have meant by that term, says that the new attitude consisted of "a permanent disposition to raise new questions whenever it is so warranted by a gap in our knowledge, and to search for an answer as long as that gap remains open."³³ For Örsy this new attitude of faith seeking understanding operated during the council and enabled the Fathers to come to new insights. He mentions a few examples:³⁴ (a) The Fathers moved from an imperial understanding of the Church (perfect society model) to a *communio* model. This switch was possible due to the historical investigations before the council. (b) There was a change from a confessional conflict to an ecumenical understanding. They took a fresh look at all the Churches and communities.

³² Scholars like E. Schillebeeckx and R. McBrien describe the change in terms of discontinuity. Schillebeeckx speaks of a change from essential to existential thinking. E. Schillebeeckx, *Struggle of Minds - Vatican II: A Struggle of Minds and Other Essays*, Dublin, Gill, 1963, 91 p., espec. pp. 7-32.

McBrien characterizes the pre-Vatican II Church as ptolemaic: the Church is seen as the center of history and as the ordinary means of salvation. With Vatican II the Church went through a Copernican and Einsteinian revolution: the Church is supplanted from the center of history of salvation and replaced by the Kingdom of God. Space and time are not absolutes, but relative to the frame of reference of a particular observer. History itself is creative of new forms and the Christian community's consciousness of itself as the Body of Christ grows and matures in the context of progressive rather than static history. R. McBrien, *Do We Need the Church?* New York, Harper and Row, 1969, 255 p.

Although this is a somewhat simplistic view of history--changes in the Church do not take place so radically--McBrien has a point.

³³ Örsy, "The Meaning of *novus habitus mentis*," p. 431.

³⁴ L. Örsy, "Novus habitus mentis: New Attitude of Mind," in *The Jurist*, 45 (1985), pp. 254-256.

(c) With Trent the Church moved itself into a defensive isolated position. At Vatican II, the bishops got a better insight on the whole planet. This led to an appreciation of secular values, and also they perceived the cry of the needy. (d) The discoveries of the empirical sciences, together with new historical insights allowed the Fathers to move away from a static world view to a dynamic one.

Örsy is of the opinion that this change of attitude should of course also affect the canon lawyers:

A good canon lawyer in the future should do the same that the council has done: move beyond the familiar into a higher viewpoint that only enhanced knowledge can give, then raise new questions and have the courage to accept fresh answers.³⁵

The renewed understanding of the Church inevitably affected the understanding of canon law.

The following section will report on this renewed understanding.

³⁵ Örsy, "*Novus habitus mentis*," p. 257. Possibilities for evolution in canonical interpretation are also mentioned by H. Schwendenheim, "Der 'Geist der Gesetzgebung' als dynamischer Interpretationsfaktor," in *RDC*, 22 (1972), pp. 315-332; H. Pree, *Die evolutive Interpretation der Rechtsnorm im kanonischen Recht*, Linzer Universitätsschriften, Monographien, Bd. 6, Wien, Springer Verlag, 1980, xii, 270 p.; W. Schulz, "Der 'Geist des Konzils' als Interpretationsmaxime der kanonistischen Rechtsordnung? Zur Auslegung der kodikarischen Interpretationsregeln," in *Apollinaris*, 55 (1982), pp. 449-460; L. Örsy, "The Interpretation of Laws: New Variations on an Old Theme," in *Studia canonica*, 17 (1983), pp. 95-133.

For a different opinion on the possibility of evolution in interpretation see R.J. Castillo Lara, "Die authentische Interpretation des kanonischen Rechtes im Rahmen der Tätigkeit der päpstlichen Kommission für die authentische Interpretation des *ius canonicum*," in *ÖAKR*, 37 (1987-1988), pp. 209-228.

2.2 - Recent developments in the science of canon law

The changes in ecclesiology brought about a new approach to canon law. The change happened already before the council, but was intensified due to the doctrine on the Church as proclaimed by the council. With the vanishing understanding of the Church as a perfect society, the role of law had to be reflected on³⁶ and both Pope Paul VI and John Paul II encouraged the influence of theology in the understanding and interpretation of canon law.

Canonists started to rethink the foundations of canon law, and the method to be applied. This all led to the emergence of what could be called--in a rather broad sense--'schools.'³⁷ Unfortunately no detailed comparative study of methods used by various large groups of canon lawyers, working after the council, has been published.³⁸ The major difference between the schools consists in their evaluation of canon law being primarily a juridical or a theological science. The different schools of thought could be identified as the

³⁶ Another reason for this awakening of the study of the foundation of canon law might have been provoked by Rudolph Sohm (1841-1917) with his famous thesis that the essence of the Church and the essence of canon law exclude each other. Sohm's thesis is explained in more detail in the first chapter of the part on Mörsdorf (1.2.1 - *Rudolph Sohm poses a question*).

³⁷ The word 'school' might be too strong, but the alternative 'trend' is too weak. These schools represent a certain group of canon lawyers, who adhere to a certain view on the relationship between theology and canon law.

³⁸ The legislation itself has of course changed in the meantime; initially canon lawyers had to deal with the old law, while their theology had changed. They also responded to drafts of the forthcoming legislation. Only with the promulgation of the 1983 Code is it possible to evaluate the work of canon lawyers. The historical-critical method is acknowledged, but the schools use more the exegetical method, with an influence of theology.

project of *Concilium*, the lay-canonists in Italy, the school of Navarre in Spain, and the school of Munich.

The following section will give a short description of the teachings of the popes on the influence of theology, followed by a characterization of these schools.³⁹

2.2.1 - The teachings of Paul VI and John Paul II

In the years after the council both popes stressed that there was a close relationship between theology and canon law.

Paul VI said that, because of the will of Christ, the Church is a visible society.⁴⁰ Like any other society it is governed by laws. This shows a christological foundation of canon law. In Paul VI's own words:

Canon law is the law of a society that is indeed visible but also supernatural; a society which is built up through the Word and the sacraments, and whose objective is to lead people to eternal salvation. For this reason it is a sacred law, entirely distinct from civil law. It is a law of a very special, hierarchical nature, and proceeds from the very will of Christ. It is totally incorporated in the salvific action of the Church, by which she continues the work of Redemption. By its very nature, then, canon law is *pastoral*. It is an

³⁹ This is a summary presentation because the scope of this dissertation does not allow for, nor require, an in-depth analysis of their thoughts.

⁴⁰ An analysis of the teachings on canon law by Paul VI is published by F.G. Morrissey, "The Spirit of Canon Law: Teachings of Pope Paul VI," in *Origins*, 8 (1978), no. 3, pp. 33, 35-40; R. Potz, "Papst Paul VI. und das Recht," in *ÖAKR*, 29 (1978), pp. 199-216; J. Grelon, E. Hamel, "Nature et légitimité du droit canonique: Pour une lecture des discours de Paul VI," in *PJR*, 1 (1984), pp. 59-65 and R.J. Castillo Lara, "La place du droit canonique dans une vision conciliaire de l'Église," in *Studia canonica*, 24 (1990), pp. 5-26.

expression and instrument of the *apostolic function*, and a constitutive element of the Church of the Incarnate Word.⁴¹

For Paul VI, the council marked the beginning of a new era, in which canon lawyers have to take theology into consideration. The first concern for a canon lawyer should therefore be, he said, "to deepen the work of the Spirit which must be expressed also in the Church's law."⁴² The end of the law, besides the good of the community, is the protection of the autonomy of the person in his Christian existence. Justice is a returning point in his teaching.

John Paul II relates canon law in a special way to the Second Vatican Council.⁴³ The Pope expressed his thoughts on this subject most profoundly in the apostolic constitution *Sacrae disciplinae leges*. There he says that the Code is no substitute for faith, grace, charism, and especially charity in the life of the Church or the faithful, but

its purpose is rather to create such an order in the ecclesial society that, while assigning primacy to love, grace, and charisms, it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons belonging to it.⁴⁴

⁴¹ Paul VI, Allocution to the Sacred Roman Rota, 8 February 1973, in *AAS*, 65 (1973), p. 96 (English translation: "The Value of Canonical Equity," in *The Pope Speaks*, 18 (1973-1974), p. 76).

⁴² Morrisey, "The Spirit of Canon Law," p. 38.

⁴³ See H. Schmitz, "Wertungen des *Codex iuris canonici*: Versuch einer ersten Bilanz," in *AfkKR*, 154 (1985), pp. 19-57, espec. pp. 20-27.

⁴⁴ "[Ex contrario] Codex eo potius spectat, ut talem gignat ordinem in ecclesiali Societate, qui, praecipuas tribuens partes amoris, gratiae atque charismati eodem tempore faciliorem reddat ordinatam eorum progressionem in vita sive ecclesialis societatis, sive etiam singulorum hominum, qui ad illam pertinent" (John Paul II, Apostolic Constitution, "Sacrae disciplinae leges," in *AAS*, 75 (1983) pars II, p. xi [English translation in *Code of Canon Law*, Latin-English edition, translation prepared under the auspices of the Canon Law

He goes on to say that the Church needs canon law for its social and visible framework. Concerning the relationship between theology and canon law, the Pope says that the legislative texts have to be interpreted from the perspective of the Second Vatican Council, especially taking into consideration the new images of the Church, like the doctrine of the people of God, the hierarchy as service, the doctrine of 'communion,' the doctrine of sharing in the three offices of Christ, and ecumenism.⁴⁵

2.2.2 - The project of *Concilium*

In the first canonical issue of the international periodical *Concilium*,⁴⁶ its editors proposed a 'dejuridicizing' of theology and a 'detheologizing' of canon law. The proposal

Society of America, Washington, DC, Canon Law Society of America, 1983, p. xiv (all future references will be made to this English translation)).

⁴⁵ John Paul II, "Sacrae disciplinae leges," p. xv. He confirmed this in the address to the Roman Rota in 1984; see John Paul II, Allocution to the Sacred Roman Rota, 26 January 1984, in *AAS*, 76 (1984), pp. 643-649 (English translation: "Innovation of Canon Law: Discourse Delivered by Pope John Paul II to Judges, Officials and Advocates of the Court of the Sacred Roman Rota," in *The Pope Speaks*, 29 (1984), p. 174).

⁴⁶ N. Edelby, T. Jiménez Urresti, P. Huizing, "Preface," in *Concilium*, 1 (1965), vol. 8, pp. 3-4. They made a distinction between theology *of* canon law and theology *in* canon law. Jiménez Urresti elaborated on the issue two years later. He is of the opinion that there is a different level of speaking in canon law and theology, and illustrates this with an example: "[...] it is not the same thing, theologically, to say that the hierarchy, when it grants ministerial licences to priests, gives them jurisdiction to hear confessions, as it is to say that it approves and does not annul the exercise of this jurisdiction which they received at their ordination. But Canon Law, which does not pretend to formulate theological doctrine, but to regulate conduct, can use either formula indiscriminately, since both, for practical purposes, define the same principle of the behaviour of the priest towards his constituted authority" (T. Jiménez Urresti, "Canon Law and Theology: Two Different Sciences," in *Concilium*, 3 (1967), vol. 8, p. 11).

implied that theology and canon law are two distinct sciences, but related; the 'detheologizing' of canon law meant that its relativity became more to the forefront and that canon law would not be considered theology. The 'dejuridicizing' of theology implied that historical lines of action should not be absolutized theologically. Although the proposal obtained quite some attention, it disappeared quietly in the seventies.

2.2.3 - The lay canonists in Italy

The second group of people dealing with the relationship between theology and canon law are the so-called 'lay canonists' in Italy.⁴⁷ For this school the scientific foundation of canon law concerns the juridicity (*giuridicità*) of canon law and the juridical quality of the science of canon law. The fact and juridical nature of this *giuridicità* is proven from the sociological comparison of the Church with other social secular entities (especially the state), holding the theory of *ubi societas ibi ius*. For them the Church is a society willed by Christ. In the development of their thoughts, the theory of the *societas iuridice perfecta* also played a significant role. For the Italian school, the Church forms a 'state' *peculiaris*

⁴⁷ G. Feliciani gives a description of this school in his study "Le droit canonique dans les universités d'état en Italie," in M. Zimmermann, *Fondements du droit canonique*, (classnotes), Strasbourg, n.p., 1986, pp. 69-88 (the study must have been written between 1981 and 1986). Other sources for information are A.M. Rouco Varela, "Allgemeine Rechtslehre oder Theologie des kanonischen Rechtes? Erwägungen zum heutigen Stand einer theologischen Grundlegung des kanonischen Rechtes," in *AfkKR*, 138 (1969), pp. 95-113, espec. pp. 102-103 and R. Sobański, *Grundlagenproblematik des katholischen Kirchenrechts*, Wien, Böhlau, 1987, 160 p., espec. pp. 9-28.

The school was born at the end of the 19th century, as a result of the anti-clerical attitude that led to closing faculties of theology. As a result the canonists were deprived of theological education and they had to justify the existence of canon law as a science in the secular universities. Relevant canonists in this school are V. del Giudice, P. d'Avack, and O. Giacchi.

generis and its juridic system is essentially the same as the one of the state. The lay canonists are, however, aware of the peculiarity of this society. They declare everything which concerns exclusively the nature of the Church and which is outside the domain of law, to be in a meta-juridical sphere. The Spirit then, belongs to this meta-juridical sphere. The same is the case for the end of canon law, considered to be the *salus animarum*, which forms a meta-juridical factor. But the existence of meta-juridical categories is not a typical canonical phenomenon. The lay canonists remark that the state has also meta-juridical categories.

In interpreting the norms, the presence of the Spirit cannot be taken into account, because it would cause a confusion of both the juridical principles and the theological immutable requirements. The method for teaching canon law can therefore be the same as for teaching civil law. The primary focus of this school is to keep the science of canon law and the science of theology distinct.

These canonists do not deny the necessity to look into the substantial reality of the Church. The task of the science of canon law is to look into the juridical aspect of the Church. Canonists have to consider what is and should be the social order, which is a good order for the communal journey of the people of God in the world.

The lay canonists affirm that canon lawyers should have a theological training, but there is no consensus about the role of theology in the method and application. At most, they see history and theology as auxiliary sciences to canon law.

Presently this school is being challenged on three points: (1) the council urged canonists to take an interest in theology, (2) there is a general crisis of the juridical

method, and (3) a better understanding of other schools of canon law on this subject provides new insights.

In conclusion, the Italian lay canonists consider canon law as a juridical science, with somehow an influence of theology, but that influence is on a meta-judicial level.

2.2.4 - The school of Navarre

Canonists at the Catholic University of Navarre--mostly lay canonists who are also members of *Opus Dei*--form another school of thought concerning the relationship between theology and canon law.⁴⁸ In their thinking they show strong affiliations with the Italian lay canonists, but they are more sensitive to the theological aspects that determine the canonical order. Already before the council they applied a systematic modern juridical methodology to canon law, especially in the area of a fundamental law. Initially, they showed a greater interest in the epistemological and methodological aspects of problems, but recently they pay more attention to their ecclesiological aspects.

The attitude of these canonists is marked by their affirmation that canon law and theology are separate. Canon law is a juridical discipline, but the difference from the Italian school is that the Navarre school stresses that canon law is subordinate to the Magisterium of the Church. In spite of this, they consider canon law a *species generis iuris*. Its foundation is sought in a legal theory that coincides with a modern institutional doctrine. They envision

⁴⁸ Representatives of this school are P. Lombardia, J. Hervada, A. de la Hera, P.J. Viladrich, Gonzales del Valle, and others. They present their thoughts especially in the periodical *Ius canonicum*. The information on the school of Navarre is obtained from A. de la Hera, "À la recherche d'un fondement théologique du droit canonique," in *L'Année canonique*, 12 (1968), pp. 49-58; A.M. Rouco Varela, "Die katholische Rechtstheologie heute: Versuch eines analytischen Überblickes," in *AfkKR*, 145 (1976), pp. 17-19.

canon law as an *estructura ordenadora*, which results from a dimension of justice which is a constitutive element in the people of God. The connections between the ecclesiological elements and the legal structures are not clarified.


2.2.5 - The German school

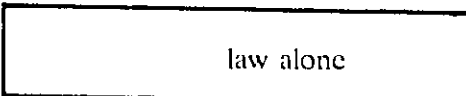
Besides the schools of thought where canon law is considered primarily as a juridical science, there is also the German school, which tries to give canon law a theological foundation and sees canon law as a sacred law (*ius sacrum*). The founder of the German school is Klaus Mörsdorf, who was director of the institute of canon law in Munich from 1947 until 1977. Several of his disciples--among them are A.M. Rouco Varela, E. Corecco, W. Aymans, and K. Walf--have followed him in his basic theory although they have pointed out some of its weaknesses and attempted to come forward with new answers. Mörsdorf sees the *locus theologicus* of canon law in ecclesiology, especially in the understanding of Word and sacrament as constitutive elements of the Church. To envision canon law primarily as a theological science, where the juridic aspect is also taken into consideration, is the main thesis of this school of thought. Mörsdorf expressed that as follows: the science of canon law is a theological discipline with a juridical method.

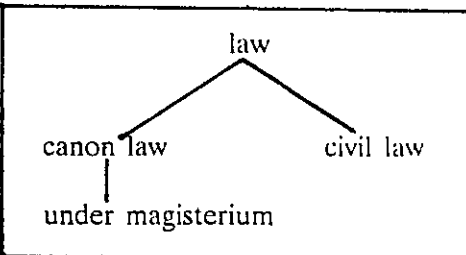
2.2.6 - Summary of present schools

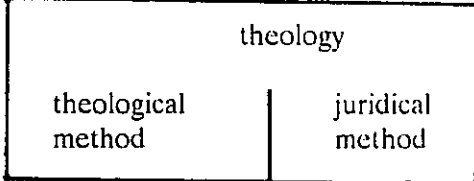
The description of the different schools of thought on the understanding of the relationship between theology and canon law showed that there are two extreme opinions. One is that canon law is strictly a juridical discipline independent from theology (Italy) and

the other extreme is that canon law is a theological discipline (Germany). Visualizing these different ways of thinking leads to the following schema (as an approximation):

1. Concilium:
The two are autonomous, but related.
 

2. Lay canonists (Italy):
The two are autonomous; law is not analogical; law has value in itself; value is not provided by any philosophical and / or theological system
 

3. Navarre:
The two are distinct; there is some dependence: there is an equation of jurisdiction and magisterium; there is an extrinsic relationship
 

4. Germany:
There is one discipline: theology; two are related; they are dependent; distinction is in method, not in substance.
 

The schema reveals that there is a major fundamental difference in the thinking about the relationship between theology and canon law. Having made this clarification, it is not difficult to imagine that the implications for the interpretation of the law are far reaching.

3 - CONCLUSION

The historical overview and the characterization of the contemporary schools of thought on the relationship between theology and canon law show that theology has always influenced that understanding. This will be evident in a short characterization of these timespans expressed in paradigms:

1. The time until Gratian: The general trend was neither critical examining nor scientific synthesizing, but rather collecting judgements (wisdom) both in theology and canon law. The horizon is the prudent interaction of faith and the surrounding culture.

The paradigm of legal decision makers: prudent believer.

2. From Gratian until Trent: In theology and canon law the scholastic method is applied; abstraction, critical method and synthesis are introduced and used. Canonists expand their horizon by going into Roman legal science, Aristotelian philosophy and scholastic theology.

The paradigm of the lawyers of the golden age: the broad-minded and curious researcher.

3. After Trent until the beginning of the 20th century: Both theology and canon law have a defensive attitude; in canon law there is not much foundational research, little use of historical-critical method, but an obedience of judgement to authorities and an excessive paraphrasing. Later, there is also exegesis of texts and development of more research into history. Canon law is a tool to prove that the Church is

indeed a perfect society. Canon lawyers have little interest in theology. Their horizon is one of preserving, obeying, and not thinking much beyond.

The paradigm: the obedient servant.

4. Contemporary canonists: Theology provides several images of the Church and all have to be taken into consideration; the attitude is an open one towards new problems; theology starts a process of interaction with other sciences. Canon law responds by investigating its foundation and relation towards other sciences. The horizon is one of leaving the familiar and moving into the unknown.

The paradigm: the researcher in the process of conversion to theological sources.

The overview presented above is not a very detailed description, but it provides an overall background for the study of one particular school in depth.

As the introduction indicated, the choice fell on the German school and in particular on Klaus Mörzdorf and Eugenio Corecco. The following two parts of the dissertation will therefore present the report and evaluation of their theories from the perspective of the understanding of the relationship between theology and canon law.

PART 2 - AN ANALYSIS OF THE THEORY OF KLAUS MÖRSDORF

The German theologian and canon lawyer Klaus Mörsdorf was born in Muhl on April 3rd, 1909.¹ He was ordained a priest for the diocese of Berlin on March 15, 1936 and died on August 17, 1989.

Mörsdorf studied law and theology in Munich, Berlin, Cologne, Frankfurt and Fulda. In 1931, he obtained his doctorate in law with the thesis *Das neue Besetzungsrecht der bischöflichen Stühle unter besonderer Berücksichtigung der Entwicklung des Listenverfahrens* in Cologne. As a student of Eduard Eichmann, he defended his doctoral thesis in theology *Die Rechtssprache der Codex iuris canonici: Eine kritische Untersuchung*² at the theological faculty of the Ludwig-Maximilians University in Munich in 1938. The following year, he went to Münster, where he worked as a research assistant and librarian at the Catholic theological seminary. In 1939, he obtained his *Habilitation* in canon law from the Catholic theological faculty of the university of Münster, where he started lecturing in canon law in 1943. In 1946, he returned as *ordinarius* to the faculty of theology in Munich, where he

¹ Bibliographical information obtained from K. Mörsdorf, *Schriften zum kanonischen Recht*, W. Aymans, K.-T. Geringer, H. Schmitz (Hrsg.), Paderborn, F. Schöningh, 1989, pp. 877-878.

² K. Mörsdorf, *Die Rechtssprache der Codex iuris canonici: Eine kritische Untersuchung*, Görres-Gesellschaft zur Pflege der Wissenschaft im Katholischen Deutschland, Veröffentlichungen der Sektion für Rechts- und Staatswissenschaft, Bd. 74, Paderborn, F. Schöningh, 1937, 424 p.

founded the *Kanonistisches Institut der Ludwig-Maximilians-Universität* in 1947. He directed this institute until his retirement in 1977.

Mörsdorf had several students, among whom were H. Ewers (*Decano emerito della Rota Romana*), M. Kaiser (professor in Regensburg), G. May (professor in Mainz), E. McDonagh (was professor in Maynooth), J. Neumann (honorary professor in Mannheim), H. Schmitz (professor in Munich), E. Corecco (bishop of Lugano), A.M. Rouco Varela (archbishop of Santiago de Compostella), K. Walf (professor in Nijmegen and Tübing), W. Aymans (professor in Munich), and K. Lüdicke (professor in Münster and Graz).

In 1953, he was made an ordinary member of the *Bayerische Akademie der Wissenschaften*. From 1955 on, he was member of the advisory board of the Institute of Research and Study in Medieval Canon Law in Washington, DC. Mörsdorf was made a prelate of the papal Household in 1962. He was given a honorary doctorate in Louvain in 1976 and became an Apostolic Protonotary in 1983.

At the Second Vatican Council, Mörsdorf was officially appointed as *peritus*. In 1964 he was made consultor of the *Pontificia Commissio Codici Iuris Canonici Recognoscendo*, where he was involved in the committees for the systematic order of the Code, the *Lex Ecclesiae fundamentalis*, the sacred hierarchy (as *relator*), and the commission for physical and moral persons in general. In 1973, he became consultor for the *Sacra Congregatio Pro Clericis*.

From 1960 until 1978, he was editor of the periodical *Archiv für katholisches Kirchenrecht*. He was co-founder of the *Consociatio Internationalis Studio Iuris Canonici Promovendo*.

Mörsdorf published an abundant amount of literature.³ Most of his ideas are expressed in articles and entries in lexicons or handbooks. His major contribution in book form was his *Lehrbuch*, a three volume revised commentary on the 1917 Code, originally authored by Eduard Eichmann.⁴

³ For a complete bibliography of Mörsdorf, see Mörsdorf, *Schriften zum kanonischen Recht*, pp. 878-889.

⁴ K. Mörsdorf, *Lehrbuch des Kirchenrechts auf Grund des Codex iuris canonici*, 3 Bd., Begründet von Eduard Eichmann, fortgeführt von Klaus Mörsdorf, 6. neubearbeitete Aufl., Paderborn, F. Schöningh, 1949-1950. In the foreword of this edition Mörsdorf wrote that he is responsible for this sixth edition and that Eichmann was only able to read the first volume before he died in 1947:

In this dissertation the 11th edition, published between 1964 and 1979, also consisting of 3 volumes, will be used.

CHAPTER 1 - AN OVERVIEW OF THE THEORY OF MÖRSDORF

Mörsdorf presents his ideas over a timespan of fifty years. During this time, two events, especially important for his work, took place in the Church: the Second Vatican Council and the reform of the *Code of Canon Law*.

This chapter will present an exposition of Mörsdorf's theory. This overview will show how crucial the ideas of Mörsdorf were to both the council and the reform of the Code. The most significant points of his theory can be classified under five headings. These headings will be used to present Mörsdorf's ideas.

The first deals with the nature and method of canon law. In response to Rudolph Sohm, Mörsdorf argues that a correct understanding of the Church will clarify the understanding of the existence of canon law. His fundamental proposal is that the *locus theologicus* of canon law is especially Word and sacrament. Mörsdorf, then, defines the science of canon law as a theological discipline with a juridical method. He became well known for this definition.

The second issue, the peculiarity of canon law vis-à-vis secular law, can be appreciated from the vantage point of the so called *forum internum et externum*. Mörsdorf holds that canon law operates and is effective in both the internal and the external forums, but not in the forum of conscience. He shows that the internal forum is often incorrectly equated with the forum of conscience.

The third topic Mörsdorf deals with touches on the 'sacred power.' He argues that a correct interpretation of history reveals that the powers of orders and jurisdiction form one sacred power; they can be distinguished, but not separated.

The fourth topic he treats is membership in the Church. This subject was especially relevant before the council. Mörsdorf distinguishes among several levels of membership according to the level of participation. He sees the relevance of his investigation (which only deals with membership of the visible Church) as extending to the question of salvation, and not being limited to the juridical only.

Closely related to this subject is the distinction between the clergy and laity or between the ordained and non-ordained persons. Mörsdorf follows the opinion that there is an essential difference between them, a doctrine that appeared especially in the Second Vatican Council's understanding of the ministerial and general priesthood as expressed in *Lumen gentium* no. 10.

Although it might appear from this that Mörsdorf's thoughts focused on five neatly divided topics, this is hardly the case. This report will show that these five topics are strongly interrelated. Thus the above division and ordering of the topics is admittedly somewhat arbitrary. Be that as it may, there is much to be said for starting with the general theory of canon law and subsequently presenting the implications of the general theory as developed by Mörsdorf.

1 - CANON LAW

The understanding of canon law forms a central theme throughout the work of Mörsdorf. This understanding has two aspects: the nature of canon law itself and the

method to be applied by canon lawyers. Mörsdorf addresses the nature of canon law by first considering its natural foundation, and then by considering its supernatural foundation.

The natural foundation is built on the adage *ubi societas ibi ius*. For the supernatural foundation, Mörsdorf starts by identifying what the Church is, since he thinks that the essence of the Church will determine the understanding of canon law. In Mörsdorf's words: "Before the question about the organisation of canon law is the question about the essence of the Church."⁵ Once this is determined, the methodology proper to canon law will flow automatically.

1.1 - The natural foundation

In his early publications, Mörsdorf focuses on the natural foundation of canon law. Though he also treats the supernatural foundation, he argues that a natural foundation is itself sufficient.

Mörsdorf starts with law in general. Every form of law (*ius*) is related to justice: it refers to what is considered to be right. Law serves as the instrument of order in a society. The adage *ubi societas ibi ius* is applicable here. People are by nature ordered towards community life, and this social life requires order. The enforcement of order presupposes an authority. Though the final and highest authority for every law is God, since law deals with earthly life here and now, a human authority is also necessary.

⁵ "Vor der Frage nach der Gestaltung des Kirchenrechts steht die Frage nach dem Wesen der Kirche" (K. Mörsdorf, "Wort und Sakrament als Bauelemente der Kirchenverfassung," in *AfkKR*, 134 (1965), p. 74).

Mörsdorf considers the Church as "the people of God living in hierarchical order to realize the Kingdom of God on earth."⁶ Before the Second Vatican Council, Mörsdorf already used the idea of the people of God. Like every community, this group of people is in need of law. Canon law, in this understanding, is therefore a law of a specific group of people, viz., the people of God. In a later article,⁷ Mörsdorf moves away from this idea. There he argues that canon law cannot be considered as a law for a special group, because that would imply that the function of the law determines how one deals with it. The problem, as Mörsdorf understands it, is that the function can only be determined from the essence of the law. Mörsdorf writes,

[...] it is not enough to focus on the function that canon law has, even when its pastoral task in the mission of salvation of the Church is taken into account. It would be too easy if one would be satisfied with a consensus in the function of canon law. The function of canon law can eventually only be determined from the essence of this law.⁸

He considers canon law as bringing order into the people of God, which means that it is fundamentally and directly related to the Church. He says,

⁶ "Die Kirche ist das in hierarchischer Ordnung lebende neue Gottesvolk zur Verwirklichung des Reiches Gottes auf Erden" (Mörsdorf, *Lehrbuch*, I, p. 21).

⁷ K. Mörsdorf, "Kanonisches Recht als theologische Disziplin," in *AfkKR*, 145 (1976), p. 45.

⁸ "[Hier wird deutlich, daß] es nicht genügt, auf die dem kanonischen Recht eigene Funktion abzustellen, selbst wenn seine pastorale Aufgabe in der heilsmittlerischen Sendung der Kirche mit in Anschlag gebracht wird. Es wäre in der Tat allzu einfach, wenn man sich mit einem Konsens in der Funktion des kanonischen Rechtes begnügen wollte. Die Funktion des kanonischen Rechtes kann letztlich nur aus dem Wesen dieses Rechtes überzeugend dargetan werden" (Mörsdorf, "Kanonisches Recht," p. 45).

Canon law is the order of the community of the new people of God, which is determined in its fundamental structures by Jesus Christ and is for all those who are called to the Church a visible sign of an invisible reality that is founded in God.⁹

Thus it is the essence of the Church that determines how canon law is to be understood. In his early writings, Mörsdorf actually considers this, calling it the *supernatural foundation* of the law.

In summary, in his early writings Mörsdorf developed a theory which argued for both a supernatural and a natural foundation for canon law. He initially considered the latter foundation sufficient. But later on, he decided that the natural foundation of canon law was insufficient (if not impossible), because the natural foundation could not give expression to the special nature of canon law.

1.2 - The supernatural foundation

1.2.1 - Rudolph Sohm poses a question

Mörsdorf's attempts to describe the Church were conducted in the context of defining what canon law is or should be. The person who heavily influenced the discussion

⁹ "Das Kirchenrecht ist die Gemeinschaftsordnung des neuen Gottesvolkes, die in ihren Grundstrukturen von Jesus Christus gegeben ist und für alle, die zur Kirche gerufen sind, sichtbares Zeichen einer unsichtbaren in Gott gegründeten Wirklichkeit ist" (Mörsdorf, "Wort und Sakrament," p. 74).

about the relationship between Church and canon law was Rudolph Sohm.¹⁰ Mörsdorf says about Sohm,

No matter what opinion one has about Rudolph Sohm, it is to his credit that through his paradoxes about the science of canon law, he brought about a renewed awareness that canon law is a function of a presupposed understanding of Church and therefore a theological reality.¹¹

Mörsdorf describes Sohm's theory very briefly: Sohm's major point is that the essence of canon law and the essence of Church are in contradiction with each other, which is to say, the Church cannot have canon law, because of its essence. The essence of the Church is spiritual, while the essence of law is secular. Although law does not directly require obedience, it presumes it. The essence of the Church, however, is opposed to this: only a free following has real spiritual value. For Sohm, it is unthinkable that the Kingdom of God should have human (legal) forms of organisation; it is unthinkable that the Body of Christ has human (juridical) power. Mörsdorf says that Sohm nevertheless recognized that canon law had to appear after about a hundred years of Christianity. The necessity of canon law was the result of an understanding of Church in which the Church had lost its

¹⁰ Rudolph Sohm was born in Rostock on October 29, 1841. He was an historian and jurist, and worked as professor in Göttingen, Freiburg i. Br., Strasbourg and Leipzig where he died on May 16, 1917. He wrote an outline of Church history, a handbook on the institutes of Roman Law, a study on the Decretum of Gratian, and a study on Church-State relations (T.D. Dougherty, art. "Sohm, Rudolph," in *NCE*, vol. 13, p. 413).

¹¹ "Man mag zu Rudolph Sohm stehen, wie man will; es ist sein Verdienst, durch seine Paradoxien der Kirchenrechtswissenschaft wieder zum Bewußtsein gebracht zu haben, daß das Kirchenrecht eine Funktion des vorausgesetzten Kirchenbegriffes ist und damit eine theologische Realität ist" (K. Mörsdorf, "Altkanonisches 'Sakramentsrecht'? Eine Auseinandersetzung mit dem Anschauungen Rudolph Sohms über die inneren Grundlagen des *Decretum Gratiani*," in *Studia Gratiana*, 1 (1953), p. 489).

original idea. Mörsdorf remarks that, for Sohm, the start of canon law coincides with the development of Catholic sacramentality. In the early Church, there were no visible signs, but human insecurity brought about an external order. Sohm situates the beginning of this development in the first century and especially relates it to the celebration of the Sunday Eucharist. With the sacrament came regulations.

Sohm called this timespan '*sacramental law*' (*Sakramentsrecht*). According to Mörsdorf, Sohm thinks that a second timespan in canon law started after Gratian, when it turned into a purely secular law. The governing separated itself from the sacrament; the *hierarchy ordinis* was now ruled by the *iurisdictio*. In this shift, Sohm sees the victory of law over charism, a victory of Catholicism over early Christianity. Mörsdorf grants the theory of Sohm a fundamental point: if the law of the Church is determined by the essence of the Church and, since the Church has a sacramental character, canon law has to participate somehow in this sacramental character. Sohm evidently has an exaggerated spiritual vision of the Church; and this, according to Mörsdorf, is due to his incorrect understanding of sacrament and his insufficient recognition of the human nature of the Son of God. Mörsdorf says:

The Church is neither only a Church of the Word nor only a Church of the sacrament, but it is both at the same time and in each other: Church of Word and sacrament. Word and sacrament are two different, but very closely interrelated elements in the structure of the visible Church.¹²

¹² "Die Kirche aber ist weder bloß Kirche des Wortes noch bloß Kirche des Sakramentes, sondern beides zugleich und in einem: Kirche des Wortes und des Sakramentes. Wort und Sakrament sind zwei verschiedene, aber eng miteinander verflochtene Elemente im Aufbau der sichtbaren Kirche" (Mörsdorf, "Altkanonisches 'Sakramentsrecht'?" p. 492).

Mörsdorf is of the opinion that Sohm identifies canon law with sacrament and that Sohm did not see the link between Word and sacrament.¹³ Mörsdorf then presents his own foundation of canon law in Word and sacrament.

1.2.2 - The Church as Word and sacrament

The notion of Church determines the way canon law must be understood. Mörsdorf is interested in the canonical aspects of the Church. He admits that the essence of the Church is difficult to determine in juridical terms. The juridical structure of the Church is, however, revealed in its sacramental character. A sacrament is an external sign and through the sign it confers grace. This idea is also applicable to the Church and makes it possible to understand its juridical structure as an essential element. Mörsdorf says,

Since canon law can only deal with what appears externally, the sacramental symbolic character of the Church is the place where the juridic structure of

¹³ For a more detailed exposition of Mörsdorf's interpretation of Sohm see "Altkanonisches 'Sakramentsrecht'?" pp. 486-502.

Beside the challenges that Sohm provided, one has to keep in mind that in 1947 Joseph Klein published his *Grundlegung und Grenzen des kanonischen Rechts* (Recht und Staat in Geschichte und Gegenwart, Bd. 130, Tübingen, Mohr, [Paul Siebeck], 1947, 32 p.). In this work, which was the text of his inaugural lecture given at the University of Bonn on May 17, 1946, he points out that the ecclesial law lacks an essential requirement compared to secular law: coercion (*Zwang*). This implies that the Church is unable to impose the faithful decision of an individual. Punishment is only effective in the Church if the person submits himself to it. The final result is that one deals with a *Kirche der freien Gefolgschaft*. In this expression Klein presents a spiritual concept of Church. The unacceptance of such ideas became evident when this booklet was placed on the *Index* in 1950 (*AAS*, 12 (1950) p. 739).

In commenting on Sohm's and Klein's theories, Walf remarks that presently the majority of the faithful practice a Church of free following. Therefore, neither Sohm's nor Klein's theoretical appeal, but inner ecclesial development itself is active (K. Walf, *Kirchenrecht, Leitfaden Theologie*, Bd. 13, Düsseldorf, Patmos, 1986, pp. 18-19).

the Church is located.¹⁴

Mörsdorf argues as follows: the Church received a mission to proclaim salvation. The two ways of mediating salvation are through Word and sacrament. The proclamation of the Word builds up the community and forms an essential element in the building up of the visible Church. This proclamation of the Word has a juridical character, because it is done under the authority of the Lord. The gospel proclaimed by the Lord is related to his person; the message and the messenger are inseparably related. Mörsdorf says that obedience to the Word is owed not only because of the internal power of the Word, but also because the proclaimer of the Word was the Son of God. The message of the Lord cannot be separated from the Lord as a person. Mörsdorf argues that this power of the Lord has continued in the Church: the Lord provided for this in selecting his apostles as representatives, by way of giving them full power (*Bevollmächtigung*). The apostles continued the work of the Lord. Since the Lord himself is owed obedience, the apostles are also owed obedience for those things they do in the name of the Lord, within the apostolic mission.¹⁵ Mörsdorf bases his case for the 'juridical' interpretation noted above by appealing to two passages which he interprets as having juridical import. He quotes two scriptural passages to support his opinion: the first one is where the pharisees question

¹⁴ "Da sich das Recht nur mit dem befassen kann, was nach außen in die Erscheinung tritt, ist die sakramentale Zeichenhaftigkeit der Kirche der Ort, an dem die rechtliche Struktur der Kirche ihren Sitz hat," (Mörsdorf, "Wort und Sakrament," p. 76).

¹⁵ "In der gleichen Mächtigkeit, mit welcher der Herr das Wort verkündet hat, lebt dieses fort in der Kirche. Der Herr schuf hierzu die Voraussetzung, indem er sich durch rechtliche Bevollmächtigung die Apostel zu seinen Stellvertretern erwählte" (Mörsdorf, "Wort und Sakrament," pp. 77).

Jesus' authority. Jesus replies that two testimonies are enough and refers to himself and his Father (John 8:12-20). The juridical aspect of the Word is also clear in the sanction that the Lord links to his message: Those who believe and are baptized will be saved; those who do not believe will be condemned (Mark 16:16).¹⁶

What is proclaimed in the Word, becomes visible in the sacrament. The Church is built up of sacred signs. The juridical symbol and the sacrament both refer to the invisible reality: "The juridical structure of the sacrament is based [...] on the institution of the signs, chosen by the Lord, to which he gave sacramental symbol and force [*Wirkmächtigkeit*]."¹⁷

Mörsdorf applies the relationship that exists between Word and sacrament to the hierarchical structure of the Church. There is a distinction between the powers of orders and jurisdiction. The power of orders is usually related to the sanctifying part of the Church, while the power of jurisdiction is related to the juridical power.

Presently one can see that the power of orders becomes active in the administration of the sacraments and sacramentals and in other liturgical acts and the power of jurisdiction refers to the Church discipline, that is, the external governing of the people of God.¹⁸

In his theory on the powers of orders and jurisdiction, Mörsdorf suggests that they

¹⁶ K. Mörsdorf, art. "Kirchenrecht," in H. Fries (Hrsg.), *Handbuch theologischer Grundbegriffe*, Bd. 1, München, Kösel Verlag, 1962, p. 839.

¹⁷ "Die rechtliche Struktur des Sakramentes beruht indessen [...] darauf, daß der Herr den von ihm auserwählten Zeichen ihre sakramentale Sinnbildlichkeit und Wirkmächtigkeit eingestiftet hat" (Mörsdorf, "Wort und Sakrament," p. 78).

¹⁸ "Heute sieht man die Weihegewalt tätig werden beim Spenden der Sakramente und der Sakramentalien sowie bei der Ausübung anderer liturgischer Dienste und weist der Hirtengewalt die Kirchengewalt, also die äußere Leitung des Gottesvolkes zu" (K. Mörsdorf, "Zur Grundlegung des Rechtes der Kirche," in *MThZ*, 3 (1952), p. 337).

can be distinguished, but never separated.¹⁹ About the relationship between the powers of orders and jurisdiction on the one hand, and the relationship between Word and sacrament on the other, he writes,

Just as power of orders and power of jurisdiction can be distinguished but not separated, in the same way the sacramental life of the Church and the juridical order are related in a profound unity.²⁰

The powers of jurisdiction and orders have their correspondence in Word and sacrament.

1.2.3 - Vatican II

After the Second Vatican Council, Mörsdorf notes that the council had, as its central notion of Church, the 'people of God.' At the same time the council did not abandon the image of the Church as 'Body of Christ,' but neither did it relate the two images into such a unity that the Church can be seen as the new people of God, structured according to the unity of Head and Body, and exercising in this fashion its mission of salvation in the name of the invisible Lord. Mörsdorf continues to say that, despite the differences both expressions were able to encompass the complexity of the Church in one image, and therefore they were able to prevent a thinking about the Church in

¹⁹ This part of Mörsdorf's theory is explained in more detail in the section 3 - *Sacred Power*.

²⁰ "Wie Weihe- und Hirtengewalt wohl voneinander zu unterscheiden, aber nicht zu trennen sind, so verbinden sich sakramentales Leben und rechtliche Ordnungsmacht der Kirche zu einer tiefgründigen Einheit" (Mörsdorf, *Lehrbuch*, I, p. 25).

distinctions.²¹ Mörsdorf summarizes the teaching of the council about the Church into one formula:

The Church is the new people of God, living in hierarchical order, in service of the Kingdom of God.²²

Mörsdorf, then, goes on to say that although the council did apply different categories (like a society structured with hierarchical organs and the mystical body of Christ, the visible society and the spiritual community), these categories are the expression of, what *Lumen gentium* calls in no. 8, *una realitas complexa*. The Church forms one complex

²¹ "Bei aller Verschiedenheit haben beide Aussagen gemeinsam, daß sie die komplexe Realität der Kirche aufgrund der Heiligen Schrift in einem Begriff erfassen und dadurch einem Trennungsdanken wehren, das sich der Theologie in vielerlei Variationen bemächtigt hatte und die Einheit des Kirchenbegriffes zu sprengen drohte [...]" He mentions as examples 'institution' vis-à-vis 'community,' and the Church as 'community of salvation' vis-à-vis the Church as 'juridical society,' where law belongs to the domain, that deals with external order, where the ecclesial mediative acting of salvation is irrelevant. See K. Mörsdorf, "Das konziliare Verständnis vom Wesen der Kirche in der nachkonziliaren Gestaltung der kirchlichen Rechtsordnung," in *AfkKR*, 144 (1975), p. 390. It is not clear if the word *Aussagen* refers to the images 'people of God' and 'Body of Christ,' or if it refers to the teaching of the Council and the encyclical *Mystici Corporis Christi*.

²² "Die Kirche ist das in hierarchischer Ordnung lebende neue Gottesvolk im Dienste des Reiches Gottes." Mörsdorf emphasizes that this Church exists because of the will of Christ and not in virtue of the will of its members. He does admit though that the personal decision, for those who are capable of making such a decision, is a necessary requirement for the effectiveness of God's salvation to people. See Mörsdorf, "Das konziliare Verständnis," p. 390.

Section 4 - *Membership* will show that this understanding of Church has a major impact on Mörsdorf's notion of membership. At the same time, it will show how Mörsdorf distinguishes between levels of membership in the Church.

reality.²³

Mörsdorf is of the opinion that the council repeatedly shows that Word and sacrament are the spiritual structural elements of the Church. The council presents the Church as the universal sacrament of salvation.

With the council's doctrine on one hand, and with his own theory about the juridical structure of Word and sacrament on the other, Mörsdorf says that the law of the Church

has its theological place on the level of the sacramental signs of the Church, not in such a way that it is a third point in the community in addition to Word and sacrament, but it lives in Word and sacrament itself, and it supports and protects the spiritual order of the life of the Church.²⁴

1.3 - The nature of canon law

Mörsdorf says that "[c]anon law is the law of the Church. It has a spiritual character that is characterized through the essence and the goal of the Church."²⁵ This law has a

²³ Mörsdorf says that this way of speaking, which is based on the opposition of 'community' and 'society,' shows that the understanding of 'new people of God' had not matured enough in order to be able to renounce the existing categories. Mörsdorf, "Das konziliare Verständnis," p. 391.

²⁴ "Das Recht der Kirche [...] hat seine theologischen Ort in der Ebene der sakramentalen Zeichenhaftigkeit der Kirche, nicht dergestalt, daß es zu der durch Wort und Sakrament konstituierten geistlichen Gemeinschaft als ein Drittes hinzuträte, sondern in dem Sinne, daß es in Wort und Sakrament selbst wirksam ist und zugleich die geistliche Lebensordnung der Kirche mitträgt und schützt" (Mörsdorf, "Das konziliare Verständnis," p. 392).

²⁵ "Das Kirchenrecht ist das Recht der Kirche. Es trägt geistlichen Charakter, der durch das Wesen und die Zweckbestimmung der Kirche geprägt wird" (Mörsdorf, *Lehrbuch*, I, p. 24).

divine foundation, because it is founded on the revelation of God and the good news of the Lord. Although every law is finally grounded in God, the essential difference between canon law and secular law is that

canon law is the community-order of the people of God and therefore the visible sign of an invisible reality that is founded in God. It is sacred law [...] in the sense that [...] it is connected with and participates in the sacramental essence of the Church.²⁶

Mörsdorf calls canon law a sacred law because it is God's tool for the mission that was entrusted to the Church, viz., the salvation of the people. This law is not something external, but is an essential element of the sacramental visibility of the Church. With regard to the reform of canon law, this implies that canon law has to operate such that it will guide all who want to find the way to the heavenly Father.²⁷

Canonical legislation is different from the secular legislation inasmuch as canonical legislation can enjoy the assistance of the Holy Spirit. Mörsdorf points out that this does not exclude a change or development in the law. In the interpretation and application of canon law, the principle of canonical equity is important, because it helps to take away the rigidity of the law. The spiritual character of the law is also expressed in the free recognition of the law. Mörsdorf envisions this most clearly when he notes that penalties

²⁶ "Das Kirchenrecht ist die Gemeinschaftsordnung des neuen Gottesvolkes und daher sichtbares Zeichen einer unsichtbaren in Gott begründeten Wirklichkeit. Es ist heiliges Recht[...] in dem Sinne [...], daß es dem sakramentalen Leben der Kirche verbunden ist und Anteil an dem sakramentalen Wesen der Kirche hat" (Mörsdorf, *Lehrbuch*, I, p. 25).

²⁷ See Mörsdorf, "Wort und Sakrament," p. 79.

are not based on physical force, but intend to bring about a better attitude.²⁸

Mörsdorf says that, after determining what canon law is, the science of canon law can be identified. This science of canon law in its turn will reveal the methodology to be used by the canon lawyer.

1.4 - The science of canon law

The science of canon law²⁹ deals with the doctrine of canon law. It has as its object the ecclesial community-order which has its foundation in the institution founded by the will of Christ.³⁰ According to Mörsdorf, this explains why the science of canon law is a *theological discipline*. The source for the science of canon law is the same as the source for dogmatics, viz., the faith that is grounded on the authority of God. At the same time, canon law is a *legal science*, because it obtained its forms of juridical thinking from the legal sciences and brought them to a fruitful development in an ecclesial context. Mörsdorf summarizes his ideas about the science of canon law in one sentence: "The science of

²⁸ Mörsdorf says in his *Lehrbuch*, I, pp. 25-26, that a special characteristic of canon law is the internal forum. In this forum, especially in the sacramental internal forum, the Church can reach a level that secular law cannot touch. In this forum, the tensions of the formal character of the law can be reduced. (The section on *forum* will give a more detailed description of Mörsdorf's theory, especially on his understanding of forum of conscience vis-à-vis internal forum.)

²⁹ The German term *Kanonistik* has no equivalent in English. The best translation of the word is *science of canon law*.

³⁰ Mörsdorf says, "Das Kirchenrecht ist die Gemeinschaftsordnung des neuen Gottesvolkes, *die* [italics added] in ihren Grundstrukturen von Jesus Christus gegeben ist und für alle, die zur Kirche gerufen sind, sichtbares Zeichen einer unsichtbaren in Gott gegründeten Wirklichkeit ist" (Mörsdorf, "Wort und Sakrament," p. 74).

canon law is a theological discipline with a juridical method."³¹

The *end* of the science of canon law is to bring the law in agreement with the essence and goal of the Church. This requires both an analysis and a synthesis of the law. Canon lawyers should analyze the individual norms and demonstrate the relationships among the norms. They should synthesize these norms into general rules.³² This requires a critical attitude because instances of incorrect development should be pointed out, and suggestions should be made for new formulations. Evidently, a knowledge of canonical history is of major importance.

Mörsdorf sees theology, legal philosophy and secular law as ancillary sciences of canon law. Canon law has a relation to all theological disciplines, but especially to dogmatics (ecclesiology), to moral theology (ethical foundation of law) and to Church history. Questions about the essence of canon law relate canon law to the philosophy of law, but it has an advantage over the philosophy of law because it has revelation as its basis.³³ Its relation to secular legal sciences is especially evident through a study of Roman

³¹ "Die Kanonistik ist eine theologische Disziplin mit juristischer Methode" (Mörsdorf, *Lehrbuch*, I, p. 36).

³² Mörsdorf could have called this synthesizing of norms into general rules simply 'abstraction.'

³³ Mörsdorf thinks that although all law is eventually founded in God, canon law has a deeper relationship to divine legislation, because it is rooted in the revelation of God and in the Gospel. "Der Herr selbst hat die Grundlinien der Kirchenverfassung festgelegt und einläßliche Gebote für das Gemeinschaftsleben der Gläubigen gegeben. Hierdurch gewinnt das Kirchenrecht einen bedeutsamen Abstand zum weltlichen Recht, wenngleich weltliche Rechtsmacht durchaus befähigt ist, ihre Gesetze aus dem Geist der frohen Botschaft heraus zu gestalten." The essential difference between secular and canon law is that canon law is a sacred law. "Das Kirchenrecht ist die Gemeinschaftsordnung des neuen Gottesvolkes und daher sichtbares Zeichen einer unsichtbaren in Gott begründeten Wirklichkeit" (Mörsdorf, *Lehrbuch*, I, p. 24-25).

and Germanic law.³⁴

In one of his last articles, Mörsdorf emphasizes that the canon lawyer has a theological task. He says,

The theological place of his work is on the level of the sacramental symbolic character of the Church. He should contribute to this with the results of his juridical way of working--as is expected from him--in such a way that he faithfully preserves the Church as a sign of salvation and maintains the identity of the Church of Jesus Christ.³⁵

Finally, Mörsdorf points out, that since the science of canon law is now to be considered a theological discipline, it has entered a new timespan.³⁶

1.5 - Conclusion

The question put forward by Rudolph Sohm challenges Mörsdorf to think about the foundation of canon law. In his early writings he gives a foundation that can be summarized

³⁴ Mörsdorf, *Lehrbuch*, I, p. 38.

Mörsdorf speaks about a 'juridical method,' but he does not explain anywhere in his work what it means.

³⁵ "[Dem Kanonisten ist damit eindeutig eine theologische Aufgabe gestellt.] Der theologische Ort seines Schaffens liegt in der Ebene der sakramentalen Zeichenhaftigkeit der Kirche, auf welcher er mit dem Einsatz der von ihm erwarteten juristischen Arbeitsweisen seinen Teil dazu beitragen soll, die Kirche als das für alle Menschen aufgerichtete Zeichen des Heiles glaubwürdig zu erhalten und die Identität der Kirche Jesu Christi zu bewahren" (Mörsdorf, "Kanonisches Recht," p. 58). Mörsdorf concludes this from the decree "Optatum totius," n. 16 [Vatican II, Decree, "Optatum totius," in *AAS*, 58 (1966), pp. 713-727]. That document requested that canon law should be studied from the perspective of the mystery of the Church. Mörsdorf mentions that Paul VI confirmed this thinking in his address to the second international congress for canon lawyers, published in *Communicationes*, 5 (1973), pp. 123-131.

³⁶ Mörsdorf, "Kanonisches Recht," p. 58.

in the principle *ubi societas ibi ius*. Canon law is in this way considered as any other law, and it exists for a particular group, viz., the people of God.

At the same time, Mörsdorf starts to develop an explanation of the theological foundation of canon law which he also calls a supernatural foundation. The major point is the sacramentality of the Church.

The principal consequence of Mörsdorf's analysis for the science of canon law is that it is to be considered as a theological discipline with a juridic method.

Initially, Mörsdorf gives a natural foundation, but this is later expanded to include both a natural and a supernatural foundation. Finally, he moves to a theological foundation. In this last stage, Mörsdorf becomes aware that the peculiarity of canon law cannot be determined through its function (*Funktion*), because the function is determined by the understanding of the law. In the ecclesial context, this implies that the Church determines canon law. Thus Mörsdorf addresses the influence of ecclesiology on canon law. However, the consequences of ecclesiology for the science of canon law are not described in Mörsdorf's work.

2 - INTERNAL AND EXTERNAL FORUM

In several articles, Mörsdorf refers to his understanding of forum. First he explains the term *forum*, and then he poses his questions related to *forum* in the form of a thesis. Following this, he gives historical arguments for his thesis. In light of the data, he takes a new look at the 1917 Code. Finally, Mörsdorf indicates the relevance of the distinctions that are made in *forum*.

2.1 - The notion of *forum* and an exposition of Mörsdorf's theory

Mörsdorf points out that the term *forum* goes back to antiquity. It referred to a place where justice was administered. Later on, it became associated with a court of justice, becoming a formal term in juridic language, and primarily referring to a court as an institution. In a stricter sense, it meant a sphere of competence.

Canon law distinguishes between the internal and the external forum. Canon 196 CIC/1917 says that the power of jurisdiction is exercised *alia [...] fori externi, alia fori interni*.³⁷ Mörsdorf proposes to translate this *alia...alia* not as 'either ... or,' but as 'partly ... partly'.³⁸ In this way he wants to express that the *potestas iurisdictionis* is a power both of the external and the internal forum. According to Mörsdorf, the canon did not want to split the power of jurisdiction into two different forums with two different effects; and this is clear especially in his point that jurisdiction for the external forum includes the internal forum.³⁹

Canon 196 CIC/1917 also speaks of *iurisdictionis fori interni, seu conscientiae*. Paralleling general use in the canonical language, *forum conscientiae* is here synonymous

³⁷ C. 196 CIC/1917: "Potestas iurisdictionis seu regiminis quae ex divina institutione est in Ecclesia, alia est fori externi, alia fori interni, seu conscientiae, sive sacramentalis sive extra-sacramentalis."

³⁸ "Wenn die Wendung *alia - alia* sprachlich auch eine scharfe Unterscheidung ausdrückt, so darf dabei doch nicht übersehen werden, daß die Unterscheidung von ein und derselben Gewalt ausgesagt wird, die kraft göttlicher Einsetzung in der Kirche ist. *Alia - alia* ist daher nicht zu deuten mit 'die eine - die andere', sondern mit 'teils - teils', d.h., die *potestas iurisdictionis* ist sowohl eine Gewalt des äußeren wie des inneren Bereiches" (K. Mörsdorf, "Der Rechtscharakter der *iurisdictionis fori interni*," in *MThZ*, 8 (1957), pp. 162-163).

³⁹ In this Mörsdorf already lays foundations for his theory of the unity of sacred power.

with *forum internum*. Mörsdorf says that, in this terminology, the pair of concepts *forum externum* - *forum internum* parallels an antithesis between legal and consciential forum. He reacts to this saying,

It is completely overlooked that the ecclesial legal sources, especially the Code, use the pair of concepts predominantly in a sense that is not determined by the antithesis legal and consciential forum. The distinction between sacramental and extra-sacramental forum in the internal forum shows that the distinction between external and internal forum is not made because of the antithesis law and conscience, but it is a demarcation of the effective domains of the Church.⁴⁰

Mörsdorf considers the terminology *forum conscientiae* as the *locus* of a direct relationship between a person and God.⁴¹ He says that an act placed in any forum does not have a different effect on the conscience of the person. The major difference between the internal and the external forum is the absence of publicity in the internal forum.

This is Mörsdorf's theory in a nutshell. The following sections will present Mörsdorf's arguments to support his theory. These arguments are of an historical nature.

⁴⁰ "Es wird dabei aber vollends übersehen, daß die kirchlichen Rechtsquellen, insbesondere auch der CIC, das Begriffspaar vorwiegend in einem Sinne gebrauchen, der nicht von dem Gegensatz Rechts- und Gewissensbereich bestimmt ist. Allein schon die Aufgliederung des inneren Bereichs in einen sakramentalen und einen nicht-sakramentalen inneren Bereich läßt erkennen, daß es bei der Unterscheidung zwischen äußerem und innerem Bereich nicht um den Gegensatz Recht und Gewissen, sondern um Abgrenzungen des Wirkungsbereiches der Kirche zu tun ist" (Mörsdorf, "Der Rechtscharakter," pp. 163-164).

⁴¹ Mörsdorf is of the opinion that the juridic order can only deal with what is visible. The conscience of a person lies therefore outside the canonical domain. Mörsdorf, *Lehrbuch*, I, p. 311.

2.2 - The historical development

Mörsdorf sees two historical factors in the development of the distinction between the external and the internal forum. The first factor is an *institutional* one: it grew out of the penances, and it understood both forums to be within the proper domain of the Church. The second factor is, a *legal-philosophical* one: it expressed the antithesis of external appearance and internal actual being, also showing, therefore, the distinction between legal and moral forums.

2.2.1 - The institutional development

Mörsdorf says that the term *forum poenitentiale* appeared in the work of Robert de Courçon⁴² between 1204 and 1207. It referred to what the Church did in the process of penance as this contrasted with God's invisible rule.⁴³ About twenty years later, the term *forum iudiciale* appeared in the works of William of Auxerre (1150-1231), Alexander of Hales (circa 1185-1245), and Philip the Chancellor (1160/85-1236). The latter contrasted it with the *forum poenitentiale*. Mörsdorf says that at that time there was no clear-cut division between penitential and juridical practice, and that these men, in making a distinction, must

⁴² Robert de Courçon was born between 1115 and 1160 in England. He studied with Peter Lombard in Paris and taught there himself between 1204 and 1210. In 1212, Innocent III made him a cardinal, and in 1213 he became a legate to France. He reorganized the studies at Paris in 1215 and drew up a set of statutes for the arts faculty and the theologians, repeating a prohibition of teaching Aristotle. In 1218, he accompanied the Crusades to Egypt, where he died at the siege of Damietta on February 6, 1219. His *Summa* contains many canonico-moral questions and medical cases. See I.C. Brady, art. "Robert de Courçon," in *NCE*, vol. 12, p. 529.

⁴³ Mörsdorf points out that the penitential practice was both private and public during this time. See Mörsdorf, "Der Rechtscharakter," p. 167.

have thought that the distinction consisted of there being two domains of one whole. The distinction thus dealt with two ways of operating in the Church. Mörsdorf remarks that in order to separate the penitential and the juridical, crime and sin had to be distinguished first. The contrast between law and morals became relevant in the sense that it demarcated two spheres of competence as a basis for assigning cases.

2.2.2 - The legal-philosophical development

The rules of law and the rules of morality had their effects in two distinct forums respectively. Mörsdorf points out that the distinction between penitential and juridical practice presupposes that the juridical understanding of crime is differentiated from the ethical (moral) understanding of sin. Thomas Aquinas had a great influence on the development of the terminology.⁴⁴ He asked, in his *Summa Theologica* II, q. 96 a. 4, whether the *lex humana* is obligatory for people in *foro conscientiae*? Mörsdorf states:

Here *forum conscientiae* does not have the meaning of an external institution, but is synonymous with *iudicium conscientiae* and *conscientia* itself. Human law and conscience, or in more general terms, legal and consciential forum are contrasted with each other.⁴⁵

Mörsdorf is of the opinion that Thomas, in his doctrine on penance, applied the term *forum poenitentiale* and *forum conscientiae* within a context determined by an

⁴⁴ Mörsdorf, "Der Rechtscharakter," p. 168-169.

⁴⁵ "*Forum conscientiae* bezeichnet hier nicht eine äußere Institution, sondern steht gleichbedeutend mit *iudicium conscientiae* und *conscientia* selbst. Menschliches Gesetz und Gewissen, oder allgemeiner gesagt, Rechts- und Gewissensbereich werden einander gegenübergestellt" (Mörsdorf, "Der Rechtscharakter," p. 168).

institutional meaning.⁴⁶ For the *forum iudiciale*, he also used *forum contentiosum*, *forum exterius*, *forum iudicii*, *forum publicum exterioris iudicii* and *forum causarum*.

Along with the terminological change, Thomas also proposed a change in his doctrine on power that, according to Mörsdorf, is relevant. In Thomas' time, reconciliation with the Church was replaced by the indicative form of the absolution of the sins. This meant that the *forum poenitentiale* was taken out of the juridical domain of the Church. Mörsdorf refers also to St. Bonaventure (1217/18-1274) who expressed all of this by describing the power to bind and to loose in the *forum poenitentiale* as *clavis* and in the *forum iudiciale* as *gladius*. In accordance with this, the power of the keys is ascribed to the power of orders, and the exercise of the power of the keys is ascribed to the power of jurisdiction. Mörsdorf finds the same line of thought in Aquinas:

Thomas gives a foundation for the necessity of the power of jurisdiction for sacramental absolution with the distinction of *clavis* and *actus clavis*. He says that all spiritual power is conferred with ordination, the power of the keys is also given with the *ordo*. But the exercise of the power of the keys is in need of the necessary matter, which is the people subjected through the jurisdiction. This means that an ordained person has the *claves*, before he has the jurisdiction, but he has not the *ictum clavium*.⁴⁷

⁴⁶ Mörsdorf refers to St. Thomas *IV Sent.dist., 17 and 18*. See Mörsdorf, "Der Rechtscharakter," p. 168.

⁴⁷ "Thomas begründet die Notwendigkeit der Jurisdiktionsgewalt für die sakramentale Absolution mit der Unterscheidung von *clavis* und *actus clavis*. Er sagt, alle geistliche Gewalt werde mit einer Weihe gegeben, also auch die Schlüsselgewalt mit dem *ordo*. Aber die Ausübung der Schlüsselgewalt bedürfe der *materia debita, quae est plebs subdita per iurisdictionem*. Daher habe ein Geweihter, bevor er Jurisdiktion besitze, zwar die *claves*, aber nicht den *actum clavium*" (Mörsdorf, "Der Rechtscharakter," p. 169).

Thus Mörsdorf claims that Thomas emphasized that one has the *claves* in virtue of ordination, but can exercise it only in virtue of jurisdiction. He then remarks on Thomas' point (IV.sent.dist.18 q.2 a.2 sol.1) that the jurisdiction of the external forum could also be called the *clavis*, because excommunication has some relevance for entering the Kingdom of God. Mörsdorf continues,

If therefore Thomas recognizes the internal connection in which both forums of the Church relate, then his definition, viz., that in the consciential forum a case is decided between a person and God, but in the judicial external forum, however, a case is decided between human beings, has definitively contributed to deny the juridical character of the active power to bind and to loose in the *forum poenitentiale*.⁴⁸

Mörsdorf remarks that initially the term *forum poenitentiale* referred to *forum ecclesiae*, while later on it appeared as *forum coram Dei vicario*.⁴⁹

Mörsdorf describes that the distinction between a sacramental and a non-sacramental forum goes back to the council of Trent.⁵⁰ At this council, the bishops agreed

⁴⁸ "Wenn so der innere Zusammenhang, in dem beide Bereiche der Kirche zueinander stehen, von Thomas anerkannt wurde, so hat doch seine Begriffsbestimmung, daß *in foro conscientiae causa agitur inter hominem et Deum; in foro autem exterioris iudicii causa agitur hominis ad hominem* entscheidend dazu beigetragen, der im *forum poenitentiale* tätigen Binde- und Lösegewalt den rechtlichen Charakter abzuerkennen" (Mörsdorf, "Der Rechtscharakter," p. 169).

⁴⁹ Mörsdorf refers especially to Sylvester Prierias (+1523) and says this change of meaning influenced questions about power in the sense that it led to a distinction between a vicarious and a proper power. These ideas influenced theology until today and has made an understanding of the distinction between the external and internal forum more difficult. See Mörsdorf, "Der Rechtscharakter," p. 169.

⁵⁰ Mörsdorf remarks that there were earlier developments; he refers to the *Summa Astesana* (1317) that distinguished between a *forum conscientiae* and a *forum ecclesiae*. The *forum ecclesiae* was divided into a *forum secretum* and a *forum publicum* (Mörsdorf,

to have the existence of a non-sacramental internal forum: they granted faculties to bishops to dispense from irregularities and from suspensions that were occult and not in the *forum contentiosum*. The bishops also allowed that absolution be given in *forum conscientiae* from occult offenses incurring censure. The faculties for dispensation and absolution were also granted outside the sacrament of penance:

Accordingly it was perceived that *forum internum* (or *forum conscientiae*) was not identical with *forum poenitentiale*, but meant a juridical effect both *in sacramento* and *extra sacramentum*, with the particularity that the act of jurisdiction in the internal sphere had no efficacy *in foro externo*.⁵¹

Mörsdorf says that once these ideas were accepted there followed the usage of the term *forum internum* as the counterpart of *forum exterius* or *externum*.⁵²

After reporting on the historical development, Mörsdorf applies the data to the interpretation of the 1917 Code.

2.3 - The 1917 Code

After Mörsdorf has given his interpretation of c. 196 CIC/1917, as discussed above, he turns to consider the exercise of the power of jurisdiction as it is expressed in c. 202,

"Der Rechtscharakter," p. 170). The *Summa Astesana* was a work dealing with the penitentials. It is divided into 8 books, and its major source is the commentary on the *Sentenzen* by Richard of Mediavilla. Its author is Antonius of Asti. See J.G. Ziegler, art. "Astesana," in *LThK*, Bd. 1, col. 959.

⁵¹ K. Mörsdorf, art. "Forum," in *Sacramentum mundi*, vol. 2, p. 345.

⁵² Mörsdorf states that the term *forum internum* was used, because it "was more accurate than *forum conscientiae*, with its various senses, as a term embracing both the sacramental and the non-sacramental domain" (Mörsdorf, "Forum," p. 345).

§ 1 CIC/1917.⁵³ This canon says that

an act of ordinary or delegated jurisdiction granted for the external forum is also efficacious in the internal forum, but not vice versa.⁵⁴

First, Mörsdorf says that this is incorrect, but that its meaning is nevertheless clear: an act placed in the external forum in virtue of jurisdiction granted for the external forum is also efficacious in the internal forum, but an act that is placed in the internal forum has no effect in the external forum. The question that Mörsdorf raises is: What does the *non autem e converso* mean? He answers that the act has effect, but only in the internal forum. Mörsdorf wonders what is meant by the 'effect' or 'non-effect' of one and the same act. It is important to find out if the effectiveness refers to a relief in conscience or to a juridic quality.⁵⁵

In his discussion, Mörsdorf proposes to leave aside for a moment the absolution of sins in order to compare equal entities. He then indicates that the objects (*Sachen*) of the internal and external forum are essentially the same. It depends on the concrete case

⁵³ C. 202, § 1: "Actus potestatis jurisdictionis sive ordinariae sive delegatae collatae pro foro externo, valet quoque pro interno, non autem e converso."

⁵⁴ Mörsdorf, "Forum," p. 345.

⁵⁵ "Was bedeutet das *non autem e converso* (c. 202, § 1)? Es ist die Umkehrung der von einem Hoheitsakt des äußeren Bereiches ausgesprochenen Regel: *valet quoque pro foro interno*. Das in der Umkehrung liegende *non valet* besagt an sich, daß ein Akt des inneren Bereiches nicht im äußeren Bereich gilt, d.h. daß er im äußeren Bereich unwirksam ist. Der Akt entfaltet aber gleichwohl eine Wirksamkeit, aber nur im inneren Bereich. Es fragt sich also, was mit der Wirksamkeit und der gleichzeitigen Unwirksamkeit ein und desselben Aktes gemeint ist, insbesondere geht es darum, ob die im inneren Bereich gegebene Wirksamkeit etwa nur zur Beruhigung des Gewissens bestimmt ist oder ob ihr rechtliche Qualität zukommt" (Mörsdorf, "Der Rechtscharakter," pp. 170-171).

whether something is dealt with in the internal or the external forum. What is secret and is expected to stay secret can be dealt with in the internal forum but if something is public or might become public, it should be dealt with in the external forum. In both forums, however, the effect of the act is that the case is validly decided in its essence. Mörsdorf gives as an example a dispensation from a marriage impediment in the internal forum. The juridic obstacle has vanished, and the marriage cannot be declared invalid later on (presuming of course that proof for the acquired dispensation is given). The only difference is that the impediment, dispensed in the internal forum, falsely appears to be undispensed in the external forum.⁵⁶ The same principle applies for the absolution of an excommunication. Mörsdorf concludes from this that the juridic quality of an act placed in the internal forum cannot be doubted.

For the sake of his argument, Mörsdorf left out the sacramental internal forum in his discussion. He returns to this and shows how the decisions in that forum are also definitive. The absolution of sins has the special problem of the jurisdiction of the priests (c. 872 CIC/1917). Mörsdorf turns to theology and recalls that sacramental absolution reconciles the penitent with the Church:

[...] *pax cum Ecclesia* as a constituted and efficacious sign (*res et sacramentum*) becomes a sacramental cause of the *pax cum Deo*. The sacramental sign is primarily concerned with bringing the sinner back to the bosom of the Church, which, canonically speaking, is an act of jurisdiction on the part of the Church whereby the sinner is juridically restored to ecclesiastical fellowship and to enjoyment of all his rights as a member of

⁵⁶ "Was demnach bei einem Befreiungsentcheid im inneren Bereich noch bleibt, ist lediglich die Möglichkeit eines falschen Scheins, wenn das bisher geheime Hindernis öffentlich bekannt wird, und ein gleicher Hoheitsakt im äußeren Bereich hat gegenüber einem Akt des inneren Bereiches nur dies voraus daß er auch den Schein des Hindernisses zerstört" (Mörsdorf, *Lehrbuch*, I, p. 313).

the Church.⁵⁷

According to Mörsdorf, this shows why the power of jurisdiction is required for valid absolution.

2.4 - The ecclesiological significance

The historical development and the law about the distinction between the external and the internal forum show that the relevance of the distinction in forums is not founded on the antithesis of law and conscience. The distinction lies in the different ways the power of jurisdiction can be exercised:

The distinction between penitential and judicial practice and the later classification in acts within and outside the sacrament of penance has only one purpose: to eliminate or at least to lessen friction between the human person and society.⁵⁸

Mörsdorf concludes his theory by saying that the Church depends on the upright loyalty of its members. It cannot look only to the outside and has to keep in mind that outward behaviour depends on the inner frame of the mind. It is therefore the task of the rulers of the Church to see to it that the appearance corresponds to reality. Since the Church discovered that it could no longer ask people to do public penance, it had to distinguish between the confessional and the court.

⁵⁷ Mörsdorf, "Forum," p. 346.

⁵⁸ "Die Trennung zwischen Buß- und Gerichtsverfahren und die spätere Aufgliederung des inneren Bereiches in ein Vorgehen innerhalb und außerhalb des Bußsakramentes haben letztlich nur ein Ziel: die Spannungen zwischen Person und Gemeinschaft auszugleichen oder wenigstens zu mildern" (Mörsdorf, *Lehrbuch*, I, p. 315).

But the Church makes it perfectly clear to this day that it considers the two spheres one, especially by prescribing that one who has gravely sinned, whether the offence was secret or public, cannot approach the common eucharistic table until he has been absolved from his sins in the sacrament of penance [...]⁵⁹

2.5 - Conclusion

Mörsdorf argues that the terms *forum internum* and *forum externum* cannot be characterized as consensual and legal forum respectively. He understands the distinctions that are made between the internal and the external forum to be practical, and says that it depends on the publicity of the case whether something is dealt with in the internal or the external forum. Acts placed in either forum have juridic effect.

He also says that *forum conscientiae* is incorrectly applied in the 1917 Code, because the forum of conscience touches the relationship between a person and God, and this relationship is outside the juridic realm.

Mörsdorf's reference to Thomas for the relationship between power of jurisdiction and power of orders are an important aspect of his argument that the power of orders and the power of jurisdiction be considered one sacred power. This theory will be explained in the following section.

⁵⁹ Mörsdorf, "Forum," p. 346. After showing how excommunication and penance have become so distinct that there seems to be no link any longer between them, Mörsdorf protests against the 1973 schema of penal law (viz., its c. 16, § 1, b). This schema did not prevent the excommunicated person from receiving the sacrament of penance and of anointing of the sick. See K. Mörsdorf, "Der Kirchenbann im Lichte der Unterscheidung zwischen äußerem und innerem Bereich," in J. Lindemans, H. Demeester (eds.), *Liber amicorum Monseigneur Onclin: actuele thema's van kerkelijk en burgerlijk recht; thèmes actuels de droit canonique et civil*, Gembloux, J. Ducelot, 1976, pp. 37-49.

3 - SACRED POWER

The fundamental structure of the Church is related to the understanding of the powers of orders and jurisdiction. Mörsdorf argues that an incorrect interpretation of history has led to the understanding of the powers as two separate powers. The distinction is made between a power of orders (*potestas ordinis*) and a power of jurisdiction (*potestas iurisdictionis*). The power of orders is envisioned as a sacramental power, because it becomes visible in the sanctification of the Church's members. The power of jurisdiction is looked upon as a juridical power, because it governs the people of God. When one takes into consideration that leading and governing are a function of sanctifying, then a contrast between sacrament and law is established. This means that the pneumatic element will be pushed aside by the juridical element and the Church of love will be played off against the Church of law.⁶⁰

Mörsdorf argues that a correct interpretation of history will lead to the understanding that the two powers are complementary and that they form one sacred power. This emphasis on there being one sacred power will also help to overcome the danger of envisioning the Church as either juridical or as purely charismatic.

⁶⁰ "In dieser Sicht erscheint die Weihegewalt als die *sakramentale* Gewalt, weil ihr die Austeilung der göttlichen Gnadenmittel, das Heiligen der Kirchengliedschaft zugeordnet wird, und die Hirtengewalt als die *rechtliche* Gewalt, weil sie das Gottesvolk mit der einer souveränen Gemeinschaft zustehenden Hoheitsgewalt zu führen hat. Wenn dabei auch anerkannt wird, daß das Leiten und Führen mittelbar im Dienste der Heiligung des Gottesvolkes steht, so wird mit dieser Unterscheidung doch ein bedenklicher *Gegensatz zwischen Sakrament und Recht* aufgerissen, der weithin den Zugang zur Wesensschau der Kirche versperrt und das Kirchenbewußtsein nicht nur des gläubigen Volkes getrübt hat. Man sieht das pneumatische Element verdrängt durch das rechtliche und spielt die Liebeskirche aus gegen die Rechtskirche" (K. Mörsdorf, "Abgrenzung und Zusammenspiel von Weihegewalt und Hirtengewalt," in *Die Kirche in der Welt*, 4 (1951), p. 17).

The separation of the powers led to immense problems at the Second Vatican Council, especially in its work on the division of the three offices.⁶¹ Mörsdorf interprets the changes in the different schemas for the council's doctrine on ecclesiastical authority as an indication of the struggle. He says, "We can gather from the textual alterations what difficulties the Council experienced in connection with the doctrine on ecclesiastical authority."⁶²

Mörsdorf considers it necessary to reinterpret the history of the doctrine on power, to trace the development from a twofold doctrine of power to a threefold doctrine of offices, and, eventually, to evaluate the conciliar texts. Facing these three challenges might bring about a better understanding of the one power operating in the Church.

3.1 - Historical development

Mörsdorf starts his historical argument by considering Christ's power. In Christ, the fullness of the powers of orders and jurisdiction existed, but they formed one power. There was no distinction. Christ sent his disciples out with this one power: "As the Father has sent me, so am I sending you" (John 20:21). The disciples continued to give their mission to other people by laying on of hands. They conferred their mission in this one symbol. But when people started to confer this mission, problems arose. What should be done with a person who received the laying on of hands, but later on abandoned his faith? What then

⁶¹ The term *munus* will be translated as 'office' since theological language usually speaks about the three offices of Christ. It should not be confused with office as understood in ecclesiastical office (*officium*).

⁶² K. Mörsdorf, art. "Ecclesiastical Authority," in *Sacramentum mundi*, vol. 2, p. 134.

was the value of the laying on of hands? These questions, eventually, led to the distinction between the power of orders and the power of jurisdiction.

In the first millenium, ordination conferred both the consecration and the office. The council of Chalcedon (451) legislated against absolute ordination: no one was to be ordained without being attached to a Church. This council declared in its sixth canon that such an ordination was *akuron* (= *irrita, vacua*). According to Mörsdorf, the problem addressed at Chalcedon was the following:

Is absolute ordination invalid in the sense that it does not confer spiritual power; or in the sense that the ordained is validly ordained, but is impeded in the legitimate exercise of the power acquired in the ordination?⁶³

Concerning the invalidity of absolute ordination, Mörsdorf says,

It is not doing this canon justice to suggest, in the light of later knowledge, that the Council does not question the validity of absolute ordination but only forbids the use of the power received. On the contrary, the fact that the Council pronounces absolute ordination ineffectual is eloquent proof that the concept of ordination was still embryonic at that time.⁶⁴

This shows that, in Mörsdorf's opinion, spirit and office were considered as one, but the problem of absolute ordination continued until the twelfth century. Mörsdorf suggests that "[a]bsolute ordination was really not a problem of speculative theology but one of apostolic

⁶³ "[Es ging, kurz gesagt, darum ob] die absolute Ordination in dem Sinne wirkungslos sei, daß sie keine geistliche Gewalt übertrage, oder nur in dem Sinne, daß der so Geweihte zwar gültig geweiht, aber an der rechtmäßigen Ausübung der durch die Weihe erlangten Gewalt gehindert sei" (Mörsdorf, "Abgrenzung und Zusammenspiel," p. 18). Mörsdorf does not give account for this interpretation of the council in any form.

⁶⁴ Mörsdorf, "Ecclesiastical Authority," p. 136.

tradition."⁶⁵ The conviction grew that ordination without the simultaneous conferring of an office was valid, and by the twelfth century the distinction between the powers of orders and jurisdiction was established.⁶⁶

This distinction between the powers of orders and jurisdiction was ultimately founded on the idea that the power of orders could not be lost, because the consecration had conferred an indelible character. The power of jurisdiction, however, could be lost, because it was rooted in canonical mission.⁶⁷

Besides the distinction, there is also a relation between the two powers. Mörsdorf illustrates this with the parable of the vine (John 15:1-11); there are two forces at work: a life-giving power (the vine from which life flows into the branches) and an ordering power (the vinedresser, who cuts away barren branches and purges fruitful ones so that they may bear more fruit). The life-giving power is the *potestas ordinis* and the power of

⁶⁵ Mörsdorf, "Ecclesiastical Authority," p. 136. He means by this that it was a concern that the mission given by Christ to the apostles would continue despite human failure.

⁶⁶ Mörsdorf says that Gratian put the tradition carefully together and occupied himself with the simonists and heretics, but that he did not touch the question of absolute ordination. It was, however, Rufin, the first decretist, who said that absolute ordination in relation to the reception of a benefice was invalid. This invalidity was not applicable though to the *veritas sacramenti*, but to the *officii executio*. Mörsdorf says that according to Rufin the absolutely ordained priest validly celebrates the Eucharist, but it is illicit. Rufin did not clarify what he meant by *officium*. It was his student Stephan of Tournai, who concluded that the absolutely ordained person could celebrate Mass, but not publicly exercise the divine ministries for the people. See K. Mörsdorf, "Die Entwicklung der Zweigliedrigkeit der kirchlichen Hierarchie," in *MThZ*, 3 (1951), p. 15.

⁶⁷ "Hiernach ist die Unterscheidung zwischen Weihe- und Hirtengewalt letztlich darin begründet, daß sich die Kirche bewußt wurde, daß die eine Gewalt, weil durch heilige Weihung verliehen, in unverlierbarer, und die andere, weil auf kanonischer Sendung beruhend, in verlierbarer Weise gegeben werde" (Mörsdorf, "Abgrenzung und Zusammenspiel," p. 19).

ordering is found in the *potestas iurisdictionis*.⁶⁸

The power of orders is so specifically related to the ordained person that it can be exercised throughout the whole world; but the effect of the power of jurisdiction is--except for the Roman Pontiff and an ecumenical council--limited by territory or person. The two powers form, however, a unity.⁶⁹

Mörsdorf sees the two powers as essentially one power with two complimentary parts. This is also very clear in the ordination of a bishop. This ordination continued to be a relative ordination. The bishop is ordained for a particular see:

Only for the episcopal ordination is the principle of relative ordination kept, apparently because the episcopal ordination has the character of a ruling ordination and cannot be thought about sensibly without the assignment, at least, ideally, to an episcopal see.⁷⁰

⁶⁸ Mörsdorf, "Ecclesiastical Authority," p. 137.

⁶⁹ Mörsdorf demonstrates the unity of the two powers in an example. According to the 1917 Code, a bishop, even when he had no jurisdiction or if he was forbidden to exercise the jurisdiction, could confirm (c. 782, § 1). A priest with a papal indult could also do this (c. 782, § 2). The question was whether the indult was adding what was lacking in the power of orders or in the power of jurisdiction? Since the power given to the priest is a limited one, e.g., for a territory, time, or person, and is invalid outside the given power, it must be conferred in addition to the jurisdiction. That means that the priest can confirm in virtue of both the power of orders and the power of jurisdiction. This, however, implies that for the bishop these two powers must also be present. Mörsdorf, "Abgrenzung und Zusammenspiel," pp. 18-19.

⁷⁰ "Allein für die Bischofsweihe blieb das Prinzip der relativen Ordination erhalten, offenbar deshalb, weil die Bischofsweihe den Charakter einer Herrscherweihe hat und sinnvoll nicht ohne die wenigstens ideelle Zuordnung zu einem Bischofssitz gedacht werden kann" (Mörsdorf, "Die Entwicklung der Zweigliedrigkeit," p. 15).

The ordination places him in the highest level of the hierarchical order, and the hierarchical jurisdiction places him in the other level of divine law.⁷¹

History reveals that the two powers are really one power. This one power is a sacred power, because it goes back to the Lord himself:

[...] Christ established in his Church a sacred power, that is not for every member, but only for those who are called to lead the People of God in the name of the Lord. The sacred power is only established because of a service. It belongs to the essence of the Church and gives foundation to the hierarchical structure.⁷²

The subject of the power is one who is called to this in a juridic way. It is not enough to know that one has a charism. This means that the hierarchical structure excludes a charismatic structure, but it does not exclude charisms. This hierarchical structure has its foundation in the sacramentality of the Church. In this Church the invisible Lord, the Head of the Church, is represented by people: in the universal Church by the Roman Pontiff, in the particular Church the bishop. Mörsdorf says that this structure is also visible in the parish, where the priest presides with the mission of the bishop.

⁷¹ The intimate relationship between the two powers is especially present in confirmation and ordination, since every bishop can do that everywhere. Mörsdorf, "Die Entwicklung der Zweigliedrigkeit," p. 16.

The existence of levels of divine law in relation to jurisdiction will be addressed in section 3.4 - *Ranks within the hierarchies of orders and offices*.

⁷² "[...] Christus der Herr hat seiner Kirche eine heilige Gewalt eingestiftet, die nicht jedem Glied der Kirche zukommt, sondern allein denen, die dazu berufen sind, das Volk Gottes im Namen des Herrn zu weiden. Die heilige Gewalt ist allein um des Dienstes willen eingesetzt. Sie gehört zum Wesen der Kirche und begründet deren hierarchische Struktur" (K. Mörsdorf, "Über die Zuordnung des Kollegialitätsprinzips zu dem Prinzip der Einheit von Haupt und Leib in der hierarchischen Struktur der Kirchenverfassung," in L. Scheffczyk, W. Dettloff, R. Heinzmann (Hrsg.), *Wahrheit und Verkündigung: Michael Schmaus zum 70. Geburtstag*, Bd. 2, München, F. Schöningh, 1967, p. 1436).

The 1917 Code did not use the term *sacra potestas*. It did apply the same notion in the terms *ecclesiastica potestas sive ordinis sive iurisdictionis* in c. 145, § 1 CIC/1917. It also applied the term *sacra hierarchia* and distinguished between a level of orders and a level of jurisdiction (c. 108, § 3 CIC/1917). The 1917 Code, however, excluded a separation between the power of orders and the power of jurisdiction. According to Mörsdorf, the 1917 Code handled the two powers as related to each other.⁷³

3.2 - From two powers to three offices

Mörsdorf says that, until the beginning of the 19th century, the doctrine of a threefold power was alien to the Catholic tradition. The theory originated in the work of Calvin and Bucer. It goes back to the three offices of Christ and the Church, viz., magisterium, priesthood and government. The Lutherans adopted the theory in the 17th century, and eventually Catholic theologians accepted it in the late 18th and early 19th centuries.

The German canonists Ferdinand Walter and George Phillips attempted to relate the notion of the three offices to the original two powers. They assigned each office a power of its own: *potestas docendi*, *potestas sanctificandi*, and *potestas regendi*. As is clear from this, the powers were defined by their tasks. Mörsdorf points out that the consequence of this approach was that the three powers remained unrelated to each other:

Now this cuts away the whole network of relations that subsist between the two poles, orders and jurisdiction, because of the distinction between orders and canonical mission; it destroys too the bonds which link the powers of orders and jurisdiction with the three offices of the Church and must do so

⁷³ In the section on the laity, Mörsdorf deals again with this problem.

unless we are to sacrifice the unity of ecclesiastical power.⁷⁴

In so far as the old division between the powers of orders and jurisdiction still existed, theologians and canon lawyers attempted to relate the doctrine of two powers to the doctrine of three powers. The power to sanctify was related to the power of orders, and the power to govern, to the power of jurisdiction. The third power, the teaching power, had to be assigned to one of the two: it fell more towards the power of jurisdiction.⁷⁵

Mörsdorf continues, arguing that, since the power of orders and the power of jurisdiction form one sacred power, both of them relate to the three offices,⁷⁶ although the strength of the ties between the powers and the offices differ (see also figure 1):

The polarity of the relationship between the powers of orders and jurisdiction may be compared with the foci of an ellipse, supposing these to be movable. Each of the two powers has its own connections with the three offices, because both the power bestowed by holy orders and that bestowed by canonical mission operate, each in its own way, in the priesthood, magisterium, and government that compose the Church's work.⁷⁷

⁷⁴ Mörsdorf, "Ecclesiastical Authority," p. 135.

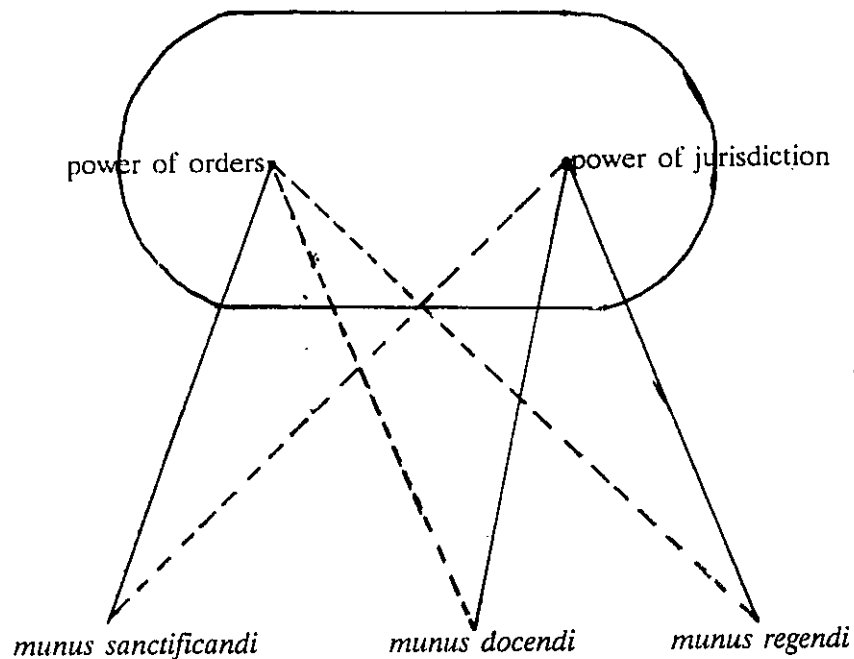
⁷⁵ Mörsdorf indicates that the Council reflects this idea when it says that the bishops as a body succeed the college of apostles in the office of teaching and government (*LG* 22). However, Mörsdorf says that the college of bishops succeeds the college of apostles in the priestly office as well; how could they otherwise have full and supreme power? See Mörsdorf, "Ecclesiastical Authority," p. 135.

⁷⁶ In the article "Ecclesiastical Authority," Mörsdorf at times uses the terms 'power' and 'office' very loosely. (This might be due to the translation, but the original text is not available.)

⁷⁷ Mörsdorf, "Ecclesiastical Authority," p. 137.

Mörsdorf's theory can be best illustrated in a drawing.

Figure 1. The continuous lines signify a strong relationship, while the interrupted lines refer to a weaker relationship.⁷⁸



3.3 - The Second Vatican Council

In drafting its dogmatic constitution on the Church, *Lumen gentium*, the Second Vatican Council struggled with the notions of *potestas* and *munus*. Mörsdorf suggests that the questions about *munera* refer to what should be done, while the questions dealing with power refer to the source of the action or to the power that operates in the exercising of

⁷⁸ K. Mörsdorf, "Kritische Erwägungen zum kanonischen Amtsbegriff," in W. Wegener (Hrsg.), *Festschrift für Karl Gottfried Hugelmann*, Bd. 1, Aalen, n.p., 1959, p. 391.

the offices.⁷⁹

According to Mörsdorf, the complexity of the relationship between the office and the power is very well illustrated in a sentence in *Apostolicam actuositatem*: "To the apostles and their successors Christ has entrusted the office of teaching, sanctifying, and governing in his name and by his power" (AA 2).⁸⁰ Mörsdorf remarks that in the Latin text the words 'teaching, sanctifying and governing' follow immediately after the word 'power;' however, they do not refer to the word 'power,' but to the word 'office.'⁸¹

Mörsdorf points out that the division into three offices is rather arbitrary: Scripture does not know of this exclusive division. On the contrary, it attributes several other titles to Christ: Mediator, Son of Man, Messiah, etc. It is only Flavius Josephus who, for the first time, uses the threefold division of King, Prophet, and Priest. Mörsdorf remarks that the Second Vatican Council, besides these three titles, uses other terms for Christ: Mediator (SC 48), Redemptor (OT 3), and the new Adam (GS 22). Mörsdorf says "The council uses

⁷⁹ "Quaestio de munere interrogat quid sit agendum, quaestio autem de potestate sese refert ad principium agens seu ad auctoritatem quae in munere exsequendo operatur" (K. Mörsdorf, "Munus regendi et potestas iurisdictionis," in Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Acta conventus internationalis canonistarum, Romae, diebus 20-25 mai 1968 celebrati*, [Città del Vaticano], Typis Polyglottis Vaticanis, 1970, p. 199).

⁸⁰ "Apostolis eorumque successoribus a Christo collatum est munus in ipsius nomine et potestate docendi, sanctificandi et regendi" (Vatican II, Decree, "Apostolicam actuositatem," in *AAS*, 58 (1966), p. 838 [English translation in A. Flannery (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, Northport, NY, Costello Publishing Company, 1984, p. 768]).

⁸¹ "Patet haec ultima verba, scilicet 'docendi, sanctificandi et regendi', etsi immediate verbum 'potestate' sequuntur, sese non ad potestatem, sed ad munus referre, quia hoc alias non esset definitum. Sensus ergo verborum est hic: Munus docendi, sanctificandi et regendi a Christo collatum est atque nomine et potestate ipsius exercetur" (Mörsdorf, "Munus regendi et potestas iurisdictionis," p. 201).

the distinction of the three offices principally to subdivide the text."⁸² These thoughts lead Mörsdorf to the following conclusion:

Weighing all this, one can say that the distinction of three offices of Christ and Church are neither adequate nor complete. It is *not adequate*, because the offices transcend each other and the one office is efficacious in the other; it is *not complete*, because not everything can be expressed through the medium of the distinction of the three offices that constitute the one office of Christ and the Church.⁸³

The schema for the constitution *Lumen gentium* applied a division into three powers, but this schema was rejected. The final text speaks rather about three offices.⁸⁴ Mörsdorf says,

The *Nota explicativa praevia* (n. 2) says in answer to *LG.* no. 21, chapter II, that the word *office* is used and not *power*, because the ultimate sense of power can be understood as ready for action. I am persuaded that in this case not simply a substitution of words took place.⁸⁵

⁸² "Concilium distinctione trium munerum praecipue ad textus subdividendos utitur" (Mörsdorf, "Munus regendi et potestas iurisdictionis," p. 203).

⁸³ "His omnibus perpensis dici potest distinctionem trium munerum Christi et Ecclesiae nec adequatam nec completam esse. *Nec adequatam*, quia munera sese inter se transcendunt ac unumquodque munus in alteris efficax est; *nec completam*, quia mediante distinctione trium munerum non omnia enuntiari possunt, quae munus in se unicum Christi et Ecclesiae constituunt" (Mörsdorf, "Munus regendi et potestas iurisdictionis," p. 203).

⁸⁴ "Diese Aufteilung ist eine Denk- und Aussagehilfe, aber keine notwendige Unterscheidung. Die drei 'Ämter' sind keine Ämter im rechtlichen Sinne, sondern Aufgaben und Dienste, die sich gegenseitig durchdringen und darum nicht voneinander getrennt werden dürfen" (K. Mörsdorf, "Die hierarchische Verfassung der Kirche, insbesondere der Episkopat," in *AfkKR*, 134 (1965), p. 93).

⁸⁵ "In *Nota explicativa praevia* (n. 2) ad n. 21 Cap. II Const. *Lumen Gentium* dicitur, consulto adhiberi vocabulum *munerum*, non vero *potestatem*, quia haec ultima vox de potestate ad actum expedita intelligi posset. Mihi persuasum est hac in re agi non de sola substitutione verborum" (Mörsdorf, "Munus regendi et potestas iurisdictionis," p. 205.)

Mörsdorf mentions that the *Nota praevia* did not really say something new. It avoided the distinction between orders and jurisdiction in the ordination of the bishop by keeping them together:

This acknowledgement poses an important step forward in the canonical doctrine on power. Power of orders and power of jurisdiction are complementary elements of the one sacred power and they may not be looked upon any more as independent and separated powers, as was generally the case until now.⁸⁶

3.4 - Ranks within the hierarchies of orders and offices

Mörsdorf sees in the hierarchy of orders three ranks that are of divine law, viz., the diaconate, the presbyterate and the episcopate. The other ranks are of ecclesiastical law, viz., subdiaconate, acolyte, exorcist, lector, porter.

The hierarchy of offices also has ranks.⁸⁷ The office of Roman Pontiff, the college

⁸⁶ "Diese Erkenntnis stellt einen wichtigen Fortschritt in der kanonischen Gewaltenlehre dar. Weihewalt und Hirtengewalt sind komplementäre Elemente der einen heiligen Gewalt und dürfen nicht mehr, wie dies bisher weithin der Fall war, als je für sich stehende und getrennte Gewalten angesehen werden" (Mörsdorf, "Die hierarchische Verfassung," p. 94.)

⁸⁷ Mörsdorf points out that c. 145 CIC/1917 says that an ecclesiastical office brings with it a share in the powers of the Church, and that this can be either for the power of orders or the power of governing. C. 210 CIC/1917 also communicates the idea that the power of orders is bound up with an office or that it can be delegated to a person. Mörsdorf remarks that c. 109 CIC/1917 makes very clear that the power of orders is conferred through the sacrament of orders and that the pastoral power is conferred through canonical mission (an exception is the papal authority). "The conferring of office is a form of canonical mission (c. 197, § 1 CIC/1917) and can thus confer only pastoral jurisdiction but not the power of orders; this is clear from the fact that the power linked with an office ceases with the office" (K. Mörsdorf, art. "Ecclesiastical Office," in *Sacramentum mundi*, vol. 2, p. 167).

of bishops, and the episcopal office, are of divine law. The episcopal office is subordinated to the other two powers which have supreme authority. All other offices are of ecclesiastical institution. The offices of Roman Pontiff and the college of bishops are constitutive of the Church and do not need ecclesiastical erection. The episcopal office, related to a particular Church, must be erected by the competent authority because it requires an ordination to a particular flock. Mörsdorf then refers to *LG* 27 and to *CD* 8 and says,

The particular episcopal office is of ecclesiastical law, but the tasks and powers which belong to the episcopal office thus made concrete flow from the episcopal office as instituted by God and are not derivable from the primatial power of the Pope.⁸⁸

The bishop is ordained in a relative ordination. This shows how the episcopacy as the highest level of the hierarchical ordination is directed towards the tasks of governing that belong to it in the *hierarchia iurisdictionis*.

The unity of power also becomes visible in the Roman Pontiff, who has supreme and full power of jurisdiction. He can withdraw from it, but it cannot be taken away from him.

3.5 - Conclusion

Mörsdorf argues, with the help of historical data, that the powers of orders and jurisdiction form one sacred power. The two powers are distinct, but not separated.

The Second Vatican Council adopted a division into three offices, but Mörsdorf is

⁸⁸ K. Mörsdorf, art. "Hierarchy," in *Sacramentum mundi*, vol. 3, p. 28.

of the opinion that this did not really affect the basic structure of one sacred power. In his treatment of the position of the laity, Mörsdorf will use his theory of one sacred power to determine their position.

4 - PERSON IN THE CHURCH

One of the main points in Mörsdorf's work is the definition of *person in the Church*. The encyclical *Mystici Corporis Christi* of 1943 brought about a discussion on this subject. Mörsdorf participated in that discussion from 1944 on.

First he talks about the method to be used in treating this topic. Secondly, he describes and evaluates definitions--including the one of *Mystici Corporis Christi*--of what constitutes a person in the Church. He identifies two contradictory definitions. For a solution to the problem, Mörsdorf turns to c. 87 CIC/1917. He analyzes the canon and shows its implications. Eventually, he points out that salvation is most relevant in determining what constitutes a person in the Church.

4.1 - The method

Mörsdorf starts his article "Die Kirchengliedschaft im Lichte der kirchlichen Rechtsordnung"⁸⁹ with the remark that in the past the attempts to define membership in the Church were not very successful. He thinks that the reason for this is that a precise definition of Church was used to define membership. There is, however, no absolute definition of the Church. The Church can only be described. This implies, according to

⁸⁹ K. Mörsdorf, "Die Kirchengliedschaft im Lichte der kirchlichen Rechtsordnung," in *ThGl*, 36 (1944), pp. 115-131.

Mörsdorf, that it is impossible to answer the question about membership from a formal notion⁹⁰ of Church.

The canonical order, however, provides some avenues for answering the question. Since this order arises from and is supported by an awareness of faith, Mörsdorf believes it is capable of answering the question.⁹¹

Years later, in reply to an accusation that he used only juridical sources, Mörsdorf argued that the source of his theory was in the canonical order. Mörsdorf said that he failed to see how his theory did any damage to the theological meaning, even if it was on the juridic level. He responded,

In the question on membership of the Church there can be no real, different answer in canon law and in theology. If it would be different, an important dichotomy in the teaching of the Church would be revealed, which eventually would have to question the credibility of the ecclesial authority. The foundations of the ecclesial constitution are based on divine law. Statements made by the ecclesial legal order are no less theological than statements in the ecclesial teaching area. The authority that speaks is the same in both areas; it can use another language, occasionally another method in treating the actual problems, but it cannot split itself if it does not want to dissolve itself.⁹²

⁹⁰ Mörsdorf uses the word *Kirchenbegriff*. The word *Begriff* is not as wide as the English word *notion*, and it is not as strict as the word *definition*. The word *concept* is not adequate either. The best translation seems to be *notion*.

⁹¹ Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 115.

⁹² "In der Frage der Kirchengliedschaft kann es in Theologie und Kanonistik keine sachlich verschiedene Antwort geben. Wäre es wirklich anders, so offenbarte sich darin ein verhängnisvoller Zwiespalt in der Lehre von der Kirche, der letztlich die Glaubwürdigkeit der kirchlichen Autorität in Frage stellen müßte. Die Grundlagen der Kirchenverfassung beruhen auf göttlichem Recht. Aussagen, welche die kirchliche Rechtsordnung darüber macht, sind nicht weniger theologisch als entsprechende Aussagen im kirchlichen Lehrbereich. Die Autorität, die hier und da spricht, ist die gleiche; sie mag sich jeweils einer anderen Sprache, mitunter auch einer anderen Methode in der Behandlung eines sachlichen Problems bedienen, aber sie kann, will sie sich nicht auflösen,

Mörsdorf considers the question about membership to pose both a theological and a canonical problem. These two areas are interrelated and cannot be dealt with separately.

It is therefore methodologically incorrect to overlook the law of the Church in the theological discussion on the question of membership or to put inattentively aside those questions that arise from a theological definition.⁹³

After the exposition of the methodology, Mörsdorf describes the existing theories on *persona in Ecclesia Christi*.

4.2 - The existing theories

Mörsdorf describes how Bellarmine's definition of the Church established that membership in the Church was envisioned through three bonds: the unity of faith (*vinculum symbolicum*), the bond of the sacraments (*vinculum liturgicum*), and the hierarchical authority (*vinculum hierarchicum*). The subsequent apologetic literature left the liturgical bond out, and those who did not submit themselves to the hierarchical authority and to the true faith were not considered to be members of the Church.⁹⁴ The apologetics formulated three positive criteria for membership: (1) reception of baptism, (2) profession of the true

in der Sache selbst nicht divergieren," (K. Mörsdorf, "Persona in Ecclesia Christi," in *AfkKR*, 131 (1962), pp. 352-353).

⁹³ "Es ist deshalb methodisch falsch, wenn man in der theologischen Erörterung der Gliedschaftsfrage das Recht der Kirche übersieht oder die Fragen, die sich von hier aus einer theologischen Begriffsbestimmung stellen, achtlos beiseiteschiebt," (Mörsdorf, "Persona in Ecclesia Christi," p. 353).

⁹⁴ Mörsdorf remarks that they did consider the *excommunicati tolerati* as members of the Church (Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 115).

faith and (3) submission to the hierarchical authority of the Church.⁹⁵

The encyclical letter "Mystici Corporis Christi" of Pius XII determined membership in the following way:

Only those are really to be included as members of the Church who have been baptized and profess the true faith and who have not unhappily withdrawn from Body-unity or for grave faults been excluded by legitimate authority.⁹⁶

This description contains two positive elements--baptism and the profession of faith--and two negative elements--no separation from the Body and no excommunication. Mörsdorf relates the two positive elements back to the first two elements of the apologetic definition. The two negative elements refer to c. 87 CIC/1917. That canon said,

⁹⁵ K. Mörsdorf, art. "Kirchengliedschaft," in *LThK*, vol. 6, cols. 221-222.

⁹⁶ "In Ecclesiae autem membris reapse ii soli annumerandi sunt, qui regenerationis lavacrum receperunt veramque fidem profitentur, neque a Corporis compage semet ipsos misere separarunt, vel ob gravissima admissa a legitima auctoritate seiuncti sunt" (Pius XII, Encyclical letter, "Mystici Corporis Christi," in *AAS* 35 (1943), p. 202 [English translation: *The Mystical Body of Christ, An Encyclical Letter issued June 29, 1943, by Pope Pius XII under the title Mystici Corporis, Study Outline, review Questions, selected bibliography*, prepared by J.J. Bluett, New York, NY, The America Press, 1943, p. 12]).

Mörsdorf remarks that despite the different opinions about this encyclical, all agree that it deals with the question of membership in the visible Church only. One can determine membership in the Church only for the external level, since that is the domain of juridic science. At the same time, however, canon law does deal with those who desire baptism; the catechumen who is not yet baptized does have a right to a funeral. The reason for this is that the baptism *in voto* refers to a desire to belong to the visible Church. Mörsdorf says, "Die Kirche ist zugleich sichtbar und unsichtbar, und bei dem Problem der Kirchengliedschaft geht es darum, die äußeren Kennzeichen der Zugehörigkeit zu der einen wahren Kirche aufzuzeigen. Wenn dabei zwischen Kirchengliedschaft 'in re' und 'in voto' unterschieden wird, ist wohl zu beachten, daß sich letztere nicht auf die innere Gnadengemeinschaft, sondern auf das Begehren nach der Zugehörigkeit zur sichtbaren Kirche bezieht" (Mörsdorf, "Persona in Ecclesia Christi," p. 353).

Baptismate homo constituitur in Ecclesia Christi persona cum omnibus Christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura.

According to Mörsdorf the tradition reveals two different theories. The first is that baptism constitutes a person in the Church: the person becomes a member because of the sacramental character. The second theory is that the baptized person who in a juridical tangible way⁹⁷ becomes an apostate, a heretic, or a schismatic is outside the Church. It was in reference to this group of people that the expression *Extra Ecclesiam nulla salus* was addressed.⁹⁸

These two ideas contradict each other: the first one affirms that by baptism one becomes a person in the Church and that nothing can undo this; the second opinion, however, allows the possibility of losing one's ecclesiastical personhood. Mörsdorf addresses this by saying that if the Church does not want to define membership in a sociological way, but theologically, then it is the task of theology to relate these two theories to each other in such a way that both can be affirmed.⁹⁹ The following section will discuss Mörsdorf's

⁹⁷ The question of whether the secret heretics and schismatics are members of the Church has made clear that we should only deal with the visible Church. Mörsdorf gives K. Rahner the credit for pointing out that membership in the Church is on the level of sacramental signs and not on the level of personal attitude and internal decision and internal grace. So only those aspects are relevant that touch the visible public-judicial society. Mörsdorf, "Persona in Ecclesia Christi," pp. 354-355.

⁹⁸ Mörsdorf says that the council of Florence saw heretics and schismatics in a similar way as they saw pagans and Jews, viz., that they did not exist in the Catholic Church (Denz. 714) [=DS. 1351] (Mörsdorf, "Kirchengliedschaft," in *LThK*, col. 222).

⁹⁹ "Die theologische Aufgabe besteht darin, beide Gedankenreihen so miteinander zu verbinden, daß beide unverkürzt bestehen bleiben. Dies dürfte jedenfalls notwendig sein, wenn man nicht bloß eine soziologische Standortbestimmung geben, sondern eine theologische Aussage machen will" (Mörsdorf, "Persona in Ecclesia Christi," p. 358).

solution to this problem.

4.3 - Mörsdorf's theory on membership

4.3.1 - Two levels of membership

In order to bring the two different theories about membership in the Church together, Mörsdorf proposes to distinguish levels of membership. These levels have to be understood in their own peculiarity yet in a way that relates them to each other.

The statement of c. 87 CIC/1917 that deals with *persona in Ecclesia Christi* shows how the two ways of thinking can be related. That canon is, for Mörsdorf, the model for the structure of the concept of membership.¹⁰⁰ In this canon, baptism is the only positive aspect, and the other elements form the negative because of the *nisi* clause.

Baptism confers an indelible character and shows a belonging to Christ and the Church. By baptism one is constituted a person in the Church. This implies that those who receive baptism do not confer personality upon themselves. The will of the person is

¹⁰⁰ Mörsdorf says that c. 87 CIC/1917 does not use the word *membrum*, although its sources do. The juridic term *persona* is used and is, according to Mörsdorf, more appropriate. The word *membrum* is a more theological term. The word *persona* refers to the role one plays in life. In the 1917 Code, however, it does not refer to a role, but to what one *is*; it indicates juridic capacity and it means the concrete ecclesial person. Mörsdorf remarks that Pius XII also used the term *persona in Ecclesia Christi* in the *Motu proprio*, "Cleri sanctitati," c. 16 [§ 1. Baptismate homo constituitur in Ecclesia Christi persona. § 2. Persona in Ecclesia Christi omnibus Christianorum iuribus fruitur et officiis adstringitur, nisi, ad iura quod attinet, obstat obex ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura (Pius XII, *Motu proprio*, "Cleric sanctitati," in *AAS*, 49 [1957], p. 440)]. The second paragraph of this canon says that the *persona in Ecclesia Christi* enjoys all the rights of a Christian and is subject to all obligations. He says that therefore *persona* in the juridic sense means the carrier of rights and obligations. See Mörsdorf, "Persona in Ecclesia Christi," pp. 360-365.

irrelevant.

The two negative elements of the canon concerning obstacles or censures are, however, at the level of the free personal decision of the baptized. A person can decide how to act, and this decision can be different from one day to the next. Another aspect of these two negative elements is that they are only applicable to those who have the use of reason; infants, for instance, cannot make such a free personal decision. Mörsdorf is of the opinion that the notion of membership has to be described in such a way that it includes everybody: those who have and those who do not have the use of reason.

The canon allows a distinction between a constitutive¹⁰¹ and an operative¹⁰² membership.

The sacrament of baptism gives a person constitutional membership in the Church. Mörsdorf says,

The baptismal character is a principle of creating membership, because it makes the baptized like Christ (*signum configurativum*) [...], it distinguishes the person from all who do not belong to the people of God (*signum distinctivum*), it obliges the person to the service of the Kingdom of God (*signum obligativum*) and it gives him candidacy for salvation (*signum*

¹⁰¹ Until 1976 Mörsdorf uses the term 'constitutional' (*konstitutionell*) in all his articles as opposed to 'operative' (*tätig*) membership. In his article "Kirchengliedschaft," in *LThK* published in 1961 he already uses the word *konsokratorisch*, but does not apply that as opposed to *tätig*. In 1976 he deliberately and explicitly replaces the word *konsokratorisch* for 'constitutional.' This word 'constitutional' was derived from the word *constituitur* as used in c. 87 CIC/1917. However, according to Mörsdorf the term *konsokratorisch* expresses better what it signifies, viz., the sacramental-ontological level of Church membership. See Mörsdorf, "Der Kirchenbann im Lichte der Unterscheidung zwischen äußerem und innerem Bereich," p. 42.

¹⁰² The German word *tätig* has no equivalent in English. It means 'active,' 'engaged,' or 'efficacious.' The closest English word to it would be 'operative.'

depositivum ad gratiam). In the way that a valid baptism can never be repeated, incorporation in the Church is irrevocable. This means that constitutional membership cannot be dissolved and lost.¹⁰³

This membership is dependent on the sacramental character and cannot be lost. It confers an indelible character. With the acquisition of personality goes the reception of rights and obligations. Persons will always keep their obligations, but their rights may be limited by an obstacle or a penalty. This limitation, however, never has the effect that it touches the personality itself.

The other level is the operative membership. This means that the person takes up God's gifts of salvation. The operative membership can be active or passive. Mörsdorf returns to this later on.

He emphasizes that the membership of those who have the use of reason is a full membership when they are members on both levels. This means that they are not excluded from the community of the faithful due to a defection from the faith or the unity of the Church, or due to a serious offence in a juridically tangible way. For those who do not have the use of reason, the constitutional membership is a full membership, because they are not able to make a personal decision. This does not apply to those baptized outside the

¹⁰³ "Der Taufcharakter ist dadurch gliedschaffendes Prinzip, daß er den Getauften Christus, [...] ähnlich macht (*signum configurativum*), ihn dadurch von allen unterscheidet, die nicht zum Gottesvolk gehören (*signum distinctivum*), ihn zum Dienst im Gottesreich verpflichtet (*signum obligativum*) und ihm die Anwartschaft auf das Heil gibt (*signum depositivum ad gratiam*). Wie die einmal gültig gespendete Taufe niemals wiederholt werden darf, so ist auch die einmal erfolgte Eingliederung in die Kirche unwiderruflich, d.h. die konstitutionelle Gliedschaft ist unauflösbar und unverlierbar" (Mörsdorf, *Lehrbuch*, I, pp. 176-177).

Catholic Church.¹⁰⁴

Mörsdorf compares his theory about constitutional and operative membership with belonging to a family: children can break all contacts with their parents (operative level), but they can never break the blood relationship they have with them (constitutional level).

4.3.2 - The general rights and obligations

Baptism confers upon a person rights and obligations. In virtue of the constitutional membership one can never lose the obligations. They exist independently from the will of the person who must submit to these obligations. They only become effective once the person has the use of reason, i.e., with the completion of the seventh year of age (c. 12 CIC/1917).

The rights are acquired automatically, but they can be restricted. The restriction can be either through an obstacle (*obex*) or through a censure (*censura*).

¹⁰⁴ "‘Tätige’ Gliedschaft ist der persönliche Vollzug der konsekratorisch geprägten Christusförmigkeit des Getauften, die gläubige Aufnahme der Heilsgaben Gottes, die im Bereich dieser tätigen Gliedschaft zu fruchtbarer Entfaltung, aber auch zu hartnäckiger Ablehnung kommen. Für den mündigen Christen ist Kirchengliedschaft in voller Wirklichkeit nur dann gegeben, wenn er in beiden Schichten Glied der Kirche ist, d.h., wenn er nicht wegen Abfalls vom Glauben oder von der Einheit der Kirche oder wegen schwerer Vergehen in rechtlich greifbarer Weise von der Gemeinschaft der Gläubigen ausgeschlossen worden ist. Für den unmündig in der katholische Kirche Getauften ist, weil er eigener personaler Entscheidung noch nicht fähig ist, die konstitutionelle Gliedschaft bereits vollwirkliche Gliedschaft; nicht so für den außerhalb der katholischen Kirche getauften Unmündigen, weil dieser durch die ihm anhaftende Sperre außerhalb der katholische Kirche steht" (Mörsdorf, "Kirchengliedschaft," in *LThK*, cols. 222-223).

Mörsdorf remarks that it is incorrect to think that baptized persons would have to create *consciously* the obstacle and therefore revoke themselves their rights of membership. Mörsdorf insists that for both the penalty and the obstacle, the ecclesial authority has to reduce the rights. The Christians themselves are incapable of limiting their own rights. See K. Mörsdorf, "Der *Codex iuris canonici* und die nichtkatholischen Christen," in *AfkKR*, 130 (1961), p. 36.

4.3.2.1 - Restriction of rights by a penalty

The penalties that are applicable in light of c. 87 CIC/1917 are excommunication, interdict, *infamia* and a *remotio ab actibus legitimis*. The censures can be distinguished as excommunication, interdict and suspension.

Interdict only affects the exercise of a right, but it does not touch the right itself: one is not excluded from the active Church community.

Excommunication, however, excludes the person from the community of the faithful (c. 2257, § 1 CIC/1917).¹⁰⁵ The rights that can be restricted are determined by law. This censure, however, does not take away the acquired personality of the person: the constitutional membership is unaffected. On this constitutional level the operative level is built. The operative membership can be passive or active. This membership implies a full right of membership; passive membership means that the person has a restriction in the membership's fundamental rights. Mörsdorf considers the excommunicated person as a passive-operative member. He says,

The excommunicated person is therefore for the most part not an active-actual member, but only a passive-operative member of the Church. Taking into consideration the end of the penalty, namely a reform, [...] the excommunication can be defined as a temporary separation of the community of active-operative members.¹⁰⁶

¹⁰⁵ Mörsdorf questions the effectiveness of the excommunication. The essence of this penalty lies in exclusion from the community, but that does not work any more. Presently (1962) the effect is in the forum of conscience only (Mörsdorf, "Persona in Ecclesia Christi," p. 375).

¹⁰⁶ "Der Gebannte ist daher in der Hauptsache nicht mehr aktiv-tätiges, sondern nur passiv-tätiges Glied der Kirche. Mit Rücksicht auf den Besserungszweck, [...] läßt sich der Kirchenbann kurz bestimmen als einstweilige Absonderung von der Gemeinschaft der aktiv-tätigen Kirchenglieder," (Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 123).

The third possibility of restriction of rights by a censure is by a vindictive penalty.¹⁰⁷ This means that a good reputation is lost. In order to be an active-operative member one has to be in good standing (*Vollbesitz der kirchlichen Ehre*). The effect of the loss of a good reputation implies a limited operative position.¹⁰⁸

The last possibility is the prohibition to participate in legitimate acts, like the acts of a judge, of an administrator of property, of a chancellor, or of a notary (c. 2256, n. 2). Mörsdorf says that the exercise of these acts require that one has a good reputation. So the prohibition is linked to the *infamia* or the excommunication.¹⁰⁹

4.3.2.2 - Restriction of rights due to an obstacle

The second group of possibilities that diminishes the person's rights consists of obstacles. The term obstacle (*obex*) refers to the doctrine on sacraments. The sacraments are always effective when there is no obstacle on the side of the receiver.¹¹⁰

Mörsdorf points out that only those obstacles apply that can be determined in external situations.

¹⁰⁷ Mörsdorf, *Lehrbuch*, I, p. 178. He is of the opinion that c. 87 CIC/1917 applies the word *cenſura* in the broad meaning and not in the strict sense of censure. It therefore implies also the so called *poena vindicativa*.

¹⁰⁸ Mörsdorf does not explain what he means by the 'limited active position,' but it probably refers to the passive-actual membership (Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 124).

¹⁰⁹ Mörsdorf, "Persona in Ecclesia Christi," p. 387.

¹¹⁰ In "Die Kirchengliedschaft," in *ThGl*, p. 124 Mörsdorf refers for this to Denz. 848, Tridentinum sess. 7 can. 5.

He also emphasizes that the obstacle can only be the result of a decision of the Church; it does not depend on the will of the person. He makes this very clear in a footnote where he says,

[It can be] established, that the Church is not an association in which it depends on the will of the people, if and how long they want to belong to it, but the new People of God, in which one is born, whose member [*Glied* not *Mitglied*] one becomes and from which a person, concerning the obligations, is never released.¹¹¹

4.3.3 - Internal and external forum

On several occasions Mörsdorf indicates that the legal order can only work with what is public. This is also applicable to the canonical order. This does not imply that the legal order therefore should be satisfied when the orders are obeyed. The law should exist in such a way that it is also followed in the conscience of people. These remarks lead to an essential point in the canonical order: the distinction between the internal and external forum. Both forums, although they are related to each other, have their own rules. Law deals with the external forum. Those acts that are publicly known or can become publicly known belong to this external forum. To the internal forum belong those things that are unknown and have no chance of becoming known. Besides these two forums, Mörsdorf mentions a third domain for membership. It is in this domain that it is decided who is an

¹¹¹ "[...] ist festzustellen, daß die Kirche kein Verein ist, wo es von dem Willen der Mitglieder abhängt, ob und wie lange sie ihm angehören wollen, sondern das neue Gottesvolk, in das man hineingeboren wird, dessen Glied (nicht Mitglied!) man wird und aus dem man, was die Seite des Verpflichtetseins anlangt, niemals entlassen wird." (Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 125, footnote 17). This sentence does not flow in the German text!

active and who is a passive operative member. He says,

There is, however, an internal domain of membership, towards which the law can lead, but may not enter: the domain of the invisible choice of the Spirit of God, which is the soul of the mystical Body of Christ and with that the internal principle of unity of the Church. It is in this forum of the Spirit of God that it is decided whether a constitutional member of the Church is to be looked upon as active or passive in the operative order.¹¹²

This means that membership on the external level corresponds with membership on the internal level. The presumption is that, when there is a restriction in the external forum, this also has effects in the internal forum. At the same time, however, a restriction of rights in the internal forum has no effects in the external forum. This can also be applied to a releasing of excommunication: if this was done on the external forum, it automatically has effect in the internal forum. If the releasing takes place in the internal forum, it has no effect in the external forum and has to be requested (c. 2251 CIC/1917).

Mörsdorf argues that a judgement is always human and therefore subject to mistakes. Something that is decided for the external forum might not have any effect in the internal forum. This means that there can be a conflict between the internal and the external forum:

A passive-operative member in the external forum can continue to be an active-operative member in the internal forum and, vice versa; a passive-operative member in the internal forum can have the appearance of an

¹¹² "Aber es gibt einen innersten Bezirk der Gliedschaft, zu dem das Recht wohl hinführen, aber nicht eintreten darf: den Bereich des unsichtbaren Waltens des Geistes Gottes, welcher die Seele des mystischen Leibes Christi und damit das innerlichste Einheitsprinzip der Kirche ist. Vor diesem Forum des Geistes Gottes entscheidet es sich letztlich, ob ein konstitutionelles Glied der Kirche in der tätigen Ordnung als aktiv oder passiv anzusehen ist," (Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 128).

active-operative member in the external forum.¹¹³

The conflict between these forums can be diminished by the Church in the sacrament of penance, because there it can remove the conflict, at least for the internal forum. Mörsdorf is of the opinion that there can be cases where the conflict cannot be solved, and those cases should be left to God's forum.¹¹⁴

Mörsdorf mentions that the distinctions he makes in membership can be drawn in three circles that cross each other mutually. The central circle is the constitutional circle; it radiates the active and passive capability in the operative membership. The circles corresponding to the internal and the external forum cross the foundational circle.¹¹⁵

4.4 - The relevance of the question

Mörsdorf remarks that the question of membership is one that deals with membership in the *visible* Church. In the whole attempt to determine what membership is, the relevance of the question should be taken into consideration. It is not important for Mörsdorf to get a definition per se; if it is just a theory, it is irrelevant. Mörsdorf says:

As the tradition shows, the question of membership is related to the question about salvation. Not in such a way as if membership and possession of salvation coincide,[...] but in such a way that the member of the Church

¹¹³ "Ein im äußeren Bereich passiv-tätiges Glied kann im inneren Bereich aktiv-tätig bleiben und umgekehrt kann ein im inneren Bereich passiv-tätiges Glied im äußeren Bereich den Schein eines aktiv-tätigen Gliedes haben," (Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 129).

¹¹⁴ Mörsdorf mentions as an example the case where the penitent lacks the proper disposition. Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 129.

¹¹⁵ Mörsdorf, "Die Kirchengliedschaft," in *ThGl*, p. 130.

is on the proper, God-given way to salvation.¹¹⁶

Mörsdorf does not elaborate his theory any further.

4.5 - Conclusion

Mörsdorf's theory can be summarized easily. The membership question is a theological and a canonical question that has to be answered in both fields simultaneously. This membership touches only the visible Church. In that Church, valid baptism is the only criterion for being a member. This baptism constitutes a human being as a person in the Church. The juridic effect of this baptism is a conferral of rights and obligations. Since baptism confers an indelible character, the obligations will always exist. The rights of the person, however, might be restricted. This leads to a distinction in levels of membership. There is a constitutional membership that can never be taken away or lost, and there is an operative membership. These two levels have to be distinguished for the internal and external forum. The external forum is the only important one in the question about membership. The relevance of the question has to do with salvation, although Mörsdorf describes this only in very global terms.

Mörsdorf attempts to show that his theory on membership is related to his theory on sacred power. He says that the sacramentality of the Church is intrinsically related to the hierarchical structure of the Church. The power of orders and of jurisdiction are

¹¹⁶ "Wie die Tradition der Kirche bezeugt, verbindet sich mit der Frage nach der Kirchengliedschaft die Frage des Heiles. Nicht so, als ob Gliedschaft und Heilsbesitz zusammenfielen, [...] sondern in dem Sinne, daß sich das Glied der Kirche auf dem ordentlichen, von Gott bestimmten Wege zum Heile befindet" (Mörsdorf, "Persona in Ecclesia Christi." pp. 353-354).

complementary to each other. Being a member in the Church implies participating in this structure. Moreover, in the same way as the power of orders and jurisdiction are related to each other, so are the two levels of membership.¹¹⁷

5 - LAITY

Before the Second Vatican Council, a discussion about the notion and position of laity intensified. Mörsdorf replied to two proposals made by Yves Congar and Karl Rahner. After reporting on those proposals, he presented his own opinion about the notion of laity and their participation in the Church.

After the Second Vatican Council, Mörsdorf evaluated the conciliar texts on the position of the lay person. He also dealt with the specific problem of lay judges.

5.1 - The lay person before the Council

5.1.1 - The theories of Congar and Rahner

In an article that appeared before the council,¹¹⁸ Mörsdorf notices a recent development in the thinking about the laity. He points out that the 1917 Code devoted only one canon to the rights of the laity (c. 682). In this article he describes the two major proposals on the position of the laity, one made by Yves Congar, and the other by Karl

¹¹⁷ Mörsdorf, "Persona in Ecclesia Christi," pp. 355-358. Mörsdorf explains his sacred power theory, and says that it connects to the membership question. He does not really say, though, why it is related.

¹¹⁸ K. Mörsdorf, "Die Stellung der Laien in der Kirche," in *RDC*, 11 (1961), pp. 214-234.

Rahner.¹¹⁹

Congar distinguishes between the Church as *institution* and the Church as *community*. The institution is present for and above the faithful, for and above the community. Congar links to this two organizational principles, viz., a hierarchical and a communal principle. Mörsdorf is not pleased with this division: he does not see how it is relevant for the attempt to determine the position of the laity. He also remarks that there is no sign that the unity of the Church is preserved.

Rahner also proposed a theory about the *notion* of laity. He is of the opinion that every person who has legitimately obtained and possesses an habitual part of liturgical or juridical power cannot be considered a lay person in the strict sense. Mörsdorf says that Rahner concludes from this that in a strict theological sense a woman could actually belong to the clergy. As a foundation for his theory, Rahner questions whether an unordained person elected pope, upon accepting the election and therefore having the full and supreme power, can still be called a layperson in the theological sense. Rahner concludes that a layperson ceases to be a layperson when there is participation in the power of orders or in the power of jurisdiction. Mörsdorf says that, with this notion of 'clergy,' only a secular notion of laity is left. It was Rahner's notion that was voiced in LG 31, 2, but Mörsdorf considers this notion a sociological one, and not a theological one at all.¹²⁰

¹¹⁹ Mörsdorf refers to Y. Congar, *Jalons pour une théologie du laïcat*, Unam sanctam, no. 23, Paris, Les Éditions du Cerf, 1952, and to K. Rahner, "Über das Laienapostolat," in K. Rahner, *Schriften zur Theologie*, Bd. 2, Einsiedeln, Benziger, 1955, pp. 340-373 (English translation: "Notes on the Lay Apostolate," in K. Rahner, *Theological Investigations*, vol. 2, *Man in the Church*, Baltimore, Helicon Press, 1964, pp. 319-352).

¹²⁰ Mörsdorf gives a very brief description of Rahner's article (Rahner, "Notes on the Lay Apostolate," pp. 319-352) but this description needs some nuancing remarks. Rahner says that the lay person should be distinguished from those who have proper hierarchical

5.1.2 - Mörsdorf's notion of laity

Mörsdorf gives the history of the term *laicus*: it finds its roots in the Greek word *laikos*, which relates to the word *laos*.

In the language of the New Testament, the word *laos* refers to the people of Israel and is applied to the new people of God. *Laos* also means the people, as distinguished from the leaders (Luke 22:2, 23:5.13). In the letter of Clement (40:5) the word *laikos* is used for the first time and has the meaning of belonging to the people of God. It distinguishes the people and the ordained leaders of the people.

In juridic language *laicus* refers to the secular (mundane). The Code speaks about the *iudex laicus* (c. 120, § 2 CIC/1917), the secular power (*laica potestas*) (c. 2333 CIC/1917).

powers (c. 948 CIC/1917), that is, the powers of orders and jurisdiction. The power of orders consists of those full powers, which are by their essence of a sacramental nature. The power of jurisdiction is made up of those powers which belong to ruling and governing. Lay status in the strict sense means that one does not have these powers. There are, however, powers that do not require transmission exclusively by the sacrament of orders or cannot even be conferred by it (e.g. complete sovereign power). So the layperson and the cleric cannot be differentiated based on the *manner* of transmission of the power, but only on the *content*. This implies, for Rahner, that anyone who is rightfully in *habitual* possession of any liturgical or legal power is no longer a layperson in the proper sense. He says that in a strict theological sense it would be possible for a woman to belong to the 'clergy' and as an example he mentions that an abbess could have the permanent right of patronage of a parish. If in fact the 'clergy' is normally composed of men, that is because the power of ruling and ordination are meant to exist in one and the same person according to Christ's will. "[T]he powers conferred only by Ordination are reserved to men and that already *de iure divino*" (p. 321). Rahner warns the reader to be very careful in using this theological terminology. He concludes his thoughts with the sentence: "The lay state in the proper sense ceases whenever there is real and habitual participation in the powers of the hierarchy in such a way that the exercise of these powers characterizes the life of such a person, i.e. determines his station (in life). It is theologically indifferent in this connection whether in the actual practice of the Church these powers are given by ordination or are (or can be) bestowed without it" (p. 330).

In colloquial language the word *laicus* refers to the non-professional.

In order to determine the theological notion of the laity, Mörsdorf says, "The *theological notion* of laity can only be derived from the position that the lay person has in the Church."¹²¹ He therefore takes the 1917 Code as his source. Canon 107 CIC/1917 introduces the canons on clergy, laity and religious.¹²² It says that clergy and laity are to be distinguished, and that both of them can be religious. Mörsdorf points out that to have the impression that the Code acknowledges a division in three is a misconception. Canon 107 clearly says that there is a division in two, and that the institutes of religious life can be divided into clerical and lay institutes.

The theological notion of the laity marks its difference from the clergy and can therefore only be derived from this confrontation. Canon 108, § 1 CIC/1917¹²³ determines that a cleric is someone who has received first tonsure. The Code adds the word *saltem*, indicating that first tonsure does not constitute a cleric in the full sense. Canon 107 CIC/1917 says that not all clerics are of divine institution. There is a difference of clergy of divine and of ecclesiastical institution.¹²⁴ With the diaconate the person is a cleric in

¹²¹ "Der *theologische Begriff* des Laien läßt sich nur erhellen aus der Stellung, die der Laie in der Kirche einnimmt" (Mörsdorf, "Die Stellung," p. 217).

¹²² C. 107 CIC/1917: "Ex divina institutione sunt in Ecclesia *clerici* a *laici* distincti, licet non omnes clerici sint divinae institutionis; utriusque autem possunt esse *religiosi*."

¹²³ C. 108, § 1 CIC/1917: "Qui divinis ministeriis per primam saltem tonsuram mancipati sunt, clerici dicuntur."

¹²⁴ Mörsdorf points out that c. 211 CIC/1917 requires that both those in minor orders and those in major orders have to be laicized. The ones in minor orders can decide this themselves, but for the ones in major orders, this is a different matter. For them, only the exercise of the orders can be restricted. Mörsdorf, "Die Stellung," p. 219.

the full theological sense. Mörsdorf, therefore, proposes to restrict the notion of cleric, at least in the full theological sense.¹²⁵

5.1.3 - The lay person and the three offices

Mörsdorf points out that a correct understanding of the powers of orders and jurisdiction, and of the three offices is very important. He says,

*All members of the Church participate somehow in the circumscribed scope of the Church by the triad of sanctifying, teaching, and governing. The difference between clergy and laity exists in that the respective way of cooperation is different. Not a quantitative more or less participation in the works of the Church distinguishes the laity from the clergy, but a qualitatively different way of participation, which is rooted in the different character of being a person in the Church. In other words, it is only the belonging to the ecclesial hierarchy that distinguishes the cleric from the lay person.*¹²⁶

¹²⁵ Mörsdorf responds to this in view of Rahner's proposal to broaden the term *cleric*. Mörsdorf does not agree with Rahner, because he is of the opinion that Rahner separates the powers of orders and jurisdiction. Rahner focuses, according to Mörsdorf, on the *content* of the power that is given, not the *way* it is given. Mörsdorf says, "*Rahner übersieht dabei, daß es sich bei der Unterscheidung zwischen Klerikern und Laien um eine Verschiedenheit in dem kirchlichen Personenstand handelt, der nur von der personalen Bestimmtheit, aber nicht von den Aufgaben abhängig sein kann, die einem Christen in der Kirche gestellt sind.*" Mörsdorf thinks that Rahner does not understand the distinctions and relations between the powers of orders and jurisdiction on the one hand, and the three offices on the other hand. Mörsdorf, "Die Stellung," p. 220.

¹²⁶ "An dem durch die Trias des Heiligens, des Lehrens und des Leitens umschriebenen Wirkungskreis der Kirche sind *alle Glieder der Kirche irgendwie beteiligt*. Der Unterschied zwischen Klerikern und Laien besteht darin, daß die *jeweilige Art des Mitwirkens eine andere* ist. Nicht ein quantitatives Mehr oder Weniger der Teilnahme an dem Wirken der Kirche unterscheidet den Laien vom Kleriker, sondern die *qualitativ andere Art der Teilnahme*, die in der jeweils anderen Prägung des Personseins in der Kirche begründet ist. Mit anderen Worten, allein die Zugehörigkeit zur kirchlichen Hierarchie scheidet den Kleriker vom Laien" (Mörsdorf, "Die Stellung," p. 221).

Canon 109 CIC/1917 determines that one receives the power of orders through ordination and the power of jurisdiction through canonical mission.¹²⁷ In the system of relative ordination, the two powers are conferred in one act, which expresses the unity of the two powers. The system of absolute ordination attempts to keep the idea of a unity of powers by requiring ordination before the transferral of jurisdiction. "This is the deeper theological meaning of the sentence that only clerics can receive powers of orders and jurisdiction (c. 118 [CIC/1917])."¹²⁸

In the description of the sacred power, Mörsdorf mentions his theory of the ellipse about the relationship between the two powers and how he relates that to the three offices of the clergy. Concerning the laity, Mörsdorf then says, "The *position of the laity* in the Church shows a *complete parallel to these relations*."¹²⁹ Mörsdorf indicates that ordination corresponds with baptism and confirmation, and that marriage also has a forming force. The canonical mission¹³⁰ is so much alike that there is no juridical difference between a cleric

¹²⁷ C. 109 CIC/1917: "Qui in ecclesiasticam hierarchiam cooptantur, non ex populi vel potestatis saecularis consensu aut vocatione adleguntur; sed in gradibus potestatis ordinis constituuntur sacra ordinatione; in supremo pontificatu, ipsomet iure divino, adimpleta conditione legitimae electionis eiusdemque acceptationis; in reliquis gradibus iurisdictionis, canonica missione." Mörsdorf points out that the use of *sacra* or *ecclesiastica hierarchia* in the singular demonstrates that the two powers are to be considered as one power (Mörsdorf, "Die Stellung," p. 222).

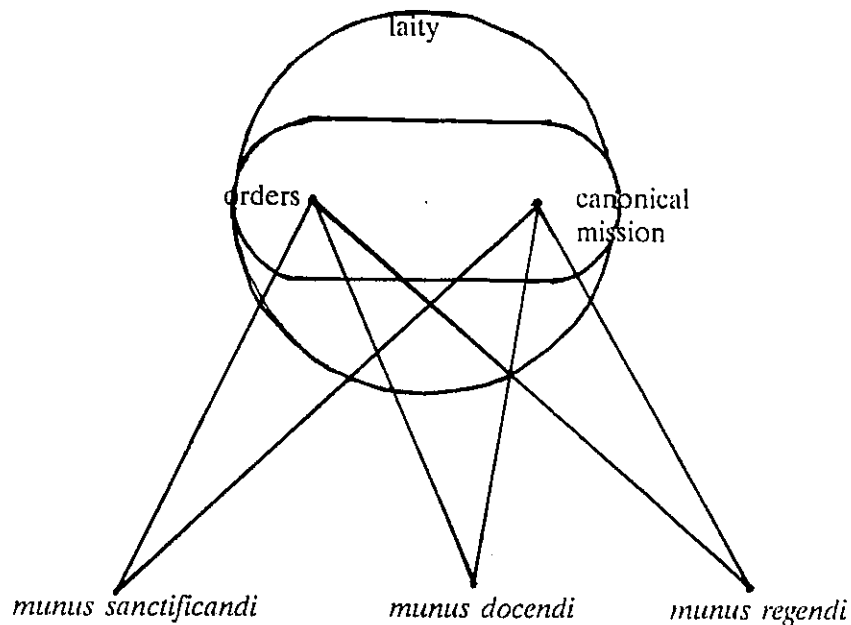
¹²⁸ "Das ist der tiefere theologische Sinn des Satzes, daß allein Kleriker Weihe- und Hirtengewalt erlangen können (c. 118)" (Mörsdorf, "Die Stellung," p. 224).

¹²⁹ "Die Stellung der Laien in der Kirche zeigt eine volle Parallelität zu diesen Beziehungsverhältnissen" (Mörsdorf, "Die Stellung," p. 225).

¹³⁰ Mörsdorf suddenly moves from the power of jurisdiction to canonical mission. He is of the opinion that the powers of orders and jurisdiction form one power and that therefore the layperson cannot have the power of jurisdiction. In the domain of the *canonical mission* Mörsdorf says that that can be given to both clergy and laity. Then he says that canonical mission means in fact the transfer of jurisdiction (c. 109 CIC/1917).

and a lay person. So both clergy and laity participate in the threefold mission. Mörsdorf illustrates his theory in the following way: it is a circle that surrounds the ellipse representing the laity. The points of tangency are with orders and canonical mission. From both points of tangency there are lines to the three offices.¹³¹

Figure 2:



Mörsdorf emphasizes that baptism constitutes a person in the Church and that it

This transfer can be done either through office or through delegation (c. 197, § 1 CIC/1917). Mörsdorf continues to say that the canonical mission leads to a strong approximation in the authorization of clergy and laity. Mörsdorf, "Die Stellung," p. 226.

¹³¹ "Bildlich läßt sich die Stellung der Laien so darstellen, daß ein um die Ellipse gelegter Kreis die Laienschaft versinnbildet, wobei die Berührungspunkte jeweils die der heiligen Weihe und der kanonischen Sendung entsprechenden Parallelen aufzeigen. Von beiden Berührungspunkten aus zeigen die zu den drei Ämtern gehenden Linien die Mitarbeit der Laien am Wirken der Kirche" (Mörsdorf, "Die Stellung," p. 225). He illustrates this in K. Mörsdorf, "De conceptu officii ecclesiasitci," in *Apollinaris*, 33 (1960), p. 82.

is fundamental. Ordination does not wipe out the foundation that a person has; it only places the person into a 'Head' position:¹³²

Irrespective of the rights and obligations that result from his prominent position, the ordained person--in those matters which are decisive for his personal Christian existence, that is, in all questions concerning his salvation--is on the same level as all Christians.¹³³

5.1.4 - The participation in the three offices

Mörsdorf illustrates his ideas with examples¹³⁴ to show how the laity collaborate¹³⁵ in the three offices of priest, prophet, and king.

The laity collaborate in the *priestly* office through all the sacraments. Mörsdorf considers the Eucharist as the best example of the relationship between the clergy and the laity: he refers to *Mediator Dei* and says that the faithful participate not only by bringing the offering through the hands of the priests, but they bring it together with him. The priest has a double function: he represents the Lord and the Church.

¹³² Mörsdorf applies the Head-Body image. The ordained belong to the head, the baptized form the rest of the Body.

¹³³ "Unbeschadet der Rechte und Pflichten, die sich aus seiner Hauptstellung ergeben, bleibt der Geweihte in dem, was für seine persönliche christliche Existenz entscheidend ist, d.h. in allen Fragen seines Heiles, auf der für alle Christen gleichen Ebene" (Mörsdorf, "Die Stellung," p. 229). He emphasizes that the responsibilities of the ordained are higher than those of the laity.

¹³⁴ Mörsdorf, "Die Stellung," pp. 230-233.

¹³⁵ Mörsdorf uses the word *Mitarbeit* and adds between brackets *collaboration*. Mörsdorf, "Die Stellung," p. 230.

The laity collaborate so extensively in the *teaching* office that differences between the laity and the clergy can hardly be found. Mörsdorf says that the laity, however, cannot proclaim the Word in a Church,¹³⁶ even when they are religious (c. 1342, § 2). The reason for this has to be found in the unity of the proclamation of the Word and the celebration of the Eucharist; Mörsdorf says that the gathered community is subject to the spiritual leader. He remarks that the cleric, who is really a leader or a potential one, teaches out of his own responsibility as leader; the layperson lacks this autonomy.¹³⁷ It is, however, possible that the Word proclaimed by the layperson and by the cleric can lead a respondent to a certain decision.

In the office of *governing*, the laity are hardly passive either. They cannot be the leader of a Church, but they nevertheless can play an important role. Mörsdorf mentions *custom* as a juridical source in which laity are involved. Then he mentions the reception of a law: a norm does not require an acceptance by the community in order to be binding, but the reception of the law has juridic effect. The ecclesial law that is not received from the beginning or is not followed later on loses its binding force and falls into decay.

From these examples, Mörsdorf proposes that the divisions among clergy, laity and religious should be abandoned in the revised Code. He suggests a chapter that deals with the constitutional rights, in which most of the pronouncements of the 1917 Code on laity

¹³⁶ Mörsdorf does not clarify exactly what he means by the 'proclamation of the Word' (Mörsdorf, "Die Stellung," p. 231).

¹³⁷ "[...] die Unterschiedlichkeit der Teilnahme an den weiteren Lehraufgaben durch Kleriker und Laien [läßt sich] dahin bestimmen, daß Kleriker, die wirklich oder kraft ihrer Weihe potentiell die Stelle eines Hirten haben, in der Eigenverantwortung des Hirten lehren, während das Lehren der Laien dieser Eigenständigkeit entbehrt" (Mörsdorf, "Die Stellung," p. 231.)

and clergy could be used. To this, however, he suggests adding "that the laity are called to collaborate in their own way in all forms of the apostolate in building the Body of Christ and that they can receive a canonical mission for this."¹³⁸

5.2 - The lay person in the conciliar texts

After the Second Vatican Council, Mörsdorf looks back and observes that the council was only able to define the notion of laity in relation to clergy.¹³⁹ *Lumen gentium* said in number 31 that the laity are those who are not in sacred orders and do not belong to a religious institute. The laity as members of the people of God "in their own way [*suo modo*] share the priestly, prophetic and kingly office of Christ and, to the best of their ability, carry on the mission of the whole Christian people in the Church and in the world."¹⁴⁰

The dogmatic constitution continues to say that secular activity is proper and peculiar to the laity. Mörsdorf responds to this saying, "I cannot see a theological statement in this, though, possibly, and then only with reservation, a sociological declaration."¹⁴¹ He

¹³⁸ "[...], daß die Laien in ihrer Art dazu berufen sind, in allen Formen des Apostolates am Aufbau des Leibes Christi mitzuwirken, und daß sie hierzu kanonisch gesandt werden können" (Mörsdorf, "Die Stellung," p. 234).

¹³⁹ See Mörsdorf, "Das konziliare Verständnis," p. 396.

¹⁴⁰ "[...] in Populum Dei constituti, et de munere Christi sacerdotali, prophetico et regali suo modo participes facti, pro parte sua missionem totius populi Christiani in Ecclesia et in mundo exercent" (Vatican II, Dogmatic constitution, "Lumen gentium," in *AAS*, 57 (1965), p. 37 [English translation: Flannery, *Vatican II: The Conciliar and Postconciliar Documents*, p. 388]).

¹⁴¹ "Ich vermag darin keine theologische Aussage zu sehen, allenfalls, aber das nur mit Einschränkungen, eine soziologische Aussage" (Mörsdorf, "Das konziliare Verständnis," p. 396).

points out that the use of the term *secular* for the mission of the laity runs the risk of suggesting that the mission of the laity is not to be understood as belonging within the domain of the Church, or that it may not be taken seriously.¹⁴²

Mörsdorf also indicates that the formulation of the participation of the laity in the threefold ministry of Christ is so wide that it even applies to bishops. This mission is applicable to all members of the people of God. Once more, Mörsdorf says that the distinction between the clergy and the laity is not a quantitatively different participation in the offices, but is qualitatively different. This qualitative difference is rooted in different ways of being a person. Ordination confers a personal character to an important service of presiding.¹⁴³ Mörsdorf says that this does not imply that the ordained person has an advantage over the laity regarding salvation; on the contrary, he has a greater responsibility towards the Lord.

The difference between the laity and the clergy is also noticeable in the apostolate. The conciliar texts distinguish between the lay apostolate and the hierarchical apostolate. The two apostolates are not to be considered separate. *AA* 23 says that the apostolate of the laity has to be within the apostolate of the whole Church, and that it is essential to the

Mörsdorf says that the idea that laity have a task in the world and clergy have a spiritual task, is a reflection of the way it is found presently. This sociological development, which started after the fifth century is not rooted in the essence of orders. *PO* 8, moreover, indicates that priests can engage in manual labour and share the lot of the workers. See K. Mörsdorf, "Das eine Volk Gottes und die Teilhabe der Laien an der Sendung der Kirche," in K. Siepen, J. Weitzel, P. Wirth (Hrsg.), *Ecclesia et ius: Festgabe für Audomar Scheuermann zum 60. Geburtstag, dargebracht von seinen Freunden und Schülern*, München, F. Schöningh, 1968, p. 106.

¹⁴² Mörsdorf, "Das konziliare Verständnis," p. 396.

¹⁴³ See Mörsdorf, "Das konziliare Verständnis," pp. 397-398.

Christian apostolate to be in union with those who rule the Church.¹⁴⁴ Mörsdorf is of the opinion that whenever clergy and laity work together, it should be according to the structural principle of head and body.¹⁴⁵

The structure of the Church is organized according to the Head-Body-unity. He says, "The Church is [...] the new people God, living in hierarchical structure, in order to realize the Kingdom of God on earth."¹⁴⁶

5.3 - The lay judge

One particularly contentious question Mörsdorf deals with concerns the lay person as judge.

In 1971, *Causas matrimoniales*¹⁴⁷ legislated that a lay person could be a judge, provided the lay persons did not constitute an absolute majority. Mörsdorf responds to this as follows:

Not taking into consideration that this maxim shows a certain distrustfulness towards the laity, it shows that the theological central issue, if and how much laity can be involved in the exercise of supreme power of jurisdiction, is

¹⁴⁴ This applies also to the pastoral council (CD 27) and the diocesan council (AA 26). Mörsdorf emphasizes that the bishop is the one who finally has the responsibility. See K. Mörsdorf, "Das Weihesakrament in seiner Tragweite für den verfassungsrechtlichen Aufbau der Kirche," in *Ephemerides theologicae Lovanienses*, 52 (1976), pp. 203-204.

¹⁴⁵ Mörsdorf, "Das eine Volk Gottes," pp. 110-111.

¹⁴⁶ "Die Kirche ist [...] das in hierarchischer Ordnung lebende neue Gottesvolk zur Verwirklichung des Reiches Gottes auf Erde" (Mörsdorf, "Die Stellung," p. 216).

¹⁴⁷ Paul VI, *Motu proprio*, "Causas matrimoniales," in *AAS*, 63 (1971), pp. 441-446.

jurisdiction, is dealt with in a pragmatic way.¹⁴⁸

Mörsdorf continues by saying that the theological difficulty was indeed experienced as such, since they talked about a third person in the college and not about a single judge. He replies,

If one considers that in a collegial tribunal the subject of judicial power is not the individual judge, but the college, then one can postpone the theological reservations.¹⁴⁹

Mörsdorf has reservations about appointing lay judges, because it creates a division between orders and office. He says that the council deliberately did not give the deacon any judicial power. He warns of a potential situation where a lay person may be appointed as a judge about acts undertaken by the diocesan bishop, or about those organs that are installed by him or are under his responsibility. There, he contends, lies the danger that the

¹⁴⁸ "Ganz abgesehen davon, daß diese Maxime von einem gewissen Mißtrauen gegenüber den Laien zeugt, macht sie deutlich, daß die theologische Kernfrage, ob und in welcher Weise Laien an der Ausübung der hoheitlichen Hirtengewalt beteiligt sein können, in pragmatischer Weise umgangen wird" (Mörsdorf, "Das konziliare Verständnis," p. 399).

¹⁴⁹ "Wenn man bedenkt, daß bei einem Kollegialgericht nicht die einzelnen Richter, sondern das Kollegium selbst Träger der richterlichen Gewalt sind, könnte man die theologischen Bedenken zurückstellen" (Mörsdorf, "Das konziliare Verständnis," p. 399). In another article, Mörsdorf says that a college is made up of people; it is not the total sum of its members. It can only have those rights and obligations that flow from its nature. It cannot, for instance, receive sacraments, it cannot pray, but it can legislate, decide, reconcile, or excommunicate. A collegial act is an act of the college. It is the integration of the will of the individual members into a unity of a collegial will. A *collective* act, however, is an addition of the will of every individual person, who has a common end with the other members. See Mörsdorf, "Über die Zuordnung des Kollegialitätsprinzips," pp. 1438-1439).

judicial power is used as a lever to level the hierarchial structure of the Church.¹⁵⁰

5.4 - Conclusion

Mörsdorf is very much aware of the unity of the powers of orders and jurisdiction. He wants to keep those two linked. He indicates that the canonical mission and the power of jurisdiction are the same. Yet, at the same time he realizes that the lay person cannot receive the power of governance, but can obtain canonical mission.

Lay people can participate in the mission of the Church, and this participation should be recognized, but the structure of the cooperation between the laity and the clergy should be according to the idea of Head and Body.

¹⁵⁰ "Im Hinblick auf die zu erwartende Einführung einer allgemeinen Verwaltungsgerichtsbarkeit besteht Anlaß, darauf hinzuweisen, daß der Einsatz von Laien als Richter über Hoheitsakte des Diözesanbishops oder der von ihm eingesetzten und seiner Weisungsbefugnis unterstehenden Verwaltungsorgane die Gefahr in sich birgt, die richterliche Gewalt als Hebel anzusetzen, um die hierarchische Struktur der Kirche einzuebnen" (Mörsdorf, "Das konziliare Verständnis," p. 399).

CHAPTER 2 - EVALUATION OF MÖRSDORF

After the report on the theory of Mörsdorf, it is time to evaluate this theory. Before doing so, it is important to recall the description of the method of this dissertation as presented in the Introduction. The first step is the collecting of the relevant data, which are presented above. The second step consists of formulating hypotheses, and the third step consists of the verification of the hypotheses whether they are true or not. This chapter will deal with the second and third steps.

In order to facilitate the presentation of the evaluation, it is divided into themes, keeping in correspondence as much as possible with the structure of the report. Every theme starts with a brief summary of the relevant points, followed by a critical examination.¹⁵¹

¹⁵¹ A. Cattaneo wrote a dissertation on the theory of Mörsdorf: *Questioni fondamentali della canonistica nel pensiero di Klaus Mörsdorf [sic.]*, Pamplona, Ediciones Universidad de Navarra, S.A., 1986, 477 p. This dissertation consists of two parts: in the first part he presents the theory of Mörsdorf. This report is adequate, but is mostly in the form of long quotations of Mörsdorf, connected by sentences written by Cattaneo. The second part is supposed to be an evaluation, but Cattaneo does not display a critical approach. Even his terminology is that of an admirer, not of a detached researcher--he says, e.g., on almost every page when referring to Mörsdorf *Il Maestro!* His evaluation does therefore not provide new insights. Moreover, his bibliography does not indicate that he read much beyond the writings of Mörsdorf himself.

1.1 - The natural and supernatural foundation of canon law

Mörsdorf's understanding of the foundation of canon law goes through three different stages. Initially he proposes a natural foundation, then he presents a natural and a supernatural foundation, and finally he emphasizes a supernatural foundation.

The natural foundation is based on the adage *ubi societas ibi ius*: where there is a society there is law. Mörsdorf defines the Church as "the people of God living in hierarchical order to realize the Kingdom of God." The Church, thus understood, forms a group of people and therefore is in need of law. Later on, Mörsdorf sees that such an understanding of canon law implies that its peculiarity is determined by the function it has. He then says that the function of canon law has to be found in the law itself. The supernatural foundation is in the fact that canon law is the order of the community of the new people of God; this community (=Church) should determine what the law is. Within the supernatural foundation, he singles out two elements: Word and sacrament.

1.2 - Evaluation

The first part of this dissertation showed that in post-Tridentine times the theory of perfect society prevailed. The fact that the Church had law was a confirmation of the truth of this theory. When Mörsdorf started his work as a canonist he was surrounded by people who kept thinking in this way. Mörsdorf himself says that it was especially R. Sohm

who challenged the canonists to come forward with a theological foundation of canon law.¹⁵²

It is important to notice that there are two possible ways of justifying canon law. One way is to use a metaphysical foundation; i.e., the existence of canon law is postulated by way of a philosophical deduction. The starting point is the principle *ubi societas ibi ius*, where there is a society there is law, followed by the acknowledgement that the Church is a society. Subsequently the deduction is completed: since the Church is a society, and since every society has law, the Church has law.

The second possibility for a justification of the existence of canon law lies in accepting, on the basis of *faith*, the empirical fact that the Church is a structured community. This implies that it has certain norms, but these norms are not the same as in a secular state. The next step is then in finding out how and what role these norms play in the Church.

When Mörsdorf speaks about a natural foundation, he indicates that law belongs to the 'essence' of a society; he carries the same approach into the consideration of a theological foundation. Ultimately, the problem with Mörsdorf is that he starts with a rigid concept of law that locks him into his own system.

Mörsdorf speaks about the essence of the Church as a determining factor for the essence of canon law. The idea that ecclesiology has a decisive function in determining the

¹⁵² It would go far beyond the scope of this dissertation to investigate Mörsdorf's interpretation of Sohm. The major influence Sohm had on Mörsdorf was that he challenged him to investigate the foundation of canon law. Mörsdorf does not give any reasons why he investigated Sohm, but it is well possible that he indirectly wanted to answer to J. Klein, whose inaugural lecture also dealt with the questions of Sohm and the foundation of canon law, and which was placed on the *Index* in 1950. (See also footnote 13 above.)

understanding of canon law has found quite some approval among canonists. Yet, there is a risky part in this understanding: operating with the help of a philosophy based on the doctrine of 'immutable essences' implies the (unavoidable) risk of turning ecclesiology into a system of static concepts and consequently seeing canon law as a system of rigid unchangeable norms.¹⁵³

Be that as it may, Mörsdorf wants to show how canon law participates in the essence of the Church.¹⁵⁴ He then moves to the Church as a sacrament: a Church that mediates salvation. The two modes of mediating that salvation are through Word and sacrament.

2.1 - Word and Sacrament

Mörsdorf wants to give canon law a theological foundation. He proposes to do this through determining the essence of the Church, but admits, at the same time, that it is

¹⁵³ In this context, Walf says that most people who attempt to find a justification of law and legal structures in the Church, encounter a problem which finds its roots in the structures of justification. Instead of taking into consideration that these structures themselves are dependent on the ecclesial reality, most people start with the status quo of the ecclesial reality at that given moment. At the same time, they give the impression that the present state of the Church is something given and willed by God. Walf warns that the science of canon law should not overlook the problem that is given with the contingency of canon law. It has to find responsible answers in order not to disavow itself as a science. Walf then sees only two options: either one legitimizes scientifically the law of the Church and illuminates its secular dependencies (*Innerweltliche Abhängigkeiten*) or one legitimizes canon law on a faith that is based on a concept of Church. As H. Barion says: Faith determines the understanding of Church, the understanding of Church determines canon law. Walf, *Kirchenrecht*, p. 17.

¹⁵⁴ A.M. Rouco Varela points out, as will be seen in the *Excursus* following this evaluation, that the question that really has to be addressed is whether or not the Church is in need of canon law in order to be a sacrament of salvation.

difficult to determine the essence of the Church in juridical terms. However, Mörsdorf thinks that the sacramental character of the Church provides a possibility to get out of a possible impasse. He thinks that the sacramental aspect of the Church reveals its juridic structure, because the Church received a mission to proclaim salvation and exercises this mission through the Word and the sacrament. Both the Word and the sacrament have juridical character. Mörsdorf sees the juridical character of the Word in the mission that was given by the Lord and bases this idea on two biblical passages. The juridical character of the sacrament is based on the institution of the signs that are chosen by the Lord.

Word and sacrament are related: what is proclaimed in the Word becomes visible in the sacrament. Mörsdorf relates the unity of Word and sacrament to the power of orders and the power of jurisdiction. Since Word and sacrament are one, the powers of orders and jurisdiction are one power. In the same way as the powers of orders and jurisdiction can be distinguished but not separated, so the sacramental and juridical order of the Church relate to each other.

After the council, Mörsdorf emphasizes that the Church has to be understood as one complex reality (LG 8). At the same time, he is aware that the council presents the Church as the universal sacrament of salvation. Mörsdorf, therefore, says that the theological place of canon law is on the level of the sacramental signs of the Church. It lives in the Word and the sacrament, and it supports and protects the spiritual order of life.

Since canon law participates in the life of the Church it is a sacred law, different from any secular law.

In summary, the *locus theologicus* where the evidence for understanding canon law can be found is the sacramental aspect of the Church.

2.2 - Evaluation

Mörsdorf's theory does not undergo major changes during or after the council. Even before the council he spoke about the Church as 'people of God' and as a 'sacrament.' These themes were heavily used at the council and therefore Mörsdorf did not have to change his terminology. Yet, a close look at the meaning of especially the Church as sacrament reveals that Mörsdorf used the same terminology but in a more restrictive sense than the council.¹⁵⁵

Before the council several scholars discussed the issue of mediation of salvation through Word and sacrament.¹⁵⁶ Mörsdorf himself wants to show that Word and sacrament have juridic character. The Word has juridic character, because it is proclaimed with the authority of the Lord. The sacrament has juridic character because the signs were chosen by the Lord. Although Mörsdorf does not really say what he means by *juridic* character, he seems to find it in 'binding force.' It is not clear why the Word and the sacrament could

¹⁵⁵ L. Boff has done an elaborative study on the understanding of the Church as a sacrament. See L. Boff, *Die Kirche als Sakrament im Horizont der Welterfahrung: Versuch einer Legitimation und einer struktur-funktionalistischen Grundlegung der Kirche im Anschluß an das II. Vatikanische Konzil*, Konfessionskundliche und kontroverstheologische Studien, Bd. 28, Paderborn, Verlag Bonifacius, 1972, 552 p.

¹⁵⁶ In the theology current before Vatican II the focus in the Catholic Church was really on the mediation of grace through the sacrament, but in the years directly prior to the council Catholic theologians began to pay more attention to the relevance of the mediation of grace through the Word. For more literature on those discussions see L. Scheffczyk, "Die Heilsbedeutung des Wortes in der Kirche," in A. Scheuermann, G. May (Hrsg.), *Ius sacrum: Klaus Mörsdorf zum 60. Geburtstag*, Paderborn, F. Schöningh, 1969, pp. 327-347, espec. p. 347, footnote 6; see also E. Schillebeeckx, "De dienst van het Woord in verband met de Eucharistieviering," in *Tijdschrift voor Liturgie*, 44 (1960), pp. 44-59.

Mörsdorf himself refers to G. Söhngen, *Symbol und Wirklichkeit im Kultmysterium*, Grenzfragen zwischen Theologie und Philosophie, Bd. 14, Bonn, P. Hanstein, 1937, 101 p.

not have this authority without having a juridic character. Mörsdorf continues saying that the message and the messenger cannot be separated: the apostles and their successors can claim obedience.¹⁵⁷ He ultimately bases his theory on the will of Christ and this is especially noticeable in the two passages from Scripture he quotes to support his theory. Although he does not say why he refers to the two biblical passages,¹⁵⁸ it seems that he quotes them because they give authority to Jesus' teaching and therefore to his apostles.¹⁵⁹

A. Gläßer, especially, criticizes Mörsdorf severely on this point. He agrees with Mörsdorf that canon law has to have a theological basis, and that the apostolic succession as formal, and kerygma and sacrament as material, constructional elements have to be considered. However, this should not imply that the mission of Jesus and the Church must be juridicized. Gläßer emphasizes that the encounter with God is not of a juridic nature,

¹⁵⁷ It is not clear why only when the Word is proclaimed by the apostles (and their successors) obedience is due. Did Vatican II not affirm that the Holy Spirit was promised to all and that all can proclaim the Word (*LG* 12)?

¹⁵⁸ He quotes John 8:12-20--Jesus replies that two testimonies are enough for his authority--and Mark 16:16--those who believe and are baptized will be saved; those who do not believe will be condemned. It should be noted that the pericope Mark 16:9-20 does not belong to the original Gospel of Mark. The council of Trent defined it as part of the New Testament canon (as a result of the *Vulgata*), see "Decretum primum: recipiuntur libri sacri et traditiones apostolorum," 8 April 1564, Sess. IV, in J. Alberigo, et al. (eds.), *Conciliorum oecumenicorum decreta*, 3rd ed., Bologna, Istituto per le Scienze Religiose, 1973, pp. 663-664. In any case, proving a theory by isolated texts is not a good method.

Moreover, Vatican II says that the act of faith is a free act (*DH* 10) and that salvation is possible for those who through no fault of their own do not believe (*LG* 16).

¹⁵⁹ R. Sobański qualifies the idea of sending by Jesus as having little power of persuasion. He remarks that not only the office of proclaiming the Word and ministering the sacraments is often founded on a mission by the Lord, but also other powers (*Vollmachten*). He considers this not to be a very satisfying foundation and says that it does not provide an answer to those who propose a charismatic system, since they also base their ideas on a mission. R. Sobański, *Grundlagenproblematik des katholischen Kirchenrechts*, Wien, Köln, Böhlau, 1987, p. 60.

but it has to be understood as a personal happening of communication and communion. He thinks that Mörsdorf presents too much an image of God that goes vertical from Jesus, through office-holders and their message, instruments and laws, to people. It portrays an image of commanding and faithful exercise. There is no provision for a possible free encounter from heart to heart between God, who reveals himself, and a responding person. This idea reduces the act of faith to impersonal objects; it deprives the faithful of a free communication with God, made possible through grace.¹⁶⁰

Gläßer's point is well taken. Indeed, Mörsdorf puts too much emphasis on the juridical implications of Word and sacrament. Besides the juridical aspect, there is also another point of critique that can be made. It concerns the lack of taking into consideration that Word and sacrament have not only a messenger, and a message, but also a receiver. The council itself was already aware of modern theories of communication,¹⁶¹ but Mörsdorf does not pay attention to the receiver.

The arguments above, then, show that Mörsdorf interprets Word and sacrament in a too juridical way. Another point to be considered is that he takes only the sacramental aspect of the Church for a foundation of canon law. He does not take into consideration other images. Especially Rouco Varela will point out that in order to give canon law a

¹⁶⁰ A. Gläßer, "Zur Theologie von Sittlichkeit und Recht," in A. Auer e.a., *Recht und Sittlichkeit*, J. Gründel (Hrsg.), Studien zur theologischen Ethik, Bd. 10, Freiburg (Schweiz), Universitätsverlag, 1982, pp. 72-111, espec. 102-103 and A. Gläßer, *Kirche contra Gesellschaft? Beiträge zur Theologie und Soziologie der Kirche*, Eichstätter Studien, Bd. 11, Kevelaer, Butzon & Bercker, 1976, pp. 137-141.

¹⁶¹ The same can be said for the sacrament. For an introduction into a communications theory of sacraments, see A. Ganoczy, *An Introduction to Catholic Sacramental Theology*, New York, Ramsey, NJ, Paulist Press, 1984, 192 p., espec. pp. 142-182.

theological foundation, all aspects of the Church have to be considered, i.e., Body of Christ, people of God, sacramentality, etc.

It is not clear why Mörsdorf did not take these other images into consideration, yet it should be emphasized that he had two points he wanted to achieve. The first one was a theological foundation of canon law and the second point was that he wanted to make clear that canon law can only deal with what is visible. So, he had to come forward with an image of the Church that would allow him to do so. Surely, the visible aspect of the sacrament was an option that had potential. Thus, Mörsdorf deserves credit for having taken up the challenge to give canon law a theological foundation.

3.1 - The science of canon law

After Mörsdorf said that the *locus theologicus* of canon law is the sacramental aspect of the Church, he speaks about the implications of this for the science of canon law (*Kanonistik*). The science of canon law deals with the doctrine of canon law. Since its object is the order in a supernatural community, canon law is a theological discipline. Yet, Mörsdorf acknowledges that it uses a juridical mode of thinking. He therefore summarizes his theory in this statement: the science of canon law is a theological discipline with a juridical method.

Mörsdorf sees theology, legal philosophy and secular law as ancillary sciences to canon law.

The implications for the canon lawyers are that they should contribute to the sacramental character of the Church with the results of their juridical way of working. They

should do this in such a way that they preserve the Church faithfully and maintain its identity.

3.2 - Evaluation

Mörsdorf is well known for his definition that the science of canon law is a theological discipline with a juridical method. There are two points in this definition that need attention. They are 'theological discipline' and 'juridical method.'

After Mörsdorf has defined the object of the science of canon law, namely the doctrine on which it operates, it is not difficult to see why he qualifies canon law as a theological discipline. At the same time it has to be noticed that he does not see canon law as being fully a part of theology, because he attributes to it a juridical method. So, Mörsdorf does see that canon law has its own peculiarity within the theological disciplines. A problem arises here with the meaning of 'juridical method:' Mörsdorf does not indicate what he means by it. Moreover, Corecco questions Mörsdorf's definition. He asks how it can be possible that a theological reality postulates a juridic method, if it is true that, in order not to fall into a positivistic option, the method has to be defined from the nature of the object and not vice versa.¹⁶²

Mörsdorf's definition of the science of canon law appears to me as a good indication of the development Mörsdorf has made. Mörsdorf starts his work in a time where the

¹⁶² "Wenn es wahr ist, daß, um nicht der Gefahr einer positivistischen Option anheimzufallen, die Methode ausgehend von der Natur des Objektes definiert werden muß und nicht umgekehrt, in welchem Sinne ist es dann möglich, die juristische Methode auf eine theologische Wirklichkeit anzuwenden?" (E. Corecco, *Theologie des Kirchenrechts: Methodologische Ansätze*, Canonistica, Beiträge zum Kirchenrecht, Bd. 4, Trier, Paulinus Verlag, 1980, p. 93).

science of canon law is considered to be a juridical science--which implied a juridical method. He sees, however, that canon law relates to theology. Mörsdorf then says that canon law is a theological discipline, and therefore moves to the other end of the scale. I perceive that he is aware that canon law could not be theology itself and he has to come forward with a 'compromise.' His compromise is that canon law is a theological discipline with a juridical method.

The *excursus* following this evaluation will show that Rouco Varela continues the thinking of Mörsdorf, but he sharpens the questions and is able to see better the connection between theology and canon law, while also seeing their peculiarity.

In conclusion, Mörsdorf is consistent in his way of thinking. His understanding of the science of canon law coincides with his thinking on the nature of canon law. He made the first important step, by relating theology and canon law. This step has major implications for the understanding of canon law itself: the understanding of the *forum internum* and *forum externum*, the problem of membership, and last but not least, the issue of sacred power.

4.1 - The internal and external forum

The 1917 Code made a distinction between external and internal, or consquential forum. Mörsdorf clarifies that this distinction was not completely correct: the forum of conscience and the internal forum are not the same. The forum of conscience concerns the relationship between God and a person; this forum is outside the juridical realm. In the internal forum a power of jurisdiction is exercised. That power of jurisdiction is the same power of jurisdiction as is exercised in the external forum. Mörsdorf says that the

effectiveness of the exercise of the jurisdiction has to be qualified as 'juridical.' The difference between the external and internal forums is the publicity of the act that is placed.

The purpose of the distinction between the internal and external forum lies in diminishing the friction between the human person and society.

4.2 - Evaluation

Throughout his work Mörsdorf is, in general, very conscious of the terminology that canon law uses. It is therefore not surprising that he discusses and clarifies the notion of internal and external forum, and of the forum of conscience.¹⁶³ With historical arguments--a recurring methodological aspect of Mörsdorf's work--he presents the development of the terminology and the concepts.¹⁶⁴

The impact of Mörsdorf's understanding of internal and external forum is noticeable within his theory both in the content of the canonical norms as well as in the foundation of canon law. On the level of the content it becomes apparent in the understanding of the relationship between the reception of the sacraments of penance and anointing of the sick

¹⁶³ Mörsdorf is certainly not the only one who contributed to the clarifications of the use of internal and external forum. Other publications in the 1950s are : W. Bertrams, "De natura iuridica fori interni Ecclesiae," in *Periodica*, 40 (1951), pp. 307-340 and L. Bender, "Forum externum - forum internum," in *Ephemerides iuris canonici*, 10 (1954), pp. 9-27.

¹⁶⁴ In clarifying the historical development, Mörsdorf was able to show the difference between sin and law, or between moral theology and canon law. F. McManus remarked about the close connection between moral theology and canon law that moralists went so far as to 'make sins' through legislation, i.e., one could commit a sin by not following a law. See F.R. McManus, "The Internal Forum," in *Pontificia Commissio Codici Iuris Canonici Recognoscendo, Acta conventus internationalis Canonistarum, Romae diebus 20-25 mai 1968 celebrati*, [Città del Vaticano], Typis Polyglottis Vaticanis, 1970, p. 252.

on the one hand, and penal law on the other hand.¹⁶⁵ The influence is also noticeable in the foundation of canon law: the existence of the internal forum touches upon the peculiarity of canon law.¹⁶⁶ In the theory of Mörsdorf, the existence of the internal forum is considered to be a special characteristic of the canonical system. Indeed, here the relationship between the understanding of canon law and its theological realm becomes

¹⁶⁵ As the report on Mörsdorf indicated, he protested against the 1973 schema for penal law, because it did not keep a connection between the reception of the sacrament of the anointing of the sick and penance, and the penalty of excommunication. Mörsdorf was in favour of such a connection. The present legislation has overturned the 1973 schema and preserved this connection (c. 1331, § 1 CIC/1983).

The understanding of internal and external forum in penal law is quite complicated and has been the object of major discussions during the revision of the 1917 Code. Especially the position of P. Ciprotti--*relator* for penal law--who wanted to distinguish between penal law and internal forum, caused some reaction. Ciprotti believed that medicinal penalties are an anachronistic phenomenon. The purpose of a penalty is to punish. The effects of a penalty should be interpreted for the external forum only. He proposed to suppress the prohibition to receive the sacraments of penance and the anointing of the sick in a case of excommunication, since that relates to the internal forum. This theory is reflected in the 1973 Schema, but it did not find a final acceptance.

The canonist L. Gerosa, a disciple of Corecco, presented a completely different opinion in a thesis in 1984. He denies that the Church has penalties and says that it is a wrong terminology. The penalties are ecclesial realities that look for conversion, contrition and pardon. Instead of a penalty the judge can impose a penance. Even the expiatory penalties are penalties *sui generis*. Penal law has to be considered as an aspect of the *communio* in the Church. For Gerosa the censures are penitential and not penal: penal law is absorbed in penance. See J. Werckmeister, "Théologie et droit pénal: autour du scandale," in *RDC*, 39 (1989), pp. 93-109.

¹⁶⁶ The Spanish canonist F.J. Urrutia says at the beginning of an article on the internal and external forum that the arguments presented by scholars on the juridical character of the internal forum are "as varied as the concepts of canon law proposed by the different authors, because those who deny the juridical character of the internal forum do so on the basis of their conception of canon law" (F.J. Urrutia, "Internal Forum - External Forum: The Criterion of Distinction," in R. Latourelle (ed.), *Vatican II: Assessment and Perspectives Twenty Five Years After (1962-1987)*, vol. 1, New York, Mahwah, Paulist Press, 1988, p. 635).

apparent. If he would understand canon law as any secular law, the existence of the internal forum would not be possible.¹⁶⁷

Mörsdorf's proposal that the internal forum would help diminish a possible friction between a person and a society is unclear, because he does not clarify what he means by a 'diminishing of friction.'¹⁶⁸

The decisive criterion for Mörsdorf for the distinction between the external and the internal forum is the public versus hidden exercise of the power.¹⁶⁹

In conclusion, Mörsdorf clarified the notion of internal and external forum and especially the misunderstanding of the forum of conscience. It is important to notice that Mörsdorf was able to bring these clarifications based upon his historical investigation. His

¹⁶⁷ It goes beyond this dissertation to investigate the thoughts of those who consider canon law as any secular law, with no regard for its theological dimension (e.g., the Italian lay canonists). In connection with this it would be interesting to compare their ideas about the lack of coercive power of the Church. Indeed, the Church is highly dependent on the uprightness and loyalty of its members.

¹⁶⁸ H. Pree, who applies the same terminology as Mörsdorf, is somewhat clearer on this point when he says that the reason for the existence of an internal and external forum has to be sought in the peculiarity of the Church: the Church concerns both the *bonum commune* of the ecclesial community (*Gemeinschaft*) and the spiritual well being of the individual. There is a necessary tension between the person and the community, which finds its foundation in the unrepeatable condition of the person self and its direct responsibility towards God. The distinction between the internal and external forum has as its function to assist in this tension. Not all conflicts between law and conscience can be solved. See H. Pree, "Die Ausübung der Leitungsvollmacht," in *HdbKathKR*, p. 132.

¹⁶⁹ Urrutia points out that the present legislation (c. 130) affirms this position. He remarks that neither the matter or the object nor the social or private dimension of the act are good criteria for distinguishing between the internal or external forum. Urrutia rightly says that it is important to know if an act is placed in a secret manner or in a manner that can be recognized by the community: "Thus, the difference between the exercise of power between the internal forum and the external forum lies neither in the matter ruled on, nor in the nature of the act itself, but in the way in which the power is exercised" (Urrutia, "Internal Forum - External Forum," pp. 644-645).

theory flows from his understanding of canon law. Another methodologically important aspect is that Mörsdorf thinks in terms of connections and relationships; he does not think in a disjunctive mode, as Corecco will do. On the level of the content it is important to notice that he is consistent within his own theory: the existence of an internal forum can be justified within his understanding of canon law as a theological discipline.

5.1 - Sacred power

Mörsdorf presents a theory of sacred power by which he refers to the unity of the powers of orders and jurisdiction. There are three aspects on which he works: (1) the historical aspect, (2) the systematic aspect that he developed before the council and that deals with the change from two powers to three offices, and (3) the 'evaluation' of the council's doctrine on sacred power.

The first aspect concerns a presentation of the historical development of the relationship between the powers of orders and jurisdiction. Mörsdorf says that during the first millennium the two powers were really one power. In the second millennium the powers became independent. Mörsdorf proposes to return to the theory of one sacred power. He is of the opinion that ordination confers this sacred power to a person and therefore the power of jurisdiction cannot be exercised without having the power of orders. This power is a sacred power, because it is related to the Lord himself.

The second aspect of Mörsdorf's theory concerns the relationship between the two powers and the three *munera*. He says that most canonists linked the *munus regendi* to the power of jurisdiction and the *munus sanctificandi* to the power of orders. Mörsdorf considers the *munus docendi* as most closely related to the power of jurisdiction. On the

basis of his understanding of the existence of one sacred power he, however, has to relate all three *munera* to the two powers. He therefore opts for some relations to be stronger and others to be weaker.

The third aspect concerns an evaluation of the council's doctrine on three offices: Mörsdorf thinks that the division in three offices is neither adequate nor complete. He also says that the *munera* a person has really refer to a task, while the power refers to the source of action. This then relates to his understanding of offices: ecclesiastical authority is sacramentally based on orders, but canonical mission is needed to make the power capable of being exercised. According to Mörsdorf the *Nota explicativa praevia* of *Lumen gentium* affirms the theory of one sacred power.

In relation to sacred power, Mörsdorf says that the offices in the Church are either of divine law or of ecclesiastical law. The offices of the Roman Pontiff, of the episcopal college, as well as of the episcopal office, are of divine law. All other offices are derived from these.

5.2 - Evaluation

The literature identifies Mörsdorf as the major representative of the sacred power theory. He has obtained approval from several people, especially Germans,¹⁷⁰ and these

¹⁷⁰ A. Celeghin mentions as the people who are of the opinion that the one sacred power is related to the sacrament of orders: W. Aymans, P. Krämer, K. Lüdicke, J. Neumann, O. Saier, H. Socha, K. Walf, M. Schmaus, K. Rahner, W. Bertrams, G. Philips and J. Ratzinger. See A. Celeghin, "Sacra potestas: quaestio postconciliaris," in *Periodica*, 74 (1985), pp. 168-192.

people together are identified as the German school. On the opposite side from this German school stands the Italian school.¹⁷¹

The first aspect of Mörsdorf's theory concerns his turn to historical evidence, a recurrent pattern in Mörsdorf's approach. Yet, a question has to be raised as to whether he presents a complete and adequate historical overview of the development of the relationship between orders and jurisdiction. A. Stickler, who belongs to the Italian school, also presents a historical treatise on the relationship between orders and jurisdiction.¹⁷² He draws a different picture and questions the validity of Mörsdorf's arguments. Indeed, history gives too many examples of the power of jurisdiction exercised without the power of orders.

Mörsdorf calls the power a *sacred* power. He bases this on the mission (*Vollmacht*) of the Lord: it was the Lord himself who gave this power. It can hardly be doubted that only the power given to the apostles could be named a sacred power. A careful reading of Mörsdorf's work reveals that he in fact refers to a sacerdotal or episcopal power. It would be better to give that power a name that corresponds to its content. To ascribe to those

¹⁷¹ The major representatives of this school of thought are, besides some individuals, especially the members of Opus Dei and the Italian lay canonists. Names of people who belong to this school are J. Beyer, J. Cuneo, G. Ghirlanda, A. Gutiérrez, A. Stickler, J. Hervada, P. Lombardia, P. Gismondi. See Celeghin, "Sacra potestas," pp. 192-205.

¹⁷² A.M. Stickler, "De potestatis sacrae natura et origine," in *Periodica*, 71 (1982), pp. 65-91. Stickler investigates the relationship between orders and jurisdiction from Nicea onwards. He concludes that even in the first millennium in the practical order, but not doctrinally spelled out, the power of orders was conferred by sacred orders and jurisdiction was conferred by office. In the second millennium sophisticated distinctions were made between the two powers. He gives examples of popes who obtained and exercised jurisdiction, but were ordained bishop some time later; their ordination, however, did not add anything to their jurisdiction. Stickler goes so far as to say that Vatican II did not break with the tradition: it was concerned about the union of the powers, but not the unity.

in orders a sacred power and to deny this sacred power to those who are not in orders brings about a disturbed picture of power in the Church.¹⁷³

There is also another aspect to qualifying this power as 'sacred:' it relates to the understanding of the Church and of the nature of canon law. The understanding of the Church as a perfect society allows perfectly for a language that speaks in terms of jurisdiction.¹⁷⁴ But within the renewed understanding of the Church and therefore the renewed understanding of the role of canon law--it is a sacred law and not a law identical to a secular legal system--the meaning of 'power' is more complicated.¹⁷⁵ In qualifying this power as 'sacred' it is clear that this power should not be understood as secular society understands power.

¹⁷³ One could not even say that the sacred power is reserved to those who administer the sacraments, because a couple getting married administers the sacrament: undoubtedly an exercise of sacred power. The same could be said for administering baptism: to give the sacrament of spiritual rebirth to someone, is that not an exercise of *sacred* power?

¹⁷⁴ The term 'jurisdiction' itself is a vague and ambiguous concept. In a very interesting article, G. Alberigo points out that the ecclesiological context determines the meaning of 'jurisdiction.' He is of the opinion that today this context is not sacramental any more. He ends his article by saying that if the object of the jurisdiction is not in the sacramental means of salvation, which it is not most of the time these days, there is a danger of falling back into a secular vision. Such a vision is exactly what Vatican II tried to overcome. G. Alberigo, "La juridiction: remarques sur un terme ambigu," in *Irenikon*, 49 (1976), pp. 167-180.

¹⁷⁵ M. Kaiser points out that in the understanding of the Church as a perfect society the power was understood as *Gewalt*, which has a negative connotation. With the council the power was understood in a renewed way: it is more a *Vollmacht* or *Dienst*. It is important to recognize that a different language is used to express a different understanding. The intention is to show that the Church is not a perfect society and therefore the same terminology does not apply. See M. Kaiser, "Macht oder Vollmacht? Zum Verständnis der *sacra potestas*," in R. Beer, e.a. (Hrsg.), *Diener in Eurer Mitte: Festschrift für Dr. Antonius Hofmann, Bischof von Passau zum 75. Geburtstag*, Schriften der Universität Passau, Reihe Katholische Theologie, Bd. 5, Passau, Passavia Universitätsverlag, 1984, pp. 318-329.

The second and third aspect in Mörsdorf's theory is the understanding of the relationship between the two powers and the three offices. Indeed, Mörsdorf is very consistent in his theory. Since he understands the power of orders and the power of jurisdiction to be one power, both these powers have to relate to the three offices. The problems between two powers and three offices has existed during and since the council:¹⁷⁶ at this point it is important to notice that Mörsdorf sees a relationship between them. Yet, a question can be raised: Mörsdorf sees the relationship based on the sacrament of orders, but he does not speak about the meaning of these three offices in relationship to baptism. Mörsdorf's whole system is based on orders¹⁷⁷ and he does not indicate what baptism could

¹⁷⁶ G. Philips played a leading role as an expert in the redaction of *Lumen gentium*. His notes and reflections on the *Nota explicativa praevia* are therefore highly informative and interesting. See J. Grootaerts, *Primauté et collégialité: le dossier de Gérard Philips sur la Nota explicativa praevia (Lumen gentium, chap. III), présenté avec introduction historique, annotations et annexes*, Bibliotheca ephemeridum theologarum lovaniensium, vol. 72, Leuven, Leuven University Press, 1986, 226 p.

¹⁷⁷ I believe a fundamental point in Mörsdorf's theory is that he starts from the perspective of the mission (*Vollmacht*) that the Father gave to the Son and that Christ gave to his apostles. The ecclesiology of Mörsdorf is built on this idea of a particular mission to the apostles, not on the idea of proclaiming the good news of the Kingdom of God. That last mission is given to any one who is baptized, and could that not be considered as the exercise of a sacred power (although *sacred* obtains a different meaning here)?

One of Mörsdorf's students, M. Kaiser, wrote his dissertation on the one sacred power from the perspective of this mission of Christ. See M. Kaiser, *Die Einheit der Kirchengewalt nach dem Zeugnis des neuen Testaments und der apostolischen Väter*, Münchener theologische Studien, III. Kanonistische Abteilung, Bd. 7, München, Zink, 1956, xii, 206 p.

Yet, there is also an important aspect to this: Mörsdorf considers the incarnation of great relevance. The fact that God became human is of significance for the understanding of not only the power in the Church, but especially the nature of canon law. As the report on Corecco will show, he does not give the incarnational aspect as much relevance.

mean in this context.¹⁷⁸ This is a fundamental issue that is insufficiently taken into consideration by Mörsdorf: all baptized participate in the three offices of Christ. He identifies sacred power in the Church *tout court* with episcopal power: a narrow vision. I agree, however, with Mörsdorf's point that to speak about three offices is not adequate nor complete; indeed, there are more offices and all of them cannot be reduced to these three (to teach, to sanctify and to govern).

Mörsdorf says, that according to Vatican II, the offices refer to the task someone has and the power refers to the source of the action of the power. Only the college of bishops and the Pope do not need a canonical mission. He also distinguishes offices that are in need of orders and those that are not (these can be conferred on the laity but without the sacred power). The danger of this whole theory of Mörsdorf is a neatly divided Church: on one side are those who are ordained and on the other side those who are not ordained. With Mörsdorf's theory that would imply that the ones who are ordained are the active people in the Church; the non-ordained have a rather passive role.¹⁷⁹

The understanding of offices shows how the whole theory of Mörsdorf is rooted in episcopal ordination. In accordance with Vatican II (*LG 22*), Mörsdorf says that the Roman Pontiff and the college of bishops have supreme ecclesiastical power. Indeed the relative ordination of a bishop to a see shows how close the ordination and the jurisdiction are. The fact that a bishop is still a member of the college of bishops, even when he has no

¹⁷⁸ Mörsdorf speaks, of course, about baptism in the context of membership in the Church and when he speaks explicitly about the laity.

¹⁷⁹ Both on the basis of development in the praxis and on the basis of theological reflection, Mörsdorf's theory is rendered out of date.

responsibility any more towards a diocese, and therefore can participate in the exercise of supreme power, shows that, with ordination, a part of the jurisdiction is conferred. There is no problem in acknowledging this, but the question still can be raised if it is really necessary to be ordained in order to exercise jurisdiction. The problem with this whole theory is the silent assumption that what is received as a unity cannot be shared under any aspect. A gratuitous assumption!

In conclusion, the theory of Mörsdorf is consistent in itself, because it coincides with his understanding of canon law as a sacred law. It is clear that Mörsdorf wanted to show that the whole canonical system is not the same as any secular legal system. His attempt to have a terminology that coincides with this renewed understanding has therefore to be applauded; it should, however, not imply that the clergy alone has power--which means a clerical Church. It is very clear that Mörsdorf does not want any jurisdiction given to people as the secular law understands it, but he wants to anchor it in a sacramental source.¹⁸⁰ Why could baptism not function as that source? The council itself affirmed too often the participation of all the baptized and therefore prevents an agreement with Mörsdorf on this point.

¹⁸⁰ The section on lay judges will show that there is an inconsistency in the theory of Mörsdorf: he says that only somebody with orders can have jurisdiction. Therefore, the lay person, who has not been ordained, cannot receive jurisdiction. Yet, Mörsdorf does not deny that a certain college could exercise a power of governance, e.g., an ecumenical council, an episcopal conference, or as Mörsdorf says himself, a collegiate tribunal.

6.i - Membership

Mörsdorf begins his theory on membership in the Church with a reflection on method. He says that until recently, i.e. 1944, when he starts writing on the subject, the definitions for membership were not very successful. The reason for this is that the definition of Church was normally used as source for determining that membership. He says that a formal notion of Church cannot provide an answer; the canonical order can. The legitimacy of the canonical order, providing for this, derives from the fact that it arises from and is supported by an awareness of faith. In any case, there can be no contradiction between theology and canon law. Statements in the ecclesial legal order and in the ecclesial teaching order are theological. In both cases the authority is the same; the language and the method can differ, but the two orders cannot really be split.¹⁸¹

In discussing the existing theories themselves, Mörsdorf says that the issue of membership as expressed in *Mystici corporis Christi* concerns only those aspects that touch the public-juridic society. He also says that he wants to give a theological answer to the question and not a purely sociological one. The existing proposals do not really give an answer, but Mörsdorf is of the opinion that c. 87 CIC/1917 does. This canon speaks about a person in the Church, which is a less theological term than member (*membrum*) in the Church. Since *persona* means a carrier of rights and duties, it is a better term to determine membership in the Church. Mörsdorf then proposes to distinguish between levels of membership: there is a consecrational and an operative membership. The consecrational membership is rooted in baptism; here rights are acquired upon receiving baptism, although

¹⁸¹ Mörsdorf, "Persona in Ecclesia Christi," pp. 352-353.

they can be restricted through a penalty or an obstacle; obligations are effective once the baptized has the use of reason. Once the obligations are binding, they can never cease. The operative membership is determined by the right to exercise the rights: when all rights can be exercised the person has an active operative membership; when there is a restriction in the exercise of the rights there is a passive operative membership.

Mörsdorf emphasises that these divisions concern only the external forum. The membership of someone is ultimately determined in the forum of conscience. If there is a conflict between the external and internal forum, it can be diminished in the sacrament of penance. If it cannot be solved there the case should be left to God's forum.

The relevance of the question of membership lies in salvation: it is a sign of a person being on the proper, God-given way to salvation.

6.2 - Evaluation

The treatment of membership in the Church is really a beautiful example of the method of Mörsdorf. There is a development in his awareness of the issue that coincides with his notion of canon law itself. Mörsdorf displays his attention for organisation and terminology in his method and in his language.

In a methodological reflection, Mörsdorf speaks about a theological and canonical treatise on membership: canon law and theology cannot really give a different answer to the question about membership, because canon law arises from and is supported by an awareness of faith. He confirms that canon law is a theological discipline, although it might apply a different language and a different method. This is an important statement, because it allows for a better understanding of Mörsdorf's thesis that canon law is a theological

discipline with a juridical method. In treating the questions about membership he places the question into the realm of theology and uses juridical tools. How do these juridical tools appear in his treatise? Instead of applying the theological term *membrum*,¹⁸² Mörsdorf proposes to use the juridical term *persona*.¹⁸³ He makes very clear that he only speaks about a membership of the visible Church (the juridical realm cannot touch upon the

¹⁸² A. Dulles says: "[...] it is evident that membership is not a univocal term. In every case it signifies a positive relationship between a believing Christian and his Church. But the meaning varies, first, because the Church itself is a highly complex reality, and second, because the relationship of individuals to it are almost infinitely various." Dulles affirms that the theory of membership differs according to the notion of Church and the relationships a person has with the fellow-believers. "If the word 'member' is retained, it should not be used except in a context that makes it clear precisely how the author is using it" (A. Dulles, *Church Membership as a Catholic and Ecumenical Problem*, The 1974 Père Marquette Theology Lecture, Milwaukee, Marquette University, Theology Department, 1974, pp. 103-104).

¹⁸³ The relevance of terminology also becomes evident when reading another canonist, L. Bender. He proposes to replace the word *membrum* with *persona* in c. 87. Bender considers the word *persona* to be an absolute concept, while c. 87 uses it in a relative sense. By this he means that baptism does not make someone simply a person, but one becomes a person in the Church. The absolute concept of *persona* would confer all the same rights (this causes problems in relation to those who are not members of the Catholic Church). For Bender the word *membrum* is a relative concept, because one must add immediately: a member of this or that society. With a different membership comes a new set of rights. L. Bender, *Normae generales de personis: commentarius in canones 87-106*, Roma, Desclée, 1957, pp. 11-13. Mörsdorf does not agree with this objection: he says that the same human being receives personality, be it through birth or through baptism. The natural and the supernatural order cannot be divided. In any case, personality--be it natural or supernatural--cannot be lost. Mörsdorf, "Persona in Ecclesia Christi," pp. 372-373.

internal disposition of the person).¹⁸⁴ Yet, at the same time Mörsdorf does not want to give a sociological definition, but a theological one.¹⁸⁵

In determining theologically what constitutes membership Mörsdorf proposes to distinguish between a consecrational membership and an operative membership. Methodologically, it is important to notice that Mörsdorf pays attention to his terminology: initially he speaks about a constitutional membership (*konstitutionelle Gliedschaft*), but later on he replaces it with consecrational membership (*konsekratorische Gliedschaft*). His rationale behind this change reflects how much he envisions this juridical question to be into the realm of theology: a consecrational membership reflects much better that this membership is rooted in baptism.¹⁸⁶

¹⁸⁴ The issue of membership itself was highly debated before the council. With the council, however, the discussion underwent a major shift: the concern was not the membership of the Catholic Church, but being in (full) communion with the Church of Christ. In fact the council itself did not want to discuss the issue of membership in the terms of *Mystici Corporis Christi*.

¹⁸⁵ Mörsdorf does not clarify how he understands a sociological definition of membership.

H. Carrier, a sociologist, makes a distinction between membership in a theological-juridical sense and belonging in a psycho-sociological sense. He says that for the sociologists questions arise that concern the psycho-sociological significance of the religious adherence of the faithful. There is an almost infinite gamut in the intensities of conscious attachment to the Church between full commitment and almost total passivity. The phenomenon of religious belonging is present in the measure that the individual sees himself as taking part in the group, identifies himself with it, and interacts with it. See H. Carrier, "Psycho-Sociologie de lien d'appartenance à l'Église," in F. Boulard, e.a., *L'Appartenance religieuse*, Brussels, ed. du Cep., 1965, pp. 101-102.

¹⁸⁶ When Mörsdorf says that membership in the Church is different from membership in any society, he affirms implicitly his understanding of canon law, which is different from any other legal system. Such an understanding goes both ways; because he thinks that the canonical system is different, he can understand the question of membership differently and because he understands the question of membership as being different from other memberships, he affirms his theory of the peculiarity of the Church. Had Mörsdorf applied the terminology of Vatican II--being in (full) communion--he would have had an even

Besides the division in consecrational and operative membership, Mörsdorf also distinguishes between the forum in which one speaks about this membership. The distinctions between the membership in different forums shows a point of tension in Mörsdorf's theory here: initially he wants to speak about the membership of the visible Church. He tries to discuss the issue with juridical tools--speaking about *persona* instead of *membrum*--but ultimately he admits that the question of membership is determined in the internal forum and that the issue is related to salvation.

It would go beyond the scope of this dissertation to discuss the issue of membership in the Church in detail.¹⁸⁷ The council did not really want to discuss the issue, but it may well have been that Mörsdorf had an impact on the distinctions that were made in the 1983 Code. K. Lüdicke, a disciple of Mörsdorf, says that the consecrational membership can be found in cc. 204 and 843 CIC/1983 and that the notion of operative membership returned

better tool to express the peculiarity of membership of the Church.

¹⁸⁷ One person has to be mentioned, however. K. Rahner severely criticized Mörsdorf's division of membership. He initially questions if one can really speak about levels of membership, but Rahner modifies his position somewhat in a later stage. It appears to me, without having done any in-depth study of the position of Rahner on this issue, that Mörsdorf is more concerned about the membership in the juridical tangible forum, while Rahner speaks more about salvation itself. Rahner does make an interesting observation though when he says that the terminology of 'operative membership' is incorrect: it should be an activation of the membership (*die Betätigung der Gliedschaft*). K. Rahner, "Die Gliedschaft in der Kirche nach der Lehre der Enzyklika Pius' XII. *Mystici Corporis Christi*," in K. Rahner, *Schriften zur Theologie*, Bd. 2, Einsiedeln, Benziger, 1956, pp. 7-94, espec. p. 29; K. Rahner, art. "Kirchengliedschaft, Dogmatisch," in *LThK*, Bd. 6, cols. 223-225.

J.R. Dionne presents a very interesting summary of the discussions on membership in the Church, especially in relation to the understanding of salvation. J.R. Dionne, *The Papacy and the Church: A Study of Praxis and Reception in Ecumenical Perspective*, New York, Philosophical Library, 1987, espec. Chapter V. The Church and her Members, pp. 195-236.

in c. 205 CIC/1983.¹⁸⁸ Of course, with the council and the 1983 Code the terminology has changed to being in (full) communion.¹⁸⁹

The contribution of Mörsdorf then has been on the level of clarifying what membership in the Church entails. He roots this deeply in baptism, with its indelible character. Methodologically, Mörsdorf is consistent within his own work, i.e. from the perspective of his understanding of the nature of canon law and the understanding of internal and external forum. Yet, it is regrettable that he does not elaborate on this understanding of baptism when he speaks about sacred power. His explanation of the divine gifts that the sacrament of orders brings is not balanced by an in-depth presentation of the power that baptism gives.

¹⁸⁸ Lüdicke says that the 1917 Code was much clearer on the issue of membership than the 1983 Code: in the 1917 Code the Church of Christ was identical with Catholic Church, which is not the case in the 1983 Code. He is of the opinion that in the light of Vatican II the issue is clearer, but the implementation is more difficult. K. Lüdicke, "Die Kirchengliedschaft und die *plena communio*: eine Anfrage an die dogmatische Theologie aus der Perspektive des Kirchenrechts," in K. Lüdicke, H. Paarhammer, D.A. Binder (Hrsg.), *Recht im Dienste des Menschen: eine Festgabe - Hugo Schwendenwein zum 60. Geburtstag*, Graz, Styria, 1986, pp. 377-391.

Notice should be taken that both the council in *LG* 14 and the c. 205 CIC/1983 speak about the visible Church; indeed the legislation can only speak about what is juridically tangible. (See also footnote 170 in the part on Corecco).

¹⁸⁹ It has to be noted that Mörsdorf himself does not take up the new terminology provided by the council: he does not refer to it in the article "Der Kirchenbann im Lichte der Unterscheidung zwischen äußerem und innerem Bereich," published in 1976! It appears from this--and also from other points in his theory, e.g., in the sacred power theory--that he developed his ideas before the council and never really internalized the affirmations of the council (an exception to this is his treatise on the laity).

7.1 - Laity

Mörsdorf starts his treatise on the laity by describing where the discussion on the notion of the laity is when he joins it. He reports on the opinions of Congar and Rahner, but replies especially to Rahner, who says that all those who somehow share in the powers of orders or jurisdiction cannot be called laity. His major objection is that in Rahner's theory the notion of laity has to end up as being of a secular nature. *Lumen gentium* 31, 2, however, accepted Rahner's notion.

Subsequently, Mörsdorf attempts to bring forward a new notion of laity. Mörsdorf says that the only source that can be used is the position that the layperson has in the Church. For Mörsdorf, this implies the 1917 Code as starting point. This Code says that with diaconate a person is a cleric in the full theological sense. Mörsdorf, therefore, proposes to restrict the notion of cleric in the full theological sense.

Mörsdorf, then, moves to the participation of the laity in the three offices; this participation is *qualitatively* different between a cleric and a lay person. Yet, all people participate and Mörsdorf illustrates how the participation of the laity shows a parallel to the participation of the clergy in the three offices. Moreover, the canonical mission that the layperson and the cleric receive is not really different. Hence, there is not really a juridical difference between the cleric and the lay person. The difference that exists between a layperson and a cleric consists in ordination, which places the cleric in the 'Head' position, while the layperson belongs to the Body. Ordination confers a personal character to an important service of presiding.

The conciliar texts portray the layperson as someone who is not a cleric or a religious. Moreover, *LG* 31, 2 says that the secular activity is proper and peculiar to the laity, but Mörsdorf qualifies this statement as sociological and not as theological. The difference between laity and clergy is also noticeable in the apostolate: the council speaks about a lay apostolate and a hierarchical apostolate (*AA* 23). Mörsdorf objects to this by saying that there is only one apostolate, and that this apostolate should be exercised in union with those who govern the Church.

A special point of consideration is the appointment of lay judges. Mörsdorf says that it is dealt with in a pragmatic way and that the requirement of two clerics in a collegial tribunal shows distrust towards the layperson. He does not see a theological problem with the appointment of lay judges, since the collegial tribunal is the subject of judicial power and not the individual judge. Yet, his major objection towards lay judges is that it creates a distinction between an office and orders. He is especially concerned that, with the appointment of lay judges, the judicial power is used as a lever to level the hierarchical structure of the Church.

7.2 - Evaluation

A general pattern in Mörsdorf's method is that he establishes where the discussion on a topic is before he presents his own views. He did so in the question on forum, sacred power, membership and also in the last issue of this report, viz. the laity. Subsequently he selects the source(s) he will use for his own reply. In the case of the laity it is the existing position they have: initially this is the 1917 Code and later on also the documents of Vatican II.

To return to the first aspect of the presentation of Mörsdorf, he discusses briefly the position of Congar and quite extensively the position of Rahner. Mörsdorf does not agree at all with Rahner's proposal that everybody who participates in the powers of orders or jurisdiction cannot be called a layperson any more. The implications of Rahner's proposal are twofold: the definition of cleric becomes very wide and the notion of the laity acquires a secular character. Mörsdorf replies to the definition of cleric with a proposal to limit the notion of cleric: only those who are ordained to the diaconate, priesthood or episcopacy are clerics. Mörsdorf made this proposal in 1961 and it was confirmed by Vatican II in its dogmatic constitution, *Lumen gentium*, when it abolished minor orders. It has to be noted that Mörsdorf's source is here the 1917 Code. In his attempt to come forward with a theological definition he uses a canonical source! Is this an example of the ultimate consequence of his understanding of canon law as a theological discipline? In the question on membership he said that there could not really be a difference between a canonical and a theological answer, but here he takes the canonical source to determine the theological status of the lay person. Is this an inconsistency in Mörsdorf's theory or an ultimate application of his thinking?

It is especially after the council that Mörsdorf replies to the second issue, viz., the secular character of the laity. He thinks that *LG* 31, 2 has taken over Rahner's notion of laity, viz. the secular character of the laity, but Mörsdorf considers this conciliar passage to be a sociological rather than a theological definition. This section is evaluated differently by scholars: some consider it to be of a theological nature, others of a sociological

nature.¹⁹⁰ A correct evaluation of this section of *Lumen gentium* cannot depend on this passage only; all conciliar texts have to be taken into consideration. From that perspective, *Apostolicam actuositatem* 5 sheds some light on the issue. It says that the laity exercise their apostolic mission both in the world and in the Church, in the temporal and the spiritual order. Mörsdorf is, however, correct when he observes that *LG* 31, 2 places the mission of the clerics into the realm of the Church and leaves little room for work in the world.¹⁹¹

Both before and after the council Mörsdorf places the question of the laity in the context of the three offices. He says that all baptized participate in the three offices, but clergy and laity collaborate in a qualitatively different way. It is important to notice that

¹⁹⁰ The apostolic constitution *Gaudium et spes* speaks about the Church *in* the modern world, not the Church *and* the world. The different opinions, concerning the notion of laity as being sociological or a theological definition, are echoed in a report of a discussion between Y. Congar, B. Häring and H. de Lubac that took place in 1966: J.H. Miller (ed.), *Vatican II: An Interfaith Appraisal, International Theological Conference, University of Notre Dame, 20-26 March, 1966*, Notre Dame, University of Notre Dame Press, 1966, pp. 267-289.

In a treatise on the position of the laity according to the 1983 Code, Walf takes up the same line of thought as Mörsdorf when he evaluates *LG* 31, 2. He has a rather pessimistic view when he evaluates the 1983 Code about the relationship between clergy and laity: the 1983 Code presumes an immature laity that in important questions needs the guidance of the clergy. K. Walf, "Der Laie im neuen Kirchenrecht," in *RDC*, 37 (1987), pp. 3-17.

¹⁹¹ Mörsdorf usually thinks in relational terms, but here he really makes a sharp distinction, which is neither necessary nor desirable. The Church is really one complex reality; it has a visible and an invisible aspect that are ordered towards each other. F. Klostermann says it well when he comments on *LG* 31: "This secular character specifies the modus of the layman's share in the offices of Christ and the part he has in the mission of the People of God. And therefore we may safely assume that it affects the mission of the layman not only 'in the world' but to a considerable extent in the Church as well" (F. Klostermann, "*Constitutio dogmatica de Ecclesia* - Dogmatische Konstitution über die Kirche: 4. Kapitel Die Laien," in *LThK*, Bd. II, *Das Zweite Vatikanische Konzil: Konstitutionen, Dekrete und Erklärungen*, Lateinisch und Deutsch Kommentare, Teil 1, Freiburg, Basel, Wien, Herder, 1966, p. 265 (English translation in H. Vorgrimmler (ed.), *Commentary on the Documents of Vatican II*, vol. 1, [Freiburg], Herder, 1967, p. 237).

Mörsdorf uses the term 'qualitative' and not the word 'quantitative,' because these thoughts appear again in *LG* 10, when it says that the common and ministerial priesthood differs essentially and not only in degree.¹⁹² Mörsdorf does something surprising in his treatise of the laity: in most parts of his theory he thinks from the perspective of sacred power and finds a foundation for this in the sacrament of orders. When he speaks about the laity, however, he departs from the sacrament of baptism. He even goes so far as to say that the canonical mission that a person receives is so much alike between the cleric and the layperson that juridically there is not much difference. Considering the theory of Mörsdorf on sacred power this statement about the canonical mission and the likeness of clergy and laity makes me cautious: it appears not to fit in Mörsdorf's theory. Hence, an investigation is called for.

When Mörsdorf speaks explicitly about canonical mission, he says that it refers to the mission to teach and to the canonical provision of an office, as expressed in c. 109 CIC/1917.¹⁹³ In speaking about the laity, he does not exclude the canonical mission of the teaching office. Yet, his insistence on the connection between office and orders, between orders and jurisdiction, and his image of the Head-Body--the clergy belonging to the Head; the laity to the Body--is enough indication that he does not really intend to see them as

¹⁹² *LG* 10, 2: "Sacerdotium autem commune fidelium et sacerdotium ministeriale seu hierarchicum, licet essentia et non gradu tantum differant, ad invicem tamen ordinantur."

¹⁹³ "*Missio* (c. 1328) ist die jurisdiktionelle Übertragung der Lehrgewalt und erfolgt mit der Verleihung eines Amtes oder durch besondere Vollmacht. Die wissenschaftliche Fachsprache spricht hier von *m. canonica*, womit c. 109 in einem weiteren Sinn jede kirchliche Amtsbestellung (= *provisio canonica*, c. 147) kennzeichnet" (Mörsdorf, *Die Rechtssprache der Codex iuris canonici*, p. 249).

equal. His opinion that there is almost no juridical difference between a cleric and a layperson is inconsequential.

Mörsdorf expresses an affirmation of the theory that the power of jurisdiction can only be held by those in orders when he speaks about lay judges. He replies that it is not the individual judge who has the judicial power, but the college as such. He adds that the college as such can only have those rights and obligations that flow from its nature: e.g., it can not receive sacraments or pray. If this is the case and if Mörsdorf wants to keep the powers of orders and jurisdiction together, then how can the college have a judicial power, since it has no power of orders? Mörsdorf's consideration that the requirement of a majority of clerical judges shows a distrust towards the laity is well taken, but it turns immediately back to him. The fear that lay judges eventually could end up judging acts of a bishop confirms Mörsdorf's remark on distrustfulness towards laity. Is the primary task of any judge not to serve the truth, even when the matter involves a bishop?

In conclusion, the treatise of the laity shows how Mörsdorf applied a terminology before the council, that subsequently the council itself applied (qualitative difference, participation in three offices). It also shows that Mörsdorf kept applying an up-to-date language, but his fundamental concepts--especially the sacred power theory--are still at work.

8 - Conclusion

After the presentation of the report and the analysis of the theory of Mörsdorf the following conclusions can be made:

1. The method of Mörsdorf reveals a pattern: he starts with the current theories, moves then to history and subsequently proposes his own ideas.

2. The sources are therefore often historical, but they are sometimes taken with a specific idea in mind. An example is the theory of *sacra potestas*, where he selects the historical data that will suit his own hypothesis. Other relevant historical information is then not taken into account. This affects the accuracy of the theory. After the council, Mörsdorf does not use the conciliar documents extensively, with the exception of the treatise on the laity.
3. The vocabulary of Mörsdorf shows a great awareness of the need for precise and correct language. This awareness is not surprising considering his start in the canonical field with a dissertation on the language of the 1917 Code. Given this awareness, it is surprising and disappointing that he does not take up the terminology of Vatican II. Mörsdorf's theory could have tremendously benefitted had he really accepted that terminology.
4. Ultimately, Mörsdorf considers canon law to be a theological discipline with a juridic method. In relation to his selection of sources, often being the 1917 Code, canon law becomes part of theology. Fundamentally, he does not allow for a distinction between theology and canon law; both are expressions of the same reality. This implies that Mörsdorf does not see the difference between theology as faith seeking understanding and canon law as norms for action. From the practical application, it seems that 'juridic method' implies a great awareness of the visible and juridical aspect of the Church (law can only touch what is tangible; it cannot deal with the forum of conscience), but he never defined it clearly.
5. On the level of the content, the theory of one sacred power is a constitutive element in Mörsdorf's theory. In most cases he applies the implications of that

theory. He has an awareness of the relevance of the sacrament of baptism, but he has not reflected on it in depth and is not able to incorporate that structurally in his theory.

The theory of Mörsdorf shows that the impact he had in the life of the Church really dates from before Vatican II. It is regrettable that Mörsdorf ceased developing his theory.

Yet, if there is one field where his influence continues it is in the formation of his disciples. Several of them have become internationally renowned canonists. One of these disciples is Eugenio Corecco. The next part will report on his theory and analyze it. There is however, another person that deserves some attention: Antonio Maria Rouco Varela, also a student of Mörsdorf, follows him in his understanding of the relationship between theology and canon law, but modifies that understanding as well. Since Rouco Varela also had an influence on the theory of Corecco, it seems appropriate to explain briefly his theory on the relationship between theology and canon law in an *Excursus*.

EXCURSUS: ANTONIO MARIA ROUCO VARELA

The previous chapter reported on and evaluated the theory of Klaus Mörsdorf. One of Mörsdorf's disciples was Antonio Maria Rouco Varela. Rouco Varela wrote several articles on the relationship between theology and canon law. It appears that he influenced the thinking and the terminology of Eugenio Corecco, whose theory will be examined in the next chapter. Corecco evaluates Rouco Varela as having clarified the *status quaestionis* in the investigations dealing with the relationship between theology and canon law. Since Rouco Varela forms, in some ways, a bridge between Mörsdorf and Corecco it is opportune to present his major thoughts on the relationship between theology and canon law.¹

Antonio Maria Rouco Varela was born in Villalba (Spain) in 1936. He studied in Mondonedo, Salamanca, and Munich; he obtained a licentiate in theology and a doctorate in canon law (Munich).²

¹ Rouco Varela published the majority of his articles concerning the relationship between theology and canon law in German. He published some articles that do not concern the foundations of canon law in Spanish. His influence on Corecco appears to be especially on the level of that foundation of canon law. Since this is only a report on the foundation and not the complete theory of Rouco Varela, it appeared opportune to call this report an *Excursus*.

² The title of his canonical dissertation is *Kirche und Staat im Spanien des 16. Jahrhunderts*. This dissertation is published as *Staat und Kirche im Spanien des 16. Jahrhunderts*, Münchener theologische Studien, III. Kanonistische Abteilung, Bd. 23, München, Max Hueber, 1965. xix, 327 p.

Rouco Varela taught canon law at the *Kanonistisches Institut der Ludwig-Maximilians-Universität München* from 1966 until 1968. Subsequently, he was a professor of canon law at the University of Salamanca.

He was ordained a priest in 1959 and a bishop in 1976. Since 1984 he is archbishop of the archdiocese of Santiago de Compostela in Spain.

Rouco Varela wrote several articles on the relationship between theology and canon law. In the majority of those articles he presents a historical overview of that relationship, both of the Catholic and the Protestant traditions. This overview is often followed by his own opinion and proposals.³

The articles of Rouco Varela show a great awareness for the method he uses--he often indicates what steps are to be taken and in what order--and an awareness for the need to clarify the terms he applies. The exposition of his theory is, therefore, relatively easy to understand.

This theory can be divided into three points: the first issue deals with the determination of the question; the second one focuses on the ontological nature of canon law, and the last one concerns, what he calls, the epistemological status of canon law.

³ The first part of this dissertation presented an historical overview of the relationship between theology and the science of canon law. That part concerned especially the Roman Catholic tradition. There is no need to repeat that nor does this dissertation require a description of the developments in the Protestant tradition. Therefore, this *Excursus* will only present Rouco Varela's own ideas concerning the relationship between theology and canon law.

1 - DETERMINING THE QUESTION

In his publications Rouco Varela mentions several different reasons for the need to determine the status of canon law. These reasons can be brought together under the headings of 'theology of canon law' and 'ecclesiology.' The following two sections will elaborate on these reasons.

1.1 - A general theology of law or a theology of canon law?

Rouco Varela identifies that the concept of 'law' appears in several treatises of theology (moral theology, pastoral theology, the science of canon law), but there is no theology of law that transcends all these approaches. He, therefore, asks if there could be such a theology of law.⁴ At the same time he says that considering law as a phenomenon of societal life would lead the answer to this question to moral theology, where the Word of God is reflected upon for Christian existence.⁵ If one, however, starts from the essence

⁴ Rouco Varela considers this not as a merely intellectual enterprise: the answer to this question also has an effect on the understanding of the relationships between Church and State, between the Church and the political world, the actions of individuals in the society and in politics. See A.M. Rouco Varela, "Was ist 'katholische' Rechtstheologie? Gedanken zu dem Buch von B. Schüller: Die Herrschaft Christi und das weltliche Recht," in *AfkKR*, 135 (1966), p. 531; A.M. Rouco Varela, "Die katholische Rechtstheologie heute: Versuch eines analytischen Überblickes," in *AfkKR*, 145 (1976), p. 4.

⁵ One of the major points in Rouco Varela's theory is his denial of a philosophical basis for canon law. The reason for this denial is that all philosophy has become too relativized. The implications of a too relativized understanding of the concepts 'justice' and 'right' became clear in Nazi Germany. Another problem is that in philosophy the idea of supernatural justice and natural law are not the same. Ultimately the problem that has to be addressed is the relationship between the ecclesiastical laws and the divine laws. "El conocimiento experimental-racional del Derecho conserva su sentido y una filosofía válida del Derecho y de la justicia no sólo no es posible, sino que además está plenamente justificada. Puesto que esa Teología del Derecho, arriba esbozada, se construiría 'ontológicamente' sobre la base no de una *analogia fidei*, entendida en irreconciliable disyuntiva

of Catholic theology then the turn to moral theology will not take place for the following reasons: first of all, Catholic theology understands itself as the theology of the Mystery, which is superior to any philosophy.⁶ Secondly, there are more kinds of law than secular law: the existence of canon law shows this. Thirdly, canon law cannot be considered as a *species* of the *genus* law. According to Rouco Varela, these three points show that the issue of a theology of law is not simply locating it theologically, but it is a fundamental theological problem:

What is involved here is a part of the essential and cognitional fundamental problem of theology; the problem of the relationships between its *obiectum formale quod* and *quo* (= the God who reveals himself in the Word) and its *obiectum materiale* (= the world in the broad sense of the word).⁷

dialéctica, a lo Karl Barth [...] según la que no hay más verdad, al menos existencialmente válida (=respuesta a la existencia humana) que la Palabra y Revelación Personal de Dios, sino de una *analogia fidei simul et entis*" (A.M. Rouco Varela, "Filosofía o Teología del derecho? Ensayo de una respuesta desde el derecho canónico," in L. Scheffczyk, W. Dettloff, R. Heinzmann (Hrsg.), *Wahrheit und Verkündigung: Michael Schmaus zum 70. Geburtstag*, Bd. 2, München, F. Schönningh, 1967, p. 1731).

⁶ Rouco Varela says that a Catholic theology of law cannot primarily be a theology of natural law, because that would have the danger that canon law would lose itself in natural law and it would limit a theology of canon law to a theology of natural law. See Rouco Varela, "Was ist 'katholische' Rechtstheologie?" p. 539.

Rouco Varela keeps emphasising that neither the empirical-social nor the historical aspect of the Church is relevant, but it is the mystical dimension. "[...] conseguentemente l'ultima parola non la dice la filosofia o la storia e la scienza del Diritto ma la Teologia della Chiesa" (A. Rouco Varela, E. Corecco, *Sacramento e diritto: antinomia nella Chiesa? Riflessioni per una teologia del diritto canonico, dialogo tra Antonio Rouco Varela e Eugenio Corecco*, Strumenti per un lavoro teologico, vol. 1, Milano, Jaca Book, 1971, p. 57).

⁷ "Es handelt sich nämlich [...] um einen Teilaspekt des seins- und erkenntnismäßig fundamentalen Problems der Theologie, des Problems der Beziehungen zwischen ihrem *obiectum formale quod und quo* (= der sich im Wort offenbarende Gott) und ihrem *obiectum materiale* (=die Welt im weiten Sinne des Wortes)" (Rouco Varela, "Was ist 'katholische' Rechtstheologie?" p. 532).

Rouco Varela, subsequently, says that this theology of law has to be a theology of canon law. He supports this opinion with the following consideration: the theological point of departure should be Catholic theology, that is, theology of the Mystery, and this should be its formal principle. This means that the revealing and supernatural salvific acts of God are the governing and determining object of all its expressions.⁸ This, in its turn, implies that theological expressions should be more than merely translations of philosophical expressions.⁹ Therefore, only the science of canon law is capable of dealing with a Catholic theology of law. This science of canon law has to remember, though, that in its origins it has to be a theological discipline.¹⁰

This question of the self awareness of canon law is above all an ontological question, which means that the existence and the nature of canon law is at stake. Rouco Varela remarks that a lot of sciences start with determining their goal followed by establishing their epistemology. But the science of canon law has to justify the existence of

⁸ "Daß katholische Theologie formal Theologie des Mysteriums ist, bedeutet, daß ihr alle Aussagen beherrschender und bestimmender Gegenstand das im personalen Wort sich offenbarende, übernatürliche Heilshandeln Gottes ist" (Rouco Varela, "Was ist 'katholische' Rechtstheologie?" p. 540).

⁹ Rouco Varela says that a theological anthropology as a Catholic theology can only take place under two conditions. First, it has to bring persons and their surrounding world in connection with salvation. Secondly, these essential and existential structures of the salvific acts of God have to mount to a better understanding of the human existence. This implies that the acting of God has to be disclosed. This is also the task of a theology of law. If God uses law, justice, etc. as means to reveal himself, then the task of a Catholic theology of law cannot be but disclosing scientifically the structures of this salvific law (*Heilsrecht*). (He remarks that this salvific law should not be understood in a primarily causal sense, but in its sacramental mediating meaning.) Rouco Varela, "Was ist 'katholische' Rechtstheologie?" pp. 541-542.

¹⁰ Rouco Varela refers to K. Mörsdorf on this point.

canon law beforehand, because it is not the result of a social-political-economical enterprise of human life. This implies that the foundation of canon law cannot limit itself to a natural foundation of the science of canon law. This means that only a theology of canon law will be able to come forward with an essential fundamental foundation of canon law. This theology should, however, really be a theology of canon law and not a theology about its foundations.¹¹

Only a nuanced ecclesiological interpretation of the principles of Incarnation, which explains, through the kerygmatic-sacramental structure of the Church, law as a christological postulate of the human-pneumatic essence of the Church, can produce a real theology of canon law, which discloses theologically an internal reality of canon law beyond a pure external justification of its existence.¹²

Thus, Rouco Varela understands the foundation of canon law as theological. He remarks though that there are three methodological presuppositions. First, the Church is

¹¹ Rouco Varela remarks that the problem of the 'ecclesial' canon law of the past hundred years or so has been that it based canon law on a voluntaristic act of Christ, which implied that it did not touch the formal theological essence of canon law. He goes so far as to say that if canon law is considered as a voluntary act of Christ and not as an internal result of his historical salvific acting and as a structural requirement of his salvific acting, then canon law has to be considered as a law, which is subject to the same ethical imperatives and logical rules as any other existing secular law. See A.M. Rouco Varela, "Allgemeine Rechtslehre oder Theologie des kanonischen Rechtes? Erwägungen zum heutigen Stand einer theologischen Grundlegung des kanonischen Rechtes," in *AfkKR*, 138 (1969), pp. 110-111. See also footnote 23 of this *Excursus*.

¹² "Allein eine nuancierte ekklesiologische Interpretation des Inkarnationsprinzips, welche mittels der kerygmatisch-sakramentalen Struktur der Kirche ihr Recht als ein christologisches Postulat ihres menschlich-pneumatischen Wesens einsichtig macht, vermag eine echte Theologie des Kirchenrechts abzugeben, die über eine bloß äußere Existenzrechtfertigung hinaus die innere Wirklichkeit des Kirchenrechts theologisch eröffnet." Rouco Varela remarks that especially the contribution of Mörsdorf to the theological foundation of canon law goes into this direction. Rouco Varela, "Allgemeine Rechtslehre," p. 111.

the *locus theologicus proprius* from which a correct understanding of canon law can be developed. But he warns that in doing so, the doctrine of canon law has to protect itself from becoming isolated from the total historical salvific connection, or from an intra ecclesial isolation.¹³ Taking only parts of the ecclesial reality into consideration could result in such an isolation. Consequently, Rouco Varela emphasizes that it is important to take the whole Mystery of the Church into consideration.¹⁴

Secondly, this ecclesiological thinking does not imply that canon law becomes part of ecclesiology. On the contrary, it has to have its own autonomy, because the interpretation of salvific historical data has to be from a specific point of view, which the ecclesiologist is unable to do, namely, the perspective of law.¹⁵

Thirdly, law, in understanding order in the Church, has a hermeneutical function not as an all embracing, philosophical, or scientific category, but as a prescientific fundamental

¹³ Rouco Varela expresses clearly that canon law is the law of a theological community. The analysis of Corecco will show that he converts this into a different affirmation: for him canon law is all theology.

¹⁴ A.M. Rouco Varela, "Grundfragen einer katholischen Theologie des Kirchenrechts: Überlegungen zum Aufbau einer katholischen Theologie des Kirchenrechts," in *AfkKR*, 148 (1979), p. 345. In the article "Allgemeine Rechtslehre," (p. 110) he says that it presupposes that not all positive law is envisioned as optional-human-juridical matter, but as a concretising of the *ius divinum positivum*. It also presupposes that the examination of the canonical order is performed in connection with the sources of faith and under substantial consideration of all the possibilities of the reality of the Church.

¹⁵ Rouco Varela says that the theology of canon law has its own hermeneutics. See Rouco Varela, "Grundfragen," p. 345.

It is important to observe that Rouco Varela sees canon law as connected, but not identified with theology.

experience of people, which only obtains conceptual and terminological contours after an intellectual and existential encounter with the salvific historical revelation of the Church:¹⁶

In conclusion, the third methodological presupposition of a Catholic theology of canon law forms the consequent and determined adherence to the anselmian maxim *credo ut intelligam* as its decisive hermeneutical criterion.¹⁷

So if canon law is essentially a theological entity that can only be understood in faith, then the science of canon law has to be a theological discipline.

He then says that since canon law is an ecclesial reality, rooted in the mystery of the Church, it can only be adequately understood in the faith of the Church and the faith in the Church:

Therefore, only when it is performed in faith can a general doctrine of canon law contribute to an enlightening discussion on the foundational questions of the existence and of the nature of canon law.¹⁸

¹⁶ "Das Recht hat die hermeneutische Funktion in der Konstruktion der Theologie des Kirchenrechts nicht als eine begrifflich festumrissene, philosophische oder wissenschaftliche Kategorie, sondern in der Form einer vorwissenschaftlichen Grunderfahrung des Menschen zu spielen, die erst nach der intellektuellen und existenziellen Begegnung mit der heilsgeschichtlichen Offenbarung über die Kirche begriffliche und terminologische Konturen zu gewinnen vermag" (Rouco Varela, "Grundfragen," p. 346).

¹⁷ "Alles in allem, die dritte methodologische Voraussetzung einer katholischen Theologie des Kirchenrechts bildet das konsequente und entschiedene Festhalten an der anselmianischen Maxime, *credo ut intelligam*, als ihr maßgebendes hermeneutisches Kriterium" (Rouco Varela, "Grundfragen," p. 347).

¹⁸ "Eine allgemeine Lehre des kanonischen Rechts kann daher zur erhellenden Erörterung der Grundfragen der Existenz und der Natur des Kirchenrechts nur dann einen Beitrag leisten, wenn sie gläubig betrieben wird." He says that in its deepest essence it cannot be understood in a purely empirical-logical sense. Rouco Varela, "Allgemeine Rechtslehre," p. 110.

At the same time, however, canon law is really law and is therefore a *ius humanum* that has an undeniable analogy with secular law.¹⁹ This implies for the science of canon law that it should apply the legal philosophical principles and techniques of secular law, "but only in as far as the theological peculiarity of its content and its form allow it. Canon law has to be a 'theological discipline,' that knows how to work with the 'juridical method.'"²⁰

These reflections of Rouco Varela point to determining what he calls the ontological and epistemological status of canon law. It is, however, not only these deliberations that point to that direction: Rouco Varela is of the opinion that an ecclesiological crisis also urges an investigation in the status of canon law.

1.2 - An ecclesiological crisis becomes an ontological question

Rouco Varela describes²¹ that there is a crisis in ecclesiology which leads to a question about the status of canon law. He says that this crisis manifests itself in two ways: first, this crisis is a struggle which is best characterized with the terms 'order' and

¹⁹ It is precisely at this point where Corecco goes in a different direction: he does not see an analogy between secular law and canon law.

²⁰ "[... die Wissenschaft des kanonischen Rechts muß sich der rechtsphilosophischen Prinzipien und der weltlichen Rechtstechnik bedienen] aber nur in dem Ausmaß, wie es die theologische Eigenart seines Inhaltes und seiner Form zulassen. Die Kanonistik muß also eine 'theologische Disziplin' sein, welche mit 'juristischer Methode' zu arbeiten weiß" (Rouco Varela, "Allgemeine Rechtslehre," p. 112). The reference to Mörsdorf's definition of the science of canon law is very clear: it is a theological discipline with a juridical method.

²¹ The ecclesiological crisis forms the major question of the article: A.M. Rouco Varela, "Le statut ontologique et épistémologique du droit canonique: Notes pour une théologie du droit canonique," in *RSPTh*, 57 (1973), pp. 203-226.

'organisation.' He adds that this first manifestation of the crisis does not really lie in ecclesiological concepts themselves--like primacy, collegiality, particular and universal Church, hierarchy, or People of God--but it touches on the level of 'order' and 'organisation.' The second manifestation of the crisis emerges in the appearance of a contradiction between order and organisation on the one hand, and the Church of the Spirit, charism and freedom for the children of God on the other hand.²² This crisis has existed for quite some time, but Rouco Varela says that nobody was able to bring forward a satisfactory answer.²³ The question he then poses does not concern so much whether the Church can tolerate law, but it questions its need for law; in Rouco Varela's words:

Does the Church as such, in that which constitutes it positively, have an internal need for law in order to be itself, to be that sacrament of Christian salvation that lives of the inspiration of the Holy Spirit in faith, hope and charity?²⁴

²² Rouco Varela, "Le statut ontologique," pp. 204-205.

²³ Rouco Varela mentions those who applied a christological and soteriological model that was based on the concepts of Incarnation as explained by Möhler (W. Bertrams, M. Arbus, J. Salaverri, G. Lesage, A.M. Stickler, H. Heimerl). According to Rouco Varela they were unable to answer their critics satisfactorily, because the Incarnation implies a visible existence of the Church. This visibility, however, can present itself in many forms: a visible community and a juridic character do not have to be identical. See also footnote 11 of this *Excursus*.

The Second Vatican Council was barely aware of the existing crisis and Rouco Varela calls it a major lacuna in the ecclesiology of *Lumen gentium* to have almost completely forgotten canon law. The council has probably only one seed that could be fruitful for a satisfactory foundation of canon law: the fundamental sacramentality of the Church. See Rouco Varela, "Le statut ontologique," pp. 211-214.

²⁴ "[...] l'Église comme telle, en ce qui la constitue positivement, a-t-elle de nécessité interne besoin du droit pour être elle-même, pour être ce sacrament du salut chrétien qui vit du souffle de l'Esprit Saint dans la foi, l'espérance et la charité?" (Rouco Varela, "Le statut ontologique," pp. 221-222).

Once the question is posed so directly it is possible to determine the ontological status followed by the epistemological status of canon law.²⁵ Before doing so, he defines two relevant terms, namely, the Church and law:

The Church [is] understood as the community of faith, hope, and charity, which finds its life and support in the Spirit of the Lord Jesus and which is a visible instrument or sacrament of salvation.²⁶

Then he defines the term law and says:

Law [is] understood from the common human experience of the juridic reality, which includes the communal organisation and the order of social life without having passed first the lense of a particular philosophy of law or social phenomena.²⁷

Both the theology of canon law and the ecclesiological crisis lead to a request for clarification of the ontological and epistemological status of canon law.

²⁵ Rouco Varela does not say what he means by 'epistemology,' but it appears that it refers to the method that is used in applying canon law. The French words he uses in this context are also *saisir* and *connaître*. See Rouco Varela, "Le statut ontologique," p. 225. Another indication that epistemology refers to method, or possibly to the science of canon law, is his insistence that a foundation of canon law has to precede a definition of the science of canon law. "Das 'Was' und 'Wie' der Kirchenrechtswissenschaft läßt sich ausschließlich von dem 'Was' und dem 'Wie' des Kirchenrechts selbst wissenschaftlich bestimmen." Once he speaks of epistemology, he does not use the term 'science of canon law' anymore (see also Rouco Varela, "Allgemeine Rechtslehre," p. 109).

²⁶ "L'Église, entendue comme communauté de foi, d'espérance et de charité, qui trouve vie et soutien dans l'Esprit du Seigneur Jésus, et qui est instrument visible ou sacrement du salut" (Rouco Varela, "Le statut ontologique," p. 221).

²⁷ "Le droit, entendu à partir de l'expérience humaine commune de la réalité juridique, qui inclut l'organisation communautaire et l'ordre de la vie sociale, sans avoir fait d'abord passer à travers la lentille d'une philosophie particulière du droit ou des phénomènes sociaux" (Rouco Varela, "Le statut ontologique," p. 221).

2 - THE ONTOLOGICAL STATUS OF CANON LAW

Rouco Varela starts with determining the ontological status of canon law.²⁸ This determination has to begin with the Mystery of the Church (*fides quaerens intellectum*). He says,

Only the attentive contemplation, the docile understanding of what the Church is *in faith*, what it is as a specific moment of the history of salvation, can lead to the understanding of what canon law is in its intimate ontological nature.²⁹

In order to determine the ontological status of canon law, Rouco Varela proposes to follow what he calls a *progressive process*. This process entails five steps:³⁰

1. He starts with the people of God. This model of people of God provides the ultimate foundation for the community aspect of the Church. This idea of people of God contains necessarily an idea of intersubjectivity and inter-personal relations. This idea of people of God is in itself, however, not enough to provide a

²⁸ Rouco Varela also speaks of the ontological status of canon law in terms of determining the meaning (*Sinndeutung*) of canon law, after he has said that the problem of a Catholic theology of canon law has two fundamental problems: a methodological and a thematical problem. The methodological problem concerns the position of this theology and the thematical problem refers to the juridical dimension of the Church that should be investigated. See Rouco Varela, "Grundfragen," pp. 341-352.

²⁹ "Seule la contemplation attentive, la compréhension docile de ce qu'est l'Église *dans la foi*, de ce qu'elle est comme moment spécifique de l'histoire du salut, peuvent conduire à comprendre ce qu'est aussi, dans sa nature ontologique intime, le droit canonique" (Rouco Varela, "Le statut ontologique," p. 222).

³⁰ Rouco Varela describes this process, in different terms, but with basically the same content in his articles "Grundfragen" (pp. 348-351) and "Le statut ontologique," (pp. 223-224).

justification for the existence of canon law, because, as he says, the community could exist and realize itself by way of a spiritual communication of non-objectifiable values.³¹

2. The constitution and the existence of the Church as people of God cannot be understood without turning to the Mystery of Christ. The Church is people of God in as far as it exists and lives as Body of Christ, and through the Spirit that nourishes and animates the Church. So the Church only exists as a christological community and especially as a visible Incarnation.
3. This christological nature and the visibility of the Church demand a sacramental force and character (in its fundamental meaning).³² This sacramentality concretizes itself in Word and sacrament. In its kerygmatic and sacramental structure the Church is a community knit (bonded)³³ together, both internally and externally. The Eucharist is the bond of the ecclesial community due to its source and its end.
4. This community, bonded together by Word and sacrament, cannot realize itself other than as an apostolic community; Word and sacrament can only be constitutive and

³¹ He does not explain what he means by a 'spiritual communication of non-objectifiable values:' "[...] une communauté peut exister et se réaliser sur le mode d'une communication purement spirituelle de valeurs non objectivables" (Rouco Varela, "Le statut ontologique," p. 223).

³² See Rouco Varela, "Le statut ontologique," p. 223; in his article "Grundfragen," (p. 349) Rouco Varela does not speak about a 'demand' (*comporte*), but simply says that this visibility of the Church as Body of Christ is also expressed in the communicative means of kerygma and sacrament.

³³ The German text speaks about *Bindung* (Rouco Varela, "Grundfragen," p. 349); the French text speaks about *articulation*, but the translators explicitly mention that the Spanish word used by Rouco Varela is *vinculación* (Rouco Varela, "Le statut ontologique," p. 223).

ordering factors of the Church when, in history, they are recognizable as the Word and sacrament of Jesus Christ. The Church can only speak about its visibility if it can present itself, historically, as a christological visibility. The apostolic succession makes this possible (due to the *mission* that the apostles received).

5. The Church is not only People of God, Body of Christ and apostolic community, it is also a human community.³⁴ People follow the call of God with their whole being, including their whole anthropological integrity, which also includes a communal and societal aspect (*Gemeinschaftlichkeit und Gesellschaftlichkeit*). Rouco Varela emphasizes that, of course, the Church is 'Church,' not only due to social anthropological factors, but due to the perpetual decisions of God the Father through Jesus Christ in the Holy Spirit.

In conclusion, Rouco Varela says that canon law "has the function to be the structural dimension *implicit in the ecclesial community*."³⁵

After identifying the ontological status of canon law, Rouco Varela determines its epistemological status.

³⁴ In the article "Le statut ontologique," this anthropological aspect does not appear as a fifth aspect, but is mentioned separately from the other four points. In the article "Grundfragen," this human dimension is mentioned as the fifth point in the process.

Especially the understanding of the Church as people of God and Body of Christ is an indication that the Church is a community of people. If it is a given fact that every community has rules (or order) then it is not clear what the contribution is of this fifth element to the process, as Rouco Varela describes it.

³⁵ "[...le droit canonique] a fonction d'être 'la dimension structurale *implicite dans la communion ecclésiale*'" (Rouco Varela, "Le statut ontologique," p. 224.)

3 - THE EPISTEMOLOGICAL STATUS

Rouco Varela starts with saying that determining the epistemological status of canon law implies, to begin with, a knowledge of its foundations and its theological nature and "it requires that one knows it as a living reality of the historical moment in which the life of the Christian is situated and fundamentally committed."³⁶ Rouco Varela outlines in three phases what he calls an integral process of knowing and understanding, in faith, canon law:

1. A sapiential, speculative phase: the knowledge (*la connaissance*) of the principles and the fundamental structures;
2. A historical phase: the knowledge of the developments and of the institutional unfolding through the ages until the present, the *hic et nunc* where the life of the faithful develops.
3. A scientific and practical phase: "the knowledge of the current canonical legislation, which in contemporary Christian existence determines and realizes the salvific imperatives of the Church emanating from its theological *humus*."³⁷

³⁶ "[...] il exige qu'on le saisisse comme la réalité vivante du moment historique dans lequel la vie du chrétien se trouve située et vitalement compromise" (Rouco Varela, "Le statut ontologique," p. 225).

³⁷ "[...] la connaissance de la législation canonique en vigueur, qui détermine et réalise dans l'aujourd'hui de l'existence chrétienne les impératifs salvifiques de l'Église émanant de son *humus* théologique" (Rouco Varela, "Le statut ontologique," p. 225).

According to Rouco Varela these three phases have epistemologically a common denominator: they all constitute distinct and complementary aspects of theological knowledge.³⁸

Rouco Varela, then, is able to determine the epistemological status of canon law. He proposes to do that by commenting on Mörsdorf's definition of the science of canon law:³⁹

Canonical knowledge is a theological knowledge, that is, one that knows how to use scientifically the dogmatic, scientific and juridical method, in order to achieve the ecclesial praxis most faithful to the Lord Jesus (that is, to the Gospel) and most possibly faithful to humanity (that is fruitful from a pastoral and missionary point of view).⁴⁰

Rouco Varela admits that he has not formulated a methodological program for the elaboration and application of canon law.

³⁸ The process, as described by Rouco Varela is not strictly epistemology. Rather it is a theory of history as to *how* canon law was discovered and how it developed in the mind of the community.

³⁹ Mörsdorf said that the science of canon law is a theological discipline with a juridical method (See also: Chapter II). Rouco Varela considers this definition as an orientative criterion. Rouco Varela, Corecco, *Sacramento e diritto*, p. 65.

⁴⁰ "[...] la connaissance canonique est une connaissance théologique, celle qui sait user scientifiquement des méthodes dogmatiques, historique et juridique, en vue d'obtenir la praxis ecclésiale la plus fidèle au Seigneur Jésus (i.e. à l'Évangile) et la plus fidèle possible aux hommes (i.e. féconde du point de vue pastoral et missionnaire)" (Rouco Varela, "Le statut ontologique," p. 226).

4 - EVALUATION AND CONCLUSION

The report on Rouco Varela shows that he has identified the question that contemporary canon lawyers and theologians should address. This question is in simplified terms: is the Church in need of canon law in order to be Church?

For any investigation, it is of the greatest importance that the question be phrased in such a way that it originates in what is known, but moves into the unknown. Rouco Varela has demarcated his question very clearly. He denies a merely natural philosophical understanding of canon law and at the same time distinguishes canon law from theology. He wants to ground canon law in theology, but he does not equate theology and canon law. The two disciplines have to be autonomous, but they relate to each other. Canon law has to have its own hermeneutics independent from theology. Rouco Varela does not say why and how theology and canon law are different. At the same time he does not deny the analogy between secular law and canon law; he affirms the human aspect of the law, which is important, because it provides a possibility to have changes in the law. Rouco Varela is able to raise the question with clear parameters.

The capacity of a person to raise a good question does not imply that the same person is also able to answer that question satisfactorily. The answer of Rouco Varela is an honest attempt to reply to the question if the Church is in need of law. His reply that the whole Mystery of the Church has to be taken into consideration is not completely successful. He indicates that there is to be a 'process' in applying all the images of the Church. The process he describes is valuable, because it indeed shows what the Church is. But in spite of this, I think he has not fully answered his own question if the Church is in

need of canon law to be herself. He started his 'process' with the idea of 'people of God.' Such a point of departure does not do away with the impression that his theory is ultimately also based on the idea that where there is a group of people there is law (*ubi societas ibi ius*). Rouco Varela accepts this principle on the basis of historical experience. He answers that for the Church to be a sacrament is to have a visible structure. A community cannot have a visible structure unless it has laws. Rouco Varela really formulated a theory as to what canon law is, its origin and its place; he did not advert to the specific nature of canon law. Hence his theory is correct, but incomplete.

Rouco Varela is, however, better able to answer the question about the relationship between the science of canon law and theology. Then, his thoughts on the ontological status of canon law help to see that theology, especially faith, should be a decisive moment in the interpretation of canon law: a decisive moment, but for Rouco Varela never the exclusive aspect of interpretation.⁴¹ He has presented a good balance between theology and the science of canon law.

⁴¹ It is important to notice that faith is not the exclusive criterion for interpreting the law. Corecco, on the other hand, will consider canon law as an *ordinatio fidei*.

PART 3 - AN ANALYSIS OF THE THEORY OF EUGENIO CORECCO

Eugenio Corecco was born in Airolo in Switzerland on October 3, 1931.¹ He was ordained a priest for the diocese of Lugano in 1955 and ordained a bishop for this diocese on June 29, 1986. He studied theology at the Gregorian University in Rome (licentiate in 1956), canon law in Munich (doctorate in 1962)² and civil law in Fribourg, Switzerland (licentiate in 1965). After these studies he was appointed teacher at the seminary in Lugano and also Vice-officialis for his diocese. From 1967 until 1969 he worked as Assistant Professor at the *Kanonistisches Institut* of the Ludwig-Maximilians University in Munich. Subsequently he became Ordinary Professor of canon law at the Faculty of Theology in Fribourg, Switzerland, where he was also dean between 1979 and 1981. He left this university in 1986. Between 1976 and 1986 Corecco was also a visiting professor at the Catholic University of Milan as well as at the autonomous faculty of Protestant theology in Geneva.

¹ E. Corecco provided biographical information in a letter to me, dated June 30, 1989, and he sent also some sources for this analysis.

² The title of his doctoral dissertation is *La formazione della Chiesa Cattolica negli Stati Uniti di America attraverso l'attività sinodale: con particolare riguardo al problema dell'amministrazione dei beni ecclesiastici*, Pubblicazione del Pontificio Seminario Lombardo in Roma. Ricerche di Scienze Teologiche, vol. 7, Brescia, Morcelliana, 1970, 245 p.

He organized the Fourth Congress of the *Consociatio Internationalis Studio Iuris Canonici Promovendo* held in Fribourg (Switzerland) in 1980. In 1986 this association elected him as president.

In 1982 he was appointed a member of a commission of experts, created by John Paul II to revise the text of the Code submitted for papal approval. In 1983 he was appointed a consultor of the Pontifical Commission for the Interpretation of the Code, presently called the Pontifical Council for the Interpretation of Legislative Texts. In 1987 John Paul II appointed him as a member of the Bishops' synod and in 1988 he became vice-president of the episcopal conference of Switzerland.

Corecco was also a founder of the Italian edition of the international periodical *Communio*.

Corecco has, for the major part, published his thoughts in articles.³ Some of these articles were collected and published in book form.

³ For a complete bibliography see E. Corecco, *Théologie et droit canon: Ecrits pour une nouvelle théorie générale du droit canon*, P. Le Gal (dir.), *Studia Friburgensia*, vol. 68, *sectio canonica*, vol. 5, Fribourg, Éditions Universitaires Fribourg Suisse, 382 p. (to be published in the Fall of 1990).

CHAPTER 1 - AN OVERVIEW OF THE THEORY OF CORECCO

Corecco started publishing his ideas in the second half of the sixties. Thus he was on the scene at the start of the implementation of the council, and while the revision of the Code of Canon Law was taking place. He was actively involved in the final stage of the latter process, for he was a member of the commission that revised the draft submitted to the pope in 1982.

Corecco had his canonical training in Munich, and he mentions several times in his articles that he had the honour of having had Klaus Mörsdorf as his teacher.

In reading Corecco's bibliography, one can see that he especially focuses on issues that touch on ecclesiology and, even more, on issues that touch on the nature of canon law itself. A central idea in Corecco's work is the concept of *communio*. In Corecco's own terms, one can say that he uses *communio* as the key concept for understanding canon law. Corecco not only applies this concept to the nature and foundation of canon law, but he also uses it in evaluating the new Code and in treating of canonical issues. Overall, these issues are of a more theoretical than a practical nature.

Although the work of Corecco can be classified under five headings, this does not imply at all that these five subjects are not interrelated. For the purposes of this part of the dissertation, namely a report on the theory of Corecco, such a subdivision will add to clarity.

The report, then, starts with the foundation of canon law. Corecco is of the opinion that canon law is not an *ordinatio rationis*, but an *ordinatio fidei*. He is also of the opinion that the end of canon law is *communio*. Actually, he proposes to use the concept of *communio* as--what he calls--the hermeneutical criterion for interpreting canon law. With this renewed understanding of canon law as *ordinatio fidei*, and with *communio* as his hermeneutical criterion, he provides a context or basis for interpreting specific issues.

Before turning to specific issues, Corecco deals with the concept of codification as such, as well as the decision to recodify the Code. He discusses this subject in the light of the promulgation of the 1983 Code, and he notes the peculiarity of canon law vis-à-vis secular law. The second section, then, will report on Corecco's ideas of recodification. Only subsequently does Corecco address various canonical issues.

In the light of the object of this dissertation, namely a study of the relationship between theology and canon law in the work of Corecco, his ideas on the laity are pertinent. Corecco himself deals with the issues touching on the laity by first addressing issues concerning sacred power. In that context he considers, among other things, the general and ministerial priesthood.

This report of Corecco's theory will follow the sequence proposed by Corecco himself; thus section three treats of the sacred power and section four, the laity. In dealing with the faithful, Corecco goes beyond the issues of general and ministerial priesthood, and addresses also the obligations and rights of the faithful. Although he does deal with specific obligations and rights, of greater relevance are his ideas about the existence and nature of these obligations and rights. Especially relevant is his understanding of fundamental rights. The fifth section will report on this issue.

1 - CANON LAW

The nature of canon law is addressed by Corecco throughout his whole work. At times he devotes an article or even a book to the subject;⁴ at other times he mentions it in treating of a specific canonical problem. This section will focus on this theme.

In analyzing Corecco's work, one can see that in his early writings he reports solely on the historical development of the understanding of canon law. In his more recent works, he enters into discussion with contemporary scholars and brings forward his own theory. This theory starts by identifying the question which he believes the science of canon law must answer today. Then he proposes a change in the object of canon law from *salus animarum* to *communio*. This change is accompanied by a new understanding of canon law as an *ordinatio fidei* and not as an *ordinatio rationis*. Lastly, Corecco mentions the consequences of these changes for the methodology of canon law.

⁴ He presents his ideas in a most elaborated form in his book *Theologie des Kirchenrechts: Methodologische Ansätze*, Canonistica, Beiträge zum Kirchenrecht, Bd. 4, Trier, Paulinus Verlag, 1980, 116 p., which is a translation and revision of the articles "Diritto," in F. Arduoso, e.a. (eds.), *Dizionario teologico interdisciplinare*, vol. 1, Torino, Marietti, 1977, pp. 112-150; "Teologia del diritto canonico," in G. Barbaglio, S. Dianich (eds.), *Nuovo dizionario di teologia*, Edizioni Paoline, Alba, 1977, cols. 1711-1753; "Ordinatio rationis oder ordinatio fidei? Anmerkungen zur Definition des kanonischen Gesetzes," in *Internationale katholische Zeitschrift Communio*, 6 (1977), pp. 481-495.

1.1 · Determining the *status questionis*

Corecco divides the history of the science of canon law into three periods.⁵ He characterizes the first period, which starts with Gratian, as a *techno-juridical* phase: canon law was considered as methodologically and systematically distinct from theology. During this time, canon law developed into a juridical science. This first phase lasted until the Reformation when an *apologetic phase* began: canon law was then understood as *ius publicum ecclesiasticum* and was basically a confessional juridical system whose primary function was to guarantee the right of citizenship of the Catholic Church within a secularized environment. The third phase, the present one, started with the Second Vatican Council and is called a *theological phase*:⁶ the council demanded a rethinking of canon law. In identifying this third phase, Corecco points especially to *OT* 16 and *LG* 8, which talk about the mystery of the Church.⁷

⁵ Corecco separates the history of the science of canon law into three periods (See Corecco, "*Ordinatio rationis*," pp. 481-482). In the article "Aspects of the Reception of Vatican II in the Code of Canon Law," (in G. Alberigo, J.-P. Jossua, J.A. Komonchak (eds.), *The Reception of Vatican II*, Washington, DC, The Catholic University of America Press, 1987, p. 295) Corecco mentions as a fourth phase for canon law not the science of canon law, but a *sapiential* phase; he does not say what he means by that, but only says that it lasted until Gratian.

⁶ Corecco remarks that, because of the subtle anti-juridical vein at the council, one of the seemingly most paradoxical results of Vatican II has been a provoking of a rigorous renewal of the canonical science. He is also of the opinion that theological science has not yet taken notice of this renewal. See Corecco, *Theologie des Kirchenrechts*, p. 96.

⁷ Corecco notices that the way these documents view canon law is inspired by the German canon lawyer G. Phillips and the university of Tübingen. Stickler and Heimerl especially have attempted to place the ultimate root of the social character of the Church within the mystery of the Incarnation of the Son of God. The Incarnation requires that there be a visible Church. The council adopted their idea and envisioned that an indissoluble bond had been established between the social and visible dimensions of the Church as the totality of the mystery of the Incarnation and the existence of the juridical

Corecco suggests that Rudolph Sohm was the one who most particularly raised the question about the foundation of canon law. Sohm brought the problem back into the realm of ecclesiology, because he asked what the function of canon law was for the concept of Church. The merit of Sohm was that he pointed out

that canon law does not represent an autonomous reality, but depends in a strictly functional way on the concept of Church, and for that reason it is an ecclesiological reality.⁸

Corecco approvingly refers to Mörsdorf, considering him to have been the one who most directly addressed himself to Sohm's question:

[...] Mörsdorf has sought the theological point of insertion of ecclesial law within the very elements which constitute the Church, that is, in Word and

dimension. Corecco says that this doctrine has however not been able to render theoretically plausible the existence of law itself. He mentions two reasons for that: first, the council did not theologially redefine the concept of canon law and therefore had to borrow it from the social philosophy of the Church; second, even if the Incarnation implies a visibility of the Church, that visibility does not automatically postulate a juridicity, but could also express itself through a purely charismatic structure, as Sohm said. Corecco concludes that in this proposal the foundation of canon law is ultimately derived from the social structure of human social life. He remarks that Paul VI, in his address to the international congress for canon law in 1973, substituted the Incarnation for the Holy Spirit. Corecco says that to propose that all institutions and juridical elements are sacred, because they are animated by the Holy Spirit, is an insufficient proposal. This proposal still presupposes the law of the Church and the juridical phenomenon can not be deducted from the Holy Spirit without the mediation of the Church. Corecco wants to avoid a voluntaristic basis of canon law, according to which Christ and the Spirit wanted to have the juridical aspect of the Church. See Corecco, *Theologie des Kirchenrechts*, pp. 90-92.

⁸ "[...] che il diritto canonico non rappresenta una realtà autonoma, ma dipende in modo strettamente funzionale dal concetto di Chiesa e che perciò è una realtà ecclesiologica" (E. Corecco, "Il rinnovo metodologico del diritto canonico," in *La Scuola cattolica*, 94 (1966), p. 23).

sacrament.[...] In Mörsdorf's position emerges the key element of all Catholic fundamental theology, that is, that of the *locutio Dei attestans*.⁹

Corecco draws on this, and argues that Word and sacrament give existence to a kerygmatic and sacramental community:

The 'incarnational' principle finds its realization in the Church, even without relation of total identity with Christ's Incarnation, through the mediation of Word and sacrament, giving to the whole ecclesial reality a primordial sacramental valence. It guarantees, therefore, the necessary existing relationship between Church and canon law.¹⁰

Corecco sees Mörsdorf's merit in his having identified a *locus theologicus* and having applied a rigorously theological method. But Corecco expresses some criticism as well: Mörsdorf defined canon law as a theological discipline with a juridic method.¹¹ Corecco remarks

If it is true that, in order to avoid incurring in a positivistic option, the method must be defined on the basis of the nature of the object and not

⁹ "[...] Klaus Mörsdorf [suchte] den theologischen Ansatzpunkt des kirchlichen Rechts in den konstruktiven Elementen der Kirche selbst, d.h. in *Wort und Sakrament*. [...] Nach Mörsdorf taucht das Schlüsselement der ganzen katholischen Fundamentaltheologie, der *locutio dei attestans*, auf" (Corecco, *Theologie des Kirchenrechts*, p. 92-93).

¹⁰ "Das Prinzip 'Inkarnation' findet seine Verwirklichung in der Kirche - sei es auch ohne Beziehung der totalen Identität mit der Menschwerdung Christi - über die Vermittlung von Wort und Sakrament und gibt so der ganzen kirchlichen Wirklichkeit einen ursprünglichen sakramentalen Wert. Sie garantiert daher die notwendig existierende Beziehung zwischen Kirche und kanonischem Recht (Corecco, *Theologie des Kirchenrechts*, p. 93).

¹¹ In an article in 1966 Corecco confirms the position of Mörsdorf and does not criticize it at all. One can clearly see the development in thinking in Corecco when in his later writings he starts questioning Mörsdorf's theory (Corecco, "Il rinnovo metodologico," p. 35).

vice versa, in what sense is it possible to apply the juridical method to a theological reality?¹²

Corecco then turns to Rouco Varela who has attempted to overcome this dilemma. He says that Rouco Varela has convincingly shown that the philosophical notion of law should not be taken as the starting point. The main reason is that canon law is not generated by a dynamism spontaneous to human social life, but it is inherent to the nature of the Church; it is the product of faith and is knowable only through faith. The second critical point made by Rouco Varela is that the problem of juridical phenomenon has to be addressed from all categories, or components, of the Church and not simply from one particular aspect. The first category is that of the people of God: this concept provides an anthropological meaning for the concept of law and avoids an excessive spiritualization of the *ius divinum*. The second category is that of the mystical body of Christ. This category helps to show that the visibility of the Church is sacramental in nature. The third category is the Church as a community built on Word and sacrament. Lastly, the apostolic succession guarantees the authenticity of the canonical injunctions of the Church. Corecco says

It follows that the ontological status of canon law must be determined within the function that is capable of expressing the dimension through which the Church, as 'sacrament of salvation in Christ,' appears in a binding social and communal manner in the world. Herewith one can define canon law as the 'implicit structural dimension of the ecclesial communion.'¹³

¹² "Wenn es wahr ist, daß um nicht der Gefahr einer positivistischen Option anheimzufallen, die Methode ausgehend von der Natur des Objektes definiert werden muß und nicht umgekehrt, in welchem Sinne ist es dann möglich, die juristische Methode auf eine theologische Wirklichkeit anzuwenden?" (Corecco, *Theologie des Kirchenrechts*, p. 93).

¹³ "Daraus folgt, daß das ontologische Statut des kanonischen Rechts bestimmt sein muß innerhalb der Dynamik des Mysteriums der Menschwerdung durch die Funktion, die es innehat, die Dimension zu zeigen, wodurch die Kirche sich als 'Sakrament des Heils in

Corecco affirms Rouco Varela's contribution in determining the *status quaestionis*, which is not whether the Church can tolerate law, nor whether it needs law because of its human condition. The question, as Rouco Varela poses it, is whether the Church 'internally' needs law. In other words: does the Church need law to be itself a sacrament of Christian salvation that lives by the breath of the Holy Spirit in faith, hope, and charity?¹⁴ Corecco sees the second contribution of Rouco Varela to have been his showing that a reflection should encompass the whole of the Church and not just one particular aspect.¹⁵

In his own words, Corecco then phrases the question as follows:

The problem for Catholic theology, then, is not that of producing the theological proof of the existence of canon law, which is ultimately academically not even questioned. The problem is that of providing a theologically correct foundation of a reality which, if not always at the level of practice, at least at that of theoretical consciousness already belongs to the content of faith. The problem, therefore, is one of method. Canon law is to be given a foundation no longer on the basis of natural law or of social presuppositions, but from a purely theological point of departure.¹⁶

Christus' verbindlich in einer sozialen und gesellschaftlichen Weise in der Welt zeigt. Damit kann man das Kirchenrecht als 'der kirchlichen *communio* implizite strukturelle Dimension bezeichnen'" (Corecco, *Theologie des Kirchenrechts*, p. 95).

¹⁴ Corecco, *Theologie des Kirchenrechts*, p. 95.

¹⁵ In evaluating Rouco Varela's proposal, Corecco says that the constitutional elements should be weighted on its formal binding force. Corecco is of the opinion that the apostolic succession presupposes the existence of Word and sacrament. "Die Kirche ist nicht wegen der apostolischen Sukzession rechtlich bindend [...], wenn nicht in dem Sinne, daß die Authentizität des Rechtsanspruchs garantiert, der ontologisch bereits in der fundamental sakramentalen Struktur der Kirche verwurzelt ist" (Corecco, *Theologie des Kirchenrechts*, pp. 93-94).

¹⁶ "Das Problem besteht deshalb für die katholische Kirche nicht darin, den theologischen Nachweis der Existenz des kanonischen Rechts zu führen, der letztlich wissenschaftlich nicht einmal in Frage gestellt wird, sondern vielmehr eine theologisch

1.2 - The theory of Corecco

Corecco remarks that the 'theologization' or the 'sacramentalization' of canon law does not lead to a 'de-juridization' of it, because it is still normative. Corecco argues that there is no stronger binding and imperative reality than the fact that God makes himself manifest to humanity through the historical concreteness of the Church. The formal juridical force helps to intensify and render absolute the normative nature of ecclesial law. In relation to secular law one can say that the binding force of canon law is much stronger, since it is rooted in the normativity of divine law, that is, of revelation.

In fact, it is a law, which, unlike the secular one, does not pretend to require obedience at a merely ethical level; it goes to the very level of the ultimate and supernatural destiny of man: his salvation. It is, therefore analogical, that is, different from secular law in the whole totality of its elements, not only as a theological reality, but also as a juridical one.¹⁷

Corecco sees it as impossible to pretend that once the existence of the theological status of canon law is demonstrated, it can be dealt with as a worldly reality.¹⁸

korrekte Begründung für eine Wirklichkeit zu geben, die bereits, wenn auch nicht immer in der Praxis, so wenigstens auf der Ebene des theoretischen Bewußtseins, zum Inhalt des Glaubens gehört. Das Problem ist daher ein Problem der Methode. Es geht in der Tat darum, das kanonische Recht nicht mehr ausgehend von naturrechtlichen [...] oder sozialen Gegebenheiten, sondern von einem klaren theologischen Ausgangspunkt grundzulegen" (Corecco, *Theologie des Kirchenrechts*, pp. 81-82).

¹⁷ "Es ist in der Tat ein Recht, das im Unterschied zum staatlichen nicht den Anspruch hat, Gehorsam auf rein ethischer Ebene zu verlangen, sondern auf jener des letzten und übernatürlichen Schicksals des Menschen, des Heils. Es ist daher analog, d.h. verschieden vom staatlichen, in der ganzen Gesamtheit seiner Elemente, nicht nur als theologische, sondern auch als rechtliche Wirklichkeit" (Corecco, *Theologie des Kirchenrechts*, p. 98).

¹⁸ Corecco points out that although the canonical science has always considered canon law as a law *sui iuris*, modern literature sees the impossibility of continuing to consider secular law as *analogatum princeps* of the ecclesial one. In fact the use of analogy is

The attempt to develop a renewed ontological and epistemological status for canon law inevitably requires a formal definition of the terms 'right' (*diritto*) and 'law' (*legge*). Corecco mentions that Thomas Aquinas, who was neither a jurist nor a canon lawyer, but a philosopher and theologian, outlined the elements for a definition of law (*STh* I-II, q. 90 ff) and of right (*STh* II-II, q. 57). Corecco says in scholastic terms, that the science of canon law has to deal with the formal definition of its *obiectum quod*, i.e., its notion of law. Law was defined on the basis of the concept of justice. The following section shows that, for Corecco, the end of law is not 'justice,' but *communio*. After that, Corecco moves to the second problem: a definition of canon law itself. Corecco proposes to view canon law as an *ordinatio fidei*.

1.2.1 - The end of canon law is *communio*

Corecco suggests that the definition of law underpinning the science of canon law, can be traced back to philosophical roots in the Aristotelian system, in which law was envisioned as *objectum virtutis iustitiae*.

Corecco, however, remarks that the basis of canonical justice is not to be found in natural law, because the Church *vivit iure divino*. He says that in the Church salvation, viz., the justice of God, has to be realized.¹⁹ The peculiarity of divine justice vis-à-vis human

questioned, also because it is not able to define the specific nature of canon law in positive terms. It can only tell what it is not in comparison with secular law. See Corecco, *Theologie des Kirchenrechts*, p. 98.

¹⁹ "Die in der Rechtsphilosophie gründende und von der Kanonistik seit jeher mitgeschleppte formale Definition des Rechts geht letzten Endes auf das aristotelische System zurück, wo das Recht als *objectum virtutis iustitiae* bezeichnet wurde (*STh* II-II, q. 57 a. 1). Der Maßstab der kanonischen Gerechtigkeit kann aber nicht einfachhin im Naturrecht gesucht werden, da die Kirche *vivit iure divino*. Was in der Kirche verwirklicht

justice becomes noticable inasmuch as the values of ecclesial sociality, that are to be realized, are not so much the cardinal virtues (to which 'justice' belongs), but the theological virtues of faith, hope, and love.²⁰

The end of canon law also becomes clear in another aspect:

The ultimate end of the canonical order is not simply that of guaranteeing the *bonum commune ecclesiae*, but of realizing *communio*. Indeed, it is the specific modality by which, within the ecclesial community, both intersubjective relations and those which exist at a more structural level between the particular Churches and the universal one become juridically binding. [...] It follows that the principle of *communio* must be considered as the formal principle of canon law, that is of the *nova lex evangelii*. From it the juridical structure of canonical institutes is to be derived at both the formal and the material levels.²¹

werden muß, ist das Heil, d.h. die Gerechtigkeit Gottes [...]" (E. Corecco, "Theologie des Kirchenrechts," in *HdbKathKR*, pp. 22-23). Corecco does not elaborate on this interesting understanding of salvation. He does not mention it anywhere else in his writings either! In speaking about God's justice he does mention that this is a revealed justice, which is realized in the *communio cum Deo et hominibus*. See E. Corecco, "Considerazioni sul problema dei diritti fondamentali del cristiano nella Chiesa e nella società: Aspetti metodologici della questione," in E. Corecco, N. Herzog, A. Scola (dirs.), *Les droits fondamentaux du chrétien dans l'Église et dans la société: Actes du IVe Congrès international de droit canonique, Fribourg (Suisse), 6-11, X, 1980*, Fribourg, Éditions universitaires, Freiburg i. Br., Verlag Herder, Milano, Dott. A. Giuffré Editore, 1981, p. 1216.

²⁰ Corecco refers for these ideas to an article of R. Sobański, "Die methodologische Lage des katholischen Kirchenrechts," in *AfkKR*, 147 (1978), pp. 345-376, espec. 360-376. In the context of these values, Corecco remarks that the specific task of the canon lawyer and the legislator is to weave the juridical consequences of every fundamental theological value, which can be derived from the structure of the Church as a *communio ecclesiae et ecclesiarum*, into the canonical norms.

Corecco does not mention what the values of human justice are. The relationship between human and ecclesial justice is the same as the relationship between reason and faith or between nature and super-nature. See Corecco, "Considerazioni," pp. 1216-1217.

²¹ "Das letzte Ziel der kanonischen Ordnung besteht in der Tat nicht einfach darin, das *bonum commune ecclesiae* zu gewährleisten, sondern die *communio* zu verwirklichen. Sie ist in der Tat die spezifische Eigenart, mit der innerhalb der kirchlichen Gemeinschaft sowohl die zwischen-menschlichen Beziehungen rechtlich bindend werden, als auch jene, die auf der mehr strukturellen Ebene zwischen den Teilkirchen und der Gesamtkirche

Corecco argues that the radical difference between the philosophically understood *bonum commune ecclesiae* and the theological reality of *communio*, founded in revelation, is qualitative. This qualitative difference is the same as the gap that exists in the analogy between the *lex Moysis* and the *nova lex evangelii*, that is, the law of grace. When grace becomes ontologically incarnate in people, it puts them in a new relationship with God and other people, that is, in a relationship of communion:

Thus, it is the new, specifically ecclesial modality of the existence of the *ius divinum* as root of a visible sociality, different from all forms of merely human sociality, but so much the more binding, not only at the ethical but also at the structural level, because it claims by incarnating itself to mediate salvation, i.e., God's justice, through the institution 'Church.'²²

existieren. [...] Daraus folgt, daß das Prinzip der *communio* als Formalprinzip des kanonischen Rechts, d.h. der *nova lex evangelii*, betrachtet werden muß. Von ihm her sollte die Rechtsstruktur der kanonischen Institute sowohl formal als materiell abgeleitet werden" (Corecco, *Theologie des Kirchenrechts*, p. 100).

In the article "Valore dell'atto *contra legem*," (in *La norma en el derecho canónico: Actas del III. Congreso internacional de derecho canonico, Pamplona, 10-15 de octubre de 1976*, vol. 1, Pamplona, Ediciones Universidad de Navarra, S.A., 1979, pp. 839-859) Corecco touches the problem of legal certitude (*certezza del diritto*). He mentions that in modern law justice is sacrificed for certitude. In canon law this is not the case; there, justice and objective truth prevail over certitude and legality. It does not imply though that this legal certitude is not present at all; traditionally it is seen in the *salus animarum*, but Corecco proposes here that the certitude canon law should provide is the guarantee of the unity for which *communio* is the foundation.

In another article he says that a decision made in canon law does not have as its goal the realization of objective law, because the primary goal of ecclesial legal order is to guarantee the authenticity of the celebration of the sacraments and the proclamation of the Word which are the genetic sources of the legal order. See E. Corecco, "Das Urteil im kanonischen Recht," in L.C. Morsak, M. Escher (Hrsg.), *Festschrift für Louis Carlen zum 60. Geburtstag*, Zürich, Schulthess Polygraphischer Verlag, 1989, p. 267.

²² "Sie ist daher die neue spezifisch kirchliche Modalität der Existenz des *ius divinum* als Wurzel einer sichtbaren Sozialität, verschieden von jeder Form bloß menschlicher Sozialität, aber um so mehr bindend nicht auf ethischer, sondern auch auf struktureller Ebene, weil sie den Anspruch erhebt, indem sie sich 'inkarniert,' über die Institution 'Kirche' das Heil, d.h. die Gerechtigkeit Gottes, zu vermitteln" (Corecco, *Theologie des Kirchenrechts*, p. 100).

Corecco sees this *communio* as *communio ecclesiae et ecclesiarum*.

1.2.2 - The meaning of *communio*

In his writings on the theology of canon law, Corecco does not explain what he means by *communio*. In some articles, however, where he deals with particular canonical problems, he gives an explanation.²³ For Corecco, then, the *locus theologicus* of the reality of *communio* is ecclesiological, expressive of LG 23, 1, where *communio* refers to *in quibus et ex quibus una et unica Ecclesia Catholica existit*.²⁴ He explains that this means that the universal Church that is realized in the particular Church is identical with the one that is constituted from the particular Churches. Corecco says,

The formula *in quibus et ex quibus* of *Lumen gentium* 23, 1 describes the mystery of the Church in its institutional essence. It is therefore a model that can only be understood in faith and that because of its own logic is incomparable with any civil constitutional model, even a federal one.²⁵

Corecco sees a structural dimension to *communio*. Several times he points out how the universal and the particular Church exist in and through each other. The same is applicable to general and ministerial priesthood. Corecco transposes these ideas from

²³ Especially in Corecco, "Considerazioni," pp. 1207-1234.

²⁴ Corecco refers to W. Aymans' *Habilitationsschrift* (*Das synodale Element in der Kirchenverfassung*, Münchener theologische Studien, III. Kanonistische Abteilung, Band 30, München, M. Hueber, 1970, xxxix, 389 p., espec. pp. 318-366). In this work Aymans devotes a chapter to the *communio ecclesiarum* (Corecco, "Considerazioni," p. 1223).

²⁵ "La formula *in quibus et ex quibus* della LG 23, 1, coglie il mistero della Chiesa nella sua essenza istituzionale. E' perciò un modello conoscibile solo per fede che, in forza di una logica precisa, non trova riscontro adeguato in nessuno modello costituzionale statale, neppure in quello federalistico" (Corecco, "Considerazioni," p. 1223).

ecclesiology to theological anthropology: by baptism a person becomes structurally a Christian and not only on an ethical level. The Christian represents Christ, because Christ is present with his whole Body in the Christian. The implication for the position of the person in the Church is that the Christian cannot be considered an individual reality, who is defined vis-à-vis a collective reality. Rather, a person is a subject in whom the whole community of Christians is present in a mystical, but real way.²⁶

1.2.3 - Canon law: an *ordinatio rationis* or *ordinatio fidei*?

After Corecco has identified that *communio* is the end of canon law, he moves to the second problem which deals with the formal definition of canon law. He notes that many canon lawyers apply Thomas Aquinas' definition, viz., *quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata* (STh II-II, q. 90 a. 4). Corecco points out that those applying this definition consider the Church as a human society raised to the supernatural order.

According to Corecco the nub of the Thomistic definition is provided by the *ordinatio rationis*. By defining the law as *ordinatio rationis*, Thomas favours the *ratio* over the will and considers it as the supreme principle over human acts. Corecco says that according to Thomas, "The law does not bind in force of obedience to a commanding will,

²⁶ According to Corecco, H.-U. von Balthasar expressed the structural meaning of *communio* adequately in the title of the book *Das Ganze im Fragment: (Aspekte der Geschichtstheologie)*, Einsiedeln, Benziger, 1963, 357 p.): the whole Church is present in a fragment of the Eucharist and at the same time the whole Church is constituted because of all the Eucharistic celebrations. See Corecco, "Considerazione," p. 1224.

whether transcendent or human, but from the stringency of a syllogism of practical human reason."²⁷

In an attempt to determine what Thomas means by *ordinatio rationis*, Corecco starts by saying that there is a theological breadth in the treatise *de legibus*. He sees evidence for this even though Thomas defines law as an *ordinatio rationis*. Thomas considers such a definition valid not only for human and natural law, but also for the *lex aeterna* and the *lex divina*. Corecco recognizes that Thomas did not give a theology of canon law, but he does not doubt that Aquinas would have analogically applied his general definition founded on the *ordinatio rationis* to canon law. Corecco mentions that he will not attempt to speculate how Aquinas would have done this, but he asks in what sense canon law is an *ordinatio rationis*. He suggests that one has to see Thomas in his time; and in the context of his culture, it was no problem for Thomas to speak about an *ordinatio rationis*, because Christendom was considered to be ruled and governed by the eternal law, and the *ratio humana* was envisioned as having already been informed by faith. Corecco emphasizes that the problem Thomas addressed was not that of the juxtaposition between faith and reason--reason was subordinated to faith; philosophy was an auxiliary discipline to theology--but between faith and will.²⁸

In a cultural environment like the modern one, on the other hand, faith [...] is no longer accepted as a point of reference to the *bonum commune* because *ratio*, freed from all structural connection with faith, has become [...] the ultimate and unappealable criterion of all human action. Therefore, the

²⁷ "Das Gesetz verpflichtet nicht kraft des Gehorsams gegenüber einem gebieterischen transzendenten oder menschlichen Willen, sondern kraft der Stringenz eines Syllogismus der praktischen menschlichen Vernunft" (Corecco, *Theologie des Kirchenrechts*, p. 102).

²⁸ See Corecco, *Theologie des Kirchenrechts*, pp. 103-104.

science of canon law cannot define the *lex canonica* anymore as an *ordinatio rationis*, without creating a coarse misunderstanding concerning its scientific identity.²⁹

This implies, according to Corecco, that the idea of canon law as an *ordinatio rationis* is not applicable to canon law in present times. This concept of *ratio* finds, however, an analogy in faith. Since the Church can only be known through faith, canon law has to be defined as an *ordinatio fidei*.³⁰

This means that people know the *lex divina*, define it historically and 'incarnate' it in time, not by the stringent logic of the syllogism formulated by their own *ratio*, but by God's motivation, i.e., the formal authority of the Word of God, which the impulse of *gratia* leads them to accept in the act of faith.³¹

²⁹ "In einem Kulturkreis wie unserem modernen hingegen, wo der Glaube [...] nicht mehr als Bezugspunkt des *bonum commune* angenommen wird, weil die von jedem strukturellen Zusammenhang mit dem Glauben gelöste Vernunft [...] zur letzten, unanfechtbaren Instanz des ganzen menschlichen Handelns geworden ist, kann auch die Kanonistik die *lex canonica* nicht mehr als *ordinatio rationis* bezeichnen, ohne ein grobe Mißverständnis über ihre wissenschaftliche Identität zu schaffen" (Corecco, *Theologie des Kirchenrechts*, p. 93).

³⁰ Corecco, "Theologie des Kirchenrechts," in *HdbKathKR*, p. 23.

³¹ "Der Mensch erkennt somit die *lex divina*, indem er sie geschichtlich abwandelt und in der Zeit 'inkarniert,' und zwar nicht kraft der zwingenden Logik des von seiner eigenen *ratio* erdachten Syllogismus, sondern unter dem Antrieb Gottes, d.h. der formalen Autorität des Gotteswortes, die er unter dem Antrieb der *gratia* im Glaubensakt annimmt" (Corecco, *Theologie des Kirchenrechts*, p. 104).

Corecco says that no canonical legislator could permit himself to promulgate a law that would not bring out the essence of divine law that is brought forward in Word and sacrament.

In a footnote he adds that the deliberative vote of bishops in a council is not to be understood from the perspective of the human will. The bishops do not express their will, but their faith. It is a decision of faith that is decisive and definitive. Faith can only be established. See Corecco, "Das Urteil im kanonischen Recht," p. 263.

In relation to this Corecco mentions that the Church is not a democracy: voting is not an act of power, but it is to see how the Church believes. Faith cannot be imposed by voting; it can only be through conversion. See E. Corecco, "Parlamento ecclesiale o diaconia

Corecco says that this does not imply that the *analogia entis* as proposed by some Protestant theologians, should be eliminated completely,³² but it postulates the elimination of natural law as an obligatory passage in the process which creates the positive canonical norm.³³

1.3 - Methodological consequences

Now that Corecco has defined canon law as an *ordinatio fidei* and sees the end of the law in *communio*, the implications for canonical method become clear.

Corecco pointed out that he could not agree with Mörsdorf's thesis, that canon law is a theological discipline with a juridical method. He says that, as a consequence of his own theory, the juridical science can be no more than an auxiliary discipline. The juridical method can only be applied in a subordinate way. Corecco gives as his reason the connection between divine law and the canonical human law, arguing that it can be established only within the logic and methodology proper to faith:

The function of juridical science is that of discovering positive canonical norms which allow for an understanding of the rational non-contradiction

sinodale?" in *Strumento internazionale per un lavoro teologico* *Communio*, 1 (1972), pp. 32-44.

³² Among others Corecco mentions K. Barth who was according to him the first Protestant theologian who brought canon law back into the realm of the faith deposit (*Glaubensinhalt*). See Corecco, "Theologie des Kirchenrechts," in *HdbKathKR*, p. 18.

The terminology of *analogia fidei* was especially applied by Barth who rejected the use of an *analogia entis*. See J.L. Murphy, art. "Analogy of faith," in *NCE*, vol. 1, pp. 468-469.

³³ Corecco, *Theologie des Kirchenrechts*, p. 105.

(that is, the rationally binding value) of the *ius divinum*, knowable only through faith.³⁴

In fact he says that the role that juridical science has vis-à-vis canonical science is equivalent to the role the other sciences, for example, the humanities, have towards canon law.³⁵

He also addresses the relationship between canon law and other theological disciplines. As Corecco already said, canon law is part of the deposit of faith.³⁶

Canon law contains as a reality in itself a dogmatic truth, for it depends in its own norms upon the Word and Sacrament. [...] As an ecclesial reality formed by juridical institutes in which the binding juridical dimension of the Church is concretized in history, canon law is an essential reality in which the tradition of the Church, and consequently the truth contained in the Word and Sacrament is manifested by concluding facts.³⁷

³⁴ "[... es ist] die Aufgabe der Rechtswissenschaft, positive kanonische Normen ausfindig zu machen, die die rationale Unwidersprüchlichkeit (das ist die rational verbindliche Geltung) des im Glauben zu erkennenden *ius divinum* zu erfassen erlauben" (Corecco, *Theologie des Kirchenrechts*, p. 106).

³⁵ Corecco does not define what he exactly means by the juridical method, a theological method, or a canonical method.

³⁶ Both Corecco and W. Aymans emphasize that theology should be conducted from the perspective of *communio*. They add that theology is only then useful when it is exercised for establishing ecclesial *communio*. They also say that a theology that does not put itself within an ecclesial horizon can become a dangerous intellectual abstraction. See E. Corecco, W. Aymans, "Kirchliches Lehramt und Theologie, Erwägungen zur Neuordnung des Lehrprüfungsverfahrens bei der Kongregation für die Glaubenslehre," in *Internationale katholische Zeitschrift Communio*, 3 (1974), pp. 150-170.

³⁷ "Il diritto canonico in quanto realtà porta in sé stesso la verità dogmatica, perché partecipa della normatività propria alla Parola e al Sacramento.[...] In quanto realtà ecclesiale, formata da istituti giuridici in cui si concretizza nella storia la dimensione giuridicamente vincolante della Chiesa, il diritto canonico è una della realtà essenziali in cui si manifesta per fatti concludenti la Tradizione della Chiesa e di conseguenza la verità contenuta nella Parole e nel Sacramento," (Corecco, "Valore dell'atto *contra legem*," pp. 846-847).

1.4 - Conclusion

The major point of Corecco's theory is that canon law is an *ordinatio fidei*, because the Church can only be known through faith. Although he does not say it in so many words, it appears that the work of K. Barth has influenced Corecco's ideas. It would be worth finding out if this is the case, because Corecco then would have adopted a Protestant thinker in solving the question of the theology of canon law.

A direct point of his theory is the assertion that the end of the canonical order is not the *salus animarum*, but *communio*. In fact it deals with unity. Lastly, the methodological consequences are that the juridical method cannot function autonomously; Corecco says that it has a subordinated role, but he does not say to what it is subordinated: theology or canon law.

The following sections will report on major themes in Corecco's work. These sections will show if and how Corecco applies his proposed theory on the relationship between theology and canon law.

2 - CODIFICATION

Corecco reminds his readers that Vatican II in *Optatam totius* no. 16 decreed that the mystery of the Church should be taken into account when teaching canon law. This principle logically requires that it be applied to the creation of the law itself, which in turn implies that it should direct the revision of the Code. However, Corecco remarks that the concept of codification has changed; one of the results of the Enlightenment is that reason became dominant over faith. This being the case, the idea of codification of canon law

causes some problems, because the modern notion of law is more apt to express a societal and institutional notion of Church.³⁸ This tension between the modern idea of codification and the notion of law in the Church calls for an investigation of reasons favouring a renewed codification and reasons disapproving of it. The question, then, is whether the Church went through the process of codification like some European countries, or did it find an internal justification for codification?

Corecco published his thoughts on the codification as such after the promulgation of the 1983 Code. This allowed him to obtain data for answering his questions from both general principles, independent of this Code, as well as from the 1983 Code itself. One can say that he applied both an inductive and a deductive approach.

2.1 - A codification of the law

The decision to revise the *Code of Canon Law* brings forward an obvious question: Why revise the Code? Corecco remarks that this decision was made at a time when the whole of Europe was overexpanding its legislation; the Church, however, chose to tighten its legislation.³⁹ Then the question is posed: Why did the Church decide to recodify?

³⁸ Corecco, "Theological Justification," pp. 250-251. On the point of a philosophical notion or theological notion of canon law, Corecco refers to A.M. Rouco Varela, "Le statut ontologique et épistémologique du droit canonique: Notes pour une théologie du droit canonique," in *RSPTh*, 57 (1973), pp. 203-226.

³⁹ "Zu einem historischen Zeitpunkt, in dem sich die staatliche Gesetzgebung maßlos aufbläht und dadurch das kodifizierte gemeine Recht zu ersticken droht, erfährt die *Gesetzgebung der Universalkirche* eine bemerkenswerte Straffung und schlägt damit eine nicht umkehrbare Marschrichtung ein" (Corecco, "Die kulturellen und ekklesiologischen Voraussetzungen des neuen CIC," in *AfkKR*, 152 (1983), p. 7).

However, before Corecco deals with that question, he addresses the issue of codification itself.

According to Corecco the concept of codification is found in the ideas of the 18th century, where the ideal was to have the whole of reality, and therefore also the legal system, determined by reason; the idea was to make law rational. The Church defined as a perfect society is able to have such a law, but this becomes a problem when the Church is understood as *communio*. This implies that the Church is better able to verbalize its institutional side than to express its sacramental side:

The problem arises ultimately from the fact that the philosophical notion of law that lies behind the modern idea and experience of codification is not applicable to canon law, because the formal definition of the latter cannot prescind from its theological dimension.⁴⁰

Corecco mentions that in 1917 the Church did not have a problem with codification, because the Church was then understood as a perfect society. Through the *ius publicum ecclesiasticum* it was able to prove that the Church had the same juridical and institutional aspects as any other society.⁴¹ Corecco says that the 1917 Code had all the essential elements that a general legal theory required:

⁴⁰ Corecco, "Aspects of the Reception," p. 251.

⁴¹ E. Corecco, "Ecclesiological Bases of the Code," in *Concilium*, 185 (1986), vol. 3, p. 3.

- a) a *strict juridical system* of the five books according to the model of Gaius (*personae, res, actiones*);⁴²
- b) the principle of unity of legislative power of c. 27, § 1 CIC/1917;
- c) the principle of completeness (there are just two exceptions, namely the *ius liturgicum* and the *ius concordatarium*);
- d) the legislator gives the authentic interpretation, so that the jurisprudence "*facit ius (tantum) inter partes*."⁴³

Corecco points out that the 1917 Code satisfied the requirements of codification. One of the reasons was that the 1917 Code envisioned the Church as a perfect society, made up of unequal, hierarchically structured members.

The existence of a Code was also the result of a political and a theological consideration:

- 1) to determine the primacy of jurisdiction of the Roman Pontiff in the constitution of the Church;
- 2) to guarantee the peculiarity and scientific autonomy of the ecclesial law vis-à-vis the civil legal order.

⁴² Corecco does not give any account for the difference between the three books of Gaius and the five books of the 1917 Code. See Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," p. 8.

⁴³ Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," p. 8.

2.2 - Recodification of the law

Corecco is of the opinion that, even if there has been a general agreement to justify the codification in 1917, that is not enough to justify the contemporary revision of the Code. In fact, he presents several arguments against such a revision:

- 1) a modern system that would have left room for updating would have been practical, because accessibility to the law would have been easier;
- 2) the 1917 Code had as one of its purposes to demonstrate that canon law could sustain a comparison with civil law, a need which has completely vanished;
- 3) there is a risk in legislating for a long time when there is no experience with that law and old preconiliar ideas are still present;
- 4) the ecclesiology of Vatican II is still unclear and too many fundamental questions are still unanswered;⁴⁴
- 5) in a pluralistic society where people identify themselves in political terms and not in cultural and social terms, the codification as such is replaced by legislative micro-systems. This raises the question as to whether the Church has once again not taken into consideration modern cultural and juridical development;

⁴⁴ Corecco mentions the position of pneumatology in ecclesiology, the constitutional value of charisms, the constitutional character of the evangelical counsels, the relationship between the particular and the universal Church, the position of the Roman Pontiff over the bishops, or vice versa (Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," pp. 10-11, see also E. Corecco, "Theological Justifications of the Codification of the Latin Canon Law," in M. Thériault, J. Thorn (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, Organized by Saint Paul University and Held at the University of Ottawa, August 19-25, 1984*, vol. 1, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, p. 70).

6) the phenomenon of codification is a European phenomenon. Is it justifiable (reasonable), asks Corecco, to have the Roman, European legal tradition imposed on the whole world?⁴⁵

After these observations Corecco asks:

Is it possible to compile a Code which still maintains its essential cultural and juridical definition, even though its norms are no longer supported by its internal legal obligation, but rather by a theological truth that is located somewhere else; in summary: a Code that is sustained and determined by a super-ego, viz., Vatican II?⁴⁶

Corecco, subsequently, refers to the image that Pope John Paul II used in the presentation of the Code: a triangle whose head is Holy Scripture over the documents of the Council on one side and the Code on the other side.

In spite of these deliberations there are enough arguments that favoured the new codification. Corecco demonstrates that some arguments existed before the promulgation, while others date from after the promulgation of the Code. There are at least three favourable arguments:

1. The constitutional character of the 1983 Code;
2. The epistemological and hermeneutical change;
3. The individual member of the faithful as subject of the 1983 Code.

⁴⁵ Corecco refers to the *Lex Ecclesiae fundamentalis* that could have provided a better chance for cultural identity of people (Corecco, "Theological Justifications," pp. 72-73).

⁴⁶ "Ist es möglich, einen Kodex zu erarbeiten, der die ihm wesenseigene kulturelle und juristische Definition noch aufrechterhält, wenn sich seine Normen nicht mehr allein auf die ihnen innewohnende Rechtsverbindlichkeit, sondern letztlich auf eine theologische Wahrheit stützen, die anderswo liegt, kurz: einen Kodex, der von einem 'Über-Ich', dem II. Vaticanum, getragen und beherrscht wird?" (Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," p. 11).

2.2.1 - The constitutional character of the 1983 Code

The 1917 Code was universal in nature and had the principle of *unum imperium, unum ius*. Vatican II applied the principle of *communio*. This concept

meant to designate [...] the mutual inclusion of the universal in the particular and of the particular in the universal. In the ecclesiological dimension, this finds paradigmatic expression in the mutual immanence of the universal and the particular Church.⁴⁷

This implies that the 1983 Code does not focus on a universalistic law, but is constitutional in nature.

Another example of the constitutional nature is the reinforcement of the legislative autonomy of the particular Church: in the 1983 Code the legislator has respected the right of particular Churches to legislate (unless a case is explicitly reserved), so permission does not have to be obtained anymore for every single case.⁴⁸

A third example is the catalogue of obligations and rights of the faithful: these obligations and rights do not have the character of 'fundamentality' as do the rights of the citizen in a state constitution,⁴⁹ but they do have a material priority "in the measure that

⁴⁷ Corecco, "Theological Justifications," p. 80.

⁴⁸ Corecco points out that this is especially remarkable in a time where the legislation of states has expanded so much that it is getting out of proportion. The Church decreases the volume of laws and gives the existing law a more constitutional character, with space for particular legislation (Corecco, "Theological Justifications," p. 81).

⁴⁹ See also the section on the faithful which explains Corecco's ideas on this in more detail.

they derive from divine positive or natural law."⁵⁰ As the section on the faithful will show, Corecco divides the catalogue of duties and rights into three groups: those of divine law; those of natural law but of ecclesiological nature; and those of natural law or pertaining to general principles of law.⁵¹

The final example that Corecco mentions is that the 1983 Code describes persons not in categories of *de personis*, but in terms of their ecclesiological function and role. The 1983 Code applies this to the diocesan bishop, the metropolitan and the pastor.

2.2.2 - The epistemological and hermeneutical change

Corecco says that the 1917 Code had as its operative epistemological and hermeneutical principle *reason*. The 1983 Code, however, has *faith* as its fundamental principle. This means that not the juridical principle, but the theological principle has precedence:

The 1983 Code is arranged as systematically as the old Code. However, for the hermeneutical and epistemological principle of philosophical and legal reason, it has substituted that of faith. The change, to put it in scholastic philosophical terms, is in the formal object *quo*. The new codification is no longer placed under the sign of the rational penetration of the canonical

⁵⁰ Corecco, "Theological Justifications," p. 82.

⁵¹ Corecco says that the principle that governs the relationships between these rights and duties is that of *aequitas canonica*, "which does not completely coincide with a relaxation in the application of the norm, and which should be considered as an ecclesiological expression of the principle of *communio*" (Corecco, "Theological Justifications," p. 84).

system, but rather, in its central core, along the path of institutional and juridical translation of the content of faith.⁵²

Corecco says that, besides this central change, the Code contains elements that (1) are dogmatic definitions, (2) are of an ecclesiological nature, or (3) reflect ecumenical and pastoral concerns.

He remarks that, although the ecclesiological bases of the Code determine the nature of the norms or their sytematization, often juridical criteria order the content of canon law. This implies that the legislative order has its own autonomy and can possess its own ecclesiological content. He perceives this as an explanation of

why the organization borrowed from the conciliar model of the participation of the people of God in the three *munera* of Christ can exercise [...] an epistemological function that overshadows all the other dogmatic data.⁵³

⁵² Corecco points out that this is at least the case for books II, III and IV. Later on an evaluation of the Code from the perspective of this epistemological criterion will follow (Corecco, "Theological Justifications," p. 73).

⁵³ Corecco, "Theological Justifications," p. 74.

It means therefore that other dogmatic data are often isolated and juxtaposed to the whole.⁵⁴ Corecco concludes that the decisive element for the new Code is not ecclesiology, but an epistemological change. This implies that

from now on canonical science will have to [...] learn how to elaborate a general theory of canon law, bearing in mind the coessentiality of the theological aspect.⁵⁵

Corecco is of the opinion that the omission of a codification would not have led to a change:

But one may suppose that without a Code the necessity of this renewal of methodology would not have emerged with the same obvious clarity and above all with the same pretension of globality. By nature, a Code tends in fact to invest all the legislative material with the principles and with the spirit of whatever gives it form, since a Code by definition requires the homogeneity of its own content.⁵⁶

Corecco does mention that the whole 1983 Code does not evidence this change in epistemology. In fact, books I, V, VI and VII are either dominated by the concept of

⁵⁴ Corecco mentions as a typical example the canons that describe the sacraments. These canons give the Code a theological tone. He is of the opinion that these theological elements are abundant; that they could have been presupposed, because they are known through other sources (e.g., theology of the sacraments): "Because they do not exercise a global systematic and thereby epistemological function with respect to all the norms of the Code, these theological data cannot be considered as elements that are strong and organic enough to require and justify the choice of the technico-legal tool of codification."

Corecco observes that the sacraments and the Word have no constitutional value in the Church according to the Code, but they are elements that follow from the Church (Corecco, "Theological Justifications," pp. 74-75). The section on sacred power describes in more detail Corecco's ideas on Word and Sacrament as constitutive elements of the Church.

⁵⁵ Corecco, "Theological Justifications," p. 78.

⁵⁶ Corecco, "Theological Justifications," p. 78.

reason or are a direct result of an ecclesiology of *societas perfecta*. Corecco points to several concrete instances in these books to demonstrate his point:⁵⁷

- 1) In book I, the concept of 'general norms' is a typical expression of the modern codifications:
 - 1) the faithful are not defined via their ecclesiological identity (their sacramental status), but with the Roman law category of 'physical person;'
 - 2) the treatment of juridic acts leaves out the point that the most basic juridic acts are the sacraments, whose binding power are of a soteriological nature; the canons on validity are not applicable to them;⁵⁸
 - 3) the conciliar notion of sacred power is not adopted. The *potestas regiminis* appears as to be of the same nature as State power. The canons on the power of jurisdiction are after the canons on administrative acts, although these are functions of the *potestas regiminis*;
 - iv) the norms guiding laws have no reference to the *sensus fidei*: the participation of the faithful is reduced to custom (cc. 23 and 27).
- 2) Book V contains the idea of a *ius publicum ecclesiasticum* very strongly: especially c. 1254, § 1 which says that the Church has the *innate* right to acquire, retain, administer and alienate property, independent from the civil authorities; c. 1260 is also important, because it declares the right of the Church to demand from the

⁵⁷ See Corecco, "Aspects of the Reception," pp. 252-263; idem, "Ecclesiological Bases," pp. 3-7.

⁵⁸ Both in the English and the French edition of *Concilium* Corecco refers to the cc. 113 and 114, but these references are incorrect. Corecco, "Ecclesiological Bases," p. 4.

faithful financial contributions. In these canons the Church appears as if it is in a relationship vis-à-vis the faithful. Corecco says that the canons on obligations, e.g., c. 222, § 1, could have mentioned that the faithful might be called on to practice communion on the level of material goods.⁵⁹

- 3) According to Corecco modern codes of criminal law are reflected in the juridical-formal framework of book VI. The general thrust of the book is not towards *communio*, but to natural law principles of restoration (c. 1341) and the power of coercion (c. 1311). The preference of *ferendae sententiae* penalties instead of *latae sententiae* ones is not based on the principles of *communio*, but, according to Corecco, is based on the 1967 Synod's suggestion to bring "about a vision of *societas perfecta* that is more in keeping with the sensibilities of modern juridical thinking."⁶⁰ Book VI does contain some idea of *communio*: Corecco refers to c. 1341 which says that a penal process should be the last resort. This canon together with the ones on imputability (cc. 1312-1330), on specific application of punishment (cc. 1345-1363), the underlying principle of c. 1339, and the nature of excommunication, would seem to void the whole argument of book VI of any real and specific

⁵⁹ Corecco admits that this idea does emerge in c. 1254, § 2 which expresses the purpose of Church's possessions.

⁶⁰ Corecco, "Ecclesiological Bases," p. 7.

Corecco says that there is some reference to the sacrament of penance, but there should have been a more structural connection. That would have helped to understand that excommunication (both *latae sententiae* and *ferendae sententiae*) does not correspond to the idea of penalty as found in the general theory of law. He stresses that excommunication is an actual situation brought about by the believer that can be observed by authorities. So excommunication is of a non-penal nature. See Corecco, "Aspects of the Reception," pp. 256-257.

content. According to Corecco, in doing so it creates an unbridgeable gap between the material and the formal content of the book.

- 4) Book VII, finally, is also under the influence of the culture and epistemology peculiar to the 1917 Code. Its opening canons (cc. 1400-1403) show this very clearly: c. 1400, § 1, n. 1 speaks about *persona physica*; c. 1401, § 1 applies the term *res spirituales et spiritualibus adnexas* which is derived from the 1917 Code, where its meaning was determined by c. 727, § 1 CIC/1917; that term is inadequate in the 1983 Code, because sacraments are not understood as *res spirituales*. Another element is the way the Code handles contentious trials: the processes dealing with the status of persons should have preceded the civil contentious trials instead of the way the arrangement is actually presented.

It would have been possible in such an approach to meet the demands [...] for a greater responsiveness to modern juridical sensitivities and for a greater attention to other juridical traditions of non-Roman and non-Germanic origin [...] thus yielding an image of the Church and its authority that resembles less closely that of the state.⁶¹

Corecco's conclusion about the change in epistemology is that the central books of the 1983 Code have changed, but that the other books are dominated by an ecclesiology that has as its model the perfect society.⁶²

⁶¹ Corecco, "Aspects of the Reception," p. 260.

⁶² Corecco points out that the reasons that made this possible are threefold: 1) the commission installed to reform the Code lacked the necessary distance from Vatican II; 2) the members of this commission were canonists trained before the council who considered a connection with the juridical tradition as essential; 3) the norms approved by the Synod of Bishops in 1967 obscured the problem of a renewed epistemology and theological approach to canon law, because they strengthened the conviction that the existence of canon law originates in the societal nature of the Church (Corecco, "Aspects of the

2.2.3 - The individual member of the faithful as subject of the 1983 Code

The third reason that justifies a new codification appears in the 1983 Code itself. Corecco says that the essential elements of the idea of codification itself

was that of succeeding in giving expression to an organic social reality having a precise identity, and having a subject which gave it unity.⁶³

Corecco is of the opinion that the 1917 Code was able to respond to these fundamental requirements. The Church was envisioned as a perfect society and it had a subject that played the role of protagonist in its social life. This subject was 'authority,' i.e., the hierarchy.⁶⁴ Corecco is of the opinion that in virtue of *LG* 23,1 authority is more understood as the *principium et fundamentum unitatis Ecclesiae*, than as the principle and foundation of the Church:

The authority exists in virtue of the *unity* of the faithful, who in its place became the real protagonists of the Church.[...] The principle of 'authority' of the old Code is replaced by the principle of division of different ecclesial functions. In this sense the new Code can be envisioned as an *ordo Ecclesiae*.⁶⁵

Reception," p. 261).

⁶³ Corecco, "Theological Justifications," p. 84.

⁶⁴ Corecco says that in civil society this subject is the individual. He also says that the faithful are only relevant "insofar as they use the instruments offered to them by the hierarchy for the salvation of their souls, and conform discipline and obedience to the initiatives of authority" (Corecco, "Theological Justifications," p. 85).

⁶⁵ "Die Autorität existiert im Hinblick auf die *Einheit* der Gläubigen, die an ihrer Stelle die wahren Protagonisten der Kirche geworden sind.[...] Das Prinzip 'Autorität' des alten Kodex wurde ersetzt durch das Prinzip der Aufteilung der verschiedenen kirchlichen Funktionen. In diesem Sinn kann der neue Kodex als ein *ordo Ecclesiae* bezeichnet werden" (Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," pp. 14-15).

Corecco demonstrates his thesis, namely that the individual member of the faithful is the new protagonist, with several examples. One of them is the change of the notion of the legal term 'person.' The 1917 Code saw the person in the sense of the Roman law tradition,⁶⁶ while the 1983 Code envisions the person as a member of the faithful:

Due to his concrete ecclesial existence, the individual member of the Church is theologically more relevant. The only authentic subject operating in the Church, in fact, is the individual member of the faithful, not the physical person, to say nothing of the moral person.⁶⁷

Corecco admits that *in iure* the term 'person' is not synonymous with the 'human person,' but with the abstract legal subject. The 1983 Code, however, replaced it with the notion of the individual member of the faithful in the institutional treatment of the faithful

⁶⁶ Corecco mentions that the 1917 Code applied an abstract legal notion of person (cc. 88-107 CIC/1917) derived from the Roman law tradition, but he does not indicate how he understands that notion. Corecco, "Theological Justifications," p. 85.

⁶⁷ Corecco, "Theological Justifications," p. 85. Corecco is of the opinion that the moral person, even when it designates a theological reality of fundamental importance, is not capable of playing any definitive role (in its ecclesiological profile). "It remains a juridical superstructure of a positive character, both legitimate and useful, but incapable of adequately comprehending the ontological reality." The example that Corecco gives is the college of bishops. See Corecco, "Theological Justifications," p. 86.

(book II).⁶⁸ This shows that the real ecclesial subject is not reducible to an abstract juridical figure.

Instead, it is the living and concrete person of the member of the faith community, and as such, one who is invested with an ecclesial-salvific destiny which is ultimately not delineated in an adequate fashion by juridical categories.⁶⁹

2.3 - Conclusion

Corecco discusses three arguments that justify the existence of the 1983 Code: the constitutional character, the epistemological and hermeneutical change, and the change in subject. At the same time he wonders whether there exists an alternative to codification.

He proposes an *ordo Ecclesiae*:

This model is inspired by a concern for the institutional and disciplinary development of the canonical norms in total respect for the organizational logic of the content of faith itself, more than by the demands of a juridical rationality.⁷⁰

⁶⁸ Corecco mentions that in book I of the 1983 Code the term *persona* is not defined in terms of its ecclesiological identity, but by the Roman law category of *persona physica*. This definition is inadequate, according to Corecco, because it suggests that the physical person exists before the Church and that is simply not true. He also mentions that in relation to this the Code applies the concept of 'competence' in order to define the juridical situation of a person, instead of the conciliar idea of 'participation.' The distinction between juridic persons and believers is not the physical nature, but the sacramental one. Corecco believes that this should have been brought out. Corecco, "Aspects of the Reception," pp. 252-253.

⁶⁹ Corecco, "Theological Justifications," p. 86.

⁷⁰ Corecco, "Theological Justifications," p. 95.

Such an *ordo* could be important from an ecumenical point of view, since this type of legislation is operative in the Protestant tradition. It also would have left room for a structural dominance of the new epistemological criterion. Corecco envisions that the sacraments could have provided the structure of such an *ordo*, although he realizes that it would be problematic to incorporate the Word structurally.⁷¹

3 - SACRED POWER

Corecco devotes a substantial amount of his work to the theory of sacred power. He presents his ideas in several distinct sections and from different angles. First he gives an historical overview of the development of the powers of orders and jurisdiction and states what the present question is for canon law. Then he reports on the existing theories on sacred power. After that he goes into more detail in describing Mörsdorf's theory on this subject, because he will use this as a point of departure for his own ideas. The central point in his own theory is related, once again, to the concept of *communio*. In the period after the 1983 Code, Corecco evaluates this Code on its application of the sacred power.

3.1 - Historical overview and determining the question

Corecco describes how the distinction between the powers of orders and jurisdiction is the result of a process which has spanned almost a thousand years. The distinction is the result of two constitutional problems: the first one concerns the validity of sacramental acts placed by a minister who is not in ecclesiastical communion, and the second one concerns

⁷¹ Corecco, "Aspects of the Reception," pp. 261-263.

the validity of absolute ordination, which is prevalent in the Latin Church despite the prohibition of the council of Chalcedon.

It was possibly Gratian, but at least the Decretists, who distinguished between the power of orders and the power of jurisdiction. The bishop would receive the power of orders directly from God through the ordination to the episcopacy; the power of jurisdiction would be obtained from the Roman Pontiff.

At the end of the 19th century, F. Walter and G. Phillips⁷² introduced the theory of the three offices of Christ. The result of their theory was a threefold distinction of power: powers of orders, teaching, and jurisdiction. This tripartite division brought about confusion in relation to the existing two powers of orders and jurisdiction.

Corecco is of the opinion that the question for the science of canon law is not whether there are two or three powers; rather the challenge is to find out what the relationship is between the three offices of Christ on the one hand and the two powers on the other. According to Corecco the question that follows from this is whether the division of powers of orders and jurisdiction can be maintained after taking into account a thousand year theological tradition and the fact that the council did not specifically address the question.⁷³

⁷² Corecco describes how Phillips thought that the ordination itself confers the capacity to exercise the three offices of Christ (E. Corecco, "Origine del potere di giurisdizione episcopale: aspetti storico-giuridici e metodologico-sistematici della questione," in *La Scuola cattolica*, 96 (1968), pp. 32-34).

⁷³ Corecco says, "Für die gegenwärtige Kanonistik stellt sich nicht sosehr das Problem, ob zwei oder drei Gewalten existieren, sondern es geht vielmehr darum, die Beziehung zu erforschen, die zwischen den *tria munera* Christi und der *potestas sacra* besteht. Konsequenterweise erhebt sich die Frage, ob die Unterscheidung von Weihe- und Hirtengewalt bzw. die dieser Unterscheidung zukommende Sinndeutung noch beibehalten werden kann; dies in Anbetracht einer tausendjährigen theologischen Tradition und der

3.2 - The existing theories

Corecco describes two major theories that deal with the understanding of the relationship between the powers of orders and jurisdiction. The first one interprets c. 109 CIC/1917, which asserts that the power of orders is given through ordination, and the power of jurisdiction through canonical mission, in such a way that both the sacrament and the canonical mission confer the sacred power. The distinction between the powers of orders and jurisdiction is a formal distinction. The problem was that the power of orders was given directly by God, but the power of jurisdiction was given by the Roman Pontiff. It was especially Mörsdorf, who, according to Corecco, solved this. Mörsdorf proposed that with ordination the bishop not only received the power of orders, but also received an essential part of the power of jurisdiction. In order to be a leader of a particular Church the bishop needed an additional part of the power of jurisdiction, which is conferred by the canonical mission. Corecco says,

The value of the correction made by Mörsdorf is that he introduced a new objective element that was founded in the sacrament of orders: it is the foundation of the power of jurisdiction that is conferred in every case through the episcopal ordination.⁷⁴

Tatsache, daß das Konzil vermieden hat, diese Frage *expressis verbis* zu behandeln" (E. Corecco, "Die *sacra potestas* und die Laien," in *Freiburger Zeitschrift für Philosophie und Theologie*, 27 (1980), p. 126).

⁷⁴ "Der Wert dieser von Mörsdorf angebrachten Korrektur ist es, ein im Weihesakrament grundgelegtes, neues objektives Element eingeführt zu haben: den Grundbestand an Hirtengewalt, welcher kraft der Bischofsweihe in jedem Fall verliehen wird" (Corecco, "Die *sacra potestas*," p. 129).

According to Corecco the problem with this theory is the position of the bishop compared to the priest. Does the priest also receive a basic power of jurisdiction in his ordination? If the celebration of the Eucharist has a juridical dimension, and since every priest can celebrate Mass validly, has he therefore a basic power of jurisdiction, though admittedly less than that of the bishop?⁷⁵

The second theory presupposes that the sacred power is completely conferred with the sacrament of ordination. This theory postulates that the Church has the power to bind and to loose, and, if necessary, to prohibit the effects of the sacred power that is conferred with the sacrament. In this theory, the power to bind and to loose has only a formal character, but has no content.

Corecco discusses the difference between the two theories:

The substantial difference between the first and the second doctrine is founded in the fact that the first one gives a material content to both the powers of orders and jurisdiction, while the second doctrine ascribes a material content to the power of orders and only a formal content to the power of jurisdiction.⁷⁶

⁷⁵ Corecco, "Die *sacra potestas*," p. 129.

⁷⁶ "[...] der substantielle Unterschied [liegt] zwischen der ersten und zweiten Doktrin in der Tatsache begründet, daß erstere sowohl der Weihegewalt wie auch der Hirtengewalt einen materialen Inhalt zuschreibt, währenddem die zweite Doktrin allein der Weihegewalt einen materialen Inhalt zuweist und der Jurisdiktionsgewalt lediglich formalen Wert beimißt" (Corecco, "Die *sacra potestas*," pp. 130-131). He remarks that only the first theory could give any solution to the questions about conferral of power of jurisdiction to laity.

3.3 - Corecco's proposal

Corecco proposes a third solution, based on two conditions. On the one hand, one has to accept the indications provided by Vatican II about the unity of the sacred power, which directed (oriented) the majority of contemporary canonists and theologians to a rigorous solution of the origin of sacred power. On the other hand, there is the necessity to keep, at least on the conceptual level, the traditional distinction between orders and jurisdiction.

Corecco starts his proposal by describing Mörsdorf's theory: the distinction between the powers of orders and jurisdiction has its roots in the two constitutive elements of the Church, viz., sacrament and Word. These two categories allow for bypassing the limits, that are proper to the functional character of the juridic language. They are not only reciprocal, but can also not be separated. It is the same for the powers of orders and jurisdiction. Word and sacrament are modalities through which God's grace is revealed. This grace is not only a unity; it is also a sole and undividable reality. This is also the reason why sacred power as the foundation of the ecclesial structure is not only a uniform, but also a sole indivisible reality.⁷⁷ In the same way as God reveals Himself through Word and sacrament, the uniqueness of the sacred power is revealed through two institutional modalities that are called the power of orders and the power of jurisdiction. On the institutional level, orders and jurisdiction are the instruments through which the whole sacred power operates, and not only a part. They are a double modality of the expression of the unique sacred power. This implies that the distinction between orders and jurisdiction is formal and not material.

⁷⁷ Corecco, "Die *sacra potestas*," p. 132.

Corecco remarks that orders and jurisdiction also work in autonomous ways, like Word and sacrament. As the Word can be proclaimed without a sacrament, an act of jurisdiction can be placed without a direct relationship to the power of orders. The Word is, however, directed towards the sacrament; in the sacrament it will be concretized. The whole juridical order, whose most profound expression is found in 'jurisdiction,' is ordered towards the celebration of the sacraments.⁷⁸ The power of orders is linked to the power of jurisdiction:

In the same way as the Word can be proclaimed without at the same time administering the sacrament, it is possible that the Church places jurisdictional acts without the direct connection with the sacrament of orders. The relationship to the sacrament (in case of the Word) and to the Word (in case of the sacrament) exists, however, in virtue of the fundamental fact that the Word is structurally ordered to concretize [incardinate] itself in the celebration of the sacrament (like the sacrament intends to reveal the meaning of the Word) [...]⁷⁹

⁷⁸ Corecco indicates here the problem that exists because the Orthodox Tradition still has relative ordination.

⁷⁹ "Auf die gleiche Weise, wie das Wort ohne gleichzeitige Spendung des Sakramentes verkündet werden kann, ist es möglich, daß die Kirche jurisdiktionelle Akte setze ohne unmittelbaren Zusammenhang mit dem Weihesakrament. Die Beziehung zum Sakrament (im Falle des Wortes) und zur Weihe (im Falle des Sakramentes) existiert jedoch kraft der fundamentalen Tatsache, daß das Wort strukturell darauf angelegt ist, sich in der Feier des Sakramentes zu 'konkretisieren' (wie das Sakrament darauf abzielt, die Sinnbedeutung des Wortes zu entfalten)[...]" (E. Corecco, "Natur und Struktur der *sacra potestas* in der kanonistischen Doktrin und im neuen CIC," in *AfkKR*, 153 (1984), p. 364). In the French version of this same article, Corecco uses in the last sentence not the word *konkretisieren*, but the word *s'incarner* (E. Corecco, "Nature et structure de la *sacra potestas* dans la doctrine et dans le nouveau Code de droit canonique," in *RDC*, 34 (1984), p. 371).

Corecco says that this is also clear from the teaching of the indelible character, which implies that there is a structural priority of sacrament over Word and of orders over jurisdiction.⁸⁰

Corecco points out that, in contradistinction with the Word, the sacrament always implies the Word as an integral part.⁸¹ So he proposes to ascribe only a formal value to the two powers as simple modalities of the unique *potestas*.

It is important to distinguish between the attribution of the sacred power and its usage. Although the power can operate through the modalities of Word and sacrament, the power can only be transmitted through the sacrament. The apostolic succession is inseparably linked with the sacramental act, that is, with the power of orders. The problem that comes up is whether and to what degree the Church can achieve control over the transfer and exercise of the sacred power.

⁸⁰ Corecco mentions that according to Vatican II only those Christian communities are called 'Church,' where the Word is at least linked in a structural way to one sacrament, viz., baptism. "Es gibt keine Kirche ohne Taufe, d.h. ohne Sakrament" (Corecco, "Die *sacra potestas*," p. 134).

⁸¹ Corecco is of the opinion that since the Word is so strongly related to the sacrament it is possible to accept the thesis that the whole sacred power is given by ordination (Corecco, "Die *sacra potestas*," p. 134).

Corecco mentions that the way to find out what the origin is of the episcopal jurisdiction is to know in which way the single bishop becomes inserted in the episcopal college. *Lumen gentium* says in its third chapter that there are two ways: a sacramental one, viz., the ordination, and a non-sacramental one, sc. the hierarchical communion. Hierarchical communion is not the same as jurisdiction, because the retired bishop, who has no particular office, is still member of the college. So the consecration is important, which can also be seen from the consecration of an orthodox bishop. Relevant is the consecration into the hierarchical communion. With the consecration the bishop participates ontologically in the supreme and universal power of the college. The canonical mission is a jurisdictional element that has extra-sacramental origin. See Corecco, "L'origine del potere," pp. 109-118.

Corecco says that if the total *potestas* is transferred with ordination and if it is exercised fully through the sacrament and through the jurisdiction, one has to concede that the whole *sacra potestas* exercises as such a control over itself, without having to be divided in such a way that one part (i.e., the jurisdiction) exercises the control over another part (i.e., the ordination). This exercise cannot go beyond the limits of divine law and these limits are posed by the *substantia sacramenti* and the *substantia verbi*. Once the essential elements are realized in Word and sacrament,⁸² they are efficacious in the sense that their celebration has objective value to engender the Church of Christ.

Under the presupposition that the essential elements are realized, the Church cannot prohibit the Word and sacrament from having their effects also outside the *communio plena*. With this Corecco introduces the idea of *communio*:

The *communio* [...] is that ecclesial reality that exists or does not exist, but that in its existence and in its authenticity can only be ascertained and judged by the one who is equipped with the full *potestas sacra*.⁸³

In virtue of divine law, the college of bishops with the Roman Pontiff have the function of being point of reference to the communion, because they are invested with the full sacred power. This implies that only they can determine who is in full communion with

⁸² It is in virtue of the sacred power that the Church can determine what the essential elements are, as requested by the *ius divinum*, in Word and sacrament to be Christian (Corecco, "Natur und Struktur," p. 367).

⁸³ "Die *communio* [...] ist jene kirchliche Realität, die existiert oder nicht existiert, die aber in ihrer Existenz und in ihrer Authentizität allein von demjenigen festgestellt und beurteilt werden kann, der mit der Fülle der *potestas sacra* ausgestattet ist" (Corecco, "Die *sacra potestas*," p. 138).

the Church.⁸⁴ To be in full or hierarchical communion means that the bishop is in communion with the bishop of Rome.⁸⁵ *Communio* and *communio hierarchica* are therefore not dependent on the subjective decision of authority. Rather the *communio* forms the structure of the Church in which the sacred power exists:

This means that *sacra potestas* and *communio* are not identical realities. The *communio* is in one way the ecclesial and theological reality in which the *sacra potestas* has to move in order to be effective in its totality. On the other hand it establishes the reality that is created by the *potestas sacra*. It is, at the same time, preceding and succeeding the *potestas* as such.⁸⁶

3.3.1 - The implications for juridic acts

Some problems concerning the validity of jurisdictional acts because of an irritating or inhabilitating clause can now be addressed. Corecco proposes to do this by solving the

⁸⁴ The difference in the celebration of Word and sacrament by the college and the pope on one hand, and the single bishop on the other hand, is a qualitative or formal difference in the sense that only the episcopal college and the pope represent the supreme authority called upon to judge if the Word and the sacrament, celebrated by a bishop, realize the *communio plena* (Corecco, "Natur und Struktur," p. 368).

⁸⁵ Corecco points out that only the communion with the bishop of Rome is constitutive for full or hierarchical communion. Communion with other bishops has only a consequent character. This all has to do with what was confirmed at Vatican II, viz. that only the bishop of Rome is the principal, visible, and continuous foundation for the universal Church. The other bishops are principal and visible, but not a continuous foundation for the particular Church (Corecco, "Natur und Struktur," p. 368).

⁸⁶ "Dies bedeutet, daß die *sacra potestas* und die *communio* als Realitäten nicht identisch sind. Die *communio* ist einesteils die kirchliche und theologische Realität, innerhalb derer sich die *potestas sacra* bewegen muß, um in ihrer Ganzheit wirksam zu werden, anderenteils stellt sie aber auch die Realität dar, welche eben durch die *potestas sacra* geschaffen wird. Sie ist also der *potestas* als solcher vorangehend und nachfolgend zugleich" (Corecco, "Die *sacra potestas*," p. 138).

questions about the sacrament. He is of the opinion that the sacraments also have juridical effect.

Every sacrament that is administered in the context of the *communio plena* is valid and legitimate. According to Corecco the question about validity and liceity has to be seen in the context of the question concerning the realization of the sacrament in the *communio ecclesialis* or in the *communio hierarchica, seu plena*.⁸⁷ Therefore it is important to determine what constitutes this *communio*. As should be clear, the *communio* is not determined by the sacred power, but vice versa.

The invalidity of the exercise of the sacred power is therefore directly related to the minimal amount of what is required in *communio*. "Only the absence of the essential, objective element of *communio* renders the power invalid."⁸⁸ If the ecclesial communion

⁸⁷ As an example, he mentions that the absence of a papal indult prevents the newly ordained to be in hierarchical communion, but it does not make the sacrament invalid. Corecco also mentions the absolution given in danger of death, when the priest has no jurisdiction. In this situation it is not the case that the absent power of jurisdiction is given nor is the power of orders released, but it means that "die Kirche der in einer solch extremen Situation des Lebens erteilten sakramentalen Lossprechung die notwendige Legitimation zubilligt, die *communio plena* verwirklichen zu können, auch wenn sie von einem Amtsträger erteilt werden sollte, der nicht in Gemeinschaft mit der katholischen Kirche lebt." In normal circumstances, when the priest does not have jurisdiction, the absolution is not invalid because he lacks a part of the sacred power or because his power of orders is not released for the exercise, but it is invalid because he is standing outside the community and can therefore not reconcile the penitent with the Catholic Church. He emphasizes that a distinction has to be made between the minister who broke with the *communio* and the minister who belongs to another Church. In the last case there might not be a full communion, but the communion might be enough to recognize the validity of the sacrament (Corecco, "Die *sacra potestas*," pp. 141-142).

⁸⁸ "Allein das Fehlen der wesentlichen objektiven Elemente der *communio* macht die *potestas* unwirksam, d.h. ungültig" (Corecco, "Die *sacra potestas*," pp. 143-144).

is only an *extra communionem hierarchicam, seu plenam* then the problem is not the validity but the liceity.

Vatican II distinguished different levels of being in communion within the ecclesial community. Corecco says that this means that the validity of Word and sacrament cannot depend on legal norms set up to control the exercise of sacred power with pure positivistic criteria. Invalidity can be determined because validity is fundamentally linked to the essence of the ecclesial structure. The liceity, however, can be determined with criteria of a purely disciplinary legal nature.

Since the sacred power is a uniform and sole power that cannot be split, and since the same power operates in the power of orders and the power of jurisdiction, the criteria that are applied to determine the validity of the sacrament are also applicable to the power of jurisdiction. Corecco says, that since it is theologically impossible to transfer the power of orders by delegation, it is basically impossible to delegate the power of jurisdiction, even if canon law for pragmatic (terminological) reasons uses the institution of delegation.⁸⁹

⁸⁹ "Die Jurisdiktion, verstanden als Ausdruck der einzigen *potestas sacra*, kann von der theologischen und juristischen Seite her nicht mit Kriterien gehandhabt werden, die von jenen verschieden sind, welche für die Weihegewalt gebraucht werden. Ist es theologisch nicht möglich, die Weihegewalt durch Delegation zu übertragen, so ergibt sich folgerichtig, daß im Grunde genommen auch eine eigentliche Delegation der Hirtengewalt unmöglich ist, selbst wenn die Kanonistik aus pragmatischen Gründen vom Institut der Delegation weiter Gebrauch machen wird" (Corecco, "Natur und Struktur," pp. 1374-375). The French text uses in the last sentence not the equivalent of 'pragmatischen,' but says 'raison de terminologie' (Corecco, "Nature et structure," p. 381).

3.4 - Sacred power in the 1983 Code

Corecco divides his evaluation of the application of the principle of sacred power in the 1983 Code into two sections. One concerns the sacramental forum, the other the non-sacramental forum.

3.4.1 - The sacramental forum

The Code does not apply the term *potestas* in the sacramental forum, but replaces it with the term *facultas*.

The sacrament of reconciliation is the most opportune example of how the powers of orders and jurisdiction operate together: there is a reconciliation with God (power of orders refers to it primarily) and a reconciliation with the Church (power of jurisdiction refers to it primarily). The 1983 Code replaces the word *potestas* with the term *facultas*, whose meaning is closer to authorization (*Bevollmächtigung*) than to power (*Gewalt*).⁹⁰ Corecco is of the opinion that the legislator presupposes in c. 966 that the absolution is given in virtue of the power of orders. He says that it is therefore difficult to interpret *facultas* as if it had the same meaning as *potestas*. This all implies that the word *facultas*

⁹⁰ Corecco points out that it is not irrelevant that the words *probatus* and *approbatus* as used in c. 630, § 3 (confessor for nuns) and in c. 976 (confessor in danger of death) have the meaning of *designatus* or *authorizatus*. The 1917 Code applied these terms also (cc. 519 CIC/1917 and 882 CIC/1917), but there it had the additional qualification *sive ordinaria, sive delegata iurisdictione instructus* (881, § 1 CIC/1917). In the new Code the terms are equivalent to 'designated' and 'authorized' (Corecco, "Natur und Struktur," p. 376).

It appears to me that c. 630, § 3 only deals with an organisational aspect of the confession. The fact that the canon speaks about 'confessor' implies that it is a priest with the necessary faculties.

has only a formal meaning. Corecco concludes from this that the legislator has therefore decided that the sacrament of orders transfers solely the sacred power, while the jurisdiction determines the exercise *ad validitatem*. The jurisdiction is therefore a formal power with no material content.

Another example that Corecco gives is marriage, where the word *facultas* is combined with *delegatio* (cc. 1111 and 1114).⁹¹

Finally he mentions sacramentals;

For sacramentals that can be administered by laypersons the Code uses the word *potestas* (can. 1168), thus presupposing the possession of a delegated power; for consecrations, however, which presuppose possession of the power of orders, it uses the word *concessio* (can. 1169, § 2 [sic § 1]), which is correlated with *facultas*.⁹²

According to Corecco this gives the impression that the act of administering the sacramentals flows from the power of jurisdiction, and in the case of consecration it

⁹¹ Corecco remarks that c. 144, which supplies the *potestas regiminis executiva*, is important in this. By explicitly referring to the sacraments of penance, confirmation, and marriage, the canon distinguishes between the *potestas* (§ 1) and the *facultas*. This indicates that the term *delegare* in § 2 is applied in an analogous way. In fact the *facultates* should not be equated with the *facultates habituales* of c. 132, § 1, which is a typical expression of the *potestas regiminis delegata* (c. 131, § 1).

If the words *facultates* and *potestas* do not have the same meaning, then the layperson assisting at a marriage (c. 1112, § 1) is to be considered as a *testis qualificatus* and does not have a quasi *potestas iurisdictionis* understood as an expression of the *potestas sacra* (Corecco, "Natur und Struktur," p. 378-379).

⁹² Corecco, "Aspects of the Reception," p. 290. I do not think that Corecco's interpretation of c. 1168 is correct, because the word *potestas* seems to refer only to clerics, not to laity.

emanates from the power of orders with an extrinsic and formal regulation through the medium of *concessio facultatis*.⁹³

Corecco concludes from this that the Code considers the power of jurisdiction as formal power that deals with the correct administration of the sacraments. It has no material content:

The conclusion must be that the Code no longer maintains [...] that the administration of the sacraments is a joint act of the power of orders and the power of jurisdiction (understood as having two material contents), but thinks of it as being rather the effect exclusively of the power of orders. [...] It seems clear, therefore, that from a doctrinal standpoint the Code has adopted the solution that also underlies the 'prefatory note' (no. 2) [...] Neither the 'prefatory note' nor the Code gives a theologically plausible explanation of how the *potestas iurisdictionis*, understood as purely formal in nature, can in case of need annul the operation of the power of orders (which alone has a material content), without the latter ceasing to exist conceptually as a true power. The system at work here, then, is one that assigns an ecclesiological priority to the social power of jurisdiction over the sacramental power of orders.⁹⁴

3.4.2 - The non-sacramental forum

In the non-sacramental forum the Code seems to envision the power of jurisdiction as having a material content of its own. Again Corecco gives examples of this. In those acts that traditionally are considered as operations of the power of governance, the Code uses the word *potestas (iurisdictionis)*. This is the case in granting indulgences (c. 995), the power to dispense from vows (c. 1196), oaths (c. 1203) and matrimonial impediments (c.

⁹³ Corecco, "Natur und Struktur," p. 379.

⁹⁴ Corecco, "Aspects of the Reception," p. 290.

1079, §§ 2-4). The same terminology appears in the remission of canonical penalties in the external forum (c.1354, § 2).⁹⁵

Corecco concludes from his analysis of the sacramental and non-sacramental areas that the 1983 Code gives two meanings to the power of jurisdiction: a formal one and a material one, depending on the area. He indicates that this dualism is already present in a nutshell in c. 130, which says that the *potestas regiminis* normally operates in the external forum and only exceptionally in the internal forum. He is of the opinion that the underlying reason for this dualism is the two ecclesiologies-- *communio* and *societas*--that are present in Vatican II and the Code.⁹⁶

At the end of his evaluation of the new Code, Corecco returns to his ideas on *communio* as the criterion for determining the liceity and validity of acts. He says,

When the *substantia sacramenti* and the *substantia verbi* are respected, any positive intervention declaring the sacramental or jurisdictional act of a minister (acting to the degree of orders he has received) to be invalid instead of simply illicit is a dubious one. Such, for example, are the norms declaring that the sacraments of penance (can. 966, § 1) and confirmation (can. 882) are invalid when administered by a priest who lacks the necessary *facultas*.⁹⁷

⁹⁵ Corecco points out that c. 1357, § 3 uses the word *facultas* and not *potestas* when it speaks about the confessor empowered to remit penalties (Corecco, "Aspects of the Reception," pp. 290-291). In another article Corecco says that this exception should probably be explained as an inconsistent terminology (Corecco, "Nature et structure," p. 388).

⁹⁶ Corecco, "Aspects of the Reception," p. 291.

⁹⁷ Corecco, "Aspects of the Reception," p. 293.

Corecco mentions one other example "that makes clear the absence from the Code of any concern to give even a minimum of theological and conciliar direction to a matter so centrally important to ecclesiology and the canonical order:"⁹⁸ it is the juridical terminology applied in the Code. The sacred power does not only comprise the powers of orders and jurisdiction, but also the legislative, executive, judicial, and even interpretative power. The impression is therefore given that these are not functions of the sacred power, but are separate powers as in the organization of states. He ends his evaluation of the treatment of sacred power in the 1983 Code as follows,

The new Code did not once attempt to preserve the unity between *potestas ordinis et regiminis*, which is ultimately one and the same power. It is remarkable that the CIC renounced the use of the conciliar term *sacra potestas*, which created presumptions for a step forward in the knowledge concerning the essence of ecclesial power, which in no way should be confused with civil power.⁹⁹

3.5 - Conclusion

After describing two theories on *sacra potestas*, Corecco elaborates on Mörsdorf's theory, viz., that the sacred power is one power. For Corecco both the powers of orders and of jurisdiction have formal content. The major problem is how the Church can control

⁹⁸ Corecco, "Aspects of the Reception," p. 293.

⁹⁹ "Der neue CIC hat nicht einmal den Versuch unternommen, die Einheit zwischen *potestas ordinis et regiminis* zu wahren, die schließlich ein und dieselbe Gewalt ist. Bezeichnend ist, daß der CIC auf den Gebrauch des konziliaren Begriffes *sacra potestas* verzichtet hat, welcher die Voraussetzungen für einen Schritt nach vorne in der Erkenntnis des Wesens der ekklesialen Gewalt geschaffen hatte, die in keiner Weise mit der staatlichen Gewalt zu verwechseln ist" (Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," p. 22).

the exercise of the sacred power. Corecco attempts to answer this with the concept of *communio*. The validity and liceity of an act is depending on the level of *communio* that is present. That should be the decisive criterion.

Corecco recognizes that the 1983 Code does not treat the sacred power in accordance with his theory. The legislator has decided that the power of orders has material content and the power of jurisdiction only formal content. From his concept of *communio*, Corecco criticizes the norms that determine the validity of acts on the basis of faculties. His general conclusion is that the Code regretfully did not adopt the conciliar term of *sacra potestas*.

4 - LAITY

Corecco discusses the position of the laity from the dual perspectives of their participation in the sacred power and their secular character, as expressed in the documents of Vatican II and in the 1983 Code. Before dealing with these issues, he explains the relevant understandings of common and ministerial priesthood, arguing that this will provide an adequate context for answering the question about the laity and sacred power.¹⁰⁰

4.1 - The common and ministerial priesthood

The participation of the laity in the sacred power is determined by their participation in the threefold office of Christ. Corecco is of the opinion that the tripartite

¹⁰⁰ Corecco proposes to do his research this way, but in fact he does not give a direct answer to the question about laity and sacred power.

division of offices is relatively unimportant; for the offices are simply formally different aspects of the one office of Christ:

In the same way Christ is priest, he is also a teacher and head, and for the same reason that he exercises the office of priest, the teaching and governing office belong to him.¹⁰¹

Corecco proposes to deal therefore with the ontological level of the offices. He goes back to the priesthood of Christ, which will help to answer the question concerning the difference between the ministerial and common priesthood.¹⁰²

Corecco describes two elements in the priesthood of Christ: one subjective, the other, objective. The subjective element indicates that Christ gives his whole person to the Father in pursuance of the love that engenders him from all eternity. The objective element shows that Christ lets himself be sacrificed by the Father on the cross, as a sacrificial victim for the forgiveness of the sins of the whole world. The uniqueness of Christ's priesthood vis-à-vis the Old Testament priesthood is that in Christ both the subjective and the objective elements are united. This implies for the common and ministerial priesthood that the Christian who participates in the subjective dimension of the

¹⁰¹ "Wie Christus Priester ist, so ist er auch Lehrer und Haupt, und aus dem gleichen Grund, um dessentwillen er das Priesteramt ausübt, kommt ihm auch das Lehr- und Hirtenamt zu." In this context Corecco explains that Hans Urs von Balthasar is of the opinion that all three offices of Christ can be traced back to the office of priest (Corecco, "Die *sacra potestas*," p. 146).

¹⁰² Corecco is of the opinion that baptism and orders as such are insufficient to explain the difference between the ministerial and common priesthood; orders is not a development of baptism, and baptism is not a derivation of orders (Corecco, "Die *sacra potestas*," p. 147).

priesthood of Christ is in need of an objective and external authority that challenges a person to give oneself in the same way the Father challenged (*herausfordern*) the Son. In Corecco's words:

The general priesthood [...] needs the authority of the ministerial priesthood--which challenges him to faithfulness and objectivity of love--in order to participate also in the formal objective dimension of the priesthood of Christ.¹⁰³

In order to realize this, Christ gave to the ministerial priesthood of the Church an authority that expresses itself in the sacred power.¹⁰⁴

Participation in the ministerial priesthood implies also a participation in the common priesthood. The role of the ministerial priesthood is a challenging role vis-à-vis the common priesthood.

Corecco points out that participation in the priesthood of Christ by the common priesthood is not considered a *quantitatively* different participation from the participation of the ministerial priesthood. Rather, it is constituted by an *essential* difference, as *Lumen*

¹⁰³ "Das allgemeine Priestertum [...] bedarf der Autorität des Amtspriestertums - das ihn zum Gehorsam und zur Objektivität der Liebe herausfordert-, um auch an der formalen objektiven Dimension des Priestertums Christi teilhaben zu können" (Corecco, "Die *sacra potestas*," p. 149).

¹⁰⁴ E. Corecco, "Profili istituzionali dei movimenti nella Chiesa," in M. Camisasca, M. Vitali (eds.), *I movimenti nella Chiesa negli anni '80: atti del 1. Convegno Internazionale Roma, 23-27 settembre 1981*, Milano, Jaca Book, 1982, pp. 205. Corecco does not expand on his understanding of sacred power in this context.

gentium expressed it.¹⁰⁵ One has to see the difference from the perspective of the love of Christ for the Father. Corecco emphasizes that because of this love the common priesthood of the faithful should not be defined in negative terms, i.e., as a non-participation in the ministerial priesthood.

Corecco thinks that the subject of common priesthood is not exclusively the laity, because both clergy and religious share in the common priesthood as well. Those who are in the evangelical counsels neither belong only to the common nor only to the ministerial priesthood; they can belong to both. This means that in the Church the status of persons is of a circular nature:

- a) there is a priority of common priesthood that participates in the subjective priesthood of Christ;
- b) there is a ministerial priesthood, that represents the objective authority;
- c) those in the evangelical counsels express that the Christian is in the world, but not of this world.¹⁰⁶

After this Corecco refers to the constitutive elements of the Church. These elements are Word and sacrament, and charism. The difference between these elements is

¹⁰⁵ "Sacerdotium autem commune fidelium et sacerdotium ministeriale seu hierarchicum, licet essentia et non gradu tantum differant, ad invicem tamen ordinantur; unum enim et alterum suo peculiari modo de uno Christi sacerdotio participant" (*LG* 10, in *AAS*, 57 (1965), p. 14).

¹⁰⁶ Corecco, "Profili istituzionali di movimenti," pp. 218-221. He points out that the associations of the faithful have an analogous function to those in religious life, because they also unite the common and ministerial priesthood.

that Word and sacrament engender the institutional structure because of its structural reciprocity, while charism presupposes the existence of the institution:

As a privileged expression of the presence of the activity of the Holy Spirit, charism has as its function to challenge the institution to its proper authenticity and its proper vitality which allow it to be truly the support and expression of the ministry of the Church.¹⁰⁷

Corecco thinks that despite the appearances and theories the real opposition does not lie between the institution and charism. He says that it exists between laity and clergy, which means that it is between common and ministerial priesthood.¹⁰⁸ Charism is always operative within the constitution of the Church, it is present in the bipolarity of common and ministerial priesthood. The problem facing the Church is therefore not to unite charism and institution, but common and ministerial priesthood.¹⁰⁹

¹⁰⁷ "In quanto espressione privilegiata della presenza e dell'attività dello Spirito Santo, il carisma ha come funzione quella di provocare l'istituzione ad una autenticità e ad una vitalità che le permettano di essere realmente sostegno ed espressione del ministero della Chiesa," (Corecco, "Profili istituzionali di movimenti," pp. 216-217).

¹⁰⁸ Corecco, "Profili istituzionali di movimenti," p. 217.

Rahner had the idea that those who have an ecclesial office should not be considered laypersons anymore, but are clerics. Corecco does not agree with Rahner on this. See Corecco, "Die *sacra potestas*," pp. 122 and 151.

¹⁰⁹ He says that a good example of this is the *status perfectionis*, which does not find its origin in either the common or the ministerial priesthood, understood as alternatives, but in both. The *status perfectionis*, which expresses the charism in the Church, has its own position in the constitution of the Church: to call all, the clergy and the laity (the institutional aspect), to the eschatological dimension (non-institutional aspect). Corecco, "Profili istituzionali di movimenti," p. 218.

4.2 - Laity in the conciliar texts

After considering the ideas about the relationship between common and ministerial priesthood, Corecco turns his interest to how the council understands the laity. He observes that it identified the laity from two perspectives. The first one is a sacramental perspective, and the second one deals with the secular character of the laity. He remarks that this approach is in agreement with their mission, viz., a mission in the Church and in the world.¹¹⁰

LG 31,1 (and also *AA* 2,2) gives a theological definition of the layperson. In fact, it is a sacramental definition, because it is in virtue of baptism and confirmation that a person can participate *suo modo* in the priestly, prophetic, and kingly offices of Christ. According to *LG* 10, this participation is essentially different from those who are in the ministerial priesthood. The origin for this difference goes back to a different participation in the priesthood of Christ. Corecco describes the different participation in the three offices of Christ as follows:

The ordained minister can *authoritatively* preach the Word (*LG* 25), while the layperson gives a personal testimony (*LG* 35). The ordained minister can preside at the Eucharistic offering in the name of the faithful, and he can regulate with *authority* the celebration of the other sacraments (*LG* 26). The layperson can participate in the spiritual sacrifice of Christ through prayer, apostolate, conjugal life and daily life (*LG* 34). Because of the sacred power the ordained minister can govern the Church with *authority* (*LG* 27).

¹¹⁰ E. Corecco, "L'identità ecclesiologicala del fedele laico," in *Vita e pensiero*, 70 (1987), p. 165.

Laypersons have the task of bringing Christianity into their culture, and this is done especially in virtue of their secular character (*LG* 36).¹¹¹

The second definition of the laity in the conciliar texts focuses on the secular character of the laity (*LG* 31,2). In his writings, Corecco evaluates this definition differently: sometimes he sees it as a sociological definition, at other times he classifies it as theological.¹¹² Corecco thinks that the secular character does not exclusively belong to the laity: the Church has only one apostolate and all, priests, religious, and laity, participate in that.

4.3 - The 1983 Code

According to Corecco the Code fully recognizes the laity and improves even in a schematic way what was found in *Lumen gentium*, inasmuch as it deals with the laity before the clergy.

¹¹¹ Corecco finds it remarkable that the council describes the participation of the laity in the office of governing especially from the perspective of the secular character of the laity. He is of the opinion that their secular character is also an aspect in the exercise of the other two offices. See Corecco, "L'identità ecclesiologicala," p. 166.

¹¹² For the sociological qualification see E. Corecco, "Katholische 'Landeskirche' im Kanton Luzern: Das Problem der Autonomie und der synodalen Struktur der Kirche," in *AfkKR*, 139 (1970), pp. 29-31. Corecco is of a completely different opinion in his article "Profili istituzionali di movimenti," p. 213, where he says: "L'indole secolare attribuita dalla *LG* a questi laici, non è di natura sociologica ma teologica." In the footnote that goes with this he mentions that there is no agreement among scholars whether this section of *LG* 31, 2-3 considers the secular character to be of a sociological or a theological nature.

A comparison with the council shows two major areas in which there are still problems to be solved: the participation of the laity in the *munus regendi*, and the secular identity of the laity.

The Code expresses explicitly the participation of the laity in the *munus docendi* and in the *munus sanctificandi* in cc. 759 and 835, § 4. There is however no specific canon that expresses the participation in the *munus regendi* as LG, 37 and 38 taught. Corecco thinks that the reason for this lies in the decision not to have a book *de munere regendi*. It implies that the legislator experienced difficulty accepting the idea that the participation of the laity in the office of governance is as essential, from a constitutional point of view, as the participation of the clergy:

In book II, therefore, there has been a reabsorption, not only systematically but to some extent substantially as well, of the *munus regendi* of the laity into the *munus regendi* of the hierarchy.¹¹³

Corecco is of the opinion that c. 129, § 2¹¹⁴ reveals that the

participation of the laity in the *munus regendi* is not seen as the exercise of a native, personal qualification bestowed upon them in baptism, but as an extrinsic cooperation with the exercise of a *potestas* possessed by others, namely the hierarchy.¹¹⁵

¹¹³ Corecco, "Aspects of the Reception," p. 270.

¹¹⁴ Canon 129, § 2: "In exercitio eiusdem potestatis, christifideles laici ad normam iuris cooperari possunt" (John Paul II, *Codex iuris canonici*, auctoritate Ioannis PP. Pauli II promulgatus, Città del Vaticano, Libreria Editrice Vaticana, 1983, hereafter referred to as CIC/1983 with the canon number).

¹¹⁵ Corecco, "Aspects of the Reception," p. 270.

At the same time Corecco points out that the Code is not ungenerous in acknowledging the responsibilities of the laity. In fact, when all the possibilities are taken into account, it is difficult to distinguish between a layperson and a deacon.¹¹⁶

The second problem area in the Code concerning the laity is the secular character of the layperson. Corecco begins with two statements of the Council in order to deal with this. The first one is *LG 37*, which says that pastors are in a better position to judge spiritual and temporal matters if they are helped by the experience of the laity. The second statement is from *LG 35*, which emphasizes the particularity of the layperson in the prophetic task in the world. Corecco is of the opinion that these statements give an indication that the secular character of the laity has its effects both in the world and the Church. He points out that these two statements are completely ignored in the new Code. The problem that arises from this is not to urge the clergy to engage both in the world and in the Church, as the Code does (cc. 275, § 2, 394, § 2, and 529, § 2), but

the problem is rather to accept the fact that the *indoles saecularis* sets certain limits within which the ministerial priesthood must carry out its mission. The 'secular quality' thus makes it possible to determine more

¹¹⁶ Corecco mentions the problem of lay-judges: "In contentious processes, as in those dealing with the state of persons, where the sentences are purely declaratory, *sacra potestas* (in its juridical function) does not intervene directly but only indirectly in the act of passing sentence. It is directly operative only in the preliminary phase, that is, the action that initiates the procedures and appoints the judges. In contentious procedures and procedures dealing with the state of persons, judges therefore do not exercise a *potestas iurisdictionalis iudiciaria*, which as *iudicialis* does not exist (once the difference between this and legislative or administrative actions becomes purely procedural); they only carry out a functional and technical task in relation to the *sacra potestas* of the bishop. It follows that the admission of laypersons to the office of judge poses no theological problem" (Corecco, "Aspects of the Reception," p. 260).

precisely not only the ontological nature of the laity but indirectly that of the ordained minister as well.¹¹⁷

The Code did not work out very well the idea of the secular character of the laity;¹¹⁸ Corecco says that the postconciliar theology of the laity, which neglected the problem of secularity, influenced the Code. The result of this is that it sets itself on the course of a "subtle but distortive clericalization of the laity."¹¹⁹

Corecco regrets that the Code did not take on a different structure in defining the laity: besides basing its definition on baptism, it could have explicitated three other constitutive elements, viz. that of the common priesthood, that of the *sensus fidei*, and that of the possibility of their being invested with charism. The first two elements are discussed somewhat in cc. 705 and 836. However, if the Code had applied the first two elements, then the ontological relationship of the individual member to Word and Sacrament would have clearly appeared. In that case the structure of the Church would have come out more correctly, and the differences among the faithful would have been better delineated.

Corecco says that the Code did not take the third factor (charism) into consideration at all. The Code does not mention the text of *AA* 3,4, that says that the faithful have the obligation or right to exercise their own charisms:

¹¹⁷ Corecco, "Aspects of the Reception," p. 272.

¹¹⁸ Corecco mentions four groups of norms that relate to the laity as defined by its secular character: the duty to imbue the temporal order with the spirit of the Gospel (c. 225, § 2), the right of freedom to exercise this mission (c. 227), the right of association for this purpose (c. 327), and the obligations and rights of the family to educate the children (cc. 226, 793, 796-799) (Corecco, "Aspects of the Reception," pp. 272-273).

¹¹⁹ Corecco, "Aspects of the Reception," p. 273.

This lack of explicit articulation of all the elements constituting the ontological and juridical figure of the member of the faithful, or their obliteration as in the case of the charisms, diminishes the richness of the constitutive theologico-legal patrimony of the faithful, even if one ought to recognize that the common priesthood and the *sensus fidei* were at least implicitly part of the doctrine of the baptismal participation of the faithful in the three *munera* of Christ.¹²⁰

4.4 - Conclusion

Corecco attempts to solve the questions of the participation of the laity in the sacred power through a correct understanding of their participation in the three offices of Christ, which he traces back to the priesthood of Christ. He sees the need for a common and ministerial priesthood, and argues that the ministerial priesthood provides a challenge to the common priesthood. In the section on the sacred power, it became clear that Corecco is of the opinion that the powers of orders and jurisdiction cannot be separated. This has the consequence that, if someone exercises, by delegation, the power of jurisdiction, that person could also exercise the power of orders. But since the power of orders is linked to the apostolic succession, it is impossible to confer the sacred power independently from the power of orders.¹²¹

Corecco's analysis of the secular dimension of the laity shows his concern for clericalization of the laity. He would have liked a different systematic approach to the laity, or in fact a different approach to the faithful in general.

¹²⁰ Corecco, "Theological Justifications," p. 90.

¹²¹ Corecco, "Die *sacra potestas*," pp. 151-152.

The following section reports on Corecco's ideas about the faithful and especially about their rights.

5 - FUNDAMENTAL RIGHTS

Corecco deals with the faithful in general from several perspectives. The previous section showed that one approach is based on an analysis of the common and ministerial priesthood. Another approach is to view the faithful as the new protagonist of the 1983 Code. In addition to these perspectives, he mentions the obligations, but even more, the rights of the faithful. Corecco proposes to address these rights not in the same way as rights in secular law, but to use the principle of *communio* for interpreting them.

This section will focus on both the 'faithful as the new protagonist' and the rights of the faithful.

5.1 - The faithful as new protagonist

Corecco sees that the Code has changed its focus: the 1917 Code had the clergy or the hierarchy as the most important subject, but the 1983 Code has the faithful as the new protagonist. That is not only in line with Vatican II, but goes beyond it. Corecco demonstrates this in three points: firstly, book II starts with a set of norms covering the common status of all the faithful; while *LG* 10 contains this insight, the council was not able to flesh it out. Secondly, the definition of the faithful (c. 204) is not an identification

with the laity, as is done in *LG* 31. Thirdly, c. 208 mentions an equality in dignity and action for all the faithful (*LG* 32 did not do this).¹²²

Although the faithful are the subjects of the new Code, they are not envisioned in the same way as civil codes envision their subjects. Corecco stresses that canon law cannot and should not adopt the same principle as civil law. In civil law the individual precedes the law, and the law has to protect the individual's rights. Corecco says,

Also the *fidelis* [...] has nothing in common anymore with the individual of the civil society, who could base himself on the principle of free competition and on the law of the strongest, because of the interest of his self realization; but it is a person who according to c. 209, § 1 has as first moral and legal obligation to stay both externally and internally in communion with the whole Church, i.e., with all other faithful.¹²³

In this quotation several aspects are important: 1) the faithful are the new subjects of the Code; 2) the faithful cannot be compared with the individuals of secular society and 3) the first obligation of the faithful is to stay in communion with the Church. Both the position of the faithful in Church and society, and the obligation to stay in communion lead Corecco to consider the obligations and rights of the faithful.

¹²² Corecco, "Aspects of the Reception." p. 264.

¹²³ "Auch der *fidelis* [...] hat nichts mehr gemein mit dem Individuum der bürgerlichen Gesellschaft, das sich im Interesse seiner Selbstverwirklichung auf das Prinzip der freien Konkurrenz und des Rechtes des Stärkeren stützen konnte, sondern ist eine Person, der can. 209, § 1 zur ersten moralischen und rechtlichen Pflicht macht, in ihrem äußeren wie inneren Verhalten die *communio* mit der ganzen Kirche, d.h. mit allen übrigen Gläubigen, zu bewahren" (Corecco, "Die kulturellen und ecclesiologischen Voraussetzungen," p. 15).

5.2 - Rights of the faithful

In treating of the obligations and rights of the faithful, Corecco starts with methodological questions.

In civil law it is a relatively new phenomenon to speak about *fundamental* rights. Corecco points out that until Vatican II not much was said about such rights.

Since both civil and canon law speak about rights, Corecco poses the question whether it would be possible to use an analogy between civil and canon law. He proposes to look into this with the help of the concept of *fundamental right*. There are two aspects to this question: the first one is the use of an analogy between canon law and civil law. The second question is whether there are rights within the Church, that are of a *fundamental* nature.

5.2.1 - An analogy between canon law and civil law?

Corecco investigates whether an analogy can be used between secular law and canon law by applying the category of fundamental rights. As Corecco already pointed out, an *analogatum princeps* cannot be applied; so he investigates the possibilities of applying an *analogia proportionalis*. For such an analogy, a third category is required that transcends both legal systems. This third category can only be the legal notion (*Rechtsbegriff*) itself. He also asks whether the adjective *fundamental* transcends both legal systems, since this would be required to use an analogy.¹²⁴ Corecco starts with the fundamental rights.

¹²⁴ Corecco, "Considerazioni," p. 1219.

5.2.2 - Fundamental rights

Corecco remarks that the term 'fundamental rights' originates in the modern state. There, it has two meanings: (1) the person is a legal subject preceeding the state and as a consequence has (2) a guarantee of a certain latitude of autonomy. The terminology of fundamental rights corresponds to the task that human rights have in the constitutional system of the modern state. In the realm of the Church, Corecco considers it more appropriate to define the rights of Christians not as fundamental rights, but as primary rights or simply as rights.¹²⁵

Corecco believes that the *fundamental* character of the rights does not link the person in the State and the Church, but distinguishes it for three reasons:

1) the *telos* of the Church is not to guarantee the rights of the person:

[...] the primary goal of the ecclesial constitution is to offer a guarantee that the Word and Sacrament proclaimed and celebrated today are the same Word and Sacrament that were instituted by Christ. It has to preserve the message of salvation through the mediation of the Church, which is already expressed concretely in its constitutional structure. The final operating subject is Christ, who sent the Holy Spirit.¹²⁶

2) specific rights of Christians do not precede the Church, but they are acquired by baptism and other sacraments. Corecco stresses that baptism is not the only and exclusive

¹²⁵ Corecco, "Considerazioni," p. 1219.

¹²⁶ "[...] la costituzione della Chiesa ha come scopo primario quello di dare la garanzia che la Parola e il Sacramento celebrati oggi nella Chiesa siano ancora la stessa Parola e lo stesso Sacramento istituiti da Cristo. Essa deve conservare autentico il messaggio di salvezza attraverso la mediazione della Chiesa, che si esprime concretamente appunto nella sua struttura costituzionale. Il soggetto ultimo operante nella Chiesa è Cristo, è il Cristo che la inviato lo Spirito Santo" (Corecco, "Considerazioni," p. 1221).

foundation for the fundamental rights of Christians. Such a foundation might be helpful in an ecumenical discussion, but baptism is the gate to the other sacraments, and all sacraments together are constitutive for the ecclesial personality;

3) an individual autonomy deduced from a person's fundamental rights is not applicable to the Church. It does not mean that the individual does not have his or her own autonomy, but it does mean that there is a difference between one's autonomy in the Church and one's civil autonomy.¹²⁷

An analogy between canon law and civil law cannot therefore be applied. However, Corecco says,

It also implies facing the problem of the exact constitutional significance of the ecclesiological and canonical category of *communio*.¹²⁸

Corecco will not use the analogy. Rather, he proposes using the concept of *communio* in an affirmative approach of addressing the rights and duties of the faithful.

5.2.3 - The meaning of *communio*

Section 1 - *Canon Law* reported on Corecco's understanding of *communio*. In short, this *communio* refers to *in quibus et ex quibus* not only for the Church but on all levels and aspects in and of the Church. On the level of the individual it refers to a

¹²⁷ Corecco mentions that the term *autonomy* has a specific meaning in the light of *communio ecclesiae et ecclesiarum*, but he does not explain what is special about it. See Corecco, "Considerazioni," p. 1222.

¹²⁸ "Questo coincide col porsi il problema della esatta valenza costituzionale, della categoria ecclesiologica e canonistica di *communio*" (Corecco, "Considerazioni," p. 1222).

representation of Christ because Christ is in the whole Body. It also implies that the Christian is not an individual reality, but is part of a collective. In the person, the whole community is present.

He also refers to the idea that *justice* is not the end of the law, but it is God's justice, which reveals itself in the *communio*.¹²⁹

Corecco is of the opinion that his theory of *communio* shows once more that the category of fundamentality with the help of an *analogia proportionalis* cannot be applied to the rights of Christians. However, this does not imply that the Christian has no rights in the Church.¹³⁰

¹²⁹ For the idea of *communio* as criterion for constitutional rights Corecco refers to J. Beyer's article "La *communio* comme critère des droits fondamentaux," in E. Corecco, N. Herzog, A. Scola (dirs.), *Les droits fondamentaux du chrétien dans l'Église et dans la société: Actes du IVe Congrès international de droit canonique, Fribourg (Suisse), 6-11, X, 1980*, Fribourg, Éditions universitaires, Freiburg i. Br., Verlag Herder, Milano, Dott. A. Giuffrè Editore, 1981, pp. 76-96 (Corecco, "Considerazioni," p. 1216).

¹³⁰ Corecco addresses the question whether the concept of human rights is also applicable to the rights of Christians. Here the major issue is the application of natural law in the Church. Corecco turns to the principle of *subsidiarity*, which contains two elements. On the one hand this principle organizes the relationship between a higher and a lower stage; on the other hand it determines at the lower stage the pending controversy. This means that the value of the lower stage has an absolute character. Corecco says: "I valori naturali dei diritti dell'uomo non hanno per contro valore assoluto, ma sono semplicemente relativi rispetto ai valori soprannaturali e ai diritti del cristiano nella Chiesa." This relativity appears on two levels: the level of epistemology (faith should be the criterion) and the level of application (natural values are only applicable as long as faith has not yet disclosed the knowledge of truth). According to Corecco, the solution to the problem is that nature does not provide grace, but grace presumes the existence of nature. (Corecco mentions as an example the freedom of conscience, which is not applicable as a foundational right of the Christian in the Church, but it is a natural presumption without which the Church could not exist: "Il cristiano non gode della libertà di coscienza nel senso che la comunità ecclesiale non possa domandargli, come condizione della sua appartenenza, un comportamento confessionale vincolante; ma, come è già stato sottolineato da più parti in questa sede, gode del diritto che nei suoi confronti la Chiesa non eserciti alcuna forma di costrizione usando mezzi per loro natura estranei al proprio ordinamento giuridico.") His final answer to human rights in the Church is a 'yes' and a 'no.' The arguments in favour

5.3 - A catalogue of obligations and rights

The problem of obligations and rights appears in the legal order of the Church only at the time of Vatican II. The 1917 Code mentioned some rights,¹³¹ but there was no catalogue of duties and rights.

Corecco cites Leo XIII as the one who started a process of dialogue with secular culture. This led, according to Corecco, to the declaration of religious freedom and the pastoral constitution *Gaudium et spes*.¹³² Canon law had therefore to deal with modern legal systems and their postulations, one of them being the issue of fundamental rights. In several conciliar documents, obligations and rights of the faithful are mentioned. The 1983

are that rights can realize a limit and condition so that the *communio* can realize itself, and they can assist in a reflection on the nature of rights of Christians. Arguments against are that they will not produce a *communio ecclesiae et ecclesiarum*, and their nature is of a provisional character: "in attesa che i cristiani recuperino totalmente nella fede, nella speranza e nella carità i valori e i criteri che dovrebbero determinare la specificità della loro esperienza ecclesiale" (see Corecco, "Considerazioni," pp. 1231-1234).

¹³¹ Corecco cites as examples the right to marry (c. 1035 CIC/1917), the free choice of a status (c. 214, § 1 CIC/1917 and c. 572, § 1 n. 4 CIC/1917), the right of the laity to receive the sacraments from the clergy (c. 682 CIC/1917). See Corecco, "Der Katalog der Pflichten und Rechte des Gläubigen im CIC," in A. Gabriels, H.J. Reinhardt (Hrsg.), *Ministerium iustitiae: Festschrift für Heribert Heinemann zur Vollendung des 60. Lebensjahres*, Essen, Ludgerus Verlag, 1985, p. 180.

¹³² Corecco is of the opinion that Leo XIII started a dialogue with secular culture which influenced the epistemological level of natural law of the ecclesial social teaching. It had, according to Corecco, an influence on Vatican II, although the council only mentioned human rights in passing. It influenced the idea of the people of God: the faithful are equal. The Church as a *societas inaequalis* became a Church that is both a *societas aequalis* and a *societas inaequalis* (Corecco, "Der Katalog der Pflichten und Rechte," pp. 180-181).

Code also has a section on obligations and rights of the faithful, which, in the opinion of Corecco, has adopted the conciliar teaching very well.¹³³

Though there is a catalogue of obligations and rights, Corecco points out that there remain two areas to be discussed. The first one is the ontological status of the obligations and rights, and the second is the precedence of obligations over rights.

5.3.1 - The ontological status

In virtue of c. 223,¹³⁴ which speaks about the right to *exercise* the rights, Corecco considers it important to determine the ontological status of the rights. This status, once classified will influence the interpretation of c. 223.

In determining this ontological status, Corecco distinguishes three levels of obligations or rights:

1) one-third of the obligations or rights have a direct relationship to the three offices of Christ that are founded in baptism. This means that they are deducted from divine positive law.¹³⁵

¹³³ For an evaluation of the obligations and rights mentioned in the conciliar documents and the 1983 Code, see Corecco, "Der Katalog der Pflichten und Rechte," pp. 181-188.

¹³⁴ C. 223, § 1 CIC/1983: "In iuribus suis exercendis christifideles tum singuli tum in consociationibus adunati rationem habere debent boni communis Ecclesiae necnon iurium aliorum atque suorum erga alios officiorum. § 2. Ecclesiasticae auctoritati competit, intuitu boni communis, exercitium iurium, quae christifidelibus sunt propria, moderari."

¹³⁵ These canons are cc. 210, 211, and 225, § 1 1st sentence and "the duty to live in communion with the Church (c. 209, § 1), that of diligently fulfilling one's offices (c. 209, § 2), that of obeying the pastors (c. 212, § 1), and that of contributing to the material necessities of the Church (c. 222, § 1)" (Corecco, "Theological Justifications," p. 92).

2) Another third deals with obligations or rights whose structure also exists in natural law. They are, however, not to be considered in a natural relationship to one another, but in a relationship that is of an ecclesiological nature. Therefore Corecco envisions them as also derived from divine positive law.¹³⁶

3) The last third of the obligations and rights originates from natural law. In virtue of baptism however, they are to safeguard the values arising from divine positive law, and not those of the natural law itself. This implies that they are limited by boundaries determined by a priority given to supernatural values.¹³⁷

About the difference between rights of natural and divine law, Corecco says,

While natural rights are structured as being directly opposed to third parties and to ecclesial authority, the rights rooted in the *ius divinum positivum*

¹³⁶ These cases are: "[...] the right to make known one's own ecclesial needs and one's opinion to the pastors and to the faithful (c. 212, §§ 2 and 3, 1st and 2nd sentences); the right of association (c. 215); that of learning Christian doctrine and acquiring the formation appropriate to one's state of life and to one's ecclesial office (cc. 217, 229, § 1, 231, § 1)-to which are linked the right of access to academic degrees and to qualifications for the teaching of sacred sciences (c. 229, §§ 2-3)--as well as the right to just remuneration (c. 231, § 2). All of them figure as rights only insofar as they guarantee the carrying out of the primary right or responsibility of the faithful, which is to cooperate in the spreading of the Gospel, formulated in cc. 211 and 225, §1, 1st sentence.

Likewise the right to hear the Word preached and to receive the sacraments (c. 213), and that of pursuing one's own spirituality and following one's own rite (214, 1st and 2nd sentences) are the guarantees that correspond to the basic duty of tending toward personal sanctity, and in this way of helping the Church to grow, as formulated in c. 210, 1st and 2nd sentences" (Corecco, "Theological Justifications," p. 92).

¹³⁷ See Corecco, "Der Katalog der Pflichten und Rechte," p. 189. Corecco mentions the following norms: "freedom of teaching and research (c.218, 1st and 2nd sentences), that of the choice of personal state of life (c. 219), that of the protection of one's reputation and of the intimacy of the personal [sic] (c. 220, 1st and 2nd sentences), that of the four guarantees of due process of law (c. 221), and that of just remuneration (c. 231, § 2)" (Corecco, "Theological Justifications," p. 92). Nota bene: the just remuneration is now classified differently; See previous footnote.

create only an indirect opposition: that is, only insofar as they enunciate the right to fulfill the obligation which is their correlative.¹³⁸

Corecco thinks that the determination of the ontological status of these norms is not only pertinent to the interpretation of c. 223, § 2,¹³⁹ but it is also relevant for the mutual relationship between duties and rights. Corecco explains that those rights that are of a natural origin (or the ones that belong to general legal principles), that is, those designed to protect the personal autonomy of the faithful, come with a duty which does not affect the subjects of the right themselves, but the other faithful or ministers. When the norm is of divine law (cc. 209, 210, 212, and 222), the subject of the right is also the subject of the duty.¹⁴⁰

Besides the ontological status of obligations and rights, Corecco addresses the issue of obligations preceding rights.

5.3.2 - The precedence of obligations over rights

As Corecco already mentioned, in the state human persons are anterior to the state, and they have to protect their own autonomy. This is not the case in the Church, where

¹³⁸ Corecco, "Theological Justifications," pp. 92-93.

¹³⁹ Corecco adds that one has to keep in mind that norms of divine law and of natural law have a material hierarchy above other norms. He points out that in combination with c. 33, § 1 one can see that it is of extreme importance to determine the ontological nature of the canons. See Corecco, "Der Katalog der Pflichten und Rechte," pp. 189-190).

¹⁴⁰ Corecco says that those norms that deal with these rights show that there is not another party that has an obligation, but it is the same person. In fact these rights are the result of the actualization of a duty (Corecco, "Der Katalog der Pflichten und Rechte," p. 191).

the individual is not defined first outside the Church, but is a member of the faith community as a subject who has both duties and rights. Corecco explains the precedence of duties over rights as follows:

The priority of 'duties' over 'rights' is founded on the fact that all Christians, whatever their sacramental and canonical status, exist as Christians only by their relation to the salvific vocation given by Christ, the vocation to accede to communion with the Father and with all the rest of the faithful.¹⁴¹

Corecco sees this as a reason why the Code states that the first duty of the faithful is to live in communion with the Church (c. 209, § 1). It is also from this obligation that all other rights and duties flow. This canon (c. 209, § 1) implies that there is no competition between a member of the faithful and the Church. This structural absence of competitiveness between duties and rights is also apparent on the institutional level. The institution of the Church is the result of baptism and orders. These two sacraments are correlative and coessential to each other and they are not competitive or alternatives to one another.

Corecco concludes that

"[...] the Code, by identifying the member of the faith community as the primary subject of the life of the Church, has testified to his or her being the subject in whom emerges a reflection of the profound structure of the whole Church, born by the principle of communion, a principle that requires a phenomenon of immanence."¹⁴²

¹⁴¹ Corecco, "Theological Justifications," p. 93.

¹⁴² Corecco, "Theological Justifications," p. 94.

5.4 - Conclusion

The new Code has the faithful as the new subjects. One of the main aspects of the faithful is their rights and obligations. Corecco pointed out that the understandings of rights and obligations are very different in a secular legal system and in canon law. Of importance is the principle of *communio* as the hermeneutical criterion for the canonical system, because it expresses that, rather than human justice, God's justice is supremely relevant.

CHAPTER 2 - EVALUATION OF CORECCO

The previous chapter reported on the theory of Corecco. In this chapter his theory will be the object of evaluation. This evaluation will be conducted in the same way as the evaluation of Mörsdorf. Hence, each point will present, in the first section, a brief exposition of Corecco's question and position. The second section will give an evaluation of Corecco's theory. The structure of this chapter will be as much as possible in congruence with the presentation of the theory.

1.1 - Canon law is part of the deposit of faith

One of the most relevant questions that Corecco addresses is the need of a theological foundation for canon law. Until recently, canon law was considered a *species* of the *genus* law. Such an understanding of canon law flows from legal philosophy. Corecco states that Mörsdorf and Rouco Varela moved away from a philosophical foundation of canon law, since they believed such a foundation to be insufficient. They, however, did not deny the societal aspect of the Church. Corecco goes beyond these two scholars: he denies the possibility of a foundation that takes into consideration also that social aspect. Corecco urges for a sole theological foundation.

An important reason for this proposal is his conviction that canon law is already part of the content of faith. He formulates this also in different words, when he says that

canon law itself is an essential reality in which the tradition of the Church is manifested by 'concluding facts.'

Corecco expresses his opinion, that canon law is part of the deposit of faith, also in the denial of a possible analogy between secular law and canon law. According to Corecco such an analogy would only produce a description of what canon law is not. It would not be able to point out what constitutes canon law positively.

In summary, the question, concerning the theological foundation of canon law, is born out of the idea that canon law is part of the deposit of faith; it is not to be considered as a *species* of the *genus* law.

1.2 - Evaluation

Corecco starts with the notion that canon law is part of the deposit of faith. This is a very significant point for understanding his whole theory. It is of crucial importance to notice the assumption Corecco makes, because it affects his ideas of canon law, its relationship to theology, its interpretation, and its implementation.

Corecco does not give any reasons to support this all embracing statement nor does he explain it in any depth. Yet, before he did accept that canon law belongs to the deposit of faith, he should have addressed a few questions, which concern especially the relationship between the human and the divine element in canon law.¹⁴³

¹⁴³ Of course the Holy Spirit influenced the community, but that does not mean that this community lost its human aspect. Order had to be brought into the community and that was partly done through faith. Denying the human aspect to canon law is dangerous and erroneous. There is also no need for it; even Christ was not only divine, but also human!

Corecco said in the introduction to his book *Theologie des Kirchenrechts*, p. 9, that the fundamental question is if there is a bond of ontological dependence between contingent and mutable human norms and a superior form of natural or divine law which

Above all Corecco's ideas affect the understanding of the relationship between theology and canon law. Corecco thinks of canon law as if it were doctrine of faith itself.¹⁴⁴ Doctrine is part of the deposit of faith and an adequate response to it is "I believe." Theology is ordinarily understood as a science that mediates between the deposit of faith and culture. Since Corecco places canon law into the realm of the deposit of faith, he does not leave any space for an autonomous operation by either theology or canon law. The consequences are that there is no difference any more between canonical norms and theology. In identifying the canonical and the theological world, it becomes impossible to keep a distinction between theology, understood as knowledge--faith seeking understanding--and canon law, understood as norms--faith and reason seeking action. If canon law and theology overlap each other, in the way Corecco proposes it, canon law would acquire the stability of doctrine. Then, concern should arise about the possibility of and allowance for change of the canonical system.¹⁴⁵ In other words, the (im)mutability of the canonical

may transcend and justify them. In his book, however, he does not answer this question.

¹⁴⁴ Corecco's understanding of canon law changes the nature of both canon law and the deposit of faith. How can the deposit of faith contain the Word of God and norms made by people?

¹⁴⁵ There is of course no doubt that there is development in theology, but this development of theology differs from the development of canon law. The latter should be able to adapt to changing circumstances in order to be a life giving entity. The development of theology is depending on revelation.

system is at stake, because Corecco identifies knowledge with norms.¹⁴⁶ Also, he does change the nature of doctrine by inserting temporal rules into it.

The reason for Corecco's understanding of canon law might well be his refusal to accept that the Church has also a societal aspect. In denying that aspect, and in adopting only the 'supernatural' *communio* aspect of the Church as point of departure, Corecco is bound to end up with problems concerning the understanding of law. The societal aspect intrinsically provides for a need to have norms of action. This does not imply though that the societal aspect should be the sole consideration; on the contrary, the specific nature of the Church has to be taken into account as well.

The refusal of taking into consideration the societal aspect of the Church leads Corecco also to the denial of an analogy between secular and canon law. If, however, analogy means that something is partially the same and partially it is not, then there cannot be a problem in applying it. Corecco is of the opinion that the use of an analogy leads only to an identification of what canon law is not. He wants a more positive approach. Then, the question arises if the use of analogy is bound to lead to a negative definition of canon law.

At this point it is appropriate to mention Rouco Varela, because Corecco reported on him approvingly. Rouco Varela highly influenced Corecco in determining the question about the status of canon law. Yet, Corecco has different ideas when it comes to answering the question. Rouco Varela proposes to see theology and canon law as two distinct

¹⁴⁶ John Paul II emphasized also that canon law should be grounded in theology, but he warned against an identification of canon law and theology. See John Paul II, "Apostolic Constitution, "Sacrae disciplinae leges," in *AAS*, 75 (1983), pars II, pp. vii-xiv, espec. pp. viii and xi.

disciplines, although they are related. Corecco, however, considers canon law and theology much more as one discipline. According to Rouco Varela the two disciplines are independent, though related; for Corecco they can be distinguished--although he does not say 'how'--but not separated. An additional problem is that Corecco never explained what he meant by theology.

The implications of Corecco's understanding of canon law, as being part of the content of faith, are tremendous. Departing from this assumption he tries to give canon law a theological foundation, for which he moves to the purpose and the ontological status of canon law.

2.1 - The purpose of canon law

Corecco says that the definition of canon law has always been determined from the notion of 'justice.' He is, however, of the opinion that natural justice does not apply to canon law, because of the theological nature of canon law. In canon law the realization of salvation is important and he equates this salvation with divine justice. Subsequently, he says that the meaning of divine justice becomes clear in the theological virtues of faith, hope and love. In their turn, these theological values can be determined from the Church as *communio*. Hence, *communio* is the ultimate criterion for the definition of canon law.

At the same time Corecco speaks about the end of the law. Traditionally it would be the *bonum commune ecclesiae*, but Corecco is of the opinion that it should be the realization of *communio*. He defines this *communio* as a *communio ecclesiae et ecclesiarum*. The difference between the *bonum commune ecclesiae* and *communio* lies in the mediation of salvation. Canon law mediates this salvation because of its roots in the *ius divinum*.

Considering the above, for Corecco *communio* functions both as the source and as the purpose of canon law.

2.2 - Evaluation

The description of the theory of Corecco shows that he opposes natural justice to *communio*. At this point not so much the understanding of *communio*--which will be discussed in the next section--, but his pattern of operating deserves attention. Corecco opposes here two realities, viz., justice and *communio*. The opposition of two realities is a recurrent pattern in Corecco's theory--one is usually the 'natural,' the other the 'supernatural' aspect. Since Corecco does not operate with analogy, he excludes one fully and chooses the other. Already in the previous section he did this, when he opposed the societal aspect of law against the *communio* aspect, and when he opposed canon law as a juridical reality against a theological reality. In this section he opposes human justice against divine justice. Corecco will continue to operate in this pattern of disjunctive terms (especially when he opposes faith against reason). This pattern of operation, then, shows that he thinks in terms of 'either...or' and not in analogical terms. In all instances in which Corecco thinks in this disjunctive mode, the question can and should be asked, if it is necessary and desirable to think in such a way.

In the current case, viz. the opposition of justice against *communio*, it is neither necessary nor desirable to operate in this manner, since they do not mutually exclude each other. That is to say, once Corecco accepted that canon law is part of the deposit of faith, he consequently had to come to the idea that human justice could not function as the

source of a definition of canon law. So Corecco is consistent in his thinking, but the foundation and method of his thinking has to be questioned.

Corecco's idea that the canonical norms would mediate grace forms a good example of the consequences of seeing canon law as part of the deposit of faith. He does not explain in what sense canon law mediates grace, but the impression is given that he exalts canon law to the level of the Word of God. Then, the question arises how a human norm, which *lex ecclesiastica* is, can ever mediate grace.

In conclusion, the question about the end of canon law shows that Corecco indeed places canon law in the theological realm. The pattern of operation is a disjunctive manner, which brings about--or at least gives an impression of--an unnuanced theory.

In the following section the meaning of *communio* is the object of investigation.

3.1 - The meaning of *communio*

Corecco uses the reality of *communio* as a central point in his theory. He does not indicate why he selects *communio* as the decisive criterion for the canonical system, but he refers for the meaning of it to the last chapter on *communio* in the *Habilitationsschrift* by W. Aymans.¹⁴⁷ The meaning of *communio* then can be found in LG 23,1, where this reality is expressed in the phrase *in quibus et ex quibus una et unica Ecclesia Catholica*. Corecco says that this means that the universal Church which is realized in the particular Church is identical with the one that is constituted from the particular Churches. Corecco goes on to say that this understanding of *communio* has a structural dimension. By that he means

¹⁴⁷ Aymans, *Das synodale Element in der Kirchenverfassung*, pp. 318-366.

that it occurs at several other instances in ecclesiology, like ministerial and common priesthood, and the individual member of the faithful and the Body.

Corecco says that since *communio* describes the mystery of the Church, it can only be known through faith. The understanding of the Church as *communio* shows that the Church cannot be compared with any secular constitutional model.

3.2 - Evaluation

If someone had to say what the ecclesiology of Corecco is, the word *communio* would directly come forward. Not only is it a central term in his whole theory, it is also an exclusive term. 'Exclusive' in the sense that Corecco takes only *communio* to describe the Church. This exclusiveness is somewhat surprising, after having praised Rouco Varela for pointing out that all aspects of the Church have to be taken into consideration when speaking about a theological foundation. Corecco limits his description of the Church to one image.¹⁴⁸

¹⁴⁸ D. Pirson, professor in Munich, questions the possibility of having *communio* as the basis for canon law. He says that *communio* can only be understood in relation to the Holy Spirit which works through Word and sacrament. Yet, he questions if *communio* provides canon law with a principle of law that is only appealing, but not normative. He says: "Der Versuch, das Kirchenrecht auf Grund eines ausschließlich auf theologische Kategorien gestützten Rechtsbegriff zu entfalten, mag eine gewisse Konsequenz für sich haben. Ob dies möglich ist ohne die Funktion des Kirchenrechts zu gefährden, nämlich die Funktion, durch ein normatives Element dem kirchlichen Auftrag zu dienen, muß als Frage gestellt werden. Wenn man es als erstrebenswert ansieht, in der kirchlichen Rechtsordnung dem *communio*-Gedanken Rechnung zu tragen, ist gleichwohl kritisch zu prüfen, ob die dem *communio*-Prinzip entsprechenden Beziehungen als Rechtsverhältnisse begriffen und so gefaßt werden können, daß die *communio* selbst zum Inhalt von Rechten und Verpflichtungen wird" (D. Pirson, "Communio als kirchenrechtliches Leitprinzip," in *ZevKR*, 29 (1984), p. 35-45, espec. 42).

For the meaning of *communio* Corecco turns to Aymans. Aymans, however, does not consider the meaning of *communio* itself, but discusses *communio ecclesiarum*. Moreover, Aymans does not say that the principal understanding of the Church should be *communio*; he says that the images of People of God and Body of Christ are highly relevant.¹⁴⁹ Corecco adopts Aymans' understanding of *communio ecclesiarum*, which means the *in quibus et ex quibus*,¹⁵⁰ and applies this to *communio*.

Besides Aymans, Corecco could have mentioned O. Saier, who wrote a dissertation on the meaning of *communio* in the documents of Vatican II.¹⁵¹ That dissertation would

¹⁴⁹ An article by Aymans, presented in the same year as his *Habilitationsschrift* shows that Aymans considers the image of People of God as the main image of the Church. Besides that image he also mentions *Corpus Christi* and *communio*. See W. Aymans, "Die *communio ecclesiarum* als Gestaltgesetz der einen Kirche," in *AfkKR*, 139 (1970), pp. 69-90. Two years later, Aymans says that the images of Body of Christ and People of God determine the meaning of *communio*. Body of Christ refers to the Eucharistic community and to the *hierarchica communio*. People of God refers to the *communio ecclesiarum*. See W. Aymans, "'Volk Gottes' und 'Leib Christi' in der *Communio*-Struktur der Kirche: Ein kanonistischer Beitrag zu Ekklesiologie," in *TThZ*, 81 (1972), pp. 321-334. In this article Aymans refers especially to a dissertation by O. Saier.

¹⁵⁰ Aymans says that the notion of the Church as *communio ecclesiarum* (the *in quibus et ex quibus*) is characterized well in the doctrine on episcopal collegiality. See Aymans, *Das synodale Element*, pp. 318-324.

Corecco says that the title of von Balthasar's book *Das Ganze im Fragment: Aspekte der Geschichtstheologie* expresses well what he means by *communio*. It should be noted that it is indeed only the title of the book, not the content that Corecco refers to. Von Balthasar's book concerns, as the subtitle says, historical theology. The main title of his book refers to the question how should we deal with our life which is fragmented? Does our existence make any difference to the whole?

¹⁵¹ O. Saier, *Communio in der Lehre des Zweiten Vatikanischen Konzils: eine rechtsbegriffliche Untersuchung*, Münchener theologische Studien, III. Kanonistische Abteilung, Bd. 32, München, Max Hueber, 1973, xxi, 302 p. In this dissertation, Saier discusses two meanings of *communio*: one concerns the relationship between God and people; the other one deals with the relationship between the people themselves. Saier relates *communio* to Body of Christ and People of God. He says that *communio* has two aspects: the first aspect is that *communio* is interlocked with the salvific activity of the Church, because *communio* is the fruit of the purpose of this work. The second aspect

have provided Corecco with a more nuanced understanding of *communio*. Saier identified the sacramentality of the Church as the *locus theologicus* of *communio*. Such an expansion of the understanding of *communio* provides a good foundation for the understanding of canon law; it respects the peculiar nature of canon law, and takes the visible and human side of the Church into consideration.

Neither Aymans nor Saier speak about *communio* as having a structural meaning. Corecco is the only one who expands the understanding of *communio* from an ecclesiological meaning to an anthropological meaning, i.e., he applies it to people as such and not only to the relationships between Churches.¹⁵²

In spite of these criticisms, Corecco is to be praised, because he has pointed out that *communio*, understood as *in quibus et ex quibus*, is relevant for the understanding of canon law. He deserves credit for having pointed out what the consequences are of applying *communio* to the foundational understanding of canon law. It is important to see

concerns the mystery of the Church, because *communio* participates in the characteristics of the Church, that is both in the divine and the human, the visible and the invisible aspect of the Church. Saier says that the doctrine on the sacramental quality of the Church, as expressed in Vatican II, is able to incorporate all these dimensions.

¹⁵² H. Mühlen presents an understanding of the meaning of one person in many. Although he worked this more out from the perspective of the concept of the mystical Body, he nevertheless needed a whole book to explain it. Mühlen warns against a disjunctive way of thinking: the Church is one complex reality. He warns against a monophysitic thinking--only the divine aspect of the Church is taken into consideration--and against a nestorian mode of thinking--the human aspect is emphasized so much, that the divine aspect cannot be noticed any more. See H. Mühlen, *Una mystica persona: Die Kirche als das Mysterium der heilsgeschichtlichen Identität des heiligen Geistes in Christus und den Christen: eine Person in vielen Personen*, 3. Aufl., München, F. Schöningh, 1969, xvi, 629 p.

these consequences, because they show the possibilities and limitations of the understanding of the Church as *communio*.

The last remark on the understanding of *communio* concerns Corecco's idea that the Church can only be understood 'in faith.' Since this idea is related to the understanding of canon law as an *ordinatio fidei* it will be discussed in the following section.

4.1 - Canon law as an *ordinatio fidei*

Corecco says that in order to determine a theological foundation of canon law, it is necessary to define its ontological status. Since most canonists apply Aquinas' definition of law, he starts with that definition. He argues that Thomas could easily speak about an *ordinatio rationis*, because in his time faith was presupposed in the operation of reason. Today's culture does not imply faith in reason. Corecco, therefore, says that we cannot apply the definition of *ordinatio rationis* to canon law any more. In this matter, Corecco sees that this *ratio* finds an analogy in faith. Since the Church can only be known through faith, canon law is an *ordinatio fidei*.

Corecco says that people know the *lex divina* by the authority of the Word of God, which is accepted in the act of faith. Corecco mentions that he incorporates here ideas of Protestant theology, especially K. Barth, but he remarks that he does not want to do away completely with an *analogia entis* as Barth proposes it. However, natural law, as an obligatory passage in the process of creating positive canonical norms, has to be eliminated.

In conclusion, Corecco wants to determine the ontological status of canon law. He starts with Aquinas' definition of law--*ordinatio rationis*--and replaces this definition with *ordinatio fidei*. The impulse for that change is coming especially from Barth.

4.2 - Evaluation

The role of faith in canon law is another crucial point in Corecco's theory. Indeed, in the present culture, it is necessary to rethink the relationship between faith and reason. Contemporary understanding of reason does not (automatically) presuppose an act of faith.¹⁵³ Corecco's reflection on the role of faith has therefore to be welcomed.

Besides the positive aspect of this thinking, there is also a negative side. The section on the purpose of canon law pointed out that Corecco often applies a dialectically exclusive way of thinking. The opposition of canon law as an *ordinatio rationis* against an *ordinatio fidei* is a good example of such an absolute way of operating. Corecco considers faith and

¹⁵³ Corecco is of the opinion that Thomas thought that faith preceded reason. An investigation of this presumption would go beyond the scope of this evaluation, but that presumption is supported by, e.g., O.H. Pesch, *Thomas von Aquin: Das Gesetz*, Die deutsche Thomas-Ausgabe: Vollständige, ungekürzte deutsch-lateinische Ausgabe der *Summa theologica*, Bd. 13, Heidelberg, F.H. Kerle, 1977, 832 p., espec. pp. 535-538. Corecco's assumption is neither supported nor denied in the articles by J. Collins, "Aquinas and Law: Law a Function of Reason," in *Irish Theological Quarterly*, 18 (1951), pp. 220-237 and J. Neumann, "Bedeutung und Begrenzung des Rechts bei Thomas von Aquin," in *ZevKR*, 23 (1978), pp. 7-28. Neumann, however, does say that Thomas was the first who was able to give a definition of law, independent from any theology or philosophy; it is a legal pragmatic definition (p. 16).

Moreover, in a discussion with Dr. B. Garceau, dean of the faculty of philosophy and full professor of philosophy in the faculty of theology at Saint Paul University in Ottawa, about a possible interpretation of Thomas on this point, he referred to the *Contra gentiles*. In the first three parts of the *Contra gentiles*, Thomas treats subjects that can be known by reason. In the fourth part he discusses subjects that are only accessible through faith. When looking to the subjects he discusses, law clearly falls into the category of reason. (Quoted with permission).

reason as opposites and as incompatible. Yet, any theological handbook or encyclopedia will indicate that mankind has seen some relationship between faith and reason, and has kept examining it since early times.

There are several possible theories to this relationship.¹⁵⁴ Barth, to whom Corecco refers, is described as seeing faith and reason to be incompatible.¹⁵⁵ Now, Barth was speaking in the context of theology and not of canon law. Corecco in saying that canon law is an *ordinatio fidei* makes the following methodological steps: since theology can only be

¹⁵⁴ The understanding of the relationship between faith and reason is basically twofold: either they have a relationship or they are considered to be incompatible. In skeleton form the different views are as follows. "(1) Faith and reason are identical because : (a) whatever is known by reason is contained somehow more perfectly in the faith (e.g., some of the early Fathers); (b) whatever is known by faith is somehow contained in that which is known by reason (tendency of many modern thinkers, e.g., Hegel). (2) Faith and reason are distinct because: (a) what is known by faith is (often) opposed to what is known by reason ([...] Kierkegaard and Barth); (b) what is known by faith comes from God whereas what is known by reason comes from man (mystical tendency [...])" (E.F. Byrne, E.A. Maziarz, art. "Faith and Reason," in *NCE*, vol. 5, p. 810). The difference in understanding of the relationship between faith and reason or the absence of it has, of course, major consequences for the understanding of canon law.

¹⁵⁵ Catholic and Protestant theologians agree that the knowledge of God, both natural and revealed, rests on analogy. There are two kinds of analogy that deal with this. An *analogia entis* describes the application of concepts of the nature to God (natural knowledge); an *analogia fidei*, which concerns supernatural knowledge, says that God chooses some of the concepts used by people in order to tell them something about Himself. In Catholic doctrine there is harmony between these two analogies. In Protestant doctrine, however, there is only a conflict between the two analogies: an analogy of being cannot be redeemed and therefore it cannot be raised into analogy of faith. It is important to notice that the Catholic doctrine does not reject completely the *analogia entis*, which Barth does. See also B. Mondin, art. "Analogy, Theological Use of," in *NCE*, vol. 1, pp. 465-468 and Murphy, "Analogy of Faith," pp. 468-469.

known through faith, and since canon law is part of theology, canon law can only be known through faith.¹⁵⁶

Even when there are problems with Corecco's understanding of the relationship between faith and reason, nevertheless the idea that faith is an important criterion sounds beautiful. But, what does 'faith' mean? Corecco does not explain how he understands it. Is he referring to *fides qua creditur* or to *fides quae creditur*? *Fides qua creditur* concerns the capacity to believe. The implication of this faith for canon law is that it could be the inspiration to create a certain norm. An example of this are the norms created around the mystery of the Eucharist. *Fides quae creditur* concerns the beliefs themselves. The laws born out of a *fides quae creditur* are the result of a certain belief. An example of that would be the belief that the pope has primacy, which leads to certain rules to protect and ensure that belief.

Canon law is made up of laws of three different origins: (1) laws originating in the *fides qua creditur*, (2) laws originating in the *fides quae creditur*, and (3) laws that have a human origin (e.g., procedural laws). To call canon law an *ordinatio fidei*¹⁵⁷ without any

¹⁵⁶ It would go far beyond the scope of this dissertation to investigate the understanding of Barth and compare that with Corecco's ideas. At this point it appears that there is indeed an influence of Barth. It is interesting that Corecco turned to a Protestant theologian for developing a theology of canon law! Corecco does say that he has no intention of rejecting the *analogia entis* completely, as Barth proposed it. Hence, it would be highly necessary that Corecco elaborates on his understanding of the role of reason in this.

¹⁵⁷ Corecco does not translate the term *ordinatio fidei*. If *ordinatio fidei* is understood as a *genitivus subiectivus*, then it means a rule ordered by faith. This poses the question how, e.g., the procedural norms could be ordered by faith.

qualification is implying that all these norms are of the same nature and of equal standing.¹⁵⁸

In conclusion, Corecco rightly perceives the importance of the role of faith in canon law. That in itself is correct and necessary, but an explanation of the relationship between faith and reason is indispensable.

5.1 - Methodological consequences

Corecco starts with saying that traditionally canon law was considered to be a juridic science. A renewed understanding of canon law as a theological discipline brought about a reflection on the canonical methodology. Corecco says that since canon law is to be considered as a theological discipline, it, therefore, has to have a theological methodology. At the same time he does not reject a juridic methodology, but it has to play a subordinate role. The role of the juridic science is to discover canonical norms that will allow for an understanding of the rationally binding value of the divine law.¹⁵⁹

¹⁵⁸ Earlier Corecco said that the laws mediate salvation. After this analysis it is questionable if such a statement can be made in such an absolute way. Even if Corecco would only speak about divine laws, the mediation of salvation would be a problem, because not all divine laws are of the same nature. The question has to be raised; how far a law can be identified with the Word of God.

For a good article on divine law, see K. Rahner, "Über den Begriff des *ius divinum* im katholischen Verständnis," in K. Rahner, *Schriften zur Theologie*, Bd. 5, *Neuere Schriften*, Einsiedeln, Benziger, 1962, pp. 249-277.

¹⁵⁹ "[... es ist] die Aufgabe der Rechtswissenschaft, positive kanonische Normen ausfindig zu machen, die die rationale Unwidersprüchlichkeit (das ist die rational verbindliche Geltung) des im Glauben zu erkennenden *ius divinum* zu erfassen erlauben" (Corecco, *Theologie des Kirchenrechts*, p. 106).

5.2 - Evaluation

After Corecco has placed canon law in the realm of theology, called it an *ordinatio fidei*, and defined its purpose as *communio*, the methodological consequences are self-evident. The method to be applied is a theological method, but Corecco does not say what he means by that, nor does he define 'juridical method.' It is important to notice the difference between Rouco Varela and Corecco on this point. Rouco Varela did not identify canon law with theology, nor did he see canon law as a pure juridic science. He was able to see canon law as part of both. He therefore proposed a *canonical* method. Such a method would be the result of both a juridical and a theological method.¹⁶⁰

Corecco does not make such a sharp distinction, but considers the canonical method to be a theological method. Yet, he indicates that the role of the juridic method is 'to discover positive canonical norms which allow for an understanding of the rationally binding

¹⁶⁰ K. Walf appears to think in the same line of thought as Rouco Varela does. He sees that canon law demarcates itself against other theological disciplines and other juridical disciplines. But the science of canon law does participate in some disciplines of both theology and the juridic sciences. In relation to theology he mentions ecclesiology; in relation to the juridic sciences he mentions (1) the common history of canon law and of juridic sciences and (2) questions about methodology. Walf says that both theology and the juridical sciences have some methods in common (exegesis, systematics, and historical critical method), but the difference between these sciences lies especially in the application of these methods. The exercise of a critical method in both theology and canon law is limited by the magisterium. See K. Walf, *Kirchenrecht, Leitfaden Theologie*, Bd. 13, Düsseldorf, Patmos, 1986, pp. 14-15.

It is important to notice that 'method' is used by Walf, Corecco, and Rouco Varela as a particular pattern of operation (action) in a given field to get results. Their 'method' is determined by the content.

value of divine law.' It appears that Corecco is aware of the role of reason in the process of making law, but he does not indicate what this role of reason exactly means.¹⁶¹

In conclusion, as a consequence of his thinking of the foundation of canon law, Corecco had to determine the method of canon law as theological. Yet, a higher evaluation of the juridical method would have delineated the peculiar nature of canon law, not only in relation to the juridic sciences, but also vis-à-vis theology!

6.1 - A renewed codification

Corecco raises the question whether or not the promulgation of the new Code can be justified at all. This question is born out of his opinion that the concept of codification derives from the Enlightenment, where reason had precedence over faith. Ultimately, his

¹⁶¹ The German former professor of systematic theology at the university of Tübingen and present bishop of the diocese Stuttgart-Rottenburg, Walter Kasper, appears to have a good understanding of the relationship between theology and canon law. When he speaks about methodology, Kasper keeps a distinction between theology and canon law. He says that the new Code, with its theological canons of a chapter, obviously understands canon law as theologically grounded and desires a theological foundation. It departs from the Church as *communio*. At the same time it does not want to do away with the model of the Church as society (LG 8). The Church has its own peculiar foundational structure. Kasper is of the opinion that canon law cannot juridically order the reality of salvation (*Heilswirklichkeit*). "Wohl aber kann und muß die Kirche die rechte Vorbereitung auf die Heilswirklichkeit wie die sich daraus ergebenden Konsequenzen rechtlich regeln. [...] So muß das Kirchenrecht eine Rechtsordnung aufstellen, die einerseits der neuen Gerechtigkeit des Evangeliums und andererseits der menschlichen Gerechtigkeit und dem menschlichen Rechtsempfinden entspricht. [...] Dem Kirchenrecht als theologischen Fach obliegt die Aufgabe, die konkrete rechtliche Ordnung der Kirche auf ihre Menschlichkeit wie auf ihre Christlichkeit hin zu bedenken und auszulegen." This implies that canon law has its own position in a faculty of theology. From the perspective of tradition, canon law is more related to systematic theology than to the practical theological subjects. See W. Kasper, "Die Wissenschaftspraxis der Theologie," in W. Kern, H.J. Pottmeyer, M. Seckler (Hrsg.), *Handbuch der Fundamentaltheologie*, Bd. 4, *Traktat theologische Erkenntnislehre*; *Schluss teil Reflexion auf Fundamentaltheologie*, Freiburg, Herder, 1988, pp. 272-273.

question is: was the Church able to find an internal justification for a codification? This justification concerns two levels. The first level deals with the phenomenon of a codified system itself: Is a codified system a good system? The second level concerns the promulgation of a new Code.

Corecco answers to the first question that the Church, understood as a perfect society, could easily justify such a codified system. So, he can move to the second question and explain that the problem about a renewed codification exists because of the change in the understanding of the Church as a 'perfect society' to a Church understood as *communio*. There are many arguments against such a renewed codification. Among them is the idea that a different form of codification could have been used: a modern form of codification would have left room for updating and it would have allowed for a greater flexibility. This would have been preferable especially because of the many fundamental questions that are still unanswered. He also questions the imposition of one juridic way of thinking (viz. the Western European) on the whole world.

Besides the arguments against such a codification, there are also arguments that favour it. Corecco mentions three points: (1) the constitutional character of the Code, (2) the epistemological and hermeneutical change, and (3) the individual member of the faithful.

In conclusion, Corecco raises the question if there is a justification for a renewed codification. He lists both positive and negative arguments to answer his question. The negative arguments concern more general ideas, while the positive arguments are derived from the 1983 Code. He concludes that on balance, the existence of the 1983 Code is justified.

6.2 - Evaluation

Corecco discusses the phenomenon of a codification. He lists the arguments that favour such a codification and the ones that are against it. Corecco published these evaluations after the promulgation of the 1983 Code. What is interesting in his lists of arguments is that the ones that are against such a codification are not directly related to the content of this Code, while the arguments that favour the codification find their source in the 1983 Code. In any comparison or evaluation it is important that the arguments be of the same nature!

Concerning the arguments themselves, Corecco's point that a more flexible system could have been better is well taken. Indeed, there are too many fundamental questions still unanswered. Above all, such a system would have allowed for a faster adaptation to a rapidly changing world and therefore changing Church. Such a system would also have allowed for an increasing recognition of the local Church.¹⁶² In this context, Corecco's remark about the European juridical legal system as example for the Code is also well

¹⁶² K. Rahner says that at Vatican II the major shift that took place is the shift from a European Christianity to a world Christianity. He evaluates this shift as having the same weight as the change the Church went through with Saint Paul, when it moved from Jewish to Gentile Christianity. He is of the opinion that these are the two major shifts that have taken place in the life of christianity. See K. Rahner, "Towards a Fundamental Theological Interpretation of Vatican II," in *TS*, 40 (1979), pp. 716-726.

taken.¹⁶³ If the Church is indeed a world Church, can one juridical way of thinking serve as the source for a juridic structure that affects the whole Church?¹⁶⁴

In conclusion, the arguments by Corecco against a renewed codification are well taken. Indeed, there are still a lot of questions to be addressed that concern a legal system for a world Church at this point in time.

The arguments that favour a renewed codification are threefold. Since the first argument--the constitutional character of the Code--is clear and does not need any more attention, only the last two points will be discussed. These points--the epistemological

¹⁶³ Commemorating the 50th anniversary of the 1917 Code, S. Kuttner also spoke about the dominance of one juridical system. He ended his speech with the words: "Se la nostra generazione troverà la via per creare un nuovo corpo di legge canoniche che corrisponda a tutti i desideri legittimi del Popolo di Dio e che trascenda, nella sua ispirazione fondamentale, le concezioni ancora dominanti al principio del secolo, un grande progresso sarà compiuto: per l'incremento della scienza giuridica e canonica, per l'onore della Chiesa, per la *salus aeterna animarum*" (S. Kuttner, "Il codici di diritto canonico nella storia," in *Apollinaris* 40 (1967), p. 25).

¹⁶⁴ Canon law has always been grounded in some kind of theology. If there was a development in theology, canon law reacted to that (the first part of this dissertation shows that also). Most of the time, theology has developed in a linear way; that is, one theology succeeded the other in time.

The recognition of the local Church by Vatican II raises the question if there can be still one (universal) theology at any given moment. To phrase it in a different way: does the recognition of the particular Church imply an affirmation of different theologies--faith seeking understanding--at the same time? If this question is answered in the affirmative, consequences for the making and especially interpretation of laws are inevitable. It implies that different legitimate interpretations of certain norms could coexist. (The theory of *horizons*, as described in the first part, supports this way of thinking.)

In a good article, the American canonist J. Huels shows why and where there could be complications with legal concepts, that are born in one cultural context--the Western European legal tradition--but are to be interpreted in a world Church. In his concluding remarks Huels says: "Plurality of canonical interpretation is not something to be lamented or eradicated, but should be seen as the norm and the ideal in a 'world Church' made up of local Churches." See J. Huels, "Interpreting Canon Law in Diverse Cultures," in *The Jurist*, 47 (1987), pp. 249-293.

criterion and the individual member of the faithful--will be discussed in the following two sections.

7.1 - The epistemological criterion of the Code

Among the favourable arguments for a renewed codification, Corecco mentions the change in the epistemological and hermeneutical criterion from the 1917 Code to the 1983 Code. He says that the 1917 Code had 'reason' as its epistemological criterion and the 1983 Code replaced it with 'faith.' The change implies that not the juridical principle, but the theological principle has precedence. Corecco does not indicate any source for his idea that the epistemological criterion of the Code changed. He mentions the hermeneutical criterion as a heading in his article, but does not elaborate on it.

Corecco, then, demonstrates how in the central books (II, III, and IV) of the 1983 Code this change has taken place. He also shows how the other books are still governed by a model of the Church as a perfect society.

7.2 - Evaluation

Corecco states that faith is the epistemological criterion of the 1983 Code. This sounds like a beautiful and impressive statement, but what does he mean by 'epistemological criterion'?

Corecco himself does not indicate once what he means by epistemology, but uses it relatively frequently; therefore it is important to attempt to find a possible meaning.

In the world of philosophy, epistemology means the science of the process of knowing. Here 'science' has to be understood in the classical sense: knowledge through causes. In other words: science supported by reason.

History reveals that several theories have emerged to explain what our cognitional process is. Plato proposed the theory of perfect forms accessible to the intellect only; Aristotle suggested a theory of abstraction from sensible phantasms, and Kant accounted for it through the theory of the innate categories and ideas in the 'pure' intellect. These cognitional theories have to be proven *per causas*. This proving of the theory is traditionally called *epistemology*. So, the theories respond to the question what is taking place in the process; epistemology tries to justify a given theory and to say why a particular theory is correct and another theory is incorrect.¹⁶⁵

Plato said that his theory is correct, *because* the mind sees the superior world of ideas; Aristotle argued that his theory was right, *because* the mind had the capacity to abstract a spiritual idea from the phantasms. Kant claimed that his theory alone accounted for the facts of the process, *because* it alone explained how the mind can form synthetical *a priori* judgements. What happened here is that each philosopher created his own cognitional theory and explained it by different causes, thus creating his own epistemology.

¹⁶⁵ B. Lonergan has worked extensively on cognitional theories and their epistemological justification. He says that there are three basic questions: "What am I doing when I am knowing? Why is knowing that doing? What do I know when I do it? The first answer is a cognitional theory. The second is an epistemology. The third is metaphysics where, however, the metaphysics is transcendental [...]" (B. Lonergan, *Method in Theology*, paperback ed., Minneapolis, MN, Seabury press, 1979, p. 25).

This being said, there can be little doubt that Corecco did not use epistemology in the classical philosophical sense.¹⁶⁶ Corecco says that faith is the epistemological criterion of canon law: it cannot possibly mean that faith would be the *cause* of the knowledge of canon law, since such knowledge is certainly accessible to non-believers. The question then arises, in what sense did he use the term 'epistemology,' or 'epistemological criterion'? The only way to answer that question is to go to his writings and interpret it in that context.

It appears that Corecco strongly argues that the doctrine of Christian faith has to be taken into account, in order to grasp the meaning of canon law fully. In other words, without this doctrine canon law cannot be correctly interpreted and applied. Thus, doctrine plays an indispensable role in canon law to the point of being virtually identical (*ordinatio fidei*). Conventional philosophical parlance would express this in saying that the doctrine of faith is a hermeneutical factor in understanding the nature of canon law and the content of its rules. So, Corecco would have been more precise if he had said that faith is the hermeneutical criterion for canon law.¹⁶⁷

¹⁶⁶ There is also a looser use of the term 'epistemology.' Thus writers speak about the 'epistemology' of physics, of historical knowledge, etc. In such cases, often enough, they attempt to respond to the question 'How do we know physical objects?' or 'How do we know past events?', etc. Their response consists mostly in a cognitional theory applied to the particular branch of science in which they are interested. As long as they do not go into the investigation of the *causes*, they do not exercise epistemology in the classical sense of Plato, Aristotle, or Kant. If the writers mentioned above went into the causes they would soon discover that the causes can be found in the structure of the human spirit, which does not operate differently in the cases of physics or history, it operates only about different objects; the same tool (the mind) works within different fields. The tool and the process does not really change for that. (See also Lonergan, *Method in Theology*, pp. 3-25).

¹⁶⁷ Corecco uses the word 'hermeneutic' only in a heading or in the phrase 'epistemological and hermeneutical criterion.'

Be that as it may, this whole exposition would not have been necessary if Corecco had clarified in the beginning what he meant by 'epistemological criterion.'¹⁶⁸

In conclusion, the idea that faith has a decisive role in the interpretation and application of canon law is an important consideration. Corecco's point is well taken, although a more nuanced use of terms would have increased the clarity, preciseness, and, therefore, the credibility of his theory.

8.1 - The individual member of the faithful as the new protagonist

Corecco says that the 1917 Code had 'authority,' that is, the hierarchy, as its main subject. The Council brought forward a renewed understanding of the role of the hierarchy, which was one of service. Corecco then posits the thesis that the principle of 'authority' is replaced by the principle of division of different ecclesial functions. According to Corecco the individual member of the faithful is the new protagonist. In order to prove the accuracy of his thesis, Corecco gives several examples. One of these examples is the application of the term 'person' in the new Code. Corecco acknowledges that *in iure* the term person is not synonymous with the 'human person,' but with the abstract legal subject. Since, however, the new Code has a different approach from the 1917 Code, it has a new epistemological criterion. Not the legal subject, but the individual member of the faithful is the real protagonist. Corecco emphasizes that this living person is invested with an

¹⁶⁸ This is a good example of how Corecco introduces concepts and uses them throughout his work without giving any account for their meaning. Moreover, these evaluative sections show that Corecco does the same for faith, *communio*, and for formal and material content of the sacred power. Such an approach affects the credibility of his theory!

ecclesial-salvific destiny. This sacramental aspect, he says, can never be adequately expressed in juridic categories.

8.2 - Evaluation

The ideas of Corecco about the change in protagonist¹⁶⁹ is a beautiful example of integration of several aspects of his theory. The change that has taken place is caused by the change in the epistemological criterion, and Corecco has to balance the tension between theological concepts (member of the faithful) and juridic concepts (juridic person). His ideas deserve some attention.

First, the shift from an abstract legal subject to an individual member of the faithful is a point well taken. Indeed, it shows that the baptized is more important than any legal abstract subject. As Corecco accurately points out the salvific dimension, that goes with the member of the faithful, cannot be delineated in an adequate fashion by juridic categories.

There is also a second point to be made. This observation of Corecco shows so well the consequences of his identification of canon law with theology. Nobody in theology would have a problem with his emphasis, on the contrary. Since, however, Corecco identifies canon law and theology, he is bound to have a problem with the juridic notion of person. But, even if somebody sees canon law as norms for action, would that exclude the possibility of seeing the individual member of the faithful as highly relevant? Corecco

¹⁶⁹ The Oxford Dictionary defines 'protagonist' as "the leading character in a play, story, contest, etc.; the most prominent or most important individuals in a situation or course of events." In using the word 'protagonist,' Corecco delineates the importance he wants to give to the main subject of the Code.

opposes the juridic abstract person against the individual member of the faithful,¹⁷⁰ but I fail to see why they are incompatible. A healthy balance between the juridic person and the individual member of the faithful, that is, a balance between the juridic and the theological world is asked for.

A last remark concerns Corecco's earlier ideas that *communio* is the decisive criterion and that the individual has to be considered differently in the Church than in the state. It appears that there is a contradiction in Corecco's idea, because he sees *communio* as a foundational principle--and denies the individual as foundation for canon law--and, yet, he sees the individual member of the faithful as protagonist.

In conclusion, to the question if the existence of the 1983 Code can be justified, Corecco responds with saying that the 1983 Code has changed its protagonist. This change, which has taken place in the light of Vatican II, is according to him justified. Therefore, the Code is justified. Corecco's ideas about the change in protagonist are fine in

¹⁷⁰ J. Provost evaluates the canons 96 and 204 as complementary; c. 96 attends to the individual, while c. 204 considers the people of God and the social effect of baptism. The purpose of the canons is also different: c. 96 establishes the juridical status of a person, while c. 204 describes the Christian faithful in terms of communion (people of God) and Church mission. See J. Provost, "The Christian Faithful," in J.A. Coriden, T.J. Green, D.E. Heintschel (eds.), *The Code of Canon Law: A Text and Commentary*, Commissioned by the Canon Law Society of America, New York, Mahwah, NJ, Paulist Press, 1985, p. 123.

R.J. Castillo Lara, the president of the Pontifical Council for the Interpretation of Legislative Texts, sees an apparent duplication in the canons 96 and 204. However, this duplication is justified in the diversity of the perspective of each canon: "c. 96, in a more juridical slant presents the baptized as a 'person' in the Church, that is as *subiectum iuris*, and is placed therefore in book I which has a more refined character, while c. 204 presents a theological notion, which has been appropriated to define the baptized as a member of the people of God and therefore introduces book II, which treats precisely of the people of God" (R.J. Castillo Lara, "Some General Reflections on the Rights and Duties of the Christian Faithful," in *Studia canonica*, 20 (1986), p. 25).

themselves, but if Corecco had nuanced them more--especially the unclear points mentioned above--his theory would have been stronger.

9.1 - The control over the transfer and exercise of sacred power

Questions about the control over the transfer and exercise of sacred power lead Corecco to speak about the sacred power.

In order to answer the questions, Corecco starts with stating two assumptions. The first assumption is that Vatican II accepted the unity of sacred power. The second assumption is that he wants to preserve, on a conceptual level, the traditional distinction between orders and jurisdiction.

Corecco begins his theory by stating an analogy between 'Word and sacrament' and 'the power of jurisdiction and the power of orders.' Both the Word and the sacrament are different modalities of mediating the same grace. The Word can mediate this grace without the sacrament, but the sacrament can mediate it only together with the Word. Just as Word and sacrament are one, so are the powers of orders and jurisdiction. The powers of orders and jurisdiction are two modalities of the sacred power. Corecco proposes to ascribe only a formal content to these two powers. The power of jurisdiction, however, cannot be exercised without the power of orders.

The next step he makes concerns the control over this sacred power. Corecco says that the sacred power itself exercises that control, but within the limits of divine law. The limits of divine law are posed by the *substantia sacramenti et verbi*. Once the substance is there the exercise is efficacious, that is, it engenders the Church of Christ. It is here that Corecco links his theory of *sacra potestas* to *communio*. He says that the level of *communio*

that is achieved can only be determined by those invested with the full sacred power. This *communio* determines at the same time the *sacra potestas*.

In summary, questions about the transfer and exercise of sacred power prompt Corecco to investigate this power. He ascribes a formal content to the powers of orders and jurisdiction. The level of *communio* determines the effectiveness of the exercise of the power.

9.2 - Evaluation

The theory of sacred power is not an easy subject. Corecco starts with describing the existing theories. He adheres partially to Mörsdorf's theory, which is that the sacred power is one power.¹⁷¹ Subsequently, he builds his own theory on two assumptions.¹⁷² The content of these assumptions is interesting: (1) the council teaches that the sacred power is one power¹⁷³ and (2) it is a given fact that there exists a power of orders and of

¹⁷¹ Since Corecco places himself very much in the line of theory of Mörsdorf, the remarks made in the section on sacred power in the part on Mörsdorf should also be taken into consideration here.

¹⁷² Methodologically, Corecco has to be praised for pointing out these assumptions. Any serious researcher should be aware of his assumptions.

¹⁷³ The interpretation that the council has affirmed the theory of one sacred power is in itself a discussed issue. The different opinions between, what the literature identifies as the Italian and the German school find their origin in the different interpretation of LG 21: the Italians hold that the council did not affirm that there is one sacred power, but that it made a distinction between *potestas* on the one hand and *munera* on the other hand. The Germans, however, believe that there exists one sacred power. There is an abundant amount of literature on this subject. For an extensive bibliography see J. Beyer, "De natura potestatis regiminis seu jurisdictionis recte in Codice renovato enuntianda," in *Periodica*, 71 (1982), pp. 93-145; and J. Provost, "The Participation of the Laity in the Governance of the Church," in *Studia canonica*, 17 (1983), pp. 417-448.

jurisdiction in the Church. Corecco attempts to explain the coexistence of these two assumptions. It is remarkable that he does not use substantial historical data to discuss the questions about the sacred power. This makes his theory susceptible to severe criticism, since history itself has shown that the powers of orders and jurisdiction were exercised separately. Corecco also does not go into the conciliar texts themselves, but starts with asserting his own theories. Is it, however, really possible to produce a sound theory without taking into consideration historical and doctrinal data?

The argumentation of Corecco shows the following pattern: because Word and sacrament are one, the power of jurisdiction and the power of orders are one. Word and sacrament both mediate the grace of God, although in different ways. At the same time, he acknowledges that the Word can do this without the sacrament (but it is ordered towards the sacrament). The sacrament, however, cannot mediate grace without the Word. This analogy could have led to the following theories: (1) the power of jurisdiction could be exercised without the power of orders; (2) the power of orders could not be exercised without the power of jurisdiction. Corecco does not conclude this: he says that the power of jurisdiction cannot be exercised without the power of orders. The reason he mentions is that the apostolic succession is inseparably connected with the power of orders.¹⁷⁴

¹⁷⁴ Rouco Varela said that for the ontological status of canon law four images of the Church should be taken into consideration: people of God, Mystical Body, Church as sacrament, and apostolic succession. (See also the *Excursus* on Rouco Varela.) Corecco, in evaluating this proposal, does not see the need to take the apostolic succession into consideration. He says that the apostolic succession presupposes the existence of Word and sacrament. Moreover, the Church is not juridically binding because of the apostolic succession, except in the sense that it guarantees the authenticity of the legal claim (*Rechtsanspruch*) already ontologically rooted in the fundamental sacramental structure of the Church. (See Corecco, *Theologie des Kirchenrechts*, pp. 94-95.) When dealing with the sacred power, it appears that the apostolic succession is necessary to explain the existence of one sacred power. Here a fundamental question arises: is there a link between the

Corecco does not say what the function is of the apostolic succession in this, but could it be for the following reason: because the apostolic succession transmits the jurisdiction, and because the apostolic succession is inseparably linked to the power of orders, the powers cannot be separated? His analogy to Word and sacrament is therefore only partially applicable: the analogy works to see that both powers confer the same sacred power, but he does not use the analogy when he speaks about the exercise of the power.¹⁷⁵

He also says that the powers of orders and jurisdiction have a formal content and not a material content. This speaking about formal and material content is confusing, because Corecco does not say what he means by material and formal content. In reading carefully Corecco's theory, it appears that these concepts in simple language mean that both the power of orders and the power of jurisdiction includes the whole sacred power (formal content).¹⁷⁶

theory of one sacred power and the understanding of the foundation of canon law? History shows that the distinction between the power of orders and the power of jurisdiction took place in the same time as the separation between canon law and theology (12-13th century). In the German school, a rethinking of the one sacred power and the relationship between theology and canon law coincided. Is this purely accidental or is there a link between these two events? An investigation, which would go beyond this dissertation, could be done in which the different schools of thought, as mentioned in the first part, are compared on their understanding of the relationship between theology and canon law, and the understanding of the sacred power.

¹⁷⁵ There is a methodological omission here in the sense that Corecco does not explain how the two pairs 'Word and sacrament' and 'power of orders and of jurisdiction' are identical and how they differ.

¹⁷⁶ In more modern parlance, 'matter' refers to what is real and 'form' to formality. Corecco does not say how he understands the terms material and formal, but it appears that he uses it in the modern sense of the word. When an author does not clarify the meaning of crucial terms, the reader is impeded from making a just evaluation!

Corecco's theory is heavily linked to the sacrament of orders and pays little attention to the sacrament of baptism, which, too, confers a sacred power. Corecco did not take into consideration that the Council did emphasize the importance of baptism and through that was able to speak about the power of the *christifideles*.¹⁷⁷ In this context it appears that there is an internal contradiction in his theory: in the previous section, Corecco pointed out how the individual member of the faithful had become the protagonist of the new Code; he appeared to welcome that. Yet, at the same time, his whole theory on power is built on the sacrament of orders! Is this not an inconsistency--if not a contradiction--in his own theory? Another point is that Corecco, in reserving the term 'sacred power' to ordination, seems to imply that the laity do not and cannot have any power. Yet, historically there is no doubt that the laity were in possession of certain powers that Corecco identifies with sacred power.

Finally, Corecco says that the exercise of the sacred power is dependent on *communio*. At the same time he says that the *communio* is depending on the sacred power! Corecco is aware that he has to address the question who determines if the sacred power is exercised in *communio* or not. In order to bypass a subjective decision, Corecco says that only those who have the full sacred power can determine who is in full communion. In order to have the full sacred power, the bishop has to be in full communion. In case

¹⁷⁷ LG 12 affirmed that the whole people of God has the power to determine doctrine.

There is an apparent inconsistency in Corecco's theory: in the context of sacred power he speaks about episcopal ordination, but in the context of a participation of general and ministerial priesthood, he focusses on the peculiarity of the ministerial priesthood. It is therefore not clear if the basis in Corecco's theory is the episcopal ordination or the ordination to the priesthood. In either case, he does not speak about the ordination to the diaconate.

this appears to be a circular mode of thinking. Corecco emphasises that the *communio* proceeds and succeeds the *potestas* as such. Despite this comment, this mode of thinking is not very precise. For Corecco's ideas to have any impact on canon law, a more precise and detailed proposal is indispensable.

This whole theory of Corecco is not very strong on the theoretical level. Yet, at the practical level, Corecco admits that at least the 1983 Code did not adopt his theory, but rejects a formal content for the power of orders. Reading Corecco's analysis of the present Code gives the impression that he puts too much emphasis on the terms that were used, especially the terms *facultas* and *potestas*. Sure, it is necessary to investigate the terminology of the Code and to indicate its deficiency, but to conclude that a certain doctrine was chosen might be risky. There is no evidence that the commission wanted to decide on doctrinal matters; on the opposite, there is evidence that they did not want to do so.¹⁷⁸

10.1 - *Communio* determines the validity of jurisdictional acts

The ultimate question that Corecco wants to address concerns the validity of jurisdictional acts. Since canon law is not like secular law, he wants to do away with the idea that jurisdiction could determine the validity of jurisdictional acts.

Corecco proposes to clarify this issue with the help of the following reasoning: not only jurisdictional acts have juridical effect; sacramental acts have also juridical effect. Since

¹⁷⁸ Corecco does not refer to the comments on the 1977 Schema that were made about the use of *potestas* and *facultas*. The Commission said that the powers of the internal and external forum are really the same, but the effect of their exercise can be different: "Itaque, potestas regiminis qua conceditur sic dicta iurisdictio ad confessiones, nunc dicitur et rectius appellatur facultas ad confessiones audiendas" (*Communicationes*, 9 (1977), p. 235).

the power of orders and the power of jurisdiction are modalities of the one sacred power, the criteria that apply to sacramental acts should also apply to jurisdictional acts.

Corecco is of the opinion that *communio* should govern the validity of the sacramental act; the jurisdictional aspect should only determine the liceity of an act.

Corecco does not really go into detail, but his final point is that since the power of orders cannot be delegated, the power of jurisdiction cannot be delegated. He admits that canon law does use the institution of delegation in the case of the power of jurisdiction, but considers that to be a legitimation of the exercise of the sacred power.

In summary, ultimately Corecco says that since the power of orders cannot be delegated, and since the power of orders and jurisdiction are both modalities of the sacred power, jurisdictional power cannot be delegated.

10.2 - Evaluation

Corecco's idea that *communio*, i.e., being in communion, should govern the validity of acts, is a concept of doubtful validity. It is clearly a result of his idea that canon law cannot and should not be considered as a *species* of the *genus* law. The idea that the validity of sacramental acts should not be governed by jurisdiction is food for thought, but contradicts history.¹⁷⁹ Indeed some of Corecco's examples show that the validity of a sacramental act depending on jurisdiction does not always make sense. So he proposes to do away with the principle of jurisdiction for validity, but keep it for liceity. That in itself

¹⁷⁹ For many centuries the Church made the validity of certain sacraments dependent on a jurisdictional act, not on communion. Examples are confirmation, penance and even marriage, when through jurisdiction the Church set up impediments and absolute conditions for the valid form.

raises the question how Corecco relates this idea of abandoning the jurisdiction to his earlier idea that the power of jurisdiction is a modality of the sacred power. Corecco does not give any indication how he relates these thoughts to each other.

Corecco then proposes that *communio* should govern the validity. This sounds beautiful, but there are a few questions to be addressed. Even when the concept of *communio* is clear and determined, what to do with the following situations: would a baptism administered by a non-baptized person be valid? What about a baptism by a person who is not in full communion? How far does Corecco want to go? And what about a marriage between two baptized non-Catholics? Would it be invalid? The Church never accepted that full communion is necessary for the validity of the sacraments; e.g., the sacraments of the Orthodox Churches are valid sacraments, although they are not in full communion.¹⁸⁰

Corecco really deserves credit for pointing out that jurisdiction might not be the best criterion for determining the validity of sacraments, but that there should be more theological criteria. Yet, the full implications of his proposal are difficult to envision, since he does not give a detailed explanation of his concepts.

¹⁸⁰ The validity of sacraments is determined by norms of revelation, as the Church perceives them. This perception is authenticated by the episcopate.

Corecco does not say where the *communio* is determined: in the act, or in the minister, or in the receiver. It cannot be the minister, because the controversy around the Donatists--a movement in the 4th-5th century in North Africa--has shown that the validity of the sacraments does not depend on the minister. For the Donatists, the value of a sacrament depended on the ecclesial position of the minister, as either inside or outside the local Church. Augustine responded to this in saying that a sacrament was not dependent on the quality of a person who administered it, because that would imply that the creation of a spiritual gift is attributed to the minister. See D. Faul, art. "Donatism," in *NCE*, vol. 4, pp. 1001-1003.

A last remark concerns the idea that since the power of orders cannot be delegated, the power of jurisdiction cannot be delegated. Corecco himself sees that this theory is difficult to hold, because the history of the Church testifies too often to the contrary!

11.1 - The laity and the sacred power

Corecco wants to determine the relationship between the laity and the sacred power. He proposes to do this by starting with the difference between the ministerial and common priesthood. This then should clarify what the relationship is between the clergy and the laity. He says that the difference between the common and ministerial priesthood is that the ministerial priesthood has an authority given by Christ, which is expressed in the sacred power. Corecco remarks though that all members of the faithful participate in the common priesthood.

Another point Corecco discusses is the constitutive elements of the Church. These elements are Word, Sacrament, and charism. Charism presupposes though the institution.

Subsequently, Corecco says that the council documents portray both a theological and a secular notion of laity. He emphasises that the theological notion shows that in virtue of baptism a person participates *suo modo* in the threefold offices of Christ. The secular character, which concerns the apostolate, is not peculiar to the laity: all people participate in the one apostolate of Christ.

The 1983 Code does speak about the role of the laity in relation to the power to sanctify and to teach. Their role in the governing office is not discussed. He interprets c. 129, § 2, as an *extrinsic* cooperation in the exercise of the *potestas* possessed by the hierarchy. He allows lay judges, but denies a participation in the power of governance to

them: the judge exercises a functional and technical task in relation to the *sacra potestas* of the bishop.

The Code did not describe the secular notion of the laity; Corecco says that a subtle clericalization of the laity has taken place.

Corecco finishes in saying that the Code could have used a different approach toward the laity: especially the element of charism is lacking.

11.2 - Evaluation

Corecco wants to solve the questions about the laity and the power of governance by starting with the difference between the common and ministerial priesthood. There are two aspects to his methodology in this issue. The first point concerns his previously expressed idea that there is one sacred power and that the power of governance cannot be exercised without the power of orders. That being said, one wonders what additional investigation was necessary to deny the power of governance to the laity. The second remark involves Corecco's point of departure: he starts with the *difference* between the common and ministerial priesthood. He does not start with what they have in common, viz. baptism. Indeed, Corecco says that the difference lies in the possession of the sacred power by the ministerial priesthood.¹⁸¹ Truly, his whole theory is based on the sacred power and

¹⁸¹ Provost says about the common and ministerial priesthood that the council spoke about a difference in kind and not just in degree: "But the council did not determine precisely what it is that differentiates them 'in kind,' and the question continues to be discussed today. To hold that the dividing line consists in the ability to exercise sacred power is one view, but not the only one, and not the only possible interpretation of the conciliar teaching" (Provost, "The Participation of the Laity," p. 432).

not on baptism.¹⁸² These two remarks show that in many ways the question that Corecco raises, viz. what is the relationship between the power of governance and laity, was already answered because of the premises he accepted.

In light of the above it should be evident that Corecco will deny any power of governance to laity as expressed in the 1983 Code. He considers c. 129, § 2 as an 'extrinsic' cooperation to the *potestas* and not as a native, personal qualification. 'Extrinsic' is opposed to 'native personal qualification bestowed at baptism.' The question arises how this cooperation could be extrinsic in nature. If the cooperation is not in virtue of baptism, would that imply that any non-baptized could cooperate in this power? It is very clear that the 1983 Code does not hold Corecco's theory, but goes beyond it. At this point Corecco is faced with the implications of his *sacra potestas* theory.¹⁸³ He attempts to answer the

¹⁸² In history, the emphasis on the sacrament of orders has caused a certain imbalance in the Church: "Order is rooted in baptism, and no matter how extensively we are able to discourse on order, as long as our understanding of baptism lacks depth and breadth, our understanding of order will suffer too. A visible proof of this imbalance is that in our contemporary Church there is an overabundant symbolism in clothing, titles, speech in connection with the sacrament of order, virtually nothing in connection with the sacrament of baptism. In the early Church baptism held the attention [..]; clerical symbols developed later. The imbalance is present in the new Code of Canon Law: it regularly speaks of 'sacred pastors' but never of the 'sacred laity'" (L. Örsy, *The Church: Learning and Teaching*, Wilmington, DE, M. Glazier, 1987, pp. 42-43).

¹⁸³ It appears that other scholars who adhere to the sacred power theory also find themselves faced with difficulties. Walf, e.g., says, when speaking about laity and jurisdiction, that he has to come to an ambivalent judgement: for historical reasons, the theory of sacred potestas should be kept, because it also reflects the concerns of the Council fathers. From a factual point of view, from the current situation of the Church, the question arises if the exclusion of non-ordained from the power of jurisdiction is not rendered out of date. Thus, he asks if the problem of the powers of orders and jurisdiction should not be reconsidered. See Walf, *Kirchenrecht*, pp. 103-104.

questions about lay judges and their power of governance. Did history itself not show that laity have always participated in the power of governance?¹⁸⁴

In conclusion, some of the implications of the theory on sacred power become evident in the discussion about the laity. The question can be asked if the point of departure, viz. the sacred power, is the best way of approaching these issues. Would not baptism lead to another perspective and reveal better the richness of the different gifts present in all baptized?

12.1 - Fundamental rights

The last section concerns the fundamental rights of the faithful. Corecco starts with a methodological question: in order to approach the rights in the Church, can he use an analogy between fundamental rights in secular law and those in canon law? He proposes to find out if the *fundamental* aspect of these rights can qualify as category that transcends both systems. Corecco says that the fundamental character of the rights does not link the person in the State and the Church. The reasons are threefold: (1) the end of the Church is not to guarantee the rights of the person; (2) the rights in the Church exist in virtue of baptism and do not precede the Church; (3) there is a difference in the autonomy of the person in the Church from the autonomy in the State. He suggests a discussion of the rights from the perspective of *communio*.

¹⁸⁴ The first seven ecumenical councils were convoked by the emperor. Did he therefore not exercise the power of governance? What about custom as legal source? Is there not a power of governance at work?

When discussing the catalogue of obligations and rights, Corecco proposes to determine their ontological status; that will influence the interpretation of the control of the exercise of the rights (c. 223, § 2). Ultimately, he relates all different ontological levels to divine law. He does this because he wants to bypass natural law.

The other aspect of this catalogue of obligations and rights is that the obligations precede the rights. Corecco is of the opinion that this is a direct result of the vocation given by Christ to accede to communion with the Father and other faithful (c. 209, § 1). This aspect of communion implies also that there is no competition in the Church and that baptism and orders are correlative and coessential to each other.

12.2 - Evaluation

The issue of rights in the Church serves well as the last topic for this evaluation. Indeed, Corecco's theory comes together in this subject, although not always explicitly. Already above it became clear that Corecco does not want to consider canon law as a *species* of the *genus* law. He proposes to approach the rights from a *communio* aspect. It also became clear that Corecco called canon law an *ordinatio fidei*, because he wanted to bypass natural law. A third aspect is Corecco's explanation of his concepts, in this case, *fundamental* rights.

To start with the last aspect, Corecco does not really elaborate on the meaning of 'fundamental' rights. He analyzes the meaning of 'fundamental' only in the context of the secular legal meaning, but does not think about it in a possible ecclesial context.¹⁸⁵ He

¹⁸⁵ L. Örsy presents an example of possible meanings of fundamental rights for the Christian person. He speaks about fundamental rights in the sense of legal, moral, and ontological. Legal rights are rights that are legally defined (c. 87 CIC/1917), e.g., the right

says that the meaning it has in the secular society--where it corresponds to human rights--is not applicable to canon law.¹⁸⁶ This is ultimately not applicable because Corecco cannot accept the priority of reason over faith, that is, he cannot accept that there could be rights of natural law.¹⁸⁷

Corecco is indeed operating from within his own horizon. That horizon does not allow him to make a comparison between the rights in the secular society and in the Church.¹⁸⁸ Again, he proposes to think from the perspective of *communio*.¹⁸⁹ The

to marry, if law does not prevent it. Rights grounded in a moral relationship are, e.g., the right to life, and freedom of expression. Ontological rights are rights that give a description of human nature. These could be rights on the level of emotional life, intelligence, and freedom. See L. Örsy, "The Fundamental Rights of Christians and the Exercise of the *munus sanctificandi*," in E. Corecco, N. Herzog, A. Scola (dir.), *Les droits fondamentaux du chrétien dans l'Église et dans la société: Actes du IV^e Congrès international de droit canonique, Fribourg (Suisse), 6-11 octobre, 1980*, Fribourg, Éditions universitaires, Freiburg i. Br., Verlag Herder, Milano, Dott. A. Giuffrè Editore, 1981, pp. 209-211.

¹⁸⁶ Castillo Lara also concludes that the fundamental rights as understood in the secular sense are not applicable to the Church. He says about the qualification of the rights as being *fundamental*: "One should also consider that in spite of the worthwhile studies on the issue [...] a sufficient doctrinal consensus was lacking in an issue of such importance given its ecclesiological and juridico-canonical implications" (Castillo Lara, "Some General Reflections on the Rights and Duties," p. 16). Castillo Lara, however, says that some rights exist in virtue of baptism; that is, they are prior to the determination of positive law (e.g., maintaining communion, conducting a holy life, rights that express a participation in the threefold functions of Christ). Other rights are human rights (right to good reputation, privacy, etc.).

¹⁸⁷ An evaluation of the classification of the obligations and rights as Corecco described it would require a study of each and every obligation and right. Such a study goes beyond this dissertation.

Besides the classification by Corecco, Castillo Lara presents an overview of some other classifications in his article "Some General Reflections on the Rights and Duties," pp. 30-31.

¹⁸⁸ Corecco's idea, viz. that in the Church the individual does not proceed, as such, the Church, might be contested: the Church does recognize non-baptized. Are there not some rights that every person has in virtue of birth and not only in virtue of baptism, e.g., a right to education? Does not every person have a right to hear the Good News

implication of *communio* for the catalogue of duties and rights concerns especially the priority of duties over rights. Moreover, because of the peculiarity of canon law, because it is not analogical to secular law, because the individual does not precede the institution, and because the individual responds to a call by God, there is first an obligation, viz. to stay in communion with God and the people. The underlying pattern of operation by Corecco is that he uses *communio* as foundation for the obligation to preserve that *communio*. This sounds like a circular mode of thinking.

I feel uneasy about the priority of duties over rights: the gift received through baptism is one and undivided, rights and duties flow from it. They are often the two poles of one point; e.g., the duty of worship goes with the right to worship; the duty to preserve life, goes with the right to do so.

Corecco also says that the obligation to stay in communion (c. 209, § 1) implies that there is no competition between a member of the faithful and the Church. The concept of Church that Corecco uses here is interesting. He remarks that there has always been a state of conflict in the Church, but this "arises only as a consequence of the fact that faithful and pastors do not succeed in entering into a reciprocal relationship which respects the dynamics of communion."¹⁹⁰ It appears that Corecco uses the word *Church* in several different senses. In the context where there can be no conflict, he refers to the *Church* as

proclaimed? What about the right to be baptized? What about the rights of a fetus?

¹⁸⁹ The Synod of Bishops proposed, in the "Principles Guiding the Revision of the Code," that the rights that the faithful have by natural law and the rights contained in divine positive law be acknowledged and safeguarded. See *Communicationes* 1 (1969), p. 82.

¹⁹⁰ Corecco, "Theological Justifications," p. 93.

implying all the faithful, while in contexts of actual conflict, he defines *Church* as 'pastors.' He identifies this last tension as a tension between person and institution. This relationship, so says Corecco, cannot formally exist in the Church. In the Church, the fundamental relationship is institution-institution; and this coincides with person-person, because all the faithful belong to the institution and represent it, although in different ways.¹⁹¹ Here the structural meaning of *communio* is again noticeable. Corecco says that the absence of the competitiveness between duties and rights is also in the relationship between the sacraments of baptism and orders. Although he says this, these evaluations have shown that in practice Corecco does not see the two sacraments as correlative and coessential. Corecco's theory is heavily built on the sacrament of orders.

13 - Conclusion

Indeed the topic of the rights of the faithful has shown very well the implications of the theory of Corecco. In that theory some points stand out clearly:

- canon law is part of the deposit of faith and belongs to the realm of theology;
- communio* is the central category in his method;
- faith is the hermeneutical criterion;
- canon law is not analogous to secular law;
- most central terms are not clarified and leave the reader guessing about the meaning.

The theory of Corecco has shown the strong implications of the use of one image of the Church, viz. *communio*. Although the shortcomings of such an approach have been

¹⁹¹ Corecco, "Der Katalog," p. 193.

identified above, the undertaking by Corecco is worthwhile in itself. The value of this approach is that it shows the implications of one particular image of the Church. If indeed the same research would be done for other images and the positive results that such investigations would produce would be combined, the Church would benefit tremendously.

CONCLUSION

The main question of this dissertation was: What is the relationship between theology and canon law according to Mörsdorf and Corecco? Now that the question is answered it is time to bring this work to a conclusion.

This conclusion consists of three parts. The first part will present a brief comparison between the two theories. The second part will indicate shortly what is new in this dissertation. The third part will point out directions for further research.

Now that the theories are reported on and evaluated, it should be interesting to present a brief comparison. Since at this point it can be presumed that the reader is familiar with the theories, and in order not to repeat what has already been said, a comparative table seems appropriate. Since the dissertation concerns the relationship between theology and canon law, the comparative table is limited to those aspects that are in direct relation to that question.

This table has in the left column the subject of comparison, followed by the conclusion of the subject matter according to Mörsdorf and Corecco.

<u>Subject</u>	<u>Mörsdorf</u>	<u>Corecco</u>
Nature of canon Law	theological discipline	<i>ordinatio fidei</i>
method of canonical science	juridical	theological
philosophical foundation	<i>ubi societas ibi ius</i>	minimal or none
predominant point of departure	1917 Code	ecclesiological reflections, intuitive insights
use of historical sources	extensive	minimal
Central idea of theory	Word and sacrament	<i>communio</i>
predominant sacrament underlying the theory	(episcopal) Orders	Orders
major themes handled	<i>potestas sacra</i> , internal and external forum, membership, laity	<i>potestas sacra</i> , codification, laity, fundamental rights
language	precise and often explained	loose, often unclear
mode of thinking	emphasis on connections and relations	disjunctive mode

The second part of this conclusion consists in pointing out what is new in this dissertation. The 'newness' of this dissertation refers to the progress of moving into new horizons, by discovering new ideas and new principles that are supported by evidence.

This dissertation moved into a new horizon by having provided a systematic exposition of the theories of these scholars. The deficiencies of the theories were also pointed out. The newness consists in that neither such a systematic report--from the perspective of their theological understanding--nor a critical evaluation of the whole of the theories of these scholars has ever been presented. The relevance of such an investigation lies in identifying the underlying theological ideas, which display why a certain theory can, or can not help the Christian community to progress in faith.

Having arrived at this point of the research, the third part of the conclusion can be addressed. As the introduction to this dissertation pointed out, ultimately all research will point to new questions. These questions could be objects of further research. The pattern of such investigations should be the same: seek out new horizons, find new ideas and principles, and thus expand the understanding of the role of law in the Church. This field of research is very broad and all that can be done now is to point towards some possibilities.

The need remains to give more thought to the evolutionary nature of canon law, since neither Mörsdorf nor Corecco pay a lot of attention to that. The evolutionary nature of canon law entails the continuous adjustment of law to the needs of the community. It implies that canon law can adjust relatively easily to those needs, without jeopardizing legal security. It is remarkable that research has made great progress concerning the development

of dogma, but relatively little investigation of development in canon law has been done.

There is a need for further exploration of the contribution of the People of God towards legal development by way of customs. Custom has been the source of the creation of law since the early Church and this was sustained nearly until modern times. Today it is virtually non-existent, while Vatican II encourages research into this direction.

There are several ecclesiologies within Catholic faith. The Church cannot be expressed in one concept. Vatican II said it well when it spoke of the Church as one complex reality (*LG 8*). This implies for canon law that not one ecclesiological concept can be used for legislating and interpreting canon law. Hence, an investigation of the consequences for canon law of the different ecclesiological concepts is needed. Once such an investigation is completed and all implications of the different concepts are identified, the positive aspects of these investigations could be advantageously combined. Rouco Varela has made some suggestions into this direction, but it has not been worked out for the whole canonical system as such.

The awareness of the existence of several ecclesiological concepts is also relevant in relation to the renewed appreciation of the Church as a world Church. Mörsdorf and Corecco often give the impression that they speak about one theology, but if theology is understood as faith seeking understanding, there can not be but a pluriformity in theology. The understanding of the Church as local Church also supports this understanding. The implications of pluralistic theologies for the interpretation of canon law should be investigated.

The role of the subject in the interpretation of canon law should be investigated. In recent times several disciplines have come to the awareness that in any mental operation,

the subject forms the consistent category. Theology itself has become aware of this and research is being conducted, but canon law pays virtually no attention to the subject. It gives little consideration to the reception of the law, and the existence of different horizons of the interpreting subjects is almost not recognized. Yet, any level of interpretation, be it authentic or doctrinal, displays the horizon of the subject (time, place, knowledge, experience, etc.).

Theology and canon law find a common denominator in that both deal with values. Theology provides the values, while canon law produces norms for action that support these values. Investigations should continue into the similarity and the difference between theology and canon law from this perspective; such an investigation might well lead to an understanding of canon law that allows for development, consideration of the subject, and spiritual growth of the ecclesial community.

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¹ The works listed here are used directly in the dissertation. For a complete bibliography of K. Mörsdorf, see K. Mörsdorf, *Schriften zum kanonischen Recht*, W. Aymans, K.-T. Geringer, H. Schmitz (Hrsg.), Paderborn, F. Schöningh, 1989, pp. 879-889. A complete bibliography of E. Corecco will be published in June 1990 by Éditions Universitaires in Fribourg, Switzerland.

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Abstract of *Theology and Canon Law: The Theories of Klaus Mörsdorf and Eugenio Corecco*
by Myriam Wijlens

"The essence of the Church and the essence of canon law contradict each other and therefore the Church does not want to have law." Such was the thesis that Rudolph Sohm, a German protestant jurist, posed at the end of last century and by which he challenged canonists to provide for an adequate foundation of canon law.

It was not only this thesis, but also internal ecclesial development itself that asked for a reflection on the foundation of canon law and its relation to theology. The new *doctrinal* vision to which the Church had come at Vatican II, had to be translated into *legal norms* and this translation process was cause for reflection. The challenge thus put to canonists resulted in the appearance of several schools of thought: some consider canon law as equal to secular law and deny a relationship to theology (Italian lay canonists); others opt for an influence of Magisterial teaching on canon law only (Navarre; Opus Dei); others again opt for a very close relationship between theology and canon law (German school).

This research topic was chosen because of the historical development (the process that had to take place after the council) and the diversity in ideas (the appearance of different schools). But the scope of research had to be limited to the theories of two people, both belonging to the German school: Klaus Mörsdorf and Eugenio Corecco.

Mörsdorf was the founder and director of the institute of canon law in Munich between 1947 and 1977. He wrote before the council and participated in the revision of the Code. His influence is also noticeable through his numerous students several of whom became internationally renowned canonists (Heinz Ewers, Winfried Aymans, Enda

McDonough, Heribert Schmitz, Klaus Lüdicke, and Eugenio Corecco). He died in 1989.

Corecco wrote after the council and he is of importance because of his membership of the commission that went over the final draft of the 1983 Code. Corecco is presently president of the International Association of canon law.

Before discussing the thoughts of these two men a few words about the method used in this dissertation are necessary. It is a very simple method and it basically underlies any mental operation. It is well described by Lonergan and consists of the following:

1. Determine the question. In this case the question is: what is the relationship between theology and canon law in the theories of Klaus Mörsdorf and Eugenio Corecco?
2. Collect all the necessary data relevant for answering the question. In this dissertation it implied reading the total work of the scholar, and reporting on what appeared to be relevant for answering the question. It meant standing 'in the shoes of the scholar and let him speak.'
3. Once the data is collected, the researcher brings in the power of the mind to understand the data. The researcher formulates hypotheses in the mind.
4. Then a judgement has to take place: are the formulated hypotheses true? In order to be true they should remain within the parameters of the question, account for all the data, not go beyond the data, and in doing all of this exclude other understandings.
5. Often enough this process of discovery leads to the determination of a value. In this stage responsibility is necessary: the person accepts the consequences of the option. The result is a decision or action.

In this dissertation it implies that after the data is collected, the hypotheses are formulated and checked against the obtained data. That then should result in an answer

that is either acceptable or not. In fact, what happens here is also known as an evaluation of the theory. The process of discovery is completed and points to further research.

So, what is the content of the theories of these two scholars? Mörsdorf sees a full identity between theology and canon law. The difference between the two is the method that they apply: theology uses a theological method, canon law a juridical method. With this as his main principle he focused on particular topics, like internal and external forum, sacred power theory, membership in the Church, and laity. Mörsdorf intends to present a doctrine that is both applicable to theology and to canon law.

Corecco moves away from the understanding of canon law as an *ordinatio rationis* to an *ordinatio fidei*. In doing so, he also identifies theology and canon law, but the identification is different from Mörsdorf's, because he denies any analogy to secular law. For him canon law uses also a theological method. Actually, Corecco goes so far as to make canon law part of the deposit of faith. Corecco takes the doctrine of *communio* as a central category for understanding the Church and canon law. Yet, at the same time, he does not clarify sufficiently his understanding of *communio*. Corecco worked his theory also out in different subjects, like the issue of codification itself, sacred power, laity, and fundamental rights in the Church. Corecco tries to work out the transition from a certain doctrine (the Church understood as *communio*) to practical points.

The newness of this dissertation consists in the *systematic exposition* and *critical examination* of the work of these scholars, which has never been done before. The relevance of such an investigation lies in identifying the underlying theological ideas, which display why a certain theory can or cannot help the Christian community to progress in faith. Moreover, the theories, because of its language of publication (German) are known

only to a limited amount of scholars in the English speaking world. To make these theories accessible to a wider public, can help to understand some of the influences they had on both the Second Vatican Council and the Code.

The research thus conducted resulted in some positive aspects and some deficiencies. The main positive aspect consists in the affirmation of the relationship between theology and canon law by both scholars: they have thought about it, and attempted to come forward with a plausible answer. Especially Mörsdorf, who already in the 1940's started this reflection, has to be praised for having had the courage to take up the challenge that Sohm provided him with. Mörsdorf is certainly one of the people who pioneered in that discussion. Corecco also sees that close relationship between theology and canon law and deserves praise for emphasizing the importance of faith and the impact of the concept of *communio* on the juridical aspect of the Church.

The deficiency, however, is closely related to the positive aspect: Mörsdorf sees the difference between the theology and canon law only in the method. He defines the science of canon law as 'a theological discipline with a juridical method.' Corecco, in defining canon law as an ordination fidei takes away much of the human aspect of canon law. This aspect is absolutely indispensable because of the composite nature of the Church, since the Church is one complex reality comprising a human and a divine element (LG 8).

Despite the deficiencies it is most important that these men have seen a link between theology and canon law. Hence, future investigations into the relationship between theology and canon law should continue, because they might lead to an understanding of canon law that allows for development and spiritual growth of the ecclesial community.