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## INTRODUCTION

Human Dignity is a foundation of law. This is the common thread running through all the papers of this publication. What does it mean, however, that all law is grounded on human dignity? Should all or at least, all constitutional provisions be derived from human dignity? Or is human dignity rather to be considered as a norm or an extra-legal foundation of law? Does it confer a right on every human being or is it rather an objective principle? If it is a right, is it only a right to have rights, without determining their content? One could call the assumption that all law should be derived from dignity a material concept of human dignity, whereas a second formal perspective sheds light on its function in law. Both perspectives need not contradict each other. They can also be formulated with more or fewer presuppositions: Is human dignity only the basis for fundamental rights, but not for the elementary norms of the organization of the state? Should we maybe reject the idea of deriving constitutional provisions from dignity, and assume instead that no constitutional provision should contradict dignity?

And also: If human dignity is the foundation of law, what is the foundation of human dignity? Is autonomy or freedom a prerequisite of dignity? In a legal sense, however, autonomy could also be interpreted as a consequence of human dignity. How about dignity and equality? If we relate human dignity to these values, which concept of dignity are we to follow? Is a Christian concept of dignity as an image of God of much help, especially in secular states? Is Pico della Mirandola's concept of the dignity of men as a self-projecting being pertinent? Many of the authors in this book refer to Immanuel Kant's idea that dignity requires treating men always as subjects and never as mere objects. Is this concept not too idealized and abstract and should not dignity demand the overcoming of alienation and oppressive working conditions?

Compared to equality and liberty, human dignity is a relatively recent legal concept. In its broadest sense, it was first mentioned in the preamble of the Irish Constitution of 1937. Only after World War II did it successfully find its way into various constitutions. Before that, human dignity was a principle in moral philosophy and occasionally in the theory of natural law, but not in positive law. This is why these questions not only raise problems in the dogmatics of constitutional theory on the one hand, or in the philosophy of law on the other hand, but in both. In the aftermath of the National Socialist atrocities, many framers of constitutions were driven by the intuition to transform human dignity from a moral into a legal principle by incorporating it into the preambles or normative parts of their founding documents. The more precise meaning of this new principle, however, remained open to interpretation. Legal philosophy needs to provide arguments for such an interpretation or else criticize ready interpretations in legal dogmatics for naively taking certain philosophical assumptions to be the one right answer.

Thus, just as human dignity serves as a foundation of law, legal philosophy recognizes that there are two sides to the coin – dignity as a moral, philosophical precondition of law and dignity as a principle incorporated into constitutions. Ac-

cordingly, this book deals with the methodological problems raised by such a principle, with its structural problems as a legal principle and with the ethical questions of its relation to other principles. As we are dealing with a current legal principle, it will be interesting to take a look at a rather recent constitution – the Brazilian one – and at an old one – the US-Constitution – in order to compare how they deal with human dignity. This will be the topic of the last two contributions to this volume.

The first couple of articles in this volume are dedicated to concepts of human dignity. *Dietmar von der Pfordten* (“Some Remarks on the Concept of Human Dignity”) is convinced that a secular understanding of human dignity requires conceptualizing it as a second order principle within a context of normative ethics. According to this concept, human dignity rests on the ability of a human being to satisfy his or her elementary needs, such as to live, to eat etc. It is the expression of men’s capability to preside over his own interests and concerns. If this ability is infringed, as it is in cases of tube feeding, use of lie detectors or torture, human dignity is violated.

*Paul Tiedemann* (“Human Dignity as an absolute Value”) attempts to construe human dignity as a non-metaphysical absolute value of personal identity. Taken in this sense, dignity is a relational concept: Like Fichte, Tiedemann upholds that the awareness of one’s identity depends on the identity of others. On this basis, he examines human dignity as a legal concept, applying by the criteria of a connection to ordinary language, distinctness, metaphysical restraint and empirical significance.

*Winfried Brugger* (“Dignity, Rights, and Legal Philosophy within the Anthropological Cross of Decision Making”) situates human dignity within the context of the “anthropological cross of decision making”. This cross illustrates the four dimensions of human agency: the idealist perspective upwards, the empirical or realist perspective downwards and the time line from left (the past) to right (the future). All human actions have to take a position on this cross by deciding about the balance between the four dimensions. This necessity distinguishes human beings from animals. Consequently, their dignity lies in their ability to decide on these dimensions.

*Stephan Kirste* (“A Legal Concept of Dignity as a Foundation of Law”) finds the common use of the concept of dignity too strong for law. Responsible for this problem are religious or particular moral assumptions behind the idea of human dignity. Kirste identifies two ways to avoid this problem and to transform the concept into law: One is to generalize its content; the other is to weaken its form. The disadvantage of generalization is that the idea loses an applicable meaning. Weakening its form, however, has disadvantages too. When understood as a mere objective value or a principle that binds the state, but does not contain an individual right, it loses its impact in the balancing against other principles and values. The solution is to understand human dignity as the right to be recognized as a person in law. Thereby human dignity keeps the strong form of an individual right and has a specific content, guaranteeing the individual always to be treated as a subject of law and never as a mere object. Understood in this way, human dignity is the foundation of human rights and the law in general.

Self-respect and freedom from humiliation are the two key aspects that characterize human dignity according to Julian *Nida-Rümelin* (“Why Human Dignity rests upon Freedom”). Again, human dignity founds an ethical humanism. An illustration of the issue at stake here can be found in the genital mutilation of girls in

Africa: humiliation as the paradigmatic violation of human dignity presupposes self-respect on behalf of the victim. Self-respect requires a certain degree of autonomy – a capability which embryos and mentally disabled people are lacking. Accordingly, the price Nida-Rümelin is willing to pay is the exclusion of those groups of human beings from the protection of dignity. Besides, the ethical foundation of values cannot be grounded solely on the value of human dignity, but also has to take account of human life.

*Bernhard Jakl* (“Human Dignity as a Fundamental Right to Freedom in Law”) tries to elaborate a legal concept of human dignity on the basis of Kant’s means-end-distinction. The concept of dignity as a faculty to act is a construct which helps him avoid the introduction of non-legal values into the definition of the term.

*Luis Pereira Coutinho* (“Human Dignity as Autonomy?”) introduces human dignity as a “background-idea” behind the legal order, in the tradition of the Greek concept of *paideia*. As such, dignity is neither based on autonomy, nor is it an individual right. It is an objective founding principle of legal orders, which in itself relies on religious beliefs.

The oldest legal meaning of human dignity refers to the right to a dignified existence. The contemporary importance of this right is evaluated by *Elena Pribytkova* (“The Human Right to a Dignified Existence”). For this purpose she interrogates thinkers as diverse as Immanuel Kant and Vladimir Solov’ev. She also discusses Gewirth’s concept of dignity as a capability to assert claims and Birnbacher’s idea of dignity as respect for a bundle of rights belonging to every individual irrespective of his or her achievements or social merits.

Not the foundation, but the consequences of human dignity are what is analyzed by *Klaus Mathis* (“Human Dignity as a Two-edged Sword”). Does the protection of human dignity entail legal paternalism? Klaus Mathis thinks so and pleads for the careful application of this principle. He is especially concerned with the question of who defines what human dignity is. Is it the state or the individual who has the authority to define it? For the purpose of his enquiry he introduces the cases of “Dwarf tossing” and “Peepshows”. His analysis further includes comparative studies of the German, French and Swiss jurisdiction. Mathis proposes a narrowly defined concept of human dignity on a case by case basis.

Has the debate between natural law and legal positivism come to an end? And if not, is Radbruch’s argument still shaping the debate? Finally, if the first question is answered with “no” and the second with “yes”: Is it convincing that Radbruch appeals to human dignity as an argument to resolve the debate? These are the questions *Miodrag Jovanović* (“Legal Validity and Human Dignity – On Radbruch’s Formula”) contribution to this volume discusses. Jovanovic carefully discusses different versions of legal positivism, esp. “exclusive” and “inclusive” versions, before he situates Radbruch within this context. In particular, Jovanovic turns to the Radbruch formula in the assumption that it might be substantiated with the help of the principle of human dignity as a threshold for the disavowal formula. Human dignity is the core content of natural law which may never be violated if law is not to lose its legal character.

How does cultural heritage pertain to human dignity? *Milena Petters-Melo* (“Safeguarding Cultural and Natural Heritage”) discusses their connections, building on an analysis of several relevant UN declarations. According to Petters Melo, increas-

ingly social systems are economically dominated. As a result, men become an abstract variable in the pursuit of the desired concrete economic developments. In this situation Petters-Melo holds it that the general awareness for humanity and dignity is lost.

*Jan Schaefer*, winner of the German IVR-Price for his contribution to the IVR-World-Congress discusses the often problematic discourse about values and human rights between East and West, taking human dignity as an example (“Human Dignity as a Remedy for the Clash of Legal Cultures?”). Indeed, he finds elements of equality, individualism and welfare in the teachings of Mo Di (5<sup>th</sup> century a.C.). A more thorough investigation, however, reveals far-reaching differences. Love and dignity cannot readily be equated, because love is something to give, while dignity – at least in the Christian understanding – is something all men obtain. Are the virtues of righteousness and humanity in the Confucian writings of Mencius better candidates for building ethical bridges between East and West? His concept of “tian-jue” can indeed serve as a bridging concept, precisely because it does not contain any elaborate metaphysics, but is rather a biological concept combined with few normative assumptions, for instance that a fellow member of society does not deserve to be killed. From this analysis, Schaefer derives a common principle of dignity which demands respect and even empathy for fellow human beings.

In his second article, *Paul Tiedemann* (“The Relation between Human Dignity and Human Rights”) justifies the derivation of human rights from human dignity as claimed by several human rights declarations and conventions. Since Tiedemann assumes that dignity is a value, the problem arises, how to transform a value into a norm, i. e. an obligation to respect human rights. For this purpose he relies on Frankfurter’s distinction between first- and second-order volitions.

Does the principle of human dignity derive its validity from the constitution or does it, on the contrary, found the constitution itself? In other words: is it a constitutional or a constituting principle? In order to elaborate his answer, *Oliver Lembcke* (“Human Dignity – a Constituent and Constitutional Principle: Some Perspectives of a German Discourse”) makes helpful distinctions between different definitions of human dignity, focusing respectively on the social nature of men and on the essence of men as contrasted with that of animals, with further sub-categories in both cases. None of the proposed conceptions of human dignity, however, are fully satisfactory. Instead, following Emmanuel Joseph Sieyès, Lemcke divides the principle into two branches – dignity as a constituent and as a constituted principle. The first institutes a liberal order, while the second serves to further elaborate the protection of dignity in and by these liberal institutions. This way, human dignity is being transformed from an ethical via a political into a legal principle.

The last two articles adopt a comparative perspective, illustrating and to some extent problematizing the concepts elaborated above. *Ingo Sarlet* (“Human Dignity in the Brazilian Constitutional Order: An Analysis in the Perspective of Jurisprudence of the ‘*Supremo Tribunal Federal*’ (Brazilian Supreme Court)”) concentrates on the latter aspect and analyzes human dignity as a constituted principle, using the example of the Brazilian Constitution. Sarlet discovers a distinction between the individual dignity of a human person and an objective form of human dignity. It is striking to discover how much not only constitutional provisions, but also the jurisdiction of the Supremo Tribunal Federal, have been influenced by the Romanic le-

gal traditions inherited from the Spanish and the Portuguese constitutions, German Basic Law and the Federal Constitutional Court, as well as the United States. Sarlet argues for a careful application of dignity arguments, pointing to the danger of their misuse.

What sort of role does the concept of human dignity play in a legal order which has refrained from defining it? It is successful, nonetheless, and has become a background theme of American law, as *Edward Eberle* (“Human Dignity in American Constitutional Law”) puts it. Not only is dignity undefined, however, but the whole concept of rights is far more oriented towards external action than towards the human being in itself. The problem is that there are questions of privacy in which not only the right to act, but also the right not to act, the right to retreat and other very personal forms of behavior are at stake. Again, there is need for the principle of human dignity. But Eberle also analyzes how similar problems lead to very different solutions in the German and in the American legal order: The first seems to be more apodictic, drawing on Kantian philosophy, whereas the latter seems to follow a more pragmatic line, based on mores and conventions.

The last two articles illustrate how the efforts to specify the relatively novel legal concept of human dignity call for an international discourse – a discourse along the lines of the one that took place at the IVR-World Congress in Beijing in 2009. Winfried Brugger, who co-organized the workshop, could not see this volume published. In the middle of his work, full of projects, he died on Nov. 13<sup>th</sup> 2010. Human dignity was one of his main research areas from early on. He traced the principle through the works of Max Weber,<sup>1</sup> William James<sup>2</sup>, Georg Jellinek and Werner Maihofer<sup>3</sup>, developed his own concept of dignity<sup>4</sup>, tried to solve conflicts where dignity collides with dignity, as it is the case in ticking bomb-cases<sup>5</sup>, and attempted to pinpoint the problem with the help of his famous symbol, the anthropological cross of decision-making<sup>6</sup>. The workshop would not have been possible without the almost fourteen years he spent discussing the matter with me. He helped gather the authors of this volume. This is why he is not only the co-editor of this book, but why I also dedicate it to him.

Finally, I would like to express my gratitude to Luisa Schulz, Kristin Albrecht and Stefan Kofler assisting me to edit this book.

- 1 Menschenrechtsethos und Verantwortungspolitik. Max Webers Beitrag zur Analyse und Begründung der Menschenrechte. Freiburg/München 1980, pp. 221, 279 ff.
- 2 Pluralismus und Menschenwürde im Werk von William James, in: Heiner Bielefeldt / Winfried Brugger / Klaus Dicke, Hrsg., Würde und Recht des Menschen. Festschrift für Johannes Schwartländer. Würzburg: Königshausen und Neumann, 1992, pp. 15–34.
- 3 Existenz, Freiheit und Ordnung. Von Werner Maihofer zu Georg Jellinek und zurück. In: Menschliche Existenz und Würde im Rechtsstaat. Ergebnisse eines Kolloquiums für und mit Werner Maihofer aus Anlass seines 90. Geburtstages, hrsg. von Stephan Kirste / Gerhard Sprenger, Berliner Wissenschaftsverlag, 2010, pp. 152–169.
- 4 Menschenwürde, Menschenrechte, Grundrechte. Baden-Baden 1997.
- 5 Würde gegen Würde, in: Verwaltungsblätter Baden-Württemberg 16 (1995), S. 414 f., 446–455.
- 6 Menschenwürde im anthropologischen Kreuz der Entscheidung, in: Jahrbuch des öffentlichen Rechts. Neue Folge, Band 56 (2008), pp. 95–124 and in the present volume, pp. 43 ff.