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# Law and Conscience;Note

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## LAW AND CONSCIENCE

The juxtaposition of law and conscience gives rise to two distinct problems: the protection of conscience by the existing law and the creation of new law through conscience. In both instances we mean by the term "law" the law and the legal order as recognized by a politically organized society, or perhaps the "officially" enforced and enforceable norms for human relations. This juxtaposition, however, also brings to the fore the connection between conscience and a suprahuman law: that is, the law of nature through which conscience has been placed in man, indeed the law of God Who infused conscience in human nature. In the present study the legal aspects of the first two problems arising from the juxtaposition will be discussed; nonetheless, the relationship of conscience to legal facts cannot be totally isolated from the question concerning the origin of conscience. At the very least we must consider whether and to what extent the origin influences the concept of conscience when it is examined in the context of law.

This particular examination leads to the very heart of the problem: what is "conscience" as the term is used in domestic and international rules for behavior? The following are instances of such use:

Paragraph IX of the Introduction to the Agreement of October 18, 1907, concerning Land War Laws and Customs (i.e., the land war regulations of the Hague Constitutional Treaty) states that in the absence of specific regulation, and for the interpretation of Articles I and II of the Land War Regulations, the following are to be applied: *Les lois de l'humanité et des exigences de la conscience publique* (the laws of humanity and the demands of public conscience).

In Article IX of the Convention for the Protection of Human Rights and Constitutional Liberties (November 4, 1950), published (August 7, 1952) as Federal Law in the Federal Republic of Germany, it is provided:

Everyone has a right to freedom of thought, conscience, and religion. This right comprises the freedom of the individual to change his religion or his Weltanschauung, as well as the freedom to exercise his religion or Weltanschauung, singly or together with others, publicly or privately, by means of worship, instruction, and through the exercise and observation of religious usages. In a democratic society freedom of religion and of religious worship may not be limited unless by law, and then only in the interest of public safety, public order, health, morals, or for the protection of the rights and freedom of others.<sup>1</sup>

This idea is reiterated by Article 4 of the Bonner Grundgesetz Constitutional Law for the Federal Republic of Germany of May 23, 1949:

Freedom of religion and of conscience, and freedom to profess religious and philosophical convictions are inviolable. Unmolested exercise of one's religion

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1. 2 BUNDESGESETZBLATT 685, 953.

is guaranteed. No one may be compelled to bear arms in time of war contrary to his conscience. Details are to be regulated by Federal Law.<sup>2</sup>

The various State constitutions of Western Germany contain similar provisions. For example, Article 107, paragraph 1 of the Bavarian Constitution of December 2, 1946, provides that "freedom of belief and of conscience is guaranteed."

These few examples indicate that two concepts of conscience must be distinguished. The constitutional regulations of West Germany provide for the *protection* of conscience. The Hague Land War Regulations stress the fact that humanity and the demands of conscience are the foundations of law.

## I

The protection of the freedom of conscience through law and public policy as expressed in the above-mentioned laws, especially in Article 4, Section 1 of the *Grundgesetz*,<sup>3</sup> and even more so in the highly detailed provisions of Article 9 of the Convention for the Protection of Human Rights and of Basic Liberties (*Konvention zum Schutze der Menschenrechte und der Grundfreiheiten*) of November 4, 1950, should make plain the historical connections between freedom of conscience, freedom of belief, and freedom of religion. But for modern human relationships the historical connection is not enough. The freedom of religion and religious worship is simply taken for granted in that it serves the preservation of human dignity. Less obvious, however, is the application of this freedom to minors or children, especially in regard to parental decisions concerning the religious or secular education of their children.<sup>4</sup> Such decisions, which are motivated by considerations of conscience, have been widely discussed.<sup>5</sup>

The protection of conscience is also significant in numerous human relationships where persons in authority demand acts that are contrary to individual conscience and conviction. A nurse, for instance, for reasons of conscience refuses to give a dying patient certain medication prescribed by the physician in order to shorten his sufferings and his life. This nurse must be protected against being dismissed for insubordination, as must the hospital pharmacist who for the same reason refuses to sell contraceptives. The owner of a movie house who refuses to fulfill a contract to show, as part of a series, a film which violates his conscience, likewise must be protected. In all such cases the state courts will have to provide protection for the individual, whether by denying the right of the

2. This provision was also incorporated as paragraph 25 of the Military Service Law of June 21, 1956.

3. Hereafter cited as *GG*.

4. Most of these problems have arisen in connection with "parochial" or "state" schools.

5. Concerning the several problems arising from the German Concordat of 1933 and especially from the Catholic School issue, see the decision of the *Bundesverfassungsgericht* (Federal Constitutional Court) of March 26, 1957. 6 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* 310 (this is subsequently cited as *BVERFG*). For survey of the criticisms of this decision together with some indications as to the possible future development of this question, see Freiherr von der Heydte, *Die Katholische Kirche in Deutschland und das Konkordatsurteil des Bundesverfassungsgerichts*, *ZEITSCHRIFT FÜR POLITIK* 203 (1957).

employer to dismiss, or by interpreting certain contracts in a manner which accords with constitutional rights. Modern legal developments tend to recognize constitutional rights of the individual not only as against the state but also as against other individuals or citizens.<sup>6</sup>

The concept of conscience as it is used in these provisions is not meant to be an objective, but obviously a subjective, standard. Protection, therefore, is accorded the freedom of man's individual, subjective conscience, even when his conscience, viewed from the higher point of view of theological or ethical teachings, is based on erroneous judgment. Man possesses an "internal" immediate relationship to the world of values. Inside himself, within his own "self," man may intuitively attain to the world of values and ideas, and no power may gainsay him. This individual faculty or power, given to man by nature, constitutes the natural boundaries of the state and, at the same time, proclaims man's right to freedom of conscience. This freedom yields a certain minimum guarantee for the unhampered exercise of one's conscience — a sort of "conscience-minimum." It safeguards legally man's freedom to raise himself in his innermost mind, his "self," to the world of values, and to think, feel, will and judge in accordance with his immediate personal relationship to values. Man is even free to consult with his conscience *about* conscience and to imagine the meaning and origin of conscience in accordance with his personal thinking and feeling.

The advantage inherent in this guaranteed "conscience-minimum" is easily overlooked, especially by those people who insist that man carries in himself a self-evident realization of a tribunal from which there is no appeal. This tribunal spontaneously announces itself in his soul through an inner voice which warns him against evil and calls upon him to do good, and either precedes, accompanies, or follows an evil deed with pangs of conscience. The fact of this "voice of conscience" cannot be disputed even among those who dispute the origin of conscience<sup>7</sup> (God, *synderesis*,<sup>8</sup> value systems).<sup>9</sup> And this fact furnishes

6. See G. KÜCHENHOFF and E. KÜCHENHOFF, *ALLGEMEINE STAATSLEHRE* 36-37 (3rd ed.).  
 7. See ROMANO GUARDINI, *DAS GUTE, DAS GEWISSEN UND DIE SAMMLUNG* (Mainz, 1929); VICTOR E. FRANKL, *DER UNBEWUSSTE GOTT* (2nd ed., 1949). Frankl's critical "existential analysis" is directed against Freud, by whom man is comprehended as an automaton and human existence as "driven-ness" or "impulse." (p. 13) Frankl develops the unconscious spiritual element in "depth psychology." (p. 33ff.) He discovers man's conscience in the realm of the irrational and the intuitive, unfathomable in its decrees and anticipating reality in the concept of what ought to be done. (pp. 39 ff.) Compare, on the other hand, IMMANUEL KANT, *METAPHYSIK DER SITTEN* (ed. Vorländer) Hauptstück 2, Abschnitt 1, paragraph 13, where at first, to be sure (p. 289), conscience is designated as "the consciousness of an inner court," but later as "an original intellectual and moral (because it carries the idea of duty) inclination." (p. 290) Its unintentional effects are described by Kant as follows:

Every man has a conscience and finds himself observed, threatened, and generally disciplined (esteem linked to fear) by an inner judge. This power in man, which guards the laws, is not something that he *does* for himself voluntarily, but is part of his essence and being. It follows him like his shadow when he seeks to flee it.

So far as the *origin* of this conscience is concerned, Kant considers God only a necessity of practical reason, because in this court called man's conscience "the defendant and the judge cannot be imagined as one and the same person." Therefore, he says, "conscience must be thought of as a subjective principle of man's responsibility for his actions before God." (p. 290 ff.)

8. See Oskar Renz, *Die Synderesis nach dem hl. Thomas von Aquin*, 10 BEITRÄGE ZUR GESCHICHTE DER PHILOSOPHIE DES MITTELALTERS 1-240 (ed. Bäumer, 1911). For ad-

a basis for the concept of conscience in the law. This concept of a "conscience-minimum" should also disprove all those who denounce conscience as a weakling's imagination (Nietzsche),<sup>10</sup> or perhaps as a mere "recall" to original guilt essential to the essence of man (Heidegger).<sup>11</sup>

Conscience is neither an artificially induced or imaginary phenomenon, nor an obscure self-reference. Rather, it is a real psychic phenomenon which becomes manifest in man's relation to God, to absolute values, and to his fellow man, and thus fulfills the ultimate meaning of human existence.

The concept of "conscience-minimum" also plays a decisive role in the administration of criminal law in West Germany.<sup>12</sup> The *Bundesgerichtshof* [Federal Supreme Court for Civil and Criminal Laws] for West Germany in its decision of March 18, 1952,<sup>13</sup> used the following as the criterion for determining the question of criminal responsibility in the case of mistake of law: Would knowledge of the prohibitory norm have been possible if the person had made a proper effort of conscience (*Gewissensanspannung*)? The Court stressed the fact that

the realization of doing wrong may in certain circumstances be lacking even in a person of sound mind because he either does not know or else misjudges the prohibitory standard. In such case of error, a person is not in a position to decide against wrongdoing. But not every error as to the law excludes criminal guilt. Up to a certain degree, at least, lack of knowledge is rectifiable.

The Court also pointed out that

in everything he is about to do, man has a duty of becoming aware of the fact that his action should be in harmony with the legal precept. It is his

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ditional bibliographical information, see *id.* at 238-40. Compare JOHANNES MICHAEL HOLLENBACH, *SEIN UND GEWISSEN* 330 ff. (1954). For the linguistic root of the concept (derived from *συντηρεῖν*: to preserve oneself — further conceptualized into preservation of the remainder of man's originally good nature, left over after the Fall) see Jahnel, *Woher stammt der Ausdruck Synderesis bei den Scholastikern?*, *THEOLOGISCHE QUARTALSCHRIFT* 241 ff.; 250 f. (1870).

9. See, for instance, NICOLAI HARTMANN, *ETHIK* 134 ff. (3rd ed., Berlin, 1949). For the problem of the conflict of conscience, including an excellent presentation and grouping of the various dogmas, consult FRITZ PUSTET, *GEWISSENSKONFLIKT UND ENTSCHEIDUNG* (Regensburg, 1955). Pustet himself, by achieving an "ethics of critical realism," rises beyond the "material value ethics" of Max Scheler and Nicolai Hartmann, as well as beyond the theories of Hans Driesch and Aloys Wenzel. In this system a highest value is established in the final goal toward which all existence is striving. Hence conscience is derived from its ultimate origin: God. For details see PUSTET, *op. cit.* at 65 ff., 76 ff., 91 ff., 114 ff., 147 ff., and especially the final chapter.

10. See especially NIETZSCHE, 2 *ZUR GENEALOGIE DER MORAL* 16 and *id.* at 20-1. For an analysis of the "conscience in Nietzsche's philosophy" see the Zürich dissertation of that title by Stefan Sonns, which brings valuable insights into the concept of conscience and its development in Nietzsche.

11. See especially SEIN UND ZEIT section 2, chapter 2 (6th ed., Tübingen, 1949). For a critique of Heidegger, see HOLLENBACH, *op. cit. supra* note 8, at 317.

12. For Austrian law, see the author's *Der Normenirrtum*, *FESTSCHRIFT FÜR THEODOR RITTLER* 195 ff. (Innsbruck).

13. 2 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN* 194, 201. (This is hereafter cited as BGHST.)

duty to overcome doubts by thorough reflection or inquiry. For this he must resort to an effort of conscience (*Anspannung des Gewissens*), and the degree to which he must do so is to be determined by the particular circumstances of the case as well as by the social and educational status of the individual. If in spite of the effort of conscience which may properly be expected of him he was unable to realize the unlawfulness of his action, his error may be deemed insurmountable and his conduct unavoidable. This being so, the question of his guilt cannot be properly raised. If, on the other hand, he would have been able to recognize the unlawfulness of his action by a proper effort of conscience on his part, his error or ignorance does not exclude his guilt. But his guilt is lessened to the degree to which he did make the effort of conscience.

In the past the Court has consistently relied upon these principles.<sup>14</sup> But in a more recent decision<sup>15</sup> it abandoned its former doctrine of the "indivisibility" of man's awareness of committing a wrongful act.<sup>16</sup> In doing so the Court deliberately rejected the Anglo-American legal role that a person is considered criminally responsible if "there is an intent to commit a crime," that is, that the intent need not necessarily be directed towards the particular object that has actually been "injured."<sup>17</sup> The Court points out that neither the general awareness of doing *something* wrong, nor the particular awareness of wrongfulness, if related to a nonanticipated factual situation, justifies us in finding a person guilty for having brought about the nonanticipated situation. A general relationship to a legally protected interest — in other words, a general knowledge or knowability on the part of a person that a violation of this particular interest is prohibited by law — is not sufficient to find him guilty. These principles in the case of error or ignorance as to certain legal prohibitions, principles which are closely connected with the problem of conscience, are given much attention in the decisions of the *Bundesgerichtshof* as well as in labor law and civil law.<sup>18</sup>

The importance of man's personal conscience finds its fullest expression in the application of legal norms. The court, to be sure, retains its dominant role in declaring the (objective) law. But the individual's personal decision, based on the conscientious choice, may conflict with the opinion of the court. In such a case the individual prevails over the court, and his conduct is "guiltless." In disagreeing with the law as propounded by the court, the individual puts himself outside the generally accepted legal or moral principles of his time, or perhaps outside those precepts which are founded in the natural law or in the Decalogue. Even in the domain of the criminal law the State, when confronted with a genuine question of conscience, may no longer simply or blindly enforce "the legal order" or generally agreed upon legal norms. It may not blindly de-

14. Compare 3 BGHSr 105 ff.; 400 ff. *Id.* at 5 BGHSr 284 ff. *Id.* at 7 BGHSr 17 ff.; 261 ff. *Id.* at 8 BGHSr 324 ff.; 358 ff.

15. 10 BGHSr 35 ff.

16. 3 BGHSr 342 ff.

17. 10 BGHSr 39.

18. Alfred Hueck in his notes to the basic decisions of the *Bundesarbeitsgericht* (Federal Labor Court) of September 15, 1954, in *ARBEITSRECHTLICHE PRAXIS* 1954, no. 1, 2, dealing with paragraph 66 of the *Betriebsverfassungsgesetzes*. Compare also BAGE, 3 *AMTLICHE SAMMLUNG, DER ENTSCHEIDUNGEN DES BUNDEARBEITSGERICHTS* 287.

cide against an individual who, after a careful "conscientious effort," holds an opinion which is contrary to the "legal order."

We must not overlook the fact, however, that any true conscience is related to or based upon some objective values. With the exception of the situation just discussed (the case of a subjectively general error rather than a merely subjectively individual error),<sup>19</sup> this relation becomes evident particularly whenever conscience demands proclamation or overt action — where freedom of conscience, for example, manifests itself in the freedom to express one's opinion, that is, freedom of speech. This freedom of speech is restricted in the constitution *GG* of the German Federal Republic, and these restrictions appear to be natural limitations to freedom to exercise one's conscience as well.

According to Article 18 *GG*, the freedom to express one's opinion may not be misused to overthrow or endanger the free democratic structure of the German state. Constitutional law, in other words, does not grant the "scorners of freedom" the freedom to activate their scorn.

The right to express one's opinion freely, according to Article 5, paragraph 2 *GG*, is further restricted by general laws, such as bylaws for the protection of minors, as well as by everyone's right to personal integrity and honor. Such restrictions may not forbid an expression of opinion "solely on account of its ideological aim or purpose and the resultant ideological effects." For to do this would be violative of the fundamental right to free expression as guaranteed by Article 19, paragraph 2 *GG*. If a person, in expressing his opinion, makes a conscientious decision based on his conviction or on his religious or political belief, then he may not be placed in jeopardy as a citizen<sup>20</sup> or suffer any discrimination within the framework of private employment or of a civil service relationship. The prohibition of any kind of discrimination on account of belief, religious conviction, or political view, not only flows from the general assumption of human equality expressed in Article 3 *GG*, but it is also essentially related to the freedom of conscience guaranteed by the law. All men have an equal right to exercise and proclaim the dictates of their conscience and to do so without outside interference. This right grows out of the humanity of all men, out of the fact that we all are human beings. Part of this "being a human being" is man's relationship to the world of values, another part his power of articulate expression. Out of all this emerges the right to speak out from the abundance of the heart what conscience urges us to express.

Like all other expression in general, the *expression* of conscience as free expression of opinion is subject to the limitations of those laws which protect certain interests other than the interest in free expression and free speech, including the free utterances of the dictates of conscience. It is the state which must draw the "correct boundaries,"<sup>21</sup> that is, establish a balance of "conflicting interests." This drawing of boundaries was effectuated in Article 18 *GG* which provides that in case of conflict of interests, the interest of free expression must yield. In addition, Article 21, paragraph 2 *GG*, which supplements Article 5 *GG*, was upheld by the *Bundesverfassungsgericht* (Federal Constitutional Court) in

19. See the author's work cited *supra* note 12.

20. See article 3, paragraph 3; article 33, paragraph 3, sentence 3 of the *GG*.

21. 1 *ENTSCHEIDUNGEN DES BUNDESARBEITSGERICHTS* 194.

its decision of August 17, 1956, outlawing the Communist Party of Germany (KPD):<sup>22</sup>

If, on the one hand, the *Grundgesetz* recognizes the traditional democratic freedoms which, among other matters, insist on the principle of tolerance for all political parties, it does not go so far, on the other hand, as to renounce, in a spirit of indifferentism, the enactment of and protection for its own value system. It chooses from the pluralistic goals and values which are incorporated in the various political parties certain basic principles of governmental structure. These, when they have once been declared valid by democratic procedures, are recognized as absolute values and must therefore be resolutely defended against all attack. Inasmuch as certain restrictions of the political freedom of action claimed by the opponents of democracy are considered necessary for defense of democratic values, such restrictions are considered acceptable.<sup>23</sup>

Even according to Article 5 *GG*, the right to free expression of opinion is subordinated to those legally recognized and secured interests which are contained in "general" laws, that is, in those laws which, although they are not (and indeed may not be) directed expressly against the exercise of the right of free speech, may (in accordance with Article 5, paragraph 2 *GG*), restrict the right to free speech and utterance in the interest of some other legally recognized and secured individual or social interest. Included in such general laws are provisions arising under the police power of the various states. This was affirmed by the *Bundesgerichtshof* in its decision of February 1, 1954,<sup>24</sup> involving an order of the Hessian Minister of the Interior prohibiting all solicitation to attend the Communist-inspired "World Peace Festival for Youth and Students" (August 5-19, 1951) in East Berlin. The *Bundesarbeitsgericht* (Federal Labor Court), in a decision of December 3, 1954,<sup>25</sup> involving the dismissal of a shop committeeman engaged in communistic agitation during working hours, stated that among the "general laws" limiting the freedom of expression are also fundamental rules governing the broader human relationships and the basic regulations of labor relations, including the duty to preserve industrial peace, as well as the provisions against political agitation on the part of shop committeemen.<sup>26</sup>

## II

So far only the powers and limitations of the individual's personal conscience in relation to public law have been considered. Here conscience has been regarded as man's *inner* or intuitive knowledge of good and evil. But the term conscience is also used in the sense of *conscientia*, that is, of a *collective* knowledge of good and evil, referring, as it were, to the concepts of right and wrong as conceived by a "collective legal consciousness." This other notion of conscience is referred to in the term "conscience publique" of Article IX of the

22. 5 BVERFG 137 ff.

23. *Id.* at 138-139.

24. 12 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN 197 ff.

25. Quoted in BAGE, *op. cit.* *supra* note 18, at 186 ff.

26. Paragraph 51 of the *Betriebsverfassungsgesetz*.



Introduction to the Hague Land War Regulations, or in such terms as "political conscience," "popular conscience," "European conscience," and "world conscience."<sup>27</sup>

Conscience in this second sense must be based on certain "value judgments" which are "so commonly accepted that each person in his particular environment should be aware of the fact that they are shared by a large majority of men."<sup>28</sup> Since only the individual man, but never the collective whole, is capable of rational thought, this kind of "corporative conscience" must not be identified with a collective knowledge, determined by a "dominant majority." One may assume, therefore, a common conscience and determine its specific contents only if one can establish the *greatest possible community of content of conscience*, hereafter referred to as "conscience-maximum."

First to be considered here are certain *values*<sup>29</sup> which, so to speak, are related to or based upon conscientious motivation and are recognized as having a real efficacy. These values have asserted themselves in human society during a given era and have been acknowledged as a part of generally agreed-upon cultural goals as well as cultural achievements. Such values in our Western or Christian culture are the Good, the Beautiful, the True, and the Holy.

To these may be added the principles of natural law; the Decalogue; such principles as *neminem laedere*, *neminem violare*; *sum cuique, pacta sunt servanda*; the principle of contradiction, *non licit venire contra factum proprium*; submission to proper authority; the right to human existence and human freedom, a right which is derived from the fact of human existence in the context of universal existence; man's right to formulate his specific human existence as a conscious and voluntary act; the right to continued existence; and the right to co-existence and social existence.<sup>30</sup> These rights and duties are founded in man's nature, in the being and the "being together" of human beings. They *originate* in the irreversible individuality of man, but *tend* to objective moral or legal orders and thus tend to overcome the specifically Western or occidental dualism between objective and subjective values or norms. Together with the individual consequences deriving from the nature of law, from legal relationships,

27. See RUDOLF VON LAUN, *DER WANDEL DER IDEEN STAAT UND VOLK ALS ÄUSSERUNG DES WELTGEWISSENS. EINE VÖLKER- UND STAATSRECHTLICHE UNTERSUCHUNG AUF PHILOSOPHISCHER GRUNDLAGE* 395; 427 ff.; 436 (Barcelona, 1933). Cf. Laun's commentary on the HAGUE LAND WAR REGULATIONS (5th ed., Hannover, 1947), especially section 3, pp. 24 ff.; Laun, *Zum Problem der Behandlung der nationalen Frage durch internationale Organisation*, in *RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION (Festschrift für Hans Wehberg's seventieth birthday)*, ed. by Walter Schätzel und Hans-Jürgen Schlochauer (Frankfurt, 1956), especially 235-38 and 258. See also the profound and thorough examination of Laun's work by Arthur Wegner, who agrees with Laun on all essential points, in *ZEITSCHRIFT FÜR INTERNATIONALES RECHT UND DIPLOMATIE* 254-63 (1957).

28. Laun, *op. cit. supra* note 27 (*Festschrift . . .*), at 236.

29. In addition to the works cited in note 9 *supra*, see also HEINRICH RICKERT, *ALLOEIMNE GRUNDLEGUNG DER PHILOSOPHIE* 112 ff.; 121 ff.; 129 ff.; 171 ff.; 203 ff. 254 ff. (Tübingen, 1921); and the author's essay, *Die Stellung des Rechts im Weltganzen*, *ZEITSCHRIFT FÜR DAS GESAMTE ARZTRECHT* 197 ff. (Karlsruhe, 1952); and his *STAATSRECHT, ALLOEIMNER TEIL* 8 (1951).

30. Compare G. KÜCHENHOFF and E. KÜCHENHOFF, *ALLOEIMNE STAATSLEHRE* 40 ff. (3rd ed., 1957); also M. E. Schmitt, *Recht und Vernunft*, 8 *POLITEIA* 120 (Freiburg-Schweiz, 1955).

from the "*Natur der Sache*" (Radbruch), these rights and duties contain certain "directives," and often the specific content, for the concrete definition of a legal conscience as it operates in the actuality of social relationships.

Viewed in this manner, natural law is both an ontological law and a standard determining moral existence law and conscience law. This being so, it is capable not only of formulating universally valid criteria of the conscientious acts omitted by individuals, groups, nations—in fact, by humanity as a whole—but also of influencing the structure of international and public laws.

Finally, the *commandment to love* has been given to man, reaching all the way from the biological laws of sex, through conjugal, parental, and filial love, to that love of man which finds the fulfillment of all existence in the *caritas socialis*.<sup>31</sup> The meaning of human existence, which reveals itself in the *love of the other*, finds expression in the law and in interhuman relations. This love of the other which ultimately fosters a "sense for law and justice," manifests itself between individuals in an attitude of decency and considerateness, and between the state and the individual in a spirit of good will on the part of the state towards the individual and his aspirations (*Law of Love*).<sup>32</sup> This demand of love and good will, which is revealed in the divine command to love God and one's neighbor, cannot forever be ignored by man, at least not as a demand of conscience. To conform to this demand and to translate it into action would be the noblest task of law and legal policy. In this fashion would be built up a Law of Love,<sup>33</sup> in the sense of a legal system founded on love of neighbor.

### III

Reference to a determination of law on the basis of human good will, no less than the visible manifestations of human conscience, in the final analysis compels us to reveal the ultimate source of conscience itself.

31. See POPE PIUS XI, ENZYKLIKA QUADRAGESIMO ANNO (May 15, 1931) final section; and, forty years earlier (1891), LEO XIII, ENZYKLIKA RERUM NOVARUM, no. 19. For a discussion of particulars in the development from "the justice of the common good," to "social justice," see Utz, in the German-Latin edition (1953) of ST. THOMAS, 18 SUMMA THEOLOGICA 564 ff. (Law and Justice). According to No. 19 of RERUM NOVARUM, in the case of "extreme necessity" there exists a legal obligation to love. This the author has tried to point out in his work cited in note 32 *infra* at 75 ff. The problem of the *caritas socialis* as well as that of social justice as the application of the highest ethical communal good, see also the recent work of Utz, *Socialethik*, 10 POLITEIA 230 ff. (Freiburg-Schweiz, 1958).

32. In connection with this concept see the author's NATURRECHT UND CHRISTENTUM 69 ff. (Düsseldorf, 1951); G. KÜCHENHOFF and E. KÜCHENHOFF, ALLGEMEINE STAATSLEHRE 40-41; 60-61 (3rd ed., Stuttgart, 1957). The following authors are in agreement with Küchenhoff: JOSEF FUNK, PRIMAT DES NATURRECHTS 63 ff.; 334 (Wien, 1952); ALBERT AUER, DER MENSCH HAT RECHT. NATURRECHT AUF DEM HINTERGRUND DES HEUTE 121 f. (Verlag Styria, Graz, 1956); Erik Wolf, *Rechts des Nächsten. Ein rechtstheologischer Entwurf*, 15 PHILOSOPHISCHEN ABHANDLUNGEN 18 ff.; 24 ff.; 28 ff. (1958).

33. From a purely scientific point of view it seems to be a matter of international concern to examine the command of love in its various religious and philosophical implications, and to study its effect on law. It is possible, after all, that the law of the state is colored, in fact planned and formed, not only and everywhere by power (whatever the current ruling majority group may be) but often enough by well-wishing and humane considerations.

In order to answer the question concerning the origin of conscience, we must make use of the old scholastic concepts of *synderesis* and *syneidesis* as they have been coined and used by St. Jerome and later developed by St. Albert the Great and St. Thomas Aquinas. The concept of *synderesis* comprises man's entire spiritual and ethical "habitus" which enables him to recognize and will the good, insofar as he has retained such capacity after the Fall. Hence, *synderesis* is "the spirit of man as it inclines to good and abhors evil." Let us cite the decisive words of Albert the Great:

Cum enim homo per peccatum corruptus fuit, in naturalibus non adeo fuit corruptus, quod nihil maneret integrum, ergo in singulis viribus manet aliquid rectum, quod in iudicando et appetendo concordat rectitudini primae, in qua creatus est homo . . . . cum ergo hoc sit officium synderesis in homine, *synderesis est rectitudo manens in singulis viribus concordans rectitudini primae.*<sup>34</sup>

Hollenbach illustrates this inherent "moral potency" which, together with the "habitus" of practical moral principles, constitutes *synderesis*.

It [the "potency"] must be a capacity which underlies habitus. If reason in its passive power is the seat of the habitus, it cannot itself underlie this habitus. And if the active power of reason divulges the existence of the habitus as such, then it too cannot underlie it. Hence the only "potency" which can possibly underlie the habitus is the will, insofar as this will, in experiencing its moral freedom and in its natural and general striving after the good, by way of a knowledge of the existence of God, tends towards complete surrender to God. The principles of natural law, therefore, have their ultimate roots in the realization that I, as a limited free being, must be a product of the unlimited free creator. The recognition of God's existence would thus be the *habitus principiorum operabilium* to which the will is subjected. It is this recognition of God's existence which immediately and personally, through my free will, makes certain definite demands upon me. Thus *synderesis* could be defined as the basic tendency of "passion" of the will, formed as well as directed by the knowledge of God through the natural powers of reason.<sup>35</sup>

This *synderesis* is also the basis of the *syneidesis*, and *syneidesis* is man's moral conscience having decided in favor of the good.

Conscience, built upon *synderesis*, in its essential conduct, which comprises the total human being, is thus directed towards the good. In so doing, it strives toward harmony with God. Romano Guardini has set this forth impressively in his book, *Das Gute, das Gewissen und die Sammlung*. According to Guardini, conscience "means knowledge — of oneself, and before God — of the Good, as the demand of God's holiness; it means the understanding, — of oneself, and before God, in the light of each situation as it occurs — of the Good, as an ordinance of God's Providence."<sup>36</sup>

34. SUMMA DE CREATURIS, pars. II (*De homine*), quaest 69 (ed. Lugd., 1651), A. XIX, p. 320.

35. HOLLENBACH, *op. cit. supra* note 8, at 333.

36. ROMANO GUARDINI, CONSCIENCE 60-61 (transl. Ada Lane, London, 1932).

We may summarize as follows:<sup>37</sup> The impulses of man's moral conscience spring directly from the act of the *synderesis*. This act is "the struggle against evil through inclination towards the good." The capacity freely to oppose evil rests upon God. Hence, conscience, the good, and God stand inseparably linked.

It may be that in our own time this lofty concept of conscience transcends the conscience-maximum which we may possibly expect from man, i.e., the utmost harmony in the varying concepts of conscience which may conceivably be achieved. On the other hand, it is of utmost importance for law and politics to rise above mere sporadic manifestations of individual conscience in the domain of law and justice, and to tackle the problem in its *totality*. This totality is God, Who, through man's conscience, speaks to individuals as well as to those *men* who are responsible for the legal or political ordering of nations, including the organization of many nations. Only by visualizing this totality can we conscientiously and successfully manage to solve the problems of law with which we are faced.

Thus, what does it really mean when in Article 2, no. 2 of the Charter of the United Nations of June 26, 1945, the members of the organization are requested to "comply in good faith" — "*remplir de bonne foi*" — with those duties that had been commonly agreed upon? It can only mean that the fulfillment of such duties will be in a manner that accords with the concept of conscience and, at the same time, is mindful of the origin of conscience.<sup>38</sup>

A legal system based upon or rooted in conscience acquires additional significance in a "space age"; e.g., in the light of such possibilities as "space stations," landing strips on the moon, and the like, where the question of "national control" may arise. The necessity may also arise in the determination of municipal and international legal problems connected with the assignment of a definite stratospheric orbit of different earth satellites. Since in the stratospheric domain human influence is still partially felt, the latter may be designated as the *cosmic sphere of man's influence*. But in the case of a space ship moving freely beyond the gravitational pull of the earth, or in the case of the establishment of a so-called outer-space station, or of a landing on the moon, a new and comprehensive concept of sovereignty is proposed here: the *cosmic sphere of legal sovereignty*. Such spheres of cosmic influence and sovereignty are subject to human regulation. The attempt of man to penetrate into outer space is by no means to be rejected as mere *hybris* or, perhaps, as an "act against nature" and, hence, as wrong. By penetrating outer space man obeys the divine command to conquer the earth.<sup>39</sup> This command refers not only to our planet, but to the whole universe over which man may gain sovereignty. The entering of outer space is therefore subject to law and the legal order. To be sure, we will not be able to use here our traditional legal rules of discovery or first occupancy. For these were made for our earth, not for outer space: they refer to objects devoid of dominium, not to objects which hitherto could not possibly have been subject to dominium. Hence, in outer space we cannot legally operate with the principle of *res nullius cedet occupanti*.

37. For details, see HOLLENBACH, *op. cit. supra* note 8, at 330 ff.; 336 ff.; 340; 341 ff.

38. See FREIHERR VON DER HEYDTE, *VÖLKERRECHT* 29 f. (Köln, 1958).

39. Genesis 1:28; 9:1-17.

Whenever we get away from the well-trodden paths of traditional legal problems, we are compelled more and more to rely on moral conscience when framing vital legal relationships. Man's penetration of space, together with its inevitable concomitant of *cosmic legislation*, compels us to fall back on the *command of humility*,<sup>40</sup> which is bound up with the command to conquer and rule. We shall have to adjust ourselves more perfectly to the divine order of life as well as of the universe, and hence abide by the commands to love God and our neighbor. Cosmic law, even more than earthly law, will therefore have to be the law of conscience and the law of love. Man's ascent to highest outward sovereignty must keep pace with his duty to inwardly profoundest obedience to God and His command to love.

Such thoughts permit us to draw certain practical conclusions which may serve not only for the philosophical understanding of law, but also to produce concretely effective law. Whenever an individual, or perhaps the delegate of a national state, ascends into outer space, there ascends with him the whole of mankind. For the whole of mankind thinks with him, feels with him, participates in his venture, and is interested (in the original sense of the word). In other words, the whole of humanity is, so to speak, represented in outer space by an individual delegate who, in this case, acts as a *part* of humanity, or, lacking the will to represent, at least embodies the principle of the singleness of humanity. Hence, all scientific discoveries — in fact, any advance in human knowledge that might be connected in outer space — belong not to the single occupying individual, but to all of humanity, including humanity's various national organizations and their members.

No state would be justified, if it should succeed in reaching the moon, in excluding "later arrivals" or in preventing other states and their messengers from landing. A *cosmic occupation*, on the other hand, is possible. If a state establishes a sort of definite, spatially limited sovereignty in outer space, such as the orbit of a satellite, and particularly if it is able to control the duration and regularity of this orbit, no other state may, through its representatives, interfere with it or seek to influence it. If a space station were created by a particular national state, others may use it only by agreement, though they could anticipate this consent, provided there is sufficient room so as not to endanger the landing surface. *Cosmic occupation*, in other words, provides the individual national state or union of states with a right to regulate, but not a right to establish absolute sovereignty. In short, it grants him the position of an executor for the whole of humanity, to be held in humility, considerateness, and the will to serve the advancement of all mankind.

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(Translated by MARIANNE COWAN)

40. In this connection see Genesis 1:26-28; 2:7; 2:15-17; ROMANO GUARDINI, *DIE MACHT, VERSUCH EINER WEGWEISUNG* 26 ff.; 30 ff.; 40 ff. (Würzburg, 1951).