PRO PUBLICO BONO – Public Administration, 2021/2, 86–103. • DOI: 10.32575/ppb.2021.2.5

Ferenc Hörcher

NATURAL LAW, HUMAN DIGNITY AND TRADITION

OF BÖCKENFÖRDE'S CATHOLIC POLITICAL THEOLOGY, FROM A CONSERVATIVE VIEWPOINT

Ferenc Hörcher, Research Professor, University of Public Service, Research Institute for Politics and Government, Horcher.Ferenc@uni-nke.hu
Senior Research Fellow, Eötvös Loránd Research Network, Institute of Philosophy, Horcher.Ferenc@abtk.hu

This paper aims to show the connection between ideas on natural law, human dignity and tradition in the legal-political thought of Ernst-Wolfgang Böckenförde, an influential earlier judge of Germany's Federal Constitutional Court. It starts out from the Catholic background of the legal theorist, and his close connection to Carl Schmitt, probably the most charismatic legal thinker of the age, who, however, burnt himself by his support of the Nazi regime. Böckenförde was politically closest to the Social Democrats, yet political theology remained crucial for his legal thought. His interpretation of the German Grundgesetz was founded on a very strong, universalist interpretation of the concept of human dignity, which he took as the most important, founding value in the value catalogue of the Basic Law. Although not a conservative, Böckenförde also claimed that in a specific legal sense, tradition also plays a major role in legal interpretation. He took over from the writings of his brother, the theologian Werner, the idea that tradition and reception can serve as checks on the way natural law is interpreted. All in all, as Böckenförde points out, the three concepts (natural law, human dignity and tradition) provide a strong foundation for legal and constitutional interpretation.

Keywords:
Böckenförde, political theology, human dignity, tradition

1. INTRODUCTION

Human dignity plays a crucial role in the rise of the discourse of human rights. It already appears in the first sentence of the Preamble of the *Universal Declaration of Human Rights,* as something that is foundational for freedom, justice and peace. It also appears in the first two clauses of Article 1 of the *Basic Law of the Federal Republic of Germany*: 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.'

If you want to understand the career of the term in the context of the dynamic interactions of the post-war discourses of politics and constitutional and international law, one of the most reliable sources that you can turn to is Ernst-Wolfgang Böckenförde (1930–2019), the legal scholar and influential judge of the Constitutional Court of the Federal Republic, from 1983 to 1996. His respect can be illustrated by the following quotes: 'One of Europe's foremost legal scholars and political thinkers', 'who has influenced the German debates on legal theory for more than half a century'.[1] This paper offers a narrative of his views of human dignity, in the context of political theology, natural law and tradition.

Böckenförde had an excellent educational background, as is the case with many of the Catholic legal academics in Germany. He defended his doctoral thesis as a legal theorist in Münster in 1956, and had a PhD in history from the University of Munich. His habilitation thesis was again in law, defended in 1964, which led him to a professorship in Public and Constitutional Law, in legal theory and legal history in Heidelberg, and later in Bielefeld and finally in Freiburg. Yet beside his research into legal thought he also took an active part in the political life of Germany. As a member of the SDP, he participated in the legislative work of the Federal Assembly as well, being a member of the Special Parliamentary Commission of Inquiry on Constitutional Reform, from 1971 to 1976.

His legal career was a powerful combination of active involvement and theoretical reflection. His position as judge of the Constitutional Court allowed him to get involved in solving some of the most intricate political and social issues of the day, contributing to their legal resolution. On the other hand, this job also allowed him to reflect on the major issues of public debate in his country and in a European context, exercising an intellectual impact on the direction of these debates.

His intellectual palette had a further important colour: a self-identification as a practising Catholic. Although he heavily criticised the practice and thought of the Church itself, he remained a loyal member of it until his death. He had his opponents within the Church however, for what was regarded as critical attacks against some of its official lines; as a Catholic he also had his opponents from the outside, including non-believers who claimed that his religious convictions made him biased in his decisions or his theoretical views.

[1] Mirjam Künkler and Tine Stein, 'State, Law, and Constitution. Ernst-Wolfgang Böckenförde's Political and Legal Thought in Context', in *Constitutional and Political Theory. Selected Writings by Ernst-Wolfgang Böckenförde,* ed. by Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2017), 1–35, 1; Judith Hahn, 'Ernst-Wolfgang Böckenförde's Approach to Natural Law as Normative Legal Ethics', *Oxford Journal of Law and Religion* 7, no 1 (2018), 28–50, 28.

Yet he took his own starting point seriously that Catholics have to accept the fact that they are the citizens of a secular state. This was not difficult for Böckenförde. He thought that the logical connection holds: their religious freedom is indeed dependent on the precondition that everyone else can enjoy religious freedom. In other words, the state is (positively) neutral towards the churches. As he himself phrased the dilemma: 'Especially as a jurist I could not understand how someone can claim more for himself than he is willing to concede to others.'[2] Secular freedom is best preserved in a secular state, and vice versa: a secular state has a duty to defend religious freedom, including the religious practice of believers. For these reasons, he fully endorsed the secular concept of the state, which was also declared by the Second Vatican Council, a move within the teaching of the Church which was not only welcomed by Böckenförde, but which he also tried to promote.

Yet there is another side to his view of the secular state as the surest guarantee of religious freedom for Christians. The development of the shift from a Christian to a neutral state was prepared theoretically in the work of Thomas Hobbes, whom he identifies as one of the key thinkers of the new concept of the state.[3] Yet as the title of Hobbes's *opus magnum* shows, the language which enabled him to conceptualise this neutral state, is still the language of religion, the language of Christianity. When Hobbes compares the superpower of the state to that of the *Leviathan,* he takes this example of a monster from the Bible. This way he proves that the language of the Bible formed our frame of references in political thought. Böckenförde has a specific interest in these parallels and overlaps, and due to his cultural background, he is able to show the great debts our political vocabulary owes to that of Christianity.

2. BÖCKENFÖRDE ON POLITICAL THEOLOGY

Political theology can be identified as the overlap of theology and political thought. In particular, political theology reveals the impact of theological concepts and doctrines on political discussion or action, mainly, but not exclusively, in the Western world. If you think of ideas like freedom of thought, sovereignty, charisma or a number of other terms, you will soon realise that the European political reality is largely framed by concepts taken over from theology. But the significance of religious ideas in politics is not only demonstrable on the level of political reflection: there is no doubt that religious ideas can

[2] 'Biographical Interview with Ernst-Wolfgang Böckenförde', in *Religion, Law, and Democracy: Selected Writings,* ed. by Mirjam Künkler and Tine Stein (Oxford: Oxford University Press, 2020), 369–93, 381.

[3] Beside Hobbes, Jean Bodin is an important milestone in the intellectual development, preparing the ground for the birth of the modern state. See Lars Vinx, 'The Political Theology of the Secular State in Hobbes and Böckenförde', *Oxford Journal of Law and Religion* 7, no 1 (2018) 51–73. Vinx mentions 'the French "*politiques*", Jean Bodin, and most importantly Thomas Hobbes', as the key players in Böckenförde's reconstruction of the process leading to the construction of the secular state. See Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der S'kularisation', trans. 'The Rise of the State as a Process of Secularisation', in Künkler and Stein, *Religion, Law, and Democracy*.

motivate explicit political actions, including waging (civil) wars, or self-sacrifice for the good of the community.

The modern discourse of political theology is closely associated with the oeuvre of Carl Schmitt, one of the most controversial figures of 20th century legal and constitutional theory. A highly influential scholar and combatant commentator already in the interwar period, Schmitt committed the mistake of his life when he joined the Nazi party, and became one of its ideological spokespersons. Although he lost his academic position and his career was broken after the end of WW2, he managed to remain very influential among the new generation of legal theorists in the Western part of the divided Germany. Böckenförde met Schmitt in the 1950s and established an especially good relationship with him; the two of them discussing and debating the major jurisprudential issues of the post-Totalitarian moment.[4] One needs to point out two things about this nexus. First, that Böckenförde joined the Social Democrats, so his political views were indeed far away from those of Schmitt. And second, Böckenförde was obviously impressed by the wideness and depth of Schmitt's knowledge of the rich tradition of German *Staatslehre,* which showed his appreciation for the originality of the elderly scholar. As both of them realised that their political views diverged very characteristically, there was no ground for an Oedipus complex, which made it easier for Böckenförde to remain loyal to Schmitt, never denying the impact he made on him, while never endorsing any of the politically unaccepted views of Schmitt.

People often attacked Böckenförde, provoking him to break his relationship with Schmitt. But he never felt like that, as he thought that he can securely distinguish between what is acceptable and what is not acceptable of his teaching and private opinions within the context of a properly working constitutional democracy. In fact, he remained in contact with the elderly scholar until the very end of his life, learning whatever could be learnt from him. He had to keep a very delicate balance in this academic and personal relationship, which was certainly not a master–disciple relationship, but which had many signs that indicated friendship. Yet Böckenförde did not leave any doubts that his views on the issues of democracy and totalitarianism were quite different, in fact the direct opposites to those of Schmitt.

One should also mention another milieu of Böckenförde's intellectual development, to be able to assess his position in the intellectual field of the post-war Federal Germany, and in the context of the rising discourse of political theology. Importantly, Böckenförde was also a member of what came to be called the Münster School or Ritter School: the scholarly circle around Joachim Ritter. While he was still working on his doctoral thesis in law in Münster, he participated in the circle of the Collegium Philosophicum, an initiative of Joachim Ritter, 'one of the most influential German philosophers of the post-war period', famous for his edition of the *Historisches Wörterbuch der Philosophie,* to which

[4] For a detailed account of their relationship, see Mirjam Künkler and Tine Stein, 'Carl Schmitt in Ernst-Wolfgang Böckenförde's work: Carrying Weimar constitutional theory into the Bonn Republic', *Constellations* 25, no 2 (2018), 225–241.

Böckenförde also contributed.[5] Beyond its founder, the disciple of Heidegger and Cassirer, the important thing about the Collegium was that it served as one of the powerhouses which had a major influence on the constitutional arrangement of the new Republic. The list of the most famous members of the school contained – beyond Böckenförde – such names as Max Imdahl, Hermann Lübbe, Odo Marquard and Robert Spaemann. One can identify a Catholic cultural-theological, as well as a liberal-conservative political orientation within the group. Although Böckenförde's party affiliation linked him to the SDP, many of his views were based on the Catholic tradition, a common source of thought with both other members of the group and with Schmitt as well. Another disciple of Schmitt was Ernst Forsthoff, who as a young man also came close to the Nazi party, but later distanced himself from its ideology and practice. Forsthoff also played a major role in the post-war reawakening of German legal thought, having organised a legendary summer seminar, in Ebrach, in Bavaria. Students and professors participated in it on a regular basis, Schmitt and Böckenförde included. The influence of Schmitt on Böckenförde, therefore, should be seen in the context of the Ritter circle and Forsthoff's summer seminar, a rather important early formation through both intellectual and personal exchange. Members of these circles reflected together on what went wrong and when, and how the new order should be invested in with commonly shared values, explicitly relying on the Catholic tradition.

The main point to be established is this: Böckenförde had an intellectual profile, in which the relevance of interpreting theological ideas in order to make sense of political phenomena always remained crucial. This is even more interesting as in many ways he was a progressive public intellectual, whose liberal credentials were never questioned. His interest in Catholic tradition was also connected with his educational background, characterised by doctoral degrees both in legal theory and in history. As a result of his research, and directly influenced by some of his personal contacts, he soon realised that the workings of a secular democracy require that moral traditions which helped its birth, keep informing it, intellectually and even spiritually. Böckenförde's self-perception was that of a Catholic intellectual, who took part in public debates, and in general, in democratic procedures. He was actively involved in exporting elements of Catholic teaching into contemporary discourse. Beyond that: both as a legal scholar and as a historian of ideas, he was convinced that we cannot fully understand certain complex notions that we use, without being aware both of their theological origins, and also of their meaning in a religious context.

[5] For this phrase see Künkler and Stein, 'State, Law, and Constitution', 7, n 16. For a detailed account of the relationship of Böckenförde to the Collegium, see Aline-Florence Manent, *The Intellectual Origins of the German Model: Rethinking Democracy in the Bonn Republic,* PhD Dissertation, Dept. of History, Harvard University, 2016, particularly ch. 5.

3. BÖCKENFÖRDE ON NATURAL LAW

Böckenförde was a headstrong and obstinate thinker. He was loyal to the Catholic tradition that he was brought up in, yet he was not uncritical with this very tradition.[6] He famously gave a tantalising critique of the reproachful role Catholics played in the rise of Hitler's power. He was keen to support the efforts of Vatican II to bring the Church closer to the secular world from which it had excluded itself, and prepared a rather detailed account of the role they could and should pay in a well-functioning secular state.

As a Catholic legal scholar and also as a legal practitioner, he had a keen interest in the notion of natural law. He defended the notion of it, yet once again he criticised the dominant view of it, among Catholics, what he regarded as a rigidly scholastic approach to and understanding of it.[7] His essay *Reflections on a Theology of Modern Secular Law,* gave an account of his nuanced views on this rather vexing problem.

In this essay, Böckenförde quite naturally joins those who took Gustav Radbruch's suggestion of how to deal with the law of totalitarian regimes, like Nazi Germany, seriously. Radbruch's point was that we have to suppose universal standards which allow us to recognise and resist a grossly unjust law. This thesis was expressed in his article, *Statutory Lawlessness and Supra-Statutory Law,* after the end of the war.[8] Böckenförde claims that natural law can help to correct positive law, when our sense of justice contradicts its ethical content.[9] Yet he attributes two further functions to it as well: it supports the legitimacy of positive law, and it can also help as a 'compass for reform and improvement of positive law', serving as a kind of benchmark for the legitimacy of new legal norms.[10] According to Judith Hahn, these are the three basic functions of natural law in Böckenförde's legal thought: the legitimising, directive and corrective function.[11]

His own specific contribution to the discourse around natural law in post-war Germany comes when he criticises the notion of abstract natural law principles. Abstract notions cannot really help us in practical dilemmas. You have to be able to apply natural law in particular contexts, and to do so is also the role and function of a political theology, according to him, which should be presented by publicly engaged Catholics. As we shall see, his own contributions to certain debates in legal theory should be taken as an exemplar of how he conceptualised the role of the Catholic public intellectual in a particular political and constitutional culture.

---

6 His ambiguous relationship to his own religious tradition might bring up the theoretical issue if and how a tradition can be criticised from within that very tradition.

7 In my account of Böckenförde's views of natural law, I will heavily rely on Hahn, 'Böckenförde's Approach'.

8 Published in English in the *Oxford Journal of Legal Studies* 26, no 1 (2006), 1–11. Original German version: 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* 5, (1946), 105–108.

9 Hahn, 'Böckenförde's Approach', 32.

10 The quote is from Ernst-Wolfgang Böckenförde, *Vom Ethos der Juristen.* 2nd ed. (Berlin: Duncker and Humblot, 2011), 49. Quoted and translated by Hahn, 'Böckenförde's Approach', 31.

11 Hahn, 'Böckenförde's Approach', 32.

4. BÖCKENFÖRDE ON HUMAN DIGNITY

One of his most influential contributions to public debate concerned the interpretation of Article 1 of Section 1 of the German Constitution. Böckenförde published an article in the *Frankfurter Allgemeine Zeitung* in 2003 in which he criticised the new direction the interpretation of this clause took in the commentary of the German Constitution by Matthias Herdegen.[12] Böckenförde's point was made obvious in the title of his intervention: 'Human dignity was inviolable.'[13] As he argued, the earlier interpretation of the clause by Günter Dürig turned human dignity onto a pillar of natural law for the whole constitution: 'Dürig's commentary understood […] the guarantee of human dignity as taking into positive constitutional law a fundamental "moral value" that had emerged in the European history of ideas, and which itself relates to a pre-positive foundation as a kind of natural law anchor."[14] Dürig was one of the founding fathers of the *Grundgesetz*. He was a Catholic, and characterised as a Catholic personalist.[15] His emphasis on human dignity was interpreted as a move away from strict Natural Law. According to Dürig's interpretation, this personalist account of human dignity was 'purporting to leave behind the choice between the individual and the collective'.[16] According to Böckenförde, however, it was rather meant to secure a natural law framework for the *Grundgesetz,* in spite of its obviously secular nature. As I shall try to show, the same is true about Böckenförde's own account of the central concept of human dignity, as the foundation of an ethical standard which can serve as a measure of positive law, including the Basic Law. His interest in dignity did not only aim at the questions raised by bioethics, technological innovations and medical inventions. Neither was his interest a dogmatically 'Catholic' one, in the sense of joining the culture war between secularists and believers. As I mentioned earlier, for Böckenförde, to become a constitutional judge meant that one should keep a distance from his own religious convictions, and judge the cases purely in accordance with the *Grundgesetz*. As I shall try to show, he, too, like Dürig, took human dignity as the foundation of the whole *Grundgesetz*.

In order to prove this, I first look at the reason why Böckenförde thought that Herdegen's new interpretation served to undermine this anchor of the Basic Law. Böckenförde said of Herdegen that his new interpretation was 'not an amendment to and updating of Dürig's commentary to reflect new problems and challenges, but an entirely new

12 The new interpretation is to be found in Matthias Herdegen, 'Kommentierung von Art. 1. Abs. 1 GG', in Theodor Maunz and Günter Dürig, *Kommentar zum Grundgesetz,* ed. by Matthias Herdegen et al., loose-leaf collection no 42 (München: CH Beck, 2003).

13 Ernst-Wolfgang Böckenförde, 'Die Würde des Menschen war unantastbar', *Frankfurter Allgemeine Zeitung* 33/35, 03 September 2003.

14 From Böckenförde, *Vom Ethos,* trans. by Hahn, 'Böckenförde's Approach', 33.

15 Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), 98.

16 Ibid.

commentary – a farewell to Günter Dürig'.[17] According to the new interpretation, the clause on human dignity 'the Basic Law […] "declaratorily" adopts into positive law an entitlement that supersedes the state and the constitution'.[18] According to Böckenförde, by becoming part of positive law, the concept of human dignity becomes a legal concept, with its own circumscribed territory of interpretation. This way it becomes too flexible, opening the door for juridical deliberation, which will necessarily lead to a relativisation of its value. As Herdegen puts it: 'In spite of the categorical claim to dignity by all people, the nature and scope of the protection of dignity are certainly open to differentiations that do justice to concrete circumstances.'[19] Böckenförde's disappointment is explicit and pronounced: 'A protection of dignity seen in this light leads by its relativization invariably also to the relativization of the absoluteness and inviolability of human dignity itself.'[20]

It is from this criticism of Herdegen's effort at reinterpretation that we can trace back Böckenförde's original intention. As he saw it, the concept of human dignity was not simply a key legal concept of the Basic Law. Rather, it remained an external anchor of the whole interpretation of the Basic Law. Why was it so important to have that external anchor? Certainly, because of the sinful activity or lack of it of the German state and its leaders, indeed the majority of the German elite, including its legal scholars, leading Germany to WW2 and the Holocaust. In Böckenförde's reconstruction, both the constitutional founders (the members of the Parliamentary Council) and Dürig, as the first interpreter of the starting clause on human dignity, looked for a legal guarantee against the misuse of the constitution, after such an historically disastrous 'abuse of power and the staggering contempt for human dignity'.[21] In another piece by him, the legal scholar recalled the formulation of Theodor Heuss, who called human dignity, with an often repeated phrase, a 'non-interpreted thesis'.[22]

According to his interpretation of Dürig, by the first clause on human dignity, a term was co-opted from European intellectual history to positive constitutional law, but not incorporated, to ensure a pre-positive foundation of the latter. Böckenförde's account of the intellectual genealogy of the concept emphasised two sources: Christian tradition and Immanuel Kant. From the Christian tradition, he referred both to the Bible: 'So God created man in his own image, in the image of God he created him', and to Boethius, who

[17] Ernst-Wolfgang Böckenförde, 'Will Human Dignity Remain Inviolable?' (2004), published as chapter xv of Böckenförde, Künkler and Stein, *Religion, Law, and Democracy,* 354.

[18] Herdegen in Maunz and Dürig, *Grundgesetz,* Kommentar, Article 1 Section 1, margin note 17.

[19] Ibid, margin note 50.

[20] Böckenförde, 'Will Human Dignity', 357.

[21] Ibid. 354–355.

[22] *Der Parlamentarische Rat, 1948–1949. Akten und Protokolle,* vols. 5.1 and 5.2, ed. by Eberhard Pikart and Wolfram Werner (Boppard am Rhein: Harald Boldt Verlag, 1993), vol. 5.1, 72. Quoted in Ernst-Wolfgang Böckenförde, 'Human Dignity as a Normative Principle', in Böckenförde, Künkler and Stein, *Religion, Law, and Democracy,* 339–353, 344.

wrote: 'Persona est natural rationalis individual substantia.'[23] In Kant's concept of human dignity, the key term for him was that the human being is 'an end in itself', which lead him to the Constitutional Court's formulation, that human dignity refers to the 'existence for its own sake'.[24] Both of these sources were external to the constitution, but their application to the concept of human dignity provided a very stable standard, which helped to ensure that an enclosure of its interpretation could never happen. In Böckenförde's view, the role and function of the term human dignity was to rely on the external standard for the evaluation of the whole edifice of the constitution. He quoted from another founding father: 'It is, as it were, the general condition for the entire catalogue of fundamental rights. In its systematic importance it is the actual key to the whole.'[25]

The conclusion of Böckenförde's defence of the original interpretation of human dignity was that its main function was that of an external, ethical guarantee against backsliding into an ethical relativisation of constitutional values. To see the relevance of the emphasised externality of the ethical standard for the stability of the interpretation of the constitution, we should see Böckenförde's understanding of human dignity within the context of his views of natural law.

5. ONCE AGAIN ON BÖCKENFÖRDE AND NATURAL LAW

As we saw, Böckenförde claimed that the clause on human dignity is centrally significant as a guarantee of the interpretation of the whole Basic Law. It serves as the foundation of the foundation ('Fundament des Fundaments').[26] This securing of a foundation for the law, especially of the Basic Law, cannot be achieved from the inside. It is therefore absolutely crucial that the human dignity clause should not be understood as a legal concept, part of positive law. Human dignity should remain a part of what he regards as natural law: 'Dürig's interpretation of the norm, as Böckenförde interprets it, served to root the German Constitution itself deeply in natural law.'[27]

In Böckenförde's view, no democratic state can survive without substantial support from the ethical realm. This is the point of the famous Böckenförde Dictum, which has played a major role in debates on constitutionalism ever since in the German speaking world. Even a liberal state cannot survive, so the dictum runs, if members of the society

[23] *The Old Testament,* Gen. 1:27; Boethius, *Contra Eutychem et Nestorum*, in Boethius, The Theological Tractates, trans. by H F Stewart, E K Rand and S J Tester (Cambridge, MA: Harvard University Press, 1973), 5, quoted in Böckenförde, 'Human Dignity as', n 8.

[24] Ibid. 364.

[25] Carlo Schmid, *Der Parlamentarische Rat,* vol. 5.1, 82. Quoted in Ernst-Wolfgang Böckenförde, 'Human Dignity and the Right to Life at the Beginning and End of Life. Outline of the Problems'. Online: www.con-spiration.de/texte/english/2008/boeckenfoerde-e.html, as the translation of the original German, published in *Stimmen der Zeit* 4 (2008), 245–258, 257.

[26] Böckenförde, 'Die Würde des Menschen', 33.

[27] Hahn, 'Böckenförde's Approach', 33.

which it takes care of, do not share a common moral foundation. 'The liberal, secularized state draws its life from preconditions it cannot itself guarantee […]. As a liberal state it can only survive if the freedom it grants to its citizens is regulated from within, out of the moral substance of the individual and the homogeneity of society.'[28] In other words, members and groups of a society need to contribute to the smooth operations of the state – there is a need for an explicitly 'civil' value production, both by religious and non-religious moral agents. The norm of society's value production leads directly to the notion of natural law. To honour natural law is a prerequisite of the smooth operation of a liberal constitutional state. And natural law is based on Christian thought and Christian belief. This is extremely interesting: that not only the state, but the majority of a society as well, is secular, non-believer or even non-Christian. In spite of this fact, however, constant value production is required even in a non-religious, secular society. European culture, even in its secular phase, is underpinned by a Christian conceptual framework. This is a historical coincidence: the Christian origins of Western culture.[29]

Although natural law, as an external ethical standard, remained crucial for the sustainability of a liberal system according to Böckenförde, he did not accept that sort of legitimation of it which was provided by neo-scholastic, Catholic natural law. Those who wanted to conquer natural law by transferring it into the text of positive law committed a mistake, the same way, Böckenförde thought, it was a misconception to think that the external ethical standards could themselves be identified as transformable into legal concepts. Both of these approaches to natural law misinterpreted the notion, mixing it up with actual, legislated and valid law, excluding the way that it could serve as an external standard, operating as the foundation upon which the law can be built.

But if we call natural law the result of the value production of society, or either Christian Secular, and usually both, it means that we give up its universal claim, and its ahistorical validity. As Hahn puts it: 'Natural law is a similarly fragile resource […] /it/ is based on the moral beliefs and ethical convictions that the members of society share […] and is therefore as changeable as society's value foundation.'[30] This view, that natural law itself depends on the particular state of a given society's ethical views and convictions, can lead to its dependence on culture and history.

Yet a historical or cultural dependence can mean different things in connection with natural law. Already at the time of conceiving the Basic Law, the major view even among Catholic lawyers was that 'Natural law is a cultural construct'. Böckenförde himself looked at it as a historically unfolding structure of norms.[31] 'History shows that the doctrines of natural law with regard to its content are not permanent and supertemporal, but bound to

[28] Quoted from: Böckenförde, Künkler and Stein, *Religion, Law, and Democracy,* vol. 2, ch. 1.

[29] It is worth recalling, how the planned text of the European constitution wanted to dismiss these very same Christian origins.

[30] Hahn, 'Böckenförde's Approach', 37.

[31] For this claim see David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998), 188.

the moral understanding of their time and determined by it.'[32] In short, the kind of natural law that he defended was 'natural law in history'.[33] This was a layered statement, however. One of its layers was that natural law was born in time, simply meaning that it manifested itself historically. A second layer of its meaning, connected to the first one, was that its content kept changing with the flow of time.

Now if the substantive norms of natural law keep changing, one needs to know how to identify the actual normative contents of it. As the application of natural law requires interpretation, it was predictable that different interpreters would arrive to different interpretations of it. Here, Böckenförde's notion of 'natural law in history' accepts the Kelsenian criticism, according to which there will be multiple conceptions of the content of natural law. These different conceptions may even contradict each other. Böckenförde here compares the task of giving content to natural law to the concrete interpretation of the notion of human rights. That is again based on a universal idea, but its actual content is culturally determined. The Western understanding of human rights is a particular way of making this universal norm real, in other contexts other results would come out of a procedure of application. In the same way, the same natural law can result in different interpretations, due to the historical context, its interpretation is born.

Böckenförde makes two further points about the historicity of the natural law doctrine. One is that humanity gets through a learning process historically while it tries to apply the idea, this way reaching an ever richer and more complex understanding of it. To comprehend this point, we can compare it to the development of precedent law, of all sorts of customary law, but in particular common law. There too, judicial decisions are built upon each other, this way making the content of the law ever more explicit and dogmatically more and more complex, without relying on the notion of invention or legislation.[34] The second point is that humankind is helped to uncover the content of natural law by divine revelation, by God's disclosure of the depth of natural law.[35] In Böckenförde's own words: 'It was only by His revelation that God removed the cataract, so to speak, from human thought and cognition, making it possible for truths that had previously been hidden or covered up to be fully recognized and grasped as "natural" truths. There is much to suggest that the recognition of human dignity and its inviolability represents such a case.'[36] This is certainly a sensitive point, as living in a secular age, in a secularised continent, in a secular state, it is really difficult to argue in defence of this point of direct divine intervention. Yet this difficulty does not hinder the reception of his general theory. He does not forget, that even

[32] Ernst-Wolfgang Böckenförde, 'Die Historische Rechtsschule und das Problem der Geschichtlichkeit des Rechts', in *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht,* ed. by Ernst-Wolfgang Böckenförde (Frankfurt/Main: Suhrkamp, 1976), 9–41, 9, 28.

[33] Ibid. 29.

[34] For another effort to make sense of natural law as a historical process of uncovering its content, see Ferenc Hörcher, *Prudentia Iuris. Towards a Pragmatic Theory of Natural Law* (Budapest: Akadémiai Kiadó, 2000).

[35] Hahn, 'Böckenförde's Approach', 43.

[36] Ernst-Wolfgang Böckenförde, 'Reflections on a Theology of Modern "Secular Law"', in Böckenförde, Künkler and Stein, *Religion, Law, and Democracy,* vol. 2, ch. 4, 40.

in Catholic theology, the *differentia specifica* of natural law is that it can be recognised by non-believers as well. We can quote with Judith Hahn the theologian Joseph Fuchs, who succinctly points out: 'natural law exists without the Bible.'[37]

As for Kelsen's criticism of the contradictory interpretations of the content of natural law, Böckenförde, as we saw, admitted that there is a plurality of interpretation, but his main point about it is that there is a gradual development in the recognition of its content. His example is the Church's approach to religious freedom: there is an obvious opposition between the earlier view of the Church, that religious freedom would mean a turning away from truth, for which reason it is not wanted, and the present position of the Church, that religious freedom (of everyone) is a prerequisite of religious belief itself. What happens is not a denial of the basis of the earlier position (i.e. the obligation of the believer to search for the truth), rather a change of perspective, leading from a strict denial of the chance to fail, to the realisation that faith is only possible in an environment of freedom of conscience and religious freedom, while the moral duty to search for the truth still prevails.

Yet even if the argument of a gradual development to recognise natural law is accepted, how should society proceed if there are competing contemporary interpretations of its content? There is a question of legitimacy to be raised here. Who defines what natural law is, if it is not regarded as an integral part of the Church's doctrine?[38] Here, Böckenförde seems to be rather creative, yet it is easy to see that his explanation comes, indeed, from the Church's teaching.

6. BÖCKENFÖRDE ON TRADITION

Judith Hahn convincingly showed that Ernst-Wolfgang Böckenförde cooperated with his brother, the theologian Werner Böckenförde, in searching to answers for vexing questions like the one above. He knew he had to find a proper answer to the question of how to decide which is the right understanding of natural law in a situation of competing alternatives. The two brothers could tackle together the most delicate issues of Catholic teaching and its relevance for contemporary society. While Ernst-Wolfgang himself was cultivated – beside his legal, historical and philosophical education – in the Catholic social teaching and moral theology as well, his brother, Werner was a proper theologian. The two of them nicely complemented each other.

In connection with the problem of the last subchapter, i.e. how to choose the authority to define natural law, certainly, the Church is more than the authoritative voice of the magisterium. Papal encyclicals, of course, have what Böckenförde calls the 'presumption of rightness'. Yet, as with legal norms, their validity finally depends on their reception. The judgement of the magisterium has to be reconfirmed by what is called the sense of faith,

[37] Josef Fuchs, 'The Natural Law in the Testimony of the Church', in *Natural Law and Theology,* ed. by Charles E Curran and Richard A McCormick (New York: Paulist Press, 1991), 5, 10.

[38] Bernd Rüthers, *Rechtstheorie.* 2nd ed. (München: CH Beck, 2005), 443.

sensus fidelium, the belief of the faithful, of the members of the community of believers. In other words, to call a norm authoritative, we need both the support of the magisterium, and the acceptance of that decision by the whole religious community. Describing these two sides of the check over the doctrines of the church, and in particular over what should be regarded as the content of natural law, Böckenförde identifies the two sides with two, opposite but complementary theological concepts: with that of tradition and reception.[39] It is important to emphasise that these concepts are meant in their theological sense here. The concepts are familiar from another writing by Werner Böckenförde, where he offers them as his alternative, replacing the accepted ones of command and obedience, which he finds hierarchical, and not reflecting truthfully the Catholic teaching of the relationship and responsibility of the religious leadership and the community of the faithful. In connection with the idea of how that teaching of the Church is transmitted, Werner Böckenförde points at a 'process consisting of tradition and reception'.[40]

These terms were known in Roman law already, but with a much simpler, legal meaning. *Traditio* meant a change of ownership by means of a mere delivery. *Receptio,* on the other hand, meant to receive, with another abstract noun, acceptance. The reason behind the shift in the meaning of them is that here it is not an object that is delivered and received, but an abstract entity, a doctrine or teaching. Also, by connecting the two, as identifying two sides of the same thing, there is a further shift in the meaning: both those who give it over and those who take from others have their own responsibility. The same way in the church: those who lead, and those who follow have their special, but complementary mission or calling, in relation to the future of belief.

For a conservative, however, there is a further crucial aspect. Tradition is a keyword of the conservative agenda as well. As such, it is the product of the debate about modernisation and the ideology of progress in the late 18th century. The movement later identified as the Enlightenment looked at the past as something that needed to be surpassed, but Burkean conservatives and early Romantics repositioned the idea of the past, as a golden age, the inheritance of which needs to be saved. 'In the later 18th century, the mobilisation of "the past" as an explicit political resource became especially important, and a contrast between "traditional" and "modern"—as opposed to "ancient" and "modern"—was stressed.'[41] The Enlightenment saw the Church as the major impediment of social and cultural progress, initiating what Charles Taylor called the secular age.[42] Burkean Conservatives and Romantics, on the other hand, were aware of the social mission of the Church: to preserve and transmit the traditions of a culture – a point which is crucial for Böckenförde.

---

[39] Ernst-Wolfgang Böckenförde, 'On the Authority of Papal Encyclicals: The Example of Pronouncements on Religious Freedom', in Böckenförde, Künkler and Stein, *Religion, Law, and Democracy,* vol. 2, 301.

[40] Werner Böckenförde, 'Statement aus der Sicht eines Kirchenrechtlers auf der Jahrestagung der Arbeitsgemeinschaft Katholischer Dogmatiker und Fundamentaltheologen zum Thema „Der Claubensinn des Gottesvolkes"', in *Freiheit und Gerechtigkeit in der Kirche. Gedenkschrift für Werner Böckenförde,* ed. by Norbert Lüdecke and Georg Bier (Würzburg: Echter, 2006), 161, 163.

[41] Andy Hamilton, 'Conservatism', *The Stanford Encyclopedia of Philosophy,* Spring 2020, ed. by Edward N. Zalta.

[42] Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap Press of Harvard University Press, 2007).

If we discuss tradition in the context of social sciences, Weber's notion of traditional authority is also soon invoked, beside charismatic and rational-legal authority. Certainly the magisterium of the Church relies on traditional authority, fulfilling its function of transmitting the message of Christ. Yet the Böckenförde brothers complete this picture by adding – through stressing religious freedom and human dignity – that authority needs to be recognised by the community of the faithful. For contemporary readers this would signalise a kind of democratic impulse prevailing within the church. Yet in fact that is only an unintended effect of applying a theological pair of concepts used to decide the authoritative interpretation of natural law in a contemporary context of competing interpretations.

If you want to translate this conceptual pair of tradition and reception to the required mechanism prevailing in a secular society, you will find there, too, agents or institutions which have the function to preserve the tradition. On the other hand, you will also find the opponents of this view, who demand the right of intervention in the transition of heritage, and who will actually shape the 'ideology' of the state. If we look at this comparison of Church and state, we can ascertain, that Böckenförde succeeds to negotiate a peaceful cooperation of a traditional and a constructive element in society.

Yet his solution of connecting tradition and reception, which sets up a double test to check the correct interpretation of Natural Law, has its parallel in practical judgement, and in particular in judgements of taste, as described both in Hume's *Of the Standard of Taste* and in Kant's *Critique of Judgement.* In this Humean–Kantian tradition, the objectivity of a judgement of taste is assured by a somewhat similar double test. First comes the ideal critic, who has got an experience- and tradition-based practical knowledge of judging objects of art correctly. Yet the procedure of the ideal critic includes an act of imagination, which lets her see how an imagined, well-informed other would chose in that situation. This way the critic lets her judgement be tested by the common sense of generalised opinion of all the others. As if the ideal critic would have the right and power to choose, while the others have the right of veto, if the choice made is too far-fetched, and does not harmonise with the understanding of a generalised other.

A final point. Realising the competing interpretations of the content of natural law, Böckenförde returns to the idea of a magisterium, or an institutional control mechanism. On the other hand, in order to avoid the potential criticism to rely on an authoritarian type of rule, he is ready to check abstract natural law by both the judgement of ideal critics, but also by the common sense of the community of the faithful, by the *sensus fidelium.* This way he combines a natural law legitimacy of law, and a traditionalist test of natural law.

7. CONCLUSION – THE ENDURING RELEVANCE OF THE CHRISTIAN TRADITION IN EUROPEAN POLITICAL CULTURE

In what follows, I try to show the logical sequence this paper wanted to uncover in Böckenförde's thoughts on political theology, natural law, human dignity and tradition.

This is a sequence which is especially relevant for a conservative philosopher, in an age when Europe tries to cut all its links with religion and natural law, while the demand for a human rights discourse is ever louder. The fact that this sequence is part of the thinking of an author, usually regarded as liberal, and loyal to the Social Democratic Party, makes the case all the more interesting. Also, the intellectual authority of the author makes this interpretative work the more urgent.

As a legal scholar and thinker of the theory of state, Böckenförde was and remained convinced that our political and constitutional vocabulary is rooted in Christian, and in its deep structure, mainly Catholic ideas and doctrines. Unlike most European politicians, who got their initiation into politics either directly from 1968, or indirectly through the post-war generation, for which it was evident that if you want to avoid a repetition of the deeds of the Nazi era, you need to strengthen the moral foundations of your society, and Christianity should play a major role in it, he was also aware, that to fulfil that mission, Christianity had to be cleaned from false views and he published some writings in which he exercised a rather strong criticism of Catholicism in the interwar period to support this intention. Yet this was the criticism of the Church by an active and practising believer, who tried to prepare the Church for a public role, in tune with the intention of the Second Vatican Council. An important segment of his oeuvre remained his political theology, the investigations into the effect of Catholic teaching on the secular state, negative or positive, and especially on the democratic and constitutional state.

One central issue for him in this respect was his firm conviction that natural law is an important condition of the proper operation of positive law. Contradicting its name, natural law was not a part of law in the strict sense of the term, but an eternal standard to which it could and should be compared, to legitimate it, to correct it or simply to preserve it. This attribution to natural law of the role to be the external judge over positive law was and remained a strong claim, one to which Böckenförde remained loyal until the very end of his life.

Yet natural law is an unwanted guest in the secular, liberal public discourse. Therefore, there are some who claim that the German Basic Law's strategic decision to lift the notion of human dignity to a central place was meant to replace natural law with human dignity. Yet Böckenförde's rather stubborn defence of the original interpretation of human dignity in the first commentary of the Basic Law shows that he himself does not look at it like that. On the contrary, his point was that the anthropologically grounded concept of human dignity in fact serves as a safeguard for the external control of natural law over the content of positive law. To sum it up, he was less interested in the cultural war that broke out after 1968, which brought hard-case issues of human rights and human dignity, like abortion or euthanasia into the centre of ideological debate. Rather he tried to defend the necessity to refer to the ethical foundations of the Basic Law in any legally binding interpretations of it.

As natural law was so crucial, and the constitutionally defended concept of human dignity was connected to it in its logic, Böckenförde could not avoid addressing the argument of the historical and cultural saturation of natural law, which was proof in the eyes of Kelsen that it was not, and could not have been a universally valid notion. To explain the

historicity of natural law, while insisting on its universal validity, most participants to the debate returned to the application argument of hermeneutics, as we know it, for example, from Gadamer's *Truth and Method*. This is not the path Böckenförde takes. Instead, he offers a double test to check it: first there is a need to judge it alongside the work of the magisterium in the Church, on a ground of authority. Secondly, there is a need for general positive feedback from the whole community. In case both of these requirements are met, we can be fairly sure of the statement's truth. The theological terms introduced to explain this double test with the help of his theologian brother, Werner, *tradition* and *reception*, are important from a conservative perspective, because in conservatism, traditional legitimation is crucial. Tradition, in fact, is one of the major pillars of conservative social epistemology. With this interference between Böckenförde's own view and intellectual conservatism, we can illustrate the claim that in spite of his left-liberal political orientation, through his reliance on political theology, natural law, human dignity and tradition, his oeuvre remains important for Conservatism, too.

REFERENCES

1. Boethius, 'Contra Eutychem et Nestorum', in Boethius, *The Theological Tractates,* trans. by H F Stewart, E K Rand and S J Tester. Cambridge, MA: Harvard University Press, 1973. Online: https://doi.org/10.4159/DLCL.boethius-theological_tractates_contra_eutychen.1973
2. Böckenförde, Ernst-Wolfgang, 'Die Würde des Menschen war unantastbar'. *Frankfurter Allgemeine Zeitung* 33/35, 03 September 2003.
3. Böckenförde, Ernst-Wolfgang, *Law, and Democracy: Selected Writings,* ed. by Mirjam Künkler and Tine Stein. Oxford: Oxford University Press, 2020. Online: https://doi.org/10.1093/oso/9780198818632.003.0008
4. Böckenförde, Ernst-Wolfgang, *Vom Ethos der Juristen.* 2nd ed. Berlin: Duncker and Humblot, 2011. Online: https://doi.org/10.3790/978-3-428-53652-8
5. Böckenförde, Ernst-Wolfgang, 'Human Dignity and the Right to Life at the Beginning and End of Life. Outline of the Problems'. Online: www.con-spiration.de/texte/english/2008/boeckenfoerde-e.html, as the translation of the original German, published in *Stimmen der Zeit* 4 (2008), 245–258.
6. Böckenförde, Ernst-Wolfgang, 'Die Historische Rechtsschule und das Problem der Geschichtlichkeit des Rechts', in *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht,* ed. by Ernst-Wolfgang Böckenförde. Frankfurt/Main: Suhrkamp, 1976, 9–41.
7. Böckenförde, Werner, 'Statement aus der Sicht eines Kirchenrechtlers auf der Jahrestagung der Arbeitsgemeinschaft Katholischer Dogmatiker und Fundamentaltheologen zum Thema „Der Claubensinn des Gottesvolkes"', in *Freiheit und Gerechtigkeit in der Kirche. Gedenkschrift für Werner Böckenförde,* ed. by Norbert Lüdecke and Georg Bier. Würzburg: Echter, 2006.
8. Fuchs, Josef, 'The Natural Law in the Testimony of the Church', in *Natural Law and Theology,* ed. by Charles E Curran and Richard A McCormick. New York: Paulist Press, 1991.
9. Hahn, Judith, 'Ernst-Wolfgang Böckenförde's Approach to Natural Law as Normative Legal Ethics'. *Oxford Journal of Law and Religion* 7, no 1 (2018), 28–50. Online: https://doi.org/10.1093/ojlr/rwx072
10. Hamilton, Andy, 'Conservatism'. *The Stanford Encyclopedia of Philosophy,* Spring 2020, ed. by Edward N Zalta. Online: https://plato.stanford.edu/archives/spr2020/entries/conservatism/
11. Herdegen, Matthias, 'Kommentierung von Art. 1. Abs. 1 GG', in Theodor Maunz and Günter Dürig, *Kommentar zum Grundgesetz,* ed. by Matthias Herdegen et al., looseleaf collection no 42. München: CH Beck, 2003.
12. Hörcher, Ferenc, *Prudentia Iuris. Towards a Pragmatic Theory of Natural Law.* Budapest: Akadémiai Kiadó, 2000.
13. Künkler, Mirjam and Tine Stein, 'State, Law, and Constitution. Ernst-Wolfgang Böckenförde's Political and Legal Thought in Context', in *Constitutional and Political*

Theory. Selected Writings by Ernst-Wolfgang Böckenförde, ed. by Mirjam Künkler and Tine Stein. Oxford: Oxford University Press, 2017, 1–35. Online: https://doi.org/10.1093/acprof:oso/9780198714965.003.0001

14. Künkler, Mirjam and Tine Stein, 'Carl Schmitt in Ernst-Wolfgang Böckenförde's work: Carrying Weimar constitutional theory into the Bonn Republic'. *Constellations* 25, no 2 (2018), 225–241. Online: https://doi.org/10.1111/1467-8675.12362
15. Manent, Aline-Florence, 'The Intellectual Origins of the German Model: Rethinking Democracy in the Bonn Republic'. PhD Dissertation, Dept. of History, Harvard University, 2016.
16. Moyn, Samuel, *Christian Human Rights*. Philadelphia: University of Pennsylvania Press, 2015. Online: https://doi.org/10.1017/S0034670517000936
17. Novak, David, *Natural Law in Judaism*. Cambridge: Cambridge University Press, 1998. Online: https://doi.org/10.1017/CBO9780511582844
18. Pikart, Eberhard and Wolfram Werner (eds.), *Der Parlamentarische Rat, 1948–1949. Akten und Protokolle,* vols. 5.1 and 5.2. Boppard am Rhein: Harald Boldt Verlag, 1993.
19. Radbruch, Gustav, 'Statutory Lawlessness and Supra-Statutory Law'. *Oxford Journal of Legal Studies* 26, no 1 (2006). Online: https://doi.org/10.1093/ojls/gqi041
20. Rüthers, Bernd, *Rechtstheorie*. 2nd ed. München: CH Beck, 2005.
21. Taylor, Charles, *A Secular Age*. Cambridge, MA: Belknap Press of Harvard University Press, 2007. Online: https://doi.org/10.1086/590032
22. Vinx, Lars, 'The Political Theology of the Secular State in Hobbes and Böckenförde'. *Oxford Journal of Law and Religion* 7, no 1 (2018) 51–73. Online: https://doi.org/10.1093/ojlr/rwy003

Ferenc Hörcher (1964) is a historian of political thought, political and legal philosopher and philosopher of art. He is Research Professor and Head of the Research Institute for Politics and Government of the University of Public Service in Budapest and Senior Research Fellow and earlier Director in the Institute of Philosophy of the Eötvös Loránd Research Network. His research focuses on early modern history and contemporary analyses of political and aesthetic thought, including the conceptual framework of conservatism and liberalism. His book on Natural Law was published with the title *Prudentia Iuris. Towards a Pragmatic Theory of Natural Law* (Akadémiai Kiadó, 2000). His last published books were *A Political Philosophy of Conservatism: Prudence, Moderation and Tradition* (Bloomsbury Academic, 2020) and *A Political Philosophy of the European City. From Polis, through City-State, to Megalopolis?* (Lexington Books, 2021).