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Natural Law Tendencies in Contemporary German Jurisprudence;Note

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NATURAL LAW TENDENCIES IN CONTEMPORARY GERMAN JURISPRUDENCE

SINCE THE SECOND HALF of the nineteenth century most German jurists had been accustomed to consider as law every command of the state that claimed to be law. It was not until the terrible experience of the Nazi regime caused German jurists to raise again the question of the nature of law that they began once more to reflect upon the reality, the function, and the essence of natural law. In a recent article[1] Erich Fechner observes that the question of the nature of law and the so-called problem of natural law really are different designations for the same thing. He is undoubtedly right. The question of what law is, says Fechner, can be answered

> in two different ways. One says that law is an accidental order, determined by the respective historical circumstances and changing political and economic conditions. According to this answer, law is not something fixed and reliable, but a relative phenomenon that is modified by changing conditions . . . The other one maintains that law rests on eternal basic norms, founded in either reason or divine will. These norms endure from the beginning of time in uncontestable authority; they are independent of relative circumstances and above all independent of the wishes and views of men. . . . This is the issue on which the so-called natural law debate has turned for more than two thousand years. It is the crucial point of all legal thinking. The history of legal philosophy is a seesaw between these two basic views.

Fechner goes on to point out that in German legal philosophy since the Second World War one can distinguish two periods: during the first, natural law was advancing, and the term itself became fashionable and was accepted as a guiding criterion almost as a matter of course; in the second, however, natural law doctrine was forced to defend itself, while a good many jurists returned to the former habit of deriding any notion of a scientifically knowable natural law. The first period is characterized by a penetrating criticism of positive law, a criticism resulting in the affirmation of natural law. Characteristic of the second period is a no less penetrating criticism of the various traditional schools of natural law, a criticism resulting in a deepening of the various views about the function and essence of natural law.

In another recent publication[2] Erik Wolf attempts to clarify the present situation of thinking in the field of natural law, to put the various theories into systematic order and to analyze the different solutions of the problem. Wolf starts from the notion that the difference among theories lies in various conceptions of nature as well as of law, since the idea of natural law obviously depends as much on one as on another. He distinguishes nine different theses about nature and again nine different concepts of law, each of which he links with

1. *Naturrecht und Existenzphilosophie*, 41 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 305 (1955).
2. DAS PROBLEM DER NATURRECHTSLEHRE (1955).

a specific idea about natural law. Such ambiguity in the idea of natural law must necessarily lead to a multitude of theoretical conflicts and contradictory goals among those who apply the concept of natural law. Out of this great number of theoretical possibilities which Wolf demonstrates in a masterly fashion, we will select only a few which are particularly characteristic of the now prevailing views in Germany.

One may distinguish two different currents in the natural law tendencies in postwar German jurisprudence, according to the position from which the question is raised: one group approaches the problem of natural law on the basis of traditional philosophical positions, while the other group approaches it from the basis of the problems and experiences of contemporary thinking.

On the basis of traditional positions Neo-Thomism attempts to solve the problem of natural law. In Germany it has developed a theory usually called the Catholic doctrine of natural law. Its representatives in Germany today are primarily Johannes Messner of Vienna with his voluminous work on natural law,[3] Ernst von Hippel of Cologne,[4] and Günther Küchenhoff of Würzburg.[5] Another member of this group is the Viennese professor Alfred von Verdross, who formerly was strongly influenced by Hans Kelsen. In this connection one must also mention Heinrich Kipp, Arthur Wegner, Adolf Süsterhenn, and Valentin Tomberg, the latter a disciple of Ernst von Hippel. The Catholic natural law theorists see nature above all as the creation of God; and natural law as a law that results from the essence of creation and is recognizable by human reason. Natural law characteristically transcends positive law. Catholic theory conceives this transcending character of natural law as a reference from creation to the Creator: natural law is thus conceived metaphysically. As Wolf has shown, at the core of this doctrine is the problem of the basis of law, and both the faith in and the search after an absolute and timeless law. The doctrine faces the perennial antinomy between timeless natural law and the historical character of positive law.

Over against the Catholic theory of natural law there is a Protestant theology of law—in part a deliberate and accentuated opposition. It does not always use the terminology and the concept of natural law, as evidenced, for instance, in a sensational article by the President of the Federal Supreme Court, Hermann Weinkauff.[6] To some extent it even rejects the term and the concept; but the main intent and the fundamental approach are the same, irrespective of the terminological question. The most important representatives of the Protestant theology of law are Erik Wolf of Freiburg,[7] Walter Schönfeld of Tübingen,[8] and Ulrich Scheuner of Bonn.[9] In addition one should mention Hans Liermann, Ernst Wolf, and Hans Dombois.

3. (2d ed. 1950).
4. RECHTSGESETZ UND NATURGESETZ (2d ed. 1949) and EINFÜHRUNG IN DIE RECHTSTHEORIE (4th ed. 1955).
5. NATURRECHT UND CHRISTENTUM (1948).
6. *Das Naturrecht in Evangelischer Sicht,* 23 ZEITWENDE 95-102 (1951).
7. RECHTSGEDANKE UND BIBLISCHE WEISUNG (1948).
8. GRUNDLEGUNG DER RECHTSWISSENSCHAFT (1951) and ÜBER DIE GERECHTIGKEIT (1952).
9. KIRCHE UND RECHT (1950).

This Protestant theology of law has much in common with the Catholic theory of natural law. In both views the justice of positive law does not contain its own justification; both interpret transpositive law in metaphysical terms; both revolve around a central doctrine of the basis of law. Still, the Protestant theology of law does not really recognize natural law in the sense of the Catholic theory: sinful, fallen man, according to its teaching, is barred from perceiving true justice; the sinful creature can know the norms of eternal law not from created nature and its essential order, but only through the word of the Creator himself. The Catholic theory of natural law, at any rate, is also based on anthropology, while the eternal law of the Protestant doctrine, as Erik Wolf points out, is founded in Christology. This eternal law is in a sense transcendent in inverse direction from that of Catholic natural law: it transcends God in the direction of man. The Word as a revelation of law stands in the midst of the world and of a history conceived as a process of salvation. The antinomy which here is to be resolved is that between Christian and worldly existence.

Besides these two religious versions of modern German natural law thinking there are two other branches having their origin in philosophy: in the objective idealism of Hegel and the subjective idealism of Kant. Both Neo-Hegelians and Neo-Kantians raise the question of natural law—like the Neo-Thomists—from the point of view of tradition. It is significant that the label common to these three views is contained in the prefix "neo."

Neo-Hegelianism has taken little part in the discussion of natural law since the Second World War. In part this is the result of the heavy mortgage burdening Neo-Hegelianism, for some of its ideas were exploited politically by National Socialism. The most significant contribution of Neo-Hegelianism to the problem of the nature of law is the last work of Gerhard Dulckkeit of Kiel.[10] In addition there is a paper by Karl Larenz of Kiel.[11] Erich Kaufmann of Bonn has not written on the problem of natural law since he courageously professed the idea of law in his Hague lectures of 1935. The idea of natural law in modern Neo-Hegelianism is found mostly in a curious connection with the concept of history, a connection that, according to Erik Wolf, is usually alien to thinking about natural law. Erik Wolf points out that the historicity of law in the sense of its determining idea is here meant as the necessity of its development, which from the beginning has governed the history of law. In other words, historicity here does not connote change and transition but rather a perennial law of development that underlies all variety and mutation and recurs in all phenomena of law. If, in the eyes of Neo-Hegelianism, there can be a natural law, it would be transcendent with respect to positive law in the sense in which the unchangeability of historical dialectic transcends the changeability of each moment in history. The center of such a theory would be formed by a doctrine about the idea of law. Such a conception of natural law of Neo-Hegelian variety is by no means the only way of getting from Hegel to an understanding of the problem of natural law. A still missing and badly needed interpretation of Hegel that is

10. PHILOSOPHIE DER RECHTSGESCHICHTE (1950).
11. *Zur Beurteilung des Naturrechts,* 21-23 FORSCHUNGEN UND FORTSCHRITTE 49-50 (1947).

founded on the object-logic might lead to new insights into the problem of natural law.

The connection between natural law and the philosophy of history is to be found today not only among the few representatives of Neo-Hegelianism who seriously try to solve the problem of natural law. It also characterizes the thought of Heinrich Mitteis of Munich.[12] Likewise, Thomas Würtenberger of Freiburg, although having some reservations with respect to the renaissance of natural law in our time, seeks to find in history typical legal norms. Not absolute in nature, they nevertheless constitute a more basic legitimizing of legal decisions in concrete situations.

Much greater than the influence of Neo-Hegelianism, in recent years, has been the influence of Neo-Kantianism on German legal philosophy. Neo-Kantian influence appears today in three different schools of thought about natural law. First, Kant's subjective idealism has led to a theory which, following Rudolf Stammler, construes natural law along purely logical lines. This school is today represented by Jürgen von Kempski.[13] Natural law logically construed ultimately coincides, as Erik Wolf has pointed out, with the correct method of legal thinking, the logic of jurisprudence, since it is the quintessence of what is "correctly" thought or known. It transcends positive law in the sense of transcending the historical aspects, ethical principles, psychological compulsions, and sociological conditions which may become the respective content of law; in other words, it is pure form transcending substance, form for which the content is irrelevant. The central part of such a logically construed natural law is a theory of the fundamental concepts of law; the crucial question is that of what law is logically possible and hence formally correct; the antinomy to be solved is one between actually observed substance and logically correct form. This antinomy originates in the presupposition of a world of being as conflicting with a world of oughtness.

With this branch of Neo-Kantianism one may possibly—although only to a certain extent—group the attempts of Carl August Emge[14] to approach natural law. Emge is influenced not only by Kant but doubtless also by Nietzsche and the formalistic and axiomatic thinking of Hilbert. For Emge the ultimate basis of obligation of empirical law is the pure "idea" in which reality and normativity coincide, this idea being conceived as the highest a priori normative principle, the zero point in a system of logical categories which condition all facts. This a priori idea and any other a priori criteria derived from it by way of logical inference are logically necessary in the sense that they cannot be anything different from what they are. Emge's path leads through a series of successive concretizations in the realm of the real as well as in that of logical correctness from that zero point to the concrete situation in which positive law exists. He works with a transcendence pointing from the categorical into the empirical sphere. Emge, too, construes the transpositive origin of positive law in a logical way; and the central part of his legal theory is also a doctrine of the fundamental concepts of law.

12. Über das Naturrecht (1948).
13. Naturrecht und Völkerrecht (1948); *Das Problem des Rechts und die Ethik*, 9 Zeitschrift für Philosophische Forschung 358-365 (1955).
14. Einführung in die Rechtsphilosophie (1955).

A second branch of Neo-Kantianism has an utterly different idea, for it construes natural law ethically. On the basis of Kant's philosophy, Rudolf von Laun of Hamburg in his famous address on *Ethics and Law* in 1924 had already predicted a renaissance of natural law theory. The idea which Laun first developed in this address—that the obligation of law could ultimately root only in a norm which the obligated person had in full substance given to himself—is later on consistently developed in Laun's subsequent publications.[15] What he considers natural law is always the autonomously posited and autonomously known law of individual consciousness which alone has obligatory force. Just as many Neo-Hegelians have exaggerated the objectivity of Hegel's idealism, so Laun, who among the Neo-Kantians is the critic closest to Kant himself, pushes the subjectivity of Kant's idealism to its ultimate possibilities. One may well doubt that in Laun's doctrine of natural law there is still a genuine transcendence, since positive law too becomes obligatory, according to Laun, only through the individual consciousness of duty. At most, one may see here the consciousness of duty transcending the actual performance of duty.

Laun's principles of legal theory had already been fully developed before the Second World War. After the war, Helmut Coing of Frankfort[16] sought to re-establish natural law in the sense of Kantian idealism. He leaned on the philosophy of values as developed by Max Scheler and Nicolai Hartmann. Starting with the value consciousness of man, Coing tries to discover a system of supreme ethical values of law and substantive principles of law which would constitute the criteria and legitimation of positive law. Coing's natural law transcends positive law in the sense that the realm of consciousness and conscience transcends the realm of external conduct; but unlike Laun, he does not deny that the positive law outside this realm of consciousness is law; nor does he conceive it as mere projection or as an appeal to the inner sphere.

Despite the many differences between Laun's and Coing's theories, they both have in common not only the basis of Kantian philosophy, but also the conception of natural law as an ethically obligatory order. The centerpiece of this ethically construed natural law is a theory of the fundamental principles of law; the crucial question is which norms are substantively right. The antinomy to be solved is one between the practical concern that exploits the protection of legality and the ethos that seeks the path of morality.

A third Neo-Kantian school of thought is to be found in Gustav Radbruch's last works.[17] Radbruch's starting point is the double thesis that legal norms on the one hand are formed out of the stuff of social facts—which stuff thus enters into the idea of law—and on the other hand have obligatory force only because of the value inherent in these norms—which values legitimize and criticize all positive law. Transpositive law is the sum total of those principles of law which, as the expression of the idea of law, are inherent in and stronger than any positive

15. *E.g.*, REDEN UND AUFSÄTZE ZUM VÖLKERRECHT UND STAATSRECHT (1947).
16. DIE OBERSTEN GRUNDSÄTZE DES RECHTS (1947) and GRUNDZÜGE DER RECHTSPHILOSOPHIE (1950).
17. *Gesetzliches Unrecht und Übergesetzliches Recht*, 1 SÜDDEUTSCHE JURISTEN ZEITUNG 105-08 (1946); *Gesetz und Recht*, 12 STUTTGARTER RUNDSCHAU 5-10 (1947); *Die Natur der Sache als Juristische Denkform*, FESTSCHRIFF FÜR RUDOLF LAUN 157-76 (1948); RECHTSPHILOSOPHIE (4th ed. 1951).

rule. These principles of law, in Radbruch's view, are not above but within positive law. Any positive rule which does not express the idea of law, i.e., any act that contradicts transpositive law, does not have legal authority for Radbruch. Radbruch is envisaging a transpositive idea of law that transcends social data, factual necessities and purposes. He construes natural law, if we are to give this name to his transpositive law, in ontological terms. The centerpiece of his theory is, therefore, a doctrine of the fundamental structure of law. His chief question is the obligatory force of law. To answer this question, he must of course clarify the previous question of the substance of the idea of law. That substance, for Radbruch, is simply justice, seen in three dimensions as formal justice, the principle of the predictability or calculability of law, and suitability to ideal ends —dimensions among which there is continuous tension. A conflict between them is ultimately a conflict of justice with itself, or rather the inevitable debate of justice with itself which is essential to law. Without this antinomy there can be no law; its solution is the perennial task of law. The principle of predictability (*Rechtssicherheit*) argues in favor of a legal act which in fact may violate formal justice even though it may endeavor to realize that justice. But where there is not even this endeavor, or where the act violates justice in a degree unbearable to the individual conscience, positive law has to give way before transpositive law. The decision about this last question, as we gather from Radbruch, must be made in the realm of dialectic consciousness and individual conscience.

This last idea is rejected by Hans Welzel of Bonn.[18] Hans Welzel also construes natural law ontologically—in a certain way. His philosophical premises are quite different from those of Radbruch. That is why he does not envisage a dialectic tension between the ontological and the ethical conception of natural law, a tension which Radbruch sees not only in terms of a necessary difference (that much Welzel acknowledges), but also in terms of a necessary and inescapable relation. Welzel rejects the value content of traditional theories of natural law and finally arrives at the assumption of a certain materio-logical structure in the object which he considers the guiding criteria of legal rules limiting the arbitrariness of legislators and embodying eternal truths.

Radbruch and Erik Wolf—somewhat alike in their thinking—already went beyond the starting point of tradition and raised the question of natural law from the point of view of the time, that is from the existence of man, his innermost core and his experience of himself. This latter approach wholly characterizes the work of Erich Fechner of Tübingen,[19] as well as that of Werner Maihofer of Würzburg.[20]

Both approach the problem of natural law from the existentialism of Jaspers and Heidegger; both also have root in the realm of religion; both see the tremendous tension between the static doctrines of classical natural law and the dynamism of time; both are still groping, searching, and trail-blazing rather than quietly observing things from a fixed point of view. Fechner opposes a natural law with a developing substance to a natural law with fixed substance and a

18. NATURRECHT UND MATERIALE GERECHTIGKEIT (1951).
19. DIE SOZIOLOGISCHE GRENZE DER GRUNDRECHTE (1954) and NATURRECHT UND EXISTENZPHILOSOPHIE (1955).
20. RECHT UND SEIN (1954) and VOM SINN MENSCHLICHER ORDNUNG (1956).

natural law with changeable substance. Man participates in this developing natural law through acts of distinction and decision; at the risk of his existence he tries out the tenability of something new. The risky decision on values which again and again confronts man in this developing natural law is, according to Fechner, part of man's essence. The existential necessity of choice springs precisely from the regularities and conditions of the social sphere. Maihofer, one of Erik Wolf's disciples, distinguishes between existential (subjective) and institutional (objective) natural law; he tries to construe natural law as a right of human existence. Thus interpreted, natural law expresses the ego-existence (*Selbstsein*) of an individual in his uniqueness as well as the qua-existence (*Alssein*) of a person in society, inasmuch as he participates in typological situations *qua* father, *qua* husband, *qua* doctor, *qua* judge, *qua* citizen, *qua* neighbor, etc.

This brief survey could cover only the most important currents of natural law theory in contemporary Germany and only the most important theoreticians and their books. But however short, the survey serves to show that the problem of natural law is today the center of the theoretical discussion of law in Germany. If one adds that the highest German courts—the Federal Constitutional Court and the Federal Supreme Court—have adopted natural law ideas in some of their basic decisions, one perceives that Rudolf Laun's prophecy of 1924—that natural law would be reborn in Germany—is about to be fulfilled.

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(TRANSLATED BY GERHART NIEMEYER)