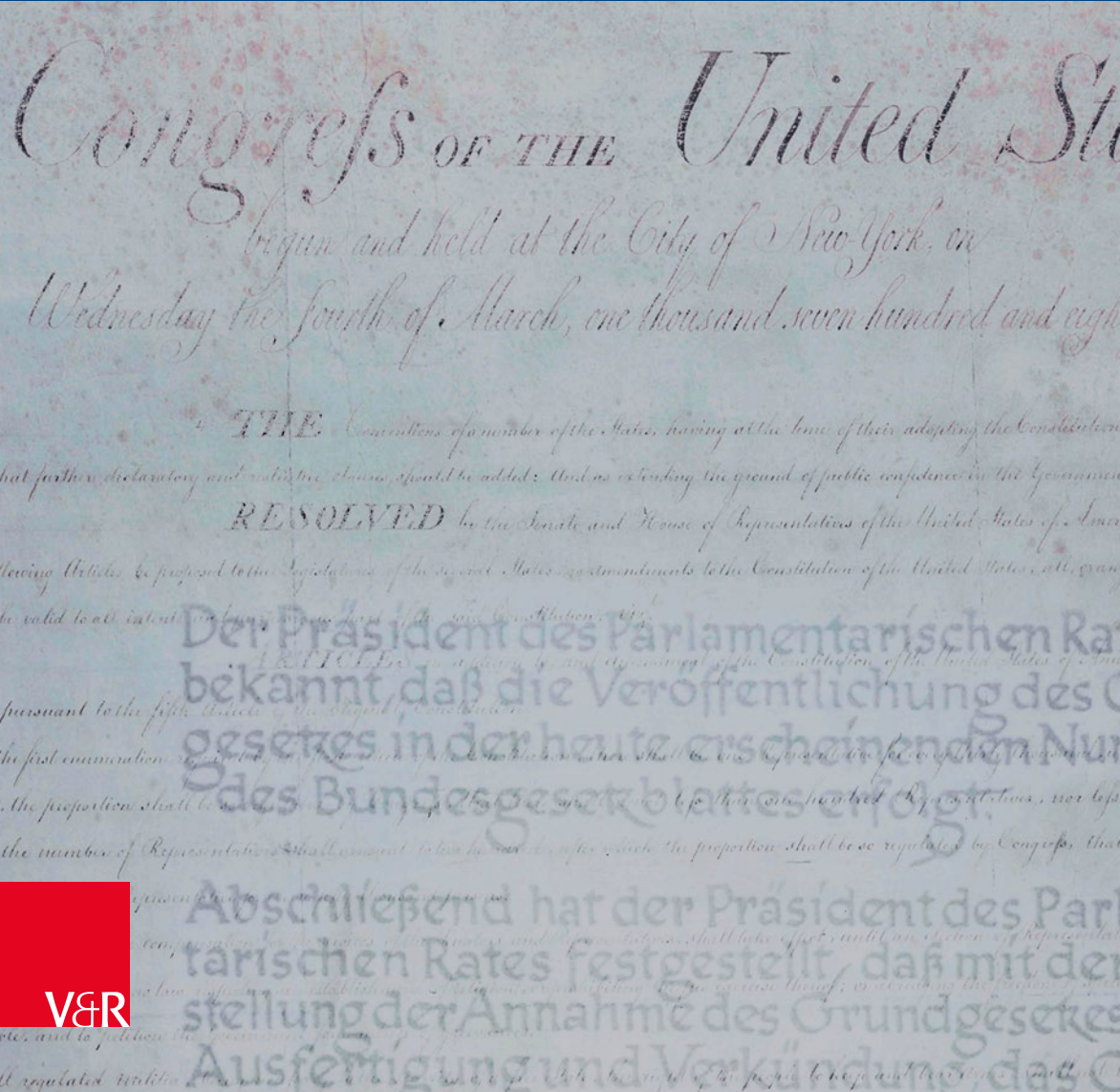


A. G. Roeber (ed.)

# Human v. Religious Rights?

German and U.S. Exchanges and their  
Global Implications







# Human v. Religious Rights?

German and U. S. Exchanges and  
their Global Implications

Edited by A. G. Roeber

Vandenhoeck & Ruprecht

Bibliographic information published by the Deutsche Nationalbibliothek:  
The Deutsche Nationalbibliothek lists this publication in the Deutsche  
Nationalbibliografie; detailed bibliographic data available online: <https://dnb.de>

© 2020, Vandenhoeck & Ruprecht GmbH & Co. KG, Theaterstraße 13, D-37073 Göttingen  
All rights reserved. No part of this work may be reproduced or utilized in any form  
or by any means, electronic or mechanical, including photocopying, recording,  
or any information storage and retrieval system, without prior written permission  
from the publisher.

Cover image: Parallel texts of the US Bill of Rights and the German Fundamental Law.  
Penn State College of the Liberal Arts

Typesetting: textformart, Göttingen | [www.text-form-art.de](http://www.text-form-art.de)

**Vandenhoeck & Ruprecht Verlage** | [www.vandenhoeck-ruprecht-verlage.com](http://www.vandenhoeck-ruprecht-verlage.com)

ISBN 978-3-647-30199-0

## Contents

<i>A. G. Roeber</i>	
Introduction . . . . .	7
<i>A. G. Roeber</i>	
Interview with Dieter Grimm . . . . .	23
<i>Christof Breitsameter</i>	
The Right to Die. Normative Patterns and Their Bioethical Implications . . . . .	29
<i>Gayle E. Woloschak</i>	
Human Subjects and Human Rights . . . . .	47
<i>Michael J. Broyde</i>	
Human Rights in Judaism Reviewed and Renewed. Education as a Prototypical Positive Human Right in Judaism . . . . .	59
<i>Carl J. Bon Tempo</i>	
Refugees and Human Rights in the Post-World War II United States . . . . .	77
<i>Michael Reder</i>	
The (Global) Sphere of the Political. Critical Views on Habermas' and Rorty's Concepts of Religion and Human Rights . . . . .	85
<i>Hans-Georg Ziebertz</i>	
Human rights and the concept of dignity: an empirical perspective . . . . .	103
<i>Roger Finke and Dane R. Mataic</i>	
Recent Findings on Religious Freedoms: A Global Assessment and American Update . . . . .	127
Bibliography . . . . .	153
Contributors . . . . .	169



A. G. Roeber

## Introduction

This volume explores a trans-Atlantic dialogue on the origins and shifting meaning of human rights. Understanding the historical development of this term directly impacts a question taken up from different disciplines by the contributors: are individual human rights to be understood primarily as “affirmative” (the overall German tradition and understanding) or “negative” i. e. protective against abuse by state power (the American legal and constitutional tradition)?

The contributors examine the question of where a commitment to human rights now exists in both the United States and Germany. Both of these nation-states represent on-going experiments in liberal representative democracy. It has become increasingly obvious during the first years of the Trump administration that the post-World War II world order to which both of these countries have long been committed appears to be in serious jeopardy. Various forms of populist nationalism, irredentist myths of racial and ethnic identity, and a growing dissatisfaction with global trade, late capitalism, and the on-going imbalance of consumption of resources by First World peoples all have cast doubts on liberalism’s future. With regard to Germany and the U. S., strains in the Post-War relationship have re-enforced the commitments on the part of many Germans to defending what has been built up in the aftermath of Germany’s national catastrophe. Two statements have appeared that signal the determination of German leaders to maintain a world order threatened by the rise of various authoritarian regimes. Some have emphasized the importance of Europe’s collective defense of that world order, a defense in which Germany will have to take a leading role.<sup>1</sup> Despite the dismay felt by the majority of Germans (and an increasing number of Americans) at the lack of leadership shown by the American president, a group of leading intellectuals and political figures insisted that Germany had no choice but to continue finding ways of maintaining its alliance with Americans committed to the vision of human dignity, rights, and responsibilities crafted over the past 70 years.<sup>2</sup>

As is always the case when scholars attempt to grapple with contemporary issues, events in Germany, the U. S. and globally move with such rapidity that

1 Nienaber, Michael: “Europe must do more to defend liberal world order—Germany’s Schaeuble,” in: Reuters, 20. Juni 2017. <https://www.reuters.com/article/us-germany-europe-schaeuble-idUSKBN19B30C>, accessed 21.03.2018.

2 Berger, Deidre/Bindenagel, James D./Fücks, Ralf/et al.: “In Spite of It All, America: A Trans-Atlantic Manifesto in Times of Donald Trump—a German Perspective,” in: The New York Times, 11. October 2017. <https://www.nytimes.com/2017/10/11/world/europe/germany-united-states-trump-manifesto.html>, accessed 21.03.2018.



even a timely appearance of these essays can hardly keep abreast of the debates over what is meant by human rights. Moreover, contributions and insights into how human and religious rights complement or are in tension with one another continue to appear, and sometimes, from surprising and unexpected sources. The interest in those tensions, seen from a German perspective, has turned toward Eastern Europe and especially Russia in recent years. The essays produced from a 2010 conference held in Erfurt addressed the difficulty Christians from both Protestant and Catholic perspectives have encountered as criticism of individual human rights continues to emerge from Russian Orthodox, and other “eastern” Christian sources.<sup>3</sup>

Yet the Orthodox bishops of Germany have more recently issued a letter addressed to German youth on issues of love, sexuality and marriage that opens with statements that can only be interpreted as forceful endorsements of human rights claims. In that address, the German Orthodox hierarchs praise the fact that “we live in a country in which the individual has the opportunity to develop in freedom and dignity ... the fact that we live in Germany, where peace, freedom, democracy and human rights are taken for granted, can be considered as God’s blessing.” In the face of growing intolerance and “religious extremism,” the bishops call upon the German Christian youth they are addressing “to do all in our power to defend those values ... man was made in the image of God (Gen 1:27). In the ability of human beings to decide for themselves, we see one of the characteristics of this divine image.”<sup>4</sup> Similarly, in response to the violence that erupted in Charlottesville, Virginia in August, 2017, Orthodox Christian bishops in the U.S. not only condemned racial bigotry and white supremacist ideology but identified claims of racial or national supremacy as heresy. That false teaching, in their choice of language, however, was not cast in terms of human “rights” but rather revealed that such persons “betray the core human values of love and solidarity.”<sup>5</sup>

Even to acknowledge the comments of religious leaders, however, leads us into an aspect of human rights discussions that reveal some substantial differences between the German and the American way of thinking about rights. As both Germany and the U.S. receive arrivals from parts of the world not identified with Judaism, Catholic, Protestant, or Orthodox Christianity, and as the number of

3 Makrides, Vasilios N./Wasmuth, Jennifer/Kube, Stefan (eds.): *Christentum und Menschenrechte in Europe. Perspektiven und Debatten in Ost und West*, Frankfurt-am-Main 2016. For an English-language review, Roeber, A.G.: Review of Ders., in: *Theologische Revue* 112/6 (2016), 502–503.

4 *Orthodoxe Bischofskonferenz In Deutschland: A Letter from the Bishops of the Orthodox Church in Germany to Young People concerning Love-Sexuality-Marriage*, 12. December 2017, <http://www.obkd.de/Texte/Brief%20OBKD%20an%20die%20Jugend-en.pdf>, accessed 02.03.2018.

5 *The Assembly of Canonical Orthodox Bishops of the United States of America: Response to Racist Violence in Charlottesville, VA*, 18. August 2017, <http://www.assemblyofbishops.org/news/2017/response-to-racist-violence-charlottesville-va>, accessed 22.03.2018.

both Germans and Americans increases that do not identify with any particular religious tradition, the integration of those voices into the debates over religious and human rights present the on-going challenge for both Germans and Americans, regardless of their religious commitments, or the absence of them. The creation in 2006 of the German Islam Conference, although intended to provide a point of contact between the German government and the growing Islamic communities, by 2014 fell into disrepute with some Muslims who claimed that only the most conservative voices of Islam were represented in the Conference. Attacks on the interpretation of Islam as compassion advanced by Mouhanad Khorchide, the director of the Centre for Islamic Theology at the University of Münster have provided sufficient evidence for some Muslims to conclude that anyone thought to be sympathetic to Jews, Christians, and the values of western liberal democracy will be attacked by Islamic voices hostile to all three. The German Constitutional Court's 2015 decision to prohibit complete bans on the wearing of headscarves by Muslim women as well as rejecting a privileged standing for Christian symbols therefore has been interpreted as a victory for religious rights by some, and denounced by others as a capitulation to those in Islam hostile to discussions about the rights of women.<sup>6</sup>

Equally troubling, the renaissance of anti-Semitism in both Germany and the U. S. has given rise to a further discussion of whether in the German context this regression is home-grown, or stimulated by the anti-Jewish prejudices of immigrating Arab Muslims who do not understand how critical the rejection of anti-Semitism is for the integrity of Germany's commitment to human rights and human dignity.<sup>7</sup> In the U. S., the Anti-Defamation League has documented for 2017 the largest single-year increase in anti-Semitic incidents on record, the only consolation in the report being the support of both Christians and Muslims to help repair vandalized Jewish cemeteries.<sup>8</sup> And this troubling evidence has now been dwarfed by the appalling attack on the Tree of Life Synagogue in Pittsburgh, Pennsylvania in October, 2018.

Much has changed in how people understand human rights since the appearance in 1948 of the United Nations Universal Declaration of Human Rights. One

6 Topcu, Canan: Dispute About Prof. Mouhanad Khorchide: a Conflict of Many Layers, in: Qantara.de, 3. February 2014, <http://en.qantara.de/content/dispute-about-prof-mouhanad-khorchide>, accessed 22.03.2018.

7 For the Court's decision, see Jones, Timothy: Constitutional Court Strikes Down Absolute Headscarf Ban, in: DW.com, 13. March 2015, <http://www.dw.com/en/constitutional-court-strikes-down-absolute-headscarf-ban/a-18313377>, accessed 22.03.2018. On the concerns over resurgent anti-Semitism, Heneghan, Tom: Germany Worried About 'Imported Anti-Semitism' After Immigrant Protests, in: National Catholic Reporter, 10. January 2018, <https://www.ncronline.org/news/world/germany-worried-about-imported-anti-semitism-after-immigrant-protests>, accessed 23.03.2018.

8 Sullivan, Emily: Anti-Semitic Incidents See Largest Single-Year Increase on Record, Audit Finds, in National Public Radio (NPR), 27. February 2018, <https://www.npr.org/org/sections/thetwo-way/2018/02/27/589119452/anti-semitic-incidents-see-largest-single-year-increase-on-record-audit-finds>, accessed 23.03.2018.

might argue that the initial purpose and origin of the modern focus on human rights sprang from the determination to prevent the abuse of individual and collective rights by state authority, and that a primary but not exclusive target of that document was the National Socialist regime of Germany. Although dominated by European and North American participants, the architects of the document who worked on the preliminary commission did include developing world members.<sup>9</sup> Since the 1940s, what has changed is the understanding and focus of human rights that is not confined merely to a vastly expanded number of nation-states and peoples who were not present during the debates that swirled around the fashioning of that document. What has changed, instead, is how scholars from the predominantly European and North American nations who did contribute to the document read the remote as well as the more recent history of human rights. On both counts, a comparison of how German scholars and those in the United States interpret those histories provides the focus for this volume of essays. One can observe in the essays that follow questions such as: what distinguishes the German understanding of human rights and can that understanding inform both trans-Atlantic and global discussions of rights? What relationship exists between American and German understandings of rights? What can Americans learn from the German development of human rights understanding? Is it possible that where once American traditions and understandings of rights helped to inform post-1945 German focus on rights, that now, a reversal has taken place and Germany's focus on a positive endorsement of individual rights has influenced not only American, but more global engagement with rights? And finally, does agreement exist that religiously based commitments to individual human rights and dignity operate quite differently in the German as opposed to the American context—and if so, which understanding now reverberates most strongly beyond the borders of both of these liberal democracies? Readers will observe how these questions of whether and how the articulation and defense of human rights does or does not relate to the predominantly Catholic, Protestant, and Jewish influences on religious rights, influences that shaped the histories of both Germany and the United States and appear to be moving in different directions.

Many recent assessments of the “origins” question of human rights have moved rather too quickly to dismiss the role of religious beliefs or values. With regard to the U.S., for example, some argue that the concern for protecting the sovereign rights of the individual states quickly led to an abandonment of a “universal” agenda for pursuing human rights. Instead, the emergence of the “individual” is the subject of “rights” but paradoxically, there “emerged a par-

9 For general surveys of human rights in the European and specifically German context, see Hunt, Lynn: *Inventing Human Rights: A History*, New York, 2008; Hoffmann, Stefan Ludwig: *Introduction: Genealogies of Human Rights*, in: Hoffmann, Stefan Ludwig (ed.): *Human Rights in the Twentieth Century*, Cambridge/New York 2010, 1–26; Wildenthal, Lora: *The Language of Human Rights in West Germany*, Philadelphia 2012.

tical American, individualistic and dualistic conception of human rights and the individual that was opposed to communistic and socialistic moralities and universalities.”<sup>10</sup> But it was not an American, but rather a Lebanese philosopher and diplomat who in the preparatory work of the commission that produced the eventual United Nations document articulated this point of view, but insisted that it was not peculiarly American, but had global implications. The Lebanese Orthodox Christian Charles Malik had intended to pursue his doctoral studies in philosophy in Germany with Martin Heidegger but was forced to abandon those plans when he was attacked by Brownshirt thugs for his “semitic” looks. Later a faculty member in both in native Lebanon and the United States, Malik remained in contact with Heidegger until the latter’s death. Never doubting that Germany could be brought back into the company of nations who would defend human rights, Malik was nonetheless not certain that this could be the case with the communist bloc, nor was he optimistic that in the case of Islamic nations, the rights of conscience and freedom of religion would be defended as fundamental human rights.<sup>11</sup>

While acknowledging such geo-political contexts, German and U.S. scholars present very different assessments of human rights history, from the question of origins to present-day applications and implications. In his own striking reconstruction of the history of human rights, one that reflects the understandable focus especially of his own country, the German sociologist Hans Joas took up political science expert Susan Waltz’s identification of “four persistent myths that dominate popular understanding of the Universal Declaration of Human Rights ... that the declaration was entirely a reaction to the Holocaust; that most of the work was done by the major powers of the United States, Great Britain, and the Soviet Union; that the text of the declaration was composed by a clearly identifiable individual; and that the success of the declaration is owed chiefly to the United States.”<sup>12</sup> Other scholars have joined the chorus of those insisting that what emerged in 1948 represented the contributions of participants from the Global South as well, and therefore cannot be dismissed as “Eurocentric” or lacking in applicability to twenty-first century emergence of new nation states grappling with human and religious rights issues.<sup>13</sup>

- 10 Barsalou, Oliver: *The Cold War and the Rise of an American Conception of Human Rights, 1945—48*, in: Slotte, Pamela/Halme-Tuomisaari, Miia (eds.): *Revisiting the Origins of Human Rights*, Cambridge 2015, 362—380, 379.
- 11 For details, Roeber, A.G.: *Orthodox Christians, Human Rights, and the Dignity of the Person: Reflections on Charles Malik (1907—1987)*, in: *Journal of Eastern Christian Studies* 70/3—4 (2018), 285—306.
- 12 Joas, Hans: *The Sacredness of the Person: A New Genealogy of Human Rights*, Washington, D.C. 2013, 182; Waltz, Susan: *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, in: *Third World Quarterly* 23 (2002), 437—448.
- 13 Sikkink, Kathryn: *Evidence for Hope: Making Human Rights Work in the 21<sup>st</sup> Century*, Princeton/Oxford 2017.

Beyond the documented reality that a “diverse range of intellectual and cultural traditions” informed the Declaration’s language, Joas pointed out what he deemed to be even more significant. The members of the commission tasked to come up with a draft declaration made “the more or less conscious decision ... to agree on an internally logical text but not on its derivation and justification.”<sup>14</sup> That deliberate omission—one that bypasses a discussion of how religious norms, values, and doubts about human rights have shaped the history of the term—began to emerge as a key to understanding how differently German and U.S. scholars view the history of human rights. This apparent difference nonetheless exists within a shared set of values, those held by a constitutional and legal democratic republic whose experiment is more than two centuries’ old, as well as those articulated a year after the appearance of the Declaration for the newly-constituted Federal Republic of Germany in its “Basic Law” that has functioned as the constitution of the country ever since. One could argue that other European nation-states might appear to have had a longer and closer relationship to the United States and thus could be the focus of comparisons as well. In the case of France, however, the commitment to a policy of *laïcité* in negotiating the treacherous waters that surround that country’s history of an established church and a violently anti-religious Revolution make comparisons with the United States tradition especially difficult.<sup>15</sup>

In the intervening 70 years since the UN Declaration, the German experiment in democratic self-determination has emerged as an exemplary nation-state ally of the United States; the most successful economic leader in Europe, and at the same time, a country dedicated to a European—not a uniquely German—defense of human rights. That determination arose despite—or perhaps because—of Germany’s descent into inhumane deliberate rejection of the rights of “other” humans in the first half of the twentieth century. The United States has, in its own reflection on the issue of human rights also had to confront the violation of the rights of the First Peoples of North America, the enslavement of Africans, and repeated outbreaks of prejudice and violence against ethnic and religious minorities as well as a delayed discussion of how a commitment to human rights should inform questions of privacy that have become especially associated with debates surrounding human sexuality and gender.

The United States and the Federal Republic remain quite different societies despite their respective commitments to versions of constitutional representative democracy and their endorsement of human rights. They bring to the question of what we mean by human rights somewhat shared, but distinctly different histories and perspectives. Studies of Germany’s own grappling with its past and the issue of human rights have created a burgeoning literature from a number of

14 Joas: *Sacredness*, 186.

15 For the French example, see Souillac, Genevieve: *Human Rights in Crisis: The Sacred and the Secular in Contemporary French Thought*, Lanham/New York/Oxford 2005.

disciplinary perspectives on the history of human rights in Europe.<sup>16</sup> The explosion of the “rights revolution” in the United States since the 1960s has created its own prolix literature that continues to expand as well, increasingly one that has focused on the issue of the right to privacy.<sup>17</sup> But explicitly comparative studies looking at both of these nation states since the 1940s have been rare, even as the global discussion of human rights has shifted now to a focus on individual identity, with accompanying disputes that have emerged when calls for expanded rights claims for sexual minorities have clashed with religious understandings of the dignity of the human person perceived to be threatened by this continued expansion of rights claims.

Despite the absence of an extensive comparative literature on human rights in Germany and the U.S., the study of the constitutional frameworks and approaches to questions of rights provides a useful starting point. No one has played a more significant role in making those comparisons than the former justice of the German Federal Constitutional Court, Dieter Grimm. The essays that follow begin with an interview in English Grimm suggested as the most profitable format for summarizing his own career as a constitutional expert on both sides of the Atlantic. Those who read German will already know of the published and extensive interview of Grimm conducted by the constitutional scholars Oliver Lepsius, Christian Waldhoff and Matthias Roßbach that document Grimm’s reflections on his long career that has included academic training and teaching at both German and U.S. law schools, as well as a seat on the German Constitutional Court.<sup>18</sup>

Two legal scholars—one German, one American—have contributed to the comparisons Grimm makes in his interviews. The core arguments of the arguments on religious and human rights advanced by Fabian Wittreck and John Witte, Jr. can be summarized in brief.

The contrast between the two legal scholars highlights both some commonalities of approach on the part of an American legal-constitutional scholar, and those of his German counterpart. For his part, Wittreck presented a synopsis of his views on the relationship between Christianity and Human Rights in a lecture first given in Essen in 2011. Those remarks appeared in 2013 in print as *Christentum und Menschenrechte*.<sup>19</sup> In that expanded lecture, Wittreck confronted two debates that as he explained, lie hidden in the conjunction linking Christianity “and” human rights. One debate has arisen if one asks about human rights “in” Christianity and is thus compelled to confront the possibility that

16 See the extensive and insightful review of some of this literature by Eichenberg, Julia: Sammelrezension: Geschichte der Menschenrechte, in: Hsozkult.de, 23. Dezember 2016, <http://hsozkult.geschichte.hu-berlin.de/rezensionen/2016-4-201>, accessed 23.12.2016.

17 Ziegler, Mary: *Beyond Abortion: Roe v. Wade and the Battle for Privacy*, Cambridge, MA/London 2018.

18 Grimm, Dieter: “Ich bin ein Freund der Verfassung”: Wissenschaftsbiographisches Interview von Oliver Lepsius, Christian Waldhoff und Matthias Roßbach, Tübingen 2017.

19 Wittreck, Fabian: *Christentum und Menschenrechte*, Tübingen 2013.

Christianity has been historically “against” what eventually emerged in the twentieth century as “human rights.” But second, Wittreck argued, debate has continued to swirl about the question of the origins of human rights and whether Christianity contributed to their emergence. Although much of Wittreck’s concern focuses on the historically deep connection between throne and altar in both Protestant and Catholic contexts of the Holy Roman Empire and the subsequent Austro-Hungarian and German Empires, his analysis of the relationship of Christianity and human rights comes to a blunt conclusion. On the whole, the historical record demands that Christians admit that “official Christianity fought bitterly against modern human rights and recognized only very late, that its own Holy Scripture did indeed provide a basis for a uniquely Christian theology of human rights.” It remained for more “worldly thinkers” to develop the emphasis upon individual human rights, the consequences of which the churches have only recently begun to engage.<sup>20</sup>

How would Fabian Wittreck’s analysis of the evolution of human, civil, and religious rights in Germany compare with John Witte’s argument? Wittreck’s lectures on Christianity and Human Rights that he delivered first in 2011 in Essen acknowledged as does Witte, the undisputed existence of at least tentative endorsements of individual human rights in both ancient Roman law and medieval western Christian debates. But Wittreck—like most of his German colleagues—remains more skeptical than Witte about the actual willingness on the part of Christian churches to engage with human rights claims. Wittreck emphasizes that from the 18<sup>th</sup> century onward, Christians of the major confessions had to endure a rather painful learning curve as they confronted what they considered the excessive individualism of rights claims on the part of their opponents and critics, a criticism that scholars have traced to the French revolutionary tradition and the Declaration of the Rights of Man. Nonetheless, as Wittreck turns to the Fundamental Law of Germany he sees in Article 2 on the protection of personal freedoms and the right to life and physical integrity a fairly easy connection to the Catholic Church’s teaching on the sanctity of life. Wittreck went on in his lecture to show that Catholic moral and social teaching, based in Roman law precedents, inform a good number of the protections set forth in Germany’s Fundamental law, including the protection of property, (Art 14) among several others.

Wittreck recapitulated a survey of the constitutional tradition in Germany since 1848, explored the renaissance of natural law and then turned to the framework and development of the Fundamental Law in which he explored civil and human rights and religious rights as “equal” rights. By raising the question of whether we should describe religious freedom as a “hypertrophic” right, Wittreck touches upon the problem of expanding religious rights claims that conceivably could, whether intentionally or not, lead to a potential conflict with other rights that in the Basic Law proceed from its declaration of the inviolability

20 Wittreck: *Christentum*, 39.

of human dignity and of “inalienable human rights as the basis of every human community...” Since much has changed not only in the German socio-political context since 1945, but in the global engagement with human rights, discussion continues in Germany to assess where religious rights fit into the “multi-level” manner in which the European community at large has developed its protection of various human rights.

John Witte’s argument, which sets out to show the ancient and medieval roots of a commitment to rights talk including in embryonic form, individual rights, has been written largely in response to the conventional narrative he has outlined in several of his many publications.<sup>21</sup> Witte wishes to argue that contrary to that narrative, religious teachings, and in his case, specifically, Christian teaching, has not been inimical to the growth in understanding what we mean by human rights. Thus, the conventional wisdom that has either located human rights in ancient pre-Christian Stoicism or regarded the gradual emergence of Renaissance insights and texts, and finally the French revolutionary assertions. The misrepresentation of Pico della Mirandola’s “Oration on the Dignity of Man” as a courageous act of rebellion against medieval Christian repression (when it is in fact a highly mystical treatise that combines Kabbalistic, Neo-Platonic, and explicitly Christian insights) could stand as a representative example of the narrative Witte wishes to challenge. In the last section of a forthcoming essay, Witte lays out the “Mapping of the Challenges” that face contemporary Christian scholars who are either themselves skeptical of the way in which secular notions of rights undermine Christian values—or who are faced with a dismissive attitude on the part of their non-religious colleagues who remain convinced that Christianity did nothing to advance, and a great deal to impede, the commitment to human rights. I can only endorse Witte’s assertion that “Christians should remain part of the broader public debates about human rights and public advocacy for their more expansive protection and implementation.” He speaks for many when he shares the concerns of Christian scholars in both the western and eastern version of Christianity who are rightly uneasy about “the reduction of rights claims to groundless and self-interested wish lists, the monopoly of rights language in public debates about morality and law, and the dominant liberalism of much contemporary rights talk...” and that “some rights recognized today are more congenial to Scripture, tradition, and Christian experience than others.” It is therefore vital “to unpack the various types of claims and relationships that are typically herded under the category of ‘rights’ today, some of which rankle Christians, some of which are taken for granted.”

The difference in tone and approach that marks Witte’s perspective as opposed to that of Wittreck may stem from the former’s engagement with the American scholar Samuel Moyn who, although known in German academic

21 Witte, John, Jr.: *The Contributions of Christianity to the Development of Western Rights*, in: Witte, John, Jr. (ed.): *Church, State, and Freedom: Toward a New Reformation of Rights* (forthcoming), typescript in editor’s possession cited with permission.



circles, has advanced an argument that one suspects Wittreck might also find problematic.<sup>22</sup> Samuel Moyn's *Christian Human Rights*<sup>23</sup> argued much along the lines Wittreck sketched, that the Christian churches East and West came late to the project of human rights, having fought against the notion historically. But Moyn's more controversial claim lies in his insistence that the late endorsement of a Christian notion of human rights came into being as a useful tool to prop up regressive, conservative regimes in the face of the threat posed by the Soviet Union and the spread of communism. In this, Moyn follows the conventional views of the origins of human rights against which Joas and others have entered their dissent. Both Witte, and the Armenian Orthodox legal scholar Mark Movsesian reviewed Moyn's monograph, and while conceding some of his argument, rejected both his claim of a neo-conservative agenda behind Christian endorsement of human rights as well as his reduction of Christianity to a system of public and private morals. Moyn's German collaborator Jan Eckel has analyzed the change in human rights thinking and claims during the 1970s with a more generous acknowledgement than Moyn's about the important contributions made because of what he labels the "transformation of the Churches." Eckel credits both Catholic and Protestant commitments to human rights, identifying the Second Vatican Council (1962–65) as "the starting point for much of what transformed the churches' activism ...." But not only Catholics, but Protestant participants in the World Council of Churches "devoted increasing attention to issues such as economic inequalities and world hunger ... this spiritual upheaval provided a fertile breeding ground for the adoption of human rights claims, and a vigorous drive for international justice more generally."<sup>24</sup>

Both German and American scholars aware of Witte's perspective would want first to ask whether, despite the undoubted presence of medieval and early modern textual arguments that do appear to advance some concept of individual human rights, we might nonetheless be justified in noting that most of these texts reflect the dominant clerical and secular hierarchy of those societies with very little thought being given to extending those rights to the lower or the marginal members of society. Witte is right to point to the famous debates at Valladolid over the enslavement of the First Peoples of the Americas, just as many would argue that the eventual decision of late Byzantine emperors to insist that slaves were not the exclusive property of their owners but in fact enjoyed some degree of the right of imperial protection. Nonetheless, neither development

22 Moyn collaborated with Jan Eckel of the University of Tübingen in publishing Moyn, Samuel/Eckel, Jan (eds.): *The Breakthrough: Human Rights in the 1970s*, Philadelphia 2013.

23 Moyn, Samuel: *Christian Human Rights*, Philadelphia 2015. For the reviews, see Movsesian, Mark: *Religious Rights*, in: *First Things*, Januar 2016, <http://www.firstthings.com/article/2016/01/religious-rights>, accessed 21.03.2018; and Witte, John: *Review of Samuel Moyn, Christian Human Rights (2015)*, in: *Books and Culture* 22/2 (2016), 22–24.

24 Eckel, Jan: *The Rebirth of Politics from the Spirit of Morality: Explaining the Human Rights Revolution of the 1970s*, in: Eckel/Moyn (eds.): *Breakthrough*, 226–259, 251.

led to an end of slavery nor to recognition of human dignity and rights of the enslaved. If one thinks of the manner in which the Russian Orthodox Church came to be a defender and even at times a champion of serfdom, and in the West how notions of rights and liberty are integrally connected to the concept of property, it becomes easy to see why critics have suggested that Christianity in its institutionalized forms appears to have come very late in the game to seeing itself as the defender of the rights of the marginalized.<sup>25</sup>

That argument has been made eloquently by John Noonan's *A Church that Can and Cannot Change*.<sup>26</sup> But Witte does correctly point out that from time to time it was the institutionalized Church that could emerge as a challenger to claims of untrammelled royal or aristocratic power. That point has been made most eloquently in Ulrich Lehner's most recent book that traces the ironic path of Catholic engagement with nearly all the contemporary streams of discovery in the areas of natural philosophy, political theory, and social and economic betterment proposals. Those engagements were arrested by the papacy's clash with Napoleon, and although the papacy emerged as a quasi-heroic institution challenging the overweening power of an emperor, in the aftermath of Napoleon's fall, Catholicism in the 19<sup>th</sup> century retreated into a reactionary posture symbolized by Pius IX's "Syllabus of Errors" and repudiation of his youthful enthusiasm for liberal European reform movements.<sup>27</sup>

On the American side of the coin, it would seem fair to ask for a more direct confrontation with what many scholars have already noted: that until the post-Civil War decades, discussion of rights in the American context hardly ever failed to couple rights claims to duties—to the nation, to fellow citizens, to God. The de-coupling of this crucial connection came about, in the opinion of many, not because of a religious failure to insist on this mutuality, but because of an increasingly secular dismissal by elite voices in politics, culture, and the law of norms of accountability on the part of the aggressively acquisitive leaders of economic liberalism.<sup>28</sup>

25 This is the main point advanced by Brett, Annabel: "Human Rights and the Thomist Tradition," in: Slotte, Pamela/Halme-Tuomisaari, Miia (eds.): *Revisiting the Origins of Human Rights*, Cambridge 2015, 82–101, 101: "We have nothing to gain, and everything to lose, in translating the thought either of Aquinas, or of early modern Thomists, or of early modern natural rights theorists more generally, into the idiom of human rights. It is not only a historical mistake, but a philosophical dead end: for in closing the gap, we lose precisely what may be most suggestive for our own thinking on the subject."

26 Noonan, John T., Jr.: *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching*, Notre Dame 2005.

27 Lehner, Ulrich: *The Catholic Enlightenment: The Forgotten History of a Global Movement*, Oxford/New York: 2016.

28 For details, see Roeber, A. G.: *Das Problem der Zwei-Reiche-Lehre in den USA*, in: Otte, Hans/Kampmann, J. (eds.): *Angewandtes Luthertum? Die Zwei-Reiche-Lehre als theologische Konstruktion in politischen Kontexten des 20. Jahrhunderts*, Gütersloh 2017, 348–364.

Finally, it would be important to see in more detail how Witte engages the Jewish ethicist whom he cites with approval in his work. Lenn Goodman's pleas that we recognize what he calls "the profit of pluralism" in creating a forum where identity and commitments are both honored and real differences discussed. For any discussion of the tensions that have arisen between advocates of a secular human rights and those who wonder if religious rights can be reconciled to the expansion of secular demands, one can compare Goodman's approach with that of the Washington University legal scholar John Inazu. Inazu also insists that Christianity has played and continues to play a crucial role in the discussion of rights. But Inazu is also realistic in pointing out that pluralism in the discussion of rights will continue to reveal tensions and conflicts in which the various proponents will have to find ways to respect profound disagreements on just such fundamental notions as human dignity, rights, and ethical behavior.<sup>29</sup> In his reflections on how American scholars such as Witte have presented their arguments, Dieter Grimm has also observed that he wishes to see more differentiation on six points: a) between rights and fundamental rights; b) between rights and privileges—the latter understood as exemptions from duties; c) intellectual roots of rights versus positive law; d) institutions versus individuals when we speak of rights; e) rights versus competencies or powers; f) legal systems and how they treat rights versus duties.

One striking difference remains, as one surveys the published works on human and religious rights in Germany and the U.S.—the relative lack of emphasis German commentators have given to the role of religion—Christianity, both Roman Catholic and Protestant, but also Judaism—in assessing both the history of human rights as well as its possible future trajectory. American scholars, by contrast, assume a much larger role for religious norms and expectations in shaping the history of human rights since the 1940s. That difference in approach extends beyond the exchanges of the legal scholars and as readers will notice, appears again in the other disciplinary presentations that follow.

Although the legal-constitutional presentations provide a framework for understanding how German and U.S. laws and institutions deal with human rights questions at a general level, the set of essays that comprise this volume focus first on bioethical, medical issues that have arisen most recently in the discussion of human rights. Here, both the essays and the discussions that have followed as this volume proceeded to publication revealed a genuinely surprising difference between U.S. and German topics of concern. On the one hand, Christof Breitsameter's analysis of the "Right to Die" and the long-standing German revulsion at the thought of state-endorsed (or imposed) euthanasia could easily find its counterpart in the debates on this topic among American ethicists. Nonetheless, Breitsameter recalls what has long been clear to legal and

29 Goodman, Lenn E.: *Religious Pluralism and Values in the Public Sphere*, New York 2014, 1; Inazu, John D.: *Confident Pluralism: Surviving and Thriving through Deep Difference*, Chicago 2016.

political scholars, namely, that the “cultural sphere” of continental as opposed to American thought has always been strikingly different since the continental tradition seeks to “find” law versus the Anglo-American tradition of “establishing” laws. In the American legal and constitutional context a “right” to die would appear to be an issue where the rights of individual privacy have long been balanced against the state’s determination to prevent undue influence from being exercised on patients that might end in their becoming subjects of involuntary euthanasia. As Breitsameter points out, however, the renaissance of natural law thinking in post-World War II Europe had no parallel in American law and debates about the “right to die” have progressed along very different lines, including the question of whether physician-assisted suicide is or is not protected by the Due Process clause of the U. S. Constitution.

The rights of humans at the beginning of life—the rights of children to education—provides the focus of Rabbi Michael J. Broyde’s explication of why this concern for education of the young is of such critical importance among Jewish discussions of rights. But as Broyde explains in an extended note to his argument, rights are nested in duties that must be fulfilled not only at the level of the individual person but with a concern for how such balancing affects others. Although Jewish law is on the whole content to allow a state authority to oversee the protection of rights, that tradition also insists that sufficient means be made available to all in order that this balancing can be carried out in practice, and not merely in theory. Gayle Woloschak’s analysis of experimentation on human subjects, especially the new CRISPR technology, reveals just how difficult such questions of balance can become, especially as in this case, when a lack of attention paid to this issue has until quite recently been the case on the part of the German academy and press. Given the rejection of human rights violations in the form of euthanasia and medical experiments upon prisoners committed under Nazi Germany’s rule, the lack of focus on this latest and most dramatic area of experimentation and its human rights implications laid bare a surprising absence of shared attention between German and American ethicists. To the extent that the CRISPR technology has been the topic of comment among German academics and the press, this has been confined largely to reproducing or reporting on the issue that has surfaced first in American media and scholarship.

An explicitly comparative analysis of German and American philosophers provides the basis for Michael Reder’s essay. By focusing attention on the works of Jürgen Habermas and Richard Rorty, Reder enables readers to gain additional insight into the sometimes stark differences of approach that have influenced German and American philosophers who have grappled with the evolving understanding of what is meant by human rights. A focused example taken from an issue of current concern on both sides of the Atlantic characterizes Carl Bon Tempo’s analysis of the origins of the human right to asylum. Bon Tempo’s analysis focuses our attention on the issue of refugees and the issue of asylum by emphasizing that both the political right and left seized upon the issue in the

1970s in the U.S. context.<sup>30</sup> Questions arise because of Bon Tempo's as well as Michael Reder's essays about whether the role of churches in both the U.S. and in Germany in the sanctuary and asylum movements need to be included in an analysis of how the discussion of the rights of asylum has developed in both countries. Reder speculates on whether Habermas' later willingness to at least concede some role for religion in the "post-secular" world of rights discussions ever acknowledged the sanctuary movement since it is not clear in published writings that Habermas' insistence upon religion adjusting itself to an "idiom" understandable to secular fellow-citizens is either necessary or perhaps even desirable in discussions surrounding the universalization of human rights, and the right of asylum in particular.

Nonetheless, Habermas appears to have expanded his willingness to see some positive contribution of religious convictions in the realization of human rights where the late Richard Rorty seems to have remained convinced that the "self-creation" notion of "religion" he was famous for cannot be adjusted to a role in the public sphere since religion blocks discussions in a secular society. If Rorty's perspective is the dominant one in American philosophical circles, then once again it perhaps is important to ask whether Germany's Basic Law sees a broader role for religion in discussing the nature of rights than did Rorty's understanding of American pragmatism that remained focused on individual liberty and autonomy to a degree the German constitutional system and discussion of rights still finds alien?

The explicit question of how and whether human rights and religious rights have emerged in tandem or in tension with one another provided the basis for analysis from the perspective of political scientists and sociologists. The essays by Hans-Georg Ziebertz and Roger Finke and Dane Mataic take up this challenging and complex question. Hans-Georg Ziebertz provides the most empirically detailed analysis of how a serious gap has emerged between the professed belief in the value of human dignity and what young Germans in particular actually demonstrate when "inherent" dignity is distinguished from dignity defined purely on the basis of "merit" or moral standing. Moreover, it is not clear that religious identification does not necessarily emerge as a reliable indicator of whether people support human dignity and political rights. Roger Finke and Dane Mataic, writing from a U.S. perspective, provide empirical data on the fate of religious freedoms in a global context. Perhaps most important among their findings is the documentation of the use of religious registration in both authoritarian and democratic regimes as a means of restricting and curtailing the rights of religious freedom. Religious freedom rights can be deployed to curtail other understandings of human rights, but it is the nature of how societies respond to religious pluralism that may emerge as the best predictor of

30 For a German analysis of the developments in international rights politics during the 1960s, see Werneke, Thomas: *Die Stimme der Vernunft? Menschenrechtssprache als Teil des Politischen während des Ost-West-Konflikts, 1961–1973*, Brüssel 2016.

whether increased conflict, or an appropriate balance of human rights (including that of the right of religious freedom) will emerge in twenty-first century nation states.

The essays presented here provide a context and background by which readers on both sides of the Atlantic and around the world can appreciate both the importance, and the complexity of these on-going challenges and debates about the nature of human and religious rights in the American, the German, and the global contexts, and their sometimes tense relationships to one another. I am grateful to the authors of the essays as well as to Professor Dr. Thomas Bremer of the University of Münster, to my colleague and long-time Co-Director of the Max Kade German-American Research Institute Daniel Purdy. Earlier versions of these essays were presented at an international conference “Rights—Human, Civil, Religious—in the Federal Republic of Germany and the U. S. Since 1948” sponsored and supported from funds provided by the Max Kade German-American Research Institute and the College of the Liberal Arts, Penn State University, March 23–25, 2017. I thank the College for permission to use the conference poster artwork as the basis for the cover of the book. I owe a debt of gratitude to Prof. Dr. em. Hermann Wellenreuther, Göttingen University, for facilitating contact with Vandenhoeck & Ruprecht, and to Prof. Dr. em. Knud Krakau, John F. Kennedy Institute, Free University of Berlin for suggesting Prof. Dr. Dieter Grimm as the keynote speaker for the conference. Dr. Jason Strandquist and Mr. Nicholas Capri both provided expert editorial assistance in preparing the final version of the volume. I also wish to thank Ingeborg Lüdtke, Daniel Sander and Kai Pätzke for their diligence and care in bringing the volume to publication with Vandenhoeck & Ruprecht.

St. Louis, Missouri and Yonkers, New York

July, 2019



A. G. Roeber

## Interview with Dieter Grimm

**Editor's Note:** This interview summarizes a keynote address and comments made by Professor Grimm for the international conference at The Pennsylvania State University "Rights—Human, Civil, Religious—in the Federal Republic of Germany and the U. S. Since 1948," March 23–25, 2017. At his request, Professor Grimm summarized his address in the form of this interview and approved the following transcription before the present volume was published.

1.

*Professor Grimm, you have often observed in your writings for both German and American audiences that several distinctions needed to be made about how we use the term "rights." You asked that we distinguish between rights and fundamental rights; on rights versus privileges (the latter understood as exceptions from duties); between intellectual roots of rights versus positive laws protecting rights; between institutions and individuals; between rights and competencies or powers; and finally between a legal system's approach to rights versus that system's approach to duties. Could you elaborate more fully on what you meant by raising these six issues?*

It is my observation from many interdisciplinary discourses with historians, social scientist and philosophers that the notion of rights, and, associated with it, the notion of freedom are used in an undifferentiated way, thereby obscuring major differences in time, meaning and effect and asserting continuity and identity where in fact discontinuities and differences exist.

Thus, it is a fundamental difference whether "rights" are moral or natural rights or whether they are positive legal rights. Moral rights without legal recognition are philosophical findings or political postulates, but not law. They give the individual a moral, but not a legal claim. The legal order may be and often is the opposite of an order based on rights. Moral rights may then serve as a legitimacy test of political and legal systems or as justification for reform postulates or revolution, like in the American and the French Revolution.

Every legally recognized right implies a certain freedom for its bearer. The bearer has a choice whether and how to use the right. But it makes a fundamental difference whether a legal order is based on rights or on duties. If a legal system is primarily based on duties, rights are either exemptions from duties—we may call them privileges, or they serve duties—we may call this functional rights. This is why the existence of certain liberties is not an indicator of general freedom. It was only the French Revolution that transformed the legal order of the Western world from a duty-based to a rights-based order. In such an order where rights



take the first place, duties have to be justified in the light of the general claim to freedom. But duty-based systems have not disappeared. They persist in various parts of the world.

If rights of individuals are recognized by law it makes a difference whether they are part of ordinary (statutory or common) law or whether some of the multitude of rights are guaranteed in the constitution. If they are part of ordinary law they bind public administration, but not the supreme power of the state, in particular not the legislative power. If they are recognized by constitutional law and thereby turned into *fundamental* rights they are also binding for the legislature (provided that the supremacy of constitutional law is fully acknowledged).

There were no fundamental rights in this sense before the Virginia Declaration of 1776. It is true that, different from the Continent, England had a long tradition of rights, partly based on constitution-like documents, partly developed in common law. But they were not constitutionalized and thus not fundamental before the Civil Rights Act of 1998. But even now their fundamentality has not been fully recognized as the UK tried to reconcile fundamental rights with parliamentary sovereignty. The British Parliament retains the power to override a judgment of the Supreme Court which declares a legislative act in violation of a fundamental right.

If fundamental rights exist, it makes a difference whether they are regarded as human rights or merely as citizens' rights. Likewise, it makes a difference whether the bearers of fundamental rights are only individuals or also collectives. If collectives such as corporations or institutions have fundamental rights, this may (but not necessarily will) go hand in hand with non-freedom of the members.

If rights are regarded as fundamental and thus binding also for the legislature, it makes a difference whether or not they can be enforced against the state organs. If there is no enforcement mechanism in form of constitutional adjudication or judicial review they are of little value. For a long time, fundamental rights were enforceable only in the United States. From a practical point of view, fundamental rights gained wide efficacy only with the establishment of constitutional courts or supreme courts with constitutional adjudication, i. e. in the second half of the 20<sup>th</sup> century.

This is particularly important for human rights protection on the international level. The UN Declaration is not law. The various UN pacts are law for those states that signed them. But they lack an enforcement mechanism. They content themselves with a monitoring system. Different from the global level, enforcement mechanisms exist in stronger or weaker form in regional human rights pacts. But by far not all states are signatories of such pacts or don't submit themselves to the jurisdiction of the corresponding courts. And international organizations, even those promoting the protection of human rights, do not yet submit themselves to human rights.

Finally there is a fundamental difference between rights and competences. A competence conveys discretion on its bearer. But it is a discretion serving a

certain purpose and limited by that purpose. In a constitutional democracy, state actors have competences but not rights.

2.

*It appeared to many of us familiar with both your own work and that of other German legal-constitutional scholars such as Wittreck that you take a more conservative position with regard to the role that ancient and medieval thinkers about “rights” have played in shaping what we today call human rights. John Witte’s arguments, by contrast, offers a reply or riposte to Samuel Moyn’s contention that Christianity has paid scant attention to human rights, and in the post-World War II context, did so only to employ the term as critique of Soviet-style communism. Would you comment on why German scholars appear to be less willing than their American counterpart to see a role for religion in having created a concept of human rights?*

I am unable to confirm or reject the contention that there is a difference between German and American scholars on the role of religion and of ancient and medieval thinkers in the emergence of the concept of rights. In Germany and even more so in France there was an intensive debate on the emergence of the concept of “subjective rights”. Was it already rooted in Roman law, did it come up in the medieval world or is it a modern phenomenon (Coing, Luhmann in Germany, Dabin, Roubier, Villey in France)? I myself do not doubt that the idea of rights has roots in Christian religion. But I cannot leave aside that the Catholic Church distanced itself from and even fought against the idea of fundamental rights for quite some time. Although Christian-democratic political parties participated in the formulation of bills of rights in postwar constitutions, the Church’s rejection ended only with the second Vatican Council.

3.

*Would you comment on the possibility that the German experience with a close linkage between a state or monarchical power and Catholic or Protestant Christianity has led contemporary German legal and constitutional scholars to be especially wary of claims that religion has played a significant role in the development of human rights thinking, in the German context? Would it be accurate to extend that same skepticism to European constitutional scholars in general, or is this a peculiar characteristic of German views on human rights?*

Again, I don’t know whether German legal and constitutional scholars are “especially wary” of claims that religion has played a significant role in the development of fundamental rights thinking. What can be said, however, is that the connection between “throne and altar” in Germany was an impediment to the recognition of fundamental rights. When they were recognized in the German constitutions of the 19<sup>th</sup> century (“constitutional monarchy”) they were not regarded as *human* rights. The German constitutions, even the democratic