

## **II.**

### **Juridical Principles**



# Constitution and Natural Law<sup>1</sup>

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## 1. Introduction

For constitutional jurists of our time, natural law appears to be (no longer) a theme, that is a trend without a distinctive legal-positive current being held responsible for it. True legal positivists are seldom to be found. Rather, there is much more a wide spread pragmatism in everyday contact with the effective constitutional law, referring the question of its source, its intellectual origin and its philosophical foundation which refers to the basic disciplines and, therefore, believing not to have to further care about these aspects in its interpretation and use.

That was, with the emergence of the Constitution, completely different. After the experience of the legally nihilistic National Socialist dictatorship, which had triggered a “crisis of law”<sup>2</sup>, many German jurists and prominent teachers of constitutional law held a “renewal of the law” and thinking about the law for unavoidable, and the search for an idea of law which could act as a vehicle for this renewal led to a “return to natural law”<sup>3</sup> and indeed to such an extent that a complete “Renaissance” of (the thinking on) natural law can here in fact be spoken of.<sup>4</sup> Therefore, it is not surprising that in the proceedings of the Parliamentary Council it came to a general, intensive debate on natural law.<sup>5</sup>

## 2. The discussion on the anchoring of the fundamental rights in natural law in the Parliamentary Council

The conducted debate in the Parliamentary Council on art. 1 GG as a whole and especially on the question of a finally acceptable judgment on the pre-state status of

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<sup>2</sup> A. Arndt, Die Krise des Rechts, in: *Die Wandlung* 3 (1948), pp. 421-440.

<sup>3</sup> O. Veit, Der geistesgeschichtliche Standort des Naturrechts, *Merkur* 1 (1947), pp. 390-405; reprinted in: *W. Maihofer* (ed.), *Naturrecht oder Rechtspositivismus*, 1966, pp. 33-51, 33.

<sup>4</sup> Davon legen die in *W. Maihofer* (fn. 3) abgedruckten Beiträge beredtes Zeugnis ab.

<sup>5</sup> The argument regarding “natural” parental rights and the question whether parents then can decide which schools their children should attend on the basis on their confessional character—an argument which would have well-nigh bid farewell to the Constitution, cannot here be entered into in great detail. Rather, cf. *F. Ossenbühl*, *Das elterliche Erziehungsrecht im Sinne des Grundgesetzes*, 1981, p. 23 ff. Just as little can it be discussed here whether portal to the moral law in art. 2, para. 1 GG makes recourse to natural law: see v. Mangoldt/Klein/ders., *GG, Kommentar*, 5. Aufl. 2005, Art. 2 Abs. 1 Rn. 36 ff., in which a memory “of the human rights tradition” is spotted and therefore sees a connection made to the declaration of art. 1, para. 2 GG. (Rn. 41).

human rights circled around the question of a natural-legal anchoring of basic rights. The deputy Süsterhenn had demanded, for the CDU-CSU faction, “stable basic rights, anchored in natural law, and not merely in an ever-changing majority”.<sup>6</sup> In the Committee for Basic Issues, deputies Heus and Schmid both spoke against the inclusion of any declarations or declamations with confessional character in the Constitution. “It is indeed practically necessary to write down a catalogue of those basic rights which are the binding laws for the courts and which the individual citizen can invoke in order to concretely enforce his legal entitlement or, by the same token, to protect himself from the intrusion of the state into his personal sphere of freedom.”<sup>7</sup> This necessity arose from the intention of making these basic rights directly applicable law. “General legal propositions of pre-constitutional nature are of no use for the legal practice. A more precise constitutional description, thus, seems to be indispensable”, deputy Zinn declared soberly.<sup>8</sup> The chairman von Mangoldt repeated the *communis opinio* in the Committee for Basic Issues (*Der Ausschuss für Grundsatzfragen*), while he named as its (the Committee’s) main task the somewhat intangible natural-legal propositions, and how “to concretize, to conceive more clearly, to make more precise, what we wish to protect.”<sup>9</sup>

Deputy Dr. Bergsträsser added to the deliberation the thought whether indeed not it would be desirable “to formulate and to determine” the theoretical “that is to say, the natural-legal foundations of basic rights”, which could be accomplished “within the framework of an especial preamble to these basic rights.”<sup>10</sup>

In the fourth meeting of the Committee for Basic Issues on 23<sup>rd</sup> of September 1948, deputies Bergsträsser, Zinn and von Mangoldt recommended a proposal for four primary articles of basic rights. The first article was phrased in the following way: “The dignity of human beings is based upon eternal laws, which are by nature immanent to everyone. The German people recognize them as the foundation of all human community. Therefore these basic laws are guaranteed, binding legislation, administration and the administration of justice also in the federal states as directly applicable law.”<sup>11</sup>

Bergsträsser outlined that the correspondants came to the conviction that “it would indeed be correct to place at the forefront of the basic rights some sentences to make clear concisely the meaning and basis of basic rights. We have attempted that with our

<sup>6</sup> 2. Sitzung des Plenums vom 8.9.1948, abgedr. in: Bundestag/Bundesarchiv (Hrsg.), *Der Parlamentarische Rat* 9, 1996, Dok. Nr. 2, pp. 18-69, 56.

<sup>7</sup> Schmid, 2. Sitzung des Ausschusses für Grundsatzfragen vom 16.9.1948, in: *Der Parlamentarische Rat* 5/I, 1993, Dok. Nr. 2, pp. 3-14, p. 10.

<sup>8</sup> Zinn, 3. Sitzung des Ausschusses für Grundsatzfragen vom 21.9.1948, in: *Der Parlamentarische Rat* 5/I, 1993, Dok. Nr. 4, pp. 28-61, p. 34.

<sup>9</sup> 3. Sitzung des Ausschusses für Grundsatzfragen vom 21.9.1948, in: *Der Parlamentarische Rat* 5/I, 1993, Dok. Nr. 4, pp. 28-61, 41.

<sup>10</sup> Katalog der Grundrechte, Anregungen von Dr. *Bergsträsser* als Berichterstatter, 21.9.1948, in: *Der Parlamentarische Rat* 5/I, 1993, pp. 15-27, 15.

<sup>11</sup> In: *Der Parlamentarische Rat* 5/I (1993), p. 62 m. Fn. 3.

formulation of art. 1., which we recommend to you.”<sup>12</sup> Chairman von Mangoldt added that the filers of the report would have had the wish to give art. 1. a shape “with which it can be built on natural law. It is only that natural law appeared to us in its individual lines still too ill defined than it could have been left with the simple citation of natural law propositions. The propositions of natural law were hence recorded in the articles of basic rights following art. 1., to which para. 3. refers, and brought into the necessary form for the direct application of law. This relegation sets for the interpretation—and it is important to make this clear—that the following basic rights are based upon the substratum of natural law and the judicature can draw on this substratum of natural law through its interpretation”. It is hardly possible to ensure all basic rights an unalterable character. Art 1. gives the legislator who alters the Constitution the possibility, on the basis of the reference to natural law, to align basic rights to the conditions and necessities of time.<sup>13</sup>

The manner of recourse to natural law remained contested in the Committee, even if the matter itself was not. Deputy Zinn showed that the Universal Declaration of Human Rights and the Virginia Bill of Rights spoke of man who by nature was entitled to certain rights.<sup>14</sup> Deputy Schmid pleaded for an historical understanding of natural law; this meant to explain that, “In this sphere of historical development, we Germans are not willing to live beneath a standard of freedom which guarantees human beings such and such freedoms which do not pertain from the state.”<sup>15</sup> For the time being, the formulation was agreed upon, that: “The dignity of human beings is protected by the state order. It is founded in eternal laws, which the German people recognize as the basis of all human community. Therefore these basic laws are guaranteed, binding legislation, stewardship and the administration of justice also in the federal states as absolutely pertaining law.”<sup>16</sup> The critic Richard Thomas<sup>17</sup> brought about a further revision of the

<sup>12</sup> 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 63.

<sup>13</sup> 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 64; siehe auch *dens.*, ebd., p. 68.

<sup>14</sup> 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, p. 62-87, 69.

<sup>15</sup> 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, p. 62-87, 67.

<sup>16</sup> 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 75. Der Antrag von CDU/CSU und DP, to add the words in line 2 “given by God” (see the Protokoll der Unionsfraktionssitzung vom 5.10.1948, printed in: Die CDU/CSU im Parlamentarischen Rat. Sitzungsprotokolle der Unionsfraktion, 1981, Dok. Nr. 10, p. 52; Abg. *Süsterhenn*, 6. Sitzung des Plenums vom 20.10.1948, in: Der Parlamentarische Rat 9, 1996, Dok. Nr. 6, p. 185, failed in the Main Committee in the second reading on 18.1.1949 (42. Sitzung, Verhandlungen des Hauptausschusses, 1948/49, S. 529-544, 531) – even with a barely thinking majority (11 to 10 votes) – the rejection

<sup>17</sup> Its “critical appraisal” printed in Der Parlamentarische Rat 5/I, 1993, pp. 361-369. *Thoma* recommended, the striking out of the second and third line of art. 1, because it is materially incorrect, that is, “the philosophers and the theologians must endeavor to answer the question where individual dignity is founded which we attribute to everything that has a human face. The lawgiver cannot provide this

formulation. A formulation was suggested which followed the preamble of the draft of the General Declaration of Human Rights of the United Nations,<sup>18</sup> that: “Along with human dignity and as one of the foundations for its enduring respect those same and inalienable rights to freedom and human rights are guaranteed, which form the basis for freedom, justice and peace in the world. The German people recognize them as one of the foundations of the order of the constitutional state of all freedom and peace-loving peoples”.<sup>19</sup> After further wrestling with an appropriate formulation in which there was consensus,<sup>20</sup> there was already concluded in the General Drafting Committee<sup>21</sup> and in the Fifth Committee<sup>22</sup> a well-nigh word-identical formulation, applicable to art. 1. (para. 2) GG (*Grundgesetz für die Bundesrepublik Deutschland*, the German Constitution), which then found the approval of the main committee<sup>23</sup> and the Plenum.<sup>24</sup> Art. 1, para 2 GG pins together the guarantee of human dignity of para. 1 with the directive of absolute validity of basic rights in para. 3. As a “bridge to basic rights”<sup>25</sup> art. 1, para. 2. desires to explain where “subsequent” basic rights come from and how they are associated with human dignity. As a consequence of the recognition of human dignity and the basis of basic rights, those “uninjurable and inalienable human rights” form, whose validity the German people recognize for themselves.<sup>26</sup> “Only he who recognizes hu-

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answer and in any case human dignity is not founded “in eternal laws”, rather vice-versa: human rights are to be deduced from human dignity.” (*ibid.*, p. 362).

<sup>18</sup> “In the consideration that the regard of the indwelling dignity of all members of the human family, as well as same and inalienable rights, forms the basis of freedom, equality and peace in the world”, printed in *Der Parlamentarische Rat 5/II*, 1993, S. 592. The draft is printed in: *Der Parlamentarische Rat 5/I*, 1993, p. 220 ff.

<sup>19</sup> Deputy v. Mangoldt, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: *Der Parlamentarische Rat 5/II* (1993), S. 584, 592. The alternative to the last line: “The German people recognize it as the basis of all human society”; *ibid.*, p. 593.

<sup>20</sup> See the Protokoll der 32. Sitzung des Ausschusses für Grundsatzfragen vom 11.01.1949, in: *Der Parlamentarische Rat 5/II* (1993), pp. 910-918; Protokoll der 42. Sitzung des Hauptausschusses vom 18.1.1949, printed. in: *Parlamentarischer Rat, Verhandlungen des Hauptausschusses (1948/49)*, pp. 529-531.

<sup>21</sup> Response from 25.1.1949 and suggestion for formulation in: *Der Parlamentarische Rat 7*, 1995, pp. 202-204.

<sup>22</sup> Suggestion for the fifth committee for the third reading of the Constitution in the main committee in: *Der Parlamentarische Rat 7* (1995), p. 339, 340.

<sup>23</sup> It was solely this in the framework of the fourth reading of the draft of the Constitution in the 57<sup>th</sup> meeting of the main committee on 5.5.1949 (in: *Parlamentarischer Rat, Verhandlungen des Hauptausschusses (1948/49)*, p. 743) on the request of deputy Zinn in art. 1, para. 2 the word “as” was added before the word “basis”.

<sup>24</sup> 9. Sitzung des Plenums vom 6.5.1949, in: *Der Parlamentarische Rat 9*, 1996, p. 429, 447.

<sup>25</sup> Abg. V. Mangoldt, 32. Sitzung des Ausschusses für Grundsatzfragen vom 11.01.1949, in: *Der Parlamentarische Rat 5/II*, 1993, p. 910, 913; ähnlich Abg. Schmid, 42. Sitzung des Hauptausschusses vom 18.1.1949, in: *Parlamentarischer Rat, Verhandlungen des Hauptausschusses (1948/49)*, p. 529.

<sup>26</sup> The here discarded declaration implies “that we as Germans have subjectively decided to recognize it, that means to make it valid for the future. [...] It is [...] a belief for us and not the recognition of an objective fact of existence in other countries.” (Deputy Bergsträsser, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: *Der Parlamentarische Rat 5/II*, 1993, p. 592).

man rights can respect human dignity for the long haul”.<sup>27</sup> In order to come to an effective insurance of these rights, the “old inalienable human rights and rights to freedom”<sup>28</sup> must be made positive, “reformulated for our time”, and be transposed into concrete guarantees of basic rights.

### 3. The positive-legal meaning of the recourses to pre-state human rights in art. 1, para. 2 GG

Thus there was a general consensus in the Parliamentary Council that positive-legal basic rights which are to be guaranteed are based on pre-state human rights, that is, on rights which are due to man by nature and are inalienable; rights which the state does not bestow, rather which are there in advance, and which he can only recognize,<sup>29</sup> but neither create nor abrogate. An explicit affirmation particular to *Christian* natural law, such as that which the CDU/CSU and DP had hoped to achieve, could not be brought through.<sup>30</sup> Nevertheless, the idea of pre-state rights, inherent to human beings, provides that they can be represented in an Enlightenment-secular form; in a viable, common basis.<sup>31</sup> The German people as the givers of the Constitution in art. 1 para. 2 GG after the unjust rule of the National Socialists explains the connection to the idea of pre-state and universal human rights and therefore links it in substance to the natural-legal, European-Atlantic tradition of human rights.<sup>32</sup> The natural rights, ascribed to human beings, were not seen as simply immutable, rather they are also to have a inviolable core.

In any event, natural law did not lend itself to the prevailing assessment, as a “catalogue of legal obligations”.<sup>33</sup> It must, in order that it—and this was the stated aim after

<sup>27</sup> See Deputy v. Mangoldt, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: Der Parlamentarische Rat 5/II; 1993, p. 584, 593 f. Siehe auch den Abg. Eberhard, ebd., p. 600: “There are these eternal, inalienable rights to freedom and human of para. 2 and we transpose them in our own time”.

<sup>28</sup> Deputy v. Mangoldt, 22. Sitzung des Ausschusses für Grundsatzfragen vom 18.11.1948, in: Der Parlamentarische Rat 5/II (1993), p. 584, 594.

<sup>29</sup> Schmid had already indicated it as a question in the 2<sup>nd</sup> meeting of the Plenum of the Parliamentary Council on 8. 9. 1948 in his report on the task given by the Parliamentary Council in respect of the exploratory work and drafts (in: Der Parlamentarische Rat 9, 1996, Dok. Nr. 2, pp. 18-69, 38) “not only of theoretical, but of eminent practical meaning [...] whether these basic rights should be considered rights which a the state has bestowed or as pre-state rights, as rights, which the state already encounters when it emerges, and which it merely guarantees and must regard”.

<sup>30</sup> See the citation in fn. 16.

<sup>31</sup> See Bergsträsser, 3. Sitzung des Ausschusses für Grundsatzfragen vom 21.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 4, pp. 28-61, 29: “These pre-state rights can be traced to two different sources. One is the natural right of the Middle Ages, which goes back to Aristotle; the other is the modern natural law of the Enlightenment. Both sources interview and correspond to themselves in many respects”.

<sup>32</sup> See. C. Starck, in: v. Mangoldt/Klein/ders., GG, Kommentar, 5. Aufl. 2005, Art. 1 Abs. 2 Rn. 126 f., 131 f. m.w.N.

<sup>33</sup> According to Heuss, 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.9.1948, in: Der Parlamentarische Rat 5/I, 1993, Dok. Nr. 5, pp. 62-87, 72.

the experience of its most flagrant disregard under the National Socialist regime—here and now again be allowed to come into effect, and first be “translated” into a positive law. Basic rights pertain as positive law “independent from particular religious or philosophical beliefs”;<sup>34</sup> they cannot in consideration of this hence—in difference to misunderstood natural law—in their application and—in times of necessity, enforced—efficacy be put into question.

With human rights as their ideal pre-state origins, basic rights are to materially remain permanently and inseparably united. Therefore this unity should be maintained, through the fact that pre-state human rights, underlying basic rights, attract attention in their interpretation with the idea of law immanent to them, without human rights themselves assuming the character of positively valid constitutional law.<sup>35</sup>

Such a pre-positive foundation stone of basic rights is laid, upon which they are based and with which they are permanently united. This has far-reaching consequences.

Indeed natural law is “not, on its own terms, a part of positive law, rather it belongs in the regions of legal ethics, to the criticism and perhaps delegitimation of positive law and the impetus to change and improve this law”.<sup>36</sup> But the constitution, with the affirmation of art. 1, para. 2, demolished the bridge between (natural-legal) human rights and (positively valid) basic rights, and therefore has “taken in something pre-positively existing into positive law”.<sup>37</sup> The universal validity of “uninjurible and unchangeable human rights” is pre-determined. “Subsequent” fundamental rights may not hence, despite their positive-legal autonomy, be separated from their natural-legal foundation of human rights, nor in their interpretative further development may they break loose from the context of justification in which they stand. It is exactly such a “decoupling” which could lead to a misinterpretation of the Constitution, which the fathers and mothers of the Constitution from the beginning wanted to oppose. The idea of human rights, the basic understanding of man as someone who is befitting of rights should hence—positive and legally binding!—remain the permanently valid central idea, which is to be respected in the interpretation of the Constitution. An interpretation of basic rights which might contravene this idea of human rights can therefore also be falsified with regard to constitutional law.

This does not therefore exclude an interpretative adaption and a change of meaning of basic rights against the background of new challenges and dangers to freedom, because, according to the prevailing wisdom in the Parliamentary Council, natural law

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<sup>34</sup> According BVerfGE 88, 203, 252 on the right to life as “the most elementary and inalienable right that emanates from the dignity of man”.

<sup>35</sup> See deputy v. Mangoldt, 4. Sitzung des Ausschusses für Grundsatzfragen vom 23.09.1948, in: Der Parlamentarische Rat 5/1 (1993), p. 62, 68. In as much as it is applicable, see *K.-P. Sommermann*, Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung – Die Menschenrechtsfreundlichkeit des Grundgesetzes –, AöR 114 (1989), pp. 391-422, 407: “The character of the legal proposition of art. 1 para. 2 GG does not lie in the constitutionalization of additional rights”.

<sup>36</sup> *E.-W. Böckenförde*, Bleibt die Menschenwürde unantastbar, in: *Blätter für deutsche und internationale Politik*, 2004, S. 1216, 1223.

<sup>37</sup> *Ebd.*



itself is not mutable, but it is capable of development and, therefore, to a certain extent, historically contingent. Therefore a certain scope of variation for possible interpretations always remains at any time, but the persisting core of which, the normative basis, remains undisturbed. Immutable is the idea of universal rights, befitting human beings by nature, while individual human rights and their contents can alter, up to and in respect of human dignity as their Heideggerian “for-the-sake-of” indispensable core. The natural-legal basic substance, immanent in human rights, must also retain the basic rights corresponding to them permanently as a positive-legal meaning. This follows from art. 1, para 2.

#### 4. Removing the guarantee of human dignity from its pre-positive foundation?

The eminent meaning of the fact that positive constitutional law has, with the provision of art. 1, para. 2, *in itself* consciously and willing taken on a foundation of a pre-positive kind can be clarified in the argument about the new interpretation of art. 1, para. 2 submitted by Matthais Herdegen, that is, the guarantee of human dignity. Herdegen understands the guarantee of human dignity as “a purely constitutional concept”, which he visibly wishes to liberate from the chains of any link to natural law: “The prevailing idea in the Parliamentary Council, that the Constitution, with the guarantee of human dignity, would transfer in a “declaratory” way into positive law a right which is superordinated over the State and Constitution, still has considerable suggestive power. [...] For the constitutional consideration are nevertheless the (inviolable) anchoring in the text of the Constitution and the exegesis of human dignity as a concept of positive law alone decisive”.<sup>38</sup> Ernst-Wolfgang Böckenförde has sharply criticized this attempt: “The guarantee of human dignity as a legal concept is so left alone, detached from and cut-out of the link with the intellectual content in front of it which the Parliamentary Council had in mind [...] What is to be said here strays into the ‘background of the history of ideas’ which is reported knowledgeably, but without normative relevance. The fundamental norm of the Constitution forfeits the supporting pivot”.<sup>39</sup>

In fact, there is a threat in removing the guarantee of human dignity from its pre-positive foundation, that is, losing its meaning.<sup>40</sup> Because exactly for the sake of the regard and protection of inviolable human dignity (art. 1, para. 1), out of the given affirmation of the idea of human rights (“therefore”) in art. 1, para. 2 results, what human dignity in any case in its inviolable core must normatively mean is the legal subjectivity of every human being and his being provisioned with a minimum stock of

<sup>38</sup> in: Maunz/Dürig, Grundgesetz, Kommentar (Stand: Oktober 2009), Art. 1 Abs. 1 (Stand: Februar 2005) Rn. 17.

<sup>39</sup> Bleibt die Menschenwürde unantastbar?, in: Blätter für deutsche und internationale Politik, 2004, S. 1216, 1218.

<sup>40</sup> Richtig E.-W. Böckenförde, Bleibt die Menschenwürde unantastbar, in: Blätter für deutsche und internationale Politik, 2004, p. 1216, 1223: “The reference to the pre-legal basis of the guarantee of human dignity is nothing other than a necessary part of the material establishing of art. 1, para. 1 GG as positive right”.

fundamental rights (the right to life, right to basic freedom and equality, art 2, 3).<sup>41</sup> Out of the pre-state dignity befitting man—not only mankind, but also every (single) human being—corresponding legal rights for him are deduced, which in the form of subjective state-court basic rights find their legal-positive recognition.<sup>42</sup>

Whoever loses sight of this context may be somewhat inclined, taking into account the supposed requirements of the temporal circumstances, to advocate for a “graduated protection of human dignity in the continuity of the development”, for a variable quality of the demand of dignity and protection of early forms of human life on the one hand, and born human beings on the other.<sup>43</sup> It is exactly with such an unequal distribution of elementary legal positions, however, that the idea of human rights, which the German people affirm in art. 1, para. 2, would become misunderstood and mistaken, and hence the absolute guarantee of the positive-legal guarantee of human dignity of the Constitution, the idea, that without exception *all* human beings “by nature” have the same moral status and, hence, also the same human rights.

## 5. Forecast

With the stabilization of the constitutional order its pre-positive foundation has, since the 60s, stepped into the background.<sup>44</sup> Natural law has disappeared behind the curtain of positive law.<sup>45</sup> At the beginning of the 21<sup>st</sup> century it might become necessary to defend capricious misinterpretations of basic rights, to bring out the Constitution yet again and install it as a central idea which enables a certain orientation and direction.

For the sake of the safeguarding of the integrity of the Constitution, its pre-positive foundation must be adhered to and, out of this, the interpretive unfolding of its meaning ensue.<sup>46</sup> The acknowledgment of art. 1, para. 2 is itself one of the inalterable “policies of art. 1” in the sense of the kind present in art. 79, para. 3<sup>47</sup> and therefore of enduring,

<sup>41</sup> See further, *C. Hillgruber*, Das Menschenbild des Grundgesetzes und seine Anfechtungen im aktuellen Bioethik-Diskurs, in: *G. Seubold* (Hrsg.), *Humantechnologie und Menschenbild*, 2006, p. 87, 92-95.

<sup>42</sup> *C. Enders*, Die Menschenwürde in der Verfassungsordnung, 1997, p. 415.

<sup>43</sup> According to *M. Herdegen*, in: Maunz/Dürig, Grundgesetz, Kommentar, Art. 1 Abs. 1 Rn. 65 ff.

<sup>44</sup> *W. Geiger*, Die Abkehr vom Rechtspositivismus in der Rechtsprechung der Nachkriegszeit 1945-1963, in: *A. Rauscher* (Hrsg.), *Katholizismus, Rechtsethik und Demokratiediskussion 1945-1963*, 1981, p. 59 ff.

<sup>45</sup> The image of the retreat of natural law behind “the curtain of positive law” was created by H. Rommen, *Die ewige Wiederkehr des Naturrechts*, 2<sup>1947</sup>, p. 259.

<sup>46</sup> Also according to *J. Zajadlo*, Überwindung des Rechtspositivismus als Grundwert des Grundgesetzes. Die verfassungsrechtliche Aktualität des Naturrechtsproblems, in: *Der Staat* 26 (1987), pp. 207-230.

<sup>47</sup> On the substance of the guarantee—with some differences in emphasis—compare further with BVerfGE 84, 90, 120 f.; 94, 49, 102 f.; *C. Starck*, in: v. Mangoldt/Klein/Starck, Bd. 1, 5. Aufl., 2006, Art. 1 Abs. 2, Rn. 132; *W. Höfling*, in: Sachs (Hrsg.), Grundgesetz, Kommentar, 5. Aufl. 2009, Art. 1 Rn. 68-71; *H. Dreier*, in: ders. (Hrsg.), Grundgesetz, Kommentar, Bd. II, 2<sup>2006</sup>, Art. 79 III Rn. 31. Eingehend *S.E. Schulz*, *Änderungsfeste Grundrechte*, 2007, pp. 127-148.

indissoluble legal-positive (!) validity.<sup>48</sup> To guarantee it is the task of the Federal Constitutional Court as the “Shepherds of the Constitution”. There must therefore, as deputy Süsterhenn had already demanded in the proceedings of the Parliamentary Council and utilized the Federal Constitutional Court for himself as an authority, “be the right to check whether the content of a law corresponds to the spirit and the natural-legal basis of the Constitution, founded on human rights, failing that, in the light of art. 1. para 2, contravening the interpretive, pertinent basic right.

Without a doubt the task of the understanding of extrapositive *Sollenssätze* is demanding, and linked to the danger of slipping into merely subjective certainties. But on the one hand natural law (Christian and secular) is in and for itself no hotchpotch of merely subjective values, rather a rich treasury of rationality (rational law!), and, on the other hand, the dependability of the interpretation of positive law is no less parlous. The supposed legal discipline of method proves itself to be chimerical. Objective constitutional law sees itself consigned to the open society of subjective and also professional interpreters of the Constitution, which recognizes no binding canon of ways of interpretation. In the same way and to the same extent here exists the only all too frequently realized danger, that that which should hold objectively becomes deformed into the subjective through arbitrary the interpretative access of anyone at all. The dizzying multiplicity of the methodic access and, so too, the acquired findings of interpretation, become tolerable only through this, that *one* interpretation, namely the one of the Federal Constitutional Court, is declared to be ultimately binding and authoritative. These procedural rules alone care for a certain measure of consistency in the practical handling of positive constitutional law. Therein, however, the reference to human rights founded on natural-law in art 1, para 2 also has a share.

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<sup>48</sup> With the so guaranteed “eternity” of the self-commitment to inalienable and inviolable human rights the Constitutional stands in the natural-legal European-Atlantic tradition of constitutionalism. Besides that, the Fathers of the American as well as the French constitution saw the unlimited power, capable of altering the constitution as understandable as the eternal connection to natural law, in particular the inalienable rights of human, as limited. See *Jefferson* und *Sieyes* bei *H. Dreier*, *Gilt das Grundgesetz ewig*, 2009, p. 62 m Fn. 145 f.