NATURAL MORAL LAW AND CANON LAW

1. NATURAL LAW: THE SALIENT POINTS IN HISTORY

One of the moral problems in our post-modern day's legislative system is the tendency to consider it as a *close legal order* where gratuitous and non-gratuitous elements may come *ad extra* either to perfect or to make the system more effective. It tends to be more rigid when external elements threaten the very foundation and application of the positive law. This is why it chooses from among the external influences only those that it considers essential to ensure its security and effectiveness without having a second thought on discarding the primary and permanent principles that can make the norms *erga omnes*, that means valid for all peoples at all times. For this reason, jurisprudence tends to eradicate the moral dimension in its discipline. The moral principles are moved to the sphere of mere private issue since they are considered to deal more on personal matters and questions of conscience; while the positive law is confined to a mere formal legal enactments of an evolved society. This inevitably has a negative impact on the correct understanding of natural law *seu* natural moral law.[1] Eventually, the natural law is considered as something that deals with subjective principles of nature, thereby excluding the core of the natural law itself, i.e., the objective principles of the very nature of man.

In order to understand the crisis and the present issues concerning natural law, it is necessary to go over the evolution of its concept[2]; if not a comprehensive evaluation, at least a review of its most salient points handed to us by works and scholarly writings from generations of great thinkers and jurists.

1.1 Natural moral law in the ancient world

The origins of the concept of natural law lie in the speculative reflections of the philosophers and the jurists of the ancient world. It is generally accepted that the notion of natural law does not have direct scriptural derivation and for the fact that it is a "truth of the natural order"[3] it is therefore pre-existing. Although it is not considered as an enunciation of the Revealed Truth, "nonetheless it is intimately related to it in such a way that the definitive character of its affirmations derive, in the last analysis, from the Revelation itself;"[4] hence, it has "also theological meaning."[5] In fact, John Paul II, affirms

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1 Cf. F. FAVARA, *De iure naturali in docrina Pii Papae XII*. Desclée Publications, Rome, 1966, p. 152: "*Ius naturale et lex moralis ad mentem Summi Pontificis habent eamdem originem, eamdem vim, easdem qualitates, eosdem effectus, eadem nomina.*"

2 Recommended readings: H. AHRENS, *Corso di Diritto naturale o della Filosofia del diritto secondo lo stato attuale di questa scienza in Germania*. Sanvito, Milano, 1857, pp. 562; D. COMPOSTA, *Natura e ragione: studio sulle inclinazioni naturali in rapporto al diritto naturale*. PAS, Zürich, 1971, pp. 256; J. MARITAIN, *I diritti dell'uomo e la legge naturale.* Vita e Pensiero, Milano, 1977, pp. 114; R. PANIKKAR, *El concepto de naturaleza: Análisis histórico y metafisico de un concepto.* Intstituto "Luis Vives," de Filosofía, Madrid, 1951, pp. 447; R. PIZZORNI, *Il diritto naturale dalle origini a S. Tommaso d'Aquino*. Città Nuova, Roma, 2nd ed., 1985, pp. 631.

3 Cf. Z. GROCHOLEWSKI, "La Legge Naturale nella dottrina della Chiesa," in *Ius Ecclesiae* 20 (2008), p. 31.

4 *Ibid*. 43:

5 JOHN PAUL II, General audience, April 23, 1980, footnote n. 1, in *The Vatican Website, John Paul II, Audiences* at http://www.vatican.va/holy_father/john_paul_ii/audiences/1980/documents/hf_jp-ii_aud_19800423_it.html. The Pontiff affirms that "*le parole citate della lettera ai Romani 2,15, sono sempre state considerate, nella Rivelazione, quale*

that the concept of natural law belongs to the universal heritage of human wisdom and has been "purified and brought to its fullness through the light of Revelation."[6]

The primeval thinkers were convinced of the existence of the rules for human behavior based upon objective and eternal norms. They conceived these norms as something that have been established by and in the nature itself that human reason could perceive. Heraclitus (c.535-475 BC), like Parmenides (c.515 BC), postulated a model of nature and universe that eventually created the foundation of various theories on physics and metaphysics. The idea that the universe is in constant change[7] and that there is an underlying *order* or *reason* for such a change challenged the philosopher to seek explanation. The true wisdom for Heraclitus implies a proper understanding on how nature works and how all things are governed.[8] For the pre-socratic Greek philosopher, the world is governed by *Logos*.

> "It is necessary for those who speak sensibly to rely on what is common to all, just as a city must rely on its law, but even more so; all human laws are nourished by a single divine law – Logos - ; for it rules as far as it wishes and is sufficient for all and is still left over." [9]

The highest wisdom man can achieve is to comprehend and obey, in words and in actions, nature, i.e., the *Logos* (the divine law) insofar as it is a universal reason that governs all things under the sun. This natural wisdom, from Heraclitus to Sofocles[10], presents the concept of human law that is radically dependent on divine law.

Aristotle in his *Nicomachean Ethics* introduced the concept of natural law, i.e., what is just *by nature* (fýsei díkaion or δικαιον φυσικον) and positive law, i.e., what is just *by convention* (nómô díkaion or δικαιον νομικον). Both of them encompass the two dimensions: the divine immutability (the natural law from God) and the human mutability[11] (the positive law from human legislator). For the father of natural law[12], political justice springs forth from natural justice where distributive and corrective justice are upheld and thereby establishing a just society; if this justice were to take the form of a rule, it could be called a «precept» of natural law.

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fonte di conferma per l'esistenza della legge naturale. Così il concetto della legge naturale acquista anche un significato teologico." The written document cites the following authors: D. COMPOSTA, *Teologia del diritto naturale, "Status quaestionis"*. Ed. Civiltà, Brescia, 1972, pp. 7-22, 41-53; J. FUCHS, S. J., *Lex naturae Zur Theologie des Naturrechts*. Patmos, Düsseldorf, 1955, pp. 22-30; E. HAMEL, S. J, *Loi naturelle et loi du Christ*, Desclée de Brouwer, Bruges-Paris, 1965, p. 18; A. SACCHI, "La legge naturale nella Bibbia," *La legge naturale*. Le relazioni del convegno dei teologi moralisti dell'Italia settentrionale (11-13 settembre 1969), Ed. Dehoniane, Bologna, 1970, p. 53; F. BÖCKLE, "La legge naturale e la legge cristiana," *La legge naturale*, pp. 214-215; A. FEUILLET, "Le fondement de la morale ancienne et chrétienne d'après l'Epître aux Romains," *Revue Thomiste* 78 (1970) pp. 357-386; T. HERR, *Naturrecht aus der kritischen Sicht des Neuen Testaments*. Schöningh, München, 1976, pp. 155-164.

6 JOHN PAUL II, *Allocutio alla Pleanaria della Congregazione per la Dottrina della Fede*, Friday, January 18, 2002, n. 3 in AAS 94 (2002) p. 334: "*Per quanto riguarda l'altra tematica ovvero lo studio circa la perdita di rilevanza della legge naturale [...], si è qui in presenza di una dottrina appartenente al grande patrimonio della sapienza umana, purificato e portato alla sua pienezza grazie alla luce della Rivelazione.*"

7 Cf. HERACLITUS, *Fragment* 12: "On those who step in the same river, different and different waters flow."

8 Cf. *Ibid*., 41: "Wisdom is one thing: to understand with true judgment how all things are steered through all."

9 *Ibid*., 44.

10 Cf. SOPHOCLES. *Antigone*. verses 450-470.

11 Cf. ARISTOTLE, *Nicomachean Ethics*. 5, 7: 1134 b 18 – 1135 a 15.

12 As some scholars consider Aristotle like M.S. SHELLENS, "Aristotle on Natural Law," *Natural Law Forum*, 4 (1959), pp. 72-100.

Aristotle's conviction on the existence of natural law is manifested in *Rhetoric* where the Greek philosopher affirmed that aside from the positive particular law that each people has established for the regulation of its social and political life, there is a common law that is in accord with the nature[13], and that is the natural law.

Stoicism provided the most complete classical formulation of natural law. The Stoics argued that the universe is governed by reason or rational principle; they further asserted that all men had reason within them and could therefore know and obey its command. However, since human beings have the faculty of choice, i.e., a free will, they have an option whether or not to obey the command of reason; nevertheless, if they comply in accordance with reason, they are necessarily "following the precepts of nature."

Cicero († 43 B.C.), who was formed from the Stoic's school of thought, developed a concept of natural law which major characteristics were the *universality* and the *rationality*. Here is an excerpt of the Roman orator:

> "True law is right reason in agreement with Nature... it is of universal application, unchanging and everlasting... we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment."[14]

The essence of law in Cicero's thought[15] is the right reason contained in the nature itself. In this context, natural law explicates the basis of our moral choice and enforces our ability to acquire sound reason.

The natural law, thanks to Cicero and the Stoic's reflections, has acquired a greater force and has become a universal law of nature that surpasses personal and particular law because it is preordained to govern the entire universe. Consequently, every man in order to achieve his self-realization has to be faithful to his own rational nature and to conform himself to the principles set by the very same law inscribed in his being.

1.2 Natural law in Roman legal tradition and Justinian's compilation

1.2.1 Roman thought and legal tradition

The Romans of the monarchic period, after more than two centuries of the founding of the city - *ab urbe condita* – had lived by customary law. Handed down through generations, this law was considered by the Romans to be a legal tradition that evolved

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[13] Cf. ARISTOTLE, *Rhetoric*. 1373b2–8.

[14] CICERO, *De Re Publica*, trans. C. W. Keyes , Harvard University, Cambridge, 1928, p. 33.

[15] Cf. R. KIRK, *The Roots of American Order*. Regnery Gateway, Washington D.C., 3rd ed., 1991, pp. 109-111. The author clearly and succinctly summarizes Cicero's concept of natural law: "Human laws are only copies of eternal laws. Those eternal laws are peculiar to man, for only man, on earth, is a rational being. The test of validity for the state's laws is their conformity to reason.... Learned men know that Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law. And so they believe that Law is intelligence, whose natural function it is to command right conduct and forbid wrongdoing. Now if this is correct, [...] then the origin of Justice is to be found in Law; for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured. Law, then, at base is knowledge of the ethical norms for the human being."

from its earliest days. This customary law which was an integral part of the system called *ius civile* was applied only to the citizens of the city of Rome (*cives romani*).

The centuries-old customary law was then written down for the first time by a commission of ten consuls or the so-called *Decemvirate* in 451 BC. The product of the compilation was the *Lex Duodecim Tabularum* or the *Law of the Twelve Tables* (c. 449 BC) that embodied not only civil but also public and religious laws. The Twelve Tables became not only the foundation of Roman law but also the nucleus of the constitution of the Roman Republic in the succeeding period of the history of the city. The Code did not rewrite the existing law or create a new one; rather, it simply transcribed the customary law in force (*ius*) to a written form (*lex*). The legal compilation did not transform all existing law to written form. Instead, it was focused on specific questions that might lead to dispute or disagreement and it addressed the technical aspects of legal procedure so that every citizen might have clear guidelines on the proper ways of pursuing legal justice.

The passage from the republican to the imperial Rome entailed an enormous and increasing responsibility in the governance. Moreover, the diversity of population of the empire inevitably demanded a more systematic administration of justice. Legal questions and disputes inevitably arose due to growing economic and commercial interactions not only among *cives romani* but especially with the strangers (*peregrini)* living in or travelling through its territories and to whom the *ius civile* could not be applied.[16] There was a need to have a systematic legal approach applicable to all peoples and this necessity led to the formation of the multifaceted norms that regulated the rapport among Romans and non-Romans. This newly formed body of "natural reason for all peoples, all nations and all men" [17] was commonly known as *ius gentium*.

The *ius gentium*, or law of nations, was based upon the general principles and reasoning that civilized societies and men were understood to live by and observe. Since the *ius gentium* contained legal provisions based on natural reason (*naturalis ratio*) and were generally recognized by all peoples to be rooted in natural human relationship based on natural and social justice; it became known also as *ius naturale*.

It was the Roman jurist Gaius who made the bipartition of law in *ius civile* and *ius gentium* and considered the latter as *ius naturale*.[18] He emphasized the value of natural reason as determinant in establishing the same principles common to all men and are observed by all peoples in all places. It is a form of *ratio naturalis* that ought to be obeyed because it is inherent in the human rationality. The concept of *ius gentium* based on natural law was developed and it became a recognizable law that by itself could be imposed on all peoples; thus, *erga omnes*.

Ius gentium and *ius naturale* are generally considered the same for the universality of their content.[19] However, *ius gentium* differred from *ius naturale* on the question of the

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[16] A foreigner cannot have recourse to *ius civile* according to the Roman principle of "personality of law". In order to satisfy any legal demand by a non-*civis romanum*, a special magistrate was appointed to preside in the legal procedures involving subjects who did not have Roman citizenship. This special magistrate was called "*praetor peregrinus*" and he had the faculty to elaborate norms directed to resolving legal conflicts among strangers.

[17] "*Omnes populi, omnes gentes, omnes homines et naturalis ratio*" was the usual formula used in referring to *ius gentium*..

[18] Cf. *Institutiones Gaius*, I, 1: "*Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos paraque custoditur, vocaturque ius Gentium, quasi quo iure omnes gentes utuntur*."

[19] The authors of the Institutes generally agreed that *ius gentium* and *ius naturale* are identical, see *Instutiones Iustiniani* 2.1.11.

institution of slavery. While the former admitted its possibility, the latter was clear in affirming that all persons are born free and equal.[20]

Beginning in the 3rd century, the Roman jurists began to differentiate the two systems of law. Justinian recognized the autonomy of *ius naturale*. However, it should be noted that there were no contradictions in the tripartite system: *ius naturale*, *ius civile* and *ius gentium* because all of them were inspired and derived from the natural reason and reason cannot be different in any place whatsoever: "*non enim alia causa est aequitas... non alia ratio iuris*."[21]

Analyzing the development of the Roman concept of natural law, it is easy to recognize the influence of the Greek religious and philosophical thought. The mystical concept of law corresponds with the pursuit of the virtue of justice. The formation of law that will govern the religious and the political life of peoples should take into consideration three essential principles. The first principle is the *divine will* as the basis of written and non-written law; the *human will* that complies to the precept of law through natural reason is the second principle, and the *nature of things* on which every law should be founded is the third element. These principles were assimilated in the legal doctrines and practical life of the Romans. It was obvious that the Philosophers and the statesmen during this period repeated and re-elaborated this Stoic's reflections on *ius naturale* connecting it to the natural inclination of man to understand and live the principles underlying its concept.

1.2.2 Justinian's compilation

The *Corpus Iuris Civilis*[22] of Emperor Justinian is a comprehensive codification of the Roman *iura* (rights) and *leges* (laws) based on all the existing imperial constitutions and

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[20] Cf. D. 50. 17. 32: "*Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt*."

[21] CICERO, *Pro A. Caecina oratio*, XX, 57.

[22] The Justinian's *Corpus Juris Civilis*, is considered to be the most complete compilation of the Roman law and the indispensable document of all modern civil law especially in Europe. Emperor Justinian I (527-565) on December 15, 530 AD commissioned a college of jurists presided over by the eminent jurist Tribonian to arrange systematically and orderly the more than 1,000 years of legal development of Roman law. The product was more comprehensive, systematic, and thorough than any previous work of that nature, surpassing in excellence even the Theodosian Code. The four parts of the compilation are the Institutes (*Institutiones*), an introductory textbook, published on November 21, 533 AD for the study of law in substitution to the *Institutiones* of Gaius; the Digest (*Digesta seu Pandectae*) published on December 16, 533 AD is so far the most important collection of the authoritative *dictum* of the most famous classical jurists *viz*., Gaius, Paulus, Ulpian, Modestinus, and Papinian; the Code (*Codex Iustinianus*), a collection of imperial constitutions or law that was published on April 7, 529 AD; and the Novels (*Novellae*), a private collections of imperial legislation issued after the promulgation of the three compilations between 535 and 565 but never officially collected. In the 11th century, with the revival of interest in Roman law in the School of Bologna, the *Corpus Juris Civilis* was exhaustively studied and commented beginning with Irnerius. Jurists and scholars trained in the *scuola bolognese* played a leading role in the creation of national legal systems throughout Europe, and the *Corpus Juris Civilis* thus became the ultimate model and inspiration for the legal system of virtually every continental European nation. See also, H. F. JOLOWICZ, *Historical Introduction to the Study of Roman Law*. University Press, Cambridge, 1961, 596pp; ID., *Roman Foundations of Modern Law.* Clarendon Press, Oxford, 1957, 217pp; A. T. von MEHREN, *The Civil Law System: Cases and Materials for the Comparative Study of Law*. Prentice Hall Inc., Englewood Cliffs N. J., 1957, 922pp. The provisions of the *Corpus Juris Civilis* influenced in a great part the Canon Law of the Church since it was said that *ecclesia vivit lege romana* — the church lives under Roman law, cf. *Lex Ripuaria*, tit. 58, c. 1: "*Episcopus archidiaconum jubeat, ut ei tabulas secundum legem romanam, qua ecclesia vivit, scribere faciat*."

their legal principles. It is a vast collection of harmonious correlation of all the sources and the materials of legislative production of the Roman law.

The term i*us naturale* is mentioned twenty times in *Digesta* and four times in the *Institutiones* of Gaius. The Roman jurists of the classical period considered *ius naturale* as a body of law known to all peoples and founded on *ratio naturalis.*

In the first title of the first book of *Digesta* under the subtitle "*De iustitia et iure*", Ulpian († 228 AD) defined natural law as what "nature teaches all animals," including human beings.[23] He distinguished natural law from the *ius gentium;* the latter was common to human beings alone and was established by their customary usages. He defined *ius naturale* as a composite of the precepts of cohabitation (living together) dictated by the nature to all living beings. He cited marriage and procreation of children as examples of natural rights arising from natural law.

While classical jurists underlined that the norms of natural law were derived from the *naturalis ratio*, the post-classical jurists upheld a transcendental vision, i.e., that the norms of natural law were unchangeable and eternal insofar as they were constituted by divine providence. In fact, the concept of natural law in the *Institutiones* shifted the source of natural law from natural inclination of creatures to the divine decree of the Creator; thus, the norms of natural law were established by divine providence and would always remain firm and immutable.[24]

As a matter of fact, the Justinian concept of natural law was already colored with theological content in the sense that it was considered to have a divine foundation,[25] *i.e.*, the nature itself that comes from divine will.[26] The law of nature, eternal and unchangeable, is a supreme reason emanating from God's mind; it is universal and eternal as universal and eternal is divine justice: "*semper aequum ac bonum est*".[27] Consequently, it would be normal during the post-classical period to equate natural law with divine law.

Likewise, the Roman jurist, Paulus († 210 AD), affirmed that a provision enacted in accord with the criteria of justice was considered to be in conformity with the *ius naturale*.

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[23] Cf. D. 1. 1. 3: "*Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.*"

[24] I 1.2.11: "*Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent: ea vero quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.*"

[25] *Ibid*.

[26] *Ibid*.

[27] Cf. D. 1.1.11. G. LOMBARDI, *Sul concetto di ius gentium*, Milano 1947, pp. 224; A. BURDESE, "0Il concetto di ius naturale nel pensiero della giurisprudenza classica," in *Rivista italiana per le scienze giuridiche* (ser. 111) 8, 1954, p. 418; G. NOCERA, *Ius naturale nella esperienza giuridica romana*, Milano 1962, p. 28; C.A. MASCHI, *La concezione naturalistica del diritto e degli istituti giuridici romani*, Milano 1937, pp. 178; ID., "Il diritto naturale come ordinamento giuridico inferiore?," in *L'Europa e il diritto romano. Studi in memoria di P. Koschaker*, II, Milano 1954, pp. 425; M. BARTOŠEK, "Sulla concezione naturalistica e materialistica dei giuristi classici," in *Studi in memoria di E. Albertario*, II, Milano 1953, pp. 492; G. GROSSO, *Problemi generali del diritto attraverso il diritto romano*, 2ª ed., Torino 1967, pp. 106.; R. MARTINI, *Le definizioni dei giuristi romani*, Milano 1966, pp. 277; W. WALDSTEIN, *Entscheidungsgrundlagen der klassichen römischen Juristen*, in *Aufstieg und Niedergang der römischen Welt*, II.15, Berlin-New York 1976, pp. 82; PH. DIDIER, *Les diverses conceptions du droit naturel à l'oeuvre dans la jurisprudence romaine des IIe et IIIe siècles*, in *Studia et documenta historiae et iuris* 47, 1981, pp. 238.

Thus, a precept of natural law is always *iustum* and *bonum*[28]; unchangeable insofar as it represents an eternal value.

The jurists of the classical and post-classical periods of Roman law commonly believed that human persons as rational and social beings should be considered as the supreme principle of nature on which every positive law should be founded. The *ratio* that was inherent to every rational being constituted the natural light[29] through which one would comprehend the nature of things and of human beings. Therefore, the essence of *ius naturale* should be sought by investigating not only the nature of the created things but most importantly the very nature of man.

The *ius naturale*, a non-written law, known in ancient jurisprudence for its humanity and rationality served as the basis for the creation of the Roman system of law and for the establishment of its legal, social and political institutions. In its development and evolution, the fundamentals of *ius vetum* and *ius novum* correspond essentially to the principles of natural law, *viz*., universality, immutability and rationality. The rules dictated by natural reason are always the same, but the form of their expression changes from time to time and from one place to another and it usually depends on political, cultural and religious factors.

From the Middle Ages down to the rise of a new School of Natural Law after the 15th century, there was a conviction that natural law contained and included the whole of *Ius Romanum*. This is because the Roman Law as a whole is considered as supremely reasonable and universally diffused making such legal system and its institutions an embodiment of the natural law itself.[30]

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[28] D. 1. 1. 1: "*Ius est ars boni et aequi.*"

[29] *Tusculanae*, III, 1, 2; Cf. R. PIZZORNI, *Diritto, etica e religione. Il fondamento metafisico del diritto secondo Tommaso d'Aquino*, Edizioni Studio Domenicano, Bologna, 2006, p. 317: "*La legge naturale, quindi, é più lumen, cioè capacità di scoperta della legge eterna, che la somma dei singoli precetti scoperti una volta per sempre.*"

[30] It was widely accepted that the Roman law was an extension of *ius naturale*, i.e., the «*ratio scripta*» embodying the principles of natural law. It was considered as a written natural law because its provisions were in conformity with the norms of natural justice (cf. V. CATHREIN, *Moralphilosophie. Eine wissenschaftliche Darlegung der sittlichen, einschliesslich der rechtlichen Ordnung*, Herder, Freiburg, 1904, vol. II, p. 336). In fact, *Providentissima Mater Ecclesia*, the apostolic constitution that promulgated the CIC 1917 affirmed that "with God's assistance, she [Church] reformed and brought to Christian perfection the very law of the Romans, that wonderful monument of ancient wisdom which is deservedly styled *written reason*, so as to have at hand, as the rule of public and private life improved, abundant material both for medieval and modern legislation" (E. PETERS, *The 1971 Pio-Benedictine Code of Canon Law*. Ignatius, San Francisco, 2001, pp. 21-22). "*In essa, infatti, il diritto romano, che la Chiesa avrebbe modificato e perfezionato in senso cristiano, è richiamato come «ratio scripta»; il che significa che il diritto romano è l'espressione per eccellenza della ragione, e quindi, secondo il giusnaturalismo tradizionale, la voce del diritto di natura* (E. ROBILANT, *Significato del diritto naturale nell'ordinamento canonico*. Giappichelli, Torino, 1954, p. 140). The Church lived with the Roman law and through the *ius humanum ecclesiasticum*, she adopted, modified and perfected its content with the gospel of humanity and universality. In fact, this is confirmed by the famous maxim: «*Ecclesia vivit iure romano*». "*In tal modo anche tutto il diritto canonico verrebbe ad essere espressione, se non dichiarazione vera e propria, del diritto naturale: parteciperebbe a questo, ne sarebbe informato e vivificato così come l'albero è vivificato dalla linfa che fluisce nel tronco e nei rami*" (*Ibid*). "Under the influence of Christian preaching, Roman law in particular lost much of its harshness, was permeated by gospel humanity (*humanitas*), and in turn offered the new religion a wonderful scientific means for drawing up its legislation on marriage JOHN PAUL II, *Allocutio* to the tribunal of the Roman Rota, January 28, 1991 in *The Vatican Website* at http://www.vatican.va/holy_father/john_paul_ii/speeches/1991/documents/hf_jp-i_spe_19910128_roman-rota_en.html.

1.3 Natural law in the Middle Ages

The Fathers of the Church, from the 2nd to the 7th century, refrained from expounding the concept of natural law simply because their primary concern was to establish, defend and confirm the Faith and the official doctrine of the Church in the midst of persecution. The first Christian philosopher to write on natural law was Isidore of Sevile (560-636), the last of the ancient Christian philosophers. In his *Etymologiae* or *Origines* as it is sometimes called, the last of the great Latin Fathers combined the Hellenistic and Roman traditions defining *ius naturale* as the law that was observed in the past, is observed in the present and the same law that will be observed in the future by all peoples. He describes this law as common to all nations and people, "that it is everywhere held by instinct of nature, not by any enactment"[31] of human will. The great Christian thinker gives some examples of objective rights deriving from the law of nature:

> "as for instance, the union of man and woman, the generation and rearing of children, the common possession of things and the one liberty of all, the acquisition of those things which are taken from air and land and sea; also the return of a thing deposited or money loaned, the repulsion of force by force."[32]

After Isidore's *excursus* on natural law in the early middle ages, it is interesting to note that very few attempted to give further details about the theory until the high middle ages. In fact, Isidore's concept of *ius naturale* will be re-elaborated by the founder of the science of the canon law in the *Scuola Bolognese*, Joannes Gratian.[33]

The reordering of the confused mass of ecclesiastical law that had accumulated over many centuries in Gratian's *Concordantia discordantium canonum* is one of the greatest legal works of all times.[34] The *monaco camaldolese* made the first comprehensive and systematic legal treatise in the history of the western legal world, otherwise known as the *Decretum Gratiani* or simply *Decretum*.

Gratian began his treatise by discussing the different kinds of law that governed and directed the behavior of men. He based the whole structure of jurisprudence on an initial distinction between *ius naturale* and customary law. This led natural law to the forefront of all the possible arguments concerning the positive law.

> "Mankind is ruled by two laws, namely natural and customary laws. Natural law is that which is contained in the Law and the Gospel by which one is commanded to do unto another what he wants

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31 *Decretum Gratiani* D. I, C. 7:

32 *Ibid*.

33 Cf. A. STICKLER, *Historia Juris Canonici*, p. 202.

34 For a more comprehensive study of «*Concordantia discordantium cnonum*», see F. LAURIN, *Introductio in Corpus Iuris Canonici: cum appendice brevum introductionem in corpus juris civilis continente*. Herder, Friburg, 1889, pp. 284; S. KUTTNER, "New Studies on the Roman Law in Gratian's Decretum," *Seminar* 12 (1953), pp. 12-50; ID., "De Gratiani opera noviter edendo," *Apollinaris* 21 (1948), pp. 118-128; ID., *Gratian and the Schools of Law*. London, 1983, pp. 396; ID., "Report on Eight Centenary of the Decree of Gratian," *The Jurist* 12 (1952) p. 396; W. ULLMANN, "The Paleae in Cambridge manuscripts of the Decretum," *Studia Gratiana* 1 (1953), p. 161; J. RAMBAUD-BUHOT, "Plan et méthode de travail pour la redaction d'un catalogue des manuscrits du Décret de Gratien conserves en France," *Studia Gratiana* 1 (1953) p. 121; J. Erickson, "The Collectio in Three Books and Gratian's Decretum," *Bulletin of Medieval Canon Law* 2 (1972), p. 67; G. FALCHI, *Fragmenta Iuris Romani Canonici*. Mursia, Roma, 1998, 258pp, read especially 183-258.

other to do unto him and to avoid (prohibit) to do to another what he does not want another to do unto him."[35]

Gratian used Isidore's definition of natural law in defining its content[36] but he connected it to the Gospel's golden rule.[37] With the obligation to treat human beings with care and dignity, on one hand, and the administration of justice and equity, on the other hand, Gratian intended to set the foundation of an ideal legal system based on natural law.

However, Gratian's definition of natural law presented some apparent difficulties for the medieval jurists and theologians. There are many reasons for such incongruity. First, Isidore's text did not contain the Gospel Rule that constituted the essence of morality in the natural law as understood by Gratian. Second, the natural law conceived by Isidore was not a precept taken from the Bible but a product of human instinct. Moreover, the influence and inclusion of some texts of Roman law taken from *Corpus Iuris Civilis* increased incoherence in Gratian's thought and language.

As a result, interpreters on different fields of legal sciences like the *civilista*, *canonista* and *decretista* found several concepts of natural law with numerous contradictions using the same source. Those concepts differ from one perspective to another.[38] As a matter of fact, some would consider *ius naturale* as an instinctual behavior of all God's creatures,[39] while others consider it as a set of behavioral norms that governed primitive human beings long before evolved human societies enacted their positive law. Some would regard *ius naturale* as a harmony of justice and equity brought about by common understanding that is present not only in *ius humanum* but in *ius gentium* as well; while others would consider it as a product of general knowledge stemming from *naturalis ratio* or divine law (where "divine" is vaguely understood). An honest analysis of the work of Gratian will surely help to unveil the real concept of natural law according to the father of the science of canon law.[40]

The concept of a natural law based on human reason and simultaneously somewhat divine, was elaborated by Peter Abelard (1079-1142). He considered natural law as pre-dating the Mosaic Law and he emphasized its connection with the *naturalis ratio*. He adopted Cicerone's distinction of *ius naturale* and *ius positivum* but failed like his contemporaries to distinguish natural law from the divine revealed law.[41]

Peter Lombard (c.1100–1160) was in harmony with the view of the school of Anselm of Laon († 1117). Both believed in the Golden rule and that the "precept of the natural law because of man's neglect, had to be reiterated in the Decalogue."[42]

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[35] *Decretum Gratiani* D. I, *dictum ante* C. 1: "*Humanum genus duobus regitur, naturale videlicet iure et moribus. Ius naturale est, quod in lege et Evagelio continetur: quo quisque iubetur alii facere quod sibi vult fieri et prohibetur alii inferre quod sibi noli fieri.*"

[36] D. I, C. 7.

[37] Mt. 7:12.

[38] B. TRIERNEY, *The Idea of Natural Rights*, Cambridge, UK, 1997, p. 59: "Already by 1160 Stephanus had found five meanings for *ius naturale* and, a little later, an English canonist gave nine, ranging from «the order and instinct of nature» to an impenetrable metaphysical definition. Others have said that natural *ius* is an extrapredicamental something including both the mode of existing as essence and as being."

[39] Ulpian's definition of natural law: "*quod nature omnia animalia docuit*" (cf. D. 1. 1. 1.).

[40] This will be our aim in the second part of this research.

[41] *Dialogus inter philosophum Judaeum et Christianum*, in PL, 178; 1656. Cf. F. DE SIANO, "Of God and Man: Consequence of Abelard's Ethics," *The Thomist* 35 (1971) pp. 639, 652-654.

[42] PETRUS LOMBARDUS, *Liber Sententiarum*, III, D. 37, in PL, 192; 832.

William of Auxerre (1140-1231) in his *Summa aurea* elaborated a wider and a narrower interpretation of the concept of natural law. He considered Ulpian's definition as the natural law in the wider sense while he asserted that in the narrower sense it is radically connected with the natural reason and intuition. He considered natural law, in the widest sense, as synonymous to the harmony of creation because it is the source and principle of all virtues.[43]

Roland of Cremona (1229-1230), the first Dominican professor at Paris, affirmed that inclination toward good in all creatures was a generic natural law. He made an important distinction on the precepts of natural law into primary that is immutable and secondary that is variable. But generally, the precepts of the natural law are unchangeable because according to Alexander of Hales (c. 1185-1245), natural law is said to derive from eternal law; therefore, it should be considered as absolutely unchangeable.[44]

Albert the Great (1206-1280) differed from many *decretalisti* during his time. He considered absurd the concept of natural law common to all animate and inanimate creatures. He pointed out that natural law and natural justice belong to the specific nature of man, *viz.*, to the rational beings and not to the nature in general. Thus, *ius naturale* in its proper sense pertains to man alone. In all oh his arguments, what usually prevailed was the affirmation that natural law was referred formally to the rational nature of man.

1.4 *Lex naturalis* and *ius naturale* in St. Thomas Aquinas

The medieval traditions on natural law were transmitted to the modern world primarily through the works of Christian philosophers and theologians, especially St. Thomas Aquinas (1225-1274). The Angelic Doctor treated natural law expansively in his *Summa Theologica* in Book One, part two, questions 91 to 95, especially 94.

St. Thomas of Aquinas began his reflection on natural law having in mind the Christian concept of man, created by God in His image and likeness and is a part of the created world wherein he pursues a goal proper to his nature in harmony with the entire universe. In order to realize the end for which man is created, God is the external principle that helps him achieve what is good; he is guided with instructions and assisted by grace. The natural law, for the Angelic Doctor, "is no other than the participation of the rational creature to the eternal law of God."[45] The eternal law, as affirmed by tradition, is the foundation of every law. God's infinite wisdom governs and directs all things to their proper end. The creatures participate in the eternal law according to their nature. The rational beings partake of the law through their rationality and freedom. In abiding to the precepts of moral law, the reason (*ratio*) knows what is convenient to the nature of rational being and is led to the achievement of its end. In fact, St. Thomas, explains that:

> "the rational creature, in an excellent way, is subject to the divine providence, insofar as it becomes part of the providence, providing for itself and for others: thus, it has in itself the participation of the

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[43] Cf. O. LOTTIN, *Psychologie et morale aux XII et XIII siecles.* part II, Abbaye de Mont César, Louvain, 1942, pp. 75-76.

[44] Cf. *Summa fratris Alexandri*, lib. III, pars 2, Inquis. 1, c. 7, a. 4 (Quaracchi t. 4, n. 223, 328-329): "*Dicendum quod omnis lex naturalis est a lege aeterna, tamen secundum propinquinus et remotius, secundum quod naturae, in quibus et, se habent secundum propinquius et remotius ad Deum.*"

[45] *S. Th.*, I-II, q. 91, a. 2: "*Lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura.*"

eternal reason, through which it has a natural inclination to the act and end; such participation of the eternal law in rational creatures is called natural law."[46]

For St. Thomas, *lex naturalis* is the light of the intelligence infused by God, through which man can know what he ought to do and what he must avoid.[47] This kind of law comes from God and yet it is a part of the essential constitution of man because it is his very own law (*lex indita*) and it is not a command that comes *ad extra* but "from within"[48]. As a consequence, man becomes the principle of his own acts inasmuch as he possesses the capacity to define the moral principles of his behavior.[49]

The concept of *lex naturalis* is connected to the natural right whose norm is the *ratio*. In this context, *law* is the rule and *right* is its objective content. Practically, it is «what is *just* by *nature*» (*iustum ex natura*). Therefore, what is due to man according to his nature as living, corporeal, rational and social being is according to justice.

Essentially, natural law is universal, knowable and immutable.[50] It is universal because it is the same law common to all men and known by all peoples of all time; thus it has a universal value. It is knowable because it is naturally known by man through his sole reason; thus it cannot be ignored by any creature considered as rational being. It is immutable because its primary precepts cannot be changed by any human authority. However, in spite of its universality, knowability and immutability, not only the concept of natural law as conceived by man may vary from time to time and from one place to another but the application of its general principles may also change depending on the influence of history, religions, cultures, economy and politics.

1.5 Natural law in William of Ockham and Francisco de Vitoria

William of Ockham (c. 1287-1347) believed that reason alone was sufficient to establish all the imperatives that constituted natural moral law. His "reason's categorical imperative" included the sum total of precepts that could oblige every rational being to comply with any blinding evidence and to lay it as the foundation for a "well-founded moral life".[51] This kind of exaltation of reason introduced a radical change. Reason lost its capacity of moral evaluation and had become a simple catalogue of the obviously known obligatory precepts. As a categorical imperative, there was a pressure to respect and observe the obligation for its own sake. It was a blind rationalism that became the foundation of moral law, almost compatible with voluntarism. The precept as imperative command on the part of divine legislator became an absolute principle of morality. The essential relationship God-man was reduced to a pure revelation and imposition on the part of God. The strength of moral action lies no longer on the capacity of man to evaluate his action as good or evil but the obligation to execute with blind obedience whatever is

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[46] *S. Th.*, I-II, q. 91, a. 1.

[47] Cf. R. PIZZORNI, *Diritto, etica e religione.* p. 317: "*La ragione umana conosce cosí ció che é bene e ció che é male scrutando e apprendendo semplicemente l'orientamento finalistico, posto da Dio, negli esseri da essa considerati nell'esperienza. La legge naturale, quindi, é piú lumen, cioé capacità di scoperta della legge eterna...*"

[48] *Veritatis Splendor*, 43.

[49] *Ibid*., 40: "The role of human reason in discovering and applying the moral law: the moral life calls for that creativity and originality typical of the person, the source and cause of his own deliberate acts."

[50] Cf. R. PIZZORNI, *Diritto, etica e religione.* pp. 272-283.

[51] Cf. G. DE LAGARDE, *La naissance de l'espirit laïque au déclin du moyen age: L'individualisme ockhamiste*. PUF, Paris, vol. 6, 1946, pp. 124-127.

commanded. The *potentia Dei absoluta* of Ockham became the supreme reason of the State and of legal positivism wherein the only source of law is the sovereign will of the legislator.[52]

Francisco de Vitoria (1483-1546) maintained that moral law did not derive from an external force to man but from his own nature that reason could discover. The problem of emphasizing the role of human rational nature separated from Christian Revelation is to construct a natural moral law that is metaphysically well founded but theologically weak. The consequence of the systematic separation of philosophy and theology is the infringement of the unity between the human and divine fields of knowledge. Eventually, the reflection on the unity of man's end suffered division: man's end is seen in two points of view: the natural, rational and philosophical, on one side; and the supernatural, spiritual and theological on the other side. There is a need to repair the fracture caused by the continuous disintegration between philosophy and theology. Unfortunately, the reflection on the succeeding periods worsened the gap and created systems of thought at the expense of the real concept of natural moral law.

1.6 The deformation of the concept of natural law

The Renaissance and the Reformation paved the way to the fast secularization of the human society especially in the Western world; such environment was conducive for the formation of new theories on natural law based on human will and reason alone. The 17th century Dutch jurist Hugo Grotius believed that humans by nature were not only reasonable but social as well. Thus, the rules that were "natural" to them - those dictated by reason alone - were those that enabled them to live in harmony with one another. The founder of the new School of Natural Law affirmed the existence of the natural law predictable by human reason and on which every positive law was grounded. He differed from the Stoic's concept of natural law by the fact that he removed the divine constitutionality of natural law which constituted the guarantee of the order in the world of creation. He asserted that the norms dictated by reason were still effective "*etiamsi Deus non daretur*"[53] (as if God did not exist or He were not concern with man's affair). The removal God and theology in the field of law eventually prepared the formation of modern States in the whole of Europe free from any religious influence and interference.

Grotius elaborated his war cry: "*etiamsi Deus non daretur*" during the Thirty Years War[54] in order to overcome the horrible religious conflict of fundamentalism that afflicted Christians in Europe. He was convinced that human reason was sufficient alone and was capable of distinguishing good and evil without any help from divine revelation; rather, any reference to such revelation as the cause of the conflict among the various Christian denominations should be avoided. This does not necessarily mean that Grotius arrived at the explicit denial of the existence of the objective nature of man; nevertheless, he diminished its essence through a reductive concept of reason. His concept of reason is grounded on some of the evident principles inherent to man and on some notions deducted through abstract reasoning. In this context, man is considered individually with his natural

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[52] "Il Diritto naturale nella dottrina sociale della Chiesa," *La Civiltá Cattolica* 140 (1989/II) pp. 521-527.

[53] Cf. H. GROTIUS, *De iure belli ac pacis, Libri Tres, Classics of International Law*, n. 3 vol. I-III (1925), Prolegomena § 11 at 13.

[54] Cf. Historical notes from the Church of the Brethren network, in http://www.cob-net.org/text/history_30yearwar.htm.

inclinations and his natural subjective rights that positive objective law must acknowledge, enact and defend.

This theory of rationalist iusnaturalism[55] (*iusnaturalismus*) has become the radical affirmation of innate and inalienable rights of men. There is an abrupt change of emphasis, i.e., from the objectivity of the natural right grounded on natural law, more stress is given to the subjectivity of natural right; from duties to freedom; from the law as norm of action to the law as choice of action. This led to the *absolutization* of the subjective rights of individuals. Thus, "where nothing can be taken for granted, everything becomes possible, and nothing is impossible any longer. Now there is no value capable of sustaining man, and there are no inviolable norms. All that counts is man's ego and the present moment[56].

In this doctrine, the notions of *state of nature* and *social contract* are of primary importance. Thomas Hobbes (1588-1679) considered important the passage from the "*state of nature*" wherein individual lived disjointedly and in permanent conflict with one another to a peaceful "*civil cohabitation*". This passage could take place through a pact that signified the transfer of the natural rights of each individual to the will of the Sovereign as the sole custodian of force. In this context, Hobbes understood natural law as the "dictate of the right reason" that obliged everyone to seek peace as a condition to safeguard "the peaceful living together in a human society".

According to another advocate of rationalist iusnaturalism, John Locke (1632-1704), the "law of nature instructs all men, provided that they would to heed to its teaching; that insofar as all are equal and independent, no one should harm anyone else in life, in health, in freedom and in property". Locke delineated a model of civil *convivenza* that emphasized, on one side, the contractual hypothesis of Hobbes and, on the other side, eliminated some essential human rights by designating the State as the sole custodian of all the natural rights of its citizens.

In the 18th century, the theory of iusnaturalism re-elaborated by Jean- Jacques Rousseau (1712-1778) and by Immanuel Kant (1724–1804), was strongly criticized by George Wilhelm Friedrich Hegel (1770–1831). Hegel denied the possibility of founding the State on a pact stipulated by individuals. After Hegel, the elaboration of positive law and natural law that excluded their historical development became an arduous task. The distinction was challenged by the legal positivism of Hans Kelsen (1881–1973) who excluded the possibility of deriving from nature or reason the substantial norms of the society. However, insofar as they are beyond positive law and nature; reason may serve as a model for the enactment of norms governing the State.

In the 19th century a critical spirit molded in the School of Natural and Historical Law of the 16th century continued to dominate discussions on natural law. The existence of a natural law was generally regarded as unprovable, and it was largely replaced in legal

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[55] There are different types of iusnaturalism (*iusnaturalismus*): the rationalist and the theological iusnaturalism. The former asserts that moral values must be discovered by solely human reason while the latter argues that moral values and rights must be discovered by human reason through the light of divine revelation. Cf. F. TODESCAN, *Le radici teologiche del giusnaturalismo laico. Il problema della secolarizzazione nel pensiero giuridico di Ugo Grozio*. Giuffrè Editore, Milano, 1983, pp. 122; ID., *Le radice teologiche del giusnaturalismo laico. Il problema della secolarizzazione nel pensiero giuridico di Jean Domat*. Giuffrè, Milano, 1987, pp. 86; ID., *Le radice teologiche del giusnaturalismo laico. Il problema della secolarizzazione nel pensiero giuridico di Samuel Pufendorf*. Giuffrè, *Milano*, 2001, pp. 103.

[56] Cf. J. RATZINGER, *L'Europa di Benedetto nella crisi delle culture*, Libreria Editrice Vaticana e Edizioni Cantagalli, Siena, 2005, pp 62-65.

theory by utilitarianism of the English philosopher Jeremy Bentham (1748-1832).He invoked Helvetius's phrase, "greatest happiness for the greatest number" as his general ethical principle. Bentham dismissed all notions of "natural rights" or "social contracts" that were embodied in some socio-political documents like the American *Declaration of Independence* in 1776 and the French *Declaration of the Rights of Man* in 1789. He also rejected all "*ipsedixitisms*", *i.e.* moral judgments based on criteria such as "sympathy" or "intentions". For Bentham *consequences* alone have their importance. Actions are to be judged strictly on the basis of how their *outcome* affects the general utility.

The elaboration of various systems of thought widened the destructive gap between the classical juridic tradition and the modern theories of natural law depriving it of any metaphysical foundation. The person as individual was placed in a high pedestal exalted by the «enlightenment theories». Human nature was then identified with reason itself capable of knowing and willing everything. That «will» on the legislative plane has become the only force that could produce law and rights. The new movement of thought resulted to the idea of supranational law and legal positivism that consider law simply as "the command of the ruler". The result is the antagonism between rationalism and positivism; universalism and particularism; individualism and nationalism. Thus, the affirmation of the supremacy of *nation* has resulted to a revolt against the *nature* itself.[57] This is the consequence of the revolution in German schools of natural and historical law: the deformation of the true concept of human nature. Any interpretation of *natura* without considering its constitutive principle which by itself is absolute tends to be destructive to the nature itself.

1.7 The Re-interpretation of the concept of Natural law

The only way to recover the genuine concept of natural law is to re-interpret it according to the framework set up by the School of Neo-Scholastism.[58] It considers the concept of Natural law as an effective rational instrument in constructing the foundation of moral law and the ethical principles of the social doctrine of the Church. Moreover, it can be an instrument in launching a fruitful dialogue with the post-modern cultural trends.[59]

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[57] Cf. O. GIERKE, *Natural Law and the Theory of Society: 1500 to 1800.* trans. E. Barker, Lawbook Exchange Ltd., New Jersey, 2001, p. 11.

[58] See also J. HERVADA, *Introduzione critica al diritto naturale*, Giuffrè Editore, Milano, 1990, 203pp; R. PIZZORNI, *La "lex aeternae" come fondamento ultimo del diritto secondo S. Tommaso.* Univ. Lateranensis, Roma, 1961, 54pp; J. Leclercq, *Leçons de droi naturel. I. Le fondament du droit e de la société.* Namur-Louvain, 1933, 462pp; S. SOLINAS, *Il diritto naturale secondo Giovanni Duns Scoto – excerptum theseos ad doctoratum in iure civili.* PUL, Roma, 2000, 101pp.

[59] Cf. JOHN PAUL II, " Discorso ai partecipanti della Plenaria della Congregazione per la Dottrina della Fede," February 6, 2004, n. 5 in AAS 96 (2004), pp. 399 - 402: "*Sulla base di tale legge si può costruire una piattaforma di valori condivisi, intorno ai quali sviluppare un dialogo costruttivo con tutti gli uomini di buona volontà e, più in generale, con la società secolare.*" See also ID., "Discorso ai partecipanti della Plenaria della Congregazione della Dottrina della Fede," January 18, 2002, n. 3 in *AAS* 94 (2002) pp. 335-336: "*La legge naturale è la partecipazione della creatura razionale alla legge eterna di Dio. La sua individuazione, mentre da una parte crea un legame fondamentale con la legge nuova dello Spirito di vita in Cristo Gesù, permette anche un'ampia base di dialogo con persone di altro orientamento o formazione, in vista della ricerca del bene comune. In un momento cosi trepido per la sorte di tante nazioni, comunità e persone, soprattutto le più deboli, in tutto il mondo, non posso che rallegrarmi per lo studio intrapreso, allo scopo di riscoprire il valore di tale dottrina, anche in vista delle sfide che attendono i legislatori cristiani nel loro dovere di difesa della dignità e dei diritti dell'uomo.*" Z. GROCHOLEWSKI, "La Legge Naturale," p. 31: "*Infatti, la legge naturale – insita nel*

The two-edged language used by the Catholic moral scholars in these past two centuries is useful to communicate to peoples of different moral, social and political beliefs. The metaphysical concept of natural law discerned by reason in the light of Christian revelation is bound to penetrate and gather consensus. This is so because the ontological parlance allows this school to establish a dialogue with those who do not rely on the "supernatural help" in stating their judgment and with whom it would be difficult to reason out on the theological perspective.[60] With these individuals, the point of departure for every discussion on natural law presupposes a well defined concept of man[61]: his nature and dignity as human person – a starting point where all tend to agree and all seem to converge. On the other side, the additional input on Revelation will gather together people with common faith in God as Creator to start the discussion on natural law putting the centrality of the person of Jesus Christ and the concreteness of the human person as realities that no Christian of good faith will dare to deny.[62] Both languages will be the basis on understanding the real nature of man not only in the intellectual level but in his "being and becoming" in conformity with the precepts of the natural moral law.

1.8 From Grotius's «*etiamsi Deus non daretur*» to Ratzinger's «*veluti si Deus daretur*»

In the book written before his election to the Papacy, *The Christianity and the Crisis of Cultures*, Cardinal Ratzinger addresses the *crisis of culture* that rampantly immerses not only Europe but also the whole of the Western world. The damaging results of this cultural crisis are the worse threats to security of man as individual and as member of human society, the increasing poverty not only in material but in cultural aspects as well, the dangers of genetic engineering and the systematic moral decadence.

The Judeo-Christian roots and foundation of the Continental Europe are being replaced by "modern enlightenment philosophy".[63] The modern philosophical movements recognize only what can be mathematically or scientifically proven, and deny any metaphysical proposition of reality. The refusal to recognize the existence of God and the objectivity of the Revealed Truth lead to consider morality as a relative concept. The

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cuore degli uomini – appartiene al grande patrimonio della sapienza umana, ma nello stesso tempo è oggetto dell'insegnamento della Chiesa, in quanto, pur essendo una verità di ordine naturale, è stata illuminata dalla luce della Rivelazione. Essa, di conseguenza, offre il fondamento naturale, che permette al credente la possibilità di dialogare anche con le persone di altro orientamento e di altra formazione."

60 "*Per la Chiesa il diritto naturale insito nella stessa creatura umana, è stato il mezzo per poter dialogare con quanti non condividevano la fede*" (J. Ratzinger – Galli della Loggia, "Dialogo del Card. Ratzinger con il Prof. Galli della Loggia, in *Atti del Convegno su Storia, Politica e Religione*, Quaderno n. 7, Roma, 2004, p. 16).

61 As it was understood by the Classical Philosophy, i.e., "*la costituzione ontologica dell'uomo nelle sue facoltà intellettuali e volitive non meno che nella sua struttura corporea. Una possibilità di essere che trova nella sua natura razionale la misura del suo agire, la norma della sua autentica realizzazione*" (A. MARTINI, "Il Diritto nella realtà umana," in AA. VV., *Il Diritto nel mistero della Chiesa*. PUL, Roma, 1988, p. 17).

62 Cf. JOHN PAUL II, Encyc. *Fides et ratio*, September 14, 1998, n. 4 in *AAS* 91 (1999) pp. 5-88; GROCHOLEWSKI, "La Legge Naturale," p. 37: "*Oggi si presenta la nuova necessità di cercare una convergenza al livello della legge naturale con le altre confessioni, religioni e culture, ma ciò può avvenire solo a condizione che da parte di tutti sia condivisa e rispettata quella che gli antichi chiamavano la recta ratio, orthòs logos, secondo quanto ha postulato Giovanni Paolo II nella Fides et ratio.*"

63 Cf. The Common Christian Roots of the European Nations. *An international Colloquium in the Vatican*, sponsored by the Pontifical Lateran University and the Catholic University of Lublin, Le Monnier, Florence, 1982, vol 1: *General Sessions*, pp. 53-215 and vol. 2: *Written Contributions*, pp. 101-172; 1123-1297

dictatorship of relativism leads to a *confused ideology of freedom that leads to dogmatism* and ultimately to the *destruction of freedom itself*.

Cognizant of the threatening serious problems of the nihilistic secularism that pervades Europe and the Western World, Ratzinger proposes a solution that has nothing to do with politics but with a spiritual renewal based on the powerful example in history by St. Benedict and the amazing cultural impact that the Benedictine Order had on a similarly declining Europe in the Middle Ages.

In view of this spiritual renewal that Ratzinger invites men of goodwill, clergy and laymen to reflect upon the origin of man and once again to freely embark on the road that leads to a better understanding of man, made not in his own image but in God's likeness. Man of the post-modern age should heed Paschal's challenge: to pay attention to those who claim to have *seen* and experienced the Living God and begin to live "as if God existed".

Ratzinger's invitation also includes the renewal of the concept of natural law by inverting the famous slogan of Grotius, from *etiamsi Deus non daretur* to *veluti si Deus daretur*.[64] Unlike Grotius's *etiamsi Deus non daretur* that was addressed to his contemporary believers, the *veluti si Deus daretur* of Ratzinger is addressed to those who no longer believe in God and especially to the atheists. The German Cardinal who succeeded to the throne of Peter is inviting them to confront the present moral problems besetting man by accepting the hypothesis of the existence of God.

In extending his invitation especially to those who do not accept a "supernatural help" in their personal investigation, Ratzinger uses the medium of communication typical of the neo-scholastism. He appeals to the non-believers as rational thinker who would like to restore life to the idea that natural law, as accepted by any responsible individual capable of acknowledging it, is as valid precept without the necessity of imposition from an external authority. Again, the Prelate does not demand non-believers to embrace the Catholic faith nor to practice Christian morality but he invites them to re-examine their moral convictions under the possibility of the existence of a supreme-divine being.[65]

By inviting non–believers to consider the possibility of the existence of divine authority, the Cardinal hopes that western culture may be awakened from its agnostic and cynical slumber and wider the horizon of its perspective. If until now many discard the possibility of seeing and feeling God's existence by limiting their philosophical inquiry in the realms of pure reason and, thus, depriving the science itself of its transcendental dimension; the time has come for a more mature reflection without excluding even the possibility of being attracted to it. Openness therefore! This is essential to the correct understanding of natural moral law. In fact, from the ancient thinkers to the Scholastics, the concept of natural law is far from imposing to nobody an unacceptable norm of law; rather it seeks to provide every possible criterion that reason can conceive in order to form a person "capable of clearly discerning in his conscience the fundamental dictates of this

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[64] J. RATZINGER, *L'Europa di Benedetto*, pp 29-65; BENEDICT XVI, *Discorso alla Pontificia Univesitas Lateranensis*, (October 21, 2006) in http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/october/documents/hf_ben-xvi_spe_20061021_lateranense_ en.html; ID., *Alloc*., "Nelle radici cristiane l'indentità dell'Europa," *General Audience* (April 9, 2008) in http://www.avvenireonline.it/papa/Extra/Le+parole+del+Papa/Udienze/20080409.htm

[65] Cf. ID., *Conference of Cardinal Ratzinger on Europe's Crisis of Culture given at Subiaco* (July 25, 2005) in http://www.zenit.org/article-13705?l=english.

law, that prompt him to do good and to avoid evil."[66] An approach of this kind is an appreciation of man's rational capacity and recognition of his personal responsibility. It should be noted that accepting the possibility of God's existence will never diminish human nature's capacity nor curtail man's freedom and personal determination; rather he will be placed on another level without depriving him of any attributes: human and divine.[67] Once again, Ratzinger does not expect non-believers to embrace the belief in the Christian dignity of man in contraposition with his natural dignity as human person; he invites them to consider the possibility of not depriving themselves even only in the intellectual level of the prospect of divine predilection.[68] After all, there is no harm in trying to live and act *veluti si Deus daretur*. In the last analysis, the Pope's renewed perspective will eventually lead not only to a spiritual progress but also toward a new and a more profound aspect of *humanism*.[69]

Once more, the Roman Pontiff reiterates his invitation reminding everyone that "to live in the world *veluti si Deus daretur* brings with it the assumption of a responsibility that knows how to be concerned with investigating every feasible route in order to come as near as possible to him who is the goal towards which everything tends (cf. I Cor 15: 24)."[70]

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[66] PONTIFICAL ACADEMY FOR LIFE, *Concluding remarks for the 8th General Assemble of Pontifical Academy for Life*. n. 3, February 25-27, 2002, in *The Vatican Website* at http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20020227_final-doc_en.html; Cf. *Gaudium et spes* 16.

[67] Cf. BENEDICT XVI, *Alloc. Meeting with the European university students*, January 23, 2007, in *AAS* 99 (2007) p. 705: "The anthropocentrism which characterizes modernity can never be detached from an acknowledgement of the full truth about man, which includes his transcendent vocation."

[68] Cf. ID., "Umanesimo senza futuro se la ragione esclude Dio," *Discorso* Parigi al mondo della Cultura, (September 12, 2008), in http://www.avvenireonline.it/NR/exeres/4A845B71-A831-4DD0-B205-CD0AED07E7DC.htm: *"Una cultura meramente positivista che rimuovesse nel campo soggettivo come non scientifica la domanda circa Dio, sarebbe la capitolazione della ragione, la rinuncia alle sue possibilità più alte e quindi un tracollo dell'umanesimo, le cui conseguenze non potrebbero essere che gravi. Ciò che ha fondato la cultura dell'Europa, la ricerca di Dio e la disponibilità ad ascoltarLo, rimane anche oggi il fondamento di ogni vera cultura.*" S. PINCKAERS, *The Sources of Christian Ethics*. Trans. M.T. Noble, T & T Clark, Edinburg, 3rd ed., 2001, p. 297: "In the light of faith and Christian experience, natural law will be affirmed, strengthened, deepened and better understood. It will enjoy and exact, supple and faithful harmony with the action of grace in the human person and will continue to provide a basis for mutual understanding and collaboration with those who do not share the same faith."

[69] Cf. ID., *Alloc. Meeting with the European university*, in *AAS* 99 (2007) p. 706: "A third issue needing to be investigated concerns the nature of the contribution which Christianity can make to the humanism of the future. The question of man, an thus of modernity, challenges the Church to devise effective ways of proclaiming to contemporary cultures the "realism" of her faith in the saving work of Christ. Christianity must not be relegated to the world of myth and emotion, but respected for its claim to shed light on the truth about man, to be able to transform men and women spiritually, and thus to enable them to carry out their r vocation in history." ID., *Alloc.*, "Nella Bibbia le radici del vero umanesimo" *General Audience* (November 14, 2007) in http://www.avvenireonline.it/papa/Extra/Le+parole+del+Papa/ Udienze/ 20071114.htm; Z. GROCHOLEWSKI, "La Legge Naturale," p. 51: "*La legge naturale, nella dottrina della Chiesa, costituisce poi la verità basilare di quell'umanesimo cristiano, di cui la comunità dei credenti sempre si è fatta ricercatrice e promotrice.*" A. TRABUCCHI, *Istituzioni di Diritto Civile*. CEDAM, Padova, 34th ed., 1993, p. 11: "*Il richiamo a principi di giustizia naturale, che un tempo sarebbe stato giudicato imperdonabile ritorno al passato, si impose come chiara esigenza di civiltà ai giuristi più attenti alla loro professione sociale; e la riscoperta di un diritto naturale, come aspetto di un nuovo umanesimo, costituì pertanto un progresso spirituale, affermato a costo delle più amare delusioni per chi aveva creduto soltanto nel diritto dello Stato.*"

[70] ID., *Discorso alla Pontificia Universitas Lateranensis*, (October 21, 2006), in http://www. vatican.va/holy_father/benedict_xvi/speeches/2006/october/documents/hf_ben-xvi_spe_20061021_lateranense_en.html.

2. DIVINE NATURAL LAW

It will be difficult to ascertain the nature of natural moral law without taking into consideration the distinction between the constitutionality of divine law and the constitutionality of human law. In fact, the logical consequences deriving from a correct understanding of the concept of natural law will not simply be a concern of the speculative discipline but will inevitably provoke a general judgement on ethics, on social institutions, on the essence of man in whatever societal relationship he entered into.[71] Knowledge of the fundamental elements that constitute law is necessary in order comprehend its cause and effect, its subject and object, its limits and extension in man's integral life. In this context, law becomes a social phenomenon that involves man in every aspect of the reality of his existence as rational, spiritual, human and social being.

2.1 The concept of law

Juventius Celsus defined law as the "art of good and just."[72] It can be considered as the oldest practice of a noble art at the service of man in his totality. Etymologically, law is derived from the Latin, "*iustum*" - just (*iustitia*) or "*iussum*" – command (*iubere*). The two concepts of *iustum* and *iussum* are complimentary terms because many things are commanded or prohibited inasmuch as they are good and evil. However, there are times wherein a morally indifferent matter may be licit or illicit just for the fact that it is commanded or prohibited. Law, in its very essence, is that which is intrinsically good (*ius quia iustum*) and it is intrinsically good that which is commanded by God (*iustum quia iussum*). Law may be identified with the concept of justice; if it is a clear expression of what is objectively just; while it may be identified with legitimacy or licitness if likewise it is a clear expression of what is objectively licit.

Law can be examined in various perspectives. Insofar as the object of justice, law is mandatory and its enforcement is not entrusted to individual but to the legitimately constituted public authority. Law *qua talis* governs the interpersonal relationships and, therefore, it has essentially a horizontal dimension; while ethics, insofar as it governs relationships between man and his Creator, has essentially a vertical dimension. Law consists mainly but not exclusively of norms. The norms are none other than regulations which establish that a certain type of action is mandatory, prohibited or permitted in specific circumstances. There is an essential connection between law and morals.[73] A moral norm directs the life of man as individual created by God; whereas a legal norm governs the life of man insofar as member of a human society.[74] The legal norm, on one hand, incorporates even the moral norm in its provision and it is for this reason that a provision of law cannot be immoral; on the other hand, moral norm cannot include in its content the legal norm. Thus, if a moral precept is not enacted as legal norm, it cannot be enforced as law.

The concept of law includes all the rights and duties which are proper to man. Man as person insofar as the center of rights and attributions realizes himself as social being in a legal relationship

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[71] Cf. R. BAGNULO, *Il concetto di diritto naturale in San Tommaso d'Aquino.* Giuffrè Editore, Milano 1983, p. vi.

[72] D. 1. 1. 1: "*Ius est ars boni et aequi.*".

[73] Cf. R. PIZZORNI, *Diritto, etica e religione.* pp. 173-195; 174: "*Infatti, la vera nozione del diritto naturale implica una stretta connessione tra diritto e morale.*"

[74] Cf. J. LECLERCQ-G. LUCINI, Lezioni di Diritto naturale: *Diritto e società.* Idea Stampa, Roma, vol. 1, 1964, pp. 46-47.

with his fellow men; that is why one speaks of mutual rights and duties. Rights and duties can be defined according to their objectivity, subjectivity and of formal causality.

2.1.1 Objectivity of law and rights

The existence of the objectivity of law is an essential condition for the affirmation of the objective rights and duties of individuals. Law is objective in the sense that it governs with norms a concrete reality. Thus, law objectively exists if actions on specific circumstances regarding the object of the norm are obligatory, prohibited or permissible. The objectivity of the law assures an entitlement of objective rights and duties. Hence, the first conceptual truth about rights and duties is that they are entitlements which must possess some kind of objectivity; their objectivity is the objectivity of an enacted law (or its promulgation).

The second conceptual truth about the objectivity of right and duty is that their entitlement or acknowledgment must be founded on the objective reality of their bearers. Therefore, if man is a holder of objective rights and duties, his claim must be founded on the reality of his being a human person. Any human being *natura sua* possesses all the constitutive elements of concrete rights and duties. In fact, human person "*è il diritto umano sussistente, cioè, l'essenza del diritto.*"[75] "He is the source of all rights and duties" and insofar as he exists as human person "he is the only foundation that gives sense to every human act because he himself is the «right/law»."[76] Therefore, the human nature is the necessary foundation of natural rights of men.[77]

By nature men are constituted equal in all levels and aspects of natural human existence; as a consequence, their objective rights and duties are recognized under the same principle of equality. The equality of rights and duties, common to all men, insomuch as it complies with the demand of justice rooted in the nature of man, is safeguarded on the basis of specific principles of justice which in turn are grounded in the natural order.

The legal relationship, which is established among subjects who are by nature distinct from one another but equal in dignity, is governed by the principle of commutative justice. In this kind of relationship, rights and duties are exercised among individuals, i.e., person to person. While the legal relationship which is established by individual with the society is governed by the principle of legal justice; the legal relationship which is established by the society towards individual is governed by the principle of distributive justice.[78]

2.1.2 Subjectivity of law and rights

In its subjective meaning, *ius*[79] designates the rights and the duties that are expressions of the moral faculty of a person to comply, to pretend and to possess something based on objective rights protected by the provisions of the legal norm.[80] This

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[75] A. ROSMINI, *Filosofia del diritto, Diritto derivato*, p. I, libro I, c. III, a, I, n. 49-50; 52, a cura di R. ORECCHIA, vol. 1, Padova, 1967, pp. 191-192; S. COTTA, "La persona come «diritto sussistente»" oggi, in AA. VV. *Rosmini. Pensatore moderno*, a cura di M. A. RASCHINI, Milano, 1989, pp. 173-178.

[76] A. ROSMINI, *Filosofia del diritto*, pp. 49-50.

[77] Cf. PONTIFICAL ACADEMY FOR LIFE, *Concluding remarks for the 8th General Assemble of Pontifical Academy for Life.* n. 4, February 25-27, 2002, in *The Vatican Website* at http://www.vatican.va/roman_curia/pontifical_academies/acdlife/documents/rc_pa_acdlife_doc_20020227_final-doc_en.html.

[78] Cf. R. PIZZORNI, *Diritto, etica e religione.* pp. 59-131.

[79] In the Anglo-Saxon world, *ius* with its subjective connotation is usually translated as *right*.

[80] *Ius* nella sua accezione soggettiva indica la facoltà di agire in base ad una norma, cf. *Dizionario giuridico romano*, Edizioni Giuridiche Simone, Napoli, 2000, p. 261.

subjectivity should always be taken into consideration even when expressing a moral faculty on performing a duty since every duty demands the right in order to comply with it. This faculty is considered by many jurists as the subjective right.[81]

If this subjectivity receives a formal recognition through a provision of the law, the subjective right becomes a legal faculty to act upon, to require and to acquire. Consequently, this faculty may legally demand a fulfillment of a duty on the part of others who are bound to respect in compliance with the law that enacted it.[82]

2.1.3 Formal causality of rights

The formal causality of right is referred to the rights and duties as object of the specific legislative norm. The norm protecting the right and duties of an individual is considered to be a command of justice (*regula iusti*).[83] The normative command is just insofar as it is in conformity with the law; however, the law in order to be just should be founded on the will of God who demands the respect of the natural order.[84] In fact, law achieves its moral binding force only because of its conformity to God's will.[85] The eternal law as supreme reason expresses the will of God; that is why all things are ordered in the most perfect way.[86] It follows that everything that is considered in conformity with the natural justice in the secular laws necessarily originates from the eternal law of God.[87]

Law may be divided into different classifications according to its nature. In reference to the formal causality of right, natural law is participation to the eternal law of God[88]; and in an absolute way, it lays down the rights and duties which are proper to human person as a social being.[89] Divine positive law establishes the norms that man should obey so as to comply with the explicit will of God made known through Revelation. Civil positive law sets down through a public act, usually in writing, the rights and duties of an individual who is a member of a civil society (civil order). Ecclesiastical positive law lays down through the solemn act of an ecclesiastical authority the rights and duties which are proper to an individual who is a member of an ecclesiastical society (canonical order).

Law, as formal expression and protection of rights and duties, is always in accordance with the demands of justice. It is a normative justice protecting individual persons[90] because the *de facto* and *de iure* existence of a permanent human nature is the source of all rights common to all peoples.[91]

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81 F. X. WERNS-P. VIDAL, *Ius Canonicum.* PUG, Roma, 1952, vol. I, p. 66.

82 Cf. A. BONI, *Costituzionalità divina ed umana del diritto.* Pontificio Ateneo Antoniano, Roma, 1986, p. 10.

83 *Ibid*.

84 Cf. ST. AUGUSTINE, *Contra Faustum*, lib. 22. c. 27 in PL 42, 418: "*Ergo peccatum est factum vel dictum vel concupitum aliquid contra aeternam legem. Lex vero aeterna est ratio divina vel voluntas Dei ordinem naturalem conservari iubens, pertubari vetans.*"

85 Cf. A. BONI, *Costituzionalità divina*, p. 10.

86 Cf. St. AUGUSTINE, *De libero arbitrio*, lib. 1, c. 6 in PL, 32; 1229.

87 Cf. *Ibid*. "*... nihil est in temporali lege iustum quod ex lege aeterna non derivetur*."

88 *S.Th.*, 1.2, q. 91 a. 2 *(in corpore): "Unde patet quod lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura.*"

89 Cf. G. MICHIELS, *Normae genarales juris canonici: commentarius libri I codicis juris canonici*, Universitas Catholica, Lublin, 1929, vol. I, 4: "*Quando ergo affirmamus legem naturalem esse «iuris» normam ac ordinis iuridici fundamentum, non de tota lege naturali loquimur... sed de solis legis naturalis praescriptis quae, quoad certa puncta, stricta iura seu uniuscuiusque rigorose sua determinant ordinemque iuridicum ordinant.*"

90 Cf. BOETHIUS, *De Duabus Naturis et una Persona Christi*, ch. 3 in PL, 64; 1345. See also U. DEGL'INNOCENTI, *Il problema della persona nel pensiero di S.Tommaso*. PUL, Roma, 1967, pp. 45-67.

91 Cf. BENEDICT XVI, "*Europa: rischia apostasia se dimentica i suoi valori,*" Udienza ai participanti al Congresso promosso dalla Commissione degli Episcopati della Comunità Europea (COMECE), 27 marzo 2007, in

In this kind of relationship the order of primacy should be respected; thus, justice comes before the law and man comes before human justice. This is simply because man is an expression of God[92] and justice is an expression of man; law is an expression of justice insofar as justice is an expression of the nature of God and it is an expression of the nature of man.[93]

The subordination of law made by man to the law divinely constituted demands the subordination of human justice to the divine justice. In this perspective the constitutionality of divine law (justice of God) is essentially the primary basis of the constitutionality of human law (human justice).[94]

2.1.4 The divine law in human nature

Divine law can be identified, first and foremost, with the non-written law of human nature. This is because God created man in his own image and likeness and endowed him with something that comes from Him - the immortal soul which is the principle of life.[95] With the advent of Christ, the same man created by God is endowed with another dignity i.e., from a simple creature he has become a child of God. It follows that human right of *divine constitution* is understood as a rational, essential, absolute, universal and immutable order of ethical and legal character inherent in the nature of man and in virtue of which man is obliged to act not only as creature but also as child of God (*agere sequitur esse*). Ontologically, man as human being is obliged to act as man because that is his nature. On the other hand, man as a child of God by Redemption is obliged to act as the same individual but elevated to a supernatural level.

The *true rights* of man are rights of *divine constitution* through the natural law.[96] These rights and duties are inherent in the very same nature of man and can be exercised morally and lawfully as long as man is faithful to his nature. With the advent of Christianity, these fundamental rights and duties of men have been "canonized" by divine revelation.[97]

The precept of divine law, eternal and immanent, is present in all men. It is manifested among men as right reason. The reason commands what should be done and prohibits what should not be done.[98] The natural law, as expression of right reason "associates men to gods" and through the human reason "a divine image is reflected in the nature of man."[99] In virtue of this non-written law knowable to rational being[100]; man by

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http://magisterobene dettoxvi.blogspot.com/2007/03/papa-europa-rischia-apostasia-se.html: "*Nell'attuale momento storico e di fronte alle molte sfide che lo segnano, l'Unione Europea per essere valida garante dello stato di diritto ed efficace promotrice di valori universali, non può non riconoscere con chiarezza l'esistenza certa di una natura umana stabile e permanente, fonte di diritti comuni a tutti gli individui, compresi coloro stessi che li negano.*"

92 Man is made in the image and likeness of God. Cf. Gen. 1:26-27; Gen. 9:6; Acts 17: 28; 1 Corinthians 11:7; James 3:9.

93 Cf. A. BONI, *Costituzionalità divina*, p. 11.

94 Cf. *Ibid*.

95 Cf. *S. Th.*, 1.2, the *Prologus* speaks of man as created by God in his own image "*secundum quod et ipse est suorum operum principium, quasi liberum arbitrium habens, et suorum operum potestatem.*"

96 Cf. A. BONI, *Costituzionalità divina*, p. 14.

97 Cf. *Ibid*.

98 CICERO, *De legibus*, 1 ,6, 18-20: "*Lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt, prohibetque contraria. Eadem ratio cum est in hominis mente confrimata et perfecta, lex est.*"

99 *Ibid*., 1 ,8, 25: "*Iam vero virtus eadem in homine ac Deo est, neque alio nullo in genere praeterea. Est autem virtus nihil aliud quam in se perfecta et ad summum perducta natura. Est igitur homini cum Deo similitudo*."

nature is prohibited to cause any damage; may it be physical or material, to nobody. This law of reason motivates men to love one another; for love is the foundation of law[101]. Insofar as the law of reason sustains and directs the life of men in conformity with the desire of gods, it is a participation of the eternal law that directs and sustains the whole of creation.[102]

Seneca (4-65 AD) affirmed that man is moved towards good by the presence of the divinity that is in him[103]. The inescapable law of reason that comes from the nature itself governs and rules all things. All men in virtue of this law of nature are brothers and sisters; and they should be ready to accept and love one another.[104] Every man deserves to be and should be respected, because he establishes a relationship with others as something holy: *Homo sacra res homini!*[105]

These pre-Christian thinkers laid the solid foundation of natural law based on the nature of man as rational and social being in relation with the non-written eternal law that puts him in perennial relationship with God, his creator, and with others, his fellow men, i.e., similar to him in nature.

2.2 Divine constitutionality of Natural Law

2.2.1 Natural law in the Sacred Scriptures

The basis for the divine constitutionality of the "primary precepts"[106] of natural law is obviously found in Matthew 7: 12: "Whatever you want people to do for you, do the same for them, because this summarizes the Law and the Prophets." This precept establishes a new kind of relationship because it considers "man" as "law" for another man. Aristotle had already affirmed that man is a law for himself.[107] Man is law for his fellow man because he is a child of God, created in his image; as such, man is the object and subject of the law.

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[100] ID., *Pro Milone*, 4, 10: "*Est igitur haec, iudices, non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non sed facti, non instituti, sed imbuti sumus.*"

[101] Cf. ID., *De legibus*, 1 ,15, 42-43: "*Ita fit ut nulla omnino iustitia, si neque natura est, eaque quae propter utilitatem constituitur utilitate illa convellitur, utque si natura confirmatura ius non erit, virtutes omnes tollantur. Ubi enim liberalitas, ubi patriae caritas, ubi pietas, ubi aut bene merendi de altero aut referendae gratiae voluntas poterit existere? Nam haec nascuntur ex eo quod natura propensi sumus ad diligendos homines quod fundamentum iuris est.*"

[102] Cf. ID., *De legibus*, 2, 4, 8-10.

[103] Cf. SENECA, *Epistulae*, 4, 12 (41): "*Prope est a te dues, tecum est, intus est. Ita dico, Lucili: hic prout a nobis tractatus est, ita nos ipse tractat. Bonus vero vir sine deo nemo est: an potest aliquis supra fortunam nisi ab illo adiutus exsurgere? Ille dat consilia magnifica et recta: in unoquoque virorum bonorum (qui dues incertum est) habitat dues.*"

[104] Cf. *Ibid*., 15, 52 (95): "*Natura nos cognatos edidit, cum ex iisdem et in cadem gigneret. Haec nobis amorem indidit mutuum et sociabiles fecit. Illa aequum iustumque composuit; ex illius constitutione miseries est nocere laedi: ex illius imperio paratae sint iuvendis manus.*"

[105] ID., 1, c. 33: "*Homo, sacra res homini, iam per lusum ac iocum occiditur et quem erudiri ad inferenda accipiendaque vulnera nefas erat, is iam nudus inermisque producitur satisque spectaculi ex homine mors est.*"

[106] The primary precepts are universal principles that establish and sustain the order set by God. If these universal principles would not be observed, there would be no salvation and the order set by God would also be destroyed. An example of these universal permanent principles is the love of God and of neighbour and the moral imperative «*bonum faciendum, malum vitandum*». Cf. J. CASORIA, *De matrimonio rato et non consumato, Dispensationis processus canonici doctrina et praxis.* Roma, 1959, p. 68. "*Praecepta primaria respiciunt quidquid directe conferet ad finis primarii consecutionem, ideoque vetant omnia quae finem primarium creaturarum rationalium directe excludunt, utpote relatione, essentialem hominum ad Deum destruentia, vel quae ordinem socialem et bonum civilis consortii pervertunt.*"

[107] Cf. ARISTOTLE, *Ethica Nicomachea*, lib. 4, c. 8, (10).

Therefore, man "possesses in himself his own law, received from the Creator"[108]. The binding force of this law derives from the creative will of God in the creation.[109]

Insofar as "man is a law for man"[110], being "*lex-homo*" persuades man to reach out and encounter other creatures like him. The precept of Christ embodied in "*lex-homo*" is the summary of the entire Mosaic Law and the teaching of the Prophets. It is no other than the law that the Creator gave to man at the moment of his own creation as the subject and object of God's predilection.[111] The "*lex-homo*" that the Creator has imprinted in the nature of man from the first moment of his creation is made concrete through a "covenant" stipulated in the Law of Moses and in the Gospel's precept of love. In fact, both the laws of Moses and the Gospel are considered a pact of friendship that implies the faithfulness of man to God's demand. Man observes the "*lex-homo*" by being faithful to the demands stipulated in the covenant: the respect for the primacy of God and the dignity of human nature.

St. Paul in the letter to the Romans 2:15 which is considered to be the scriptural foundation of the existence of natural law[112] explicitly refers to the Golden rule of Mt. 7:12 when he affirms that:

> "All who sin outside the law will also perish without reference to it, and all who sin under the law will be judged in accordance with it. For it is not those who hear the law who are just in the sight of God; rather, those who observe the law will be justified. For when the Gentiles who do not have the law by nature observe the prescriptions of the law, they are a law for themselves even though they do not have the law. They show that the demands of the law are written in their hearts, while their conscience also bears witness and their conflicting thoughts accuse or even defend them."

The pagans, who have not known the law given to Moses, are by nature acting according to it because they follow the same law imprinted in their being[113] insofar as *ipsi sibi sunt lex* - they are law for themselves.[114] As a consequence, the non-believers who are

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[108] *Veritatis Splendor* 40.

[109] *Ibid*.

[110] A. BONI, *Costituzionalità divina*, p. 17.

[111] Cf. *Ibid*.

[112] JOHN PAUL II, General audience, (April 23, 1980) footnote n. 1, in *The Vatican Website, John Paul II, Audiences* at http://www.vatican.va/holy_father/john_paul_ii/audiences/1980/documents/hf_jp-ii_aud_19800423_it.html. The Pontifff affirms that "*le parole citate della lettera ai Romani 2,15, sono sempre state considerate, nella Rivelazione, quale fonte di conferma per l'esistenza della legge naturale. Così il concetto della legge naturale acquista anche un significato teologico.*" The written document cites the following authors: D. COMPOSTA, *Teologia del diritto naturale, "Status quaestionis"*. Ed. Civiltà, Brescia, 1972, pp. 7-22, 41-53; J. FUCHS, S. J., *Lex naturae Zur Theologie des Naturrechts*. Patmos, Düsseldorf, 1955, pp. 22-30; E. HAMEL, S. J, *Loi naturelle et loi du Christ*, Desclée de Brouwer, Bruges-Paris, 1965, p. 18; A. SACCHI, "La legge naturale nella Bibbia," *La legge naturale*. Le relazioni del convegno dei teologi moralisti dell'Italia settentrionale (11-13 settembre 1969), Ed. Dehoniane, Bologna, 1970, p. 53; F. BÖCKLE, "La legge naturale e la legge cristiana," *La legge naturale*, pp. 214-215; A. FEUILLET, "Le fondement de la morale ancienne et chrétienne d'après l'Epître aux Romains," *Revue Thomiste* 78 (1970) pp. 357-386; T. HERR, *Naturrecht aus der kritischen Sicht des Neuen Testaments*. Schöningh, München, 1976, pp. 155-164.

[113] *Veritatis Splendor* 42: "The light of natural reason whereby we discern good from evil, which is the function of the natural law, is nothing else but an imprint on us of the divine light." It also becomes clear why this law is called the natural law: it receives this name not because it refers to the nature of irrational beings but because the reason which promulgates it is proper to human nature.

[114] JOHN PAUL II, Udienza Generale, *Discorso del Santo Padre ai partecipanti al Convegno sulla moralità pubblica*, (November 29, 1982) in http://www.vatican.va/holy_father/john_paul_ii/speeches/1982/november/documents /hf_jp-ii_spe_19821129_moralita-pubblica_it.html.

unaware of the law of Moses will not be excluded from the salvation if they continue to be "*lex*" for one another, i.e., if they follow what their intellect and their conscience dictate them to be (image of God) and to do (the will of God for the common good).

The natural law in the passage of St. Paul cannot be correctly understood if it is separated from his theology. In fact, conscience for St. Paul is neither autonomy nor heteronomy but essentially "theonomy"[115], i.e., the reflection of God in human reason. Thus, "free obedience to God's law in man's conscience effectively implies that human reason and human will participate in God's wisdom and providence."[116]

These scriptural passages allow us to consider the constitutionality of divine law as the basis of the natural moral law and of the divine positive law that pre-contain the Mosaic Law and the Golden rule.

2.2.2 Natural Law in St. Ambrose and St. Augustine.

St. Ambrose (330-397) believes that the law of nature written in the heart of man is the work of God.[117] This law obliges man to honor his Creator and not to do to others what he does not want others do onto him.[118]

St. Augustine (354-430) retains that from the moment God created man from nothing, He has already written in his heart an important precept of love: "Do not do unto others what you would not want others do onto you." No one can deny this precept of love because the judge and witness will be the same conscience of man.[119]

The thoughts of these two Fathers of the Church are re-elaborated by Gratian who gave a juridical definition of natural law: "*Ius naturale est, quod in lege et evangelio continetur, quo quisque iubetur alii facere, quod sibi vult fieri, et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in evangelio: «Omnia quaecumque vultis ut faciant vobis homines, et vos eadem facite illis. Haec est enim lex et prophetae.»*"[120]

2.2.3 Natural Law according to Gratian, the Father of Canon Law

The teaching of Gratian on the divine constitutionality of natural law is clear and understandable.[121] According to the Father of the science of Canon law, the divine

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[115] Cf. R. PIZZORNI, *Il diritto naturale*. p.136.

[116] Cf. *Veritatis Splendor* 41.

[117] Cf. AMBROSIUS, *De Paradiso*, 9. 39 in PL, 309: "*Id quod malum est, naturaliter intelligimus esse vitandum et quod bonum est naturaliter nobis intelligimus esse praeceptum. In eo igitur vocem Domini videmur audire, quod alia interdicat, alia precipiat. Et ideo si quis non obedierit illis quae semel a Deo praecepta credimus, poenae obnoxius aestimatur. Dei autem praeceptum non quasi in tabulis lapideis atramento legimus inscriptum, sed cordibus nostris tenemus impressum spiritu Dei vivi. Ergo opinio nostra ipsa sibi legem facit. Si enim gentes quae legem non habent, naturaliter ea quea legis sunt, faciunt: eiusmodi legem non habentes ipsi sibi sunt lex, qui ostendunt opus legis scriptum in cordibus sui. Opinio igitur huma sibi tanquam Dei lex.*"

[118] Cf. ID., *In Apocalypsis*, 19 in PL, 17; 1009: "*... et nulli se debere facere quod non vult ab alio pati. Hanc legem nullus qui sanae mentis est, ignorare permittitur*."

[119] Cf. St. AUGUSTINE, *Enarratio in Ps. 57*, 1 in PL, 36, 673; VS, 52.

[120] *Decretum Gratiani*, D. I (*Dictum introductorium*).

[121] Recommended readings: G. AMBROSETTI, *Diritto naturale cristiano: profile di metodo, di storia e di teoria.* Giuffrè Editore, Milano, 1985, 2nd ed., 339pp; J. GAUDEMET, *La doctrine des sources su droit dans le Décret de Gratien*. London, 1980, 27pp; G. GRANERIS, *La filosofia del diritto nella sua storia e nei sui problemi.* Desclée & C., , Roma, 1961, 258pp; O. LOTTIN, *Le droit naturel chez S.Thomas d'Aquin et ses prédécesseurs.* C. Beyaert , Bruges, 1931, 2nd ed., 131pp; A. PASSERIN D'ENTRÉVES, *La filosofia politica medievale.* G. Giappichelli, Torino, 1934, 238pp; H. ROMMEN, *Die ewige Wiederkehr des Naturrechts.* Trans. it. G. Ambrosetti, Studium, Roma, 1965, 217pp; G. FALCHI, *Fragmenta Iuris Romani Canonici.* Mursia, Roma, 1998, 258pp.

constitutionality of natural law is the basis of every legal construction. The law by human constitution in both civil and canon orders has been developed in the sphere of the divine constitutionality of natural law like concentric circles whose center is occupied by man.[122]

In explaining the connections and differences of the various legal systems (natural law, civil law, canon law), the Camaldulese monk defines the natural law as a *juridical order* common to all nations for the fact that it is perceived by man through his natural instinct.[123] The second part of the definition is an influence coming from Isidore of Sevile. When confronted with the question on the distinction between natural and civil law, Gratian used the same wordings of Isidore: "*ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur*."[124] Although he followed the definition given by Isidore, he distanced himself with the latter by making a distinction between the "formation of law" and understanding it through "natural instinct". Isidore, in the same manner, recognized the divine constitutionality of the natural law when he affirmed that "*omnes leges aut divinae sunt aut humane*" and that the divine decree is implicit in the precepts of the natural law (*natura constant*).[125]

According to Gratian, natural law is already included in the Law of Moses and in the Gospel (law of divine constitution).[126] He clearly affirmed that the law of nature is not only of divine constitution[127] but it can be identified with the Law of Moses and the Gospels.[128] Just as the Old and New Law are expressions of divine will, so thus "*naturalis lex veluti humana significatio aeternae legis Dei*."[129] Thus, while he made a clear distinction between the divine law grounded on nature and the human law based on customs; he also made an apparent identification of *ius divinum* (*fas*) with *ius naturale* since the latter is the law that is "*in lege et evangelio contenitur*."[130]

The "juridical construction" of Gratian is grounded on the precept of human nature as social being, i.e., "do unto others what you want others to do unto you and not to do to

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122 Cf. A. BONI, *Costituzionalità divina*, p. 22.

123 Cf. G. FALCHI, *Fragmenta Iuris*, p. 226: "*Il diritto naturale, comune a tutti gli uomini e ad ogni nazione, proviene dall'instictu naturae e perció non é statuito positivamente. Esso corrisponde col diritto divino ed é immutabile.*"

124 *Decretum Gratiani* D. I, C. 7.

125 Cf. ISIDORUS HISPANIENSIS, *Etymologiarum Lib. V*, c. 2 in PL, 82; 199: "*Omnes leges aut divinae sunt aut humane. Divinae natura, humanae moribus constant, ideoque haec discrepant, quoniam aliae aliis gentibus placent. § 1. Fas lex divina est: ius lex humana. Transire per agrum alienum, fas est, ius non est*."

126 *Decretum Gratiani* D. V (I Pars): "*Sed cum naturale ius lege [mosaica] et evangelio supra* [D. I] *dicatur esse comprehensum.*"

127 Cf. G. FALCHI, *Fragmenta Iuris*, p. 225.

128 Within the context of the Summa theologiae, "the content of natural law was taken from philosophers such as Aristotle and Cicero; it was built into the setting and structure of a theological framework. Here natural law was considered a participation in the eternal law of God and in direct relation to the law revealed in Moses and the Gospels; grace, which completed this law, was included" (S. PINCKAERS, *The Sources.* p. 407).

129 *Veritatis Splendor* 43: "In this way God calls man to participate in his own providence, since he desires to guide the world — not only the world of nature but also the world of human persons — through man himself, through man's reasonable and responsible care. The *natural law* enters here as the human expression of God's eternal law."

130 The identity of *ius divinum* with *ius naturale* in Gratian is explainable, in fact, "*Questa prima distinzione consente di identificare i concetti di Giustizia e di legalità: la prima, corrisponde allo ius divinum (fas), è immutabile e deriva dalla natura (per cui è denominato dallo stesso Graziano anche ius naturale)*" [cf. G. FALCHI, *Fragmenta Iuris*, p. 225; see especially the chapter seven on the sources of production of law in Decretum of Gratian, pp. 223-258].

others what you do not want others do unto you." This law, inherent in the nature of man, is externalized by recognizing that the *other person* is also a bearer of the same law. The human intellect that recognizes the binding force of this precept concomitantly promulgates it.[131] In other words, the mental operation of acknowledging its moral force is by itself an act of promulgation; thereby, making it a natural moral law that binds all human beings – *erga omnes*[132]. Eventually, it becomes an effective norm of conduct for every man, especially for the "other man", whoever he may be as long as he has the same dignity like every one else. In the supernatural level, the same man who is the center of the world of nature is likewise the center of the world of grace in Christian perspective. This "man" who is the center of the world of nature and grace, is likewise the center of every valid juridical construction.

With the affirmation that *ius naturale* is a law contained in the Law of Moses and the Gospels, insofar as it is the summary of the precept of the Golden rule, Gratian intended to set this precept of divine constitution as the basis of the construction of every legal system (civil and canon law) and their basic institutions.[133]

In the concentric system, there is a unity between natural law and divine positive law. The unity consists of the fact that both of them share the same center occupied by man. Based on the principle of unity of the natural and divine positive law, the legal personality of man is clearly absolute because *qua talis* he possesses an absolute value.[134] He is the "*fondamento primo..., fonte dei contenuti primordiali..., giustificazione della obbligatorietá... e il fine del diritto*."[135] Most of all, the reason why man occupies the center of this concentric structure is because every human being, as the core of the legal order, is the subject and object of God's eternal law.[136] For this reason, every the human being does not find his justification in himself but in God who has constituted him as the foundation and ultimate end of every law.[137]

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131 Cf. *Veritatis Splendor* 42.

132 It also becomes clear why this law is called natural: it receives this name not because it refers to the nature of irrational beings but because the reason which promulgates it is proper to human nature.

133 Cf. A. BONI, *Costituzionalità divina*, pp. 31 and 33.

134 Cf. L. BENDER, *Normae generales de personi: commentarius in canones 87-106*. Editori Pontifici, Roma, 1957, p. 7: "*Omnis capacitas iuris seu personalitas est aliquid absolutum, quia etiam ius est aliquid absolutum, habens valorem absolutum. Eo quod homo est capax iuris seu persona, ipse pertinent ad ordinem iuridicum, qui est absolutus et unicus. Non dantur in nostro mundo plures ordines iuridicit, sed unus tantum. In eo comprehensi sunt et in eo apud omnes homines. Sane, in hoc ordine iuridico unico distinguuntur plures dicamus sectiones, sed ordo iuridicus non est divisus in plures partes. Non agitur de divisione proprie dicta, sed de distinctione partium unius totius indivisi*." Cf. J. GARCIA MARTIN, *Le norme generali del Codex Iuris Cononici*. Ediurcla, Roma, 5th ed., 2006, pp. 88-94.

135 A. MARTINI, "Il Diritto nella realtà," pp. 6-11: 11: "*Collocata la persona umana quale centro e vertice del diritto, appare indiscussa la tesi secondo cui il diritto – nella molteplicità e complessità dei suoi problemi teorici e pratici – non é pensabile disancorato dalla struttura costitutivo - esistenziale dell'uomo. Solo discendendo dalla persona umana al diritto e risalendo dal diritto alla persona é possibile coglierlo nella sua autenticità umana e umanizzante. E' evidente - osserva G. Campanini – che, in questa prospettiva, la fondazione del diritto presuppone la fondazione della persona; perciò solo una solida fondazione della persona sul piano filosofico può schiudere la via a un ricupero del valore personalistico del diritto.*"

136 JOHN PAUL II, *Udienza generale*, (August 22, 1984): "*Il soggetto della legge naturale è infatti l'uomo non soltanto nell'aspetto "naturale" della sua esistenza, ma anche nella verità integrale della sua soggettività personale. Egli ci si manifesta, nella rivelazione, come maschio e femmina, nella sua piena vocazione temporale ed escatologica.*" in *The Vatican Website* at http://www.vatican.va/holy_father/john_paul_ii/audiences/1984/documents/hf_jp-ii_ aud _19840822_it.html.

137 A. MARTINI, "Il Diritto nella realtà," p. 11.

The divine constitutionality of the precept lies in the initial will of God who created all men equal and with the same rights and duties[138]. The *objectivity* and *subjectivity* of this precept consist respectively in the affirmation of the existence of the right enacted by the law (objective right) and in the right of every man to acquire what is due to him as person and to receive from others what is right that others should give him out of justice (subjective right).[139] This precept as an objective right is the foundation of the divine constitutionality of every natural and divine positive law[140]; thereby, making the subjective right a «legal» faculty to possess, demand and acquire whatever is enjoined by the written and non-written law.

2.3 Foundational constitutionality of Natural Law

Let us now examine the basal constitutionality of the natural law as the foundation of both the constitutionality of divine positive law and the constitutionality of human positive law (canon and civil law).

2.3.1 Foundation of the positive law of divine constitution

In the concept of Gratian, natural law is that which is commanded and prohibited by God through the Golden rule: "do to others as you would have them do unto you and not do to others as you would have them not do unto you." Insofar as natural law is of divine constitution, it follows that the divine constitutionality of natural law is also the basis of the divine constitutionality of the divine positive law.[141]

Both natural law and divine positive law hold the same authority because both of them come from the sovereign will of God: "*ius naturale est quod in lege et evangelio continetur*."[142]

The normative provision of the Mosaic Law and the Gospel is the "positivization" on the part of God of the law of nature.[143] In fact, the prescriptions of the law and all the teachings of the Prophets are summarized in the Gospel's precept of Mt. 7: 12.

Everything that is against natural law is against the will of God and, consequently, against the Sacred Scripture.[144] In doubt, between the prescript of the divine positive law

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[138] JOHN XXIII, *Pacem in terris*, 9: "Any well-regulated and productive association of men in society demands the acceptance of one fundamental principle: that each individual man is truly a person. His is a nature that is endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature. These rights and duties are universal and inviolable, and therefore altogether inalienable."

[139] Cf. A. BONI, *Costituzionalità divina*, p. 36.

[140] *Pacem in terris*, 28: "The natural rights with which We have been dealing are, however, inseparably connected, in the very person who is their subject, with just as many respective duties; and rights as well as duties find their source, their sustenance and their inviolability in the natural law which grants or enjoins them."

[141] Cf. A. BONI, *Costituzionalità divina*, p. 37.

[142] *Pacem in terris*, 28.

[143] *Ibid*., 38.

[144] *Decretum Gratiani* D. IX, C. 11: "*Cum ergo naturali iure nihil aliud praecipiatur, quam quod Deus vult fieri, nihilque vetetur, quam quod Deus prohibet fieri; denique cum in canonica scriptura nihil aliud, quam in divinis legibus inveniatur, divinae vero leges natura consistant: patet, quod quaecumque divinae voluntati, seu canonicae scripturae contraria probantur, eadem et naturali iuri inveniuntur adversa.*"

and the prescript of the natural law, "one must comply with the precepts of the natural law."[145]

The natural law is common to all nations because it is normally postulated "in the natural inclination and reasoning of man"[146] to consider some human practices as right and just, *viz*., "the union between man and woman, the rearing and education of offspring, the hereditary succession, the common possession of things, the equal freedom of all, the acquisition by all of all things coming from heaven, land and sea, the restitution of a thing deposited or money loaned and self-defense from any violence."[147]

The right and duties of man toward another person and his rights and duties toward God are "codified in the natural law".[148] *Ius naturale* is immutable, not only because it is connatural to the nature of man, but also because it is an expression of a double creatural value: the immutability of God as Creator and the immutability of the nature of man as creature.[149]

The natural law has its primacy in history and in dignity on divine positive and human positive law because, respectively, it precedes the former and it sets up the latter. There is no excuse against the precepts of the natural law; its derogation and its dispensation[150] are acts of an authority which surpasses that of man.

The divine positive law, insofar as it is the "positivization" of natural law, is immutable because of the perennial values of divine justice. On the other hand, the changes that may take place in the precepts of natural law are not substantial modification because

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[145] *Ibid.*: "*Unde quaecumque divinae voluntati, seu canonicae scripturae, seu divinis legibus postponenda censetur, eisdem naturale ius preferri oportet*."

[146] Cf. R. PIZZORNI, *Diritto, etica e religione*. p. 267: " *Riassumendo, la legge naturale é naturale: 1) In quanto ha la sua origine intima (ordine genetico) o causalità intrinseca nell'inclinazione o tendenza spontanea (a natura), per cui é inclinazione naturale. 2) In quanto ha la sua finalità (ordine teleologico) in quei beni che il soggetto riconosce necessari ed esige per la propria e naturale perfezione per attuare la propria natura di uomo ragionevole (secundum naturam), per cui é conoscenza razionale.*" S. PINCKAERS, *The Sources*. pp. 404-405: "For [St. Thomas], natural law was the expression, in the form of precepts, of our natural inclinations, which were guided by our inclinations to goodness and truth. Thus, natural law, imposed externally when taught, was in reality written in the human heart –that is, in the very nature of our human faculties of reason and will, at the root of free action. This teaching on natural inclination was fundamental for St. Thomas. It established natural law and provided the basis for morality. .. In St. Thomas's view, inclinations, like natural law, were God's most precious work in the human person, a direct, unique participation in his own wisdom, goodness and freedom and the emanation of the eternal law."

[147] Cf. *Decretum Gratiani* D. I, C. 7: *Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio et omnium una libertas, acquisitio eorum, quae celo, terra marique capiuntur; item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio. ?. 1. Nam hoc, aut si quid huic simile est, numquam iniustum, sed naturale equumque habetur*." S. PINCKAERS, *The Sources*. p. 407: "To sum up, we can distinguish five natural inclinations: 1. The inclination to the good; 2. The inclination to self-preservation; 3. The inclination to sexual union and the rearing of offspring; 4. The inclination to the knowledge of truth; 5. The inclination to live in society. These inclinations, serving as principles for the practical reason, were comparable to the first principles of speculative reason. According to St. Thomas they were self-evident to all human beings, before any research and formulation had taken place; they were known intuitively, as it were. They served as premises, on which all reasoning and questionings about human good were based."

[148] A. BONI, *Costituzionalità divina*, p. 38.

[149] *Ibid*.

[150] *Decretum Gratiani* D. XIII, *I Pars*: *"Item adversus naturale ius nulla dispensatio admittitur: nisi forte duo mala ita urgeant, ut alterum eorum necesse sit eligi." Ibid*., D. XIII, C. 1. *(Minus malum de duobus est eligendum).*

they are part of the complex and mysterious reality of the present economy of man's salvation.[151]

2.3.2 Divine Law and Natural Law

Law can be divine and human in nature: divine natural law has nature as its foundation while human law is founded on customs and practices of the peoples. Divine law is an expression of what is in conformity or against divine command; while human law is an expression of what is just and unjust in conformity with the natural positive law. Law must not only be just, but it must also be honest, doable in accordance with nature of man and with the customs and practices of human society that should observe it.

In regard to its constitutionality, no human law, neither ecclesiastical nor civil constitution, may prevail against natural law.[152] No customary law may prevail against natural law because no custom may ever prevail over sound reason. In fact, natural law is considered "none other than the eternal reason of the Creator and Ruler of the universe."[153] As a consequence, whatever norm is introduced against natural law, may it be through an enactment of human authority or through a customary practice, will necessary be considered deprived of force and effect.[154]

If divine positive law cannot go against man, neither human positive law can do the same. The reason is because God cannot act against the nature of man whom he created to his own image and likeness; likewise man can in no way act against his very nature, otherwise it will lead to self-destruction. Thus, human nature is the limitation of every divine and human positive law.[155] This limit is set by the very nature of man and of the created things and thereby considered as grounded in the natural law.[156] The created world is the work of God, so nature inasmuch as it is a reality coming from God possesses good in

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[151] Cf. A. BONI, *Costituzionalità divina*, p. 39.

[152] Cf. JOHN PAUL II, *Discorso del Santo Padre al Giubileo dei Governanti e dei Parlamentari*, (November 4, 2000): "*Proprio a questo si intende alludere quando si afferma che la legge positiva non può contraddire la legge naturale, null'altro essendo quest'ultima se non l'indicazione delle norme prime ed essenziali che regolano la vita morale, e quindi di quelli che sono i caratteri, le esigenze profonde e i valori più alti della persona umana*." in *The Vatican Website* at http://www.vatican.va/holy_father/john_paul_ii/speeches/documents/hf_jp-ii_spe_20001104_jubil-parlgov it.html. See also Decretum Gratiani, c. 11. D. 9: "*Constitutiones ergo vel ecclesiasticae vel saeculres, si naturali iuri contrarie probantur, penitus sunt excludendae*."

[153] Cf. LEO XIII, Encyclical Letter *Libertas Praestantissimum* (June 20, 1888) in *Leonis XIII P.M. Acta*, VIII, Romae 1888, p. 219: *Veritatis Splendor*, 44: "'It follows that the natural law is *itself the eternal law*, implanted in beings endowed with reason, and inclining them *towards their right action and end*; it is none other than the eternal reason of the Creator and Ruler of the universe'. See also, *Decretum Gratiani*, D. VIII, C. 6.

[154] Cf. *Decretum Gratiani* D. VIII, C. 1: " *Quaecumque enim vel moribus recepta sunt, vel scriptis comprehensa, si naturali iuri fuerint adversa, vana et irrita sunt habenda*." PIUS XII, Alloc., *Con vivo compiacimento*, cited by F. FAVARA, *De iure naturali*. p. 65: "*La volontá ordinatrice del Creatore si manifesta mediante il comandamento morale di Dio iscritto nella natura e nella rivelazione, come mediante il precetto o la legge della autorità umana nella famiglia, nello Stato e nella Chiesa. Se l'attività umana si regola e si dirige secondo quelle norme, essa rimane per se stessa in armonia con l'ordine universale voluto dal Creatore. In ciò trova la sua risposta la questione del diritto vero e falso*."

[155] Cf. CCC 1954-1959; C. CONCETTI, "I diritti umani tra libertà e autorità," in AA. VV., *I diritti umani. Dottrina e prassi*. A.V.E., Roma, 1982, pp. 751-753: "*Fondato sulla persona umana, tale diritto e dovere emerge come esigenza di fedeltà alla persona stessa, come istanza di giustizia, come bisogno di coerenza della legge al suo carattere strumentale nei confronti della medesima persona umana*."

[156] Cf. A. BONI, *Costituzionalità divina*, p. 43.

itself; it expresses the order set by God and as such is an expression of the same eternal law – unwritten - that governs the universe.[157]

The constitutionality of the divine positive law and human positive law cannot contradict and oppose the constitutionality of natural law because their *raison d'être* is grounded on the necessity of "interpretation" and "positivization" of the natural law in view of the "being and becoming" of man in all the stages of his history (biological, social and religious).[158]

2.3.3 Natural law as the foundation of human rights and duties

The human rights and duties that immediately and simultaneously arise from the very nature of man are universal, inviolable and inalienable.[159] These rights and duties that are ascribable to man as human person are placed in an order of unchangeable and reciprocal correlation. They are grounded in the natural law that confers rights to man, on one hand, and imposes duties on the other hand.[160]

"We need to emphasize that they should not be understood in a purely subjective sense, as the individual's defense against the encroachment of others and of society. Rather, they should be seen objectively as rights belonging to everyone. They call forth each one's respect and benevolence in keeping with the virtue of justice, which is a firm determination to give everyone what belongs to him: *suum cuique tribuere*. Natural law, like the virtue of justice, is primarily oriented to others, while always including the agent who is also a member of society. This is why rights and duties go together."[161]

In the realization of juridical undertaking of man, every subjective natural right demands a correlative natural duty. In fact, John XXIII asserted that in human society "every natural right in a person is inseparably connected with a particular duty of other persons, i.e., the duty of acknowledging and respecting the right in question. In reality, every fundamental right of a person derives its indestructible moral force from the natural law, which in conferring it, imposes a corresponding duty".[162] As a consequence "of that juridical order willed by God, man has his own inalienable right to juridical security. To him is assigned a certain, well-defined sphere of law, immune from arbitrary attack."[163]

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[157] Cf. *Veritatis Splendor*, 43: "The Second Vatican Council points out that the "supreme rule of life is the divine law itself, the eternal, objective and universal law by which God out of his wisdom and love arranges, directs and governs the whole world and the paths of the human community. God has enabled man to share in this divine law, and hence man is able under the gentle guidance of God's providence increasingly to recognize the unchanging truth."

[158] Cf. PIUS XII, Alloc., *Con vivo compiacimento*, cited by F. FAVARA, *De iure naturali*. p. 66: "*L'ordine morale é essenzialmente fondato in Dio, nella sua volontà, nella sua santità, nel suo essere. Anche la più profonda o più sottile scienza del diritto non potrebbe additare altro criterio per distinguere le leggi ingiuste dalle giuste, il semplice diritto legale dal diritto vero, che quello percepibile già col solo lume della ragione dalla natura delle cose e dell'uomo stesso, quello della legge scritta dal Creatore nel cuore dell'uomo (cf. Rom. 2: 14-15) ed espressamente confermata dalla rivelazione. Se il diritto e la scienza giuridica non vogliono rinunziare alla sola guida capace di mantenerli nel retto cammino, debbono riconoscere gli obblighi etici come norme oggettive valide anche per l'ordine giuridico*."

[159] Cf. CCC 1956: "The natural law ... expresses the dignity of the person and determines the basis for this fundamental rights and duties." See also *Pacem in Terris*, 9.

[160] Cf. S. PINCKAERS, *The sources*. p. 452: "Natural law is the foundation of human rights, as it roots them in our personal nature. Thus these rights are, in their source, universal and inalienable.

[161] *Ibid*., 453-454.

[162] *Pacem in Terris*, 30.

[163] *Ibid*., 27. Cf. PIUS XII's broadcast message, Christmas 1942, *AAS* 35 (1943) 21.

In this context, natural law is considered neither as an organized body of norms governing partly or entirely the most important of human behavior, nor a juridical order of non-existing but possible universal society of mankind, but it is certainly a universal order of justice among men[164] to which every legal norm of conduct should be grounded.[165]

2.4 Natural law as the foundation of the positive law of human constitution

Mankind is fundamentally governed by natural law through the positive human law based on the customs and the practices of the peoples. Every law of human constitution, insofar as constituted by the will of man, must occupy the place that natural and divine positive law assign to it. Regarding this limit, the civil law (law of human constitution), governs the life of the civil society as such, and the canon law (law of human constitution) governs the life of the ecclesial society as divine and human society.[166]

Civil law is constituted by a body of laws or state law established by individual state or single nation for the regulation of its private and public relationships. [167] When civil law is applied to international law, it refers to a composite body of laws concerning the relationships among peoples. The state law regulates the relationships of the subjects of the law of the nation while the law of the peoples (international law) is constituted by norms freely accepted by the community of nations.

Canon law, as law of human constitution, is a mass of juridic norms enacted by competent ecclesiastical organs in organizing ecclesial structures and in regulating the activities of the Christian faithful in relation to the ends proper of the Church. Canon law is constituted by canons (from the Greek word kànon = rule) that are given by the human authority of the Church.[168]

The civil and canon law, inasmuch as they are laws of human constitution, are grounded on the human and social activities of man, respectively, in the civil society and in the ecclesial society. The laws governing human and social relationships that flow from the

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[164] Cf. S. LENER, "Il concetto di diritto e il diritto naturale," *Civilta Cattolica* 131/3130 (1980) pp. 323-341.

[165] Cf. J. RATZINGER – GALLI DELLA LOGGIA, "Dialogo del Card. Ratzinger con il Prof. Galli della Loggia," p. 17.

[166] Cf. A. BONI, *Costituzionalità divina*, p. 45.

[167] For a more comprehensive reading, see J. H. MERRYMAN, *The Civil Law Tradition. An introduction to the Legal Systems of Western Europe and Latin America*, Stanford University Press, California, 1985, pp. 168; A. MEHREN, *The Civil Law System: Cases and Materials for the comparative study of law*, Prentice-Hall, Englewood Cliffs, N.J., 1957, pp. 922; H. P. DE VRIES, *Foreign law and the American lawyer, an introduction to civil law, method and language*. Columbia University, New York, 1969, pp.431; Fr. ALEXANDER, *Notions de droit civil*. A. de Boeck, Bruxelles, 5th ed., 1978, pp. 127. See also the following reading materials on comparative law: H. C. GUTTERIDGE, *Comparative law. An introduction to the comparative method of legal study and research.* University Press, Cambridge, 2nd ed., 1949, pp. 214; J. H. WIGMORE, *A Panorama of the world's legal systems*, St. Paul West Publishing Co., Minnesota, 3 voll., 1928; R. DAVID, *Major Legal Systems in the World Today*, Stevens, London, 2nd ed., 1978, pp. 584; M. A. GLENDON, *Comparative legal traditions: text, materials and cases on western law*. St. Paul, Minnesota, 2007, pp. 990; K. ZWEIGERT – H. KÖTZ, *An introduction to Comparative Law. I: The Framework. II: The institutions of private law*, North Holland Publishing Co., Amsterdam, 1977. H. W. EHRMANN, *Comparative legal cultures*, Prentice-Hall, Englewood Cliffs, N.J., 1976, pp. 172; H. J. LIEBESNY, *Materials on Comparative Law*, Washington, 1976, pp.466.

[168] Cf. *Decretum Gratiani* D. III, C. 2: "*Porro Canonum alii sunt decreta Pontificum, alii statute conciliorum. Conciliorum vero alia sunt universalia, alia provincialia. Provincialium alia celebratur auctoritate Romani Pontificis, praesente videlicet legato sanctae Romanae Ecclesiae, alia vero auctoritate patriarcharum, vel primatum, vel metropolitanorum eiusdem provincae. Haec quidem de generalibus regulis intellegenda sunt.*" See also G. FALCHI, *Fragmenta Iuris.* p. 243.

nature of man are binding because they have foundation in the natural law.[169] The divine constitutionality of natural law derives from the fact that it is an expression of the eternal law of God.[170] In virtue of this intrinsic reality, the law of human constitution cannot prevail on the law of divine constitution[171]; neither civil law can prevail on canon law.[172]

With the distinction between law of divine constitution and law of human constitution – the methodology used by Gratian - it is easier to lay the basis for a scientific and juridical evaluation of the concept of natural law as divine constitution and of the positive law as human constitution.

2.5 Divine and human constitutionality of Canon Law

"Canon law is a divine and human constitution insofar as it is the Work of God and the work of men (Church hierarchy). The constitutative law of the Church is a work of God (divine constitution); the actualization of the constitutative law of the Church is the work of man (human constitution)."[173]

The human constituent element of canon law springs forth from the divine constituent element and the former actualizes the latter in view of the development of the Church in human and in political society. Therefore, there are two constituent elements: divine and human.

A definition of canon law will be complete taking into consideration its twofold constitutionality. A definition of this kind is given by F. X. Wernz: *"Complexus legum sive a Deo sive ab ecclesiastica potestate latarum, quibus constitutio atque regimen et disciplina Ecclesiae catholicae ordinatur*"[174] In this definition one can notice the two sources of canon law as likewise defined by Gratian: a composite of laws given by God and by the Church. It is a matter of acknowledging the two constituent elements: the active element of its divine constitution *(ius divinum* - unchangeable) and the active element of its human constitution (*ius ecclesiasticum* - changeable).[175] Canon law, in reality, does not derive its foundation from a "pre-constitution" elaborated by the Church, but proceeds from the "divine constitution"

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169 Cf. CCC 1979.

170 Cf. R. PIZZORNI, *Diritto, etica e religione.* p. 175: *Così tutte le leggi umano-positive, in quanto sono veri leggi, derivano dalla legge naturale, e anch'esse, per mezzo della stessa legge naturale, discendono, come da prima sorgente, dalle legge eterna di Dio.*"

171 Cf. *Inter mirifica*, 6: "Since the mounting controversies in this area frequently take their rise from false teachings about ethics and aesthetics, the Council proclaims that all must hold to the absolute primacy of the objective moral order, that is, this order by itself surpasses and fittingly coordinates all other spheres of human affairs-the arts not excepted-even though they be endowed with notable dignity." See also: *Pacem in terris*, 43; *Gaudium et Spes*, 51; *Apostolica Actuositatem*, 51.

172 *Decretum Gratiani* D. X, C. 1: "*§2. Non quod imperatorum leges (quibus saepe ecclesia utitur contra haereticos, saepe contra tirannos atque contra pravos quosque defenditur) dicamus penitus renuntiandas, sed quod eas evangelicis, apostolicis atque canonicis decretis (quibus postponendae sunt) non posse inferred praeiudicium asseramus.*" Cf. A. MARTINI, "Il Diritto nella realtà," p. 40: "*L'ordinamento giuridico, nei suoi dettati normativi, soggiace sempre all'istanza etica. Infatti, la morale costituisce il fondamento insostituibile sul quale poggia l'attuazione dello stesso diritto.*"

173 A. BONI, *Costituzionalità divina*, p. 45

174 F. X. WERNZ – P. VIDAL, *Ius Canonicum. Tomus I: Normae generales*, Romae, 1952[2], 68-69. Cf. F. X. WERNZ, *Ius Decretalium*, PUG, Roma, vol. 1, 1899, n. 46; WERNZ-VIDAL, *Ius canonicum*, 1 PUG, Roma, vol. 1, 1952, nn. 68-69: F.M. CAPPELLO, *Summa iuris canonici, I*, Romae 19616, p. 8: "*Complexus legum a legitima auctoritate conditarum, quibus constitutio et regimen Ecclesiae ordinatur atque fidelim actiones ab Ecclesiae proprium finem diriguntur.*"

175 Cf. A. BONI, *Costituzionalità divina*, p. 49.

of the Church as willed by the Saviour;[176] the Church should accept herself as Christ instituted her: a social unit and a sacrament of salvation.[177] In this prospective, the primary objective of Canon Law is not only the organization of the community of the faithful but also to bring about the salvation of souls;[178] for this very reason *salus animarum suprema lex*.[179]

The Church as a community of faithful has Christ as the Head and *qua talis*, the first and supreme legislator of the ecclesial society. Christ instituted the Church on the foundation of the Apostles.[180] In the constitution of the first Christian communities, the Apostles' operative power enjoyed the assistance of the Spirit of the Lord.[181] The decisions transmitted through their apostolic and pastoral office possessed the gift of infallibility for the fact that they expressed the Word of God.[182] Therefore, aside from the divine law of the Gospel, there is also a divine apostolic law.[183] The provisions enacted by the Apostles as pastors of the Church are provisions of divine nature, i.e., divine constitution.[184] However, with the death of the last Apostle that coincides with the end of the so-called public revelation, the succeeding provisions enacted by the successors of the Apostles intended to translate into reality the gift of Faith are considered to be human ecclesiastical law.[185]

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176 *Ibid*.

177 A. LONGHITANO, "Il Diritto nella realtà ecclesiale," in AA. VV., *Il Diritto nel mistero*. pp. 109-112.

178 Cf. M. MAZZIOTTI, *Lezioni di Diritto Costituzionale*, Giuffrè Editore, Milano, 2nd ed., 1993, pp. 16-17.

179 Cf. can. 1752: *In causis translationis applicentur praescripta canonis 1747, servata aequitate canonica et prae oculis habita salute animarum, quae in Ecclesia suprema semper lex esse debet*.

180 Eph. 2:20; Rev. 21:14; CC 857.

181 Cf. A. GIACOBBI, "Il Diritto," pp. 149-150: "*Negli scritti neotestamentari rinveniamo altre norme che sembrano derivare dagli Apostoli. Per dare una valutazione occorre in questi casi riferirsi, prima di tutto, alla presenza dello Spirito negli organi che emanano tali disposizioni: «presenza» significa la situazione derivante dal dono dello Spirito, per cui lo Spirito stesso inabita nel soggetto e opera in lui. In questa ipotesi, che le disposizioni siano emanate da ministri che posseggono lo Spirito, e operano sotto l'azione dello Spirito, e nella misura nella quale quelle disposizioni possono dirsi norme, avremo delle norme di diritto apostolico; queste sono divine più perché sono emesse sotto l'azione dello Spirito che perché collegabili a precedenti disposizioni del Signore Gesù.*"

182 Cf. CCC 869; A. BONI, *Costituzionalità divina*, p. 50.

183 Cf. A. GIACOBBI, "Il Diritto," pp.147-153; A. BONI, *Costituzionalità divina*, p. 50.

184 CCC 857-870; A. BONI, *Costituzionalità divina*, p. 50.

185 Cf. *Ibid*.

3. NATURAL LAW AND THE CODE OF CANON LAW

The Vatican Council II defines the Church as the "universal sacrament of salvation"[186] "since, united always in a mysterious way to the Saviour Jesus Christ, her Head, and subordinated to him, she has, in God's plan,"[187] not only an indispensable relationship with the salvation of every human being but also all the necessary means in order to realize in human and ecclesial society the salvific mission entrusted to her care by divine will. The Church continues to fulfill the divine mandate faithful to her vocation as human means for the distribution of divine mysteries and as visible sign of the presence of the Author of nature and grace in the community of men. The *ius humanum ecclesiasticum* finds its *raison d'être* precisely on this theandric nature of the Church, i.e. in her human and divine dimensions.

The task for the necessary coordination of the various elements, invisible and visible, that constitute the Church is entrusted to those who received from the Divine Legislator the *tria munera*. They are primarily the Roman Pontiff as the successor of Peter[188] and the Bishops as successors of the Apostles; together they form the College of Bishops[189] that succeeds to the Apostolic College.[190]

The constitution of the Church demands a well defined structure that, on one hand, has already been permanently established by the divine authority of Jesus Christ and, on the other hand, is temporarily established by the human ecclesiastical authority. It is in this context that the promulgation of the Code of Canon Law finds not only its theological but its legal justification as well. In fact, "its foundation is found in the nature itself of the Church willed by Christ as sacrament and necessary instrument of salvation."[191] For this reason, the canonical positive order just like any legal order is composed of complex of norms and institutions that concretize and determine the indispensible order established by Jesus Christ for the Church as a *societas perfecta* (according to the principle *ubi societas ibi ius*, human element = *ius humanum ecclesiasticum*) and as an ordinary means of salvation of souls (divine element = *ius divinum*).[192]

Willed and constituted by the Divine Legislator as social and living institution, the Church has an essential need in realizing her mission on earth of vital norms that will make her hierarchic and organic structure publicly visible and spiritually effective. It is through the Code of Canon Law that the Church legally organizes and governs her permanent and temporal structures at the service of the People of God in the human society. This composite of laws determines the exercise of the ministries entrusted to the Church, of the *potestas sacra* and of the salvific administration of the divine mysteries such as the Word and the Sacraments. In fact, the end for which the Code is promulgated is to "facilitate the organic

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[186] *Lumen gentium*, 48.

[187] CONGREGATION FOR THE DOCTRINE OF FAITH, Declaration, *Dominus Ieus* on the Unicity and salvific universality of Jesus Christ and the Church, n. 20.

[188] Cf. cann. 331-335.

[189] Cf. cann. 336-341.

[190] CCC 880-885.

[191] A. LONGHITANO, "Il Diritto," pp. 110.

[192] For a more comprehensive readings on this topic, see P. A. D'AVACK, *Corso di diritto canonico. I. Introduzione sistematica al diritto della Chiesa*, Giuffrè, Milano, 1961, pp. 251; ID., *Trattato di diritto canonico. Introduzione sistematica generale*, Giuffrè, Milano, 1980, pp. 413; E. CORECCO., *Canon law and communio: writings on the Constitutional Law of the Church*. Libreria editrice vaticana, Vatican City, 1999, pp. 415; P. FEDELE, *Discorso generale sull'ordinamento canonico*. Cedam, Padova, 1941, pp. 170; ID., *Introduzione al diritto canonico, S.I.*,Roma, 2nd ed., pp. 155.

development of the spiritual values in the life of both the ecclesial society and the persons who belong to it. It should therefore be considered as indispensable instrument in order to assure the proper order in both the individual and social life; and of the Church activity itself."[193]

The Code of 1983 is an eloquent sign of the continuity not only with the juridic canonical doctrine but also of the ecclesiological and theological tradition of the past. This will explain why the natural moral law is and will always be a part not only of the theological but also of the juridic doctrine of the Church.

The following paragraphs will be a general overview on the profound influence of the natural moral law in the general legal principles of the CIC 1983 and its canonical institutions.

3.1 The general principle

The canonical doctrine of iusnaturalism affirms that there is an essential relationship that binds together canon law and natural moral law and this kind of relationship is implicit in many canonical norms contemplated in the Code (1917 and 1983) insofar as they are direct applications of the principles of divine natural law. In fact, G. Michiels asserts: [194]

> "*Omnes enim sciunt jus naturae verum esse juris canonici fontem, non solum in quantum de facto ab Ecclesia determinantis in legibus proponitur, explicatur aut accuratius determinatur, sed etiam in quantum praebet principia, in jure canonico non expresse et authentice consecrata sed ex ipsa natura rerum, sub ductu rationis, derompta et jus canonicum sicut omne jus positivum apprime dominantia et informatia, per quae conclusiones legittimae ex aliis placitis et institutis canonicis eruuntur, vel ex quibus conclusiones legitimae, conclusionibus a jure canonico jam deductis similes, deducuntur.*"

This indispensable harmonious mutual correlation between the divine law, of which *ius naturale* is an integral part, and the human positive law is no other than the vital and intrinsic rationality of the *ius humanum ecclesiasticum*. The divine law provides the primary source in order for the ecclesial community to realize the salvation of souls which is the primary purpose of the Revelation. The human positive law incarnates through its norms the content of divine law and translates it into legal structures making the Church an ecclesiastical society capable of realizing on earth the mission entrusted to her by the Divine Legislator.

In order to be faithful to the divine mandate as the universal sacrament of salvation for every human being, the Church cannot ignore the existence of natural moral law. In reality, the mere fact that she "is subject to it, she is not only oblige to observe its precepts but she is bound to be its authentic guarantor and interpreter"[195] as the mother and teacher of humanity.[196] Since the Church is a unique reality composed of both divine and human elements, thus the canon law as an indispensible instrument for its existence as ecclesial society is also composed of norms of divine and human origin.

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[193] Cf. JOHN PAUL II, Apos. Const. *Sacrae Disciplinae Leges, January 25, 1983,* in AAS 75 (1983), pars II, pp. vii-xiv; *Communicationes* XL (2008), pp. 42-43.

[194] G. MICHIELS, *Normae genarales juris canonici: commentarius libri I codicis juris canonici*, Universitas Catholica, Lublin, 1929, vol. I, p. 470.

[195] Cf. M. OLIVERI, *Natura e funzioni dei Legati pontifici nella storia e nel contesto ecclesiologico del Vaticano II.* Liberia Editrice Vaticana, Città del Vaticano, 2nd ed., 1982, p. 264: "*La Chiesa è soggetta al diritto naturale, che deve osservare e di cui è interprete e garante.*"

[196] Cf. PAUL VI, *Humanae vitae*, July 25, 1968, n. 19 in AAS 60 (1968), pp. 481-503.

3.1.1 The Primary Sources of Canon Law

The norms that come from the Christian Revelation made manifest in the Sacred Scriptures[197] and in the Sacred Tradition together with the precepts of natural moral law can be considered as law of divine origin insofar as they have God as Divine author and legislator.[198] The norms of human origin are those coming from the will of the competent ecclesiastical authorities contained in the legislative documents of the Church[199] and those customs that have been introduced through a customary practice by a community of faithful and recognized by the competent ecclesiastical authority as having the force of law.[200]

The competent ecclesiastical authorities are none other than the active subjects of ecclesiastical governance. They are divided into universal and particular legislators. The universal legislators for the whole People of God are the Roman Pontiff and the College of Bishops who are subjects of the supreme power in the Universal Church.[201] The Particular Councils, the Conferences of Bishops, the Diocesan Bishops and those who are equivalent to them in *iure canonico*,[202] the General Chapters of the Institutes of consecrated life and the Society of apostolic and clerical life of pontifical rights[203] are the local legislators for the portion of the People of God entrusted to their care.[204]

3.1.2 The Sources of Cognition of Canon Law

Canon Law, likewise, recognizes the sources of cognition (*fontes cognoscendi*) of its norms.[205] These are the compilation and the documents that contain the canonical norms and the necessary instruments for their comprehensive understanding and interpretation.[206] These *fontes cognoscendi* are divided in divine and human law.[207] The divine law, directly coming from God is known to be of twofold classification: the *ius divinum positivum* whose norms are contained in the Sacred Scriptures[208] and in the Sacred Tradition[209] and the *ius divinum naturale* based on the eternal divine law given at the moment

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[197] Cf. *Sacrae Disciplinae Leges*: "A second question arises concerning the very nature of the Code of Canon Law. To reply adequately to this question, one must mentally recall the distant patrimony of law contained in the books of the Old and New Testament from which is derived, as from *its first source*, the whole juridical - legislative tradition of the Church."

[198] Cf. A. GIACOBBI, "Il Diritto," pp. 139-154.

[199] Cf. *Ibid*., pp. 155-215.

[200] Cf. Cann. 23-28; J. GARCIA MARTIN, *Le norme generali*, pp. 133-148.

[201] Cf. cann. 332 §1; 336; J. GARCIA MARTIN, *Le norme generali*, pp. 57-58.

[202] Cf. Can. 381 §2.

[203] Cf. Can. 596 §2. This is referred to as the *ius proprium* or proper law of these juridic persons, see also CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, decree on February 2, 1984 in AAS 76 (1984) pp. 498-499.

[204] Cf. J. GARCIA MARTIN, *Le norme generali*, pp. 58-66.

[205] Cf. A. STICKLER, *Historia Juris Canonici*, p. 3.

[206] Cf. *Ibid*: "*Fons iuris insuper significare potest omnes formas, apparitiones, media, locos, documenta, monumenta, libros, collectiones, quibus ius innotescit. Fontes iuris hoc sensu vocatur: Fontes cognoscendi, cognitionis, notitiae, scientiae, sciendi, cognoscitivi, indicativi, externi, formales: sunt sunt fontes, quibus ius cognoscitur. Sensu lato omnia media cognoscendi ius hoc termino comprehenduntur.*"

[207] Cf. *Ibid*., p. 4.

[208] The Sacred Scriptures contain seventy-two books as decreed by *De canonicis scripturis* of the Council of Trent on April 8, 1546. Cf. A. STICKLER, *Historia Juris Canonici*, pp. 9-12.

[209] The Sacred Tradition is considered as the totality of the Revealed Truth that the Apostles put together coming from the same Word of Christ and is received from the Holy Spirit and the same Truth deriving from the teaching of the Fathers of the Church and of the ecclesial Authorities. Cf. A. STICKLER, *Historia Juris Canonici*, pp. 12-13.

of creation.[210] Thus, it is right "to affirm that the divine natural and positive law is the foundation of *ius canonicum*."[211] The sources of cognition of human law are the collections of ecclesiastical norms in whatever names they are called such as co*stitutiones*, c*ollectiones*, d*ecreta*, c*odices* and the like containing the juridic norms enacted by the competent legislative authorities of the Church.

Therefore, the Universal law of the Church in juridic canonical order is composed not only of *ius humanum* but of *ius divinum* as well; and the Code of Canon Law contains in different points the provisions that *canonize* the natural moral law. This comprises the uniqueness that constitutes the unity and universality of the *ius ecclesiae*. It is therefore the obligation not only of the ecclesiastical authority but also of the faithful not only to defend and promote with vigour the unity of the Church's law but also "to protect the divine positive and natural law as constitutive element of Canon Law".[212]

3.2 Canons with references to the natural law

The fact that the natural moral law is one of the constituent components of *the ius humanun ecclesiasticum* is the very reason why there are many applications of its principles not only in some specific canonical norms but also in the general principles of ecclesiastical law.[213]

Among the canons that, in one way or another, are related to natural law; very few give direct mention of it, while all the rest have only indirect reference to it. These canons are not sufficient to give us a clear view on the comprehensive notion of *ius naturale* and the range of its influence in the canonical order. However, this choice of the legislator is reasonable for the fact that it is not his duty to define legal institutions in the legislative text but to establish norms that will assure an orderly fulfilment of rights and duties of any given community. The definition and explication of the legal institutions are tasks entrusted to the legal sciences and, in the case of *ius canonicum*, to the theological discipline and canonical jurisprudence. However, a brief overview of these canons can help the reader to have a general awareness on the profound influence and relevance of natural law in the canonical norms and traditions of the Church.

3.2.1 Canons with indirect references to the natural law

There are some canons without explicit reference to natural law but are directly related to it for specific reasons like can. 6, can. 24 §1 and can. 26.

3.2.1.1 Canon 6[214] - Law that is not abrogated by the enactment of Code of 1983

This canon regulates the relationship between the *ius novum* and *ius vetus.* The norm clearly rules that with the enactment of the CIC 1983 the following are abrogated: a) the CIC of 1917; b) other universal or particular laws contrary to the prescript of CIC 1983,

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[210] *Veritatis Splendor*, 40: "God gave this light and this law to man at creation".

[211] V. DE PAOLIS – A. MONTAN, "Il libro primo del Codice: Norme generali (cann. 1-203)," AA. VV., *Il Diritto nel mistero della Chiesa*, p. 243.

[212] *Communicationes* 40 (2008), p. 38: "*Allo stesso tempo il diritto universale della Chiesa dovrà difendere con forza e promuovere l'unità della Chiesa e tutelare il diritto divino positivo e naturale, costitutivo del diritto canonico.*"

[213] Cf. J. GARCIA MARTIN, *Le norme generali,* pp. 121-122.

[214] Can. 6: "*§1. Hoc Codice vim obtinente, abrogantur: (1) "Codex Iuris Canonici" anno 1917 promulgatus; (2) aliae quoque leges, sive universales sive particulares, praescriptis huius Codicis contrariae, nisi de particularibus aliud expresse caveatur; (3) leges poenales quaelibet, sive universales sive particulares a Sede Apostolica latae, nisi in ipso hoc Codice recipiantur; (4) ceterae quoque leges disciplinares universales materiam respicientes, quae hoc Codice ex integro ordinatur. §2. Canones huius Codicis, quatenus ius vetus referunt, aestimandi sunt ratione etiam canonicae traditionis habita.*"

unless particular laws are otherwise expressly provided for; c) any universal or particular penal laws issued by the Apostolic See, unless they are retained in CIC 1983; d) other universal disciplinary laws dealing with a matter which is regulated *ex integro* by CIC 1983; e) other customs, universal and particular, centenary or immemorial, presently in force and are contrary to the prescripts of the *ius novum*[215].

On the contrary, among the laws that remain in force in spite of the provision of this canon are: 1) the *ius divinum*, whether natural or positive, occupies the primary place, then; 2) the universal laws outside the Code that are not contrary to the CIC 1983 and whose materials have not been reorganized by it[216]; 3) the particular customs not contrary to the present Code;[217] 4) the laws concerning the Roman Curia and its organizations.[218]

The provision of can. 6 of the present Code does not explicitly mention that *ius divinum* remains in force, unlike the norm of can. 6 in the previous Code with a deliberately expressed rule concerning it:

> "Among the other disciplinary laws now in force, if they are contained neither explicitly nor implicitly in the Code, they should be said to have lost their force, unless they are repeated in liturgical books, or *unless the law is of divine law, whether positive or natural*."[219]

The CIC 1983 does not consider it necessary to reaffirm the unchanging effectivity of *ius divinum*, natural and positive, insofar as it constitutes not only the foundation of Canon Law but also for the fact that *natura sua*, there is no human authority on earth that can abrogate a divine decree; the assertion of this kind will obviously turn out to be a redundancy.[220]

3.2.1.2 Canon 22[221] - The canonization of civil laws

The Universal Church, in the more than two thousand years of her existence, has already mastered the art of constructive relationship between the Church and State.[222] She has adopted, in many cases, the norms of civil legislations which were considered not only valid but also necessary for the structures and institutions of the ecclesial and ecclesiastical order.[223] In fact, by reception she adopted especially the Roman law (*ratio scripta*) in the

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[215] Cf. Can. 5 §1.

[216] This is an opinion upheld by some authors: L. CHIAPPETTA, *Il Codice di diritto canonico. Commento giuridico-pastorale*, Napoli 1998, vol. I, p. 12; B. GANGOITI, "De las normas generale," in A. BENLLOCH POVEDA, *Código de Derecho Canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, Valencia, 1993, p. 15; J. GARCIA MARTIN, *Le norme generali*, p. 42.

[217] *Ad normam* can. 5 §1, customs that are contrary to the *ius novum* unless they are centenary and immemorial and are not prohibited by the Code and can be tolerated if in the judgment of the ordinary they cannot be removed due to circumstances of place and persons.

[218] Cf. P. V. PINTO, *Commento al Codice di Diritto Canonico*. Urbaniana University Press, Roma 1985, on can. 6, p. 4; J. GARCIA MARTIN, *Le norme generali*, p. 43. The English wording from now onward is the writer's translation from the Italian text.

[219] E. PETERS, *The 1917 Pio-Benedictine Code of Canon Law*. Ignatius, San Francisco, 2001, can. 6, 6°, p. 31.

[220] Cf. P. V. PINTO, *Commento al Codice*, on can. 6, p. 7: "*Non sono invece abrogate [...] le leggi che riportano il ius divinum, sia naturale che positivo. Il Codice non ne fa più menzione, come faceva invece il CIC 17 al can. 6, 6°, ritenendolo ovvio.*"

[221] Can. 22: "*Leges civiles ad quas ius Ecclesiae remittit, in iure canonico iisdem cum effectibus serventur, quatenus iuri divino non sint contrariae et nisi aliud iure canonico caveatur*."

[222] Cf. M. OLIVERI, *Natura e funzioni dei Legati pontifici nella storia e nel contesto ecclesiologico del Vaticano II*. Liberia Editrice Vaticana, Città del Vaticano, 2nd ed., 1982, pp. 286; R. A. GRAHAM, *Vatican Diplomacy; a study of Church and State on the international plane*, Princeton University Press, Princeton, 1959, pp. 442.

[223] See F. LAURIN, *Introductio in Corpus Iuris Canonici: cum appendice brevum introductionem in corpus juris civilis continente*. Herder, Friburg, 1889, pp. 284; J. GAUDEMET. *La formation du droit séculier et du droit de l'Église aux*

form of *ius commune* in the Code of 1917; and by doing so, the norms of such legal system were applied and have become a part of the *ius humanum ecclesiasticum.*[224]

This juridico-canonical phenomenon of adoption and reception - wholly or partly - of the civil laws in *ius canonicum* is commonly known as «canonization». By canonizing a law that belongs materially and formally to another legal system, the Church makes it as her own and she confers upon it the force of an internal law valid for her faithful. The principle that lies behind the «canonization of the civil laws» is the sovereignty of the two orders or the so-called *utrumque ius*: Church (ecclesial society) and State (civil society). This has a vital relevance since faithful belonging to the Church do not cease to be citizens of their respective countries and they are, concomitantly, subject to these two distinct legal systems. All nations are by nature sovereign States; their legal order and norms on specific matter differ from one place to another. The difficulty in containing these differences in one Code applicable for all the faithful of the Universal Church and at the same time for all citizens of each country is the cause of adoption and reception of the civil laws by canonization.

Canon 22 enunciates a general principle: "the civil laws to which the law of the Church yields are to be observed in canon law with the same effects." Those civil laws are mandatory insofar as the Church made them her own and adopted them to discipline specific areas of concern. However, the law of the Church does not yield to the civil law of a particular State, but only in those places where the faithful are in need of such norm to discipline matters that involved their being faithful and citizens.[225] When canonized, those civil laws should be observed with canonical obedience.

There are two limits set by the canon: "unless they are not contrary to divine law and unless canon law stipulates otherwise". On the second limitation, the provisions of the civil law find restriction on the *ius canonicum* itself. If the provisions of the canon law stipulated differently, obviously those of the civil law cannot be canonized. It is, therefore, necessary to take into consideration the conformity of the provisions of the civil law that are objects of canonization to the provisions on the Code of Canon Law. In other words, there should always be a concord between the canonized and canonical norms.

With regard to the first limitation, i.e., divine law. By the mere fact that *ius divinum – natural and positive* – is a constitutive part of Canon Law, all the provisions of the State contrary to it are automatically excluded in the process of canonization. Therefore, any civil legislation that is contrary to the divine natural and positive law cannot produce any legal effect in the canonical juridical system. The Church cannot canonize such law neither by adoption nor by reception because the canonical norms cannot be opposed to the will of God who is the foundation of the divine constitutionality of Canon Law.

3.2.1.3 Canon 24 § 1[226] *– Custom contrary to divine law cannot obtain the force of law*

This canonical provision sets forth the primary limit for the formation of a custom, i.e., it must not be contrary to the *divine natural and positive law*.[227] Custom is usually formed by

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IVe et Ve siècles. Sirey, Paris, 1957, pp. 220; ID., *Legislazione imperiale e relgione nel IV secolo*. Augustinianum, 2000, pp. 183; L. MUSSELLI, *Chiesa cattolica e comunità politica*. CEDAM, Padova, 1975, pp. 155.

[224] See G. FALCHI, *Fragmenta Iuris*, especially 43-182 with rich bibliography.

[225] Cf. J. GARCIA MARTIN, *Le norme generali,* p. 130.

[226] Can. 24 §1: "*Nulla consuetudo vim legis obtinere potest, quae sit iuri divino contraria*."

[227] Cf. J. GARCIA MARTIN, *Le norme generali,* p. 142.

two distinct elements: material and formal. The material element consists of a normative practice that an ecclesiastical community wishes to observe. The formal element is the approval of the said custom by the competent ecclesiastical authority.

Thus, a custom has the force of law only if it is introduced by the community of faithful and has been approved by the legislator whether universal or particular. The formal judiric element that may legislate universally or particularly has the primary duty of evaluating if the custom being introduced is not contrary to the divine law *ad normam can.* 24 § 1 – "No custom that is contrary to divine law can obtain the force of law."

The legislator of the present Code did not deem it necessary to specify that in the concept of *ius divinum* both divine natural and divine positive laws are included. Once again the reason is simply because in the traditional canonical language which is still in use to date, the law of divine origin or the *ius divinum* is composed of "*il diritto divino naturale e il diritto divino positivo (ius divinum naturale e ius divinum positivum)*."[228] Therefore, there is no need to detail the traditional classification of divine law because it is obviously implicit especially for those who are very much familiar with the canonical tradition.

3.2.1.4 Canon 26 [229] – Consuetudine contra legem

Canon 26 establishes the condition for the approval of a custom contrary to the canons of the Code. The approval can be given in two distinct modes: special and legal.[230] The period of the time prescribed in order for the custom of this kind to acquire the force of law is "thirty continuous and complete years" while "one hundred continuous and complete years" for a custom not only contrary to canon law but also containing the clause that forbids (*clausulam prohibentem*) such formation in the future.

Unlike can. 27 of CIC 1917, can. 26 of CIC 1983 does not make explicit mention of natural law. In fact, the canon of *ius vetum* clearly stated that

> "no custom can derogate from divine law, whether natural or positive; neither can it prejudice ecclesiastical law, unless the custom was reasonable and has been observed for forty continuous and complete years; but against an ecclesiastical law that contains a clause prohibiting future customs, only a reasonable custom can be prescriptive if it is centenary or immemorial."[231]

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[228] V. DE PAOLIS – A. MONTAN, "Il libro primo del Codice," p. 242: "*Viene denominato diritto divino naturale quello che è deducibile dalla stessa dignità dell'uomo, diritto divino positivo quello che deriva dalla rivelazione. A questo diritto divino positivo si riallacciano anche le norme, che poste da Cristo o riconducibili alla sua intenzione, sono relative alla costituzione della Chiesa.*"

[229] Can. 26: "*Nisi a competendi legislatore specialiter fuerit probata, consuetudo vigenti iuri canonico contraria aut quae est praeter legem canonicam, vim legis obtinet tantum, si legitime per annos triginta continuos et completos servata fuerit; contra legem vero canonicam, quae clausulam contineat futuras consuetudines prohibentem, sola praevalere potest consuetudo centenaria aut immemorabilis.*"

[230] "*L'approvazione speciale può essere espressa o tacita, ma sempre deve essere manifestata: non ci può essere incertezza. In ogni caso si richiede un atto positivo del legislatore, non è sufficiente la «non disapprovazione». In forza di questa approvazione la consuetudine ha forza di legge anche se non è passato il tempo di trenta anni. [...] L'approvazione legale è quella fatta secondo le norme stabilite dallo stesso legislatore. Significa che qualsiasi consuetudine, osservata durante il tempo richiesto dal diritto e con i requisiti, o gli elementi che la costituiscono come tale, quindi la comunità capace, la razionalità e l'intenzione, ottiene forza di legge o valore giuridico in forza della stessa legge*" (J. GARCIA MARTIN, *Le norme generali*, pp. 143-144).

[231] E. PETERS, *The 1917*, can. 27, p. 38.

The custom contrary to the written law is called *consuetudine contra legem* because it introduces a law opposed to the written canonical norm and it either abrogates *ex toto* or in part its provision. In interpreting can. 26 of the present Code in light of the previous provision and taking into consideration the enunciation of can. 27, especially on divine law, it is obvious that no custom can ever go against the precepts of divine and natural law insofar as divine law is not an object of any modification or abrogation on the part of any human authority.[232] Once again, the legislator of CIC 1983 did not repeat the enunciation of the previous Code for the very reason that any law, written or non-written, cannot obtain the force of law unless it is in conformity with the *ius divinum* and absolutely not contrary to its precepts.

3.2.1.5 Canon 125 §1 – Physical violence

An act placed out of force inflicted on a person from the outside, which the person was not able to resist in any way, is considered as never to have taken place. The *vis* is considered by the legislator as violence that in no way can be resisted[233] (*cui ipsa nequaquam resistere potuit*). It may deal with physical or chemical means as force, so strong that it is totally irresistible. The doctrine distinguishes the violence into two: absolute and relative; however, the canon recognizes the invalidating force only to the former.[234]

The person inflicted with an absolute violence cannot perform a free act; if he does, he does it not in a human way because of lack of freedom. Obviously, "a juridic act done «*ex ipsa vi*» is invalid in accordance with the natural law, because a violence of this kind absolutely deprives one of his freedom."[235]

3.2.2 Canons with direct references to the natural law

The canons that have direct references to natural law explicitly declare the principles of their relationship like can. 1259, can. 1299, can. 1290, can. 1299 can. 197 and can. 199.

3.2.2.1 *Canon 1259[236] - The right to acquire temporal goods by just means of natural law*

Canon 1259 recommends that in asserting her right, the Church has to choose the right modes of acquiring temporal goods, i.e., through the various institutions of natural and positive law because they are considered to be in accordance with the norms of natural, human and social justice.[237] It is obvious that the Church can make use of the

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[232] Cf. P. V. PINTO, *Commento al Codice,* on can. 26, p. 26.

[233] "*Maioris rei impetus cui resisti non potest*" (D. 4. 2. 2).

[234] Cf. J. GARCIA MARTIN, *Le norme generali*, pp. 461-462.

[235] J. F. CASTAÑO, *Il sacramento del matrimonio*, Pioda Gianfranco, Roma, 2° ed., 1992, p. 394. The English wording from now onward is the writer's translation from the Italian text.

[236] Can. 1259: "*Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus aliis licet*."

[237] Cf. E. ROBILANT, *Significato del diritto naturale nell'ordinamento canonico.* Giappichelli, Torino, 1954, pp. 211. In pages 126-127, the Author illustrates the opinions of some iusnaturalists and modern legal writers on the accuracy of the affirmation that natural law has legal force and its precepts can be considered as valid integrative norms for the various legal institutions such as ownership, donation, *testate* and *intestate* succession and contracts. He affirms that, "*i giusnaturalisti più accreditati nel mondo cattolico affermano, contrariamente a quello che è portato a ritenere il giurista moderno consapevole del travaglio speculativo attraverso a cui è passata recentemente la concezione del diritto naturale, affermano, dunque, che quest'ultimo può rispondere ai requisiti sopra.*" Therefore, the natural law can provide norms that are certain and to which the positive law should

different modes of acquiring ownership because can. 1254 has already enunciated the general principle that she possesses the innate right to exercise with freedom and with autonomy any positive act pertaining to acquisition, ownership, administration and alienation independent from any civil power.[238]

Consequently, the canon exhorts the legitimate means of acquiring temporal goods with direct and unequivocal reference to the natural and positive law, though without exemplification. Since the Code does not indicate the modes classified as authentically deriving from natural and positive law, there is a need to confront with the legal traditions and institutions acknowledged not only by civil legislations but also by canonical tradition. The canon has an implicit reference to all the possible types of acquisition, whether original and derivative, handed to us by history from the Roman legal traditions up to the present; these traditions that have undergone changes, development and perfections are contemplated in many modern civil codes.[239] Some examples of the original modes of acquisition are occupancy, adverse possession, accession and discovery;[240] while legal agreements, testaments, title by descent and purchase are examples of derivative acquisition.[241] The CIC 1983 canonizes these legal institutions as institutionalization of natural law.[242]

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conform. He asserts that natural law is always generally conceived, at least in words as "a superior law, suspended on high above the positive law to which the latter should look at to; let itself be guided and limit itself by copying it on those norms which have in themselves the immediate effect." (Author's translation.) The positive law is considered, thus, as a practical application of natural law [...] or "*un doppione* (duplicate) *del diritto naturale per quanto riguarda le norme di maggiore importanza, e ad un complesso di disposizione integrative per quanto attiene alle norme non esplicitamente contenute nel diritto naturale*."

238 Cf. *Dignitatis humanae*, 4 and 13 ; *Communicationes* 5 (1983) p. 1; 12 (1980) p. 396.

239 Related reading materials: H. C. GUTTERIDGE, *Comparative law. An introduction to the comparative method of legal study and research.* University Press, Cambridge, 2nd ed., 1949, pp. 214; J. H. WIGMORE, *A Panorama of the world's legal systems*, St. Paul West Publishing Co., Minnesota, 3 voll., 1928; R. DAVID, *Major Legal Systems in the World Today*, Stevens, London, 2nd ed., 1978, pp. 584; M. A. GLENDON, *Comparative legal traditions: text, materials and cases on western law*. St. Paul, Minnesota, 2007, pp. 990; K. ZWEIGERT – H. KÖTZ, *An introduction to Comparative Law. I: The Framework. II: The institutions of private law*, North Holland Publishing Co., Amsterdam, 1977. H. W. EHRMANN, *Comparative legal cultures*, Prentice-Hall, Englewood Cliffs, N.J., 1976, pp. 172; H. J. LIEBESNY, *Materials on Comparative Law*, Washington, 1976, pp. 466.

240 Cf. P. V. PINTO, *Commento al Codice*, on can. 1259, p. 716.

241 Cf. *Ibid*.; A. TRABUCCHI, *Istituzioni*, pp. 412-23. J. NOLLEDO, *Civil Code of the Philippines 2008 revised edition.* National Bookstore Inc., Mandaluyong City, 2008, pp. 89-146.

242 Cf. *Decretum Gratiani*, D. I, C. 7; D. IV, C. 2. Some authors consider problematical the references to natural law: "It may be doubted that the natural law contains much of anything regarding specific modes of acquisition (other than to prohibit theft and fraud), or can appropriately be said to apply to nonnatural entities such as juridic persons." (J. BEAL – J. CORIDEN – T. GREEN [eds.], *New Commentary on the Code of Canon Law*, Paulist Press, New York, 2000, on can. 1259, p. 1460) On the contrary, authors of the Canonical and Romanistic traditions, differ on this specific question for the fact that the modes of acquisition are the product of the Romanistic legal traditions grounded on natural law (See, T. MEYER, *Institutiones iuris naturalis, seu, philosophiae moralis universae secundum principia s. Thomae Aquinatis*. Herder, Friburgi, 2 voll., 1900-1906; A. CASTELEIN, *Droit naturel; devoir religieux, droit individuel, droit social, droit domestique, droit civil et politique, droit international*, P. Lethielleux, Paris, 1903, pp. 965 ; V. CATHREIN, *Moralphilosophie. Eine wissenschaftliche Darlegung der sittlichen, einschliesslich der rechtlichen Ordnung*, Herder, Freiburg, 1904, 2 voll.) In fact, A. Castelein expounds the influence and function of the natural law in the modern legal institutions when he affirms that: «*En effet, comme la philosophie morale régit le Droit naturel, le Droit naturel régit, bien qu'avec moins de rigueur et de précision, l'ensemble des lois et des institutions, qui constituent le Droit positifs des peuples. Ce droit positif renferme deux parties : d'abord des déterminations plus précises et plus détaillées des principes du Droit naturel ;*

Though there is no explicit mention of natural law in its wording, can. 1256[243] is directly connected to can. 1259. Just by reading the norm, one can immediately identify a legal terminology that embodies the Canonical and Romanistic traditions of an institution grounded in natural law, i.e., *ownership*.

The "ownership right is considered by the iusnaturalistic tradition as an institution founded on natural law."[244] There are many reasons adopted by these authors in order to justify that the right of ownership is grounded in natural law and their reasons differ from one another; however, there is a common point that brings them together and it shows that the ownership right is «the best solution» that reason can ever formulate.[245]

A. Castelein, for example, affirms that the right of ownership has its foundation not only on the personal demand of freedom and the capacity for its perfection but also on the demand of social stability and public prosperity.[246] According to the author, the only theory that seems to be convenient is to attribute the right of property not to an abstract concept of the personality of man, of nature and of temporal goods as objects of ownership but to the purpose itself of these goods, i.e., ordained for the decorous growth and development of individual persons, of families and of human aggregations.[247] For T. Meyer, on the other hand, the primary and valid reason for the *right to own* is the moral impossibility to find another institution or another system for a just administration of temporal good other than ownership.[248]

Although the proponents of these theories differ on the primary ends and the immediate benefits of ownership on individuals and in the human society at large; at the end nobody seems to argue with the nuances because the right of ownership and the modes of acquiring temporal goods are grounded on rationality and expediency.[249] The

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ensuite des additions proprement dites, faites au Droit naturel, selon les besoins et les inspirations particulières des peuples, à travers les multiples contingences de leur histoire. Dans ce double ordre de prescriptions, le Droit positif, ne peut jamais contredire le Droit naturel. Là où le Droit naturel est suffisamment clair et fixe, le Droit positif doit s'y conformer comme à sa règle supérieure. Plus, dans les additions qu'il fait au Droit naturel, à raison de la nature particulière et variable des faits humains, le Droit positif s'inspire des principes du Droit naturel, qui seuls reflètent les besoins universels et permanents de la nature humaine, plus ce droit positif sera parfait. (A. CASTELEIN, *Droit naturel*, p. 22)» The various ways of acquiring ownership are usually contemplated in many civil codes of various legal systems as institutions handed down by the Romanistic tradition to the modern positive laws. These traditions were elaborated, corrected, updated to suit the needs of the modern times by peoples of different cultures and exigencies; the norms contained therein are considered and accepted by the iusnaturalists as grounded in natural law (cf. E. ROBILANT, *Significato del diritto naturale.* p. 149) precisely because they are in conformity with the natural reason and justice. This is very clear in Robilant's affirmation: "*si dichiara che i modi d'acquisto tradizionali sono di diritto naturale o discendono da esso perché sono conformi alla «ragione naturale», la qual cosa significa, in realtà, che rappresentano soluzioni migliori di quelle ad esse contrarie. I giusnaturalisti si sforzano, infatti, di dimostrare i vantaggi derivanti dalla loro soluzione e gli svantaggi di quelle opposte; in altre parole, la conformità al diritto naturale è data dal rispondere una determinata soluzione alle esigenze della ragione, o meglio, dal rispondere ad esse più di quanto rispondano le altre soluzioni formulate o formulabili*" (*Ibid.*).

[243] Can. 1256: "*Dominium bonorum, sub suprema auctoritate Romani Pontificis, ad eam pertinet iuridicam personam, quae eadem bona legitime acquisiverit*."

[244] E. ROBILANT, *Significato del diritto naturale.* p. 147: "*Come'è noto, il diritto di proprietà è ritenuto dalla tradizione giusnaturalistica istituto di diritto naturale.*"

[245] Cf. *Ibid*: "[...] *la soluzione cui non si può negare l'assenso, la soluzione vera insomma.*"

[246] Cf. A. CASTELEIN, *Droit naturel*, p. 259.

[247] Cf. V. CATHREIN, *Moralphilosophie*, vol. II, p. 300

[248] Cf. T. MEYER, *Institutiones iuris naturalis*, vol. II, pp. 128 and 154.

[249] Cf. E. ROBILANT, *Significato del diritto naturale.* p. 150.

institution of this kind, notwithstanding the test of time and place, continued its development and perfection simply because its principles are in conformity with the natural justice.

In synthesis, can. 1256 enunciates a general principle of natural law: the juridic person who has legitimately acquired the temporal good logically enjoys the ownership right.

3.2.2.2 *Canon 1299*[250] *- The capacity required by natural law for pious causes*

Canon 1299 is the first of the twelve canons that regulate the institution of pious causes with a particular importance given to the obligation of respecting the will of the donor who intends to dispose his assets and donate goods for the aforesaid purposes. The twelve canons can be divided into two groups. The first part (cann. 1299-1302) disciplines the legal and diligent ways of the execution of pious will; while the second part (cann. 1303-1310) illustrates the juridic constitution of pious foundations as the appropriate instruments for effecting pious wills.[251]

The first paragraph of can. 1299 has a direct and explicit reference to natural law. Anyone may dispose of his goods and donate it for pious causes by an act either *inter vivos* or *mortis causa* provided that he has the natural and canonical capacity required, respectively, by natural law and canon law.

Considered as legal contracts,[252] the *inter vivos* and *mortis causa* (*donatio*[253]) acts must have the essential elements of a valid contract of natural law.[254] Castelein lists down "*les conditions de droit naturel requises pour la validité de tout contrat, sont: 1) la capacité dans les parties de disposer librement de la chose qui est l'objet du contrat; 2) un consentement mutuel, libre, manifeste et coexistant; 3) un objet honnête, qui soit la matière du contrat.*"[255] These conditions are the legitimation of any contract in accordance with the principles of natural justice. Therefore, natural law requires that a person is capable of manifesting a "consent", i.e., a free and deliberate will[256] to give life to a "*negozio giuridico*" of this kind by a free disposition one's assets.[257]

Aside from the natural capacity, can. 1299 likewise requires the respect of some canonical provisions like can. 1301 where «clauses and conditions» may be deliberately demanded for an act of donation and can. 668 for the administration of good by the

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[250] Can. 1299: §1. *Qui ex iure naturae et canonico libere valet de suis bonis statuere, potest ad causas pias, sive per actum inter vivos sive per actum mortis causa, bona relinquere.* §2. *In dispositionibus mortis causa in bonum Ecclesiae serventur, si fieri possit, sollemnitates iuris civilis; quae si omissae fuerint, heredes moneri debent de obligatione, qua tenentur, adimplendi testatoris voluntatem.*"

[251] Cf. *Communicationes* 5 (1973) p. 10; 9 (1977) pp. 272-273.

[252] Cf. V. DE PAOLIS, *I beni temporali della Chiesa. Edizioni* Dehoniane, Bologna, 1995, pp. 196-197.

[253] Cf. A. TRABUCCHI, *Istituzioni*, p. 852.

[254] Cf. *Ibid*., pp. 599-648.

[255] A. CASTELEIN, *Droit naturel*, p. 274.

[256] Natural capacity means the human ability to perform an action with the use of reasons, i.e., *capax* of intellectual and volitive acts. It is opposed to actions referred to by philosophers as *actus hominis*.

[257] Cf. E. ROBILANT, *Significato del diritto naturale.* p. 150: "*Per quanto riguarda la capacità «di disporre dei propri beni», sia la dottrina canonistica che i giusnaturalisti più spesso invocati da questa sono ancora meno espliciti. Da quel poco che dicono si può tuttavia arguire che elementi necessari di tale capacità sono la capacità di intendere e di volere, e la libera disposizione dei beni, intesa, dato che su di essa non vengono forniti ulteriori chiarimenti, come diritto sui beni stessi e contemporanea non lesione di diritti altrui. Anche qui, perciò, la norma di diritto naturale viene a identificarsi con la soluzione ritenuta migliore.*"

professed members of religious institutes.[258] Furthermore, there is a need to comply with the requirements of a valid legal transaction adopted by the civil legislations and acknowledged as such by the Code of Canon Law through the «doctrine of canonization and reception», i.e., the provisions of civil law become applicable to a specific canonical institution provided that they are not contrary to *ius divinum* – natural and positive – and the norms of Canon Law.

3.2.2.3. Canon 1290[259] – The canonization of civil contract not contrary to ius divinum

Canon 1290 declares the fundamental principle on the canonization of the provisions of civil law on contracts – general and particular – adopted in the place. This canonical norm implies that the legal provisions and obligations deriving from an authentic civil law contract are likewise adopted by the *ius ecclesiasticum* but with two exceptions: that such provisions «are not contrary to *ius divinum* or are not otherwise stipulated in canon law »[260] and «are respectful of the prescript of can. 1547»[261].

The first part of the first exception is a precept of primary importance because it is immutable, i.e., *ius divinum*. In accord with the juridico-canonical general principle, any provision contrary to divine law, may it be natural or positive, automatically precludes the effectivity of the contract even though it has the necessary requirements of a valid and legitimate civil transaction. In this case, the canonization and reception of the provision of civil law is by nature not acceptable. Hence, the precepts of divine law prevail on the positive human law may it be civil or ecclesiastical.

In the canonization of secular contracts, the provisions set forth by canon law, the second part of the first exception, should be observed. Some of these are the following: the general principle on canonization and reception of the provisions of civil law;[262] the prescription;[263] the protection at civil law;[264] compliance to the provisions of civil law to avoid damage that can be inflicted to the Church;[265] the acts of extraordinary administration;[266] the complementary norms on alienation;[267] the canonical provision on leasing;[268] the safeguard and protection of ecclesiastical goods by available legal means;[269] the obligations of ecclesiastical administrators.[270] These canons are reminders that the provisions of canon law are complementary to those of the civil law and vice versa; thus, the compliance with canon law is as important as the compliance with civil law.

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[258] Cf. D. ANDRÉS, *Le forme di vita consacrata*. EDIURCLA, Roma, 5th ed., 2005, pp. 483-506; especially pp. 503-506.

[259] Can. 1290: "*Quae ius civile in territorio statuit de contractibus tam in genere, quam in specie et de solutionibus, eadem iure canonico quoad res potestati regiminis Ecclesiae subiectas iisdem cum effectibus serventur, nisi iuri divino contraria sint aut aliud iure canonico caveatur, et firmo iure canonico caveatur, et firmo praescripto can. 1547.*"

[260] Cf. CIC 1917 can. 1529.

[261] Cf. *Communicationes* 5 (1973) p. 101, n. 41; 12 (1980) pp. 427-428, can. 44; M. C. ARROBA, *Diritto processuale canonico*. EDIURCLA, Roma, 5th ed. 2006, pp. 452-467; especially p. 455.

[262] Cf. can. 22.

[263] Cf. can. 197.

[264] Cf. can. 1284 § 2, 2°.

[265] Cf. can. 1284 §2, 3°.

[266] Cf. cann.1277 and 1281.

[267] Cf. cann. 1291-1294.

[268] Cf. can. 1297.

[269] Cf. can. 1274 §5.

[270] Cf. can. 1284.

The second exception is the prescript of can. 1547. When contractual dispute in civil court precludes the gathering of evidence through witnesses, the ecclesiastical tribunal will not adopt such provision. The ecclesiastical administrators of justice may admit testimony from witnesses in contractual issues; however, they should take into consideration the consequences of this option.

3.2.2.4. *Canon 197*[271] *– Prescription: an institution of natural law*

Canonical prescription is a "means of acquiring or losing subjective rights and of freeing oneself from obligations" established *ad normam* can. 197 and is grounded "on good faith for an uninterrupted possession or exercise of right[272] of specified duration"[273] on prescriptible matters.[274]

It is a legal institution adopted by peoples long before its development in the Roman classical and post-classical periods. According to some authors, there were already some traces of the institution as early as the archaic period especially in the *Lex Duodecim Tabularum* (449) BC[275]; though it was methodically developed in the succeeding periods particularly during the *principate* (c. 1st century BC – 3rd century AD) and *dominate* (3rd century AD – 4th century AD) and systematically codified under Justinian legislations.[276]

The prescription is considered by many authors as legal institution in conformity with the norms of natural law since it is an essential exigency of an agreeable and disciplined acquisition of properties that is demanded for a peaceful social living. In fact, without prescription "enormous uncertainty would reign on the issue about the legitimacy of the system of *de facto* ownership".[277] Moreover, since it is for the advantage of the same legal institution that a prescribed time should be established and that all the controversies and claims should be settled in favour of the effective and *bona fide* possessor[278] that prescription, in response to the demand of natural justice, is the "*soluzione migliore del problema.*"[279]

There are essential elements for the validity of the canonical prescriptions, *viz.*, object, just cause, good faith, possession and time. Generally, any object or action is prescriptible. The restriction on prescription is established in can. 199 which categorically determines the rights and obligations subject to prescription.

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[271] Can. 197: "*Praescriptionem, tamquam modum iuris subiectivi acquirendi vel amittendi necnon ab obligationibus sese liberandi, Ecclesia recipit prout est in legislatione civili respectivae nationis salvis exceptionibus quae in canonibus huius Codicis statuuntur.*"

[272] "*La norma della legislazione precedente, seguendo i principi del diritto, disponeva che senza il possesso era impossibile la prescrizione (sine possessione praescriptio non procedit). Il can. 198 non parla di possesso, perché non considera esclusivamente la prescrizione dei beni. Il possesso di una cosa o l'esercizio di un diritto, per essere base della prescrizione, deve riunire i seguenti requisiti: 1° Giuridico, chiamato anche civile o dominativo. Consiste nel possedere la cosa a nome proprio e con l'animo di padrone. 2° Continuo o senza interruzione. La buona fede è richiesta non solo all'inizio, ma per tutto il tempo che dura la prescrizione. [...] 3° Giusto, non viziato. I vizi quali la violenza, la clandestinità rendono invalido il possesso*" (J. GARCIA MARTIN, *Le norme generali*, pp. 650-651).

[273] Cf. can. 198.

[274] Cf. can. 199.

[275] Cf. J. W. WESSELS, *History of the Roman-Dutch law*. Lawbook Exchange, Clark, N.J., 2005, p. 634.

[276] Cf. F. SCHULZ, *Classical Roman Law*. Clarendon Press, Oxford, 1951, pp. 355-361.

[277] V. CATHREIN, *Moralphilosophie*, vol. II, p. 339.

[278] Cf. *Ibid.*, p. 343.

[279] E. ROBILANT, *Significato del diritto naturale*. p. 151.

3.2.2.5. *Canon 199*[280] *- The rights and obligations which are of the divine natural and positive law are not subject to prescription*

This canon enumerates the rights and obligations that are excluded in the reckoning of time for prescription. The exempt, by nature, does not undergo the prescribed duration of time. Therefore by nature the following are not subject to prescription: the rights that can be obtained from the apostolic privilege;[281] the rights and obligations that directly concern the spiritual life of every Christian;[282] the certain and undoubted boundaries of ecclesiastical territories;[283] the mass offering and obligations;[284] the provisions of an ecclesiastical office that requires the exercise of a sacred order *ad normam iuris*;[285] the right of visitation and the obligation of obedience in order that the faithful cannot be visited by any ecclesiastical authority or are no longer subject to any authority.[286]

However, before this list and above everything else, the rights and obligations deriving from *ius divinum*, natural and positive, are absolutely outside prescription.[287] No human authority, ecclesiastical or civil, can exercise any power on them and no custom can ever prevail against its precepts.[288] The rights and obligations protected by this canonical norm are those embodied in some of the Church's divine institutions: baptism[289], matrimony[290] and primacy of the Roman Pontiff[291]. Likewise, the obligations of every man to discover and understand the mystery of God and of the Church cannot be prescriptible[292], nor any judicial action on the status of the person.[293] The time element is essential for the prescription; however, it has no relevance in the cases mentioned above because the precepts of divine law are not subject to time.

3.3 Marriage and Natural law

Marriage is not simply a religious reality; first of all, it is a human reality and, consequently, it is a social and civil reality that has essential relevance for both believers and non-believers. In order to have an inclusive comprehension of the complexity of its

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[280] Can 199: "*Praescriptioni obnoxia non sunt: (1) iura et obligationes quae sunt legis divinae naturalis aut positivae; (2) iura quae obtineri possunt ex solo privilegio apostolico; (3) iura et obligationes quae spiritualem christifidelium vitam directe respiciunt; (4) fines certi et indubii circumscriptionum ecclesiasticarum; (5) stipes et onera Missarum; (6) provisio officii ecclesiastici quod ad normam iuris exercitium ordinis sacri requirit; (7) ius visitationis et obligatio oboedientiae, ita ut christifideles a nulla auctoritate ecclesiastica visitari possint et nulli auctoritati iam subsint*."

[281] Cf. can. 199, 2°.

[282] Cf. can. 199, 3°.

[283] Cf. can. 199, 4°.

[284] Cf. can. 199, 5°.

[285] Cf. can. 199, 6°.

[286] Cf. can. 199, 7°.

[287] Cf. can. 199, 1°.

[288] Cf. can. 24 §1.

[289] The rights and duties acquired in baptism, cf. can. 204 §1; 781.

[290] Cf. "*Novae Legis septem sunt sacramenta: videlicet baptismus, confirmatio, Eucharistia, poenitentia, extrema unctio, ordo et matrimonium. Haec vero nostra et continent gratiam et ipsam digne suscipientibus conferunt.*" (*Concilium Florentinum*: Dz-Sch 1310); "*Si quis dixerit, sacramenta novae Legis non fuisse omnia a Iesu Christo Domino nostro instituta, aut esse plura vel pauciora quam septem, videlicet baptisimum, [...], aut etiam aliquod horum septem non esse vere et proprie sacramentum: anathema sit.*" (*Concilium Tridentinum*: Dz-Sch 1601).

[291] Cf. CCC 880-885; 937.

[292] Cf. can. 748 §1.

[293] Cf. can. 1492 §1; M. C. ARROBA, *Diritto processuale*, pp. 253-268; especially p. 458; J. BEAL – J. CORIDEN – T. GREEN [eds.], *New Commentary on the Code of Canon Law*, Paulist Press, New York, 2000, on can. 1492, p. 1650.

multifaceted reality, the need to recourse not only to legal discipline but also to different fields of knowledge such as liberal arts and sciences is a necessity. Each in its own field contributes in setting forth its nature, ends and values.

This part of study does not intend to expound the institution of marriage in its complex reality. It is, rather, an attempt to enumerate some of the direct and indirect references of natural moral law to the institution of marriage contemplated in the Code of Canon Law and, eventually, to understand its principles in the light of Romano-canonistic traditions and doctrine.

3.3.1 The general principle

When using the term *marriage*, one should consider that it may mean two distinct realities, i.e., either marriage as a *natural institution* or marriage as a *sacrament*. However, marriage in its comprehensive meaning includes both the natural and the supernatural institutions.

3.3.1.1 Marriage as institution of natural law

Marriage as an *institutum naturale* is a fact of nature that the Church has always acknowledged and proclaimed in the exercise of her *munus docendi*.[294] In fact, John Paul II in his allocution to the tribunal of the Roman Rota asserts that "marriage is an institution based on natural law, and its characteristics are inscribed in the very being of man and woman"[295] He stresses that "precisely because it is a reality that is deeply rooted in human nature itself, marriage is affected by the cultural and historical conditions of every people. The Church, therefore, cannot prescind from the cultural milieu"[296] but take it into consideration in understanding the range of its influence in the Church's doctrine and discipline on marriage.

As a natural institution, marriage is not only a biological and human relationship but also a legal reality. It is a biological fact insofar as marriage between two persons of opposite sex is the most suitable human relationship wherein sexual union for a reproductive end can be realized. In fact, the sexuality, the capacity to procreate and the human reproductive anatomy are constitutative elements of any marriage may it be natural or supernatural. However, the psychological values of man and his dignity as a human person cannot exhaust marriage into a mere acts of sexuality and carnal knowledge that would mean at times a sexual union guided by instincts. This is because marriage is not only a human fact but also a human act. It necessitates that sexual union which is generally driven by instincts should be intentionally motivated by human affections; it should be accepted and mutually performed with knowledge, freedom and intention. These acts are proper of human beings with intellect and will capable of constructing a bond that will place them together in another legal status, i.e., the married state. Therefore, it becomes a legal reality wherein the union between man and woman is regulated by specific norms

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[294] BENEDICT XVI, "Il matrimonio non è scelta impossibile," Alloc. alla Rota Romana, in *L'Osservatore Romano on-line edition*, 30 gennaio 2009 at http://www.vatican.va/news_services/or/or_quo/text.html#2: "*Anzi, la riaffermazione della innata capacità umana al matrimonio è proprio il punto di partenza per aiutare le coppie a scoprire la* realtà naturale del matrimonio *e il rilievo che ha sul piano della salvezza.*"

[295] JOHN PAUL II, *Allocutio* to the tribunal of the Roman Rota, January 28, 1991 in *The Vatican Website* at http://www.vatican.va/holy_father/john_paul_ii/speeches/1991/documents/hf_jp-i_spe_19910128_roman-rota_en.html.

[296] *Ibid*.

that are juridically relevant for its validity and nullity through the so-called *matrimonial contract*.

3.3.1.1.1 Marriage as «contract of natural law»

This is not the place to delve into the nature and historical development of *contract* in the Roman legal system but it is sufficient to mention some of the salient points of this institution especially in relation to marriage.[297]

In the beginning of the 4th century, the Roman institutions on marriage and family had undergone a profound transformation because of the influence of the new Religion. A new concept of marriage has started to define its very nature, formation and structure. In fact, the juridic aspect of marriage began to emerge when it was gradually considered as a legal and bilateral agreement which was formed on the basis of conventional relationship between man and woman manifested through consent. The cessation of the consent of both partners or of at least one of them no longer dissolves the *iustæ nuptiæ*;[298] unlike in the classical period[299] when the bond was automatically dissolved by the withdrawal of the effective consent of at least one of the parties. As the new period[300] began, the dissolution of *legitimæ nuptiæ* demanded a positive act of the will that has the revocation of consent as its object.[301] It follows that once a *legittimum matrimonium* is formed, it is no longer subject to the arbitrary will of the parties; it is already independent of the persistence of their consent. This juridic development and transformation can be attributed to the pressure exercised by the Church on the Emperors and is considered as one of the most significant influences of Christianity in Roman law.[302]

Among the three elements of marriage: *conubium*, *pubertas* and *consensus*, the Romans in the post-classical period knew what *matrimonium facit*, and it was, *consensus*.[303] In fact, most of the scholars generally agree on the assumption that during this period *nuptiae* was

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[297] Recommended readings on this topic: P. E. CORBETT, *The Roman law of marriage*. Clarendon Press, Oxford, 1969, 254pp; J. GAUDEMET, *La doctrine canonique médiévale*. Aldershot UK, 1994, 323pp; ID., *Il matrimonio in Occidente*, SEI, Torino, 1989, 434pp; O. ROBLEDA, *Introduzione allo studio del diritto privato romano*, PUG, Roma, 1979, 404pp; ID., "Sobre el matrimonio en derecho romano," *Studia et Documenta Historiae Iuris* 37 (1971) pp. 337-350; E.VOLTERRA, *Lezione di diritto romano: il matrimonio romano*, Roma, 1961, 459 p; ID., *Istituzioni di diritto privato romano*, La Sapienza, Roma 1961, 828pp.

[298] Cf. C. FAYER, *La Famiglia Romana: aspetti giuridici e antiquari*. L'Erma di Bretschneider, Roma, 1994, p. 153.

[299] In the Roman classical period (from the 1st to the 3rd century, cf. "Periodizzazione del Diritto Romano." *Dizionario Giuridico*, p. 386), marriage is considered as a concrete situation of fact (*situazione di fatto*) and *consensus* is only one of the required elements of its formation. This is clear in some definitions given by Roman jurists like Modestinus: "*Coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*" (D. 23. 2. 1) and Ulpian: "*Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuam consuetudinem vitae continens*" (I. 1. 9, 1).

[300] The Roman post-classical period started from the 3rd century with the ascent of Diocletian (c. 283 AD) to the Imperial throne until the 6th century during reign of Emperor Justinian (cf. "Periodizzazione del Diritto Romano." *Dizionario Giuridico Romano*, p. 386).

[301] This new concept applied in the imperial legislations is clearly expressed in one of the constitutions of Emperor Theodosius II in 449: «*Consensu licita matrimonia posse contrahi, contracta non nisi misso repudio solvi praecipimus*» (Cod. Iust. 5, 17, 8).

[302] Cf. "Matrimonium." *Dizionario Giuridico Romano*.

[303] Cf. O. ROBLEDA, "La definizione del matrimonio nel diritto romano," in *La definizione essenziale giuridica del matrimonio*, Atti del colloquio romanistico-canonistico, 13 – 16 marzo 1979. Roma, 1980, p. 43.

already considered a particular type of contract.[304] This is confirmed by some of the most important declarations in the Justinian compilation like "*nuptias... non concubitus, sed consensus facit*,"[305] "*nuptiae consistere non possunt nisi consentiant omnes*,"[306] "*quia consensus opus est*",[307] all of them with specific reference to the «*consensus*» as an important element for a valid matrimonial contract: "*contractum matrimonium, quod consensus intelligitur.*"[308] It can be said that at least in the 9th century, the doctrine had already applied the concept of contract to marriage[309] and by the 13th century the term *contractus* had already become a part of the definition of marriage;[310] though there was still a doubt whether the Roman Law had considered marriage as a contract.[311]

There has been a discussion among the theologians and jurists, before and after the Vatican Council II and especially during the revision of the Code of Canon Law, on the use of the term *contractus* and its application to the concept of marriage. According to some jurists, *contract* cannot be applied to marriage for the fact that it is considered as a private transaction that involves property and the persons taking part in that kind of legal agreement cannot set conditions contrary to the end, essential properties and to the nature itself of marriage; neither can this contract be annulled at any time.[312] Likewise, some theologians opposed the same idea for the simple truth that marriage as sacrament cannot be enclosed in the legal concept of contract; the object itself of marriage i.e. interpersonal relationship is inapplicable to the object of contract which is a material good.[313] With the promulgation of the new Code, there are still many theologians and canonists who continue the discussion on this topic. Among the prominent scholars who have contributed much to shed light on this complex issue is J. F. Castaño who elaborated realistic propositions not only on this but also in almost all the important questions on Canon Law.[314]

Juridically, according to the Dominican scholar, the term *contractus* is applicable by analogy not only to the contracts that involves property but also to international treaty or convention which is considered a true contract in the international law. Similarly, the term can be applied to *contratto matrimoniale* which is likewise considered a *negozio giuridico*, at least by the Church.[315] Taking into consideration the analogical nature of the the reality

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[304] Cf. P. E. CORBETT, *The Roman law of marriage*. Clarendon Press, Oxford, 1969, pp. 90-106 ;211-217; J. GAUDEMET, *Il matrimonio*, pp. 22-28; A. RAVA, *Il requisito della rinnovazione del consenso nella convalidazione semplice del matrimonio.* PUG, Roma, 2001, pp. 18-19; 50.

[305] D. 30. 50. 17; D. 15. 35. 1.

[306] D. 2. 23. 2.

[307] D. 16. 23. 2.

[308] D. 66. 24. 1.

[309] Cf. C. LEFEVRE, "Le mariage civil n'est-il qu' un contrat?" in *Nouvelle Revue historique du droit francais et étranger* 11 (1032) p. 308; A. CICU, "Matrimonium seminarium reipublicae," in *Archivio giuridico*, vol. 85, p. 120 ; T. G. BARBERENA, "Sobre la idea contractual en el matrimonio canónico," in *Miscelanea Comillas* 16 (1951) p. 160, n. 9; O. ROBLEDA, "Sobre el matrimonio in fieri," in *Studios Ecclesiastico* 28 (1954) pp. 9-32.

[310] Cf. J. F. CASTAÑO, *Il sacramento*, p. 33.

[311] Cf. *Ibid*.

[312] Cf. *Ibid*., p. 35.

[313] Cf. *Ibid*.

[314] J. F. CASTAÑO elaborated the concept of «natura contrattuale del matrimonio» especially on the first chapter of his book: "*Nozioni generali sul Matrimonio Canonico*" pp. 7-55.

[315] Cf. J. F. CASTAÑO, *Il sacramento*. p. 37.

called contract, it follows that not all contracts involve property as their object. Marriage, therefore, as contract is simply a "*contractus sui generis*, insofar [...] as some of its proper elements are required by the natural law or, as it is preferred to say, by the same *natura rei*."[316] Logically, "the end, the indissolubility, the unity, the heterosexual qualification of the partners, etc. cannot be the object of any clause, but are part of the nature itself of marriage."[317] Moreover, since the object of marriage is not the same as the object of any business transaction, it cannot just be cancelled with the arbitrary desire of the parties involved.

Theologically, "nobody has ever claimed to enclose the entire matrimonial reality in the concept of contract. The term *contractus* is used *only* to define: a) the *natural* aspect (not the sacramental) of marriage; b) the *juridical* nature (not the sacramental or other human "values" that are not juridic); c) the real aspect of [marriage as] *actus quo*."[318] Accordingly, "marriage, aside from being a contract, is more than that: it is a sacramental, philosophical, social, anthropological, cultural, historical moral, biological reality."[319] The theologians insisted on the fact that marriage is always a sacrament but "it is not the *entire reality*."[320] The Author asserts that "marriage is sacrament *only* among two baptized persons. Those theologians would have been right *if all* marriages were sacraments. And for the fact that things exist differently, at least for the *other kinds* of marriage, specifically, for the *natural* marriage, it would be licit to speak of *contract*[321][when referring to it]."[322]

J. F. Castaño grounded his affirmations on the canonistic doctrine and tradition with the following elucidation on the contractual nature of marriage.[323]

By analyzing the traditional definition of contract: "*duorum plurimve in idem placitum consensus*", J. F. Castaño identifies the essential elements of a valid contract. These are: "1) natural and juridic capacity of the contracting parties; 2) object of the contract; 3) consent of the parties; 4) obligations of the contracting parties."[324] These are almost the same elements required by the norms of natural law according to A. Castelein.[325]

On the first element, J. F. Castaño affirms that the natural capacity consists of the fact that the contracting parties are capable of performing human act, that is, they are "capable of understanding and willing". Whereas, "the juridic capacity consists in being free from whatever prohibition imposed by the law. In this sense, it is said that a person is

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316 *Ibid*.

317 *Ibid*, p. 38. Article 52 of the Civil Code of the Philippines of 1989 declares: "Marriage is not a mere contract but an inviolable social institution. Its nature, consequences and incidents are governed by law and *not subject to stipulation*..."

318 *Ibid*. It should be noted that the former Rector Magnificus of Pontifical University of St. Thomas of Aquinas (Angelicum) in Rome, does not use the traditional terms *matrimonium in fieri* and *matrimonium in facto esse* but he uses «*actus quo*» and «*realitas permanens*» respectively, taking into consideration the different opinions of some authors on the "limits" of the first two expressions and the conformity of the second two expressions with the spirit of the legal text of the two Codes (cf. *Ibid*., p. 22).

319 *Ibid*. p. 37.

320 *Ibid*.

321 *Ibid*.

322 *Ibid*.

323 On page 41, there is a rich bibliography proposed by J.F. Castaño for this specific topic.

324 *Ibid*.

325 Cf. A. CASTELEIN, *Droit naturel*, p. 274

habilis to stipulate a specific contract."[326] Regarding the second element, the Dominican *magister*, asserts that "since it is an objective condition, the object should be suitable, i.e.: 1) physically and morally possible; 2) existing "*in re*" or at least "*in spe fundata*"; c) proper of the contracting parties; d) somehow *estimable*; e) honest and licit."[327] The most important among these elements is the *consensus* of the parties. In fact, J. F. Castaño affirms "that it is not only the most important but it is the efficient (source) and formal (*constitutivum*) cause of the contract and, therefore, it is said to be the *soul itself* of the contract."[328] The consent of the contracting parties must be true, free and deliberate, manifested externally and reciprocally.[329] These qualities of consent are essential because marriage deals with a bilateral-juridical agreement based on the conventional relationship between the spouses. Finally, the last element of a valid contract is the «obligation» of the contracting party that has arisen as the necessary consequence of the contract. It is considered not just a moral but a legal obligation, rather a more demanding obligation under the form of commutative justice.[330]

J. F. Castaño concludes by emphasizing the following reality:

1) That marriage is a *contract*, but it is applied only "for a matrimony that is considered as *natural marriage* in its *juridic sense* and as *actus quo*"[331] (or *matrimonium in fieri)*. Consequently, the sacramental marriage, the non-juridical aspects of marriage and the marriage considered as *realitas permanens* (or *matrimonium in facto esse*) remain outside the contractual qualification of the institution.

2) That marriage "is a contract (whenever it is) *sui generis*, because it is public by nature and because some of its essential elements are imposed by the nature itself."[332]

Theoretically, civil marriage may be considered as a concrete example of natural law marriage for various acceptations. First, civil marriage in its obviously natural characteristics and requisites[333] is a matrimony celebrated validly and in conformity with the solemnity of the provisions of civil law and is done before the approved state-civil authority.[334] Moreover, it is a valid marriage for those who are not bound to the observance

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[326] J.F. CASTAÑO, *Il sacramento*, pp. 41-42.

[327] *Ibid*., p. 42.

[328] *Ibid*.

[329] Cf. *Ibid*.

[330] Cf. *Ibid*., 43.

[331] *Ibid*.

[332] *Ibid*; Cf. *Communicationes* 15 (1983) p. 222.

[333] Civil Code of the Philippines, article 53: "No marriage shall be solemnized unless all these requisites are complied with: 1) Legal capacity of the contracting parties; 2) Their consent freely given; 3) Authority of the person performing the marriage and; 4) A marriage license, except in marriage of exceptional character." The first two requisites are the elements of natural law contract (cf. A. CASTELEIN, *Droit naturel*, p. 274; J.F. CASTAÑO, *Il sacramento*, p. 41).

[334] In fact, according to article 55 of the Civil Code of the Philippines, "no particular form for the ceremony of marriage is required, but *the parties with legal capacity to contract marriage* (contractants) must declare, *in the presence of the person solemnizing the marriage* (assistens or public official representative) and *two witnesses of legal age* (witnesses), that they take each other as husband and wife. This is the "ordinary form" of civil marriage performance (cf. the canonical form of can. 1108 for comparison). Article 56 enumerates the official solemnizing officers while article 57 states the norm for a solemn and public performance of civil marriage.

of the canonical form[335] insofar as the civil solemnity, in some cases, is the only legal and natural form to have their marriage publicly solemnized and acknowledged.[336]

3.3.1.2 Marriage as institution of divine law

Marriage as sacrament is not only a revealed truth, an article of Faith, that must be respected and upheld but it is also a public ecclesial good that should be defended by legal means. This truth that was defined by the Council of Florence[337] in 1439 and the Council of Trent in 1547 and 1563[338] is reaffirmed by the Second Vatican Council's brief but significant teaching on matrimony specifically in nn. 48-52 of the *Gaudium et Spes*, the Council's pastoral constitution on the Church in the modern world.[339] The CIC 1983 endeavoured, through a long period of preparation, to translate the conciliar teaching into canonical language. In fact, there are 111 canons that discipline the sacrament of marriage and the first of these canons, i.e., can. 1055 presents an excellent and faithful description of marriage in accordance with the Church Magisterium.

The "intimate community of life and love that constitutes the married state has been established by the Creator and endowed by him with its own proper laws."[340] God himself is the author of natural and supernatural marriage. By natural law, "marriage is written in the very nature of man and woman as they came from the hand of the Creator"[341] but "it is not a purely human institution"[342] because "it has been raised by Christ the Lord to the dignity of a sacrament between the baptized."[343]

Unquestionably, it deals with the very same natural marriage, an *institutum naturale*, that is elevated to the supernatural level and has become a sacrament by the will of God who is not only the *autor naturæ* (natural order) but also the *autor gratiæ* (order of grace).[344] The indispensable passage from natural to supernatural institution, i.e., from natural marriage to sacramental marriage can happen only through the reception of another

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335 Cf. can. 1117.

336 Cf. J.F. CASTAÑO, *Il sacramento*, p. 160. See also, Civil Code of the Philippines, articles 55 and 57.

337 "*Quinto, ecclesiasticorum sacramentorum veritatem pro ipsorum Armenorum tam praesentium quam futurorum faciliore doctrina sub hac brevissima redigimus formula. Novae Legis septem sunt sacramenta: videlicet baptismus, confirmatio, Eucharistia, paenitentia, extrema unctio, ordo et matrimonium [...]. Illa enim [Antiquae Legis] non causabant gratiam [...] haec vero nostra et continent gratiam, et ipsa digne suscipientibus conferunt*" (Dz-Sch 1310).

338 In session VII "*Can. 1: Si quis dixerit, sacramenta novae legis non fuisse omnia a Christo Domino nostro instituta, aut esse plura vel pauciora, quam septem, videlicet baptismus, confirmatio, Eucharistia, paenitentia, extrema unctio, ordo et matrimonium, aut etiam aliquod horum septem non esse vere et proprie sacramentum: anathema sit*" (Dz-Sch 1601) and in session XXIV, "*can. 1: Si quis dixerit, matrimonium non esse vere et proprie unum ex septem Legis evangelicae sacramentum, a Christo Domino institutum, sed ab hominibus in ecclesia inventum, neque gratiam conferre: anathema sit*" (Dz-Sch 1801).

339 Cf. BENEDICT XVI, "Il matrimonio non è scelta impossibile," Alloc. alla Rota Romana, in *L'Osservatore Romano on-line edition*, 30 gennaio 2009 at http://www.vatican.va/news_services/or/or_quo/text.html#2.

340 CCC 1603.

341 *Ibid*.

342 *Ibid*.

343 Can. 1055 §1.

344 Cf. *Communicationes* 15 (1983) p. 222: "The term «*contract*» and «*covenant*» are used in one and the same sense, indeed deliberately, so that it may be more clearly evident that the matrimonial covenant concerning which *Gaudium et spes* speaks can be constituted for the baptized in no other way than through a contract, even if it is *sui generis*." See also G. FRENDO, *Indissolubility and Divorce*. Malta, 1973, p. 62.

sacrament. This sacrament is Baptism which is the *ianua sacramentarum* or "the door that gives access to the other sacraments."[345]

The qualification of marriage as sacrament, in this sense, depends on the valid baptism received by the persons entering into matrimonial state. In this sense, baptism of the water (*baptismus fluminis*) is a theological and not a juridical condition for the sacramentality of marriage. There are some theological reasons for the affirmation of this kind especially if the reasoning is grounded in can. 849. According to the first canon of the Chapter on Baptism,[346] it is by baptism of water that one is freed from sin, reborn a child of God and is configured to Christ the Saviour.[347] Baptism is the first form of a true Christian consecration of man to God, *Uno et Trino*. By the indelible mark imprinted on his person, the baptized receives "the character of Christ... and becomes sharer of the priesthood of the Savior".[348] It is also through this sacrament that one enters the Church and, thereby, he becomes a part of the faithful in "*communio ecclesiastica*".[349] The canon calls baptism a *ianua sacramentarum* because this sacrament enables the faithful to receive all the other sacraments of communion.[350] In effect, baptism is the primary condition to receive confirmation;[351] to be admitted to the holy communion if not prohibited;[352] to regularly obtain the absolution for the sins committed (after baptism);[353] to receive the anointing of the sick;[354] to validly receive the sacred ordination of male candidates[355] and, as what has been said, to enter into a sacramental marriage state.

Since baptism lays the foundation not only of every Christian life but also of all the other sacraments,[356] the marriage validly celebrated by non-Catholics is, therefore, a sacrament as long as these persons have validly received the first sacrament of Christian initiation.[357] In the same way, the valid marriage in the natural order between two non-baptized persons; between baptized non-Catholic and unbaptized; and the canonical marriage between a Catholic and unbaptized[358] will become sacramental marriage at the moment the unbaptized persons receive a valid baptism. Thus, it is clear that the *qualitas*

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345 CCC 1213.
346 Cf. cann. 849-878.
347 Cf. can. 849; CCC 1213.
348 Cf. PAUL VI, Cost. ap. *Divinae consortium naturae.* in *AAS* 63 (1971) p. 657; *Il Rito dell'iniziazione cristiana degli adulti*, Introduzione generale, 1-2. Libreria Editrice Vaticana, 1992, p. 17.
349 Cf. *Divinae consortium*: "In baptism, the newly baptized receive forgiveness of sins, adoption as children of God, and the character of Christ by which they are made members of the Church and for the first time become sharers in the priesthood of their Savior (cf. 1 Pt 2:5, 9)." See also A. LONGHITANO, "Il Diritto," pp. 77-79.
350 The CCC 1213 speaks of «*vitae spiritualis ianua*»: "Holy Baptism is the basis of the whole Christian life, the gateway to life in the Spirit (*vitae spiritualis ianua*), and the door which gives access to the other sacraments."
351 Cf. can. 889 § 1.
352 Cf. can. 912.
353 Cf. can. 959.
354 Cf. can. 1004 §1.
355 Cf. can. 1024.
356 Cf. CCC 1212.
357 Cf. cann. 1055; 1061 §1 (marriage that is *ratum tantum*); can. 849; CCC 1213-1284; Dz-Sch 3866-3873.
358 Cf. cann. 1059 e 1117.

sacramentalis on marriage depends solely and exclusively on baptism;[359] "without the need of any further formality."[360]

The Church holds exclusive power on these marriages; directly in the supernatural order for sacramental marriage and indirectly in the natural order for matrimonial contract.[361] In fact, a marriage, wherein at least one of the contractants is a Catholic, is regulated not only by canon law but also by *ius divinum*, natural and positive. And since the Catholic Church has an original, autonomous juridic and canonical system, she also follows her own juridical order proper of marriage; a well-established legal system that the State cannot deny and must not disregard.[362]

3.3.2 Natural right to marry

The new Code is very explicit in affirming the right of every person to marry. In fact, can. 1058 declares that "all persons *qui iure non prohibentur* can contract marriage." Marriage or *ius connubii*, therefore, is a natural right of every person[363] "in virtue of the very same nature of man and woman."[364] This fundamental right includes the right to marry and the right to freely chose one's partner. Since it deals primarily with the fundamental right deriving from the natural law, it may undergo curtailment only for grave and just reasons; however, in case of doubt whether the person is capable or lacking the capacity to contract marriage, this natural right should prevail over any other reasons. In fact, John Paul II declares that "in the evaluation of the capacity or the act of consent necessary for the celebration of a valid marriage, no one should demand that which cannot be required to the generality of persons."[365]

3.3.3 Impediments of natural law

Juridically, the Church did nothing but to perfect the natural institution of marriage by regulating its structure and without damaging its fundamental characteristics. In other words, the natural law had provided the fundamental framework of marriage which the *ius humanum ecclesiasticum* developed into a complete structure for the human and ecclesial society.

Therefore, the essential elements of an authentic human institution are logically the same elements that comprise an authentic ecclesial institution such as marriage. In fact, the validity of marriage in the supernatural order depends much on the indispensable elements of a valid celebration of natural marriage; the former presumes that the latter is celebrated observing the norms of the natural law. Its inobservance would have an

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[359] Cf. J.F. CASTAÑO, *Il sacramento*, p. 47.

[360] *Ibid*.

[361] Cf. can. 1055 §2; PIUS IX, apostolic letter. *Ad Apostolicæ*, August 22, 1851; Leo XIII, ency. *Arcanum divinae sapientiae*, February 10, 1880, ASS 12 (1879-1880) p. 394. See also *The Syllabus*, known also as *Collectio errorumin diversis Actis Pii IX proscriptorum, editus 8 dec. 1864*. The *Acta*, the sources of *Syllabus* can be found in Dz-Sch pp. 576-577.

[362] Cf. can. 1059; P. V. PINTO, *Commento al Codice*, on can. 1059, p. 620.

[363] Cf. *Pacem in terris*, 15; *Gaudium et spes*, n. 26.

[364] BENEDICT XVI, "Il matrimonio non è scelta impossibile," Alloc. alla Rota Romana, in *L'Osservatore Romano on-line edition*, 30 gennaio 2009 at http://www.vatican.va/news_services/or/or_quo/text.html#2: *"Occorre anzitutto riscoprire in positivo la capacità che in principio ogni persona umana ha di sposarsi in virtù della sua stessa natura di uomo o di donna."*

[365] JOHN PAUL II, *Alloc*. alla Rota Romana, January 27, 1997, n. 5, in *AAS* 89 (1997) pp. 486-489.

inevitable repercussion to the same institution on the supernatural order. This is true especially on the impediments of natural law that for their very nature hinder the valid celebration of marriage.

3.3.3.1 Impotentia coeundi - canon 1084[366]

Impotence is the natural incapacity on the part of man or woman to perform a complete conjugal act in all its essential elements. It is an impediment of natural law (*ex ipsa eius natura*); as a consequence, it is not subject to dispensation. Impotence must be antecedent to the valid celebration of marriage; and must be incurable, i.e., perpetual. It may also be absolute or relative. Absolute impotency means that the subject cannot perform a conjugal act to any person of the opposite sex. Relative impotency is the incapacity to perform such act only with specific persons. This may happen for various reasons not only for the anatomical incompatibility of male and/or female reproductive organs but also for psychical reasons.[367]

According to the interpretation of some scholars noted for their treatises on canonical marriage,[368] the justification of the impediment of *impotentia coendi* has its origin on the common understanding that the essence of marriage is no other than the reciprocal "*traditio*" of the "*ius in corpus*"[369] or the "mutual right on the body of one another".[370] This implies having all the necessary elements, corporal and psychical, in order to express in sexual union all the privileges that the natural law guarantees. In fact, if one of the intrinsic and objective (*finis operis*) ends of marriage is *generatio et educatio prolis*, a performance of a complete conjugal act is the *conditio sine qua non* so that generation may take place.[371] To deny that procreation is not one of the ends of both natural and

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366 Cf. CIC 1917 can. 1068; CCEO can. 801.

367 Cf. C. BURKE, "The distinction between no. 2 and no. 3 of Canon 1095," *The Jurist* 54 (1994), pp. 228-233.

368 There are many well-affirmed canonists who wrote treatises on marriage in canon law; these authors are considered to represent the «official» canonistic opinion because their work are oftenly cited in the jurisprudence. Some of these are: F. CAPPELLO, *Tractatus canonico-moralis de sacramentis*. Marietti Taurini, Romae, voll. 1-5, 1950-1953 especially regarding marriage vol. 5: *De matrimonio ; Accedunt appendices De iure matrimoniali orientalium et De iure italico post concordatum vigente;* F. X. WERNZ- P. VIDAL, *Jus canonicum*. Universitas Gregorianae, Romae, voll. 1-5, 1928-1952, espcially vol. 5: Ius matrimoniale 1928; P. GASPARRI, Tractatus canonicus de matrimonio. Typis Polyglottis Vaticanis, voll. 1-7, Romae, 1932.

369 Cf. F. CAPPELLO, *Tractatus canonico*, vol. 5, p. 357; P. GASPARRI, *Tractatus canonicus*, vol. 1, p. 308; F.X. WERNZ-P. VIDAL, *Jus canonicum*, vol. 5, p. 252.

370 Cf. CIC can. 1081: "§ 2. Matrimonial consent is an act of the will by which each party gives and accepts perpetual and exclusive rights to the body, for those actions that are themselves suitable for the generation of children."

371 In the Code of 1917 there was a distinction between primary and secondary end. In fact, CIC 1917 can. 1013: "1. The primary end of marriage is the procreation and education of children; the secondary is mutual support and a remedy for concupiscence." The new Code does not make any distinction, can. 1055 declares that matrimonial covenant [...] is ordered by its nature to the *bonum coniugum* and *generatio et educatio prolis*. According to Prof. Castaño it is more exact to say that marriage is ordered to the good of the spouses and the procreation and education of offspring than to affirm that there are two ends: primary and secondary. He explains that, "*lo stesso Concilio [Vaticano II] ridimensiona l'importanza che l'amore ha nel matrimonio, precisando che «per sua indole naturale, l'istituto stesso del matrimonio e l'amore coniugale sono ordinati alla procreazione e alla educazione della prole e in queste trovano il loro coronamento»*" (J.F. CASTAÑO, *Il sacramento*, p. 67-68). He adds: "*Il testo del canone [1055 §1], non parla di amore,ma afferma il foedus matrimoniale, per sua natura, è ordinato non solo alla generazione ed educazione della prole, ma anche al bonum coniugum*" (*Ibid*., p. 69). "*Per alcuni sarebbe stato meglio mettere in primo luogo la generazione ed educazione della prole, e poi il bene dei coniugi. L'argomento*

sacramental marriage, is also to deny the right to *ius in corpus* or the conjugal act proper of marriage.[372] If so, this right would cease to be grounded on natural law and, as a consequence, *impotentia coeundi* would no longer be an impediment even on the supernatural order.

In addition, the spouses, as what has been said, cannot modify the terms of the marital contract, nor any ecclesiastical authority may dispense from a constitutive element of natural law marriage. The terms of natural and sacramental marriage is the very same intrinsic end that constitutes marriage itself; it is no other than the *bonum coniugum* and *generatio et educatio prolis*. The conjugal act, in fact, is a demand by the very nature of marriage as a natural institution radically connected to the sexual nature of man. The significance of conjugal act emerges by analysing the effects that it can cause in *matrimonium ratum*. In fact, only after the canonical consummation that marriage becomes indissoluble; for this reason, it can never be dissolved by no human power and by no cause, except death.[373]

3.3.3.2 Prior marriage bond - can. 1085[374]

In relation to the essential properties of marriage, can. 1085 declares that a person cannot contract another marriage as long as the previous bond remains valid. This impediment derives from the natural law and, therefore, it concerns all marriages: natural and sacramental. As impediment of *ius naturale*, it is not subject to any dispensation; however, the *vinculum* of previous marriage may cease for the following reasons: 1) for the death of one of the partners; 2) for the pontifical dispensation *ad normam* can. 1142; 3) for the application of cann. 1143-1149 on *privilegium fidei* and 4) on the declaration of nullity *ad normam* cann. 1671-1691 by an ecclesiastical tribunal.

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principale è perché la Cost. Gaudium et spes afferma espressamente per ben due volte, che tanto il matrimonio come l'amore coniugale sono ordinati alla procreazione ed educazione della prole (GS 48, 50). [...] *A nostro avviso, però, non esiste nessun ordine di preferenza o gerarchia tra i due termini della formula «bonum atque generationem et educationem» ma troviamo l'ordine naturale come avvengono «le cose» in materia del cuore*" (*Ibid*., p. 70). Then, he prefers to use «coordination» and not «subordination» on the relationshiop of the ends of marriage: "*Ciò nonostante, crediamo che oggi si possa parlare di coordinazione, ma non di subordinazione, tra i due «elementi» ai quali il totius vitae consortium è ordinato, cioè, tra il bonum coniugum and generatio et educatio prolis. Con ciò vogliamo significare che, nonostante che il matrimonio e l'amore siano ordinati, per natura, alla procreazione ed educazione della prole (GS 48, 50), l'amore e la mutua perfezione degli sposi sono fini del matrimonio a se stanti, benché siano ordinati alla procreazione ed educazione della prole. Di fatto, la stessa Commissione per la revisione del Codice diceva espressamente che lo Schema recognitum dell'anno 1980 nullam vult statuere hierarchiam fiium. Fini, quindi, per se stessi e per niente secondari*" (*Ibid*., p. 72). He concludes by saying that: " *nella dottrina del Concilio e nel can. 1055 §1 esiste ordine tra i fini, giacché tutto è ordinato alla procreazione ed educazione, ma, a nostro avviso, non si può parlare di subordinazione*" (*Ibid*., pp. 72-73).

[372] This was the opinion affirmed by Doms and Krempel, (cf. H. DOMS, *Vom Sinn und Zweck der Ehe*, Breslaw, 1935; B. A. KREMPEL, *Die Zweckfrage der Ehe in neuer Beleuchtung*, Einsiedeln, 1941); consequently, on April 1, 1944, the Holy Office in its decree condemned the opinion that denies that *generatio et educatio prolis* is not the primary end of marriage (cf. *AAS* 36 (1944), p. 103). See related articles, A. LANZA, "De fine primario matrimonii," *Apollinaris* 13 (1940) pp. 57-83; 14 (1941) pp. 12-39; T. URDANOZ, "Otro grave problema moral en torno al matrimonio," *La Ciencia Tomista* 68 (1945) pp. 231-259; P. DUNCKER, "De finalitate matrimonii secundum Gen. 1 et 2," *Angelicum* 18 (1941) pp. 165-177; V. PAN ARASA, "Il fine primario del matrimonio" *Salesianum* 8 (1946) pp. 256-283; E. DE ROBILAND, "Il fine e l'essenza del matrimonio in alcune recenti dottrine," *Il Diritto Ecclesiastico* 62 (1951) pp. 697-729; C. BURKE, "Die Zwecke der Ehe: Institutionelle oder personalistische Sicht?," *Monitor Ecclesiasticus* 120 (1995), pp. 449-478.

[373] Cf. can. 1141.

[374] Cf. CIC 17 can. 1069; CCEO can. 802.

According to F. Cappello, when a law prescribes monogamy; in effect, the same norm concomitantly prohibits polyandry and polygamy.[375] The polyandry is contrary to the primary precepts of the natural law, and thereby, prohibited by it; polygamy, instead, is contrary not to the primary but to the secondary precepts. Generally, polygamy is prohibited by natural law being contrary not only to its secondary precepts but also to the secondary end of marriage.[376] Consequently, polygamy is forbidden by divine positive law[377] but reprobated only by natural law[378]. While polyandry is considered absolutely contrary to natural law because "it precludes not only the primary but also the secondary end of marriage;[379] polygamy, instead, "does not exclude per sè the primary end of marriage,"[380] i.e., the «*generatio et educatio prolis*» neither it totally hinders its realization.[381] At any rate, polygamy is surely reprobated by natural law for the fact that it is not only contrary to the secondary end of marriage but it also makes its achievement more difficult.[382]

Obviously, F. Cappello was referring to the first paragraph of can. 1013 of CIC 1917 that established the procreation and education of the children as the primary end and the mutual support and remedy for concupiscence as the secondary end of marriage. However, taking into consideration the modification on the aforesaid canon regarding the essential ends of marriage effected in can. 1055 of the present Code, his opinion is still widely accepted especially on the precepts of divine natural and positive law applied on the subject matter.

3.3.3.3 Consanguinity - can. 1091[383]

Canon 1091 establishes that marriages between blood relatives in the direct line of consanguinity like parents, children, grandchildren and great-grandchildren, are invalid. In the collateral line, marriage is invalid up to and including the fourth degree, e.g., brothers and sisters, among first cousins etc.

The majority of the canonists consider the consanguinity of the first degree in the direct line as impediment of natural law, while there are some differences in opinion on the other degrees of direct and of collateral lines.[384] Instead of delving too much on the reasons ranging from genetic, anthropological, social to patrimonial etc.; many authors prefer to stress on the Church's view on this impediment. "The Church sees in this impediment the inclination of nature, that protects and distinguishes in the families already formed that

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375 F. CAPPELLO, *Tractatus canonico*, vol. 5, p. 389.
376 *Ibid*., p. 36.
377 *Ibid*., p. 389.
378 *Ibid*., p. 37.
379 *Ibid*., pp. 36-37.
380 *Ibid*., p. 37.
381 *Ibid*.
382 *Ibid*.
383 Cf. CIC 17 can. 1076; CCEO can. 808.
384 Cf. F. CAPPELLO, *Tractatus canonico*, vol. 5, pp. 489 ff; P.GASPARRI, *Tractatus canonicus*, vol. 1, pp. 426 ff; F.X. WERNZ-P. VIDAL, *Jus canonicum*, vol. 5, pp. 441 ff; . J. F. CASTAÑO, *Il sacramento del matrimonio.* pp. 293 ff.

essential love which is different from another kind of love that leads to the formation of new family units."[385]

St. Thomas of Aquinas adds another reason. There is a greater good, according to the *Doctor humanitatis*, in increasing the bond of affections and friendship among different people. The immediate members of the family are already united to themselves; therefore, it is better to be married outside their circles because it will surely increase different types of relationships among men.[386]

3.3.4 Other matrimonial norms with indirect relations to the natural law

The following canonical norms are those that, in one way or the other, have implicit relationship with natural law either by connotation or extension.

3.3.4.1 Impediment of age – can. 1083[387]

The first paragraph of the canon establishes that a man before he has completed his sixteenth year of age and a woman before she has completed her fourteenth year of age cannot enter into a valid marriage.

The legislator deemed it better to retain the prescribed age of the previous Code,[388] i.e., the "biological age".[389] It is the minimum age established by the supreme ecclesiastical legislator, and thereby, considered as an ecclesiastical law subject to dispensation.[390]

Some scholars consider age as "impediment of natural law, at least indirectly.[391] F. Cappello asserts that "before the contractants acquire the necessary use of reason, it is an impediment of natural law;[392] but after they have reached the right age that will qualify them to articulate a valid matrimonial consent, "only then that it becomes an impediment of ecclesiastical law".[393]

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[385] P. V. PINTO, *Commento al Codice,* on can. 1091, p. 639. (Writer's translation of the Italian text.) "*La Chiesa ha visto in questo impedimento l'inclinazione della natura, che protegge e distingue nelle famiglie già fatte quell'amore essenzialmente diverso da quell'altro che porta a formare nuovi nuclei familiari*."

[386] Cf. *S. Th., supplementum*, q. 54, a 3.

[387] Cf. CCEO can. 800.

[388] Cf. CIC 1917 can. 1067.

[389] Cf. J. F. CASTAÑO, *Il sacramento del matrimonio.* pp. 246. Biological age is determined by physiology rather than chronology. The factors include changes in the physical structure of the body as well as changes in the performance of motor skills and sensory awareness. At the age of sixteen for man and fourteen for woman, after the age of puberty, it is presumed that these young men already possess the minimal maturity or discretion of judgement necessary to express their consent to marry.

[390] For the Philippines: "It has been established that the age for the licit celebration of marriage shall be 18 years for both the bridegroom and the bride. Below the foregoing ages, marriage may be solemnized only with the permission of the local ordinary" (J. GONZALEZ, *Canon Law. The Code, CBCP norms, interpretation.* Life Today Publication, Manila, 1997, p. 32).

[391] P. V. PINTO, *Commento al Codice,* on can. 1083, p. 635: "*Ma, a nostro avviso, esso è anche impedimento naturale, almeno indirettamente, nel senso che può anche dipendere dall'età che due individui non possono assolvere il prescritto dei cann. 1095, 1096, il quale non è certo stabilito ab homine*."

[392] F. CAPPELLO, *Tractatus canonico*, vol. 5, p. 343.

[393] *Ibid*., See also, A. KNECHT. *Handbuch des katholischen Eherechts auf Grund des Codex Iuris Canonici*, Herder, Freiburg, 1928, pp. 347, 349; J. LINNEBORN, *Grundriß des Eherechts* nach dem Codex Iuris Canonici. Paderborn, 1922, pp. 179, 181; A. VERMEERSCH - J. CREUSEN. *Epitome iuris canonici*, Melchliniae, Romae, 1930, vol. 2, p. 209.

3.3.4.2 Impediment of abduction – can. 1089[394]

The impediment of abduction arises when a woman is: 1) abducted or 2) or if not abducted at least detained. There is one purpose in either cases, the male abductor intends to marry the abducted woman. The norm is explicit on how the impediment ceases: only after the abducted woman is separated from her abductor and brought to a safe place and, without fear, violence and away from the abductor, she *freely chooses* to marry him who abducted her before.

The impediment is a positive canonical law, but the *condition*, demanded in order for the impediment to cease, is clearly rooted in the natural law.[395] Such condition intends to protect the *freedom of choice* that contractants are entitled to exercise. In fact, the validity of marriage depends on the freedom enjoyed by the woman in choosing to marry her abductor.[396]

3.3.4.3 Consensual incapacity due to lack of sufficient use of reason – can. 1095 §1[397]

It is not an impediment but a lack or defect that vitiates or impairs the quality of human acts and choices, especially the consent. This defect alters the natural capacity of the person to the point of becoming incapable of performing a simple act of intellect and will. Can. 1095 §1 establishes that a person who lack the use of reason is incapable of contracting marriage.

The canonical provision is unequivocal. It is obvious that the sufficient use of reason is an essential component of any juridical transaction insofar as it is the first element required not only for a legal but also for a natural valid contract,[398] like marriage. J. F. Castaño asserts: "In fact, the marriage of a person who lacks (*caret*) sufficient use of reason at the moment of giving consent is never considered valid."[399] "It is a requirement of natural law inasmuch as the use of reason is absolutely necessary when talking about human act."[400]

3.3.4.4 Error about the person – can. 1097[401]

Canon 1097 deals with *error facti* not only on the person of the contractant but also of his quality.[402] The first paragraph refers to the identity of the person and the second paragraph on the quality of the same person.

Error concerning the person renders marriage invalid (§1), while error regarding a quality of the person does not invalidate marriage even though it is the cause for the contract, unless the quality is demanded beforehand as *conditio sine qua non* for the celebration of marriage (§2).

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394 Cf. CCEO can. 806.

395 Cf. J. F. CASTAÑO, *Il sacramento,* p. 253.

396 In the *ius commune* of the Catholic Eastern Churches (i.e. CCEO), the legislator used "*persona abducta*" instead of "*mulier*". It means that not only woman but man may also be subject of abduction for the purpose of entering into marriage (cf. J. ABBASS, *Two Codes in Comparison*. PIO, Rome, 1997, pp. 122-124).

397 Cf. CCEO can. 818, 1°.

398 Cf. A. CASTELEIN, *Droit naturel*, p. 274.

399 J. F. CASTAÑO, *Il sacramento,* p. 309 (Author's translation).

400 *Ibid*.

401 Cf. CCEO can. 820.

402 The new norm is a repetition of the norm of the previous Code, (cf. CIC 1917 can. 1083).

The certainty on the identity of the person is a requisite deriving from the natural law[403] because the contractants for both natural and supernatural marriage "*soit la matière du contrat.*"[404] Consequently, the *error facti* about the identity of the physical person invalidates the contract simply because "matrimonial act is an act of the will by which a man and a woman mutually gives and accept each other through an irrevocable covenant in order to establish marriage" (can. 1057 §2).

3.3.4.5 Grave fear – can. 1103[405]

Canon 1103 establishes that marriage entered into as a result of grave fear (*metus gravis*) is invalid even though consent is given.

The legislator invalidates the consent given under violence and grave fear not only for the harm it may cause, nor for the negative consequences to those who made use of it, nor for the detrimental impact on the institution of marriage, but for the attack to the freedom by which one should enter marriage.

The freedom to choose freely one's partner for life is a primary demand of natural law. For those who would like to give a valid matrimonial consent, every moral and legal instrument should be used to guarantee "*un atto umano sufficiente richiesto, almeno come minimo dal diritto naturale.*"[406] Unfortunately, any external force that causes grave fear "*nella inderogabile libera e soggettiva opzione per il matrimonio*"[407] is always an attack to the fundamental right sanctioned by can. 1058: the right to marry and the right to freely chose one's partner.

3.3.4.6 The essential properties of marriage – can. 1056[408]

The official doctrine of the Church affirms that Christian marriage is not only monogamous but also indissoluble insofar as it is a demand of natural law for the good of the children and of the mutual bestowal and acceptance of spouses.[409]

Canon 1056, faithful to the tradition of the Church, declares the essential properties of marriage: *unity* that excludes any form of polygyny and polyandry and *indissolubility* that precludes divorce.[410] The canon also reaffirms the principle of the sacramentality of the natural bond among Christians and by reason of sacrament it acquires a special firmness and stability.[411]

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[403] Cf. J. F. CASTAÑO, *Il sacramento,* p. 337.
[404] Cf. A. CASTELEIN, *Droit naturel*, p. 274.
[405] Cf. CCEO can. 825.
[406] A. ABATE, "Il consenso matrimoniale nel nuovo Codice di Diritto Canonico," *Appollinaris* 59 (1986) p. 490.
[407] P. V. PINTO, *Commento al Codice,* on can. 1103, pp. 649-650.
[408] Cf. CCEO can. 776 § 3.
[409] Cf. PIUS XI, Encyc. *Casti connubii*, in *AAS* 22 (1930) pp. 546-547, especially p. 552: "*.... etiam naturale tantum et legitimum; omni enim vero matrimonio convenit illa indissolubilitas.*"; *Gaudium et spes* 48; JOHN PAUL II, *Alloc.* Agli Uditori della Rota Romana, January 27, 1997, in *AAS* 89 (1997) p. 487; PONTIFICIO CONSIGLIO PER I TESTI LEGISLATIVI, Dignitas connubii. *Istruzione da osservarsi nei tribunali diocesani e interdiocesani nella trattazione delle cause di nullità del matrimonio*, Libreria Editrice Vaticana, 2005, p. 9.
[410] A recent related article on the topic is J. I. BANARES, "Mentalidad divorcista e indisolubidad del matrimonio," *Revista Espanola de Derecho Canonico,* 64 (2007) pp. 281-307.
[411] Cf. can. 1141.

The doctrinal teaching of the Church does not distinguish different types of natural law.[412] Therefore, in order to understand *ius naturale* and its imperative, the Scholastic philosophy elaborated an analogy of attribution[413] by specifying its diverse degrees. The so-called «strict natural law» or «primary natural law» that occupies the highest place in the hierarchy; while, the so-called «non-strict natural law» or «secondary natural law» occupies the place next to the former.[414] The characteristics of the primary natural law are the following: "1) it exists «*semper, ubique et apud omnes*»; 2) «*numquam deficit*»; 3) «*dispensari nequit*», 4) «*imponitur modo intuitivo ad modum principiorum primorum synderisis*»."[415] On the other hand, the «secondary natural law» have the following features: "1) «*fere semper, fere ubique et fere apud omnes*»; 2) «*quandoque deficit*»; 3) «*dispensari potest*»; 4) «*cognoscitur per facile discursum ab omnibus, et inde ab initio, et ad modum conclusionum immediatarum*»; and 5) it is considered as «*ius vere humanum*»."[416]

Accordingly, the essential properties of marriage belong to *ius naturale* but only in its attributional characteristics of «*secondary or non-strict natural law*».[417] This is the main reason why in some cases the secondary precepts of natural law may be granted dispensation.

Although unity is upheld and defended by the Church as an essential property of marriage, it is not a common characteristic of marriage legislations in countries where there is a strong influence of different religions like in the Middle East, Asia and Africa. Precisely because of the fact that it does not exist «*semper, ubique et apud omnes*»; therefore, "it would be more appropriate to say that unity is of divine positive law, rather than to say that it is of natural law."[418]

Likewise, indissolubility is an essential property of marriage, but in some cases the competent ecclesiastical authority may grant dispensation for its nonobservance. It is considered as divine positive law,[419] and at the same time founded on natural law. In fact, Pius IX in his *Syllabus* condemned the error of those who propagated that "*iure naturae matrimonii vinculum non est indissolubile.*"[420]

The Scholastic traditional interpretation concerning the indissolubility of marriage can be understood by analysing its classification. It is divided into two. First, the *intrinsic indissolubility* of marriage which is absolute. It cannot be dissolved by any cause on the part of the spouses because their consent is always irrevocable. The matrimonial consent creates the bond and the seal of indissolubility before God that gives rise to all the marital rights and obligations. Through the celebration of the sacrament, indissolubility acquires firmness and stability;[421] and once the matrimonial rights are exercised, the marriage becomes absolutely indissoluble that no human authority can dissolve it. Second, the *extrinsic indissolubility* of marriage which is relative. In some cases the matrimonial bond may

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412 Cf. J. F. CASTAÑO, *Il sacramento,* p. 83.
413 Cf. *Ibid*.
414 Cf. *Ibid*.
415 *Ibid*.
416 *Ibid*.
417 Cf. *Ibid*.
418 *Ibid*., 102; 105.
419 Cf. Gen 1: 27; 2: 24; Dt. 24: 1-4; Mt. 19: 3-9; Mt. 5: 31-32; Mk. 10: 11-12; Lk. 16: 18.
420 Dz-Sch 2964: "*Iure naturae matrimonii vinculum non est indissolubile, et in variis casibus, divortium proprie dictum auctoritate civili sanciri potest*."
421 Cf. J. F. CASTAÑO, *Il sacramento,* p. 478.

be dissolved but not by an authority that is purely human like that of the spouses; the dissolution is possible if it will be an intervention coming from God himself because He alone as the author of nature is likewise the author of dispensation and exception and by his will it can be granted[422] through the exercise of *Potestas Vicaria*, a different kind of power exclusively entrusted to the Roman Pontiff.[423]

Therefore, in the dissolution of matrimonial bond, the Roman Pontiff uses his "*potestas vicaria*"[424]. It is an *omnino specialis*, *non mere humana*, *sed ex iure divino* and extraordinary power[425] that is distinct from the ecclesiastical proper ordinary power.[426] It is a *potestas*

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[422] Cf. *Ibid*., p. 477.

[423] "*L'attualte dottrina dei Romani Pontefici insegna monoliticamente che la* Potestà Vicaria anche sulle cose di diritto naturale *appartiene esclusivamente al Papa. Quindi possiamo ritenere tale insegnamento come la dottrina ufficiale del Magistero Pontificio*" (J. F. CASTAÑO, *Il sacramento,* p. 478).

[424] For a comprehensive reading: A. ABATE, *The Dissolution of the Matrimonial Bond in Ecclesiastical Jurisprudence*, New York, 1962; J. F. CASTAÑO, *Introductio ad Ius Matrimoniale.* vol. I *De matrimonii natura:* Appendix III: *De Potestate Vicaria seu Ministerialis*, Roma, 1979; M. DONOVAN, *The Vicarious Power of the Church over the Marriage Bond*, Roma, 1972; L. LAMBRUSCHINI, "Disputatio de potestate vicaria Romani Pontificis in matrimonium infidelium," *Appolinaris* 26 (1953) pp. 175-197; U. NAVARETTE, "Potestas vicaria ecclesiae. Evolutio historica conceptus atque observationes attenta doctrina Concilii Vaticani II" *Periodica* 60 (1971) pp. 415-486. D. FLORES, *La potestà vicaria del Romano Pontefice nello scioglimento del vincolo matrimoniale.* (Handout for the course of 2008-2009), "pro manuscripto", Manila 2008, pp. 96.

[425] Cf. . J. F. CASTAÑO, *Il sacramento,* pp. 477-481.

[426] Although many authors affirm the contrary opinion, a consistent number of canonists and theologians consider the *potestas vicaria* as distinct from the proper ordinary power. One of the authors who is contrary to this opinion is L. CIVISCA, *The Dissolution of marriage Bond*, Napoli, 1965, pp. 63-64: «*.. we may conclude that the power of the Sovereign Pontiff over the bond of a marriage not yet consummated is something quite in accord with his position as supreme head of the religious society which is the Catholic Church. The reasonableness or naturalness of such a power is easily understood if we compare it with the authority of a civil society which, within certain limits required by such a society, must have the power for just reasons to dissolve a non-consummated marriage. The power of the Pope in dissolving non-consummated marriages of baptized parties is of the same rank and flows from the same nature of things and from the same principles from which flows the civil society's power over its non-baptized subjects. Here we see a sound and perfect parallelism between the Pope's power and the authority of a civil society... This power of dissolving the bond and the relative restriction of the power has its origin in the nature of society as such which in this point is exactly the same in the Catholic Church and in civil society. On these premises it should be clear what is meant by 'The Vicarious Power', and expression which occurs so frequently in the pontifical documents and in the writings of authors who treat of the dissolution of the marriage bond. The power which dissolves the bond of a non-consummated marriage must be designated 'proper' and not 'vicarious' since it flows from the very nature of authority in society. This proper power (proper in the juridical sense) is possessed both by the Pope and by the state over their respective subjects. But the power which dissolves the bond of a consummated marriage which is not strengthened by the sacrament, can and should be called 'vicarious' since it does not flow from the nature of authority in society, but from the supernatural elements*». Whereas, some authors have affirmative opinion like, F. CAPPELLO, *De Matrimonio*, p. 749: «*Potestas, qua R. Pontifex solvit matrimonius ratum, non est potestas iurisdictionis propria, quae competit Ecclesiae in quantum est societas iuridice perfecta quaeque proinde ipsi connaturalis est atque ordinaria, sed est potestas omnino peculiaris et extraordinaria, ministerialis quidem et instrumentalis quatenus exercetur auctoritate et nomine ipsius Christi, ideoque potestas proprie vicaria, vero et stricto sensu divina*». J.F. CASTAÑO, *Introductio ad Ius*, 342: «*Etenim in terminologia iuridico-canonistica potestas iurisdictionis vel est ordinaria (= ipso iure adnexa officio) vel delegata (= commissa personae). Imo potestas ordinaria adhuc potest esse sive propria sive vicaria. Iam vero in casu non agitur de potestate ecclesiastica et quidem de potestate iurisdictionis, sed de potestate divina, quae modo omnino extraordinario competit Romano Pontifici. Quomodo tamen haec potestas in sua natura divina (non ecclesiastica) Romani Pontifici competat proprie est quaestio quae examinare nunc debemus.»Quia tamen haec potestas Romano Pontifici modo extraordinario competit, dicitur quoque potestas extraordinario. Sed tunc attendere debemus ad*

divina that is exercised by the Roman Pontiff *in nomine Christi*. The essential characteristics of the *potestas vicaria* is the dispensation from the divine natural and positive law and not from the ecclesiastical law.[427] Therefore, in *praeceptis legis naturae seu divinae* like indissolubility *solum Deum dispensare posse*; the matrimonial bond is dissolved not by the Supreme Pontiff but by God himself.[428]

3.3.4.7 Radical sanation and impediment of natural law – can. 1163 §2

The second paragraph of can. 1163 establishes the limit of the application of the radical sanation, i.e., only after the impediment of natural or of divine positive law has ceased. An invalid marriage because of a defect in canonical form may be sanated provided that consent still persists and has not been revocated (cf. can. 1107).

On dealing with an invalid marriage due to a diriment impediment, a distinction should be made between an impediment of ecclesiastical law and an impediment of divine natural and positive law. Some impediments of ecclesiastical law cease with a dispensation granted by a competent ecclesiastical authority (cf. can. 1078) while some cease naturally (cf. 1083). Some of the impediments of divine natural law cease naturally (like the death of a partner, cf. can. 1085); others will never cease at all (like consanguinity, cf. cann. 1078 § 3 and 1091).

Some of the impediments of divine positive law cease with an indult given by a competent ecclesiastical authority. An example of this is the indult of departure from an institute of religious and consecrated life of pontifical right that entails the dispensation from the vows and from all the obligations arising from the solemn profession, including the diriment impediment of marriage *ex virtute religionis* (cf. cann. 1088 and 1178 § 2, 1°).[429]

In these cases, the impediment of natural law constitutes the limit for the granting of the dispensation; as long as it exists, the *sanatio in radice* cannot be applied.[430]

3.3.4.8 Diocesan bishop on granting sanation and the impediment of natural law – can. 1165 §2

The granting of radical sanation in the previous Code was an exclusive right of the Apostolic See.[431] The power of the diocesan bishops to grant sanations began to be

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hoc aequivocum quod eveniri potest, scilicet: vox extraorinaria non est in eadem linea quam vox ordinaria prout in canone 197 sumitur. Est potestas natura omnino diversa a potestate ecclesiastica iurisdictionis, de qua in illo canone».

[427] Prof. Castaño enumerates some matrimonial cases where the Vicarious Power of the Roman Pontiff in the dissolution of matrimonial bond may be applied. A) Non-consummated marriages: 1. Marriage among two baptized persons (can. 1142); 2. Marriage between a baptized and unbaptized persons (can. 1142); B) Consummated marriages: 3) Pauline privilege (cann. 1143-1147); 4) Possibility to choose one from among the wives (can. 1148); 5) Impossibility of restoring the cohabitation (can. 1149); C) Cases not contemplated in the codified text but are included in the usual ecclesiastical practices and are "treated" one by one by the Roman Pontiff through the Congregation for the Doctrine of Faith: 6) Marriage between unbaptized and nobody wishes to be baptized (*in favore fidei tertii*); 7) Marriage between a baptized and unbaptized (cf. J. F. CASTAÑO, *Il sacramento*, p. 482).

[428] Cf. A. ABATE, *Lo scioglimento*, p. 24; J. F. CASTAÑO, *Introducio ad ius*, p. 343; D. Flores, La potestà, p. 31.

[429] Cf. D. ANDRÉS, *Le forme di vita consacrata*, pp. 652-656. The author expounds the *ratio* of this indult: "*... la cessazione, per dispensa, dai voti perpetui comporta un cambiamento del posto o della condizione che uno occupa nella configurazione del Popolo di Dio;un cambio di molte funzioni pubbliche che, in base al battesimo-consacrazione-professione-ordinazione, si svolgevano; il ritorno ad uno degli stati fondamentali e constituzionali nei quali si articola la Chiesa: laicato e/o presbiterato*" (*Ibid*., 652).

[430] Cf. P. V. PINTO, *Commento al Codice*, on can. 1163, p. 679.

[431] Cf. CIC 1917 can. 1141: "Radical sanation can be granted only by the Apostolic See."

recognized with the motu proprio *Pastorale munus* of November 30, 1963 on numbers 21-22 and the motu proprio *De Epsicoporum muneribus* of June 15, 1966 on number 18.

The new Code especially in can. 1165 § 2 recognizes the diocesan bishops as having the power to grant sanations but only in individual cases and with three limits. First, when all the conditions mentioned in can. 1125 for the sanation of mixed marriage have been fulfilled. Second, when the impediment is reserved to the Apostolic See *ad normam* can. 1078. Lastly, a double restriction on granting *sanatio in radice*, i.e., not only when there is impediment of natural and divine positive law but also when the same impediment has already ceased.

3.3.5 Obligations and rights of the faithful

Benedict XVI, in his message to the members of the Pontifical Council for Legislative Texts on January 25, 2008, affirms that "*ius ecclesiae* is not only a mass of norms produced by the Ecclesiastical Legislator for this special people who is the Church of Christ."[432] "In the first place", the Pope emphasizes, "it is the authoritative declaration, on the part of the Ecclesial Legislator, of the obligations and duties that are founded in the sacraments and therefore they came forth from the institution of Christ himself."[433]

The Roman Pontiff cited one of the most incisive sayings of Antonio Rosmini (1797-1855), an Italian priest, philosopher and theologian, about human law, affirming that "human person is the essence of law" and he draws the parallel conclusion proclaiming that "the essence of canon law is the person of the Christian in the Church."[434] In fact, "the Code of Canon law contains the norms produced by the Ecclesial Legislator for the good of the person and of the community in the Mystical Body that is the Church."[435]

Some of these norms that safeguard and promote the values of human person: his dignity, vocation, mission, life, freedom, family in the Church are the following:

3.3.5.1 Equality of every baptized in dignity and in action – can. 208
3.3.5.2 Obligations to maintain the communion and obedience to the Church –can. 209
3.3.5.3 Obligation to holiness for oneself and for the Church–can. 210
3.3.5.4 Obligation and right to universally proclaim the Gospel – can. 211
3.3.5.5 Obligation to obey the pastors – can. 212 § 1
3.3.5.6 Freedom to express one's need to the pastors – can. 212 §2
3.3.5.7 Right to express public opinion – can. 212 § 3
3.3.5.8 Right to receive spiritual benefits and assistance – can. 213
3.3.5.9 Right to worship in accord with one's rite and spirituality – can 214.
3.3.5.10 Right to association and freedom of assembly – can. 215
3.3.5.11 Right to apostolate – can. 216
3.3.5.12 Right to Christian education – can. 217
3.3.5.13 Freedom in research and publication – can. 218
3.3.5.14 Freedom to choose one's state of life – can. 219
3.3.5.15 Right to good reputation and privacy – can. 220
3.3.5.16 Vindication and defence of one's rights – can. 221 §1

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[432] *Communicationes* 40 (2008), p. 27.
[433] *Ibid.*
[434] *Ibid.*
[435] *Ibid.*

3.3.5.17 Right to due process applied with equity – can 221 §2
3.3.5.18 Right to due process before inflicting canonical sanctions – can. 221 §3
3.3.5.19 Obligation to support the needs of the Church – can. 222 § 1
3.3.5.20 Obligation to promote social justice and Christian charity – can. 222 §2
3.3.5.21 Juridical limits on the exercise of the rights of the faithful – can. 223
3.3.5.22 Obligation and right to universal evangelization – can. 225 §1
3.3.5.23 Specific duty on temporal animation – can. 225 §2
3.3.5.24 Obligation of the Christian spouses to the edification of the People of God – can. 226 §1
3.3.5.25 Obligation of parents to educate their children – can. 226 §2
3.3.5.26 Right to have freedom on temporal realities - can. 227
3.3.5.27 Participation in munus regendi – can. 228
3.3.5.28 Participation in munus docendi – can. 229
3.3.5.29 Participation in munus santificandi – can. 230
3.3.5.30 Obligation of formation – can 231 § 1
3.3.5.31 Right to remuneration and social security – can. 231 §2
3.3.5.32 Obligations to seek for truth on the things which regard God and his Church – can. 748 §1[436]

Norms that protect human life

3.3.5.33 Irregularity for reception of Orders a person who has committed voluntary homicide or procured a completed abortion and all those who positively cooperated in either – can. 1041, 4°[437]
3.3.5.34 Latae sententiae excommunication for abortion – can. 1998[438]

One may notice that these obligations and rights have different sources that qualify their nature. The norms that have *ius divinum* as source are either divine positive law or divine natural law (e.g., cann. 215; 219; 220; 222 § 2; 226 §2; 227; 748 §1); while, those that have *ius humanum ecclesiasticum* as source are positive ecclesiastical law. However all of them have one thing in common, i.e., the protection and promotion of laws "founded on human person which is traditionally called natural law;"[439] that *ius naturale* not only "proper of human nature thanks to his particular and unique relation of participation to the eternal reason of God;"[440] but also "inherent to creation and ordained for redemption."[441]

3.3.6 Canonical equity

The exercise of power in the Church is not similar to the exercise of temporal powers in the State; the ecclesial exercise of power is primarily a service – «diaconia»[442] – in

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[436] Cf. *Lumen gentium* 16; *Dignitatis humanae* 1. According to St. Thomas of Aquinas, the inclination to know the truth about God is one of the precepts of natural law (cf. *S. Th.*, I-II, q. 91-95; J. MARITAIN, *Nove lezioni sulla legge naturale*, a cura di F. VIOLA, Milano, 1985, p. 138).
[437] Cf. CCEO 762 §1, 4°.
[438] Cf. CCEO 1450 §1.
[439] A. LONGHITANO, "Il Diritto," p. 100.
[440] Cf. LEO XIII, Encyc. *Libertas Praestantissimum*, June 20, 1888 in *Leonis XIII P.M. Acta*, VIII, Romae 1889, p. 219; *Veritatis splendor*, 43; Z. GROCHOLEWSKI, "La Legge Naturale," p. 39.
[441] Cf. CONGREGATION FOR CATHOLIC EDUCATION, *In questi ultimi decenni. Orientamenti per lo studio e l'insegnamento della dottrina sociale della chiesa nella formazione sacerdotale.* December 30, 1988, n. 33; *Enchiridion Vaticanum*, vol, 11, nn. 1901-2044; Z. GROCHOLEWSKI, "La Legge Naturale," p. 44.
[442] Cf. *Lumen gentium* 24; *Pastor bonus* 1.

communion of faith and charity. Thus, the pastoral and juridical dimensions are inseparably united in the canonical order because both of them have one and only end: *salus animarum*.[443]

The juridic and canonical actions are aimed at realizing the order of justice willed by the Divine Legislator. Thus, the ecclesiastical laws, the administration of justice in both judicial and penal processes are not separated from charity because the juridic and canonical activities are pastoral by nature since they take into consideration the good of the souls. In fact, the ministerial characteristic of *ius canonicum* is pastoral insofar as it defends the rights of person in the ecclesial community.

There is no dichotomy of the pastoral and juridical dimension of the *ius ecclesiae*, neither one can affirm that for pastoral's sake, law should be less juridical. John Paul asserts that "true justice in the Church is animated by charity and tempered by equity and it always possesses the quality of a pastoral action. There is no authentic exercise of pastoral charity without taking into consideration the pastoral justice."[444]

Canon 19 contemplates the possibility of «lacuna» in the present legislative canonical order. This gives the possibility to the judges and the interpreters of the norms to have recourse to a *supplementary principles* applied with canonical equity.

The role of the application of equity in the codified system like canon law can be explained by the fact that the ecclesiastical legislator cannot provide specific norms for all cases. In fact, no one claims that the codified system of canon law is the only positive *source* from which a judge ought to make references in performing his *ius dicere*.

In specific cases where a "custom or an express prescript of universal and particular law is lacking," (can. 19) except in penal case, the judge is permitted to find a *just* solution in the light of "the general principles of law applied with canonical equity." The *equity* referred to in the norm is a form of administration of justice *dulcore misericordiae temperata* capable of creating a symbiosis between the rigidity of the law and the evangelical charity.

There are still many discussions on the origin of this institution but most of the scholars follow P. Fedele in attributing this formula to one of the Decretals of Honorius III: "*In his vero quibus ius non invenitur expressum, procedas aequitate servata, semper in humaniorem partem declinando, secundum quod personas et causas, loca et tempora videris postulare*."[445]

In order to apply the concept of *aequitas canonica*, there is a need to understand what are the *general principles of law* to which *justice tempered with mercy* may be applied. There are various interpretations on this, but many authors sustain that when the impossibility of finding solution from the complex canonical norms limits the judge in finding the just solution, can. 19 allows him to draw principles from other systems outside the codified

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[443] Cf. PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Salus animarum, principio dell'Ordinamento Canonico*, in: http://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc _20000406 _ salusanimarum _ it.html, 17 febbriao 2007; A. LONGHITANO, "Il Diritto," p. 89.

[444] JOHN PAUL II, Alloc. *To the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota*. January 18, 1990 in John Paul II Speeches January 1990 at http://www.vatican.va/holy_father/john_paul_ii/ speeches/1990/january/documents/hf_jp-ii_spe_19900118_rota-romana_it.html.

[445] X. I, 36, 2; Cf. P. FEDELE, "Equità canonica", in *Enciclopedia del Diritto*, vol. 15, p. 150; A. VAN HOVE, *Commentarium in Codicem Iuris Canonici*, vol. 1, p. 291; F.X. WERNZ-P. VIDAL, *Jus canonicum*, vol. 1, p. 247, note 230; A. LONGHITANO, "Il Diritto," pp. 123-124. Recommended reading: P. FEDELE, *Generalia iuris principia cum aequitate canonica servata*. S.T.E.T., Urbino, 1936, 63pp.

order. From among these systems, the divine natural and positive law occupies a prominent place.[446]

Paul VI affirms that in canon law, the *aequitas* which the Christian tradition received from the Roman jurisprudence[447] constitutes the quality of its laws, the norms of their applications, the ability of the heart and mind to temper the rigor of the law.[448] Moreover, he asserts that in ecclesiastical jurisprudence, it is not enough to find the principles of "*aequitas naturalis*"[449]; the right judgement must reflect, above all, the *aequitas canonica* which is "the fruit of pastoral charity that constitutes one of its most delicate expressions".[450]

This convergence of charity and justice that is permanently permeated in the juridical and canonical activities of jurisprudence has allowed the evolution and development of a unique juridical experience enriched with humanity. Further, it enhances the innate capacity of canonical order to adjust in the constant development and change of human reality in view of the achievement of the natural and supernatural end of the Church through the revocation of positive law tempered with canonical equity or through the proposal for legislation or modification to the competent ecclesiastical authority.[451]

CONCLUSION

Natural moral law is an inner law emanating from the Eternal law. It is the primary work of God, the Creator, who created man to share in his image and likeness in the spiritual and rational nature. Every rational being personifies in him the eternal reason, motivating him to comply with the eternal divine law given at the moment of creation.[452] The natural law "is nothing other than the light of understanding infused in us by God, whereby we understand what must be done and what must be avoided."[453]

The precepts of natural law have their source immediately in God and in human nature. This reality constitutes the divine constitutionality of natural moral law. Its divine origin should always be the basis for any juridical construction in order to assure that any law that will be enacted will serve its purpose, i.e., the good and only the good of human person.[454]

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[446] Cf. C. LEFEBVRE, *Les pouvoirs du Jege en droit canonique*, Parigi 1938, pp. 206-207 ;G. M. COLOMBO, *Sapiens Aequitas. L'equità nella riflessione canonistica tra i due codici.* PUG, Roma, 2003, p. 98; A. RAVA, Il problema delle lacune dell'ordinamento giuridico e della legislazione canonica, Milano 1954, p. 113; J. GARCIA MARTIN, *Le norme generali*, pp. 121-122.

[447] Cf. C. 6. 1. 8: "*Placuit in omnibus rebus praecipuam esse justitiae aequitatisque quam stricti iuris rationem.*"

[448] Cf. PAUL VI, *Allocutio ad Praelatos auditores.* Die 8 februarii 1973, p. 99.

[449] "*Equità è una virtù naturale che mira a temperare e quasi «umanizzare» la giustizia intesa in senso stretto, così che nessun danno spirituale o temporale, nessun incommodo inutile possa derivare ai sudditi dall'osservanza della legge. L'equità canonica, regola l'attività umana in ogni società civile (a fortiori nella Chiesa)* [P. V. PINTO, *Commento al Codice*, on can. 19, p. 20].

[450] *Ibid*., 95.

[451] *Communicationes* 40 (2008) p.. 53-54.

[452] *Veritatis Splendor*, 40: "God gave this light and this law to man at creation".

[453] *Ibid*.. 12; 40.

[454] Cf. R. DAVID, *I Grandi Sistemi Giuridici Contemporanei*, Cedam, Padova, 7th ed., 1980, p. 2: "*Per i secoli la scienza giuridica si è studiata di individuare i princpi e le soluzioni di un diritto giusto, conforme alla volontà di Dio, alla natura e alla ragione umana.*"

Man as person is the center of all legal systems, whether divine or human, insofar as he is the core and apex of every law.[455] There is but one valid legal order whose center is occupied by human person: *lex-homo*. The civil and canon law are inserted in this legal order like a concentric circles harmonizing one another without overrunning and overlapping.

The ultimate source of canon law is God, the Divine Legislator of Eternal law. Therefore, canon law derives its normative content from God, *autor naturæ* (divine natural law), from God the Redeemer, *autor gratiæ* (divine positive law) and from the competent ecclesiastical authority (*ius humanum ecclesiasticum*). Positive divine law cannot contradict natural law because it is the human expression of God's eternal law. The Church accepts and considers both as supreme binding laws which she may interpret but not modify. The unity of divine and human elements comprises the uniqueness and universality of *ius ecclesiae*.

The Code contains number of norms that are not explicitly enacted as law, since they pre-exist the law and are grounded on human nature itself. It is difficult to mark with precision the demarcation line between natural moral law and canon law; in spite of this, the Church Magisterium continues to speak of natural law to define some moral and juridic realities like marriage. In fact, Paul VI reiterates the Church's teaching on the moral doctrine of marriage asserting that "it is a doctrine founded on the natural law enlightened and enriched by divine Revelation."[456]

There are two distinct legal systems: civil law and canon law. These two universal legal orders that form together a unique system called *utrumque ius* (the one and the other law), have to regulate the relationship between their two normative spheres: the human society and the ecclesial society. Both civil and canon law must have a necessary coordination of their normative acts for the mere fact that they both have the same persons as subjects of the former and faithful of the latter.

This is the reason why the Church reiterates her constant teaching on the necessary conformity of the provisions of the civil law with the moral law, i.e., an unconditional respect of natural law on the part of every civil legislative authority,[457] precisely because both of them serve and protect the same human person. In fact, by canonizing the provisions of civil law, the Church makes them her own in order to facilitate the regulation not only of the ecclesiastical but also the civil affairs of her faithful. However, the affirmation of the exclusivity of the power of each one (*unicuique suum)*, may give rise to a conflict at the expense of the same subject and/or faithful. Should this happen, an essential criterion should be the guiding force for a just decision, i.e., the *salus animarum* that entails the derogation of the civil norms whenever their application would place in danger the spiritual welfare of the faithful.

Being the mother, teacher and human legislator of Divine will, the Church through Magisterium interprets the natural law and she may also codify its content.[458] Pius XII

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[455] Cf. A. MARTINI, "Il Diritto nella realtà," pp. 7-11.

[456] PAUL VI, Humanae vitae, n. 4 in *AAS* 60 (1968) 481-503.

[457] Cf. JOHN PAUL II, *Evangelium vitae*, 72; JOHN XXIII, *Pacem in terris*, 30; CONGREGATION FOR THE DOCTRINE OF FAITH, *Considerations regarding proposals to give legal recognition to unions between homosexual persons*, July 31, 2003, n. 6.

[458] Cf. Compendium of the Catechism of the Catholic Church, n. 430: "It is the duty of the Magisterium of the Church to preach the faith that is to be believed and put into practice in life. *This duty extends even to the*

asserts this fact by affirming that "the Redeemer has placed both the law written in the heart, that is, natural law and the truths and the precepts of Divine Revelation as moral treasure of the humanity in the hands of His Church."[459] In fact, "in recalling the prescriptions of natural law, the Magisterium of the Church exercises an essential part of its prophetic office of proclaiming to men what they truly are and reminding them of what they should be before God."[460]

Benedict XVI challenges everyone not to yield to the "dictatorship of relativism"[461] in the present cultural crisis that persuades people to move on *etiamsi Deus non daretur*; instead he encourages everyone, believer and non-believer, to invert the *dictum* of the Age of Enlightenment by arming oneself with courage and start living and projecting one's life "*veluti si Deus daretur*".[462]

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specific precepts of the natural law because their observance is necessary for salvation." See, PAUL VI, *Humanae vitae*, July 25, 1968, n. 19 in *AAS* 60 (1968), pp. 481-503.

[459] Cf. PIUS XII, Radio message, *La famiglia é la culla*, cited by F. FAVARA, *De iure naturali.* p. 146: "*Ambedue, sia la legge scritta nel cuore, ossia la legge naturale, sia la verità e i precetti della rivelazione soprannaturale, il Redentore Gesù ha rimesso, come tesoro morale dell'umanità nelle mani della sua Chiesa.*"

[460] CCC 2036.

[461] Cf. J. RATZINGER, Homily during the Mass «pro eligendo Romano Pontifice», April 18, 2005, in *The Vatican Website* at http://www.vatican.va/gpII/documents/homily-pro-eligendo-pontifice_20050418_en.html.

[462] ID., *L'Europa di Benedetto nella crisi delle culture*, Radici 3, Libreria Editrice Vaticana e Edizioni Cantagalli, Siena, 2005, pp. 62-63.