

1-1-1959

Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany

Heinrich Rommen

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Rommen, Heinrich, "Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany" (1959). *Natural Law Forum*. Paper 37.
http://scholarship.law.nd.edu/nd_naturallaw_forum/37

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NATURAL LAW IN DECISIONS OF THE FEDERAL SUPREME COURT AND OF THE CONSTITUTIONAL COURTS IN GERMANY*

Heinrich Rommen

POSITIVISM WITH ITS THESIS that "law is law" has made German jurists and lawyers defenseless against laws of arbitrary or criminal content. Positivism simply holds that a law is valid because it is successfully enforced.¹ "Any legislative act is unconditionally binding upon the judge."² This was the position taken by one of the most respected (and most influential) commentators on the Weimar Constitution. A great majority, though in the last years a dwindling majority, of his colleagues agreed with him. They were also inclined to contend that some parts of the Bill of Rights contained in the Constitution itself — especially those which, like the Fourteenth Amendment to the United States Constitution, provided for further implementation by the legislature — were not in themselves positive rights to be protected by the courts but merely "directives" or "programs" for the legislature. Thus some commentators held that Article 109, which provides that all Germans are equal before the law, was binding only on the administration (*Verwaltung*) and the judiciary, but not on the legislature, the latter being free to protect existing special privileges and to introduce new ones. Some held that this article was no legal norm at all. One called it wholly meaningless.³ In his widely used smaller commentary Gerhard Anschütz says that those who see in this article a rule of law and not merely a well-sounding claim are influenced by value judgments based on American and Swiss constitutional law;⁴ if Triepel, for instance, speaks of "legislative absolutism" then it must be said that judicial review after the American pattern establishes simply another kind of absolutism. Needless to say, Anschütz strongly opposed any form of judicial review of the legislature.

* This study was made possible by a grant of the American Philosophical Society for which the author expresses his gratitude.

PRELIMINARY REMARK: In German, the term "*Naturrecht*" includes those rules of the broader natural law or "*natürliches Sittengesetz*" which concern human living together, i.e., the political community and its common good of which the basic human rights, for instance, are a vital part.

1. GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 352 (4th ed. by Erik Wolf, 1950).

2. GERHARD ANSCHÜTZ, *DIE VERFASSUNG DES DEUTSCHEN REICHES* 279 (1929).

3. A. VON FREYTAG-LORINGHOVEN, *WEIMARER VERFASSUNG* 295 (1924).

4. *Op. cit. supra*, note 2 at 305 ff.

Similarly, Article 113, concerning the protection of national minorities and their right to the use of their language in education and in administrative agencies and courts, was declared to be merely a directive for the legislature, not an immediately applicable rule for the courts. No individual rights could be derived from it, because individual rights against the legislature were unthinkable.⁵ Thus there prevailed a tendency in stark opposition to American and Swiss constitutional doctrine, a tendency to see in the typical provisions of the classical Bill of Rights no limitation on the legislature.⁶ Judicial review as it developed in the United States was unacceptable to most commentators. In their view, the judiciary was permitted only to decide whether laws had been correctly passed and promulgated in accordance with the rules for the legislative process; whether the substantive content conformed to such criteria as justice, liberty, reasonableness, and nonarbitrariness was excluded from judicial inquiry.

The roots of this doctrine are partly historical, partly philosophical. To the first category belongs the tradition of absolutism, which gave the King the right to intervene in any case before a court and to decide it on his own authority (*Kabinettsjustiz*), as well as the rule that the courts were not permitted to interpret independently the codes of law (which were issued frequently under the absolute monarchies) but had to have recourse to the "Legislative Commission" to ascertain the will of the legislator.⁷ Under the influence of more or less rationalistic conceptions of law and of the all-comprehensive systematic code, the judge, as a civil servant wholly subordinate to the absolute king, became an automaton-like being, as Duguit said, or a "slave of the Law."⁸ Under these conditions one need not wonder that the rising liberal-democratic movements thought little about the judiciary as a possible guardian of the Constitution and the Bill of Rights.

These movements, following the thinking of the French rather than of the American Revolution, put their trust in the legislature as a limitation upon the constitutional monarch. The experiments made with "constitutional courts" or *Staatsgerichtshöfe* were, even under the Weimar Republic, more concerned with the competencies of the various branches of the government or with those of federal and state government than they were with substantive values and basic human rights.

Meanwhile, from the middle of the nineteenth century on, legal positivism

5. ANSCHÜTZ, *op. cit. supra*, note 2 at 94, 96.

6. It should not be forgotten that, from the middle of the twenties, a contrary doctrine gained some influence under Triepel, Leibholz, Nawiasky, Kaufmann.

7. FRANZ W. JERUSALEM, *DIE STAATSGERICHTSBARKEIT* 28 (Tübingen, 1930). A special order of the King of Bavaria forbade any commentaries on the Criminal Code of 1813. *Ibid.*

8. Paul Bokelmann, in *FESTSCHRIFT FÜR RUDOLF SMEND* 27 (Göttingen, 1952).

was gaining more and more primacy. Under this doctrine — branching off from general philosophical positivism — *jus* (*Recht*), especially any kind of judge-made *jus*, is pushed into the background; and *lex* — the formal law, the product of the legislative majority — gains absolute control. The judiciary is not — and does not consider itself to be — an equal of the legislature. Dr. Hermann Weinkauff, once a member of the old German Supreme Court (*Reichsgericht*) and now Chief Justice of the Federal Supreme Court, states of the former that it

followed in its whole jurisdiction the tradition of not touching the philosophical fundamental principles of law that lay at the basis of positive law. It did not take a position here but limited itself to a reasonable application to the individual case of the positive legislative law which it accepted without critical tests. . . . Such a tradition presupposes that the positive law. . . self-evidently stays within the underlying order of justice and also that in any civic society certain fundamental principles of law and ethics are universally and indubitably though perhaps only tacitly accepted as valid.⁹

Only under such a presupposition could the *Reichsgericht* in the comparatively calm days of the middle twenties say: "The legislator is sovereign [*selbstherrlich*], not bound by any limitations except those that he has imposed upon himself in the Constitution or in other laws."¹⁰ It was due to essentially transitory conditions that legal positivism, itself part and parcel of a general positivism in philosophy and ethics, was able to persist. The civil society of the time, in spite of a widespread relativism, still rested securely on a general consensus as to a traditionally or *de facto* accepted hierarchy of values in state and society.

It is scarcely surprising that under these partly historical, partly philosophical conditions the judiciary could not claim substantive review of the legislatures. It could not become the "guardian of the Constitution" as the Higher Law, nor would the people see in the judiciary the protector of the Bill of Rights. Though the *Reichsgericht* seems to have claimed in two decisions a

9. Chief Justice Weinkauff, a staunch defender of natural law, speaks of the *Ur-Rechtsordnung*, by which he means the natural law. Cf. his contribution on the question of resistance against tyranny: *DIE VOLLMACHT DES GEWISSENS* part I (Bonn, 1956); and *ÜBER DAS WIDERSTANDSRECHT* 13, 16 (Karlsruhe, 1956), where the *UR-RECHTSORDNUNG* is defined as suprapositive legal order higher than positive law, valid by itself, i.e., an order of natural law. The quotation is taken from 75 *JAHRE REICHSGESCHLECHT* 49 ff. (Bonn, 1954).

10. 118 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN* (hereafter quoted as RGZ) 327. It should be remembered that in most continental constitutions the amending power rests with the ordinary legislatures, the only difference being that a qualified majority of a qualified quorum decides.

right to review, it is still debated among jurists whether it actually did so.¹¹ In any event, the *Reichsgericht* never rendered a decision comparable to *Marbury v. Madison*. Even had it done so, it could never have established a doctrine with one or two cases, since the rule of precedent is unknown in German law.

Later, the traditional consensus, more implicit than explicit, more sensed than rationally and critically evaluated, began to give way more and more under the impact of great social upheavals of the masses — anxieties caused by frustrated longings for status and security during a demoralizing economic depression. When that happened, the socio-political cohesion, the public order and peace, began to diminish also, and antagonistic class tendencies began to threaten civil war. If civil war was to be avoided, the only way out was a legal, yet revolutionary, change of the socio-political *status quo*. Whatever the underlying longings for greater social justice, for a more perfect realization of human rights, they are for the legal positivist matters of indifference; he is satisfied if the change is legal, he is less interested in the moral values, in search of their more perfect concretization. Now Hitler — who had an uncanny flair for recognizing both the indistinct longings of the masses and the respect of officers, civil servants, and jurists for legality, however lacking in substantive legitimacy — staged just such a “legal” revolution (a wit called him Adolf Legalité) and thus he disarmed intellectually all those who adhered to legal positivism. Hitler even got legally the power to create new constitutional law, first qualified by some formalities, e.g., that the cabinet or council of ministers must consent, but ultimately issuing in the rule that solely the will of the Führer promulgated in the *Reichsanzeiger* makes the law. Toward the end of the war even that formality was dropped. The judiciary, purged of all open opponents of the regime, whose seats then were taken by trustworthy adherents, had, under this paroxysm of positivism, to restrict itself — if we except civil, commercial, and the politically irrelevant parts of criminal law — to the menial task of acknowledging the legality of all acts of the Führer and his underlings. For under the rule that the Führer’s will uttered with a minimum of form is the law, the role of the judiciary was that of an automaton. Or individual judges could defy the regime — as not a few did — and die as martyrs to their high vocation.

11. See the elaborate discussion in RICHARD THOMA and ERNST VON HIPPEL, 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS, where Thoma argues against and von Hippel in favor of “judicial review.” The cases referred to are found in 102 RGZ 164; 111 RGZ 322. Cf. the resolution of the Association of the Judges of the *Reichsgericht* of January, 1924, asking that it declare void an act contrary to the principle of good faith. Paul Bokelman, *op. cit. supra*, note 8 at 31.

II

It is understandable that under the intellectual and constitutional conditions of the Empire and the Weimar Republic — not to speak of those of the Hitler regime — the courts did not introduce considerations of natural law. The prevailing doctrines admitted neither a truly independent and equal judicial power of government nor a "*Recht*" broader than the formal law issuing from the legislature; still less did they accept a basic idea of justice and equity as superior to all positive law. It is understandable, too, that judicial review of legislation, which could have opened the way to natural law, did not find full acceptance, and that the proponents of judicial review were often, though not always, open to the theory of natural law. This does not mean that one will not find during this time traces of natural law in court decisions. The so-called general clauses, especially the references in the Civil Code to "*gute Sitten*," or "*Treu und Glauben*," and the necessity for judicial determination of certain socio-economic conflicts¹² opened opportunities to introduce arguments and opinions with a natural law orientation. On the whole, however, the prevailing intellectual climate of legal positivism stood in the way of an open acknowledgment of the suprapositive norms of natural law.

With the *Götterdämmerung* in May, 1945, there fell what many jurists had regarded as a "regime of systematic injustice," a regime which had taught *ad hominem* the necessity of universal higher standards of objectively valid suprapositive principles for the lawmaker. Accordingly, from the middle of 1946 on, a revival of natural law thinking took hold of the intellectual world, especially the jurists and the members of the constituent assemblies of the *Länder*. Or, more correctly, this revival began to manifest itself publicly. Naturally the "system of injustice" had produced conversions, as it were, to natural law much earlier; but the Nazi authorities would not permit an open discussion.¹³ At the same time, all attempts at passive and active resistance to the regime were necessarily grounded on natural law ideas or on divine law, for legal positivism as such could offer no foundation. This has been brought out in numerous publications since the war.¹⁴ It was a favorable circumstance, too, that Protestant theologians — not so much of course Karl

12. Cf. Fritz Baur, *Sozialer Ausgleich durch Richterspruch*, 12 JURISTENZEITUNG 193-194 (1957), who points out that economic conflicts of interest produced by the runaway inflation after World War I gave the judges an opportunity which they, of course, used to decide such conflicts *ex aequo et bono*.

13. The writer's book on natural law (first edition) was published in 1936, but the publisher was forbidden to advertise it and booksellers could not exhibit it; it had to be sold from under the counter, like pornographic literature.

14. Cf. ZELLER, *GEIST DER FREIHEIT* (1953) and the publications of the *Institut für Zeitgeschichte* (München).

Barth and his disciples, but those influenced by Emil Brunner's *Justice* (1943) and his earlier *Das Gebot und die Ordnungen* — had returned to natural law thinking because of the obvious substantive illegitimacy of Hitler's legality and his open paganism. Thus ended the long estrangement of Protestant theology from natural law.¹⁵

When, therefore, the first constituent assemblies of the *Länder* met, there was almost unanimous sentiment in favor of strengthening the judiciary, of creating a guardian of the Constitution and the Bill of Rights in the form of a Constitutional Court — i.e., of establishing judicial review formally and explicitly — and of exempting the Bill of Rights from the amending power generally vested in a qualified majority of the legislature. The leading Socialist member of the Bavarian Constituent Assembly, Dr. Wilhelm Högner, said during the discussions on the Bill of Rights: "We see these rights as a part of the natural law, which is older and stronger than the state and which will again and again successfully and forcefully assert itself against the state. They are valid as a higher law even though human folly has denied them."¹⁶ Professor Adolf Süsterhenn, who might be considered the Father of the Rheinland-Pfalz Constitution, said that "the judges of the Constitutional Court when examining the constitutionality of a law ought to give effect not only to the Constitution but also to the natural law."¹⁷

Meanwhile, lower courts since 1945 were referring to natural law in their decisions. Thus, the Wiesbaden *Amtsgericht* and the Frankfurt *Landgericht* decided that laws which declared the property of Jews forfeited to the Reich (*Reichsleistungsgesetz*, 1937) were in violation of the natural law and therefore void *ab initio*, a doctrine which the Federal Supreme Court affirmed with respect to deprivation of liberty.¹⁸ These decisions were handed down on November 13, 1945, and June 30, 1946, before the constitution of the Land Hessen was ratified on December 11, 1946.

Most of the constitutions drawn up in this intellectual climate after World War II have broken with the pattern of constitutional thinking that obtained after World War I (see above) and have incorporated direct references to natural rights or natural law. Thus the Bavarian Constitution of December 2, 1946, speaks of the natural right of parents to educate their children (Art. 126); the Württemberg-Baden Constitution says in Art. 1 that man should

15. Edgar Bodenheimer, *Significant Developments in German Legal Philosophy since 1945*, 3 THE AMERICAN JOURNAL OF COMPARATIVE LAW 379, 383 ff. (1954).

16. Quoted in CARL HEYLAND, DAS WIDERSTANDSRECHT DES VOLKES 113 (Tübingen, 1950).

17. HEYLAND, *op. cit. supra*, note 16 at 114.

18. 2 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOF IN STRAFSACHEN (hereafter quoted as BGHSr) 234. See below.

develop himself for his own weal and for that of his fellow man; and the preamble speaks of perpetual human rights. The Baden Constitution of May 22, 1947 (to be revived when and if the separation of Baden from Württemberg-Baden should be realized) speaks in the preamble of the principles of the Christian moral law according to which the state should be organized, and of inalienable sacred human rights which "are explicitly confirmed and protected by the Constitution." The Rheinland-Pfalz Constitution of May 18, 1947, speaks in Art. 1 of the natural right of man to the full development of his person within the framework of the natural moral law; it says in paragraph 3 of that article that public authority is founded on, and limited by, the demands of the common good based on natural law. In Art. 23 it speaks of the family as a community in its own natural right; in Art. 26 it refers to the natural right of the parents to determine the education of their children; and in Art. 60 it affirms that private property is a natural right, which the state guarantees. The Bremen Constitution declares in Art. 1 that the legislature, the executive, and the judiciary are bound by the laws of morality and humanity (*Menschlichkeit*).

The fundamental law (*Grundgesetz*, hereafter *GG*) of the West German Federal State of May 23, 1949, declares in Art. 1 that the German people acknowledge inviolable and inalienable human rights as the basis of every human community. It refers to these rights as "guaranteed," implying that they are not the product of the constituent power. In Art. 6 the education of children is declared to be the natural right of their parents. The rights enumerated in the Bill of Rights (Art. 1-20) are declared to be immediately valid law binding on legislature, executive, and judiciary. Art. 19 expressly states that in no case may the legislature violate the essential content of a fundamental right.

Art. 79 *GG* forbids any change by amendment of the Bill of Rights. As already mentioned, this is in consonance with most of the *Länder* constitutions. Thus the Rheinland-Pfalz Constitution states that bills of amendment that concern the Preamble (this constitution furnishes a rare example of a preamble of direct and immediate juridical relevance) or the rules of Art. 1 (which are declared to be natural law) and Art. 74 (popular sovereignty, democratic and social character of state and membership in the Federal Republic) are not permitted (Art. 129, par. 2). In a similar way do the constitutions of Bavaria (Art. 75), Württemberg-Baden (Art. 85), Bremen (Art. 20), Hesse (Art. 150), and Lower Saxony (Art. 37) limit the amending power. In most cases, the Constitutional Court of the individual *Land* has the ultimate decision concerning the application of these provisions, which in effect establish within the constitution a gradated system of rules and values.

Thus the Bavarian and the Federal Constitutional Courts, as well as the Federal Supreme Court, have held that they may declare unconstitutional a lower constitutional provision which is in violation of a higher provision (see below). Indirectly, this authority is further supported by the provision contained in *GG* and most *Länder* constitutions that the general rules of international law are part of federal law, have precedence over the acts of the legislature and bind immediately the inhabitants of the Federation (Art. 25, *GG*). This rejects the older "transformation theory." It makes available to the judiciary and the Constitutional Court (which, according to Art. 100, par. 2, has the ultimate decision) an additional substantive standard with regard to the legislature, and through the European Convention on Human Rights it provides an additional confirmation of the immediately binding character of the rules of the Bill of Rights. It must be remembered that all these limitations on the amending power are necessary because the constitutions generally follow the usual continental practice of vesting the ordinary amending power in a qualified majority of the legislature.

The general revival of natural law, the universal abhorrence of the misdeeds of a regime that "made injustice a system," and this distinction of rank among the provisions of constitutions produced as a necessary consequence the explicit establishment of judicial review.¹⁹ In more general ways also, the judicial power of government, "*en quelque façon nulle*," as Montesquieu said, rose to full equality with the legislature and the executive, and there is already some fear that it has risen above them.²⁰ I do not intend to assert that the recognition of natural law by the judiciary is only possible where there exists a kind of superiority of the judiciary or a system of judicial review. What is necessary to see is that if legislative acts are the only depositories of law, and "law" is only a formal term open to any content, and if the judiciary is helplessly bound by such a concept of "law," then there is scarcely an occasion for the judiciary to appeal to natural law. Now such a concept of law is repudiated by the new constitutions, in most cases explicitly. For some declare that the judges are subject to the constitution, to the law, and to their consciences (Art. 121, Rheinland-Pfalz Constitution), or to law and right (*Recht*) (Art. 20, *GG*); *Recht* is then a broader term and contains also suprapositive

19. That this review was then reserved to special constitutional courts is again a peculiarity of continental legal thinking.

20. Cf., for instance, HANS SCHNEIDER, *GERICHTSFREIE HOHEITSAKTE* 28 ff. (Tübingen, 1951). Others warn of the danger of a *gouvernement des juges*, thus picking up the title of Edouard Lambert's book published in 1921, which is a most violent critique of judicial review. In 1947 Lambert warned his compatriots against the dangers of any form of judicial review to their way of life. See his *L'ANCÊTRE AMÉRICAIN DU DROIT COMPARÉ — LA DOCTRINE DU JUGE STORY* (Paris, 1947). Cf. also WERNER WEBER, *WEIMARER VERFASSUNG UND BONNER GRUNDGESETZ* 25 (1951).

law or natural law.²¹ The quotation at the beginning of this essay from a respected commentary on the Weimar Constitution presents today an untenable doctrine.²²

Before we present and comment on a series of decisions of the Federal Supreme Court and the Federal Constitutional Court, it should be pointed out that these courts do not have the practice of publishing the voting on opinions, or of publishing dissenting opinions, so that the individual judges stand in the background and the impersonal institution in the foreground. Only insofar as judges publish their ideas in some other way can one know which of them is an adherent of the natural law. Thus the Presidents of the respective courts, Dr. H. Weinkauff and Dr. J. Wintrich, are known by their scholarly writings as devoted adherents of the natural law, whereas Dr. Katz, a member of the Federal Constitutional Court, has uttered skeptical views, but in a noble way, about natural law. If terms other than "natural law" occur in judicial decisions, such as "suprapositive basic norms," "suprapositive demands of natural moral law," "material justice," "fundamental postulates of justice," "norms of objective ethics," "the objective order of values," "universal agreement of all civilized nations," it is clear from the context that in practically every case the courts could as well have said natural law.

III

In the following pages certain significant decisions of both the Federal Supreme Court for Civil and Criminal Laws (*Bundesgerichtshof*, hereafter *BGH*) and the Federal Constitutional Court (*BundesVerfassungsgericht*, hereafter *BVerfG*) will be discussed; a task still to be done would be to peruse the decisions of the Federal Supreme Court for Labor and Social Jurisdiction and the Federal Administrative Court. The *BGH* handles general civil and criminal cases, in which natural law questions can arise in various ways. In the case of the *BVerfG* we are less concerned with decisions concerning the relationship between the executive and the legislature or the distribution of competencies between the Federal state and the several *Länder* than with cases of "constitutional complaint," where an individual person accuses the Government in its legislative and executive functions of infringing upon inviolable and guaran-

21. Cf. HERMAN VON MANGOLDT, *DAS BONNER GRUNDGESETZ* (1953), especially his observations on Art. 20, on pages 131 ff., and the bibliography cited there; GERHARD BÜCKLING, *DER OBJEKTIVE RECHTSBEGRIFF* (1950).

22. The Nordrhein-Westfalen Constitution in its initially proposed form declared that a law was binding as long as it had been passed correctly according to the formal way of legislation; the protest was instantaneous. Ernst von Hippel declared that this presented "in principle unlimited tyranny." *RHEINISCHER MERKUR*, November 22, 1947.

teed rights. It is in this latter class of cases that the Court acts in its capacity as guardian of the supreme values which the Constitution either explicitly or implicitly contains,²³ among them right itself (*Recht*), an objective supreme value with suprapositive content. In taking into account these "suprapositive and suprapolitical fundamental values the court fulfills its specific function as constitutional organ." (Wintrich.)

Let us take as our first case for discussion a *BGH* decision on a civil tort.²⁴ The plaintiff claimed damages from a *Volkssturm* commanding officer for the illegal killing of a near relative. The defendant had not intervened to protect a citizen who, having been arrested for hiding a non-Aryan person, had allegedly tried to flee; he was shot down by the driver of the officer's car, and, lying gravely wounded, was killed by the driver without intervention of the officer. The Court said in deciding for the plaintiff that the defendant was liable for civil tort. The defendant relied on Art. 131 of the Weimar Constitution and par. 839 of the Civil Code, which make the state primarily liable for illegal or immoral (against *gute Sitten*) acts of a civil servant (*Beamter*) under color of his office.²⁵ But in this case the defendant is primarily and directly liable, for Art. 131 does not go so far as to protect the official under all circumstances. In this case he gravely violated his duties and revealed by his acts that the life of a political opponent was of no value to him. He thus violated in a morally objectionable way all principles of law (*Recht*) and morality; he is, therefore, directly liable.

Another case decided at the same time involved the same commanding officer. This time the victim was a young *Volkssturm* soldier who was absent without leave. The officer had himself shot the man without any form of summary trial, and had ordered the corpse to be secretly buried, imposing strict silence on the soldiers with him. In court he pleaded the defense of superior orders since the Nazi county-leader had ordered him to kill (*umlegen*) this soldier; he also appealed to the so-called *Katastrophen*-order of Hitler empowering any member of the armed forces to kill instantly any deserter, coward, or traitor. The Court found the defendant guilty of civil tort and made him liable for damages to the mother of the slain soldier.

23. The technicalities of this "complaint" have been worked out satisfactorily. See JOSEF WINTRICH, *AUFGABEN, WESEN, GRENZEN DER VERFASSUNGSGERICHTSBARKEIT*, Festschrift NAWIASKY (1953); *SCHUTZ DES GRUNDRECHTS DURCH VERFASSUNGSBESCHWERDE*. . . (Regensburg, 1950). Cf. also HANS HUBER, *DIE VERFASSUNGSBESCHWERDE* (1954).

24. 3 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN* (hereafter cited as *BGHZ*) 94 (July 12, 1951).

25. These laws are intended, the Court said, first, to give better protection to those affected by the act of the civil servant as representative of the administrative state, and, second, to free the civil servant from overscrupulosity in his official acts due to fear of personal liability.

Every killing of a human being is illegal and a grave violation of an official's duties if it is not justified by a rule of law [*Rechtsnorm*]. The *Katastrophen*-order of Hitler ordering the execution without any form of trial cannot be considered as a rule of law. First it was not promulgated in the form of law that was then still valid (i.e., the *Reichs-Anzeiger*). The opinion of some Nazi jurists that all in some way juridically relevant acts of will of the Führer which, according to their nature might be considered as norms, should be equal to law and thus juridically binding without regard to form, is a shameful self-surrender of all members of the legal community [*Rechtsgemeinschaft*], in favor of a despot. Such a theory cannot be accepted as a "source of law" under the doctrine of the rule of law. [The Court here quotes an earlier opinion of the German Supreme Court of the British Zone (*OBZSt* 1, 321.)]

Now the Court could have settled the case on this formalist argument. But it went on significantly:

Even if the *Katastrophen*-order had been promulgated in due form it could not have become law [*Recht*]. For the positive legislative act is intrinsically limited. It loses all obligatory power if it violates the generally recognized principles of international law or the natural law [*Naturrecht*], or if the contradiction between positive law and justice reaches such an intolerable degree that the law, as *unrichtiges Recht*, must give way to justice.²⁶ Even the Führer-decree of February 15, 1945, on summary trials before military courts (R.G.Bl. I, 30) accepted the legal principle that nobody may be deprived of his life without a trial before a court; this is an inalienable human right. Thus the *Katastrophen*-order is null and void; it is no rule of law; obedience to it is against the law [*Recht*]. The claim of the defendant that he could not know this and that he acted according to the order of his superior is unacceptable. He must be held to know that no legal system permits a soldier to escape responsibility for an infamous crime by relying on the order of a superior, if the latter's orders are in stark contradiction to human morality and the laws of all civilized nations, whatever differences in positive law might exist among them.

An opinion of January 29, 1952,²⁷ dealt with the acquittal by a lower court of members of the Gestapo who had participated in the mass arrests of Jewish citizens and their deportation to the infamous death camps of Auschwitz and Theresienstadt. These officials were found not guilty of being acces-

26. This is taken verbatim from GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 353 (4th ed. Erik Wolf), in connection with which Radbruch says: "Positivism has, as a matter of fact, disarmed the German jurists against law of an arbitrary and criminal content." (p. 352) See also RUDOLF STAMMLER, *DIE LEHRE VOM RICHTIGEN RECHT* (1926); ERICH KAUFMANN, *KRITIK DER NEUKANTISCHEN RECHTSPHILOSOPHIE* (1921).

27. 2 BGHSt 234.

sories to unlawful deprivation of liberty (kidnapping) and to murder. The lower court had excused the defendants on subjective grounds, though it acknowledged that objectively they had been accessories to the criminal acts. Subjectively, the lower court held, it could not be assumed that the accused had certain knowledge of the murderous intentions of the principal criminals (Hitler, Göring, Himmler, Heydrich) nor that they had the consciousness of doing wrong, since they thought that their acts were in agreement with the law valid at that time; neither had they knowledge of sentence by independent courts or formal accusations of other Gestapo officers for arbitrary arrests; and although they conceded that they had an "unclear feeling that these arrests and deportations were unjust acts against these Jews, they were not aware that in their official activity they were violating a law valid at that time." The Supreme Court refused to accept these arguments and declared that their logical consequence would be that the accused could have considered anything as lawful that the Nazi State did or ordered to be done in political matters, a doctrine which in these general terms is clearly untenable.

The liberty of a state to determine what is lawful or not within its territory may be considered as very broad, but it is not unlimited. In the consciousness of all civilized nations we find (despite all the differences of their legal systems) a common nucleus of law [*Recht*] which, according to the universal juridical convictions of all men, may not be violated by any legislative or other act of political authority. This nucleus contains certain basic norms of human actions considered as inviolable; they have been found by all civilized nations by reason of common basic moral insight [*Anschauung*] and are thus considered valid, though an individual norm of an individual state may seem to be violating them. The decree of February 28, 1933,²⁸ against Communist violent acts dangerous to the state could by no reasonable person be considered as an unlimited authority for the Gestapo to violate that nucleus of norms which, according to the juridical convictions of all no legislative or other authoritative act of any state may violate. It is a fundamental fault of the lower court that in its decision it did not take into consideration these limitations on arbitrariness valid everywhere and at all times.²⁹ That the accused should not have known these few basic norms necessary for human living together — these fundamental norms of justice related to the dignity of the human person — or that they should have misjudged the obligatory character of these norms independent of all positive acknowledgment by authority,

28. This was the infamous decree passed after the Nazi-inspired and -managed fire of the Reichstag Building, according to Art. 48 of the Weimar Constitution; it was used more against Jews, Christians, and Socialists than against Communists. Under this decree the writer was put in "protective custody" during July, 1933.

29. This is obviously an allusion to the validity of natural law: "*ubique, semper, et ab omnibus observatur.*"

and that they should have accepted instead an authoritatively directed injustice, regarding the latter as law [*Recht*] cannot be taken seriously.

One has only to consult any ancient or modern treatise on natural law in order to see that what the Court here referred to are those basic norms which for many centuries have been called natural law.

Similar ideas were expressed in the so-called Canaris case (*BGHSt* 2, 173). Admiral Canaris and other members of resistance groups were, by order of Hitler, hanged on April 5, 1945, after a farce of a summary procedure by an SS tribunal. They had not yet been declared guilty by the infamous *Volksgerichtshof* in a formal trial. An SS colonel and other officials of the SS (*RSHA*) served as accusers; the colonel was later accused as an accessory to murder. The lower court found him not guilty because, first, Canaris and his fellow prisoners had been at least formally guilty of high treason on the basis of the laws and decrees of the Nazi state then in power and, second, because at least a kind of juridical "face" had been put on the killing by the perfunctory trial before the SS tribunal. The Supreme Court rejects this opinion and states:

It is not unjust when in times of grave necessity and danger to the state the ordinary procedural rights of accused persons are limited to a few rules, in contrast to procedures in times of peace. But if the victims were deprived of their lives in a form that was not even covered by the then valid decrees, or that violates universally binding rules of law which are valid and binding per se, independently of any positive recognition by the state, and if the accused knew this — which is to be implied since he conceded that the Hitler order to murder Canaris and the others had already been in his hands and that consequently the summary procedure served only as a kind of "legal face" — then the accused is guilty as an accessory to murder. [The death penalty imposed according to the then valid decrees on summary procedures] presupposes a bonafide procedure, not such a one as preserves only the external fiction of a procedure. It belongs to the very nature of a juridical sentence that it be passed by independent judges not bound by any orders of a superior; that it be the result of their free juridical consciences; and that it be based on a procedure which *in se* is apt to produce objective truth, to find guilt or innocence and to judge according to the measure of guilt, so that on the result of the procedure alone rests the decision which the judges have to pronounce according to their consciences.³⁰ A sham procedure is no such procedure, neither in name nor in substance. The rulers of the Nazi state have often, as every-

30. As already pointed out, in the Constitution of Rheinland-Pfalz of May 17, 1947, Art. 121 states that "the judges are subject only to the constitution, the law, and their consciences." Cf. Hans Peters, *Das Gewissen des Richters und das Gesetz*, in *GEGENWARTS-PROBLEME DES RECHTS* (Neue Folge, 1950).

one knows, issued decrees that claimed to posit law [*Recht*] or to be in agreement with law [*Recht*]. Nevertheless they lacked the nature of law because they violated these fundamental legal principles which, independent of the recognition by the State, are valid. Acts of authority which are not even intended to serve justice, which violate knowingly the principles of equality before the law, and which gravely violate the legal convictions of all civilized nations on the value and dignity of the human person, can never produce valid law; and acts of an officer of law according to such decrees are and remain unjust [*Unrecht*]. The lower court has completely misrepresented the nature of law, which is the opposite of arbitrariness, and the nature of the judicial decision.

Another illustration of this principle is furnished by the decision on the restitution of the property of Jews that was unjustly confiscated upon their forced emigration.³¹ A law on citizenship in connection with the so-called Nuremberg anti-Semitic legislation of 1935 declared that German citizens of Jewish origin who lived at that time outside the country or in the future fled or emigrated would automatically lose their German citizenship and their property would be forfeited to the State. After the war many claimed the restoration of property thus illegitimately confiscated. The court recognized these claims and said:

These laws of confiscation, though clothed in the formal rules of the legality of a law, cannot be considered as a genuine *Rechts*-norm as to content. For these laws were intended solely to deprive of their property those who were already in an illegitimate way [*"rechtswidrig"*] persecuted and thus forced to emigrate. This is an extremely grave violation of the suprapositive principle of equality before the law as well as of the suprapositive guarantee of property (Art. 153 Weimar Const.)³² The equality principle is the foundation of any legal order [*Rechtsordnung*] and must remain inviolable also for the constituent power, because of its suprapositive rank. [This refers to the fact that Hitler and his cabinet in the Second Empowering Act had by resolution of the by then wholly nazified Parliament received the competency to change old and to establish new constitutional law. Consequently these provisions of the citizenship law] were and are by reason of their unjust content [*Unrechtsgehalt*] and their violation of the basic demands of any legal order null and void; this law

31. 16 BGHZ 350 (February 28, 1955).

32. The positivist commentators (cf. Anschütz, *op. cit. supra*, note 2 at 397 ff.) recognized that this article contained an "*Institutsgarantie*," namely, that even the legislator could not abolish the "legal institution" of private property. But what of the qualified majority of the legislature as manifestation of the constituent power? Is this also bound by this "*Institutsgarantie*"? This question was scarcely discussed under the circumstances. Anyway, the commentators would never have spoken of a suprapositive institution.

could not, even at and during the time of the Nazi regime, produce any *legitimate legal effect* [*Rechtswirkungen*]. [italics in the original]

The Court, in rejecting unjust acts of the Nazi government, does not fall into the opposite kind of extreme formalism that would have it that every law or decree passed by the Nazi State is *ipso facto* tainted or invalid irrespective of its content. This — the converse of the view of the positivist jurists, to whom, without regard to content, all laws that formally emanate issue from whatever form of political authority are valid — is also repudiated by the Court, which knows that, besides the form, and independent of it, the legitimacy — as distinguished from mere formal legality — of laws and decrees rests on “*materielle Gerechtigkeit*,” i.e., on the conformity of their content to the natural law. This the Court explains lucidly in a decision of February 8, 1952.³³ In principle the formal validity of legal rules depends on the constitutional norms valid at the time of their being passed.

The particularities of the form of legislation characteristic of the *Führer*-principle do not invalidate *in se* and *per se* all the acts of this form of legislation without regard to their content. Once the dictatorship has established itself and finds external conformity, then legal norms enacted according to the specific nature of dictatorship cannot be considered as *in se* invalid. The new form of government, even though it came into existence under breach of previous constitutional law, must be considered as legal. That is in accordance with natural law. Though the mere fact of usurpation of political power cannot *ex se* produce subsequently (by the mere fact of external conformity of the citizens) its legitimacy, the legally relevant fact of the establishment of the new constitution and its actual care for the common good may serve as a subsequently developing legitimacy. [The Court refers explicitly to Johannes Messner, *Das Naturrecht*, second edition, 1950, page 496.]³⁴ Hitler and his party gained full power, acquiescence and aid from the people and international recognition (cf. Judgment of Military Tribunal Nr. III, U.S.A., Nuremberg 3-4 December 1947). When Hitler later abused this unlimited plenitude of power through oppression and criminal acts, there was ground for a denial of legal recognition to these unjust acts; these may have been just cause for active resistance and overthrow of the regime; but this cannot change the fact that the Hitler regime, as long as it was in power, was *legally competent* to posit legally valid laws and decrees. This does not mean that all of them were — in the true meaning of the word — “*Recht*” if and insofar as in their *content* they violated the commands of natural law or the universally valid moral laws of Christian Western civilization.³⁵

33. 5 BGHZ 76.

34. An English edition under the title *SOCIAL ETHICS* (B. Herder Book Company, 1951).

35. Italics in the original.

Thus, in a lawsuit involving the claim of a civil servant to a pension, it was held that service under the absolute monarchy, the Weimar Republic, and the Nazi regime could all be counted in the establishment of such a right, so long as the particular claimant had not lent himself to unjust acts of the regime.³⁶

In a decision of November 16, 1953, not involving Nazi legislation, we find also arguments from substantive equity and from distributive justice.³⁷ Plaintiff asked for indemnification for a radio requisitioned by the mayor of X by order of an American officer, to be turned over to a victim of a concentration camp. It was stolen from the latter, and the original owner sued the mayor for the value. The owner won his case, but before he received payment the currency reform took place, which created a new mark and ordered that money claims, with certain enumerated exceptions such as wages, pensions, and rents under a lease, should be paid in the ratio of one mark new currency for ten marks old currency. The question was whether the owner should receive compensation according to this ratio. The two senates in civil law disagreed; so the decision went to the so-called Great Senate, i.e., both senates sitting and deliberating together. The decision went in favor of a ratio of 1:1 because expropriation is an invasion of private property of such a character that the resulting claim to compensation cannot justly be treated as a mere money claim. The court said:

Expropriation is essentially a breach of the general guarantee of private property of Art. 14 GG. This is only permissible for reasons of the public weal, and even then full compensation is demanded by the rule of law [*Rechtsstaat*]. Expropriation is a special sacrifice that is imposed upon the proprietor actually in contradiction to the principle of equality before the law. Thus his compensation must represent the true value of his property. Only if the money offered as compensation corresponds to the value of the property without regard to a meanwhile legislated currency reform can the principle of equality be preserved; to grant only a compensation at the schematic rate [provided by law] would be against this principle; for expropriation is a compulsory act of public authority (not a voluntary act of the exproprie) relating to a material good that *in se* is not subject to currency devaluation (in contradistinction to money debts and credits, obviously). To decide otherwise would be a grave violation of equity; and the principle of distributive justice would also be unbearably violated, especially since it has become clear meanwhile that this compensation according to the rate 1:1 cannot be considered as dangerous to the stability of the currency.

36. 13 BGHZ 296.

37. 11 BGHZ 156 (163).

We have seen that the *GG* and most of the *Länder* constitutions create a gradation or hierarchy among constitutional principles when they exempt the fundamental rights from the operation of the amending power. But the courts have come to recognize that these natural rights are protected by more than the positive provisions of the constitutions. They transcend all positive law, even positive constitutional law, although, to avoid the continual threat of turning fundamental rights into merely relative values, they are given explicit and solemn acknowledgment by the constitutions.³⁸

An encroachment by the legislature is permitted only when *higher* [*übergeordnete*, emphasis in original] reasons of justice [*Rechtsgründe*] justify the encroachment, not for reasons of political expediency. In this regard, it must always be remembered that in the gradated order of the *GG* these fundamental rights are themselves the highest juridical values [*Rechtswerte*].³⁹

It is not merely against amendment in accordance with the procedure set up in the constitution that these rights are protected: they are limitations on the original constituent power (*Verfassungsgesetzgeber*) itself.⁴⁰ Thus, on the question of whether the rights enumerated in the first 19 articles of the Federal Constitution are available to invalidate formally valid dispositions made before the Constitution was adopted, the Supreme Court has this to say:

They are referred to in the *GG* as inviolable and inalienable human rights (Art. 1, 2); not as granted by the Constitution, but as existing before it and independently of it. . . . Not even anterior law can be applied if it violates them. . . . The *GG* obliges every judge to acknowledge the suprapositive [*übergesetzlich*] rank of the genuine fundamental rights. That compels him to the juridical conclusion that these rights were valid always even *before* [emphasis in the original] the *GG* was formally ordained; they were thus juridically valid also during the rule of the Nazi regime.⁴¹

In the recognition of fundamental rights of limiting the constituent power, a leading role, along with that of the two highest Federal courts, was taken by the Bavarian Constitutional Court, whose first President, Dr. Josef Wintrich, is now President of the Federal Constitutional Court. The Bavarian

38. BGH decision of October 17, 1955, 8 VERWALTUNGSRECHTSPRECHUNG 98 ff.), 3 BVERFG 135. Cf. Bavarian Constitutional Court (*Bayr. Verf. Gericht*) 1 II 29; 4 II 51 ff.; 9 II 111 in ENTSCHEIDUNGEN DES BAYERISCHEN VERFASSUNGSGERICHTSHOFES.

39. *Ibid.*, decision of October 17, 1955.

40. 2 BVERFG 51.

41. Advisory opinion 11 BGHZ 81 with regard to 6 BGHZ 208.

Court has held that "the right of respect for human dignity is an unconditional pre- and suprapolitical right [*vor- und überstaatliches Recht*],"⁴² and that:

The Bavarian Constitution sees in the elementary fundamental rights natural rights antecedent to positive law and due to all men. These rights are insurmountable limitations on all public authority, including the constituent power.⁴³

Pursuant to these principles, the Bavarian Constitutional Court asserted the power to invalidate an express provision of its own Constitution:

There exist such constitutional principles, which are so elementary and to such a degree an expression of right anteceding also the Constitution itself, that they bind the constituent power itself, so that other constitutional rules which have not the high rank of such principles may be declared null and void if they contradict these principles.⁴⁴

The case concerned Art. 184 of the Bavarian Constitution, which says that the "validity of laws, directed against National Socialism and Militarism or which are intended to do away with their consequences, is not touched or limited by this Constitution." The Court said:

If the intent of this article were, with regard to the so-characterized group of people thus characterized, to free the legislature forever from the restrictions placed on it by Constitution and justice, i.e., to put this group forever beyond the protection of Constitution and justice, then this article would be void as contravening the idea of justice, the principle of the rule of law [*Rechtsstaat*], the principle of equality before the law, and the fundamental rights which are a direct expression of the human person.

The decision of March 14, 1951, repeats and refines this dictum:⁴⁵

The constituent power, too, is bound by the *Recht* which in its very essence and meaning should serve the moral values of human dignity, of justice and thus of liberty. All public authority — and thus also the constituent power — is limited by the idea of *Recht*. Only if one presupposes, in agreement with extreme legal positivism, that the constituent power is the sole creator of *Recht* in the sense of an enforceable order with any content, may one criticize the earlier decision of the Court. . . . The Ba-

42. On the Bavarian Constitutional Court, cf. Josef Wintrich, *Die Rechtsprechung des Bayerischen Verfassungsgerichtshofes*, 4 RECHT, STAAT UND WIRTSCHAFT 139-170 (1953).

43. *Id.* at 141. Wintrich remarks that a dissenting member said that his standpoint of legal positivism made him dissent because of this enlargement of judicial review beyond the written Constitution; this is an *argumentum e contrario* for natural law.

44. 3 ENTSCH. VERF. G. 28 (Bavaria).

45. 4 ENTSCH. VERF. G. 51.

varian Constitution itself recognizes the dignity of the human person, and equality before the law as substantive justice, as human rights antecedent to all positive law. It recognizes that the constituent power did not create these rights but found them. These highest principles of *Recht* and of substantive justice [*materielle Gerechtigkeit*] limit the sovereignty of the constituent power.⁴⁶

It is clear from the whole tenor of these opinions that the Court is accepting the classical natural law doctrine in holding both the constituent and the amending powers to be subject to limitations.⁴⁷

The Federal Supreme Court and the Federal Constitutional Court have accepted the doctrine announced in these decisions. The former said in an advisory opinion to the Federal Constitutional Court that a reference to "un-constitutional norms in the Constitution" is not a contradiction in terms when the Constitution contains positive norms of lower and of higher rank, as is the case with the GG (Art. 79) or when the norms of higher rank, such as the fundamental rights, are recognized as suprapositive rules, not created but merely recognized by the Constitution:

That a constitutional provision may be void is not illogical for the reason that it is itself part of the Constitution. There are constitutional rules which are so much the expression of *Recht* antecedent to the Constitution itself that they bind the constitution maker himself. Thus other provisions of a lower rank may be declared null and void, because they contravene these higher ranking norms. There are once and for all certain constitutional norms which have supral legislative and even supraconstitutional rank, norms which the Constitution merely recognizes but does not create. The opposite opinion cannot be accepted, for it contends that the constituent power is wholly autonomous in establishing the value system of the Constitution. This denial of suprapositive *Recht* binding upon the constituent power would make a constitution-maker *rechtsmässig*, as if he intended only to legalize an arbitrary and tyrannical regime and thus make it binding on the judiciary.⁴⁸

The Federal Constitutional Court said in an opinion concerning the principle of equality before the law:

The idea that the original constituent power may ordain anything according to mere will would be a relapse into the spirit of a value-free legal

46. In a decision of January 19, 1956, the Court, despite all criticism, reaffirmed this doctrine. 7 *ENTSCHEID.* 55.

47. The opponents of the doctrine announced by the Court either are ordinary positivists or follow the "legal existentialism" of Carl Schmitt, whose "decisionism" and antinormativism have gained more and more followers recently.

48. 11 *BGHZ* 2, advisory opinion according to par. 80, *BVGG*.

positivism which has been overcome in recent juridical science and practice.⁴⁹ Experience under the Nazi regime has taught that even the legislator may posit injustice, and that, consequently, the ordinary administration of justice should be armed against a possible development of similar regimes so that, in the extreme case, it may be able to give effect to the principle of substantive justice [*materielle Gerechtigkeit*] in preference to the principles of the security and certainty of the legal order. . . . To determine what a lower constitutional rule is and if it is in contravention of a higher rule, to determine if the constituent power has kept within the ultimate limitations established by justice, is the privilege and responsibility of the judiciary, which draws its authority not only externally, as it were, from the Constitution but also from the idea of Right [*Recht*] itself.⁵⁰

The two Federal courts regard the principle of equality before the law — or its negative formulation, the prohibition of arbitrary discrimination — as part of the “suprapositive” law [*Recht*]. This principle of equality must not be confused with the “schematic” equality (Wintrich) which would have it, for instance, that socially relevant differences such as being the head of a family, a worker, or a millionaire, cannot affect the right to vote. The suprapositive principle binding on the legislature is that

Facts and circumstances [*Tatbestände*] of the same kind, which by reason of the nature of the matter, clearly demand in justice regulation on the basis of equality, must not, without objective and sufficient cause, and without regard for the demands of justice, be treated unequally; in this sense equals must be handled equally, unequals unequally.⁵¹

Few will doubt that by terms “suprapositive law,” “material or substantive justice,” “prepolitical rights,” etc., natural law and natural rights in the commonly accepted sense are meant. It is also clear that these terms are in-

49. The opinion quotes with approval the Swiss jurist Hans Marti (FESTGABE FÜR DEN SCHWEIZER JURISTENVEREIN) on sources of law in Swiss law: “In each constitution definite values find their realization. . . . A constituent power does not create a constitution out of nothing. It does not ‘invent’ new values but it finds these or other values already accepted. . . . These values and norms which it finds are by no means only moral norms without juridical relevance. Insofar as these norms claim a realization in the law (*Recht*) they are not merely ethical rules but already juridical principles (*Rechtsgrundsätze*). Thus they are above the constitution and the constituent power norms which seek recognition in positive law; they are principles of the rules of positive law.”

50. 3 BVERFG 231. It should be pointed out that the Constitutional Courts of some Länder do not claim such a broad competency. Cf. BAGHOFF, VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN? 12 ff. (1951).

51. 11 BGHZ 26; 16 BGHZ 350; 6 BGHSt 168; 3 BVERFG 135; and J. WINTRICH, DIE VERFASSUNGSGERICHTSBARKEIT. . . , a lecture at the Academy of Administration and Economics, October 17, 1955, p. 2. See also Dürig, *Gleichheitsgrundsatz*. . . , 79 ARCHIV FÜR ÖFFENTLICHES RECHT (1953-1954). The Bavarian Constitutional Court has been and is exemplary in this subject matter. See WINTRICH, RECHTSPRECHUNG DES BAYR. VERF.G. 143 (1953).

tended to designate immediately valid and thus judicially applicable law, not merely ethical standards and not merely regulatory principles or directives for the legislator.

This becomes clear in a decision of the Federal Supreme Court in which the relationship between the moral law and the judicial norm is discussed, and the strict separation between the two, so stressed ever since the time of Immanuel Kant, is criticized. The case arose under par. 181 of the Criminal Code, making it an offense for a person to permit or tolerate acts of sexual immorality (*Unzucht*) in his house by his child or someone to whom he stands *in loco parentis*. In this particular case, a mother permitted her daughter, who had had an affair with an older married man, and was pregnant by him, to live with him in her house, because they were "practically married." Since 1945, the Court of Appeals (*Oberlandesgerichte*) has been tending to interpret *Unzucht* in terms of the moral convictions of the classes of society (*Volkskreise*) in which the acts complained of took place. Under the conditions that have prevailed in some parts of the German population since the War, it is quite possible that this criterion could warrant an acquittal in this particular case. At any rate, the Court of Appeals of Düsseldorf so held.⁵²

The criterion thus adopted — one reminiscent, incidentally, of the sociological school of jurisprudence in this country — denies an objective, generally valid, and obligatory order of values; instead, the judges substitute the changing opinions and behavior of changing strata of society which they scarcely can safely determine and of which they do not know whether they are backed by moral convictions or are merely the result of indifference. A deference to *sane* popular views is no solution, for the judge has to decide if a certain popular view is still sane or not. Without an objective standard the decisions of the judges must become arbitrary and subjective. The Court of Appeals simply refused to take issue with the various views, contending that it does not belong to the obligation of judges to decide about problems of ethics, since all these various views had their own moral justification. "This view," says the Supreme Court,

cannot be right. It surrenders the very grave question full of far-reaching consequences which moral norm ought to rule, the relation between the sexes, especially between engaged couples, to an empty relativism, destructive in effect because only social reality without any evaluation serves as a standard. This simply means that human actions ought not to be ruled by norms but that these actions determine the norms. . . . The thesis that judicial decision must in principle never be based on ethical evaluations

52. NEUE JURISTISCHE WOCHENSCHRIFT 959 (1950).

is a deplorable falsehood. The inner obligatory power of the juridical law [*Recht*] is, on the contrary, based just upon its agreement with the moral law. The norm on which paragraph 181 of the criminal code rests is not a transitory convention; it is a norm of the moral law valid *in se*. Such norms are valid without regard to the changing views of the addressees, of their consent or dissent.

There is no doubt that the norms which regulate fundamentally the sexual relations and thus ordain the order of marriage, family, and remotely the living together of the people as obligatory norms are norms of the moral law and not transitory conventional customs. . . . Since the moral law prescribes monogamous marriage and the family as obligatory form of living together and makes them the basis of the life of nations and states, it simultaneously prescribes that sexual intercourse ought to take place only in marriage and that a violation of this rule is a grave violation of sexual morality. . . . Therefore one *cannot* say that the seriousness of the betrothal, the sincere will to marry is *for itself alone* an excuse from the moral law; for the *unconditional validity* of the *ethical norm* does *not permit any exceptions*.⁵³

IV

In the preceding pages a selection of representative opinions of both the Federal Supreme Court for Civil and Criminal Laws and the Federal Constitutional Court has been presented. Perhaps the opinions of the Federal Supreme Courts in Labor and Social Law and of the Federal Supreme Court in Administrative Law might have enriched this essay. But even so it is quite evident that the revival of natural law in Germany is a concern not primarily of legal philosophers and professors of jurisprudence, but of judges. Some may try to explain this revival merely as a consequence of the terrible trauma that the National Socialist totalitarian Führer-State inflicted on the judicial power of government, *quelque façon nulle* — and totally *nulle* in the totalitarian state where it is a mere tool of the legally and ethically unlimited power. But such an explanation would be not only superficial but also somewhat insulting. The idea of natural law never did wholly disappear; it was forced perhaps, in Dr. Wu's happy phrase, to "go underground" or else to find refuge where, for specific reasons, it was always "at home," in the Catholic Church and its members.⁵⁴ Nevertheless, it may be said that the shock of the experience of

53. Emphasis in the original. 6 BGHSt. 46. The Court points out that the Nazi racial legislation, which forbade unjustly and arbitrarily marriages on racial discriminatory grounds, could offer an exception; but then these laws were themselves unjust and could not invalidate a serious marriage contract. This is in agreement also with canon law (C.I.C., c. 1098, 1); see also 6 BGH 147 (suicide).

54. Cf. NATHANAEL MICKLEM, NATIONAL SOCIALISM AND THE ROMAN CATHOLIC CHURCH 173 (London, 1939), on Catholic resistance against the totalitarian state by reason of a consistent theory of natural law.

the totalitarian "injustice as a system" (*Unrecht als System*) made it apparent even to those who had been satisfied with a concededly excellent and learned legal technique, without giving much thought to the foundations of law and rights, that all positive law, the constitutional included, rests on and must be measured by an objective justice and a perennial jurisprudence. This jurisprudence is valid *in se*, and in its essential content is independent of philosophical fashions and transitory moods of legislative majorities.

The juridical, i.e., *enforceable* norm, even in its formal aspect, is not wholly indifferent to content. This constitutes the inadequacy of the doctrine of the "pure theory of law," which sees only the normative, the ordering element, and the sociological guarantee of enforcement — in other words, norm and power, the formal elements of the law (*obedientia facit imperantem*). Positive law implicitly demands justice for its content. It can claim to be valid only insofar as it finds a free assent *actu et habitu* in the consciousness of those subject to it. Obedience is a moral virtue, not merely an external response to power, terror, or utilitarian expediency. It asks, as the virtue of free men, for reason and reasons. The juridical law is, beyond all technicality and sociological condition, related to ethical values as its content. As long as there prevails in the community a habitual consensus about these values, one can afford to be a positivist. But violent destruction by a revolution à la Hitler, or sudden mass disobedience after a slow process of relativistic corruption by irresponsible intellectuals, or any obvious contradiction between ethical values and social reality, causes an awakening from this satisfaction with the formal elements of the juridical order.

Besides these ethical values this order also contains and orders what Dietrich Schindler calls "vital necessities" of man living in society, namely, to care for his economic demands and to secure his life and that of his family for the future in a peaceful order.⁵⁵ While I cannot with certainty rely on obedience by others to the moral law, I can rely, because of the certainty of enforcement, on their external conformity to the juridical law as the "ethical minimum" without which neither order nor internal peace could prevail. This is also connected with the power element in the juridical positive law, which leads to the temptation to see in the law nothing more than the protection of the social *status quo* of power. All these elements are characteristic of the juridical law. In addition, in the periphery of the positive law, far away from the nucleus of the perennial content, we find rules of expediency and

55. VERFASSUNGSRECHT UND SOZIALE STRUKTUR (2nd ed., Zürich, 1944). It is interesting that Wintrich, as well as his critic Peter Schneider in ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 98-110 (1956) (*Naturrechtliche Strömungen in deutscher Rechtsprechung*) refers repeatedly to this master work.

mere utility, the result not of any necessary radiation of the idea of justice, but of a choice, among not even true alternatives, but rather among a plurality of possibilities determined mostly by time and habit, of which one may be as easily defended as another. Natural law, being the foundation and critical norm of positive law, demands positive law; and positive law needs ethical justification in the consciences of its subjects or it will be nothing more than a labile power relation among social groups and individual and collective interests.

The jurist in the daily technique of the law need not actually consider all these matters, for they are, despite their innate tensions, implicitly accepted in positive law. If, however, the tension, because of deep changes in the habitual consensus, becomes critical, there is a vital need of going to the fundamental and perennial principles of law. Positive law, then, needs the enduring critic provided by natural law; it must forever be confronted by objective justice. There is no intrinsic inherent antinomy between the perennial natural law and the time-and-nation-bound positive law characteristic of a given time and place; but the ultimate appeal of all positive law and its legislators is to the well-informed conscience—the depository of the natural law.

Needless to say, neither the opinions discussed above nor the appeals by the courts to suprapositive law have escaped criticism. In this criticism, the professed positivists, although they are the most vocal, are not alone. This is all to the good. The natural law jurist is not safe from temptations, be they those into which the jurists of the rationalist eighteenth century fell or those into which the United States Supreme Court fell in the decades just before and after 1900. Both temptations have been vehemently pointed out to the German courts. In the matter of unconstitutional norms within the Constitution a broad discussion ensued, although the two Courts were stressing that such a thing was not unthinkable although rather improbable.⁵⁶

The Courts are aware of the limitations on their authority, namely, that they

ought not to take over strictly legislative functions, the *free* positing of objective legislation. The borderline for the judiciary in constitutional law is where the political freedom of decision of Legislature and Executive begin. Only such acts as fall into this sphere are 'unjustifiable governmental acts' [*justizlose Hoheitsakte*].⁵⁷ The principle of the separation of

56. Cf. pro: BACHOFF, VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN? (with bibliography) (1951); contra: HANS SCHNEIDER, GERICHTSFREIE HOHEITSAKTE (1951), to mention only two. See also Josef Wintrich, *Aufgaben, Wesen, Grenzen der Verfassungsgerichtsbarkeit*, FESTSCHRIFT FÜR HANS NAWIASKY (Munich, 1955); Erich Kaufmann, *Grenzen der Verfassungsgerichtsbarkeit*, VEREINIGUNG DEUTSCH STAATSRICHTSLEHRER (1950).

57. Wintrich, *op. cit. supra*, note 56 at 204; Scheuner, in FESTSCHRIFT FÜR SMEND 295.

powers does not, as has often been said, so identify law with statutory legislation as to prevent the development of judge-made law [*Richter-Recht*], if the judiciary by the development of general principles of law as they are given in the order of law [*Rechtsordnung*] finds norms applicable by the judiciary. On the other hand, it would be wrong for the judiciary to attempt, by its own free resolution and will, to establish new general norms for reasons of pure expediency or utility. The decisions of the judiciary by their very nature must be restricted to law [*Recht*] that can be judicially interpreted and/or concretized.⁵⁸

Chief Justice Wintrich points out in this connection that the "concretization (by judicial decision) in the form of deriving more concrete norms from fundamental principles of law is more similar to the development of case law than to mere technical interpretation of the law."⁵⁹ This is a consequence of judicial independence and the equality of the judiciary with the legislative and the executive powers; and it is a slow approach to the judge-made law familiar to the Anglo-American tradition. Insofar as the constitution is based on, contains, or refers explicitly or implicitly to suprapositive norms or fundamental constitutive principles of the law itself, the judiciary is entitled in its specific function of interpretation and concretization to appeal to universal philosophical and ethical propositions, to an objective order of values transcending all positive law. All political authority, and thus also the constituent power, is, like all human power, limited immanently by the idea of justice, the dignity of the human person, and its essentially social and political nature.

58. 11 BGHZ 35 (advisory opinion).

59. DIE VERFASSUNGSGERICHTSBARKEIT 10.