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Natural Law and Legal Positivism in the English Church c. 1200 to 2000

Professor Norman Doe

I. MEDIEVAL FOUNDATIONS: Gratian (1140): (1) 'The human race is ruled by two things...natural law and usages'; (2) 'Natural law is what is contained in the Law and the Gospel. By it, each person is commanded to do to others what he wants done to himself and prohibited from inflicting on others what he does not want done to himself'; it is common to all nations because it exists everywhere through natural instinct, not because of any enactment'. (3) Natural and divine law: 'All ordinances are either divine or human. Divine ordinances are determined by nature, human ordinances by usages; ...the latter vary since different things please different people'; (4) 'Morality is divine ordinance. Law is human ordinance'; thus: 'whatever is moral is included in the term "divine or natural ordinances"; "human ordinances" are "usages drawn up in writing and passed on a law"'; (5) Human rules are law if just: 'Law [*ius*] is a general term; ordinance is a species of law. Law is so called because it is just [*justum*]. Law consists of ordinances and usages'; an ordinance is a 'written enactment' and usage is 'long-continued custom'; both may be supported by 'reason' (6) 'No one is permitted to act contrary to natural law'; 'custom' is void is unreasonable; and 'both ecclesiastical and secular enactments are to be rejected entirely if...contrary to natural law'.

Positivism in Gratian: (1) 'Decretal letters...have authoritative force'. No 'custom may opposes pontifical statutes'. 'Things...not sanctioned by authority or universal practice are to be abrogated', if 'not encompassed by the authority of sacred Scripture, found established in episcopal councils, or confirmed by the custom of the universal Church'. So (2): 'An ordinance...should be proper, just, possible, in accord with nature [i.e. natural reason]...and the custom of the country, suitable to the place and time, necessary, useful, clear...and not accommodated to some private individual, but composed for the common utility'. **BUT:** 'When ordinances are enacted these characteristics should be considered, *because after they have been instituted*, one will no longer be free to pass judgment on them; rather, one must pass judgment *according to them*'. **YET:** 'Some ordinances have now been abrogated by the usage of those acting contrary to them because ordinances are confirmed by the usages of those who observe them' (e.g. ordinance of Pope Telesphorus) – that is, by desuetude.

Lyndwood (d. 1446) uses *regulae iuris* e.g. to sum up precepts of natural law/reason: a penal statute must be interpreted benignly; he writes of what is 'reasonable', 'good and

equitable', 'good and lawful'; an executor must fulfil a testator's wishes 'according to his conscience', and may be removed for 'just cause'; he uses 'equity' rather than 'rigour of law'. **BUT**: the pope is prince of the church; 'what pleases the prince has the force of law'; 'the pope is above the law'; and 'the pope is not subject to the law'. Also: customs vary according to place.

Bracton (d. 1268): 'Natural law is that which nature, that is God himself, taught all living things'; discovered by instinct, it is always 'good and equitable'; **BUT**: English law obtains its force only if 'approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king...having first been added thereto'.

Fortescue: positivism (d.1476): English government is *dominium politicum et regale*: law is made by consent of the people and king in parliament; laws are 'put forth [*editae*] by man', 'commanding what is virtuous and forbidding the contrary' - 'when...referred to the people, then to them the law is always law even though it is sometimes good and sometimes bad'.

Positivist practice-cases: 'If an act of parliament be of such manner that by the assent of the king...lords...and...commons [it] is...enacted, this is a good act of parliament' (1496); 'when a statute is made although it be...mischievous; yet this will be held for law until it be repealed' (1443); 'usage makes the law without other reason' (1455); 'we will sooner suffer a mischief than an inconvenience'; courts are 'laying down a positive law' (1468); substantive: 'if a man by his testament leaves me certain goods, I shall not recover them by our law but by the law of the holy Church, because the testament (...the principal) is spiritual and belongs to the court Christian, and therefore so does the action in respect of incidental things' (1458).

Natural law theory: Fortescue (on Aquinas): 'Natural law is nothing but the participation of the eternal law in a rational creature'; it issues from the divine will (*lex naturae lex divina est*), is immutable, consists of rules (*regulae*) and chief amongst them that a person should do to others that which he would have done to himself. Natural law is known by instinct, reason and scripture: it is that which nature taught all animals and 'is infused into and is innate in man'; 'right reason [*ratio*] reveals the law of nature'; it is 'contained in the law and gospels'. **Critically**: natural law excels 'all other human laws'; anything contrary to it is iniquitous (*iniquum*); and: 'Where as it seems against the law made by God, [human law] may not then be called a law but rather abusion, and in Latin called *corruptela et non lex*'; such law 'hastens into non-existence, as does everything which refuses to be led by natural law'.

Natural law thinking in practice: (1) *Statutes* forbid conduct that is, e.g., 'against the law of God and of natural reason', an 'offence to God', or 'to the displeasure of God'; (2) *Common law* judges occasionally expressly use natural law, e.g. 1468 Yelverton JKB: 'we will do now in this case as the canonists (*savonists*) and civilians do when a new cases comes, for which they have no law before'; in such cases, 'they resort to the law of nature [*al ley de nature*] which is the ground of all laws [*leys*], and according to that which is suggested by them to be more beneficial to the common weal, etc., they do, and so now we will do'; (3) More often 'reason', 'conscience', and 'equity' are used in statute and the courts to justify rules, argumentation and decisions. **BUT**: judges do not use natural law, etc., to strike down

statute or common law; though a local custom 'wholly against common right and all reason' is void.

Reginald Pecock (d. c. 1460): (1) natural law is the 'judgment of [man's] natural reason...which is the moral law of nature and the moral law of God'; (2) 'the common law of God [is] made of the law of nature' - its teaches every virtue and prohibits every vice; (3) whatever law 'man's reason enjoins is commanded by the law of God'; (4) each 'positive law of God' is a 'voluntary and wilful assignment of God', 'a law to us binding us'. BUT: (1) human laws bind 'if the [same] men which should be bound by the laws will and consent to the making of the laws'; (2) '[w]hen a law is justly made by consent of all people or the greater part...and used and continued by the greater part of the people as for a law, each person of this people is bound by reason and the law of nature to keep it'; 'each...renounces and forsakes all right belonging to him...contrary to the execution of this law'; (3)'positive law' consists of 'commandments and ordinances' ruling men 'to do this or that, to which by God's plain laws the men were not before bound'. YET: human laws approved by natural law are 'lawful' 'in the proper way to call a thing lawful' - however: laws 'out of which come...evils, are by right judgment of reason unlawful, and not worthy to be had and used'.

II. REFORMATION: Positivist practice-substantive rules: *Statute*: Submission of the Clergy Act 1534: Roman canon law applies unless repugnant to the royal prerogative, 'customs, laws or statute of [the] realm'. *Common law*: the fact that a legal right 'has not been put in practice' is 'immaterial' to its efficacy; 'the law consists in four principal points: it prescribes, and prohibits, and permits, and punishes'; 'the positive laws of the church do not bind, apart from those who have received them, when the contrary has been accustomed in practice for thirty years'; and: 'since the [papal] decree was never received (*resceive*) here in England, for that reason it does not bind'; 'the law of God may dispense with such moral precepts, though not with positive laws'. **Francis Bacon**: natural law merely gave dignity to positive law – statute prevails over common law and that over natural law (Case of 1608).

Temporal practice/natural law: *Statute* 1534: archiepiscopal licences are to be 'not repugnant to the law of God'. *Common law cases*: 'there is nothing...in our law contrary to nature or reason, or the law of God, but our law is agreeable to them all' (1564); 'custom is unwritten law unless repugnant to natural reason' (1569); that an agreement between did not bind a third party was based on 'the law of nature and reason' (1619); adopting a child would be 'the breaking of the law of God, the law of nature, and of the land' (1647); *Dr Bonham's Case* (1610): 'when an act of parliament is against common right and reason, repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void'.

Church courts and natural law thinking: 1589: 'for certain causes moving his conscience' X did not receive Holy Communion; 1633: the argument that God had commanded us to keep the seventh day holy was rejected to justify trading on other holy days; 1635: a man was cited to answer a charge that he had 'violated the laws of God and nature' in abusing his own 'aged father; and 1647: 'Laws are divided into arbitrary or natural laws, the last of which are essentially just and good and bind everywhere and in all places where they are observed'.

St German (d. 1540): **Doctor:** (1) 'The law of man...is derived by reason as a thing which is necessarily *and probably* following of the law of reason and...law of God'; **so:** 'In every law positive *well made* is somewhat of the law of reason and...of God; and to discern the law of God and...reason from the law positive is very hard'. (2) Human law is 'just' if 'honest, righteous, possible in itself, and after the custom of the country, convenient for place and time, necessary, profitable' and 'consonant with the law of God'; **so** (3) e.g. an 'ordinance of the Church is not righteous nor obligatory but it be consonant to the law of God'; 'against this law [natural law], prescription, statute nor custom may not prevail and if any be brought in against it they be no prescriptions, statutes or customs, but things void and against justice'. **Student:** (1) common law is 'grounded upon the law of reason, the law of God', customs, maxims, and statutes; *general customs* are 'accepted and approved' by the king 'and all their subjects'; *statutes* are made 'in such cases where the law of reason, the law of God, customs, [and] maxims...seem not to be sufficient to punish...and to reward'. **So:** 'any law duly had and ordained...which is not contrary to the law of God or...reason...is binding upon all who are subject to it, *in the tribunal of conscience*'; **however:** 'when anything is grounded upon the law of nature [common lawyers] say that reason will...be done, and if it be prohibit by the law of nature they say it is against reason or that reason will not suffer' it; **as such:** 'It is **enquired** in many courts in this realm...if any general custom were directly against the law of God, or if any statute were made directly against it...that custom and statute were void'.

Richard Hooker (d. 1600): (1) *The legal order: Eternal law* is 'that order which God, before all ages, has set down with Himself to do all things by'. *Natural law* is the application of eternal law to humans. It 'teaches laws and statutes to live by', but it is darkened by sin. As it is what human reason considers binding, it may be called 'the law of reason'. *Scripture* contains 'divine laws written', 'positive laws', its 'principal intent' is 'to deliver the laws of duties supernatural'. *Reason* should be used to interpret it, many 'natural or rational' laws are set out in Scripture, but it is not the sole source of practical wisdom for every human act; it contains 'positive law' which, when made for circumstances no longer existing, may be changed. *Human laws* derive from 'an order...agreed upon'; 'the law of a common weal, [is] the very soul of a politic body, the parts whereof are by law animated, held together, and set on work in such actions as the common good requires'. 'Without...**consent** there were no reason than one man should take upon him to be lord or judge over another'. **But:** 'there is and...great use of human laws...deducted by way of discourse as conclusions from the...divine and natural, serving for principles'; 'laws human must be made according to the...laws of nature...without contradiction to any positive law in scripture. Otherwise they are ill made' – not void. And English 'Ecclesiastical law' is that 'whereby we are governed'.

(2) *Positivism:* Laws are 'rules of action', 'a constraining force', 'correspondent to their end'; 'human laws are...ordinances, *which such as have lawful authority given them for that purpose, do probably* draw from the laws of nature and God, by discourse of reason'. In England, 'power in Ecclesiastical causes is by the laws of this Realm annexed to the Crown', by 'the general consent of all', with authority 'to exercise in [such] causes *but according to the laws of the Church*'. He refutes the claim that 'Parliament being a mere temporal Court

can neither by the law of nature, nor of God have competent power to define of such matters’.

(3) *Law and reason*: ‘the laws of well-doing are the dictates of right reason’; ‘a law is properly that which reason...defines to be good that it must be done’; ‘the law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound to’; laws of reason are ‘investigable by reason without the help of revelation supernatural and divine’; and ‘the world has always been acquainted with them’; ‘mixed’ laws are human laws reason prescribes; and ‘merely’ human laws those which ‘make that a duty which before was none’. Law with no roots in reason may still be law.

(4) *Populist theory*: ‘Laws are not made...which public approbation hath not made so’. Laws change: ‘experience of time may breed both Civil and Ecclesiastical change’. So: ‘Canons, Constitutions, and Laws which have been at one time meet, do **not** prove that the Church should always be bound to follow them’; ‘Positive laws are...permanent or...changeable, according to the matter itself is concerning which they were first made. Whether God or man be the maker of them, alteration they so far admit’. And: ‘Laws...are many times full of imperfections’; and ‘the number of needless laws unabolished does weaken the force of them that are necessary’. **But**: ‘laws as have been made upon special occasions, which occasions ceasing, laws of that kind do abrogate themselves’. **Yet**: positive laws ‘perhaps cannot be abrogated saving only by whom they were made: because the intent of them being known to none but the author, he alone can judge how long it is requisite they should endure’.

(5) *The authority of the church*: ‘The Church...being a Politic Society or Body, cannot possibly want the power of providing for itself’; ‘the true original subject of power...to make church laws is the whole entire body of that church for which they are made’; the ‘general consent of all...gives them the form and vigour of laws’. It is ‘absurd to imagine the Church...abridged of this liberty’. The church ‘has the same authority still, and may abrogate old laws, or make new, as need shall require’, at ‘the instinct of the Holy Spirit’, and ‘by the...acceptation of all’. Whilst making church ‘laws...are still termed the deeds of the King’, ‘to define of our own Church’s regiment, the Parliament of England has...authority’.

(6) *Limits on authority*: The law does not give ‘the Church a liberty which has no limits or bounds’ but ‘we have nowhere altered the laws of Christ further than in such particularities only as have the nature of things changeable according to the difference of times, places, persons, and other like circumstances’. **BUT**: ‘Christ has commanded prayers to be made, sacraments to be ministered, and his Church to be carefully taught and guided’; these ‘must be kept till the world’s end’. There are also doctrinal limits: ‘The Church has authority to establish that for an order at one time, which at another time it may abolish, and in both do well. But that which in doctrine the Church does now deliver rightly as a truth, no man will say that it may hereafter recall and as rightly avouch the contrary. Laws touching matter of order are changeable, by the power of the Church; articles concerning doctrine not so’.

(7) *The authority of the laity in law-making*: 'till it be proved that some special law of Christ has for ever annexed to the Clergy alone the power to make Ecclesiastical laws, we are to hold it a thing most consonant with equity and reason that no Ecclesiastical law be made...without consent...of the laity...Clergy' and monarch. The laity participates in making *Statutes* by the Sovereign in Parliament. Clergy in Convocation may create *Canons* with royal assent: it is *not* the case that 'any Canon devised by the Clergy alone in their Synods whether provincial, national or general has by mere force of their agreement taken place as a law making all men constrainable to be obedient thereto without any approbation from the King before or afterwards required *in their behalf*'. Canons bind the laity.

(8) *Ecclesiastical law must be enforced but may be relaxed*: 'The due execution of Laws spiritual depends most upon the vigilant care of the [chief] spiritual Governors, whose charge is to see that such Laws be kept by the Clergy and people'. Hooker deals with the erection, standards, jurisdiction, process, judges, and supervision of the English church courts. **BUT**: As 'the ordinary course of common affairs is disposed of by general laws, so likewise men's rarer incident necessities and utilities should be with special equity considered'. So the Church is to avoid 'a rigorous observation of Spiritual ordinances, without relaxation or exception' when 'equity, permitting in cases of necessity that, which otherwise it disallows and forbids'. He invokes in practical examples 'the Law of Equity', 'justice' and 'common right', 'the rules of natural equity' and 'conscience': 'Conscience is the proper court of God'.

Edward Coke (d. 1633): 'before judicial laws were made, Kings did decide causes according to natural equity'; treason is 'against the law of God, nature and reason'; and 'every man by the law of God, of nature, and of nations was bound to provide a competent for the payment of his debts'. **BUT**: cases (e.g. on property) should 'not be decided by natural reason, but by the *artificial reason and judgment of law*, which law is an art that requires among study and experienced before one is able to attain a knowledge of it'; so: 'legal reason *est summa ratio*'; 'This reason, when firmly fixed and fully developed in the human mind, is Law'.

Coke, positivism and ecclesiastical law: (1) as to the pre-1534 common law: 'Neither did this law ever yield to any Pope authority compulsive in this land, our common laws...did withal their force abjure his power and that which he had was but by usurpation'; post-1534, 'the temporal law and the ecclesiastical law...are joined together'; (2) Convocation may (with royal assent) make canons as to 'things properly belonging to doctrine and divine knowledge for the institution of the soul and reformation of conscience'; this authority, like pre-1534 canon law, operates on 'sufferance'. Yet, causes are granted to church courts on the basis of the 'natures, conditions, and qualities of the cases'; he lists causes which led 'public authority [to] authorise ecclesiastical courts'. He conceded, however, that an examination for heresy proceeds 'by the authority of canonical scripture, and by the four general councils, or by any other general council, wherein the same was declared heresy by the express and plain words of canonical scripture, or such as shall hereafter be determined to be heretical by Parliament'.

Civilians (Thomas Eden d.1645, Notebook): 'Because they are not confirmed by act of parliament...canons of Convocation are of no force except whether there is no law or custom to the contrary'; 'custom prevails against the canon'; 'a canon cannot take away any ancient prescriptive custom any more than it can a statute'; **but:** 'in conscience one must pay debts'.

III. RESTORATION AND ENLIGHTENMENT: Ambiguities in practice and theory.

Practice: common law and natural law: 'The law of nature is part of the common law' (1695); a thing washed up on a beach 'belongs to the person who finds it, because being outside the control of any person, by the law of nature it passes to' him (1695); 'every father and mother, by the law of nature, is under an obligation to maintain their own children, but yet this may be varied by circumstances' (1713); a son-in-law had no duty to support his parents-in-law even if they were poor because 'the law of nature does not reach to this case' (1719); '[i]t is certain natural justice requires that no man shall be condemned without notice' (1721); there were 'many cases in the books' where the judges 'have gone beyond the words' in a statute in order to ensure that their decisions conformed to natural justice (1727); argument in favour of a common law of copyright was supposed to have been 'founded on natural justice' ((1761); and since by natural law everyone is free, for Lord Mansfield, slavery is 'so odious that nothing can be suffered to support it but positive law' (1771).

BUT: 'it would be dangerous to depart from the words of the statute, and if they once did, they should never know where to stop' (1718); 'all usury is damned and prohibited, as being against the law of God, the laws of the realm, and the law of nature' (1771) – this did not invalidate statutes allowing it in moderation; equity was posited/juridified in 'rules of equity'.

Ecclesiastical law: Civilians mainly rely on *positive law*, not moral ideas: e.g. 'the law allows not' (1672); a proposition 'without all example in the Court...and a dangerous precedent' is weak (1676); 'there can be no resort to Parliament by...appeal for any injustice done in the spiritual courts' (1679); a Canon restricting statutory rights is 'void' (1682); 'reason or authority' are needed (1685); the court rejects 'the claim that a marriage was void if 'a mere nullity...by the law of nature' (1710); the ordinary 'must follow the law. No immoral act is an objection, but a legal objection only [is] to be regarded' (1714); 'all canons...against the law of England shall be void', and 'many authorities and precedents were cited...to prove this practice' (1718); 'Words in acts of Parliament are always to be understood in that sense the law puts on them' (1720); a court must find the applicable 'rule of law' (1728), it 'is governed by the rules of the civil law', 'the rule of the ecclesiastical courts' (1737), 'authorities from the canon and ecclesiastical law' (1739), or 'a book of good authority' (1745); 'It may be said that this will be a hard case, but that will not alter the law' (1745).

BUT: 'the mother seems to have a natural right to the administration [on intestacy] where there are no children' (1676); 'a statute is never expounded in an improper sense but *ad evitandum absurdum* or to prevent injustice' so 'the intent of the statute is observed, if not the letter' (1679); no civil law is 'to be observed among us but what is required by the law of nature' (1696); no judge is obliged to act if 'no law' requires this, or if it is 'inconvenient' or

'unreasonable' (1714); a judge may hold for a party as 'law and equity were for them'; and a will may be upheld if it is 'reasonable' (1728); and 'the rule of the civil law [on a point] is founded upon very good reason' (1737); 'This suit is to rectify the conscience of the parties. And, therefore, these suits are most favoured at law in the means to come at the truth *and that even against the general principles and practices of courts in other causes*'; and: 'The court would, therefore, have a very infirm jurisdiction in a matter of conscience if bound by its positive rules to reject the only evidence in some cases of this and the best cases in all'; so, an ecclesiastical court may examine a lunatic under oath during periods of sanity (1746).

John Godolphin (1678) civilian: *Positivism*: 'rules of canon law'; 'those Canons...received, accepted and used in any Christian Realm...by such acceptance and usage have obtained the force of Laws...and are become part of [its] Ecclesiastical Laws'; those 'embraced, allowed, and used in England, are made by such allowance and usage'; 'interpretation, dispensation, or execution of these Canons, being become Laws of England, doth appertain sole to the King...and his Magistrates...the Bishop of Rome hath nothing to do in the interpretation...of those Laws in England'; he criticises the idea that 'men by nature are able to fulfil the whole law of God'. **BUT**: (1) 'whatever was commanded in the Old Testament, *and grounded in the law of nature*, not being repealed in the New Testament, must yet stand in force, as a duty of the moral law'; (2) 'the law of nature' is 'the very ground of the moral law'; (3) It is 'repugnant to the law of nature' for a woman to marry two men; it is 'consonant to reason' that marriage is in ecclesiastical jurisdiction; testamentary freedom is 'the product of the *jus naturale*'; tithes are 'due *jure divino*'; pre-1534 canon law applies by 'sufferance, consent and custom and not otherwise'; he cites 'natural reason', 'unreasonable custom', 'reason of the law', and 'natural equity'; a canon against common law or the law of God is 'void'.

Thomas Bever (d. 1791) civilian: *ius commune* has 'a fair claim to the approbation of the learned world' to be 'be safely adopted as principles of sound reason and natural justice'.

Nelson (1709): canons are 'Rules...made for the Government of the Church...first collected out of the Scriptures, and the ancient Writings of the Fathers'; 'An Act of Parliament may abrogate any Canon, unless it consists in enjoining some Moral Duty; but a Canon not confirmed by an Act of Parliament cannot alter any other Law'; common law is 'such customs as which by the general consent of the people have time out of mind obtained the force of law'; 'Ecclesiastical Law is made up of such Canons [etc] received and approved by the People, and which by immemorial practice have been used in our National Church'.

Edmund Gibson (1713): no discussion of NL: *positivism*: pre-1534 papal canon laws 'obtained in England by virtue of their own authority...as...in other parts of the western church...till...the Reformation; and from that time have continued upon the foot of consent, usage and custom'; Act of Parliament declared them 'no longer binding by their own authority'. He often uses 'a known maxim of the canon law' or 'a rule of the canon law', but without reference to natural law. **BUT**: he refers piecemeal to: 'the law of God', 'God's law', 'the word of God', 'law of Christ', 'natural reason', 'bound by nature', 'natural obligation'.

Richard Grey (1730): ecclesiastical law operates on 'the foot of consent, usage and custom'; consists of 'legal rules', 'proper rules', 'rules' of canon or common law applied in 'tenor' or 'strictness'. He uses 'known maxims of the canon law', 'canonical reasons', 'common

opinion', and 'equitable rules'. **BUT**: bishops exercise discipline by 'divine as well as human authority'; Convocation with royal assent may make canons 'for regulation of the church...as well concerning the laity as ecclesiastics' if 'confined to church matters'; canons represent 'law of the kingdom, as well as an Act of Parliament'; **yet**: if 'not governed with the Spirit and Word of God [it] may err'; it has no 'authority' unless 'taken out of Holy Scripture'.

Richard Burn (1763): no focus on NL but on 'the rules of ecclesiastical law'; 'Ecclesiastical law...is composed of...the Civil law, the Canon law, and the Common law...in their proper rank and subordination'; 'Civil law submits to canon law, both to the common law, and all three to statute'; statute has 'superiority above all other laws...whatsoever'; the Articles of Religion 1562 'are esteemed as part of the statute law'; 'all things are done according to law'; **yet**: 'the rules of equity' may 'mitigate the rigour of the common law' if there is 'hardship or inconvenience in a particular case' **but** cannot 'relieve against an Act of Parliament, for that cannot be altered but by the same authority which established it'; royal supremacy is 'defined to be the king's executive power circumscribed by the laws of his kingdom'. **So**: 'canon laws have their decrees and decretal determinations *in writing*'; he uses a 'rule of law', 'general rule', or 'rule of the canon law' and 'maxims'. Canon law is 'authoritative' with 'the force of law' due to its 'long and immemorial usage' and 'reception'; it may be used 'in cases which the statutes have left doubtful or not clearly determined'. **BUT**: a cathedral statute which is not 'equitable' is void; a rule on valid marriages 'universally obtains'; there must be a 'just and reasonable cause' for a dispensation; Sunday is to be observed 'according to God's will'.

Jacob (1744): 'Maxims in law are...conclusions of reason, and universal propositions, so perfect, that they may not be impugned or disputed'; they 'are of the same strength as acts of parliament', and 'when judges have determined what is a maxim', they 'are held 'for law'.

William Blackstone (1765-1769): *positivism*: to permit the courts to review unreasonable legislation would be 'to set the judicial power above that of the legislature'; 'laws...denote the rules, not of action in general, but of human action or conduct'; *substantive church law*: 'If an action at law be brought by the patron against the bishop, for refusing his clerk, the bishop must assign the cause'. **BUT**: 'Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these'; God 'laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws'. 'This is the foundation of...ethics'. 'This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all [of] the globe [and] at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason'.

Canon law: pre-1534 'national canon law' (e.g. provincial constitutions), 'adapted only to the exigencies of this church and kingdom' and papal laws 'have no force or authority' here – 'their authority...wholly founded upon that permission and adoption'; post-1534, they were 'intermixed' with common law as 'supplemental parts' of 'the king's ecclesiastical law'.

IV. MODERNITY: ecclesiastical law is a system of rules and principles: **Robert Phillimore** (1873, 1895): no discussion of natural law: (1) his aims ‘to produce the law in the form of a system arranged according to the principles of science’ around ‘General principles of the law of the Church of England’; (2) ‘The rules and laws which relate to the ministrations and government, rights and obligations of a church established in a state are properly denominated *jus ecclesiasticum*’ and include ‘canons and ordinances made by ecclesiastical authority [and] the civil laws and the customs, general and local, which affect the church’; it ‘admits of various divisions: considered as to its origin, it is either divine or human, modern or recent’. **BUT:** his ‘principles’ are close to the earlier ‘maxims’ and *regulae iuris*: e.g. it is a ‘principle that a legal origin ought to be presumed if a legal origin be possible’; ‘a man cannot visit himself’. **Archbishops’ Commission on Canon Law 1947:** ‘the Church has no authority from our Lord to alter the way of faith...life and sacraments’; **Garth Moore:** ‘law has validity only within the framework of its principal and parent, the divine law’; **Mark Hill** cites the *jus divinum* twice in a discussion of the purposes of ecclesiastical law: 1.03, 1.36.

Vestiges of natural law thinking in practice: (1) *Ray v Sherwood* (1837): ‘the law of God cannot be altered by the law of man’ but ‘it may legislate inconsistent with the Divine Law’; (2) Canon 21: cathedral customs must not be contrary to the Word of God; (3) moral ideas are used in the General Synod; e.g. July 2016: ‘ethical or moral arguments’ in relation to investments; ‘conscience’ (on legislative reform); the Bible (on education); (4) Consistory Courts today use ‘principles’ reminiscent of the *regulae iuris* (2012-2013): often the task is to ‘consider the legal principles’ which apply to the matter; some are ‘binding’, ‘well-known’, or of ‘long-standing’ – but e.g. ‘the general principle’ *de minimis non curat lex*, though this will not override any contrary and explicit statutory rule: *St Peter in the East, Oxford* [2013].

Principles of Canon Law Common to the Churches of the Anglican Communion (2008): a ‘principle of canon law’ is ‘a foundational proposition or maxim of general applicability which has a strong dimension of weight, is induced from the similarities of churches, derives from the canonical tradition or other practices of the church, expresses a basic theological truth or ethical value, and is about, is implicit in, or underlies canon law’. Most express positivism: e.g. ‘The law binds the bishops, clergy and lay officers’. **BUT:** many echo the *regulae iuris*: ‘Laws cannot oblige a person to do the impossible’; ‘Law should reflect the revealed will of God’; ‘Laws should reflect but cannot change Christian truths’; ‘Scripture, tradition and reason are fundamental authoritative sources of law’; ‘Validity is acquired by full conformity to the will of God and is presumed by conformity to law’; ‘Church disputes must be resolved equitably, and, in the first instance, the parties should seek to resolve their differences amicably’; ‘Church courts and tribunals must give their decisions, and the reasons for them, in writing, and both decisions and reasons must be based on fact and law’.

Nigel Biggar (theologian, 2011): to ‘affirm natural law’ means: there is a form of flourishing given in and with the nature of human being; reflection on human nature can achieve an understanding of that flourishing; reflection on experience can produce a grasp of kinds of action that respect and promote those goods in our relations with others; all humans are, despite their sinfulness, *somewhat* capable of an accurate grasp of basic goods and their practical requirements. However: ‘None of this ... makes the Christian theological salvation

narrative ethically irrelevant. It does not say that sinful humans have the motivation to do sufficiently what they know to be right, apart from penitence, faith, gratitude, and hope that the story of God's salvific initiative inspires', nor 'that they have the power, unaided by biblical tradition, to know completely what is good, what is virtuous, or what is right'.

V. ECUMENISM: A renaissance in the common quest for universal principles.

1. Positivism and natural law thinking in the regulatory instruments of churches:

Positivism: The Church and Rule by Law: Roman Catholic 'Code of Canon Law' (1983); Orthodox: 'canon law', 'charters', 'statutes'; Lutherans: 'church laws', 'constitutions', 'bylaws'; Methodist Law'; Reformed and Presbyterian: 'laws', 'book of church order'; Baptist Union or Convention: 'laws' or 'bylaws', and a local church, a constitution or 'covenant'. **Compliance with Church Law: Obedience:** Presbyterian Church in New Zealand: 'All members of congregations...must comply with the Book of Order'; and Baptist norms require 'strict adherence' to the 'rules and regulations'. **Lawful Discretion:** Roman Catholic Code: *dispensation* is: 'the relaxation of a merely ecclesiastical law in a particular case' – but dispensation may be granted, 'within the limits of their competence, by those who have executive power'. **Law-Making:** Roman Code: (1) a law comes into existence when promulgated; (2) laws concern matters of the future – they cannot be retroactive unless express provision is made for this; (3) 'Laws, even invalidating and incapacitating ones, do not oblige when there is a doubt of law'. **Due Process:** Methodist Church of Ireland: 'All members...are subject to its government and discipline, and are under the jurisdiction and care of the appropriate Courts of the Church in all matters of Doctrine, Worship, Discipline, and Order in accordance with the Rules and Regulations...made by the Conference'.

Natural law thinking: Law of God: Roman Catholic Code of Canon Law: custom is void if against divine law; Lutheran Church Missouri Synod: 'no resolution of the Synod imposing anything upon the individual congregation is of binding force if it is not in accordance with the Word of God'; Presbyterian Church of America: 'the Word of God' is the supreme 'rule of faith and life'; Baptists: the Bible is part of 'the constitutions and laws' of a Convention, or 'the rule of church law'. **The Church and State Law:** Roman Code of Canon Law: civil law applies to the church unless contrary to divine law; Catechism: 'unjust laws...would not be binding in conscience'; Methodist Church in New Zealand: ministers declare 'While respecting the law, I will act to change unjust laws'; Baptist Union New Zealand: ministers must 'obey the laws of [the] government unless they require disobedience to the law of God'.

2. Ecumenical Dialogue: ARCIC II *Life in Christ: Morals, Communion and the Church* (1994) § 52: 'For example, a notable feature of established Roman Catholic moral teaching is its emphasis on the absoluteness of some demands of the moral law and the existence of certain prohibitions to which there are no exceptions...Anglicans, on the other hand, while acknowledging the same ultimate values, are not persuaded that the laws as we apprehend them are necessarily absolute. In certain circumstances, they would argue, it might be right to incorporate contextual and pastoral considerations in the formulation of a moral law, on the grounds that fundamental moral values are better served if the law sometimes takes into account certain contingencies of nature and history and certain disorders of the human

condition'; 'In so doing, [Anglicans] do not make the clear-cut distinction, which Roman Catholics make, between canon law, with its incorporation of contingent and prudential considerations, and the moral law, which in its principles is absolute and universal'.

3. The Principles of Christian Law: Panel of Experts (Rome 2016) from Roman Catholic, Orthodox, Anglican, Lutheran, Methodist, Reformed, Presbyterian, and Baptist churches: (1) there are principles of church law and church order common to these churches and their existence can be factually established by empirical observation and comparison;...(5) these principles demonstrate a degree of unity between the churches, stimulate common Christian actions, and should be fed into the ecumenical enterprise to enhance fuller visible unity.

Natural law and associated ideas: 'Church law and church order exist to serve a church in its mission and in its witness to the salvific work of Christ'; 'Church laws should conform to the law of God, as revealed in Holy Scripture and by the Holy Spirit'; 'A law may be relaxed, by competent ecclesial authority, by means of dispensation, economy or other form of equity'; 'The right to exercise discipline [is based on] divine and spiritual authority'; 'Christians must be judged in the church according to law applied with equity, and disciplinary procedures must secure fair, impartial and due process'; and 'Sanctions should be lawful and just'.

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