

**Tine Stein**

## *Christianity and Constitutional Democracy*

*Is Christianity an indispensable supporter of the constitutional state? Is the genealogical claim that is implied with this assertion, namely that Christianity was instrumental in giving rise to the modern democratic and constitutional state, and the validity claim, namely that this constitutional democracy is dependent on Christianity, convincing? This article discusses the particular portions of Christianity that are found in the genealogy of the constitutional state, and secondly, if one can further show where the continual validity claim of Christianity for the constitutional state lies. First, it will be shown that in biblical narratives a certain image of humans can be extracted and that this image of humans as endowed with dignity, being free and equal, can be found in human rights, codified in the law of a constitutional state. Special attention will be given to the principle of human dignity as pre-legal concept, which is deeply rooted in the history of ideas and has gained its designation from Christian tradition. Furthermore, it is also nevertheless essential that sovereignty, in particular liberal constituted sovereignty, and salvation are separated and that this can also be derived from Christian heritage. Third, it will be described what a Christian contribution could be for the success of liberal constitutionalism today. This will be elucidated with regard to the bioethical debate and the meaning of human dignity. Here, the faithful citizens in a political community are faced with the task of presenting their respective beliefs in discussions so that the members of other faiths as well as non-believers can understand the meaning of the statement.*

### *1. Introduction*

This investigation should start with a daring thesis: Paul Kirchhof – a law Professor from Heidelberg, who was in Chancellor Angela Merkel’s shadow cabinet in 2005 and also served as a long-term judge of the Federal Constitutional Court (FCC) – asserted that Christianity is an indispensable supporter of the constitutional state. When speaking about the topic of Christianity and a constitutional state, one is often confronted with the notion that one is automatically a supporter of Kirchhof’s claim. A genealogical claim is implied with this assertion, namely that Christianity was instrumental in giving rise to the modern democratic and constitutional state. A validity claim is also implied, namely that this constitutional democracy is based on Christianity, i.e. that it was supported indispensably. If this is accepted then one

can easily defend the privileges of the Christian church that are stated in the state-church law. For these, on the one hand, would virtually represent the maintenance of sustainable constitutional preconditions and, on the other hand, one could be reluctant in granting advantages to those religious communities, which are thought to be in conflict with values of the constitutional state – to be mentioned here are particularly the values of equality and tolerance regarding minorities, values which are assumedly not appreciated in “the” Islam. In light of this position of Christianity as an essential “pillar of the constitution”, the crucifix ruling of the Federal Constitutional Court in 1995<sup>1</sup>, according to which a governmental ordinance to hang up crucifixes in public schools is unconstitutional, is thus problematic, whereas the ban on the head scarves of teachers, as found in some German federal states, would not be a problem<sup>2</sup>. According to the abovementioned position, the inclusion of a reference to God in a constitution, as intensely discussed in European constitutional drafting processes and still debated in some German states as recently as 2014 in Schleswig-Holstein, is required. Moreover, this God is then to be understood as the Christian God and not, as the Lower Saxony Minister of Social Affairs Aygül Özkan once stated with reference to the oath “so help me God”, as the one and only God that is common to all three monotheistic religions and revered as the God of Abraham, Isaac and Jacob. Subsequently, she was accused of having an unspecific image of God and in this critique one may hear the undertone that the God of the constitution is the Christian God.

In the following, against the above mentioned daring thesis, I would first like to put forth that one can actually single out the particular portions of Christianity that are found in the genealogy of the constitutional state, and secondly, that one can further show where the continual validity claim of Christianity for the constitutional state lies, but that the justifying theoretical and political implications of Kirchhof’s thesis of a Christian dominant culture are by no means mandatory as well as not too convincing. For this purpose, I will first show that in biblical narratives a certain image of humans can be extracted and that this image of humans as endowed with dignity, being free and equal, can be found in human rights, codified in the law of a constitutional state<sup>3</sup>. Furthermore, it is also nevertheless essential that sovereignty, in particular liberal constituted sovereignty, and salvation are separated and that this can also be derived from Christian heritage. Third, I would like to describe what a Christian contribution could be for the success of liberal constitutionalism today, both under the terms of a non-religious as well as a multi-religious society.

1 BVerfGE 93, 1. See on this as well the very different ruling of the ECHR: Case of Lautsi and Others vs. Italy, Application no. 30814/06 (2011).

2 In a very recent decision the FCC has changed its head scarf ruling and decided that a general prohibition of teachers wearing a head scarf on religious ground is unconstitutional. See decision 1BvR 471/10, 1 BvR 1181/10 (January 27<sup>th</sup> 2015).

3 In more detail, I have developed this in T. Stein, *Himmliche Quellen und irdisches Recht. Die religiösen Voraussetzungen des freiheitlichen Verfassungsstaates*, Campus, Frankfurt am Main 2007.

## 2. Dignity, Freedom and Equality

In the guarantee of human dignity of Article 1 of the Basic Law with its “affirmation of universality, inalienability and inviolability”<sup>4</sup>, a certain image of humans is expressed: it is an image of man, who occupies a special position in the world, as he has the ability to make his own and responsible decisions, and not only those decisions that are led by rationality but also those in which a distinction is made between what is morally right and what is only in one’s self interests and then to answer according to conscience, that is, whether one has opted for the morally right thing, for the good, i.e. if the decision making person, as the Old Testament states, has listened to his heart. This image of man, which is conducive for the German constitution, is well-known in the religions with the historical revelation of God.

The idea of freedom and dignity distinguishing humans is already a topic in the first chapters of Genesis, even if the words describing these concepts are not found as such. In the creation story, Adam (in this part still a human as such, not a male human) is distinguished from all other living things made by God by being created as God’s image<sup>5</sup>. Through this similarity (not equality) with God, humans share attributes of God that have become manifest during the creation of the world (Genesis 1 and 2): Human beings have the ability to perceive, to identify and to evaluate the world<sup>6</sup>. Man, as the “crown of creation”, receives a special position as an officer, who is responsible for the reign of God (*dominium terrae*, Gen 1:28). Reason and the power of speech are not the only characteristics, which categorically distinguish humans from other living beings, but rather his destiny towards freedom and the ability to make decisions for which he is responsible. This is the topic of the story of paradise, as Eva decides to eat the fruit on the basis of her own decision after she realized that “the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise (Genesis 3:6)”. The cognitive faculty, which is promised with the enjoyment of the fruit, is already given, she must only become aware of its potential. As the image of God, man shares the divine powers of cognition, evaluation and decision. But these abilities do not automatically lead to “good” decisions. On the contrary, Eve decides to disobey God after talking with the snake. This has something quite paradoxical: the religious story of revelation about a human being, who makes autonomous decisions, begins with a decision against the law of God, a decision

4 Heiner Bielefeldt, *Auslaufmodell Menschenwürde?*, Herder, Freiburg 2011, p. 29. Article 1 Section 1 states: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”.

5 The meaning of humans as God’s representatives on earth resonates in the Hebrew word for ‘likeness’: “soeloem”.

6 “(I)n short: God exercises speech and reason, freedom in doing and making, and the powers of contemplation, judgement, and care” (See for this interpretation L.R. Kass, *The beginning of Wisdom: Reading Genesis*, Free Press, New York 2003, p. 38). This is a compilation of God’s attributes in the creation of the world which do not coincidentally encompass the catalogue of characteristics that are commonly referred to in bioethical discussions on the personality.

for which this person is responsible. It would, naturally, be a very constricted view to only see an orthodox moment in religion and not the paradoxical, whereby in addition to the law of God, free choice also has to be accepted. A 'yes' to God and to the observance of the divine must therefore not be forced, because it is only of value if is accompanied by the opportunity to say no to God. It took an incredibly long time in Christianity until Christian dignitaries arrived at this truth: that for the sake of inner freedom a state of outward freedom is necessary which must be guaranteed by an earthly power. Without this external freedom, man would be degraded to an object, whose legitimacy would be measured in what relation he stood to the truth of God. But man is a person and as such subject.

It is noteworthy that after the transgression of the divine command the almighty God did not just simply announce the punishment, namely that man has to live henceforth in the consciousness of being mortal, whose access to paradisiac eternal life and the second enticing tree, namely the tree of life, is finally impeded through expulsion from the Garden of Eden and must henceforth undergo the hardships of reproductive labour. A process of reflection and self-awareness precedes expulsion from paradise. After eating the forbidden fruit, Adam's and Eve's eyes are opened (Genesis 3:7) and they notice their nakedness, which evokes a sense of shame, whereupon they make an apron of fig leaves. Kant saw this as a first step towards morality, since an attempt is made to gain respect from others with the reciprocal covering as the basis of true sociability<sup>7</sup>. The shame is obviously not yet calmed by the apron of fig leaves, since Adam and Eve hide from God after they notice his presence in the Garden of Eden. In the subsequent dialogue with God's voice, another insight is gained, namely that of guilt, which is, however, only implicitly admitted. In reply to God's question, whether Adam had disobeyed the prohibition and had eaten from the forbidden tree, Adam did not deny the act, nor admit that it was something illegitimate<sup>8</sup>. But he also does not want to take responsibility for his actions yet, instead he accuses the only other available person: his wife: "The woman whom Thou gavest to be with me, she gave me of the tree, and I ate", (Genesis 3:11)<sup>9</sup>.

Through the experience of disobedience man discovered his inner world. He became aware of the asset to recognize and evaluate and then to make one's own free decisions. However, such decisions can evoke feelings of shame and guilt. Oriented by a dialogue with God, man realizes that he is personally responsible for his actions. This questioning voice of God, which checks the inner sphere, and questioning if one's own actions and views are in accordance with the standards that are held as righteous can be referred to as the conscience. This is not defined as such in the Old Testament, but rather as a phenomenon<sup>10</sup>. Thus, man is able to

7 I. Kant, *Mutmasslicher Anfang der Menschengeschichte*, in I. Kant, *Werkausgabe*, edited by W. Weischedel, Suhrkamp, Frankfurt am Main<sup>2</sup> 1977, vol. VIII, p. 89f.

8 Cf. Stein 2007, S. 76f. und Kass 2003, S. 92f.

9 It seems as if in this narrative an anthropological constant is grasped: the other is always to blame, especially the wife.

10 See E. Schockenhoff, *Wie gewiss ist das Gewissen? Eine ethische Orientierung*, Herder, Freiburg 2003, p. 70 u. p. 72ff., he argues that the concept of heart is the almost equivalent

realize that he is not determined by fate, by the whims of god or by tragedy, but that he is responsible himself as a free man. The thematical correlation between freedom, guilt and responsibility is central in the Bible because the first story, which is subsequently told to the reader about post-paradise times, is indeed that of a terrible crime, namely an insidious fratricide. The freedom that is given with the capacity for insight about good and evil has its price: the capacity to become guilty about a decision for evil<sup>11</sup>. In this case, Cain had received warnings. God had exhorted the angry Cain, whose merits he had spurned in favour of those of Abel, to be good in order to raise his face freely (Genesis 4:6). It is therefore necessary not to just identify and distinguish between good and evil but to decide for good in freedom and to resist sin just lurking around the corner (Genesis 4:7). But Cain is not able to overcome his anger and he kills his brother. In the following dialog, the testing voice of God leads Cain to take responsibility for his actions, which means to admit the crime and its dreadfulness so that he finally explicitly pleads guilty: “My punishment is greater than I can bear”. (Genesis 4:13). Certainly, Cain does not only complain about his own conscience but also about the prospects of punishment, namely to have to wander as a homeless person and to become a victim of a violent crime. The subsequent gesture of God is of utmost importance for the biblical image of man: God protects Cain, the murderer, and provides him with a mark. This proverbial mark of Cain thus does not primarily represent the guilt of the murderer, but is a sign of divine protection. What an individual does, whatever he does to invite blame, he nevertheless cannot lose his distinction as a human. Even a murderer has an unconditional dignity<sup>12</sup>.

Dignity is thus fundamentally independent of the individual deeds and due to the same createdness of each person also independent of the characteristics of the individual. Dignity in this biblical sense cannot be the result of some services provided to the community and it is not dependent on the recognition of the community, on social status or on individual skills. This notion of dignity within the sense of recognition of an achievement dates back to a pre-Christian understanding as we see in the testimony of the Roman Republic, in which dignity is something that is recognized for those who have rendered outstanding services to the polity. It is a status label that the community issues for services. When we speak of dignified appearance or the dignity of high office – this is especially in the Catholic Church not uncommon – then is dignity meant as a designation of rank. But in Article 1 of the Basic Law precisely this interpretation is not meant, but one

concept in Hebrew Bible. See for example 2 Samuel 7:3: “Go, do all that is in thine heart, for the Lord is with thee”; see too H.D. Kittsteiner, *Die Entstehung des modernen Gewissens*, Suhrkamp, Frankfurt am Main 1995, p. 18.

11 See H.J. Pottmeyer, *Das christliche Freiheitsverständnis in seiner Bedeutung für die staatliche Rechtsordnung in theologischer Sicht*, in *Essener Gespräche zum Thema Staat und Kirche* (vol. 30), ed. by H. Marré/ D. Schümmelfeder/ Burkhard Kämper, Aschendorff, Münster 1996, pp. 40-61, here p. 41.

12 See F. Crüsemann, *Die Tora. Theologie und Sozialgeschichte des alttestamentlichen Gesetzes*, Kaiser/Gütersoler, Munic 1992, p. 271f.

in which each person is granted dignity due to his/her being a human who has an unconditional claim to esteem. We owe each other the mutual unconditional recognition of our dignity as we are categorically equal, biblically speaking: since we are all creatures of God.

If all humans owe their existence to the “absolute other”, the creator, who has created them all in the same way, then no one can claim special powers over other humans by birth right, such as a “god-king”. From this point on, the domination of man over man needs a different legitimacy which corresponds to the categorical equality of humans. If all humans are created equally and in the same way can strive for and gain salvation – ultimately is God’s law also written in the hearts of the Gentiles (Romans 2:14f.) – then this transcends the socially given status differences. The value of humans applies regardless of their social position and is moreover not countable, but infinitely large. This biblical message can be reconstructed as a general ideal impulse with regard to the genealogy of human rights that apply within a constitutional state. This has lodged a normative framework within which the unfair treatment of humans by other humans is in the first place recognized as such. That, for example, slavery is not just merely an evil but in fact a fundamental injustice because it violates categorical human equality and the dignity of the free man is one of the central messages of the Exodus narrative. Although slavery is legalized in the Old Testament and is thus adopted as a legal institution on the long term, this is in a normative sense an outdated development to a certain extent in light of the Exodus. The basic contradiction between the categorical equality of all humans – resulting from the createdness of all – and slavery emerges repeatedly in the Bible, for example, in the Philemon letter, whereby we must ask ourselves if equality is possibly only meant as equality in the ecclesia and before God but not in the world. It is also seen in the Old Testament, in particular in the book of Deuteronomy, in which a legalization of slavery is found to be in the favour of the legal position of slaves due to the duty to protect runaway slaves, the de facto freedom of settlement and the right of asylum for fugitive slaves (Deuteronomy 23:16f.), which can be considered a significant step towards overcoming slavery. Does the legalization of slavery represent its legitimate recognition and thus the solidification of it as an institution or does the beginning of the abolition of slavery lie in the rights of slaves? In this regard, the Bible can even be an enlightening source of jurisprudential questions about the value of law as an instrument of social change.

The idea that all people are children of God does not only justify the categorical equality of all humans but is also an imperative for social action. Even the Old Testament ideal of justice aims at the integration of the weak in the sphere of responsibility of the strong<sup>13</sup>. Christian care for others is determined by the love that is due to fellow human beings as equally created brothers and sisters without a calculation of interests. The largest concern is focused on the underprivileged. The New Testament does not convey a system of norms as in the Book of the Covenant

13 See W. Huber, *Gerechtigkeit und Recht. Grundlinien christlicher Rechtsethik*, Gütersloher 1999<sup>2</sup>, p. 165f.

or in Deuteronomy. Rather Jesus gives an example through his devotion to the socially weak on what individual human beings owe each other. It must have been an unbelievably attractive idea at this point in time that people are actually equal, their value is not dependant on their social status, there can be no slavery by nature as Aristotle justifies it in his writings (and unfortunately then through reception also some church fathers), and that the life of every human is of absolute value, including that of the ill, the wounded, widows and orphans. Moreover, those who have access to special resources have a special responsibility.

This is especially the case in the vineyard parable that actually contains a disturbing message, in particular if the principle of equality is stressed. For here, the principle of equal pay for equal work does not pertain, but on the contrary equal pay for unequal work. Can it be fair if the worker on the vineyard, who only worked for an hour, receives the same pay as the worker who worked over an entire day? Should not equal pay for equal work apply? We know many sectors of society today, in which unequal pay for the same work is disbursed and we view this as unfair. But this is a different case in the parable. If the vineyard owner had not paid the worker, who had only worked an hour, an entire daily wage but rather the proportional wage for one hour's work then the worker and his family could not have been able to make a living. The daily wage is therefore the subsistence level and everyone has a right to this, regardless of performance. Thus, equality also means solidarity.

Inalienable dignity, freedom to make one's own decisions, equality and solidarity: this image of humans and what we owe each other in our actions is, in my opinion, the basic contribution that not only arises from Christianity but also Judaism, in as far as this image of humans is already essential in the Torah. The essential ideological impulse that arises from the Bible for the development of Western political thought lies here. In this sense, "Jerusalem" is one of the key places where we can symbolically denote the origin of the liberal and democratic constitutional state, in addition to "Rome" that stands for the principle of legal judgement and the Republican order, i.e. related to the common good. "Athens" stands for the idea of equal rights of the citizens in the regulation of public affairs, thus democracy. And "Jerusalem" represents the idea of free and equal human beings, endowed with dignity, responsible for the well-being of each other. But there is another essential impulse that is reflected not only in the normative structure of the constitutional state but also very much impressed in the institutional arrangement of the basic separation of state institutions from religious institutions and therefore the justification of state sovereignty to a secular purpose. Here, the separation of (state) sovereignty and salvation is meant.

### *3. The Separation of Sovereignty and Salvation*

This basic new and dashing distinction and then the separation between politics and religion can particularly be comprehended from those passages in the New Testament in which Jesus speaks of the Kingdom of God, the Roman emperor and royal dignity. For Pilate, the question is whether he should view Jesus as a rebel against

the Empire, as the high priests portrayed him to the representatives of the occupying powers (the controversial issue of Christian anti-Judaism put aside here). Was Jesus, whose speech on the Kingdom of God was a fundamental motive, actually a political leader of this empire? No, the kingdom of God cannot be recognized in the trappings of a worldly power of political domination, rather in a realm of entirely different quality. In the Gospel of Luke (Chapter 17, Verse 20-21) it reads: "The Kingdom of God cometh not with outward show. Neither shall they say, 'Lo, it is here!' or 'Lo, it is there!' For behold, the Kingdom of God is within you". And in his answer to Pilate's question, whether he is a king, a king of a new empire that questions the power of the occupying power, Jesus replies in John's Gospel with a statement that must have been questionable to Pilatus: "My kingdom is not of this world" (John 18:36). This must have been incomprehensible to Pilate. For Pilate, as a governor of the Roman Empire, everything must have circled around politics, obedience to the comprehensive claim of the Emperor to power was required and not only taxes had to be paid but Roman citizens also had to pay homage to him. In Roman thinking, politics and religion were not separated. Religion was the ferment of authority in which the emperor was worshiped like a god. Against this comprehensive claim to power, Jesus posits the separation of powers: Give to the emperor what belongs to the emperor and unto God the things that are God's, as is stated in the passage on interests (MK 12:17). In other words: taxes yes, but no prayers! This means that secular political power can make a claim but it is generally limited.

The claim of the Kingdom of Jesus is, in contrast, of very different quality. Jesus is arguably a king, but he is a king without land, territorial claims, troops, occupying powers, the right to levy taxes and claim a monopoly on the use of force against subjects. His kingdom is related to the people in a different way than claims of politics in regulating public affairs, its interests and – necessary – controversies. With the idea of a realm that is not of this world, which is rather the kingdom of God and the central point of the life of Christians, the claim of domination in worldly politics is limited. Politics is henceforth no longer responsible for the ultimate questions and no longer gives answers to where we come from, where we are going and why we are here – on the meaning of human existence. It may not make claims to the whole human being and not interfere with its means in the process of salvation. Where it may lead, when questions of salvation are pursued with the means of worldly politics, can urgently be observed in the history of Christianity in many cruel events, from the raids of the Crusaders, to the confessional wars and today in some regions of the world where extremist Muslims attempt to establish what they view as religious truth by bombings.

We also observe this temptation to achieve the salvation of man through political means in a secular variation. Fundamentalist fervour can even be kindled with secular promises of salvation. In Hölderlin's *Hyperion*, an apt verse can be cited: "The state has always been made a hell by man's wanting to make it his heaven"<sup>14</sup>. As if Hölderlin, like a literary prophet, had anticipated the history of the 20<sup>th</sup> century

14 F. Hölderlin, *Hyperion and selected poems*, ed. by Eric Santner, Continuum, New York 1990, p. 23.



with its malign empires. It was not religion that unleashed the nation state to the immense brutality that raged in totalitarian regimes, but the respective secular expectations of salvation which were claimed in Nazism and Communism. The biggest collapse of civilization known to man stems from an ideology that denied a group of humans their humanity and attempted to destroy them methodically with modern techniques. The political leaders of this Nazi barbarism did not look into a critical mirror of a transcendental idea of justice that goes beyond state law. They took it upon themselves to judge who is actually human and who is entitled to what rights. This is central when we think about the separation of power and salvation. With this not only is the separation of the state and the church or another religious community meant but the justification of political authority is also concerned. Only in a political order that is religiously and ideologically neutral can the freedom of conscience and religion exist. In such an order, worldly reign and otherworldly salvation are separated. Neither does worldly reign fulfil a function in order to gain eternal salvation, nor can religion give earthly rulers divine splendour. In addition, a worldly power cannot favour one religion over another.

Reversely, a religious community should not make its recognition of religious freedom dependent on whether this freedom is useful for its needs or not, according to the motto: if one's own religious community is in the minority in a state then religious freedom is welcomed and, in contrast, not worth much in states in which one's own religious community is in the majority. This tactical relationship to religious freedom can be observed in documents of the Catholic Church before the radical turn to the Second Vatican Council. Only with the declaration on religious freedom "Dignitatis Humanae"<sup>15</sup> did the Catholic Church first struggle from a law of truth to a law of rights of the person. Only since then could Catholic citizens feel at home, from a doctrinal point of view, in a liberal constitutional state, in which the principle of popular sovereignty applies. Incidentally, this was also the context in which Ernst-Wolfgang Böckenförde, well-known legal scholar and former judge of the FCC, wrote his famous essay on the secularisation of the state<sup>16</sup>. There, he traces the emergence of the religious-political order against the backdrop of centuries of experience in Western Europe – from the Investiture Controversy, in which one struggled over the right allocation of the mundane and transcendental spheres, to the confessional wars, in which man killed for salvation, and the German "Reichsdeputationshauptschluss" and the secularisation of church property. The separation of powers is a fundamental experience of western

15 *Dignitatis humanae*, in K. Rahner – H. Vorgrimler, *Kleines Konzilskompendium*, Herder, Freiburg 1966, 35. Aufl., pp. 661-671. See on this E.-W. Böckenförde, *Einleitung zur Textausgabe der 'Erklärung über die Religionsfreiheit'*, in E.-W. Böckenförde (ed.), *Kirche und christlicher Glaube in den Herausforderungen der Zeit. Beiträge zur politisch-theologischen Verfassungsgeschichte 1957-2002*, Münster 2007<sup>2</sup> (second enlarged edition, continued to 2006), pp. 231-246.

16 E.-W. Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation", in *Säkularisation und Utopie. Ebracher Studien*, Ernst Forsthoff zum 65. Geburtstag, Stuttgart/Berlin/Köln/Mainz 1967, pp. 75-94; last time reprinted in Böckenförde 2007, pp. 213-230.

Christianity. Currently, this becomes vividly clear when the Russian-Orthodox Church considers giving President Putin religious consecration for his acts against international law and Putin speaks from the sacred meaning of the Crimea<sup>17</sup>. But as mentioned, it is not long ago that the Catholic Church had a tense relationship to freedom. In this situation, 5 decades ago from now, Böckenförde then raised the question upon what the constitutional state is based after the nation has dried up as a creating source of power and against this backdrop he formulated his famous dictum that the liberal state depends on conditions that itself cannot guarantee. Thus, Böckenförde does not ennoble Christians as better citizens, as being the essential constitutional supporters like Kirchhof suggested. Rather, to him it is more a matter of requesting that Christians affirm and support this liberal state. What can this mean today, 50 years later?

#### *4. Continued importance of Christianity for the liberal constitutional state*

The continuing validity claim of Christianity for the liberal constitutional state cannot therefore be substantiated in that secular political power would somehow be legitimized through the back door with a reference to religious tradition. Worldly law of the state cannot be based on religious validity claims – the state should not arrogate the function of deciding the ultimate questions and it may also not decide who is human and who is not, who is bearer of human dignity and who is not. This is raised in current discussions on the beginning and the end of human life in complex medical cases. I view herein the great political importance of Christianity in the liberal constitutional state: namely that Christians become involved in public debates such as the debate on bioethics in their capacity as citizens. Of course, Christians are not always of the same opinion on how a more just system should be created and on what needs to be done to change things, but this is a self-evident effect of people being free. Christians are even not automatically of one opinion whether the preamble of a constitution should include a reference to God. But that dignity and human rights do not only owe their existence and their claim to validity to the state or the constitutional legislator's will, should be upheld in the public mind by Christian citizens.

The modern sovereign has opted for the subordination of political power under the law and the law's validity claim is twofold: as positive law it is founded in the will of the legislator and at the same time in the substantive content of the law. In positivised human rights, a pre-legal legal sphere is thus recognized which precedes state law. With such a meta-positive basis for validity, no matter how this is reasoned in public discussion, either by ideal contents of Bible narratives, by other religious traditions or by philosophical reasons, an inaccessible core is retained for politics. And with an emphasis on the respect for the inaccessible, religious

<sup>17</sup> See [www.washingtonpost.com/blogs/worldviews/wp/2014/12/04/why-putin-says-crimea-is-russias-temple-mount/](http://www.washingtonpost.com/blogs/worldviews/wp/2014/12/04/why-putin-says-crimea-is-russias-temple-mount/)

justifications for human rights can claim a moment of openness to transcendence for a secular constitution without thereby questioning secularity.

Certainly, for such an “ultimate justification” of human rights, a binding character can never be raised in such a way as it is reflected in the Basic Law with a juridical claim of validity. Nevertheless, the particular philosophical or religious approach in the justification of human rights is of great concern for a universal validity claim. For example, if some voices in a religious tradition generally view the dignity of man as given, but view the concrete extent of its presence as being dependent on the respective relationship of man to God – and enough examples of this can be found in Christian and Islamic tradition<sup>18</sup> – then this shows that the particular reasons for dignity are of considerable concern for the range of the validity claim. Philosophical justifications are also not neutral and automatically inclusive concerning human dignity. A foundation of human rights for example, in which they are understood as a protection of interests, leads to the limitation of human rights to only those who currently are in possession of these criteria. Also other reasons that are targeted to specific empirical testable qualities, such as pain tolerance or a specific state of consciousness, may eventually result in exclusive consequences that, on the one hand, undermine the idea of belonging to the human race as the only universal criterion for the support of human rights and, on the other hand, allow the justification of limitations of human rights by state violence. The universal validity claim is offset to some extent by such reasoning from the inside.

Those who cannot share the Christian justification that humans have an inalienable dignity “because God has called him to be his counterpart and this has absolutely been assumed in Jesus Christ”, as the Joint Declaration by the Council of the Evangelical Church in Germany and by the German Bishops’ Conference have summarized, and those who do not have such a certainty of faith and instead justify human dignity (with Kant) as an end in itself, can also understand then that at the moment when human dignity and human rights would only be recognized if certain criteria are given – such as the ability to reason or experience pain, which the individual members of the genus must exhibit in order to gain the protection of these rights – that this would mean the end of the general concept of man. Then dignity would only be a mere value that would provide information about what a person, who meets the criteria, would be worth. But then one could dispense with the term of dignity because we’ve missed the point.

Finally, the justification of the universality of human rights should be comprehensible for those dialogue parties who do not share the religious premises of the justification. Jürgen Habermas has described this with the requirement of translation performance<sup>19</sup>. The faithful citizens in a political community are

18 See on this with regard to Thomas Aquinas Stein, 2007, p. 240f and see for some critical insights regarding some aspects of the Islamic tradition Heiner Bielefeldt: Menschenrechte in der islamischen Diskussion, Msc. O.J., (<http://www.kompetenz-interkulturell.de/userfiles/Grundsatzartikel/Menschenrechte%20Islam.pdf>), S. 4.

19 See J. Habermas, *Zwischen Naturalismus und Religion, Philosophische Aufsätze*, Frankfurt am Main 2005, p. 143.

faced with the task of presenting the respective beliefs in discussions so that the members of other faiths as well as non-believers can understand the meaning of the statement. The contributions of religious participants in a debate will be all the more convincing the more they are presented in a self-reflective and self-critical manner, in the consciousness that in spite of the peace and justice messages of the respective normative traditions, one's own religious community has often not fulfilled the requirements.

The FCC should not embrace in its jurisdiction a particular religious or philosophical view. However, in the public debate that accompanies the constitutional court's jurisdiction it should be said time and again that the concept of dignity is a pre-legal concept, which is deeply rooted in the history of ideas and has gained its designation from Christian tradition. It has to keep up vividly in public debate that this most inspiring understanding of dignity as a specific quality owned by humans, namely to be able to make one's own conscience-based decisions and to act freely, and that *every* human being is endowed with dignity and has an unconditioned right to appreciation of his or her dignity, is the basis of the liberal and constitutional state.

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