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THE ROLE OF NATURAL LAW IN THE LEGAL DECISIONS OF THE GERMAN FEDERAL REPUBLIC

The concept of natural law, understood in its broadest sense as a supra-positive claim upon positive justice, has a special significance for Germany. For it is a basic fact about German jurisprudence that it is *not* primarily determined by *traditional* elements, such as those that play so large a role in England, even in the judicial process. Instead, German legal thinking tends to conceive of law and justice as a logical *system*.

This tendency as such is neither good nor bad, but is a simple fact or, better, an intellectual attitude. It does, however, carry with it certain advantages, as well as perils. Thinking primarily in terms of a system makes it possible to make a fresh start at any given moment by merely altering the specific (material) content or, perhaps, the point of departure — something that cannot be done on short notice within the framework of a jurisprudence determined by a deeply ingrained tradition. Whether this freedom for spontaneous initiative is good or bad depends upon whether the initiative taken is itself good or bad. Thus, from the point of view of legal thinking, the important question is whether the actual legal system, as it is enforced, bears a moral character or not.

I. PERIOD PRIOR TO THE BONN CONSTITUTION

The systematic and systematizing tendency in German legal thought happened to come to fruition, unfortunately, in an epoch when German thinking in general was irresistibly drawn towards materialism — the epoch least suited to visualizing and comprehending the higher (supra-positive) legal orders. To be sure, the very idea of thinking in terms of system has already introduced a revolutionary element in the ease with which a new approach may be selected without regard for any binding precedent. Theoretically, however, it would be possible to take tradition itself as the starting point of the system, using the system, as it were, as the means of unfolding and developing what is implicit in the tradition. This actually happened during the Middle Ages, when the Scholastics elaborated the spiritual and thereby the legal foundations of the Holy Roman Empire into a system, while yet keeping the classic Christian tradition in mind as their point of departure.

Modern systematic thought, on the other hand, took a militant stand both against tradition as such and against the particular tradition of the medieval state with its theologico-philosophical foundations. The theories of the modern European state, needless to say, were essentially of a militant character. Applied to the domain of law, especially to the notion of territorial or national law, this meant that the new state created its own legal system, and that the concept of *sovereignty* became the cornerstone of all legal thought. This concept, taken as a legal postulate, proclaimed first of all that the sovereign territorial ruler recognized no authority above his own, and in particular that he completely

emancipated himself from the universal claims of Emperor and Pope.¹ His claim to complete independence rested upon an actual or asserted physical power of defending this independence whenever and wherever necessary, as well as upon his readiness to employ this power at his own discretion. Herein lay the connection between modern voluntaristic notions of individualism and the modern theory concerning the foundations of the state. But since, as a rule, only the low and egoistical aspects of this individualism are identified with the sovereign, and, at the same time, through the novel concept of sovereignty, act as a point of departure for the whole legal system, the basic character of the modern state itself is of necessity egoistical — one in which rule by force is a predominant ingredient. Such a state is not declaratory of a moral order — that had been the aim of the medieval concept of the body politic — but is arbitrary power based on crude self-interest. Since the essence of the state is conceived of as the assertion of its physical prowess, this power in a Machiavellian sense, which makes its own interests the final standard or criterion of all action, strives above all to assert itself in the name of “freedom” as against the outside world, and to expand wherever possible in the name of “greatness.”

This is not the place to investigate in detail the development of the modern concept of the state or the particular philosophy of law which it engendered. But it is necessary to hint at this development at least as far as natural law is concerned. In this connection, it is decisive to note that the spirit of the Enlightenment, of which the concept of sovereignty is only a political and legal expression, degenerated in the course of the nineteenth century into a materialistic and thereby more and more coarse way of thinking. As a result, legal thinkers lost the inner power even to visualize the possibility of an archetypal and morally binding ideal of justice above the positive legal order. With all its deficiencies, the medieval concept of order did at least assume as well as recognize as its logical presupposition a higher form of justice, namely, the notion of a natural and divine right. The late nineteenth century in its materialistic and voluntaristic tendencies, on the other hand, concurred with Rudolf von Jhering that law is but the “child of power.”²

According to this new positivistic jurisprudence, the legislator, and he alone, *creates* the law. Everything prior to legislative enactment is at best “custom,” but never true law. Thus, law and right became wholly identified, and bare “legality” takes the place of substantive justice as an ideal. The concept of a politically organized society or state under the rule of law (*Rechtsstaat*) now comes to signify merely an “organization in which the positive law is supreme and binding upon the executive and judicial branches of government.”

This approach to law was propounded during the time of the German Empire (1871-1918). Advanced by a generation of influential jurists such as Gerber, Laband, and G. Jellinek, it was congenial to the spirit of the age and, hence, was hardly questioned. Rudolf Stammler, to be sure, in numerous publica-

1. See FREIHERR VON DER HEYDTE, *DIE GEBURTSTUNDE DES SOUVERÄNEN STAATES* (1952); ERNST VON HIPPEL, *1 GESCHICHTE DER STAATSPHILOSOPHIE* 337 ff. (2nd ed., 1958).

2. ERNST VON HIPPEL, *2 GESCHICHTE DER STAATSPHILOSOPHIE* 278 ff. (2nd ed., 1958); *DER RECHTSGEDANKE IN DER GESCHICHTE* (1955), and the bibliography mentioned there.

tions, pointed out that it was well-nigh impossible to determine what the positive law is in a given case without a valid theory of law and right which recognizes the existence of rights prior to the state. But since the concept of a "just law" which he proposed failed to establish any concrete limits to the sovereignty or powers of the state, it was a concept with no practical or workable significance, and, therefore, one which raised merely a theoretical problem of legal method. The view which held that right and law are wholly identical — a view which had already abolished the old theory of the right to resist actions of the state — excluded the very possibility of any right against the law. Because of its voluntaristic origin, the new concept of sovereignty in fact granted the legislator unlimited powers. It was hoped, however — and this not without justification in this period of "conservative decency" — that the legislator would not misuse his legislative omnipotence to the detriment of the citizen. For this was a "liberal" age in which the citizen was wont to secure for himself certain freedoms from executive interference within an already sparse framework of laws.

Thus, natural law did not become a factor in the *legal decisions* of the Imperial period. As a matter of fact, since healthy common sense and the guarantee of freedom seemed embodied in the laws themselves, natural law and natural rights were not considered necessary prerequisites of justice. Only peripherally, in some isolated instances, can we find a vague reference to supra-positivistic considerations of law and right. The Supreme Court of Germany (*Reichsgericht*), for instance, held, in a decision having to do with the photographing of Bismarck's body against the declared wishes of his next of kin, that it was "inconsistent with the natural feeling of right" that what had been "secured through such an illegal action" should remain in the possession of the securer. (December 28, 1899)³ In a later decision, the loyalty which every citizen owes his homeland is called a principle of the natural law.⁴ Furthermore, there is an implicit transcendence of mere positivistic thinking in the theory of "supralegal distress," which the court developed in its criminal decisions. During this particular period natural law was also to be found, though on a subconscious level, in the domain of statutory interpretation. The legislator himself made this possible, if not necessary, especially when he set up such general standards of "good faith" (*Treu und Glauben*) or "good morals" (*gute Sitten*), thus declaring moral norms of behavior legally authoritative. To this day certain decisions are based on the definition of the Supreme Court of the Empire, defining "good morals" as "that which accords with the predominant moral sense of the people — with the sense of decency and propriety entertained by all just and right-thinking individuals."⁵ This is a clear, though indirect, appeal to objective moral criteria. For obviously experience alone will not divulge whether someone is just and right-thinking; rather, previous knowledge of what constitutes justice and right thought is required to define a just and right-thinking individual.

Natural law as such remained alien to the Weimar Constitution (1918-1933)

3. 45 ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN (hereafter cited as RGZ) 170 (1899).

4. 62 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN (hereafter cited as RGST) 67.

5. 48 RGZ 124 (1901); 80 RGZ 221 (1912).

as well, although certain isolated principles of the natural law did enjoy the status of constitutional provisions or guarantees. But the guarantees thus accorded these general principles of justice were of limited value. The Constitution itself could be changed at any time, and it was a regular practice to enact unconstitutional laws. The President could, under certain circumstances, abrogate basic constitutional rights by virtue of Art. 48 of the Constitution itself. But the greatest obstacle to the recognition of natural law was the doctrine of positivism which equated right and might to begin with and, hence, assigned to the legislator full discretion as to the detailed content or provisions of the law, to the point of injustice, indeed to the point of complete, high-handed arbitrariness. A decision of the Supreme Court of the Reich of November 4, 1927, makes this fully clear: "The legislator is absolutely autocratic, and bound by no limits save those he has set for himself either in the constitution or in some other laws."⁶ Two years later the Supreme Court refused to consider whether a law was compatible with suprallegal standards.⁷ But that the refusal in the latter case was couched in terms not of lack of jurisdiction, but of lack of power (*Machtbefugnis*), is symptomatic of a complete surrender of legal thinking to the concepts of power politics in this period.⁸ Every other organ of government, having its properly defined and delimited area of jurisdiction, may not act arbitrarily. But the legislature was presumed to be omnipotent; hence, the question of legislative arbitrariness could not properly be raised.⁹

The Supreme Court of Germany, however, did not always sustain this standpoint which is the logical consequence of the positivistic concept of law and its doctrine of sovereignty. In some decisions the Court referred to "natural" or "inalienable" rights,¹⁰ as well as to "limitations" imposed on the lawgiver.¹¹ Occasionally, the validity (*Rechtmässigkeit*) of a certain statute was pointed out as debatable (*strittig*) and left open.¹²

The divorce of legal concepts from the demands of reason and morality is the direct result of the lawgiver's complete emancipation from any legal limitations on his power. Thus, during the almost total inflation, the Federal Supreme Court ruled that one paper mark was equivalent to one gold mark, since the dictionary meaning of the term "mark" seemed the only relevant issue. This decision enabled a mortgagee to pay off a substantial mortgage on his house for the price of a pair of shoes; it declared him an honest man, at least in the eyes of the law, and, at the same time, condoned his act of swindling the mortgager out of his rightful claim. These are the fateful beginnings of a way of thinking which, instead of determining legal concepts in accordance with actual facts, subjects actual facts and their determination to the sway of meaning-

6. 118 RGZ 327 (1927).

7. 125 RGZ 279 (1929).

8. "It is not within the competence of the court to decide whether laws that have been constitutionally enacted are compatible with good faith or good usage."

9. 102 RGZ 161 ff. (1921).

10. 62 RGSt 65 ff. (1928).

11. 125 RGZ 422 (1929).

12. 107 RGZ 376 (1924). Compare and contrast with the theory of arbitrary right during the Weimar period in Ernst von Hippel, *Das Richterliche Prüfungsrecht*, 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS 547 ff. (ed. by Anschütz and Thoma, 1932).

less concepts — nominalistic procedures which enable present-day Soviet Russia to term tyranny democracy, to treat lies as the truth and to call the unjust just.

The inadequacy of this purely legalistic standpoint became fully obvious during the Third Reich (1933-1945), a regime which in fact it was instrumental in creating or, at least, made possible in a juristic sense. The positivistic theory which held law to be simply the expression of the sovereign will regardless of the nature of that will, made supreme the will of the Führer, and, by putting it beyond the reviewing power of any court, made it the sole fountainhead of law and right. Whenever the law may not be evaluated by the standards of justice, because no higher (suprapositive) legal orders are recognized, the legality of a disposition depends entirely on its total subjection to an arbitrary and, hence, evil will. According to an order issued in 1936 by the so-called Reichsrechtsführer (Commissar of Justice), this position, into which the adherents of positivism had maneuvered themselves and the whole community as well, is epitomized as follows: "A decision of the Führer in the express form of a law or decree may not be scrutinized by a judge. In addition, the judge is bound by any other decisions of the Führer, provided that they are clearly intended to declare law." Thus the will of the Führer and everything he proclaimed arbitrarily, came to be binding on the courts. The only debatable point was the form in which this will had been expressed. But this does not furnish any guarantee of lawfulness: the decisive criterion was simply the "unambiguous intention to determine law."

II. THE BONN CONSTITUTION

The disastrous results of a jurisprudence which ignored the moral element in the law could not be missed by the majority of jurists after the collapse of the Third Reich. Especially influential was the about-face of Gustav Radbruch — criminal lawyer, philosopher of law, and Minister of Justice during the Weimar Republic — who, because of his sincerity and the literary elegance of his writings, was one of the best-known jurists in Germany. The Third Reich had dismissed him and sentenced him to silence. Now, in an essay entitled "*Rechtsphilosophische Besinnung*"¹³ (*Reappraisal of Legal Philosophy*) he came forward to renounce and denounce positivism — a Pauline conversion, for he himself had previously been among the defenders of positivist views — in these terms:

For the soldier an order is an order; for the jurist, the law is the law. But the soldier's duty to obey an order is at an end if he knows that the order will result in a crime. But the jurist, since the last natural law men in his profession died off a hundred years or so ago, has known no such exception and no such excuse for the citizen's not submitting to the law. The law is valid simply because it is the law; and it is law if it has the power to assert itself under ordinary conditions. Such an attitude towards the law and its validity [i.e., positivism] rendered both lawyers and people impotent in the fact of even the most capricious, criminal, or cruel of laws. Ultimately, this view that only where there is power is there law [*Recht*] is nothing but an affirmation that might makes right [*Recht*]. [Actually] law [*Recht*] is the quest for justice . . . if certain laws [*Gesetze*] deliberately deny this quest for

13. Reprinted in the RHEIN-NECKAR ZEITUNG of September 12, 1945, and in GUSTAV RADBRUCH, *DER MENSCH IM RECHT* 105 ff. (1957).

justice (for example, by arbitrarily granting or denying men their human rights) they are null and void; the people are not to obey them, and jurists must find the courage to brand them unlawful [*ihnen den Rechtscharakter absprechen*].

This appeal of Radbruch's is, of course, particularly addressed to the judiciary. For them it takes on especial significance, since the Bonn Constitution of May 23, 1949, has singled out the judges to be the protectors of the higher legal orders against the rules of mere positive law. Insofar as these higher principles are of divine origin, they are referred to only indirectly, in the passage of the Preamble which directs the attention of the legislator to his "responsibility before God" — a passage which, unless the basic idea of the Constitution is a lie or a blasphemy, means a recognition of the whole Christian tradition. On the other hand, the reference to natural law as a body of legally binding suprapositive principles is unmistakable when the constitution regulates the content of the positive law by acknowledging "inviolable and inalienable rights of man" which the legislator must respect at all times. Also, in Art. 1, "all public authority" (*alle staatliche Gewalt*) is enjoined always to respect and safeguard the "unimpeachable" dignity of man: the state is thus declared to exist for the sake of the higher life of man. Never may it treat man as a mere building block in its structure of egoistical power — a thing which positivism had not only permitted but actually taken as one of its logical presuppositions.

1. *The Third Reich: A Rule of Unjust Law.*—Let us attempt to analyze and systematize certain decisions which shed some light on the "legal order" of the Third Reich. We shall begin with those decisions which deny that the Third Reich had a "rule of law" in the proper sense of the term, or which declared some of its laws invalid because of their particular content. Behind these decisions is the insight, more or less distinct, that there may be a "rule of unjust law." Such a rule can be "in force" and thus be "legally binding" in a positivistic sense, and yet lack the true character of law: for evil can only constrain — it cannot oblige.

Thus, the appellate court (*Oberlandesgericht*) at Frankfurt in a decision of August 12, 1947, had to pass on the contention of certain physicians who had participated in "experimental killings," that they were not conscious of breaking the law (*Rechtswidrigkeit*) since their actions had been sanctioned, in fact desired, by the laws of the Third Reich. The court declared:

Such a way of thinking would not do justice to the true character of the National Socialist "law." Law must be defined as an ordinance or precept devised in the service of justice [citing Radbruch]. Whenever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a "lawless law [*unrichtiges Recht*]." An accused may not justify his conduct by appealing to an existing law if this law offended against certain self-evident precepts of the natural law. That is the situation here.¹⁴

As early as 1945 a decision of the lower court (*Amtsgericht*) in Wiesbaden held: "The laws which declared that the property of Jews had become forfeited

14. 2 SÜDDEUTSCHE JURISTEN ZEITSCHRIFT (hereafter cited as SJZ) 521 ff. (1947).

to the state" were "incompatible with natural law," and, therefore, "void at the very time of their enactment."¹⁵ The Federal Court (*Bundesgerichtshof*) likewise reached the conclusion that an order of Hitler's issued shortly before the end of the war which made it incumbent upon every bearer of arms to shoot deserters without benefit of trial, was not binding since it offended "to an intolerable degree" against "the law of nations and of nature."¹⁶

In a decision of February 8, 1952, the same court addressed itself to the question "whether laws and ordinances can be considered 'law,' in the true sense of the term, if their content offends against the claims of the natural law or against the generally valid rules of conduct in the Christian Western tradition."¹⁷

Finally, as though in summation, a decision of the same court of February 12, 1952, points to the general invalidity of the laws of the Nazi regime:

Those in power during the Third Reich issued numerous regulations which claimed to be "lawful" and establish "law." However, these regulations lacked the quality of laws because they violated those basic principles which are independent of the recognition of governments and stronger than any enactment by the government. Regulations issued by the government which do not even attempt to bring about true justice do not create law; and actions which conform to them remain wrong.¹⁸

2. *The Rejection of Legal Positivism.*—An explicit rejection of legal positivism with its confounding of lawfulness and legality can be found in a decision of the Federal Constitutional Court (*Bundesverfassungsgericht*) of October 23, 1951:¹⁹

Blind adherence to the principle that the original framer of the Constitution may arrange everything to suit himself would be tantamount to a relapse into legal positivism, a way of thinking that jurists have long since abandoned, both in theory and in practice. It is not necessarily true that the original framer of the Constitution, in the very nature of things, will never overstep the absolute bounds of justice.

The same idea also underlies a *per curiam* opinion of the *Bundesgerichtshof* which rejects the positivistic theory of sovereignty:²⁰

The opposite view, advanced especially by Apelt, cannot be maintained. This view holds that the framer of the Constitution is "autonomous" in establishing a "system of values." Such a position completely denies the existence of any higher compelling standard of law and justice above the legislator. It would acknowledge as "rightful" [*rechtmässig*] a written constitution

15. 1 SJZ 36 (1946).

16. 3 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN (hereafter cited as BGHZ) 106 (1951).

17. 5 BGHZ 97 (1952).

18. ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN (hereafter cited as BGHSt) 177 (1952).

19. 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (hereafter cited as BVG) 18 ff. (1952).

20. 11 BGHZ, *Appendix* 34 ff. (1953).

devised to legalize a reign of arbitrary force and thus declare it binding upon the courts. Bachoff rightly points out that such a result would be absolutely unacceptable to the German sense of justice, where the memory of "legalized wrong" [*gesetzliches Unrecht*] is still fresh.

Along with positivism itself, the positivistic method of statutory interpretation — a combination of dogmatic or empirical points of departure with what is taken for logical procedure — is rejected. A trial court (*Schwurgericht*) in Cologne declared in a case of "mercy-killing": "In the realm of natural law the intellect is supreme, and proper solutions are reached, not by following signposts, but by following a sense of moral propriety, guided by human conscience."²¹

In this connection, another court expressly acknowledged the individual's right to resist a regime of "legalized wrong."²²

3. *Acknowledgment of Suprapositive Norms and Standards.*—The decisions mentioned above find their justification in the acknowledgment of suprapositive principles at the basis of positive law. Usually these principles are referred to as "natural law," but other terms, such as the "moral law," the "moral order," "material justice," "idea of right and justice [*Rechtsidee*]," or "general order of moral values," are used.

In particular, during the interregnum between the collapse of the Nazi regime and the founding of the new Federal Republic, the courts in their decisions were often forced to fall back on natural law.²³ Not the least important of these decisions dealt with so-called "euthanasia judgments," that is, with those acts of planned murder of "incurably" sick persons during the Third Reich by an order of Hitler's to the *Reichsleiter* Bouhler and Dr. Brandt. Also the superior court (*Landgericht*) at Bonn, in a judgment of October 20, 1947,²⁴ declared the right to freedom of movement as derivative from natural law. And in a decision of July 27, 1949, the *Oberlandesgericht* at Bamberg found that the *Heimtückegesetz* was grossly unfair, but did not violate natural law, since it demanded only an omission, namely silence.²⁵

After the adoption of the Bonn Constitution (*Grundgesetz*, or "fundamental law"), and the postwar state constitutions, the courts made it clear that their use of suprapositive norms was not to be confined to cases in which the official acts of the Third Reich were in question. The *Schwurgericht* at Cologne, in the case already referred to, said: "Above positive law there is a higher unwritten law. A law enacted by man can make no claim to validity if it runs counter to the natural law."²⁶ Similarly, the Bavarian Constitutional Court (*Verfassungs-*

21. Decision of October 24, 1951, reprinted in 2 NEUE JURISTISCHE WOCHENSCHRIFT (hereafter cited as NJW) 358 (1952).

22. BVG, reported in 56 NJW 1393 (1956); and BGH, reported in 6 NJZ 1369 (1953).

23. *Amtsgericht Wiesbaden*, decision of November 13, 1945, reported in 1 SJZ 36 (1946); *Kammergericht*, decision of August 24, 1946, 2 DEUTSCHE RECHTSZEITSCHRIFT (hereafter cited as DRZ) 198 ff. (1947); *Oberlandesgericht Saarbrücken*, decision of May 21, 1947, 2 DRZ 341 ff. (1947); *Oberlandesgericht Frankfurt*, decision of August 12, 1947, 2 SJZ 621 ff. (1947); *Landgericht Köln*, decision of March 5, 1949, 3 MONATSSCHRIFT FÜR DEUTSCHES RECHT (hereafter cited as MDR) 370 ff. (1949).

24. 2 MDR 153 (1948).

25. 5 DRZ 302 (1950).

26. 5 NJW 358 (1952).

gerichtshof) referred to private property as a right which precedes the state or the legal order.²⁷

Since these principles precede both the state as such and positive law as such, it follows that the maker of the constitution is himself bound by them. Thus, the Federal Constitutional Court (*Bundesverfassungsgericht*) expressly declared that a constituent assembly is "bound by the suprapositive principles of justice which underlie all written law."²⁸ And the Bavarian Constitutional Court (*Verfassungsgerichtshof*), in a decision of June 10, 1949, held:

A provision is not necessarily valid simply by virtue of being embodied in the Constitution itself. There are constituent principles so basic, so elementary, so very much the expression of a justice which every constitution must presuppose, that they are binding even upon the author of the constitution. Those constitutional provisions which go against these principles may actually be held invalid.²⁹

Some decisions refer to "justice" rather than to "natural law," and sometimes both concepts are used simultaneously. Thus, the decision just quoted refers in one place to "natural rights belonging to all human beings, which rights precede positive law and limit the power of the state," and in another place demands of the legislator a "guiding orientation toward the ideal of justice." The *Schwurgericht* at Cologne puts the two concepts into one sentence: "For reasons of a higher justice founded on natural law. . . ."³⁰

Another decision making reference to an "ideal of justice" as a guiding principle of the positive law is that of the first senate of the Federal Constitutional Court of December 18, 1953, which mentions "material justice" as contrasted with "legal certainty" and holds: "A provision of a constitution can be invalid if it disregards to an intolerable degree those postulates of justice which belong to the basic determining principle of the constitution itself."³¹ Finally, "even the application of individual statutes," the court of last instance in the British Zone of Occupation (*Oberster Gerichtshof für die Britische Zone*, or OGHSt) ruled, always requires "an awareness of the fundamental principles of justice."³²

Other decisions, instead of appealing to "natural law," refer to the "moral law" or to the "dictates of morality." Thus the Federal Supreme Court (*Bundesgerichtshof*) in a decision of February 17, 1954, declared: "The true compelling force of the law consists precisely in its correspondence with the dictates of the moral law."³³ In this fashion monogamy was declared to be in accord with the moral order.³⁴ And the *Schwurgericht* at Cologne announced

27. 2 ENTSCHEIDUNGEN DES BAYRISCHEN VERFASSUNGSGERICHTSHOFS, Neue Folge (II), no. 1, p. 2 (1949) (hereafter cited as BAYR. VGH).

28. Decision of October 23, 1951, 1 BAYR. VGH 17 (1952).

29. 2 BAYR. VGH, Neue Folge (II), no. 5, p. 45 (1949). Accord: decision of April 25, 1950, 3 BAYR. VGH, Neue Folge (II), no. 6, p. 29 (1950).

30. 5 NJW 358 (1952).

31. 3 BVG 225 (1953).

32. 2 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFS FÜR DIE BRITISCHE ZONE IN STRAFSACHEN (hereafter cited as OGHSt) 269 ff. (1950).

33. BGH, reported in 9 JURISTENZEITUNG (hereafter cited as JZ) 509 (1954).

34. *Ibid.*

that "[t]he question whether an act is right or wrong, that is, whether the actor has made an error in judgment and whether or not his conduct is blameworthy—all these questions can be answered only on the basis of an unwritten law, the moral law."³⁵

In the decision of the *Bundesgerichtshof* of February 17, 1954 (see footnote 33), which dealt with the question of whether acts of unchastity are possible between affianced people, the moral law appears to be substantially linked with an objective moral order or order of moral values:

The precepts of the moral law derive their validity from themselves. Their absolute compelling nature not only rests upon a given order of moral values which simply must be accepted, but is founded on a set of moral imperatives which regulate human communal life. These precepts remain in force whether or not they are obeyed by those to whom they are addressed, or even whether or not they are generally accepted. Their content and meaning does not change simply because opinions about what is right or wrong may vary.

The Supreme Court (*Oberste Landesgericht*) of Bavaria, in an opinion of November 15, 1950, defined the concept of "legal order" in such a way that it includes the "entirety of all the norms of written and unwritten law," including the suprapositive concepts of law and right.³⁶

4. *The Authority of Social or Cultural Standards.*—In a number of decisions the issue was not so much the binding force of objective norms as such, as that of the special content given these norms by particular social or cultural groups. As regards this problem, the Federal Supreme Court held:

Commands issued by the sovereign which do not even aim at bringing about justice . . . but which flagrantly ignore the rights and the dignity of the human personality *as they have been observed by all civilized peoples*, do not create law. Any act conforming to such commands is unjust and wrong. [Italics added.]³⁷

And in another decision:

However wide the latitude we may allow to the state in deciding what shall be right and wrong, it still is not, and cannot be, unlimited: in the moral awareness of all civilized peoples there is, in spite of all the individual differences we may find on specific points of law, a certain core of law and justice which may not be violated by any statute or other act of the authorities.³⁸

A third decision of the same court refers to a "general intuitive feeling for what is just," to an "*ordre publique*" as well as to "convictions concerning what is

35. 5 NJW 359 (1952).

36. 1 ENTSCHEIDUNGEN DES BAYRISCHEN OBERSTEN LANDESGERICHTS IN STRAFSACHEN n. 41 (1950).

37. 2 BGHSt 177 (1952). See also 2 OGHSt 272 (1950).

38. Decision of Jan. 29, 1952, 2 BGHSt 237 (1952).

right among all civilized nations.”³⁹ Finally, the Criminal Senate of the same court, on February 12, 1952, points to the “historical tradition and practice of all civilized peoples” as well as to their “moral conviction of what is just.”

Except for the whole of humanity itself, which finds its expression in the concept of natural law, the most comprehensive point of practical moral reference for a higher law and justice seems to be the notion of a single Christendom. In a way the concept of Christendom proves to be superior, or at least supplementary, to that of the natural law, because here the religious ideal takes its place beside the ideal of justice. This is illustrated in a decision of the Federal Supreme Court of February 8, 1952, which referred to “generally valid moral laws held in common by the Christian civilization of the West.” Similarly, a decision of the same court of March 10, 1954, declared that “[e]very attempt at suicide — with possible exceptions in extreme cases — is condemned by the moral law, because no one may highhandedly dispose of his own life and inflict death upon himself” — a position tenable only from the standpoint of Christianity, since the Stoics, for example, considered suicide as an expression of personal freedom. Finally, in a decision already mentioned rendered by the appellate court (*Oberlandesgericht*) at Bamberg of July 27, 1949, the view is advanced that something can be forbidden simply by “divine law.”

In addition to these criteria, cultural standards prevailing within the particular society are also cited as carrying moral weight. The Federal Supreme Court based the right of a man to give his name to his wife upon the “still predominant feeling in all walks of life, among people of both sexes” that the man represents the family to the outside world, and that “in the natural division of labor within marriage the family is known and referred to by the name of the male.”⁴⁰ In an opinion of the *Oberlandesgericht* at Celle⁴¹ there is reference to the “unspoiled views of the peasant population,” and to “ancient well-founded tradition inherited from time immemorial.” It will be noted here that the subjectivity which inheres in any reference to someone’s “views” is modified by the objectivity implied in the adjective “unspoiled.” This excludes the possibility of interpreting the quoted language as calling for a purely sociological and, hence, value-free criterion. Seen in this light, there is great significance in the opinion of the Federal Supreme Court⁴² which prohibits the judge from deferring to the “changing opinions and customs of fluid social groupings,” inasmuch as it is not always certain “whether [these opinions] are based upon any truly moral conviction, or just upon a kind of moral indifference, or perhaps upon a sense of the wrongness and ‘illegality’ of a concrete situation [*Ordnungswidrigkeit des Geschehen*].” Otherwise one would end up in a “meaningless and destructive relativism which knows of no other standard or guide than the social realities and, hence, remains without any moral values or value judgments.”

39. 5 BGHZ 97 (1952).

40. 5 BGHZ 97 (1952).

41. 9 NJW 1158 (1956).

42. BGH, reported in 9 JZ 509 (1954).

5. *The Embodiment of Suprapositive Standards in Positive Law.*—As a further recognition of suprapositive principles of law and justice, the Bonn Constitution maintains that these principles operate both as positive, practical, and concrete criteria or norms of law and, as regards their compelling validity, as suprapositive standards of right and justice. Accordingly, the Federal Constitutional Court declared with respect to the principle that “all men are equal before the law,” that this principle was “so much a part of our basic legal and constitutional order” that “one would have to refer back to this suprapositive principle itself, if the principle of equality had not expressly been written into the Constitution in Article 3.”⁴³ Recognizing the “equality clause” as a part of the written or positive law, the court considers it at the same time as emanating from the idea of right and justice itself.⁴⁴ Similarly the Federal Supreme Court refers to the “strictly supralegal” character of Article 3 of the Bonn Constitution.⁴⁵

6. *Freedom of the Person as a Legal Standard.*—Being primarily related to the human person, the principle of equality before the law recognizes the person as a limit as well as a norm for all legislation. Thus the concept of substantial individual freedom is strengthened by the concept of restraint imposed on all arbitrary acts by those currently in power. Legislative caprice is limited not only by objective, universally valid standards, but also by the (subjective) human person and his moral freedom. Hence, all those principles of law have suprapositive meaning which grant a freedom so essential to the true human nature that to curtail it would be violative of man’s very moral substance. This being so, the provisions of the Bonn Constitution concerning human freedom are not only significant for positive law, but are actual expressions of the suprapositive constitutional principles of the rule of law itself. Also, attention should be called here once again to the “dignity of man,” a paramount legal significance which expresses, as it were, the worth of the human person as an end in himself. The “elementary basic rights,”⁴⁶ according to the Bavarian Constitutional Court constitute an “insurmountable barrier” to arbitrary caprice on the part of the sovereign. For they are the “immediate expression of the human personality”⁴⁷ as well as of its worth and dignity.⁴⁸

Among the inalienable claims that a man as such has upon the law and the legal order is that claim to a proper judicial procedure in cases where his life is at stake.⁴⁹ But such a procedure can be afforded him only where the courts enjoy fullest freedom in ascertaining the truth in order to do justice, that is, where the courts are not mere executors of commands originating outside the law. There must be a procedure calculated to “ascertain the truth,” and the findings must be made by judges “independent of any command from above,” and, hence, subject only to the dictates of their free and untrammelled consciences as jurists.⁵⁰

43. 1 BVG 233 (1952).

44. 4 BVG 144 ff. (1956).

45. 11 BGHZ 34 ff. (1954).

46. 3 BAYR. VGH II, no. 14, p. 167 (1950).

47. 3 BAYR. VGH II, no. 6, p. 48 (1950).

48. 2 BGHSt 177 (1952); 2 OGHSt 2, 27 (1950).

49. 1 VERWALTUNGSRECHTSSPRECHUNG 373 (1949).

50. 2 BGHSt 175 (1952).

7. *Conclusion.*—We have seen, then, at least in outline, the impressive evidence of the vital role the natural law is playing in the current decisions of the courts of the German Federal Republic. It cannot be denied, however, that even after 1945 a number of appellate courts, particularly in northern Germany, have clung to legal positivism.⁵¹ And there always remains the danger that after a certain state of order has been reached, the idea of a suprapositive law and justice may again be abandoned. For although it may be understandable and, in fact, in the interest of the cause, that the idea of natural law be called upon only when the necessity arises, the natural law must continue to remain constantly alive as an appeal to man's moral conscience. Viewed in this manner, Germany is already on the path back to legal positivism when the Federal Constitutional Court maintains that "legal certainty" is "an essential element of any sovereign legal order"⁵² which "seeks to realize true postulates of justice." For legal certainty is not part of the *idea* of a truly just law; it is an aspect of the legal order and, hence, can be meaningful only if what it insures is justice and not injustice.

ERNST VON HIPPEL

(Translated by HENI WENKART)

51. *Oberlandesgericht Kiel*, reported in 2 SJZ 323 ff. (1947); *Landgericht Hildesheim*, reported in 3 SJZ 143 (1948); *Oberlandesgericht [OLG] Hamburg*, reported in 3 SJZ 37 (1948); *OLG Hamburg*, reported in 3 VERSICHERUNGSRECHT 112 (1952); *Oberlandesgericht Düsseldorf*, reported in 3 NJW 959 (1950).

52. 3 BVerGE 237 (1954).