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Compliance and Rule-Following under Legal Uncertainty: Towards a Theory of Legal Casuistry?

The topic of mutual interrelationship between religion and law has been in the centre of attention of Western European and US legal historians for quite some time. It is thereby claimed that in the period starting from 1500, an unprecedented synthesis of law and religion took place, manifested in an explosion of treatises on moral theology, in which the *ius commune* and moral philosophy were closely intertwined. Indeed, theologians from a variety of different Catholic orders, such as Augustinians, Carmelites, Carthusians, Dominicans, Franciscans, Jesuits, etc., all wrote treatises dealing with legal issues from a theological, religious point of view. Thereby, mostly the issues of procedural law and contract law were seen as those that the moral theology was interested in, claiming that any confessor must take positive law into account when guiding the faithful members of the church in their everyday lives and legal problems. A good moral theologian was thus to master the tools of secular law in order to implement it correctly in the practice of confession, but also in general in solving any possible situations where religious and legal issues collided.

One of the so far neglected "legal" problems that moral theologians (confessors) often faced in their practice, was the issue of legal uncertainty. Namely, the Scripture itself, as well as the confession manuals and the secular law on which the confessors were giving advice, were far from complete, clear, unequivocal, or covering all possible situations that a daily life could bring. Thus, in modern terms, problems arose as to how to ensure compliance and rule-following in situations of legal (as well as moral, religious) uncertainty. A number of theories were proposed by experts in moral casuistry already in the Middle Ages, later categorized as the theories of tutiorism, probabilism, probabiliorism, aequiprobabilism and others.

Currently, legal theory and legal practice are facing a similar problem – is there always solely one right answer to legal problems, even in the "hardest cases"? If yes (as Dworkin claimed), how to reach or predict the correct answer – specifically if the lawyers are not Herculeses and need to advise their clients before one hears the final answer from a court? And if not (as legal realists claim), how to at least minimize the risks of breach/illegality, and to ensure the possibly highest standard of compliance? In any case, in both strands the same question arises – how to methodologically approach a legal problem from the bottom up, in a casuistic manner?

A theory of casuistry has not been developed or paid much attention in legal scholarship lately, since the failure of Viehweg to re-introduce the casuistic (topical) approach in 1950s. Yet, the related problems have not withered away and even today many legal professionals still face the same dilemmas as already the medieval confessors did… My contribution will thus ponder upon the question as to whether any solid theory of casuistry – building either on the casuistry employed by confessors, or casuistry employed nowadays by ethicists, especially in bioethical cases – can be of any help to modern lawyers, who either doubt the one-right-answer theory, or who find themselves in a situation of legal uncertainty for whatever reason.