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Introduction

Natural law – is it really a dead approach to founding law, as many legal scholars and philosophers repeatedly intimate? For many legal theorists today, the understanding that there is a link between a legal norm and the nature of the matter it regulates is rather a historical idea. Thinking that some norms exist because the nature of a matter requires them to be reveals a deep trust in the normative power of nature which hardly seems convincing in modernity. Modern thought mostly conceives of nature in accordance with the natural sciences and, in consequence, finds it difficult to relate to the perception of nature in natural law arguments. The way nature is referred to in normative contexts considers nature as normatively binding and is therefore not the same term as the one used in the empirical sciences.[1] When speaking about nature, as the legal scholar Ernst Forsthoff stated in the postwar period, natural law refers to

> the essence of humankind, their relationship with God, other human beings and the world, basically everything that is a matter of their ethically relevant behaviour. One may speak of nature because this essence and these facts may be understood as something given, which determines humankind and cannot be shaped according to their will.[2]

[1] Stephen Pope takes Darwin's theory of evolution as a paradigmatic change towards a modern understanding of nature in the sense of the natural sciences, as it helped to 'de-moralise' the idea of nature: see Pope, 'Natural Law', in Meilaender/Werpehowski (eds), *Oxford Handbook of Theological Ethics*, Oxford, Oxford University Press, 2007, 153.

That the gap between a cosmic and a moral understanding of nature is indeed a modern phenomenon is argued by Francis Oakley in his book on the history of ideas of the law of nature, natural law, and natural rights: see Oakley, *Natural Law*, New York, NY, A&C Black, 2005, especially chapters 2 and 3, 35–86. Here, the author shows that throughout medieval times until modernity, there was a close relationship between the laws of nature and natural law.

[2] Forsthoff, 'Rechtserneuerung', in Maihofer (ed.), *Naturrecht*, Bad Homburg, Hermann Gentner, 1966, 78; original: "die Wesenheit des Menschen, die Beschaffenheit seines

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NATURAL LAW AS A MATTER OF FAITH

In natural law arguments, nature is understood as something given and at the same time something given specifically to humankind, whom it normatively binds. Yet the exact shape of a natural normativity is undefined. The question of what constitutes humankind's nature has been intensively discussed throughout the history of thought, yet it can never be answered finally. Whether human nature is determined by humankind's relationship with a higher being, for example, is a question answered differently from a religious or a nonreligious point of view. Natural law, as the Protestant theologian Ernst Wolf notes, is therefore always a "question of faith – in a Christian as well as in every religious sense, from a humanistic and secular point of view – and a question of reason; contributing to the problem of natural law therefore always requires a decision of faith or *weltanschauung*".[3] Natural law, as Alfred Verdross adds, may be founded on the idea that "God, when creating the world . . ., put certain regulative principles into men's consciousness, according to which men have to act."[4] The normative significance of the individual, which may be seen as a consequence of God's creation of humankind, can also be connected with human reason and, thus, may be interpreted in a purely secular way. And instead of focussing on the individual alone, natural law may also be understood as a communal phenomenon. It can be related to the normativity of a group or of society, as individuals normatively relate to each other and to the world around them: "The norm of natural justice is the inherent standard of the right interaction among members of society. It is the rule and immanent measure of interpersonal and social human relations",[5] the International Theological Commission states.

Verhältnisses zu Gott, den Menschen und den Dingen, mithin zu allem, was Gegenstand seines ethisch qualifizierbaren Verhaltens ist. Von Natur ist hier die Rede, weil diese Wesenheit und diese Beschaffenheit als ein Gegebenes verstanden werden, das der Mensch als ihn determinierend vorfindet und nicht nach seinem Gutdünken gestalten kann."

3 Wolf, 'Gottesrecht und Menschenrecht', in Dehn/Wolf, *Gottesrecht und Menschenrecht*, Munich, Chr. Kaiser, 1954, 11; original: "Frage des Glaubens – im christlichen wie im allgemeinen religiösen, im humanistischen und innerweltlichen Verständnis – und der Vernunft; darum bedeutet die Stellungnahme zum Problem des Naturrechts immer eine glaubensmäßige oder weltanschauliche Entscheidung."

4 Verdross, 'Was ist Recht?', in Maihofer (ed.), *Naturrecht*, Bad Homburg, Hermann Gentner, 1966, 317; original: "Gott bei der Erschaffung der Welt . . . in das Bewußtsein des Menschen bestimmte Ordnungsprinzipien hineingelegt hat, nach denen sich die Menschen verhalten sollen"; see also Kuttner, 'Natural Law', *University of Notre Dame Natural Law Institute Proceedings* 3 (1950), 98–99.

5 International Theological Commission, 'In Search of a Universal Ethic', 2009, no. 88, www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html (accessed 29 November 2016).

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Being defined by this and other normative pre-decisions, nature – even if accepted as a binding force for man – can be understood variously. In consequence, referring to nature normatively presents the problem of universalising natural norms. Naturally grounded norms may convince individually. Yet we know how difficult it is to uphold a universal claim that is binding for everyone. Moreover, specific ideas about what is naturally right usually stand in fundamental opposition to one another, even though some natural goods and values are broadly accepted by most people and in most cultures. These goods – such as life, property, religious practice, and procreation and the nurturing of offspring – serve many modern natural law approaches as a foundation on which to base the theory.[6] In any case, the problem of universality does not exist at the level of these basic human goods, which most people would agree to, but arises as soon as normative *consequences* are derived from them. Matthew Levering, a Catholic theologian, notes that: “certain moral principles are in fact shared across cultures on the basis of natural law, whether or not natural law doctrine has plausibility in these cultures. But because serious disagreement will emerge when one begins to apply these principles in the complex circumstances of life, natural law doctrine alone cannot be counted upon to do all, or even most, of the work.”[7] Similarly, the moral theologian Eberhard Schockenhoff refers to the problem of finding a natural foundation of morality. Schockenhoff argues that universal values exist to which all people might consent; yet consenting to the consequences deriving from these values is a different matter entirely. There is

> the practical impossibility of achieving an intersubjectively binding consensus about the significance, the decisive character, and the hierarchy of the individual values . . . Hence, the attempt to justify law in terms of objective values does not genuinely free us from the dilemma of legal positivism, since it too must appeal to the subjective views about value which de facto exist in society; it does not possess any legally binding criterion with which it might undertake a normative evaluation of these views.[8]

[6] E.g. George, *In Defense of Natural Law*, Oxford, Oxford University Press, 2001, 102–103; Wolfe, *Natural Law Liberalism*, Cambridge, Cambridge University Press, 2006, 174; Levering, *Biblical Natural Law*, Oxford, Oxford University Press, 2008, 15; Finnis, *Natural Law and Natural Rights*, 2nd edn, Oxford, Oxford University Press, 2011, 59–99.

[7] Levering, ‘Response to Anver Emon’, in Emon/Levering/Novak, *Natural Law*, Oxford, Oxford University Press, 2014, 195; see idem, ‘Christians and Natural Law’, in Emon et al., *Natural Law*, Oxford, Oxford University Press, 2014, 109–110.

[8] Schockenhoff, *Natural Law & Human Dignity*, Washington, DC, Catholic University of America Press, 2003, 299.

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In consequence, many scholars, including the famous legal scholar and judge of the US Supreme Court Oliver Wendell Holmes, are rather sceptical of natural law's idea of a universal normativity based on fundamental goods. Holmes noted that:

> It is not enough for the knight of romance that you agree that his lady is a very nice girl – if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law.[9]

ONTOLOGY AND EPISTEMOLOGY

Two arguments can be used to explain the dissensions regarding the content of a natural normativity. One argument explains the dissent with regard to an ontological problem in natural law. In his recent book on the concept of norms, the legal scholar Christoph Möllers speaks of deep "ontological doubts" in modernity over the possibility of "using nature for moral, aesthetic or juridical judgements".[10] Whoever shares these doubts is unsure whether nature is in any sense normatively relevant. The link between nature and normativity, which is taken for granted in natural law theories, is regarded as either non-existent or unstable.

In any case, modern debates in legal theory mostly identify a different reason for generating the dissents about the content of natural law. Whereas many scholars agree on the normative meaning of nature, the question arises as to whether human reason is capable of referring to it as a source of norms. Most cultures share the idea that human acting and behaviour might be evaluated as being "according to nature", as the International Theological Commission put it in 2009. There is a cultural consent that "acts of courage, patience in the trials and difficulties of life, compassion for the weak, moderation in the use of material goods, a responsible attitude in relationship to the environment, and dedication to the common good" can be taken as reactions to the conditions and hardships of human life that are naturally right. And there is also a general consensus that "murder, theft, lying, wrath, greed, and

9 Holmes, 'Natural Law', *Harvard Law Review* 32 (1918), 40.
10 Möllers, *Möglichkeit der Normen*, Berlin, Suhrkamp, 2015, 112; original: "ontologische[n] Zweifeln"; "Indienstnahme der Natur für moralische, ästhetische oder juridische Urteile".

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avarice" are "universally recognized as calling for condemnation"[11] in all cultures.

These deeds are regarded as opposed to human dignity and human sociality all over the globe. Yet although a cross-cultural consensus exists about the moral value of certain human deeds and attitudes, the question regarding the normative consequences deriving from this consensus cannot be answered finally. The Jesuit and legal scholar William J. Kenealy takes this difficulty as proof of the openness of natural law to all kinds of normative arguments: "That natural law does not mean a closed legal system, is evident from the fact that the fundamental principles do not tell us automatically in concrete applications what is good or evil, just or unjust, wise or unwise."[12] In order to discover a law of nature, a temporally and culturally sensitive concretisation is necessary that derives normative consequences from fundamental principles: "The possession of a compass does not make the navigator's job unnecessary."[13]

This problem is evident in the recent discourses on human rights.[14] Whereas many voices agree that human rights are grounded on a natural normativity,[15] the normative consequences derived from that are unclear. In contrast to the optimism of ecclesiastical documents which suggest that there is "a universal ethical message inherent in the nature of things, which everyone is capable of discerning",[16] modernity is more sceptical about whether and how this perception might successfully work. In addition, there is the question of how the message so perceived can be used to derive naturally grounded norms. Natural law, if one does not question its existence in the first place, is epistemologically challenging at the very least.

[11] International Theological Commission, 'Universal Ethic', no. 36.

[12] Kenealy, 'Whose Natural Law?', *Catholic Lawyer* 1 (1955), 262.

[13] Ibid., 263.

[14] E.g. Reuter (ed.), *Ethik der Menschenrechte*, Tübingen, Mohr Siebeck, 1999; Ezzati, *Islam and Natural Law*, London, ICAS Press, 2002, 189–209; Lohmann, *Zwischen Naturrecht und Partikularismus*, Berlin, De Gruyter, 2002; Girardet/Nortmann (eds), *Menschenrechte und europäische Identität*, Stuttgart, Franz Steiner, 2005; Römelt, *Menschenwürde und Freiheit*, Freiburg im Breisgau, Herder, 2006; Sachedina, *Islam and the Challenge of Human Rights*, Oxford, Oxford University Press, 2009; Tönnies, *Menschenrechtsidee*, Wiesbaden, Springer, 2011; Leichsenring, *Ewiges Recht?*, Tübingen, Mohr Siebeck, 2013, 410–429; Goertz, 'Naturrecht und Menschenrecht', *Herder Korrespondenz* 68 (2014), 513–514; Kirchhoff, 'Begründung des Rechts', in Heinzmann (ed.), *Kirche*, Freiburg im Breisgau, Herder, 2015, 103; Wald, 'Menschenwürde und Menschenrechte', in Nissing (ed.), *Naturrecht und Kirche*, Wiesbaden, Springer, 2016, 53–74.

[15] At present most prominently Finnis, *Human Rights and Common Good*, Oxford, Oxford University Press, 2011; idem, 'Grounding Human Rights in Natural Law', *American Journal of Jurisprudence* 60 (2015), 199–225.

[16] International Theological Commission, 'Universal Ethic', no. 11.

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PLURALITY AND HOMOGENEITY

Due to the epistemological problem of perceiving natural law, a plurality of different norms appears to be the consequence of a natural normativity. In his famous book *Pure Theory of Law*, the legal scholar Hans Kelsen describes this dilemma of natural law as a source of (unwanted) pluralism: "As soon as the natural-law theory undertakes to determine the content of the norms that are immanent in nature . . . it gets caught in the sharpest contrasts. The representatives of that theory have not proclaimed *one* natural law but several very *different* natural laws conflicting with each other."[17] The epistemological problem of perceiving the naturally right therefore results in the identification of multiple conceptions of natural law, all of which claim universality for themselves: "Any positive law that conforms with the natural law of one theory and therefore is judged 'just' is in conflict with the natural law of the other theory and therefore is judged 'unjust'. Natural-law theory as it was actually developed – and it cannot be developed differently – is far from providing the criterion expected of it."[18]

The tendency in natural law debates to introduce a *power* argument which promotes one particular position over another is related to this problem of pluralism. In this sense the legal theorist Bernd Rüthers takes a critical stance towards arguments of natural law, as they tend to transform questions on content into questions of power: "The problem of perception ('What does natural law tell us?') becomes a question of competence ('Who defines what natural law is?')."[19] Correspondingly, the philosopher and sociologist Ernst Topitsch, reflecting the German natural law debates in the postwar period, described the rough disputes of those times in which the debaters even resorted to acts of repression to reinforce the plausibility of their positions towards natural law.[20]

The twentieth-century discourses on legal theory (of which the legal debates about the fledgling democratic state of postwar Germany are one example) also provide another insight, which is that natural law and legal positivism represent 'trends' in the debates on legal validity theory. This can be

[17] Kelsen, *Pure Theory of Law*, Berkeley, CA, University of California Press, 1967, 220.
[18] Ibid.
[19] Rüthers, *Rechtstheorie*, Munich, C. H. Beck, 2005, no. 443; original: "Aus dem Erkenntnisproblem ('Was sagt das Naturrecht?') wird eine Kompetenzfrage ('Wer definiert, was Naturrecht ist?')."
[20] See Topitsch, '*Naturrecht im Wandel*', *Aufklärung und Kritik* 1 (1994), 1–13. This is also argued by Lena Foljanty who, in her study on the postwar German legal discourses, shows that harshly arguing against legal positivism was an "identity question" (*Recht oder Gesetz*, Tübingen, Mohr Siebeck, 2013, 20; original: "Identitätsfrage") of postwar legal theory.

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understood best when reconsidering the German legal history of the past 200 years.[21] Whereas reference was seldom made to natural law in the nineteenth-century secular discourses on the foundation of law, natural law arguments reappeared following periods of totalitarian law in the twentieth century. They then became rather irrelevant again in the more politically stable times in the second half of the twentieth century. This shows that natural law as a tendency can be understood as a symptom of crisis, reacting to ruptures within societies' moral fundament and making legal theory search for a stable normativity in the prepositive realm: "Once a culture's major values have become questionable or even more than one value system has developed, humankind seeks lost security",[22] as Ernst Topitsch explains. In politically stable times, however, the positivist approach is mostly regarded as an appropriate legal foundation. Any defence of natural law might thus be interpreted as indicating a society's need for normative security and stability. This makes one wonder whether the recent debates on the legal development of the Western states and confederations of states might see a return to natural law arguments, not only in the United States, where they are still common, but also in Europe, where natural law arguments are uncommon today. Pope Benedict XVI's appeal in the German Parliament to leave "positivist reason" behind because it "dominates the field to the exclusion of all else" and has placed Western societies in "a dramatic situation"[23] was received positively by many listeners,[24] potentially indicating that a prepositive foundation of law seems once again needed in the societies of the West due to the instability of the current political situation.

Nevertheless, the growing plurality of modern Western societies has resulted in an ambivalent attitude towards natural law. On one hand, plurality shows values to be fragile and, therefore, reveals the urgent need to identify a common prepositive foundation of values for society. On the other hand, natural law arguments, because they provide plural normative answers to what is naturally right, are ill-suited for grounding norms that can be agreed on.

[21] See Foljanty, *Recht oder Gesetz*, 19–36, 343–349.

[22] Topitsch, 'Problem des Naturrechtes', in Maihofer (ed.), *Naturrecht*, Bad Homburg, Hermann Gentner, 1966, 177; original: "Sind einmal die Oberwerte einer Kultur fraglich geworden oder sind gar schon mehrere Wertordnungen entwickelt, dann sucht der Mensch die verlorene Sicherheit."

[23] Benedict XVI, 'Address', Reichstag Building, Berlin, 22 September 2011, www.bundestag.de/parlament/geschichte/gastredner/benedict/speech (accessed 29 November 2016).

[24] E.g. Hübenthal, 'Naturrecht oder moderne Ethik?', in Essen (ed.), *Verfassung ohne Grund?*, Freiburg im Breisgau, Herder, 2012, 107; Stein, 'Ethische Funktion des Naturrechts', in Essen (ed.), *Verfassung ohne Grund?*, Freiburg im Breisgau, Herder 2012, 205.

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While the security which natural law promises with regard to legal foundation appears promising indeed, it is actually unrealistic in pluralistic modernity.

However, this finding might not apply in the same way to *homogeneous* legal communities that share a common understanding of the normative meaning of nature. Such communities that agree on certain normative ideas are the religious communities. If their members agree on what they consider to be naturally right, this conviction might serve as a source of validity for natural norms.

One such community (and my example in this study) is the Catholic Church, which understands itself as an order based on the common belief of the faithful. The core of the Catholic Church's legal order consists of norms of divine origin, which refer to revelation as well as to natural moral law. Further norms can then be derived from this divine core. According to the Catholic understanding, humankind, with the use of reason, can perceive the law of nature. This law is understood as a normativity that exists prior to human reasoning and apart from human lawmaking: "the act of reason (the judgment) does not make, but find what is right".[25]

Nevertheless, considering that natural law convinces only those who share a common idea of nature and of the normativity connected with it, homogeneous communities with mutual values also need to agree on what is regarded as naturally right, so that the community's members acknowledge norms identified as natural law as being naturally just. If this consent is lacking, natural law arguments remain fragile, and the legitimacy of the law based on them is thrown into question. And if the validity of the law is doubted, its effectiveness also is endangered. Today, this phenomenon is a problem for Christian natural law too, as illustrated by the Roman Catholic's approach to natural law, which has been the target of some severe criticism. "The idea of natural law is today viewed as a specifically Catholic doctrine, not worth bringing into the discussion in a non-Catholic environment, so that one feels almost ashamed even to mention the term",[26] Pope Benedict bemoaned in his address to the German Parliament.

This feeling of shame, however, is not only a result of secular legal thinkers' widespread disapproval of Catholic natural law, but also a result of the reservations of many church members. Their objections arise because ecclesiastical law is, indeed, not detached from modernity and the plurality that comes with it. The presumption that society is plural, but that the ecclesial

[25] Kuttner, 'Natural Law', 98.
[26] Benedict XVI, 'Address', 22 September 2011, English version: www.bundestag.de/parlament/geschichte/gastredner/benedict/speech (accessed 29 November 2016).

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community is a homogeneous entity, is somewhat misleading. Church members – who are always at the same time members of a society – bring society's plurality and plural normativities into the church. Thus, the church is increasingly becoming a community which – underneath the unifying bond of a shared faith – brings together manifold ideas of the naturally just.[27] These plural conceptions of what is naturally right make a homogeneous natural law increasingly implausible, even within the church.

In theology, this implausibility is apparent in the growing distance between academic and magisterial theology which, especially within moral theology, has led to a profound silence among moral theologians with respect to many statements issued by the ecclesiastical teaching authority.[28] A similar problem occurs, albeit less visibly, in the field of canon law foundation, which has to deal with the question whether and in what way natural law arguments are suitable for use as validity sources of canon law. A growing distance of canon lawyers from natural law at the foundational level of law also extends to the more theological foundation of church law, as the canon lawyer Ludger Müller has shown. Whereas a reference to natural law was plausible in more philosophical arguments of past canon law foundation, as in the school of *Ius Publicum Ecclesiasticum*, the current approaches – with their more theological orientation – tend to refer to the revelational sources of canon law rather than to its natural sources: "The legitimacy of ecclesiastical law cannot be derived out of the nature of humankind, but out of the essence of the church, which is only captured by the means of theology."[29] Insofar as current foundational theories rely on ecclesiological categories in place of the former dependence on social philosophy, anthropology, and creation theology, canon law is at present thought of mostly in ecclesiological terms as a function of the church. Consequently, nature has lost its position as a central source of legal validity in the scholarly debates on canon law.

[27] See Utz, 'Naturrecht im Widerstreit', in Maihofer (ed.), *Naturrecht*, Bad Homburg, Hermann Gentner, 1966, 237; Gabriel, 'Pluralisierung und Individualisierung', in Münk/Durst (eds), *Christliche Identität*, Freiburg, CH, Pauslusverlag, 2005, 43–45; Eigenmann, *Kirche in der Welt*, Zürich, Theologischer Verlag Zürich, 2010, 155–170; Kaufmann, 'Kirche angesichts der Ambivalenzen der Moderne', in Striet (ed.), *Theologie und Soziologie*, Freiburg im Breisgau, Herder, 2014, 113.

[28] E.g. Sowle Cahill, 'Moral Theology', in Lacey/Oakley (eds), *Crisis of Authority*, Oxford, Oxford University Press, 2011, 193–218; Goertz, 'Relikte des Antimodernismus', in Striet (ed.), *Theologie und Soziologie*, Freiburg im Breisgau, Herder, 2014, 126–128; Lintner, 'Traditionelle Sexualmoral', in Heinzmann (ed.), *Kirche*, Freiburg im Breisgau, Herder, 2015, 170.

[29] Müller, 'Naturrecht und kanonisches Recht', in Freistetter/Weiler (eds), *Mensch und Naturrecht*, Vienna 2008, 305; original: "die Legitimität des kirchlichen Rechts kann nicht aus der Natur des Menschen abgeleitet werden, sondern nur aus dem Wesen der Kirche, das nur mit den Mitteln der Theologie zu erfassen ist."

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At any rate, scholarly contributions to canon law have thus far scarcely mentioned these doubts, as evidenced, for instance, by some recently published German canon law reference books and compendia. These works present two ways of dealing with natural law. Some authors simply cite the magisterium's doctrine on the law of nature without critically questioning it.[30] Some tend to put the problem aside and make no reference to nature as a validity source of canon law at all.[31] While these are both pragmatic strategies, they do not help to close the gap between magisterial and academic theology. And they run the risk of silencing the voice of canon law within the broader debates on a normativity of nature. Whereas the first approach tends to ignore the problems connected with natural law and especially the problem of its decreasing acceptance even within the church, the second approach (overly hastily, I would say) tends to marginalise the theological value of natural law. In contrast, I opt for referring to the category of natural law within canon law foundation, as I consider it to be theologically valuable in the debates on the foundation of religious law, while at the same time I also think it necessary to address the current natural law of the church rather critically.

NORMATIVITIES: LAW AND MORALITY

When speaking of natural law within the church, one first must clarify whether she is addressing a legal or an ethical category. This is because the law of nature as a source of norms is used as a source of normativity in ethical as well as legal theories. This study focusses on natural law as a source of law, especially as a source of canon law. Still, one might ask whether it is actually necessary to distinguish between nature as a source of moral normativity and nature as a source of legal normativity. Lena Foljanty has shown that the two categories overlap to a considerable degree. In her study on legal theory in the postwar period, she indicates that in the secular debates of those times, natural law was transformed from a source of material law into a more procedural issue and a moral category of legal application. Here, the idea of "the 'good

30 E.g. Lüdecke/Bier, *Kirchenrecht*, Stuttgart, Kohlhammer, 2013, 17–18; Brosi, *Kirchenrecht*, Zürich, Theologischer Verlag Zürich, 2013, 22–23; Rhode, *Kirchenrecht*, Stuttgart, Kohlhammer, 2015, 31. In a similar unbiased vein, the canon lawyer Helen Costigane just recently introduced 'Natural Law in the Roman Catholic Tradition' in Norman Does' newest book, *Christianity and Natural Law*, Cambridge, Cambridge University Press, 2017, 17–35.

31 E.g. Demel, *Handbuch Kirchenrecht*, Freiburg im Breisgau, Herder, 2010, 314–348; also Krämer, *Warum kirchliches Recht?*, Trier, Paulinus, 1979. That the problem of natural law is *explicitly* excluded in parts of the canon law debates on legal foundation is mentioned by Ludger Müller ('Naturrecht', 284, 297).

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