Review of Ernst-Wolfgang Böckenförde: Geschichte der Rechts- und Staatsphilosophie Antike und Mittelalter

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By Betsy Röben

German Constitutional Court judges rarely become household names. They can serve no more than twelve years on the court, their opinions are usually collective, and the actual author's identity is never officially specified unless he or she writes a lone dissent, which is not (yet) common practice. One of the manifold advantages of this system for the body politic is that judges, who must retire at the relatively young age of 68, often return to the professions they had set aside. Those returning to the professoriat have the potential to fortify their institutions, their students and their reading public with the experience gained in twelve demanding years on the court.

Such has been the case with Ernst-Wolfgang Böckenförde, who retired from the *Bundesverfassungsgericht* in May 1996, having served in the Second Senate since December 1983. He returned, emeritus, to his former position: Professor of public law, constitutional and legal history and legal philosophy at the University of Freiburg imBreisgau This portfolio, and the scope of his writings over the 45 years since his first book appeared,[1] render it no surprise that Böckenförde earned not one but two doctorate degrees, in law (Münster) and in philosophy (München).

Böckenförde's *Geschichte der Rechts- und Staatsphilosophie - Antike und Mittelalter* does not draw directly on his labors at the *Bundesverfassungsgericht*. Nonetheless, the reader has the impression that Böckenförde finally concluded that, over the many years and countless days in the courtroom, library and lecture hall, he had at last amassed the sheer time and experience necessary to reflect upon and do justice to the book he has always wanted to write. The project grew out of his lecture notes

[1] Including: Gesetz und gesetzgebende Gewalt (1958), Die Organisationsgewalt im Bereich der Regierung (1964), Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert (1961 and 1995), Das Grundrecht der Gewissensfreiheit (1970), Kirchlicher Auftrag und politische Entscheidung (1973), Probleme des Konstitutionalismus im 19. Jahrhundert (1975), Staat, Gesellschaft, Freiheit (1976), Demokratie und Repräsentation (1983), Staat, Verfassung Demokratie (1991), Staat, Nation, Europa (1999), Vom Wandel des Menschenbildes im Recht (2001).

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for a course at the University of Freiburg of the same name, for which Böckenförde repeatedly enjoyed an enthusiastic response, not only from students of law and philosophy but form disciples of other disciplines as well. To support the interest thus awakened, and to present "well-founded knowledge that leads to further reflection", he presents his former students and new reading public with this book, dedicating it "to all those who are interested still – or again – in foundational knowledge".[2]

The book comprises two main parts: I. Ancient Legal and Political Philosophy and II. Christian Legal and Political Philosophy up to the End of the Middle Ages. The first section begins with a presentation of the "Reality and Development of the Greek Polis" which, in the pattern he adopts for each section and chapter in the book, gives the reader a strong sense of the historical setting in which the respective philosopher was working, and the practical and political concerns of the public he was addressing. Thus, when Böckenförde turns to the individual teachings (in Part I) of the Pre-Socratics, Sophists and Socrates, Plato, Aristoteles, the Stoics and Cicero, neither the reader or the philosophies are lost in a vacuum but take on the shape and the dress of the real issues of the era. For example, the Sophists' efforts to educate citizens for increased participation in political decisions are set against the backdrop of the polis' drastic swings from radical democracy to oligarchy and back, and the citizen's shifting role, in the years surrounding the Peloponnesian War.[3] Or, in a later example, the centrality of Cicero's concept of *consensus iuris* for the *res publica*[4] makes much more sense when presented in the context of the territorial expansion of the Empire and accompanying erosion of Roman ethos and customs.

Böckenförde's anchoring preoccupation with the worldly reality surrounding each philosophy relates directly to his concern with the semantics of law, that law reflect the spiritual and material realities of the world it is attempting to order. The question that he poses at the outset and attempts to answer for each era is: "What is the reality that is signified with the concept 'law' (Recht)"?[5] He answers in part:

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[2] As Michael Stolleis observes in his review in the Süddeutsche Zeitung (4 December 2002 – Literature Supplement, p. V2/18): „This is a clear stance against the supposed Modern and Useful in the current battle over what the basic disciplines of [German] legal education should be. Böckenförde's first message is: no serious jurisprudence without orientation in the theoretical and historical foundations of law." (Translation).

[3] 431-404 B.C., see pp. 30-31. Böckenförde's sparing use of statistics paints a clear and memorable picture of the upheaval for the citizenry in this period, e.g. the "drastic reduction" in 411/410 in the number of active citizens to a mere 5,000; followed, after the defeat by Sparta in 404, by the "tyrannical 'rule of the 30'", with restoration of citizen participation to a reasonable democratic level following about a year later, see pp. 51 ff.

[4] Page 161.

[5] Page 3.

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"Law is not some mental abstraction, removed from the real life of human beings; law is itself a moment in the world of human life and culture. Peoples' attitudes towards life, the answer to the question as to the meaning and purpose of life that define an era and a society, and even the entire culture, have an effect on the law. They contribute to determining what is understood as law, what it can do and what it is good for."[6]

Part II continues the pattern of providing a cultural context for each philosopher, and presents the teachings of Augustine, Thomas Aquinas, Johannes Duns Scotus, William of Ockham, the Late Spanish Scholastics (Francisco de Vitoria, Bartolomé de Las Casas, Francisco Suárez), and Martin Luther. The choice of Duns Scotus and de Las Casas -- the two eye-catchers in the list -- is revealing as to Böckenförde's use of sources and his view of the role philosophy can assume in social change. It is not clear how many others would include these two names, especially de Las Casas, if asked to rattle off a standard short list of medieval philosophers; but Böckenförde includes them for two reasons. First, relatively recent editions of each author's works – we learn – have made them more accessible and have led to new scholarship and interpretations.[7] Secondly, each man effected a certain degree of social change by addressing contemporary questions of political importance. That this angle is important to Böckenförde is consistent with his own engagement in public life outside the courtroom and the university.[8] Böckenförde places each philosopher as a protagonist in the midst of the causes of the day which moved him to act in the way he knew best: by putting pen to paper.

Böckenförde has a third reason for including Duns Scotus: to remind and confirm that the teachings of Thomas Aquinas (1224/5-1274) represented only one direction in medieval theology and philosophy, no matter how influential and no matter how singularly promoted by the Catholic Church as quasi-official doctrine for

[6] Page 4. All translations from German to English are the reviewer's.

[7] For Duns Scotus by virtue of the availability of now 19 volumes of an ongoing publication of his collected works, begun in the 1950s, and replacing the 17th century (!) standard by L. Wadding, pp. 269, 432. De La Casas' work became more accessible in the 20th century with the discovery, especially in connection with de-colonization and, later, liberation theology, of works previously thought to have vanished, p. 343.

[8] Just one example is his short essay "The Significance of the humanities in political life" (Die Bedeutung der Geisteswissenschaften im politischen Leben) for the web site "1000 Words for the Humanities", http://1000worte.besign.info/beitrag_boeckenfoerde.html, where he states for a broader public (in translation): "Being knowledgeable and educated in the humanities affects human beings' political orientation and goals, leading them away from emotionalism and the absence of critical thinking, usually in the direction of enlightenment and humanism. … Beyond encouraging rational discourse in the political process, it is also a necessary precondition for first finding adequate solutions to political problems and challenges."

theological training.[9] Born near Edinburgh some 90 years after Aquinas' death, Duns Scotus (b. 1265/6 Duns, d. 1308 Cologne), was a Franciscan monk active in the hard fought theological-philosophical debate between those who accepted - in the Thomist tradition[10] - the possibility of reconciling Aristotelianism and Christianity, and those who did not. On the one hand this debate played out between the Franciscans, with their Augustinian tendencies, and the more Aristotelian Dominicans.[11] Their squaring off was set within a larger power struggle, ongoing since the time of Aquinas, between established university theologians and the upstart religious orders, who eventually secured official status as qualified to teach at the universities alongside the secular clerics.[12]

In the end, the debate in which Duns Scotus engaged with Aquinas' proponents was no less than that between Will and Reason, the implications of which reached from concept of the human being as individual, to the determination of ethical behavior and the character of the political order. Böckenförde summarizes: "The so-called voluntarist direction, which presumed a precedence of the will over reason both in the powers of the soul and in terms of human action, gained a determinative influence in the 14th and 15th centuries, which continued until the Reformation; it supported the expansion and legitimating of the state power of decision. The so-called reason-based direction, which held onto and defended a central role for reason, reached a broad and practical effect above all with the late Spanish scholastics. *For both directions the relationship between intellect, reason and will had fundamental significance*. The question as to the priority of reason before will or will before reason was even related to God and his essence, as well as to nature and the actions of men, including the orders in which they lived. The points of argument in the philosophically led disputes were in the end theologically determined, they had their actual support in the Christian concept of God and the Christian understanding of the World."[13] While none of this may be particularly

[9] Especially since the late 19th century, p. 265, fn. 1 (referring to the 1879 Encyclical *Aeterni Patris* of Pope Leo XIII). R. Cessario, Thomas Aquinas: A Doctor for the Ages, in: R.J. Neuhaus (Ed.), The Second One Thousand Years (2001), 28-39, 37 f., points to the 1983 revision of the Code of Canon Law and its recognition of Aquinas as a master for students of theology, as well as the 1998 encyclical letter of Pope John Paul II *Fides et Ratio*, which "restates the confidence that the church places in Aquinas" (Cessario, p. 38) and acknowledges "the dialogue which he initiated with the Arab and Jewish thought of his time" (*Fides et Ratio*, no. 43).

[10] Page 265: Böckenförde characterizes Aquinas as having used Aristotle's teachings to pave the way for "understanding the world, nature and man as a comprehensive order of reason, created by a God who was conceived of as Will and Reason in one."

[11] Page 221.

[12] Page 266, and Cessario (note 8), 29-31. Duns Scotus taught at the universities of Oxford and Cologne, p. 268.

[13] Page 266, emphasis added. He concludes, at 268: "Not without foundation can the question be posed, to what extent, precisely in the spiritual debates of the 13th and 14th centuries, arguments emerged that in the end led to the modern world, so strongly influenced by autonomy and voluntarism."

new to many of our readers, the pace and cogency (consistent throughout the book) with which Böckenförde recounts and contextualizes the historical development of the debate breathes new life into distantly remembered if not forgotten facts.

Böckenförde draws on newer scholarship to question the traditional view of Duns Scotus as a pure voluntarist. He characterizes his writings as centered around the "possibilities, realities and limits of metaphysics as a science which fulfilled the Aristotelian categories of scientific knowledge yet still left room for its own independent theology of revelation."[14] This inquiry included the question as to the relationship between the rationality of the will and the (non-derivative) freedom of the will.[15] Duns Scotus "argued against the cosmologic and natural philosophical necessity of Aristotle, as interpreted by Arab commentators,[16] according to which nature and world were not created out of a free decision of God, but were eternally there, with no beginning, and naturally had their order in an eternal, legal necessity."[17] His opposition was theologically based but philosophically argued, Böckenförde being careful to note the difference and, throughout the book, the difference between belief and knowledge.[18] Duns Scotus' theological opposition to Aristotelian necessitarianism was based on his understanding of Christianity, which viewed God as the God of love, as a personal and freely acting God, rather than as an Aristotelian "unmoveable Mover".[19] For Duns Scotus, now arguing philosophically, God's will was neither driven by nor derived from his cognition of reason (*Vernunfterkenntnis*); rather his reason was fed, spring-like, by his love for man and prompted his actions. God acted out of freedom, love and omnipotence.[20]

In this "new concept of will and free action," which Duns Scotus viewed as applying to man as well as to God, reason was not set aside; indeed, the will was

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[14] Page 269. Aquinas revolutionized early 13th c. concepts that human knowledge originated in revelation and divine illumination, by arguing that knowledge came from observing the natural world, that "the created world itself … possessed its own intelligibility and, furthermore, that God had equipped the human mind to capture it." Cessario (note 8), 33.

[15] Page 269.

[16] Especially Averoes and Avicenna, see p. 265, whose interpretations "left little room for God as a personal God and creator of the world, who acted out of free will".

[17] Page 271.

[18] E.g. p. 291 for both Duns Scotus and William of Ockham; p. 220 for Aquinas. At 286 Böckenförde lauds Duns Scotus for not hiding the theological premises on which his philosophical arguments were based.

[19] Page 267 (the „unbewegte Beweger").

[20] Pages 269-270. Böckenförde's treatment of such passages appears to spring from genuine personal understanding of the concepts expressed. This renders Part II an important vehicle for communicating the Christian foundations of Western legal and political philosophy to readers who, as a result of living in a post-Christian culture, are often unfamiliar with many aspects of the Christian religion, faith and scholarly traditions.

only then complete when determined by reason.[21] This concept also resulted, Böckenförde argues, in a new normativity for natural law, the content of which was the primary command to love God; all further commandments derived not from the necessity of nature but from God's free, reasonable wilfulness.[22] Thus Aquinas' *lex aeterna* as an unmoveable truth and God's planned order for the world[23] is replaced in Duns Scotus' work by the *legislator aeternus*: for the latter only God is eternal; neither laws nor the world order can be unchangeable. Positive law was also implicated, receiving "a strong component of being related to will and authority, as [was] the power of the legislator to shape law."[24] Böckenförde sees in Duns Scotus' „original human freedom – and equality – to act self-determinatively" a reflection of his image of God, "communicated through the character of the human being as *imago dei*."[25] Applied to political life, this led to deriving the establishment of political authority from an act of free will of individuals, to the rejection of slavery [and] … finally, in this way the foundation was also prepared for concepts of sovereignty."[26]

Active some two hundred years later after Duns Scotus, de Las Casas (b.1484 Sevilla – d. 1566 Madrid) fits more closely today's idea of one engaged in political change, if not our idea of a philosopher, yet Böckenförde describes him as one of the "greatest figures of the Late Spanish Scholastics". From a privileged Spanish family, at age 18 he crossed the Atlantic for the first time with his father, a mere decade after Columbus' first voyage to the New World. Ordained a priest at age 22, he also owned *encomiendas* in La Española and later in Cuba, thus possessing a quasi-feudal power over their Indio inhabitants. Several factors led to a change of heart, and to his renunciation of the *encomiendas* and entry into the Dominican order in 1522. The change evolved into a hands-on and life-long engagement for legal reforms to benefit the Indios in the Spanish colonies, reaching a high point with adoption of the (short-lived) *Leyes Nuevas* in 1542.[27]

His was not a systematic theory of natural law in the Scholastic tradition of Vitoria. Yet Böckenförde sees de Las Casas as taking a significant step beyond Vitoria in his ability to connect the concept of human freedom with the idea of right without having to rely on formulae of Roman Law, drawing instead directly on a natural

[21] Page 273.
[22] Page 281.
[23] Page 226.
[24] Page 286.
[25] Page 286.
[26] Page 286.
[27] Page 340-341. The *Leyas Nuevas*. i.a., "forbade on threat of punishment any enslavement of Indios, and prohibited the building of new *encomiendas*", 341.

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law/theological approach.[28] His presumption of human freedom had implications for his political philosophy: "the original freedom of all human beings, which is their right, leads to the right of self-rule by virtue of natural law. The freedom of individuals implies the freedom of peoples, and their own right to establish and constitute political rule and its organisation."[29] When the *pueblo* are the source of political power, the goal of rule over a people can only be their good and their welfare. These arguments related, of course, to the legitimacy of Spanish rule in the New World, a "highly explosive political question" in de Las Casas' Spain. He argued that even non-Christians had, by virtue of natural law, a claim to self-rule and independence, and went so far as to declare invalid the Spanish king's claim to have derived the right to rule from the transfer to him (in Pope Alexander VI's Bull *Inter cetera*), of all islands, lands, discovered and undiscovered, and their residents, along with the right to convert them to Catholicism. De Las Casas argued that the Pope could transfer only those things that relate to spiritual matters, but not to worldly affairs. This, he argued, left to the church not much more than the right to send missionary expeditions, but not to conquer, and left to the Spanish crown in the West Indies not much more than supervision of the welfare of missionary and evangelisation efforts.[30] Böckenförde concludes that notwithstanding the resistance his teachings often met, Las Casas is an "outstanding example of how legal and political philosophical views of great consequence can grow out of concrete engagement, carried out with tireless energy, for a specific cause."[31]

The distinction between spiritual and worldly authority is a theme Böckenförde traces in the remaining chapters of the book. In his closing chapter, on Martin Luther, he discusses this by also revisiting a second theme stressed in his portrayal of de Las Casas: the authority – or lack of it – to coerce or require religious belief. Luther's teachings on "the two kingdoms" – *regnum mundi* and *regnum Christi* - as they encompass questions of religious conversion and tolerance are presented freshly here.[32] His writings on religious belief as a matter of free will clearly have a special resonance for Böckenförde, who considers them relevant to our own efforts,

[28] Page 345.
[29] Page 346.
[30] Page 350. Conversion was rather to be accomplished by preaching Christ's example of peaceful, gentle, humble and attractive behavior, which was the King's duty to ensure.
[31] Page 351.
[32] Page 379 f. „Die zwei Reiche und ihr Regiment". 382: The *regnum mundi* involves not only the worldly rule whose thought captures humans in the physical world ; God's rule is also active in and for the *regnum mundi*, "so as not to leave this community of people to dissolve in disagreement and constant opposition, but to give them the chance for conversion. This rule is expression of the loving attention of God toward the "non-Christians", which is irresistible."

some five centuries later, to address questions of tolerance and religious freedom,[33] and as part of the larger transition from the middle ages to the modern era. Indeed, Böckenförde sees both Luther and the Late Spanish Scholastics as "standing on the border of that which is called the "medieval world" and pointing into a modern and different world".[34]

Noteworthy technical aspects of the book include its extensive bibliography, which contains primarily German literature and will thus presumably open up new sources for those used to editions and secondary work in other languages. The two-part Systematic Classification at the very back of the book (divided into Legal Philosophy and Political Philosophy (*Staatsphilosophie*)), presents a concise overview of the main themes addressed for each era (e.g. for law: "the task and function of law", and "the compulsory force of law, legal observance and its limits"; for political philosophy: "the task and justification of a state-political order", and "the scope and limits of the effectiveness of political authority"), and deserves study both before and while reading the book. Finally, the use of Latin on practically every page is a feature whose absence would puzzle the German legal public and whose presence in a similar American text would give the average US reader pause. But in fact, most readers whose German is limited should find that the Latin makes the book more, not less accessible.[35]

A final fact about Professor emeritus Böckenförde is addressed to those of our American readers who still might be wondering what attraction a judgeship could possibly hold if not the potential for individual name recognition. In 2001 his books *Recht, Staat, Freiheit* and *Staat, Verfassung, Demokratie* were selected by the Goethe Institute *Inter Nationes* for its ongoing project to make enduring German language works available in other languages. Thus, a partial list of the authors selected that year for translation reads as follows: Adorno (Portuguese and Serbian), Arendt (Portuguese), Böckenförde (Spanish), Bonhoeffer (Albanian), Gadamer (Greek, Hebrew, Portuguese and Ukrainian), Habermas (Lithuanian and Polish), Hegel (Greek), Heidegger (English, Polish, Portuguese, Rumanian and

[33] Page 391-392. Böckenförde asks at 391: "How – centuries later – can the effect and meaning of forced belief (*Glaubenszwang*) be more clearly and strikingly expressed, that it not only robs human beings of their freedom but also destroys their worth and still remains futile?"

[34] Page 402.

[35] Just one example must suffice, involving the difference between the 12th century monastic cloisters and the emerging urban cathedral schools (Domschulen) with their travelling *Scholaren*. Even quickly scanning only the Latin words in the following quotation from p. 219 one understands immediately how the two approaches differed: "Während an den Klöstern die *meditatio* bestimmend gewesen war, wurde an den Domschulen nun die *disputatio* geübt. Der repetitive Lehrbetrieb der abgeschiedene Klöster wurde verworfen, stattdessen die *curiositas*, die argumentierende Wißbegierde und theoretische Neugier gepflegt. .... *Scientia* als *habitus demonstrativus* bedeutete so nicht nur eine Denkmethode unter anderen, sie umfasste eine neuartige Denk- und Lebenshaltung."

Slovenian), Kant (Danish and Hebrew), Luther (Slovenian) and Nietzsche (Bulgarian and Ukrainian).[36] A household name, it appears, after all.

[36] These are just some of the "scientific" titles, which comprising roughly half of the complete list of 243 titles for 2001, (see http://www.goethe.de/in/d/ueberset/bewil-2001-2-f.html); the other half are "literature" and include, e.g. Ausländer, Brecht, Brentano, Domin, Dörrie, Hesse, Goethe, Grass, Kafka, von Kleist, Mann, etc.

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