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## Religious Freedom and the Ethos of Democracy in Ernst-Wolfgang Böckenförde

Michele Nicoletti

Professor of Political Philosophy, University of Trento

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### Abstract

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According to Böckenförde's interpretation in his famous essay "The Rise of the State as a Process of Secularization" (1967), in the formation of modern statehood religious freedom and, more generally, freedom of conscience played a central role. It was "for love of such freedom" that the modern state set inviolable limits on the exercise of its own coercive force vis-à-vis citizens relying on its protection. Nobody may be forced through the coercive tools of political power to hold true something that they do not believe. This dynamic of freedom is further taken up in Böckenförde's analysis of church history and theological traditions, as this essay demonstrates. The conception of religious freedom as a right of the human person, contained in the Second Vatican Council declaration *Dignitatis Humanae*, is a real "Copernican turn." It represents a true revolution in Catholic interpretation of democracy, public ethos, and natural law, which aims at reconciling modern freedom, democracy, and religion through a revised doctrine of the common good.

**Keywords:** religious freedom; ethos of democracy; common good; *Dignitatis Humanae*; natural law

Religious freedom plays a key role in Ernst-Wolfgang Böckenförde's understanding of politics and theology; one might even argue that it is *the* most important role. No other issue has been addressed as consistently and with the same intensity and continuity throughout his entire oeuvre. According to Böckenförde, religious freedom constitutes the point of convergence of theology, politics, and law within the process of the formation of modern society. In what follows, I analyze and discuss Böckenförde's interpretation of religious freedom in his theological writings, first reconstructing his interpretation of the Second Vatican Council declaration *Dignitatis Humanae* as a "Copernican turn," then examining the role of religious freedom in the development of an *ethos of democracy* and analyzing the impact of this interpretation on the idea of natural law.



## Dignitatis Humanae as a “Copernican Turn”

The link between religious freedom and the birth of the modern state clearly features in Böckenförde’s key historical essay, “The Rise of the State as a Process of Secularization.”<sup>1</sup> Therein, the formation of modern statehood is linked not only to the phenomenon of power concentrating in the hands of one sole, monopolistic entity capable of asserting its legitimacy, but also to the process of the differentiation of temporal power from spiritual power, through which the state gained autonomy from the Catholic Church. Within this process, the affirmation of religious freedom, and more generally the freedom of conscience, played a central role. It was “for love of such freedom” that the modern state set inviolable limits on the exercise of its own coercive force vis-à-vis citizens relying on its protection.<sup>2</sup> Nobody may be forced through the coercive tools of political power to hold true something that they do not believe. The modern state therefore places itself—its spiritual foundations—in the hands of this human freedom that it commits to safeguarding. Hence, the paradox in which the modern liberal state finds itself: the state cannot, and does not want to, resort to coercive force to guarantee the very prerequisites on which it, too, relies. From a different angle, the Christian God also chose to place his own announcement, starting from that incarnate “Me” in the person of his son, Jesus, in the hands of the same human freedom, thereby anticipating the paradox, seen above at work in the modern liberal state, of a power that exposes its redemptive power to the risk of freedom.<sup>3</sup> This dynamic of freedom, which Böckenförde rigorously and provocatively describes in his essays on legal history and constitutional history,<sup>4</sup> is further taken up in his analyses of church history and theological traditions.<sup>5</sup>

In his analyses of church history and theological traditions, Böckenförde considers the topic of religious freedom from the viewpoint of the history of Christianity and Christian

<sup>1</sup> Ernst-Wolfgang Böckenförde, “The Rise of the State as a Process of Secularization [1967],” in *Religion, Law and Democracy: Selected Writings*, ed. Mirjam Künkler and Tine Stein, trans. Thomas Dunlap (Oxford: Oxford University Press, 2020), 152–67. Originally published as Ernst-Wolfgang Böckenförde, “Die Entstehung des Staates als Vorgang der Säkularisation” [The emergence of the state as a process of secularization], in *Säkularisation und Utopie. Ebracher Studien. Ernst Forsthoff zum 65. Geburtstag* [Secularization and utopia. Ebracher studies for Ernst Forsthoff on his sixty-fifth birthday] (Stuttgart: Kohlhammer, 1967), 75–94.

<sup>2</sup> See Michele Nicoletti, “For Love of Freedom”: On the Dialectics between Religion and Politics,” in *Religion and the Political*, ed. Montserrat Herrero (Hildesheim: Olms, 2012), 45–59; Michele Nicoletti, “Aus Liebe zur Freiheit”: über die italienische Rezeption des Werkes von Ernst-Wolfgang Böckenförde” [“For Love of freedom”: The Italian reception of Ernst-Wolfgang Böckenförde’s work] in *Die Rezeption der Werke Ernst-Wolfgang Böckenfördes in international vergleichender Perspektive* [The reception of Ernst-Wolfgang Böckenförde’s works from an international comparative perspective], ed. Mirjam Künkler and Tine Stein (Berlin: Duncker & Humblot, 2020), 57–68.

<sup>3</sup> The analogy between the incarnation process of God and the self-limitation of the modern state can be found in Georg Jellinek’s *Allgemeine Staatslehre* [General theory of the state] (Berlin: Häring, 1914), 480. See Hans Kelsen, *Der soziologische und der juristische Staatsbegriff* [The sociological and legal concept of the state] (Tübingen: Mohr, 1928), 227.

<sup>4</sup> Ernst-Wolfgang Böckenförde, *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* [Law, state, freedom: Essays on philosophy of law, theory of the state, and constitutional history] (Frankfurt: Suhrkamp, 1991); Ernst-Wolfgang Böckenförde, *Staat, Nation, Europa: Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie* [State, nation, Europe: Essays on theory of the state, constitutional theory, and philosophy of law] (Frankfurt: Suhrkamp, 1999). Many of the essays from these two collections are published in English translation in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, ed. Mirjam Künkler and Tine Stein, trans. Thomas Dunlap (Oxford: Oxford University Press, 2017).

<sup>5</sup> See Ernst-Wolfgang Böckenförde, *Schriften zu Staat, Gesellschaft, Kirche* [Writings on state, society, church], 3 vols. (Freiburg: Herder 1988–1990); Ernst-Wolfgang Böckenförde, *Kirche und christlicher Glaube in den Herausforderungen der Zeit. Beiträge zur politisch-theologischen Verfassungsgeschichte 1957–2002* [Church and Christian faith in the challenges of the time: Contributions to political-theological constitutional history, 1957–2002] (Berlin: LIT 2007). Many of the essays from these collections are published in English translation in Künkler and Stein, *Religion, Law, and Democracy*.

doctrine. From this perspective, he attributes a key role to the declaration of the Second Vatican Council on religious freedom, *Dignitatis Humanae*.<sup>6</sup> Böckenförde attentively follows the preparatory discussions of the declaration and widely comments on the document in the following years.<sup>7</sup> According to him, the Second Vatican Council's declaration constitutes a "revolution" in the history of the Catholic Church, a truly "Copernican turn" that modifies the traditional position of the church.<sup>8</sup> The declaration represents a shift from a conception of religious freedom as freedom of religious truth, a right that only the true religion can claim, to a view of religious freedom as a right of the human person. The latter right is attached to the nature of the human being itself, not to the human being's subjective characteristics. Therefore, every human being has a right to legal protection from any form of coercion in the sphere of religious belief, regardless of the particular kind of belief the person has, and irrespective of the person actually exercising the duty (still maintained as such) to search for religious truth.<sup>9</sup> The "revolutionary" character of this turn is amply documented by Böckenförde by means of detailed quotations from documents of the previous magisterium and from views taken by the church's major protagonists. Among these protagonists, Böckenförde refers to Pope John Paul II, who defined the declaration *Dignitatis Humanae* as a "revolution."<sup>10</sup> During the Second Vatican Council, as Cardinal Wojtyła, he had contributed to the declaration in light of his experience of religious persecutions, and, after being elected pope, he constantly reaffirmed the value of religious

<sup>6</sup> Paul VI, *Dignitatis Humanae* [Declaration on religious freedom] (December 2, 1965), [https://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

<sup>7</sup> See Ernst-Wolfgang Böckenförde, "Religious Freedom between the Conflicting Demands of Church and State [1964–79]," in Künkler and Stein, *Religion, Law and Democracy*, 115–36; Ernst-Wolfgang Böckenförde, *Religionsfreiheit als Aufgabe der Christen. Gedanken eines Juristen zu den Diskussionen auf dem Zweiten Vatikanischen Konzil* [Freedom of religion as a task for Christians: A jurist's thoughts on the discussions at the Second Vatican Council], *Stimmen der Zeit* 90, no. 176 (1965): 199–213; Ernst-Wolfgang Böckenförde, "Einleitung zur Textausgabe der Erklärung über die Religionsfreiheit" [Introduction to the text edition of the "Declaration on Religious Freedom"], in *Erklärung über die Religionsfreiheit (lateinisch-deutsch)* [Declaration on religious freedom (Latin-German)] (Münster: Westfalen, 1968), 5–21.

<sup>8</sup> See Johannes Isensee, "Die katholische Kritik an den Menschenrechte" [The Catholic criticism of human rights], in *Menschenrechte und Menschenwürde* [Human rights and human dignity], ed. Ernst-Wolfgang Böckenförde and Robert Spaemann (Stuttgart: Klett-Cotta, 1987), 138–74.

<sup>9</sup> As stated in Paul VI, *Dignitatis Humanae*, section 2:

This Vatican Council declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits. The council further declares that the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself. This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed and thus it is to become a civil right. It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. Therefore the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature. In consequence, the right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of this right is not to be impeded, provided that just public order be observed.

<sup>10</sup> Ernst-Wolfgang Böckenförde, "Wahrheit und Freiheit. Zur Weltverantwortung der Kirche heute" [Truth and freedom. On the church responsibility for the world today], *Zur Debatte* 36, no. 6 (2004): 5–6, at 5. This essay also appears in Böckenförde, *Kirche und christlicher Glaube in den Herausforderungen der Zeit*, 457–66.

freedom through his magisterium, as illustrated by the homily of Havana on January 25, 1998: “a modern State cannot make atheism or religion one of its political ordinances. The State, while distancing itself from all extremes of fanaticism or secularism, should encourage a harmonious social climate and a suitable legislation which enables every person and every religious confession to live their faith freely, to express that faith in the context of public life and to count on adequate resources and opportunities to bring its spiritual, moral and civic benefits to bear on the life of the nation.”<sup>11</sup>

For Böckenförde, the analysis of the development of the ecclesiastical conception of religious freedom in the 1960s highlights two fundamental elements.<sup>12</sup> The first relates to the self-understanding of the Christian faith: by fully recognizing religious freedom as a right of the human person regardless of the person’s own religious faith, Christianity definitively understands itself, to use Hegel’s words, as a “religion of freedom.”<sup>13</sup> Christianity thereby relinquishes any temptation of conceiving itself as a religion of the *polis*—a religion that, though not identifying itself with a temporal society, relies on earthly laws and political ordering as well as the tools of earthly coercion. This “religion of freedom” is not in the least a religion merely reduced to the dimension of subjective inwardness: rather, and precisely in light of the structure of incarnation, such religion expresses itself through external acts, customs, and institutions. Yet it does so within a dynamic of freedom, that is, by entrusting the conscience of the believer with fulfilling these external tasks. By freely embracing within itself the life of the spirit, human conscience is able to creatively act in history and contribute to more human conditions of life.

The second element of the ecclesiastical conception of freedom concerns the nature of ecclesiastical pronouncements, in particular, papal encyclicals. The value of religious freedom, which was recognized as a natural right by the Second Vatican Council, had been denied by several papal pronouncements during the nineteenth century. Such earlier statements, situated within the wave of antiliberal polemics in the aftermath of the French Revolution, considered the affirmation of religious freedom as contrary to natural law. Böckenförde reads this shift of position as a genuine “Copernican revolution”—introducing a neat discontinuity compared with the previous stance. This discontinuity clearly comes to the fore if one compares the statements contained in *Dignitatis Humanae* with those contained in the encyclical *Libertas* by Pope Leo XIII (1888). Leo’s encyclical reads: “From what has been said it follows that it is quite unlawful to demand, to defend, or to grant unconditional freedom of thought, of speech, or writing, or of worship, as if these were so many rights given by nature to man.”<sup>14</sup> Contrary to this statement, the Second Vatican Council explicitly asserts the natural right to religious freedom: “Therefore the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature. In consequence, the right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of

<sup>11</sup> John Paul II, Homily delivered in Havana, Cuba, January 25, 1998, section 4, [https://www.vatican.va/content/john-paul-ii/en/homilies/1998/documents/hf\\_jp-ii\\_hom\\_19980125\\_lahabana.html](https://www.vatican.va/content/john-paul-ii/en/homilies/1998/documents/hf_jp-ii_hom_19980125_lahabana.html).

<sup>12</sup> See Ernst-Wolfgang Böckenförde, Preface to section 2 of *Kirche und christlicher Glaube in den Herausforderungen der Zeit*, 194–95.

<sup>13</sup> See Böckenförde, “Remarks on the Relationship between State and Religion in Hegel [1982],” in Künkler and Stein, *Religion, Law and Democracy*, 199–219.

<sup>14</sup> Leo XIII, *Libertas* [Encyclical on the nature of human liberty] (June 20, 1888), section 42, [https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_20061888\\_libertas.html](https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_20061888_libertas.html). The text in Latin is as follows: “itaque ex dictis consequitur, nequaquam licere petere, defendere, largiri cogitandi, scribendi, docendi, itemque promiscuam religionum libertatem, veluti iura totidem, quae homini natura dederit.”

this right is not to be impeded, provided that just public order be observed.”<sup>15</sup> Böckenförde argues that, despite several attempts to harmonize different positions, the two statements above stand in a relationship of “A and non-A.”<sup>16</sup>

Acknowledging this discontinuity obviously has a number of implications. Based on affirmations of the same magisterium, natural law is configured as immutable and clearly intelligible law.<sup>17</sup> Maintaining the substantial immutability of natural law in the face of such shift of positions implies admitting that the magisterial understanding of the contents of such law is an understanding that is arrived at through a historical process and which is therefore subject to development and improvement. As a result, the interpretations of natural law cannot pretend to carry an absolute dogmatic value and cannot be used ideologically; they should rather be taken as orientation criteria that are historically situated and revisable in their form. This means implicitly accepting that papal encyclicals themselves are fallible in principle, although they are expressions of the supreme ecclesiastical magisterium. The infallibility of the pontifical magisterium is thus reserved for the pronouncements of the pope speaking *ex cathedra* and explicitly intending to determine doctrines related to faith or customs bindingly. This is a form of extraordinary magisterium that the pontiff exercises alone, besides the ordinary magisterium exercised by bishops in reciprocal communion and with the pope, which enjoys the same degree of infallibility in doctrinal matters. Beyond such pronouncements, the requirement of infallibility cannot be extended arbitrarily. Hence, it clearly follows that every other kind of magisterial intervention may result in evaluations and indications susceptible to error. This appears to be proven not only theoretically, but also historically, as shown by Böckenförde’s historical analysis of pronouncements in matters of religious freedom in his later essay, “On the Authority of Papal Encyclicals: The Example of Pronouncements on Religious Freedom.”<sup>18</sup>

It is clearly visible that the investigation of the broad theme of religious freedom creates a space for reinterpreting the role of authority within the church itself, as analyzed in detail in two relevant essays. The first of these, “Autorität-Gewissen-Normfindung” (Authority, conscience, norm-finding), is a brief essay in the form of a thesis written in honor of the moral theologian Bernhard Häring.<sup>19</sup> The point of departure is the rupture created between the Catholic magisterium and the *sensus fidelium*, with special reference to the identification and the application of moral norms. Such a rupture calls for interrogating the coherence of individual behavior along with the modality of interpretation of the competences and functions of authority. Indeed, moral principles as well as the truth of faith cannot abstract from the task of interpretation because they represent *Prinzipien-Normen*, (principle-norms) be they given in the form of positive divine commands or regarded as elements of natural law.<sup>20</sup> According to this interpretation, influenced by Robert Alexy’s constitutional theory,<sup>21</sup> principles are norms that require something to be realized to their greatest extent. To be applied to concrete situations in a positive way, these norms must be recognized by human reason within the latter’s own universe of argumentations and turned into factual choices.

<sup>15</sup> Paul VI, *Dignitatis Humanae*, section 2.

<sup>16</sup> Böckenförde, “Religious Freedom between the Conflicting Demands of Church and State,” 130.

<sup>17</sup> See Johannes Messner, *Das Naturrecht. Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik* [The natural law. Handbook of social ethics, state ethics and business ethics] (Innsbruck: Tyrolia, 1950).

<sup>18</sup> Ernst-Wolfgang Böckenförde, “On the Authority of Papal Encyclicals: The Example of Pronouncements on Religious Freedom [2006],” in Künkler and Stein, *Religion, Law and Democracy*, 288–306.

<sup>19</sup> Ernst-Wolfgang Böckenförde, “Autorität-Gewissen-Normfindung, Thesen zur weiteren Diskussion” [Authority, conscience, norm-finding. Theses for further discussion], in *In Christus zum Leben befreit. Für Bernhard Häring* [Freed to life in Christ. For Bernhard Häring], ed. Josef Römelt and Bruno Hidber (Freiburg: Herder, 1992), 131–38.

<sup>20</sup> Böckenförde, “Autorität-Gewissen-Normfindung,” 133.

<sup>21</sup> Böckenförde, “Autorität-Gewissen-Normfindung,” 133, quoting Robert Alexy, *Theorie der Grundrechte* [Theory of fundamental rights] (Baden-Baden: Nomos, 1985).

The role of authority in moral matters is therefore located within the tense relationship between *traditio* and *receptio* that constitutes the “vital principle of the church as *communio*.”<sup>22</sup> Thus, while the conscience of the single believer is certainly compelled to orientate itself according to the official indications of the ecclesiastical magisterium, the latter must be grounded on valid argumentations justifying such indications, and which can positively be embraced by the believer. If a great number of believers are not able to embrace such recommendations after reasoning in good faith and without shortcomings, ecclesiastical authority itself should review its interpretation and verify if new articulations may be required.

As clearly visible in the essay “Wahrheit und Freiheit” (Truth and freedom), this vital relation of communion between *traditio* and *receptio* belongs to the essence of Christianity as a “religion of freedom”: if Christian faith emerges only through freedom, in the free act through which the believer embraces the Revelation, then the institutional structure that originates from this experience—that is, the church, with its authority and norms—must cultivate and respect that very dynamic.<sup>23</sup> Therefore, although the legal moment represents a constitutive moment of ecclesial reality, it cannot restrain itself to replicating the “command-obedience” dynamic of secular law. Rather, it must be defined by a “trust-authority” dynamic.<sup>24</sup>

Within the trust-authority dynamic, the magisterium of authority does not entail the blind submission of the believer, but rather appeals to her autonomous capacity of judgment: because the dogma of infallibility limits infallibility itself to a few specific and exceptional expressions of ecclesiastical authority, Böckenförde argues, it recognizes the potentially fallible nature of other pronouncements and thereby opens a space for the exercise of reason and critical consciousness within the dynamic of obedience.<sup>25</sup> However, he notes that the Code of Canon Law of 1983 does not follow this path. It prescribes for the believer “a religious submission of the intellect and will ... to a doctrine which the Supreme Pontiff or the college of bishops declares concerning faith or morals when they exercise the authentic magisterium, even if they do not intend to proclaim it by definitive act.”<sup>26</sup> In this way, it is not only prohibited to abide by explicitly condemned doctrines, as had been the case in the past, but it is also prescribed that the believer must positively adhere to all teachings of the magisterium. Böckenförde notes that this approach denies any space for autonomous reason that is necessary for the historical elaboration of the magisterium itself, and which allows authority to review and reformulate its own positions, as occurred, for instance, in the matter of religious freedom.

### Religious Freedom and the Ethos of Democracy

Religious freedom plays a fundamental role in the relationship between the church and modernity. After delineating the key structural elements of the modern world (a secular political order, an individualistic anthropological view, freedom and equality of citizens, a market economy, the distinction between law and ethos, the rationalization of social life, a progressive vision of history and a potential for totalitarian drifts), Böckenförde analytically and convincingly examines the relationship between Christianity and the modern world, thus highlighting which aspects of modernity have been affected by typical Christian

<sup>22</sup> Böckenförde, “Autorität-Gewissen-Normfindung,” 137.

<sup>23</sup> Böckenförde, *Wahrheit und Freiheit*, 6.

<sup>24</sup> Böckenförde, 6.

<sup>25</sup> See Böckenförde, “On the Authority of Papal Encyclicals,” 298–306.

<sup>26</sup> Codex Iuris Canonici [Code of Canon Law] (1983) c.752, [https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic\\_lib3-cann747-755\\_en.html#BOOK\\_III](https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib3-cann747-755_en.html#BOOK_III).



dynamics, for instance, the desacralization of political power and the assertion of the infinite dignity of each human being. Simultaneously he emphasizes elements on which the church acted as a restraint, such as the area of religious freedom, as well as the economy, as long as the church attempted to oppose a radically individualistic understanding of private property by holding to the social value of ownership.

In between tensions and reconciliations, this relationship gave rise within the West to the present mode of organization of civil and religious life, which appears to be inspired by a spirit of freedom. The state and the churches encounter each other as carriers, respectively, of a political system of freedom and a religion of freedom. It is for “love of freedom” that the state forfeited recourse to the tools of physical coercion in matters of conscience as well as the religious legitimation of its power, thereby exposing its own existence to the risk that freedom entails. It is for the same love of freedom that the churches relinquished reliance on state power as a means to assert their religious vision, thus acknowledging the value of religious freedom not only for their own believers but for each human being.

In the contemporary world this distinction between church and state has been expressed by two different models: that of the secularized state such as the Federal Republic of Germany as well as Italy, and that of *laïcité* characterizing the French Republic. Whereas the latter aims to remove religion from public life, the former tends to ensure through positive measures the freedom of development of religion both in the public and private space while remaining neutral in religious matters.

In the secular state, religious freedom is recognized as a fundamental right to which all citizens and religious communities are entitled, as a right not to be subjected to violations committed by others or the state in the sphere of personal beliefs and religious practices. The state therefore implicitly embraces religious pluralism and can no longer consider a single religion as a common terrain to which all believers refer, on which its own legitimacy rests, and from which it can derive its own political program. In this respect, the state can be defined as secular, since the scope of its acts and the foundations of its power cannot be found in spiritual elements, but rather exclusively in earthly elements, such as the security and safety of citizens, the protection of their freedoms, the administration of justice, and so forth.

Of course, this distinction does not resolve the problem of the relations between the state and religious communities once and for all. There remain broad areas of *res mixtae*, such as marriage law or the regulations pertaining to public holidays, on which both institutions claim competence. Not only that, but outside of the state sphere properly so-called, religious communities meet within civil society and therein play a fundamental role of social integration, often acting as a support for the political community by cultivating values such as civic loyalty, obedience to authority, the spirit of sacrifice, and human solidarity. Böckenförde speaks of an integrating/legitimizing function of religious communities, although he recalls that such a function must be freely chosen by the communities and not imposed on them by the state. What the state can provide is an institutional space for religious instruction (for instance in school programs), which is necessary for gaining knowledge of the heritage of both traditional and recently arrived religions, as well as for the ethical education of the citizens.

For this relationship of cooperation between the religious and the political community to develop positively, it is essential that churches gain an adequate understanding of the nature of the modern state in its democratic form, its institutions, and its *ethos*. This is the topic Böckenförde addresses in his essay on the democratic *ethos* and ecclesiastical natural law.<sup>27</sup> These are pages drafted with remarkable clarity of mind (especially considering the

<sup>27</sup> Ernst-Wolfgang Böckenförde, “The Ethos of Modern Democracy and the Church [1957],” in Künkler and Stein *Religion, Law and Democracy*, 61–76.

author's young age of twenty-seven at the time), highlighting themes at the center of current debates. In this case, too, Böckenförde proceeds with his typical method: he begins by a historical-conceptual reconstruction of the terms in question, then turns to identifying the problematic issues and eventually elaborates strategies for possible solutions.

The first focal point of his analysis concerns the question of the democratic ethos. Böckenförde is the author of pathbreaking constitutional theory essays on the foundations of the modern democratic order.<sup>28</sup> He argues that modern democracy is grounded on a set of cornerstones, such as individual self-determination and the equality of citizens, and is articulated through specific procedures, in particular as based on the majority principle. This principle is not a mere technical expedient for making decisions, but the result of a set of fundamental principles, including, as mentioned above, the right to self-determination and the equality of citizens. This procedure is put in place to render these fundamental principles effectively operational when collective choices are determined. Thus, the majority principle cannot be used to betray or undermine the underlying principles from which it stems, as occurs for instance when a majority acts in a tyrannical way or where it is utilized merely instrumentally. Modern democracy rests on principles that are of an ethical nature and it must continue relying on them. It can survive only if accompanied by an adequate ethos. This *ethos* entails that the citizens participating in the democratic game implicitly accept the equal right of all participants to determine collective choices. Citizens must be willing to accept decisions made by the majority even when contrary to their own views and, when coming to power, allow their opponents to benefit from the same, intact freedoms and opportunities to acquire power. This ethos is essentially bound to some formal values and leaves open the determination of the contents of democracy itself. Still, such values are essential for democracy and must be guaranteed concretely, or else democracy will decay. The democratic *ethos* therefore implies not only respect for democratic procedures but also a commitment to realizing and maintaining historical conditions within which the democratic procedure can be implemented. As a result, a commitment to fulfilling supposedly higher values cannot be allowed to jeopardize the preservation of the democratic framework. Hence, the democratic ethos is an ethos that commits citizens to constantly verifying whether their demands are compatible with the preservation of a democratic framework. If citizens instead give priority to certain political themes and certain forces that put forward such themes honestly or instrumentally, the democratic organization itself of collective life may decay.

From a historical perspective, Böckenförde remarks that this phenomenon occurred in the dramatic years of the rise of totalitarianisms. By prioritizing given political contents, such as the defense of confessional schools or support to families, a substantial part of the Catholic and Protestant communities endorsed the National Socialist regime and ended by contributing to the dismantling of the parliamentary system: "Looking back, what was required in 1933, then, was to support the political group that promised to offer the staunchest resistance to National Socialism on the basis of a liberal order, even if it did not recognize the confessional school or did not fully respect the natural law conception of property. What the common good demanded was, first and foremost, to protect a liberal-democratic order as such against the emerging dictatorship of National Socialists."<sup>29</sup>

To enhance the ripening of such a democratic ethos in all components of society, it is essential to recall the mistakes of the past and intensify efforts to comprehend the value,

<sup>28</sup> See the following two essays: Ernst-Wolfgang Böckenförde, "Demokratie und Repräsentation. Zur Kritik der heutigen Demokratiediskussion (1983)" [Democracy and representation. On the criticism of today's democracy discussion] and "Demokratie als Verfassungsprinzip (1987)" [Democracy as a constitutional principle], in *Staat, Verfassung, Demokratie* [State, constitution, democracy] (Frankfurt: Suhrkamp 1992), 379–405, 289–378.

<sup>29</sup> Böckenförde, "The Ethos of Modern Democracy and the Church," 68.



including the theological value, of peaceful coexistence between people with different opinions. The secularization of the modern state—that is, the state’s ceasing to be a tool at the service of a unique religious or moral end should not be viewed as impoverishing politics: conversely, that modern politics enables different people and groups to live together peacefully and freely pursue their projects of happiness precisely indicates an increased importance of politics itself.

This should not be ignored by individual believers and their associations, or by churches, which, thanks to the rise of democracies, experience growing possibilities for action. Within democratic contexts, churches, like any other entities, may exploit the mechanisms of democratic life (debates, parties, movements, elections, and referenda) to convey their values or attain their objectives. Still, when they choose to enter the democratic game, they must be aware of becoming a partisan entity, which like any other, may win or lose or may be supported or opposed by other entities through the instruments of political struggle. Under no circumstances may the churches utilize democratic mechanisms only when favorable to themselves, otherwise they would forfeit their credibility for good.

Given such recourse to modern democratic political tools, Böckenförde wonders whether it is more convenient for the church to resort to these tools or to remain independent from all groups, thereby acting as a universal and truly essential interlocutor in matters concerning ultimate values. Obviously, this would obtain in situations of normal democratic life in which people’s very lives and dignity are not called into question.

### A New Interpretation of Natural Law

This frame of discussion further allows Böckenförde to carry out a precise and deep analysis regarding Christian natural law, a frequently recurring topic in conversations on the relationship between Christianity and politics and the limits of believers’ actions in politics. In these essays, he addresses the topic both from a general standpoint, through sharp theoretical fine-tuning, and from the particular angle of “social justice.”<sup>30</sup>

At a general level, Böckenförde’s reflections feed on the wide postwar debate among European philosophers and jurists regarding the so-called eternal return of natural law that accompanies the birth of contemporary constitutions and the interpretation of fundamental rights. His reflections are further inspired by the theological rethinking of the subject, which induces a number of theologians of that time to formulate more critical and cautious thoughts compared with the strongly ideologized positions of the late nineteenth century and the first half of the twentieth century.<sup>31</sup>

In this case, too, Böckenförde begins his inquiry with a historical reconstruction of the issue at hand. Remarkably, the doctrine of natural law is adopted as an official doctrine for Catholic teaching in the nineteenth century, in particular by Leo XIII during a phase of broader redefinition of the relationship between church and modern culture. First, this doctrine is grounded in the conviction that human nature, with its essence and duties, is

<sup>30</sup> Ernst-Wolfgang Böckenförde, “Kirchliches Naturrecht und politische Handlung” [Ecclesiastical natural law and political action], in *Naturrecht in der Kritik* [Criticism of natural law], ed. Franz Böckle and Ernst-Wolfgang Böckenförde (Mainz: Grünewald, 1973), 96–125; Ernst-Wolfgang Böckenförde, “Reflections on a Theology of the Modern Secular Law [1999],” in Künkler and Stein, *Religion, Law and Democracy*, 259–79; Ernst-Wolfgang Böckenförde, “Ethische und politische Grundsatzfragen zur Zeit. Überlegungen aus Anlaß von 90 Jahre “Rerum Novarum” [Ethical and political fundamental questions of our time. Reflections on the occasion of ninety years of “Rerum Novarum”], *Herder Korrespondenz*, July 1981, 342–48; Ernst-Wolfgang Böckenförde, “Der Beitrag politischen Handelns zur Verwirklichung von Gerechtigkeit” [The contribution of political action to the realization of justice], in *Gerechtigkeit in Gesellschaft, Wirtschaft und Politik* [Justice in society, economy and politics], ed. Wilhelm Ernst (Freiburg: Universität-Verlag 1992), 149–72.

<sup>31</sup> See the essays in Böckle and Böckenförde, *Naturrecht in der Kritik*.

knowable by human reason as possessed by each human being, thus constituting a normative bond for each individual person and social group. Second, the doctrine defines human nature as an immutable reality based on the theological presupposition that it has been created by God within an established ontological order. For this reason, this position must be defined from the beginning as a *doctrine of natural Christian or ecclesiastical law*. On the one hand, the doctrine declares that, despite original sin, human reason is capable of grasping the essential and normative elements of human nature; on the other, the doctrine does not entrust the free inquiry of reason with the task of defining human nature, as rational inquiry must theoretically and practically be supported by Christian faith and the contents of revelation as interpreted by the ecclesiastical authority. Therefore, the concept of nature deployed in this view does not qualify as a universally shared concept.

The conception of law itself underlying natural law doctrine is a particular one: indeed, it tends to regard law as part of the world's ethical order and confers on it the task of preventing the human person from engaging in sin. Yet it is precisely this conception of law that is overridden by modern thought, which radically distinguishes crime from sin, thereby restraining the space of law within the sphere of external conduct. Law is not therefore meant to contribute to maintaining the spiritual integrity of the person, but rather allows the attainment of peaceful human coexistence on the basis of principles of justice.

According to Böckenförde, ecclesiastical authorities' failure to differentiate ethics from law throughout the modern period resulted in their belated recognition of the value of religious freedom. Only at the Second Vatican Council is such freedom acknowledged as a fundamental right of the human person. While, from a moral standpoint, it is beyond doubt that truth cannot be treated in the same way as something that is seen as error, legally any kind of belief embraced by the individual person must be respected by political authorities and other individuals, as long as religious freedom is regarded as an inviolable right. Failure to distinguish ethics from law has consequences theoretically as well as practically, as abundantly proven by the transactions of twentieth-century totalitarianisms and the conduct of the churches within totalitarian contexts. Excessively rigid and ideological interpretations of natural law all too often led the Catholic Church to view those posing as defenders of absolute values as trustworthy partners without considering the broader political circumstances and the concrete kind of historical "good" that such partners were pursuing. Böckenförde recalls that this occurred not only in National Socialist Germany, but also in Croatia, from 1941 to 1943, where the church regarded certain leaders as "true Catholics" without paying attention to the politics of ethnic and religious discrimination that they put in place.<sup>32</sup>

This is not about entirely rejecting the tradition of Christian natural law. To the contrary, this is a resourceful tradition that justly and duly calls on every political order to respect fundamental principles and norms. Yet this call indicates principles and norms that are general in character and shall constantly be rediscovered and comprehended in light of present history, as well as realized effectively within a unitary framework in different, contingent situations. What is questionable is an ideological conception of natural law that makes the law overly rigid, vindicating specific goods that are absolutized and detached from a comprehensive view. Problems arise when such normative elements, as both general principles and providing concrete guidelines for conduct, are regarded as rigidly binding for the believers' political action. In this situation, there is a risk of dictating to believers certain rules of political conduct that ignore the proper dimension of the political, that is, the view of the totality, allowing for action capable of concretely safeguarding not only particular

<sup>32</sup> Böckenförde, "Reflections on a Theology of the Modern Secular Law," 265.

interests but the complex of the conditions of life of the whole community. Hence, it comes down to rediscovering the *theological* value of secular modern law and its positive contribution to secular peace as a genuinely human condition of life, respectful of people's rights and freedom. This would be an understanding of law as order for the preservation of human life.

In conclusion, Böckenförde does not reject the teaching of the great natural lawyers of the past, and he indeed quotes Aquinas and many others. But, aligning with Jacques Maritain's reading,<sup>33</sup> he recovers from Aquinas a careful ability to approach human history, an attention to the diversity of situations and the weaknesses of the human, and the constant concern that duly bearing witness to ideals should not generate, in the preordained game of history, unintended effects and situations worse than those to be remedied in the first place.

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<sup>33</sup> See Jacques Maritain, "The Rights of Man," in *Man and the State* (Chicago: University of Chicago Press, 1951), 76–107.