

NATURAL LAW AND CANON LAW

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1.—In the inquiry about Natural Law which forms the object of our discussions, we have been proceeding by what I believe a highly constructive method: approaching, as it were, in a spectral analysis the central problems connected with the concept and function of Natural Law from the various angles as presented by the specific problems existing in various given legal orders: Constitutional, Common, International Law. Most appropriately so: for the science of Natural Law, like all knowledge in the realm of practical reason, deals with human acts and cannot be construed, *more geometrico*, in an abstract, strictly speculative fashion, i.e. without the empirical data of actual human relations and social compounds. The *concept* of Natural Law, it is true, taken in its strict sense as the principles which are immediately given by the rational and social nature of man, has its own reality, “exists” in the intellectual order in the manner of Universals; yet in the practical order it can exercise a normative function as *regula et mensura* only by some relation to the contingencies of man’s social existence here and now:¹ and these contingencies are many and changeable. They are the subject matter of *positive* law in all its va-

¹ Cf. J. Leclercq, *Le fondement du droit et de la société* (Leçons de droit naturel I; 3 ed. Namur-Louvain 1948) 55; H. Rommen, *The Natural Law* (St. Louis-London 1948) 187, 216.

riety and relativity, and it bespeaks the wisdom of the mediaeval schoolmen that they were satisfied with philosophizing about the essential relations of all positive law to the natural, rather than dreaming of a Natural Law which would rule human social behavior once for all as a perfect code in minute detail, and thus make all positive law superfluous by absorption; or rather than removing Natural Law to the ever unattainable, rarified spheres of a transcendental ideal. It is because of the *real*, we may even say the necessary, correlation between the natural and the positive order that a mode of inquiry which investigates the former through the data of the latter is very much of the lawyer's, not only the philosopher's concern.

2.—Because of this correlation we are entitled to speak about Natural Law and Canon Law. In doing so, we are inquiring not about the right reason of a given legal institution or set of rules concerning one partial aspect of social relations, but about the right reason of a legal order as a whole: a body of laws which considers the whole of a society and its parts, its ultimate ends, partial ends, and means, in their coherence and interconnections, and does not seek or require its justification from any other scope or form of social existence. Canon Law, the legal order of the Catholic Church, comprises the principles and rules governing the function of the Church as a social body of its own right and with regard to its specific ends, which cannot be absorbed by the ends of the body politic or of any other society. Whatever the actual relations of

Church and State in a given country — and they may be persecution, indifference, separation, privileged status, establishment, etc. — Canon Law is never a department of any other legal order, because it transcends the order of the state inasmuch as the spiritual existence of man is not part of his civic existence. This remains true even where Church government and political government coincide, as in the Papal States before 1870 and in the State of Vatican City today; or where the political government, by virtue of concordat or by encroachment, controls part of the ecclesiastical life: neither the civil law of Vatican City nor the state laws of a given country on matters ecclesiastical are Canon Law.

I — *The Church*

3.—The existence of Canon Law is a unique phenomenon in the world of laws because of the unique nature of the Church: a society of divine origin by its institution, yet human in its bearers of authority, which is a stewardship of the divine authority of Christ Himself perpetuated; ordained towards a supranatural end and yet organized in the form of a visible community with its government, legislation, courts, means of enforcement, property rights, diplomatic relations, etc.; empowered with the administration of God's graces through the instrumentality of matter and form in the sacraments, the Church is incommensurable with all other modes of social existence.

It is necessary to realize the unique character of the

Church in order to grasp the meaning of Canon Law. There has been, through all ages, the voice of those who contend that any legal order is contrary to a so-called "true" conception of Christianity. The communion of saints, they say, is an entirely spiritual fellowship of the elect, incompatible with the concept of organization, authority, law. There can be no other law but the bond of charity, no other authority but the free breathing of the Holy Spirit which guides the faithful in a holy, anarchical enthusiasm. Law, as a principle of obligation by authority, is declared contrary to love. This conception rests — it is perhaps not superfluous to repeat it — on a misunderstanding of all terms used. The notion of law is narrowed down and depreciated, because all law is here conceived as an arbitrary, voluntaristic command (in the legislator); as pertaining merely to the base world of material goods and relations (in the object); as being obeyed only in compulsion and fear (in the subject). Correspondingly, the absolute dematerialization of the concept of the Church into a mental attitude, a common feeling of spiritual union, opens up an unbridgeable chasm between religious and social existence, between the spiritual and the created world. It must ultimately lead to the denial of the unity of being, of the reality of the sacraments, and of the hypostatic union of the two natures in Christ.

On the other side, we should not forget that there is also the opposite danger of overstressing the social form at the expense of the supranatural end on which the

Church is founded. This trend may be observed, e.g., in the early Middle Ages, when parishes, abbeys, and bishoprics came more and more to be considered as objects of a quasi-feudal tenure in which the spiritual office was reduced to a mere appurtenance of the material rights of the incumbent, until the Gregorian reform restored the canonical concept of sacred offices. Or we may cite the curialism of the late Middle Ages, in which the vast apparatus of papal administration degenerated into a bureaucratic, legalistic, fiscal machinery functioning for its own material ends, and thus contributed to precipitate the great crises of the conciliar movement and the ultimate breakdown of Christian unity in the Protestant revolution.

4.—I have contrasted the excesses of spiritualism and legalism in order to make understood the complex and unique nature of Canon Law. The problem of Natural Law and Canon Law has, consequently, certain aspects which elsewhere are not found, or not found in a like manner. This is true, first, of a very fundamental question that is easily overlooked when the congenital difference of the Church's legal order from any secular legal order is not kept in mind: namely the question of how it is possible to speak of a *natural* law in an order which by its origin, first principles, and ends, belongs to the sphere of the supranatural. Is there not a serious difficulty of measuring the incommensurable? The question leads to a number of interesting observations:

(a) There is no doubt that the supranatural cannot

be explained by, or deduced from the natural. The supreme jurisdiction of the Pope as the Vicar of Christ, as well as his power to define theological truth and command its acceptance with a binding force for every Catholic conscience, are not within the grasp of natural reason. Nor is the power of bishops to confer orders; nor the fact that through the ministry of men, namely priests, sins can be forgiven; nor that there should be any difference of rights between the laity and the clergy, and within the clergy, a hierarchical gradation of (sacramental) powers of orders, or of powers of jurisdiction. And yet, the whole body of Canon Law rests on such supranatural foundations, which can be accepted by reason only when reason, in the act of faith, accepts the fact of divine revelation as the source of the constitutive law of the Church. In other words, in the law governing ecclesiastical society, there is a fundamental part, the "divine positive law," which is *beyond* natural law even as the very end of the Church, the eternal salvation of souls, is beyond the natural faculties of man. But what is beyond nature is not therefore contrary to, or destructive of nature: the identity of God the Creator and God the author of the economy of salvation precludes the possibility of any contradiction between the supranatural and the natural order. Faith is not irrational, theology does not nullify philosophy; the supranatural law presupposes, includes, and perfects the Natural Law.² It is no paradox, then, if we say that in the supranatural elements of the Church's

² St. Thomas Aquinas, *Summa theologiae* 2.1 q. 99 art. 2 ad 1.

constitution the Natural Law reappears, as it were, on a higher plane and remains valid. For example, a person not having the use of reason could not become Pope; nobody can be validly ordained against his will; a confessor cannot impose the commission of a crime or the fulfillment of impossible acts as penance; there can be no sacrament of marriage between infants, etc.

(b) Upon the supranatural foundation, the law of the Church is built in detail by the proper ecclesiastical authority which, by definition, is a human agency though instituted by divine law. Ecclesiastical laws are man-made, and while ultimately ordained for the better attainment of the supranatural end of the ecclesiastical society, (hence, *sacri canones*), they are not supranatural as means towards this end. Nor are they always *directly* connected with the end of salvation. In order to fulfill its supreme mission, the Church can and must also provide for the proper functioning of the social body as such, e.g. for the lawful and honest administration of the material means she needs; for the just and orderly settlement, by forms of legal procedure, of conflicts between the members of the society; for the protection of honor and legitimate personal rights (e.g. the right to separation of bed and board; the observation of forms in the removal of pastors, etc.). Positive ecclesiastical law, therefore, in its object is not restricted to a mere filling-out of details of the divine institution (hierarchy and sacraments); but it also regulates matters that in any way are reasonably connected with the preservation of those

common and individual interests which in the *natural* order belongs to the being of the Church *as* a society.³ All such law, like human law in general, results from historical growth under changing historical conditions: it is changeable, it may fail of its purpose, it may prove an outright mistake, or become impractical by later developments. There can be little doubt about the role which the dictates of natural reason have to play as a rule and measure in making and applying such positive ecclesiastical law.⁴

5.—Another singular aspect characteristic of Canon Law in its relation to Natural Law consists in the possibilities for the Church to realize the *unity of the moral and the legal order*. The fact that all genuine law, secular or ecclesiastical, is part of the wider realm of the moral order is not under discussion here. But it is also clear that the legal norm and the legal judgment, in that it measures the human act primarily in its external, social relevance, is narrower in its scope than the moral judgment, for which the social value of acts is only one, and not the foremost criterion. For instance, (a) the act of the will which does not manifest itself in the outer world remains beyond the reach of the legal order; (b) even an

³ *Contra* P. Fedele, *Discorso generale sull'ordinamento canonico* (Padua 1941); but see A. Van Hove, *Prolegomena* (Commentarium Lovaniense in Codicem iuris canonici I.1; 2 ed. Malines-Rome 1945) 45, 61 n. 3.

⁴ Examples for historical change in positive laws that are destined to fill out the divine law are amply supplied in the history of papal elections; or of the form prescribed by the Church for a valid sacramental marriage. As to laws of a purely social content, one may recall the historical changes in the canonical rules of court procedure.

act or fact in the external world (and which therefore falls under the rule of the substantive law) remains practically beyond the reach of the legal order if it cannot be ascertained by sufficient evidence according to adjective law, or if it is not actionable (e.g. where the doctrine of estoppel applies); (c) legal effects may result from the mere verification of conventional formal requirements (as, e.g., in a promissory note; in judgment by default; in presumptions and fictions of law).

In such cases of discrepancy between legality and morality, the limitations of every legal order become evident. But while the power of secular society stops at this point, the Church's authority reaches beyond it. (a) It includes the authority to *teach* dogmatic and moral truth in a binding manner, which creates a true obligation for the faithful to accept the teaching—the power of magisterium, which belongs to the hierarchy — so that moral precepts may even take the form of positive law.⁵ (b) It includes the power of jurisdiction over human acts in the internal sphere, the “court of conscience,” of which the administration of the sacrament of penance is the foremost, but not the only application. (This power is jurisdiction not only in a figurative or analogous manner of speech. Note that valid sacramental absolution requires powers of order *and* jurisdiction, which latter is given either by law or delegated by concession from the legiti-

⁵ For example, *Codex iuris canonici* (1917) canons 124, 415 § 5, 643 § 2, 892 § 2, etc. (in subsequent footnotes, references to the Code of 1917 will be given by canon and number only). Cf. P. Ciprotti, *Lezioni di diritto canonico* (Padua 1943) 41, 62f.

mate authority.⁶) Now, in the confessor's power to bind and loose, the absolute measure applied is the moral norm, and while the essential effect here regards the relation between the individual and God (regardless of whether the matter of the norm is a duty towards God, self, or other men), thus transcending the legal order, it is in many respects connected with the external sphere of law: Canon Law regulates the valid exercise of internal jurisdiction; the internal forum safeguards the observation in conscience of the norms of Canon Law; absolution from, or retention of sin touches upon the baptized individual's right to the reception of all other sacraments; an obligation imposed in the internal forum (e.g., restitution of ill-gotten gains or rights) can restore the social order where the external power of law is ineffective (e.g., because of lack of proof); sacramental absolution from censures imposed judicially or by operation of law has certain effects in the external forum.⁷

Through the magisterium, and in the internal forum, wide avenues for the realization of Natural Law are opened to the Church's jurisdictional power. For, the natural *moral* law is one (*lex naturalis*); moral norms which deal with the matter of just *social* relations (*ius naturale*) are an integral part of it: the possibility of conflict between

⁶ Canon 872ff. The Pope and the Roman Cardinals hold this jurisdiction by law for the universal Church; bishops, pastors, and certain other priests, for a limited territory; and certain religious superiors, for their own subjects (can. 873).

⁷ Cf. can. 2251. For the effects in the external forum of certain (non-sacramental) dispensations given in the internal forum see can. 1047.

morality and law, as it exists on all levels of the positive legal order, is cancelled on the level of the natural order. Hence, in all matters of what is morally due between man and society, the authoritative interpretation of moral truth (magisterium) includes interpretation of Natural Law; equally the overriding of all legal limitations and formalisms by the moral judgment in the court of conscience becomes application of Natural Law.

II. — *Natural Law*

6.—From all our preceding observations it becomes understandable that the problems of Natural Law have at all times been of vital interest for canonical thought. It is not by coincidence that the scholastic philosophy of the thirteenth century is largely indebted to the spadework done by the preceding generations of canonists on the doctrine of Natural Law. The opening section of the book which marks the beginning of a science of Canon Law, the *Concordia discordantium canonum* of the Bolognese monk Gratian (c. 1140 A.D.)—the book which for centuries was to remain the definitive compilation of the ancient and early mediaeval strata of Canon Law, and which for the first time subjected the immense mass of canonical legislative materials to the scientific principles of analysis and discovery—is dedicated to a discussion of natural and positive law. On the basis of his somewhat imperfect dicta the early commentators of Gratian's text probed into nearly all the aspects of the problem which were to become topical with the schoolmen: the concept

of Natural Law, the various meanings in which the term is often loosely employed; the place of Natural Law in the structure of the human mind; its contents, application, and relation to man-made law; how its immutability, universality, indispensability, and normative function are to be understood; how it operates in the fundamental data of social life, etc. The wealth of the pertinent contributions of the early canonists, especially in the century preceding St. Thomas, is to the present day far from being fully explored and analyzed, although the fact of their early leadership in the field is not unknown.⁸ For the degree to which later generations of canonists (after the leadership had passed to philosophy and theology) were conversant with all the facets of the doctrine of Natural Law, every major treatise on Canon Law through the centuries bears witness.

It could, indeed, not be otherwise. The secular lawyer should not, but can, unfortunately, be forgetful of the existence of a metaphysical order of being: confiding blindly in the forces of convention, political balance and all the external props and stays of the secular order—which indeed may seem strong enough at times to make states function (though badly and aimlessly)—he may be tempted to be satisfied with the working hypothesis of

⁸ An excellent beginning of studies in this field has been made by O. Lottin, *Le droit naturel chez St. Thomas d'Aquin et ses prédécesseurs* (2 ed. Bruges 1931). A full investigation of the historical problems involved would also have to take into account the teachings of the mediaeval authors on civil law, cf. G. Onclin, "Le droit naturel chez les Romanistes des XII^e et XIII^e siècles," *Miscellanea moralia in honorem A. Janssen* (Louvain 1948) II, 329-37.

legal positivism and all the -isms derived from an agnostic philosophy. The canon lawyer, if he were tempted to think on such lines, or if he would consider Natural Law only as an idealistic "postulate" of his religious belief,⁹ would find himself in an empty abyss, because the *Church* cannot even be *thought* without the reality of an ontological order. If natural reason does not exist, or if it is unable to form valid judgments on moral truth, then the entire supranatural order becomes either a tyrannical whim of God or a figment of the human mind; the Church, consequently, would become a social entity which exists either by irrational magic, or as a brazen lie; in either case it would have no reality *as Church*. Positivism is, therefore, *per se* impossible in Canon Law.¹⁰

7.—Equally impossible for Canon Law is any proposition which conceives of Natural Law in a purely "naturalistic" or "rationalistic" sense; i.e. which either supposes that human *nature* is altogether opposed to, and logically and historically antecedent to reason and social order (the theological properties of Adam's "natural" state before the Fall are not in question this theory); or that human *reason* is entirely self-determined, self-sufficient, unrelated to, or even opposed to religion. For the canonist, human

⁹ This is, surprisingly, the attitude of H. Singer, "Das Naturrecht im Codex juris canonici," *Archiv für Rechts- und Wirtschaftsphilosophie* 16 (1922-3) 206-15.

¹⁰ The maxim sanctioned by Pope Boniface VIII, "The Roman Pontiff is considered to have all laws in the shrine of his heart" (*Liber Sextus* 1.2.1) does not imply any shade of positivism, but expresses the doctrine that the Pope always acts in full knowledge of the law; cf. F. Gillman, in *Archiv für katholisches Kirchenrecht* 92 (1912) 3-17.

nature cannot be but rational and social; and rational nature (or natural reason) in man cannot be but *created*. This statement, we must emphasize, does not require an act of supranatural faith: although it becomes inescapable in the light of faith, it remains attainable on the level of the philosophical principle of causality which admits an uncaused cause of being. Otherwise, Natural Law would not be knowable to man without faith.

The power of natural reason to form judgments in the practical order, i.e. to proceed from the "is" to the "ought" stems from the ultimate cause of reason; the act of reason (the judgment) does not make, but find what is right. Both as a cognitive principle and a normative rule and measure Natural Law refers back, therefore, to the author of the objective order of things and of the rational nature of man. In this sense we have to understand all formulations which speak of the Natural Law as "in-born," "laid into," "impressed upon" the human heart or mind; or as "participation of human reason" in the eternal law governing the Universe. Without going into details about the differentiation between the neo-Platonic-Augustinian tradition behind the notion of "imprint" and the Aristotelian-thomistic conception of "participation,"¹¹ we can perceive the convergence of both in their stating the *divine* origin of Natural Law; i.e. in stating Natural Law as that part or mode of divine law which, without requiring supranatural revelation, is within the ken of, or

¹¹ Cf. Lottin, *op. cit.* n. 8 *supra*, 68ff.

co-natural to, human reason—a corollary to the possibility of a natural knowledge of God.

The double dichotomy, divine (natural or positive)—human ecclesiastical law, has thus become the fundamental frame, almost from the beginning of canonistic science, for describing the sum total of law governing the Church. I say, almost from the beginning: because clearness in distinguishing the natural from the supranatural divine order was not immediately achieved. In the opening sentences of Gratian's work we read that "Natural Law is what is contained in the Law [of the Old Covenant] and the Gospel: whereby each is bidden to do unto others what he wants done to himself, and forbidden to inflict upon others what he wants not to be done to himself; wherefore Christ says in the Gospel . . ." Though farther on Gratian redefines his concept and speaks of Natural Law which "begins with the beginning of rational creatures";¹² he insists that not all commandments of the Old and the New Testament are of Natural Law,¹³ and differentiates somehow between the "divine laws" and the "canon of scriptures,"¹⁴ his terminology of natural and divine laws remains always fluctuating. Only gradually did the next generations of canonists arrive at the correct interpretation: eventually they recognized that precepts of the natural moral law are included in the revelation of the Old and the New Testament not by way of reveal-

¹² Gratian, *Decretum*, dist. 5 princ.

¹³ Ibid. dist. 6 fin.

¹⁴ Ibid. dist. 9 fin.

ing supranatural truth; i.e. that the quality of Natural Law *as* natural is not due to revelation but to reason.¹⁵

III — *The Function of Natural Law*

8.—Divine natural, divine positive, human ecclesiastical law: only when we proceed to determine their *functional* relation, when we leave the field of abstract definitions and enter the much more complex field of practical realizations of Natural Law *in* the juridical order, can we grasp the all-important fact that the Natural Law doctrine is not a mere theory of a static, rigid, hierarchical structure of legal orders, but a *living force* in the legal life of the Church. What does it mean, we must ask, that Natural Law (as we read in every text book) has the force of law (*viget*) in the Church; that human positive law cannot prevail against it (or else, it ceases to be law); that statutory law is to be made, interpreted, and applied in accordance with it? Both a guiding ("in-forming") and a critical function is assigned to Natural Law in such statements; and all the more one must be on guard against the idea as though Natural Law were a code of hard and fast rules, existing, as it were, on the second story of the building above the first floor of positive law. If we ask what Natural Law contains and how it is knowable; if we further ask whether the legal order of the Church

¹⁵ Cf. the texts quoted by Lottin, *op. cit.* 13-23; 105-111. But note that Pope Gregory IX as late as 1234 uses the term "natural law" as synonymous with "divine law," and as distinct from the dictates of reason: *Decretales* 1.4.11; cf. Van Hove, *De consuetudine* (Commentarium Lovaniense 1.3; 1933) 81ff.

may more directly and eminently "bring out," or "realize" this or that aspect of Natural Law, we must always be on guard against such "positivism of Natural Law"—or else the canonist might easily be led to take the textbooks and case books of moral theology for *the* Natural Law, a sort of super-code. This is no less a danger than the opposite notion of Natural Law as a merely formal "postulate" without any material contents.¹⁶

The observation is age-old that in Natural Law not all judgments, or precepts, or rights are evident to the same degree. Between the absolutely good and the absolutely evil act there is the immense sphere of the "relative," the indifferent, the contingent, and the complex, where the simple statement that the act acquires its goodness or badness from its end leads only to the further question of proper ends, proper means, and how to establish a right relation in the multitude of ends, values, interests, goods, and rights. The judgment of right reason is therefore anything but a judgment of "simple reason," unless we want to restrict the subject matter of Natural Law to what is evident to children, or self-evident. Man *as* man is never in the absolute (as far as the law is concerned) but always in concrete relations. To judge whether the concrete situation is just or unjust requires always a varying number of considerations and ratiocinations, *for us* to perform. Some of these situations are given with social life as such; but we must insist that even in regard to the most fundamental, to Life itself, the Natural Law does

¹⁶ G. Renard, *La philosophie de l'institution* (Paris 1939) 28ff.

not consist of a simple formula, "killing is bad," "not-killing is good." What about self-defense? Just war? Capital punishment? Would we not reject, e.g., a legal order as against Natural Law which excludes the right of self-defense? Both the fifth commandment and self-defense are of Natural Law; yet defense can be excessive (as in the case of a harmless aggressor; of a trifling object; of inadequate weapons); again, the excess may be caused by overwhelming fright, etc. The *ratio naturalis* consists of one all-comprehensive judgment only, but in a given case its formulation may rest on a chain of conclusions which positive law will have to express by a number of rules and exceptions. It cannot be said, e.g., that of the different treatment given by different penal codes to excess in self-defense, one or the other must be "against" Natural Law. And the more we get away from the fundamental facts and forms of life into the relations existing in highly organized society, the more the technical, conventional regulation enters into the proper determination of wrong and right. What is Natural Law in regard to the buying and selling of shares on the stock-exchange? Or to the ordination of a cleric outside his home diocese? It would be folly to expect in such situations a detailed answer from "pure" Natural Law, or to say that a given set of rules in such situations is the only possible determination of Natural Law.

The functional relation of Natural Law and positive law may perhaps be best expressed thus: the closer a legal situation or institution is to the fundamental facts of hu-

man social life, the greater becomes the *evidence* of Natural Law; the more contingencies are involved, the more must be left to positive determination of the legislator, which in itself has the value of securing social stability, whereas leaving the determination to individual reasoning would destroy the end of society as an *order*. Every honest and sincere attempt of the lawmaker to rule in a manner consistent with the end and meaning of a given institution, with the implied possibilities of a given situation for the end of society itself, is still "of" Natural Law, "within" Natural Law.¹⁷ The "participation" of positive law in Natural Law is a participation by "non-contradiction," and also by a process of approximation, which includes the notion of perfectibility, of the openness of reason towards better reason.¹⁸ Natural Law remains one and universal in all its infinite diversifications; but our grasp of it can grow the more we are able to express the universal by a formula which covers the particular.

9.—This differentiation of degrees of evidence of Natural Law has been expressed in many ways in the history of canonical and philosophical or theological thought. The

¹⁷ For instance, duress vitiates every act somehow in Natural Law. But the act may in positive law be valid and rescindible (can. 103 § 2); valid and partially rescindible (thus in Holy Orders received under duress, can. 214); or invalid (thus in matrimony, can. 1087). In delicts committed under duress, imputability may be excluded (can. 2205 § 2; 2229 § 2), diminished (can. 2205 § 3), or fully sustained (can. 2229 § 3 n.3).

¹⁸ For instance, antecedent impotence is a marriage impediment of Natural Law; yet the Roman Church preferred till the twelfth century the "custom" according to which in this case the couple, once married, was bound to continue common life "as brother and sister."

early canonists contrasted the "precepts and prohibitions" with the mere "demonstrations" or "permissive Natural Law;" again the distinctions of necessary and convenient, mandatory and advisory, antecedent and hypothetical Natural Law are found. Such antinomies as "by Natural Law everything is common"—"by Natural Law there is property of individuals" led to a great variety of solutions: authors spoke of an original communism before the Fall versus the later division of mine and thine (here we have even Natural Law referred to a primordial "natural state"); or they referred the first proposition to the state of necessity, when all *becomes* common by Natural Law, etc.¹⁹ All such distinctions are of great heuristic value; so is in particular the thomistic formula for Natural Law. Starting from the analogy of speculative reasoning, St. Thomas finds in Natural Law certain first principles on the level of self-evident propositions, wherefrom secondary conclusions are deducible, and so on down to those rules which are left to be determined by the legislator's prudence in positive law.²⁰ But one should note that St. Thomas insists that the syllogisms of practical reason are not of the same cogency as those in the speculative field. Recent French theologians have warned very appropriately against forgetting that the thomistic formula of first principles and secondary con-

¹⁹ Cf. the texts in Lottin, *op. cit.*; especially Huguccio (ibid. 110); also the *Glossa ordinaria* on Gratian dist. 1 c.7 v. *communis omnium*.—W. J. McDonald, "Communism in Eden?" *New Scholasticism* 20 (1946) 101-25.

²⁰ *Summa theol.* 2.1. q.94 art.2, q.95 art.2. The distinction is to a certain extent anticipated in St. Albert's trichotomy, essential—suppositive—particular, cf. Lottin, *op. cit.* 46, 118.

clusions was coined as a heuristic method of analogy and does not denote degrees in the *being* of Natural Law.²¹

10.—Can we deduce from such formulae as “approximation,” “degrees of evidence,” “principles and conclusions,” etc. any guidance for the legislator and for the jurist? The following points seem to be of especial importance:

(a) the principle of caution against absolute fixations whenever the dictate of natural reason is not absolutely evident. The test of a law (of its being “informed” by, “participating” in, Natural Law) lies not in the normal cases contemplated by the law-maker, but in the unusual, the unforeseen, the extreme possibilities. The more the law provides for the contingency of the unforeseen by a flexible rule, the closer will it be to Natural Law. Also the general maxims (*regulae juris*) which jurisprudential experience since Roman times has helped to formulate as means of guidance for interpretation of law, are never to be taken as definite fixations; they can fail in the particular case, admit of exceptions; and already the wisdom of the ancients warned that “*non ex regula ius sumatur, sed ex jure quod est regula fiat.*”²² Each rule is an abstraction and has itself a high validity as approximating natural reason, but

²¹ Cf. Lottin 103; Leclercq, *op. cit.* n. *supra*, 59-61; Renard, *op. cit.* n. 16 *supra*, *passim*.

²² *Digest* 50.17.1.

precisely in its general formulation lies the danger of doing injustice to the individual, irregular contingency. The perfect balance of natural justice is not reached when the general is mistaken for the universal.

(b) the principle of finalistic, instead of formalistic thinking. The lawgiver (and the jurist as well who applies the law) has to determine his conclusions by considering the *end* of a given institution,²³ the intrinsic "*logique de l'institution*" on which he rules (*natura rerum*); and equally the end of the legal order itself, the common good. The canonist, in particular, will have to look even beyond the common good and the stability of order in ecclesiastical society, towards a supreme end, the salvation of souls.

11.—If we contemplate Canon Law in its history and as it is at present embodied in the Code of 1917, we find that the canonists' concern about making the positive serve the Natural Law is something very real. Canonical legislation has been historically leading, e.g., in assigning legal force to informal agreements which were not actionable under the forms required for contracts by the civil law; or in enforcing the right to self-determination in choosing one's spouse, as against parental domination or restrictions of status. In its utmost care to have penal

²³ For the various interesting approaches of the twelfth-century writers on civil law in discussing this problem, see E. M. Meijers, "Le conflit entre l'équité et la loi chez les premiers glossateurs," *Tijdschrift voor Rechtsgeschiedenis* 17 (1940) 117-35.

liability never go beyond the inner moral responsibility, today the Code goes farther than the most secular legislations by considering, e.g., ignorance of law as excluding guilt, and any deficiency on the part of the will or the intellect as excusing from certain penalties.²⁴ The constant admonition of the Church to judges, that they impose penalties as ultimate means of making discipline respected and of effecting emendation of the recalcitrant, rather than as retribution, marks another point in which Canon Law has led the way to principles of criminal justice which by now have become the heritage of the legal civilization of the West.

We can hardly open a page in the Code without finding this concern for realizing ends that lie beyond legal formalism; for limiting the normal effects of the law to the normal cases and leaving an open margin for the cases where "urgent need," "just cause," "reasonable cause," "grave inconvenience," "spiritual danger," etc. make the rigidity of the normal rule inappropriate for its purpose. The very extent to which *dispensation* from the common law is provided for as a corrective principle in the legal order of the Church is a unique feature: again, in this field we have the significant further "valve" that in urgent cases a local authority might, without delegation, exercise rights of dispensing which belong to the Holy See alone.²⁵ In the same vein we find such laws as that which permits the administration of sacraments

²⁴ Canons 2202, 2229.

²⁵ Can. 81.

even by an excommunicated priest in certain cases of need.²⁶ We find the legal construction of supplied jurisdiction in cases of common error—i.e., where jurisdictional acts are posited by a person commonly but erroneously believed to have jurisdictional power: the ever-latent jurisdiction of the Church Universal is substituted here to convalidate the act.²⁷

12.—Behind these examples we can see how strong the ecclesiastical law-giver's wish is to achieve *equity* within the canonical order, to establish the balance between generalization and individualization that characterizes the "right reason" of Natural Law. Particularly revealing is one of the rules which the Code gives to the judge in cases where he is called upon to fill a possible *lacuna* of the positive law, to substitute for the legislator: he has to proceed according to the *general principles* of law applied *with canonical equity*, i.e. tempered with the equity proper to Canon Law.²⁸ This is not a mere rhetorical formula but a clear statement which says: not in the general rule alone, nor in a subjective, vague individualism alone, but only in the interpenetration of two apparently contradictory principles can the judge discover what is the true law in the case—: an unusual situation, to be sure, but precise-

²⁶ Can. 2261.

²⁷ Can. 209. On the antecedents of this rule in Roman Law, cf. F. A. Wilches, *De errore communi in iure romano et canonico* (Rome 1940).

²⁸ Can. 20. The rule has been amply discussed among recent authors; for the numerous problems involved see in particular Ch. Lefebvre, *Les pouvoirs du juge en droit canonique* (Paris 1938); G. Michiels, *Normae generales juris canonici* (2 ed. Paris-Tournai-Rome 1949), I, 608-25.

ly as such a guide to the "mind of the legislator." Equity as a remedial norm of natural justice for the judge in his application of the law is mentioned several times in the Code; it is generally understood as a principle of interpretation, and has historically influenced English Equity in its origins. Equity, finally, can in exceptional circumstances effect the non-application of positive law (*epikeia*): when the latter, in a given case, would lead to defeating its own end (i.e. lead to a result *contrary* to the lawgiver's will), it becomes unreasonable and must by Natural Law cease to bind. In urgent cases, with all due caution, even the individual is allowed to solve such a conflict, i.e. to decide that the lawgiver, had he foreseen the situation, would not have included it in the general rule.

13.—We may thus say that Canon Law, by its eminently supple, flexible features, is particularly close to Natural Law. It is, however, equally true if we add: Canon Law is *also* particularly close to Natural Law because of its eminent stability and uncompromising firmness where the absolute moral truth is in question, i.e. where the highest degree of evidence of right reason has been reached and there is no longer a question of "finding" what is conformable to Natural Law, but of accepting the order of Natural Law that is known without legislative determination. The ecclesiastical lawgiver cannot change anything in the essential properties of institutions that are con-natural to Man as man: in conforming to truth there is no question of "progressive" or "conservative" but only

of right or wrong stands. The position of Canon Law on the unity and indissolubility of marriage is a case in point. In the union of sexes the fundamental distinction between the institution of marriage and the instinct of mating, is, quite apart from revelation, the "rule and measure of reason." It is because of a rational grasp of the "*logique de l'institution*," of the givenness of the family as the cell of society, and not because of conservatism, that Catholic doctrine on marriage as such, and hence Canon Law, does not yield to the specious rationalism that would assimilate the contracting of marriage to any other contract that might be terminated at will (in the terms of St. Thomas, this would run counter to a first principle) or for cause (this would be against a secondary precept). There are a number of valid reasons of natural justice that demand the right to discontinue an unbearable community of bed and board: nobody has yet been able to show how in the natural order these *reasons* could cover up the desire of *passion* to replace the consummated bond by a "happier" one.

That much may be conceded that in no other field of human acts does reason have so hard a stand against the fallacious rationalizations of elementary urges, or finds itself in a greater *psychological* need of supranatural help, as in the relation between man and woman. Canon Law has the invaluable advantage of seeing, in the light of faith, the natural properties of marriage re-enforced and heightened, on the sacramental level, by positive divine law. The principle that revelation cannot contradict, but only perfect the natural order of creation means not only

that Natural Law continues undisrupted in the sacramental marriage (e.g. in the legitimacy of children from putative marriages; in the absolute value of the interior act of the will for the validity of the marriage consent) but also that the judgment of vulnerable, natural reason is strengthened to attain an absolute degree of knowing the dictate of Natural Law.

IV — *Natural Law Terminology in the Code of Canon Law*

14.—The interpenetration of the natural, the supernatural, and the positive order, so impressively set forth in the institution of Christian marriage, actually underlies the Code in its entirety. It is of relatively small interest where and when Natural Law is expressly *mentioned* in the Code. Since the essential foundations of Canon Law on divine (positive and natural) law is an axiomatic truth, there is, strictly speaking, no need to mention it at all in positive legislation, the more so since the Code professes at its outset²⁹ that rules of Natural Law and positive divine law remain valid whether expressly restated or not. It has therefore only the secondary significance of cautioning against possible misunderstandings when elsewhere it is said in particular that no custom can prevail against divine law, positive or natural;³⁰ that there can be no prescription (adverse possession or statute of limitations) against rights that exist by Natural Law or posi-

²⁹ Can. 6 n.6.

³⁰ Can. 27.

tive divine law;³¹ or that in the matter of contracts or of settlements (in and out of court) the Church follows the secular law of the respective countries except where such law is contrary to Natural Law or positive divine law (or where Canon Law positively rules otherwise).³² All these restrictive clauses are self-evident on the principle of "non-contradiction": man-made law ceases to be law where it would violate Natural Law, which is always understood without having to be stated. The Code does not mention, for instance, the cessation of law in the case of *epikeia*.

15.—Similarly, it is evident and needs no restatement by the legislator that ecclesiastical authority cannot *dis-pense* from what Natural Law prohibits. The matter is of great practical importance in regard to marriage impediments, of which some, but not all, have their origin merely in the authority of the Church to impose reasonable restrictions on the freedom to marry. The Code terms only impotence as an impediment of Natural Law, but does not use Natural Law terminology in regard to the impediment of the consummated bond nor for even the nearest degree of kindred.³³ Yet it is not the terminology of the canons which determines the character of the impediment; and while the Church has wisely reserved to the supreme magisterium (of the Pope alone or the Ecumenical Council) the power to issue an *authentic* declaration whether a given marriage impediment has its origin in

³¹ Can. 1509 n.1.

³² Can. 1529, can. 1926.

divine law (natural or positive)³⁴—in this connection one may remember the disastrous consequences of Henry VIII's case—the Code is certainly far from intending to say that impotence is the *only* impediment of Natural Law.

16.—It is the same with Natural Law and the *exercise of personal rights*. What is allowed by positive law ceases to be allowed where the exercise of a right runs counter to Natural Law. Only one such case is expressly stated in the Code: when permission is granted by ecclesiastical authority to read prohibited books, the person remains bound by natural law, i.e. the natural moral obligation to avoid books which *for him* constitute a proximate spiritual danger.³⁵ This decision in conscience (a counterpart of *epikeia*) is mentioned by the legislator; but the same principle is understood where it is not mentioned in regard to other rights. A traveler, e.g., is not bound to observe local laws made for the territory in which he temporarily sojourns: clearly the traveler's right ceases not only where the positive common law so declares,³⁶ but also by Natural Law; notably, if by exercising his right he would cause genuine scandal, i.e., cause others to sin.

17.—Sometimes the legislator refers to Natural Law in order to stress the *gravity of an existing obligation*, e.g.

³³ Canons 1068, 1069, 1076.

³⁴ Can. 1038.

³⁵ Can. 1405.

³⁶ Can. 14 n.2: in the case of local laws made for reasons of public order or determining the solemnities of acts.

in the statement that the right to denounce a crime to the proper ecclesiastical authorities becomes a duty of Natural Law where faith, religion, and the common good of the Church are in danger, or where, quite generally, a grave public evil threatens.³⁷ The emphasis on Natural Law will serve here the purpose to dispel a hesitancy that often may arise from the instinctive aversion against becoming an informer. But all other duties by which an individual is bound to act so as to avert danger to the common good are equally of Natural Law without being expressly so stated: in denial of justice, e.g., the judge violates not only the positive law of the judicial office, but Natural Law as well.

18.—Natural Law finally is mentioned twice with regard to the *acquisition of temporal goods*: the Code states that, as to the mode of acquiring property, every just title of Natural or Positive Law that is valid for others is also valid for the Church;³⁸ secondly, that every one who by natural or ecclesiastical law is capable of disposing of his property can make a will or gift in favor of a pious cause.³⁹ In the first case, the Code does not speak of the Natural Law problem of property as such, but merely adopts an old distinction current in the schools, namely that some *titles* to property would exist “by the nature of things” without any positive legislation (occupation, fruits of labor or productive property, etc.)—which does not

³⁷ Can. 1935 § 2.

³⁸ Can. 1499.

³⁹ Can. 1513.

mean to say that these are absolute, "indestructible" titles withdrawn from the authority of restricting legislation; the Natural Law terminology is used here simply to include every possible just mode in which every one can acquire property.⁴⁰ In the other instance, reference to the capacity by Natural Law to dispose of one's property is not meant to state an "inalienable" right of disposing by will or gift, or of having one's will executed; it is only a reference to the natural limits of the capacity to posit acts-in-law, namely the use of reason: within these limits, possible restrictions of the freedom of disposal will be considered only when they are established by Canon Law (e.g. in minors and religious) while restrictions by state laws leave the canonical validity of the disposition untouched.⁴¹ Again, the Natural Law terminology is strictly speaking not necessary (in other contexts, where the use of reason as the basic requirement for the capacity of physical persons to legal acts is dealt with, it is not expressly termed as being of Natural Law): but in this particular instance the emphasis serves to dispel possible misunderstandings. It should be stressed, however, that in the two texts on titles of acquisition and on pious gifts, the question is *not* that of the unabridgeable, fundamental right of the Church to own and acquire temporal goods. For, this right, although it *may* be argued to some extent on a Natural Law basis, is actually founded in the positive divine institution of the Church: Natural Law can

⁴⁰ Cf. Wernz-Vidal, *Ius canonicum*: IV.2 (Rome 1935) 202.

⁴¹ Cf. J. D. Hannan, *The Canon Law of Wills* (Washington 1934) 123ff; Wernz-Vidal, *op. cit.* 274, 824.

only show that the Church (as a human society) cannot have less property rights than other societies; the existence of her property rights as *independent* from the authority of the state goes beyond the Natural Law.⁴²

19.—This rapid review of express mentions of Natural Law in the Code may suffice to formulate the following conclusion: by referring occasionally, for purposes of stress and clarification, to Natural Law principles in given contexts, the legislator does not intend to draw up a "Code of Natural Law." The references are and remain quite frankly selective. It is rather in its *fundamental* position to the philosophy of Natural Law, and in its constant effort to remain "open to" the guidance and normative force of Natural Law on every level of legislative and jurisdictional activity—be it concerned with the social or the spiritual ends of ecclesiastical society; in a word, it is in the *spirit* of the legal order of the Church that the functioning of Natural Law must be grasped. To have demonstrated that the natural, created, order of right reason is necessarily presupposed by, and persists within the unique framework of a society that rests on a supernatural foundation—this is perhaps the greatest contribution of Canon Law to the doctrine of Natural Law.

⁴² Can. 1495 § 1 speaks of "congenital right" (*ius nativum*). Cf. J. A. Goodwine, *The Right of the Church to Acquire Property* (Washington 1941) 6ff., 28ff., 99.