



Adrian LORETAN:

*Der demokratische Rechtsstaat –
eine Ideengeschichte. Zur Rechtskultur
des Westens und der Westkirche*

[The Democratic Constitutional State –
An Intellectual History: On the Legal Culture of
the West and the Western Church]

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With a scope that demands extensive expert knowledge as well as the courage of an experienced researcher to venture into the realms and intricacies of the titular “intellectual history” (*Ideengeschichte*) – while not avoiding the risk of original judgments – the renowned canonist Adrian Loretan attempts to illustrate the dynamics of how the foundations of the democratic constitutional state were laid. The multitude of skillfully combined research perspectives (Catholic theology, philosophy, ethics, sociology, cultural studies, political science, state law, canon law) and a methodically conducted discourse have resulted in a harmonious “depiction” – like a mosaic whose tesserae are the central themes of human thought: freedom – natural law – fundamental (constitutional) legal principles. The process of building the institutional foundations of modern statehood, as depicted in the monograph, is organized by the “logic” of the premise that the idea of the rule of law intertwines the history of ideas with the history of institutions.

And speaking of methodology, we can easily discern the influence of Jürgen Habermas's thought on the formal (and, indeed, often substantive) aspects of the Adrian Loretan's research. Suffice it to say that the author's narrative resonates in many places with the ideas of the doyen of German philosophical thought, and direct references to passages from the "classic" work: *Auch eine Geschichte der Philosophie* (Berlin 2019), are the best evidence of this (the work in question is, incidentally, cited in the introduction as a primary source of inspiration – see p. 16). Loretan writes: "The West as a legal community cannot be understood without the interrelation of intellectual and institutional history. Jerusalem, Athens, and Rome: 'This is the characteristic tension between monotheism, science, and republican tradition that the West must endure' [Habermas]." And the author promptly adds: "The philosopher Jürgen Habermas develops a history of philosophy, which, as a sociologist, he closely links to the legal history of institutions. From this unique interaction of intellectual history (philosophy) and institutional history (law), the idea of the liberal, that is, free, constitutional state developed in the West" (p. 70).

The impact of the author's discourse lies not only in the significance of the issues raised (e.g., "What role did the law of the theologically defined 'church of law' play in the emergence of secular constitutional states?" – p. 147), but also in Loretan's uncompromising nature, as he does not refrain from difficult questions, such the one posed on page 524: "Does the Church's law deliberately exclude its own legal tradition and thus modern constitutional development, because this is how the class-based society of clergy and laity, or the unequal rights of individuals, can still be legitimized?" It is worth pausing here for a moment. The critical tone evident in the quoted statement compels us – in the name of scholarly integrity – to inquire about the author's initial epistemological-methodological position – or, more precisely, about the approach to the relevant *loci theologici* in reflecting on the aforementioned issues – given the specificity of canon law, determined by the sacramental nature of the Church (Klaus Mörsdorf). If the monograph does not provide information in this regard, then in another recently (2024) published book,¹ Adrian Loretan defines his "position" (comprehensively) as a counterpoint to the methodological assumptions of Judith Hahn, the said book's co-author. Unlike his theologically-oriented colleague, he views canon law as a legal discipline. In his view, the appropriateness of practicing canon law in this manner is

¹ A. LORETAN: *Kanonistik – Rechtswissenschaft oder Theologie?* Freiburg i. Br. 2024.

justified by the legal imperative of effectively implementing urgent structural reforms in the Church *hic et nunc*. (To counter this rather hyperbolic thesis about the insufficiency of the critical theological judgment in this respect, I could draw on arguments developed in one of my earlier articles.²) Significant for the author's positioning is the view expressed in the 2024 book: "The Church legal science must undergo a new change of perspective from a legal-philosophical standpoint in order to remain in dialogue with the modern legal science of Western constitutional states in the future. It must move from a hitherto theologically presupposed absolute standpoint of God to a subjective perspective of the freedom of human beings as created in the image of God."³

In this context, it is somewhat surprising that the monograph under review omits, first of all, Benedict XVI's much-discussed speech before the General Assembly of the United Nations Organization in New York delivered on the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights,⁴ secondly, the famous debate between that Pope and Jürgen Habermas on the issue of: Which deserves epistemological primacy in the organization of public life, secular reason or religious faith? The debate, the conclusions of which were neatly summarized by a German expert: "In their own manners and styles, both Habermas and Ratzinger argue that secular reason and religious faith are interrelated and interdependent cultural resources that must exist in a dialogical and mutually respectful relationship. The secularization of public life was a defining feature of the modern world. If these two figures are to be believed, the postmodern world may look quite different."⁵

However, there was no shortage of – if I may return to the "list" of key research questions – original reflections on the famous "Böckenförde Dilemma" (1964): How the individual and the institutional aspects of religious freedom can be reconciled? (p. 516). *Nota bene*, the passage cited by the author from Ernst-Wolfgang Böckenförde's well-known book, which

² A. PASTWA: "The Law of Christian Freedom in the Spirit": New Impulses for Church Legislation." *Religions* 16/3 (2025), 329, <https://doi.org/10.3390/rel16030329> [accessed 10.03.2025].

³ Ibidem, p. 72.

⁴ Address of April 18, 2008. *Acta Apostolicae Sedis* 100 (2008), pp. 331–338.

⁵ H.-U. WEHLER: *Exchange between Jürgen Habermas and Joseph Cardinal Ratzinger on the Dangers of Rational and Religious Extremisms* (2004), Abstract, <https://german-history-intersections.org/en/knowledge-and-education/ghis:document-30#note-6> [accessed 1.03.2025].

emphasizes an individual rights-based, libertarian perspective on the relationship between the state and the churches: “As a state of freedom, it can exist only if the freedom it provides to its citizens is regulated from within, from the moral essence of the individual and the homogeneity of society”⁶ – was further elaborated upon in two interviews in 2009 and 2010. During them, Böckenförde responds to criticism that he had exaggerated the ethical force of religion. Since this source-based premise was omitted in the reviewed monograph, it is worth quoting at least the key passage from the aforementioned argument in the 2010 interview: “From the perspective of the state, a liberal order needs a unifying ethos, a kind of ‘common sense’ among those who live in that state. The question then becomes: What is the source of this ethos, which the state can neither coerce nor enforce? One could say: first and foremost, the lived culture. But what are the factors and elements of this culture? Here we are indeed dealing with sources such as Christianity, the Enlightenment, and humanism. But not automatically any religion.”⁷

As for the need for a unifying ethos, there is one more question worth noting, which John Rawls introduced into the debate and which Adrian Loretan did not fail to raise (p. 26): “How can a stable and just society of free and equal citizens, who are drastically separated from one another by reasonable yet mutually exclusive religious, philosophical and moral doctrines, survive in the long term?”⁸ The pessimistic tone of this polemical question goes hand in hand with a characteristic statement by Jürgen Habermas, which identifies a chasm (!) between natural reason and religion, with the latter’s “irrational” nature. The said “irrationality” was permanently attributed to religion during the Enlightenment – following the period of religious wars and conflicts of the late Middle Ages between the denominations in Western Europe. And from this, a simple conclusion follows: from the perspective of the liberal state only those religious communities deserve the label “reasonable” that, out of their own conviction, renounce the violent enforcement of their religious truths. Habermas’s argument culminates in the following imperative: these communities (and their members), as they engage in activities in secular states governed by the rule of law, face the challenge of embracing and assimilating a threefold

⁶ E.-W. BÖCKENFÖRDE: *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*. Frankfurt a. M. 2006, p. 112.

⁷ “Freiheit ist ansteckend.” *Frankfurter Rundschau*, 2. November 2010, pp. 32–33.

⁸ J. RAWLS: *Politischer Liberalismus*. Frankfurt a. M. 2003, p. 14.

reflection: “First, religious consciousness must process the cognitively dissonant encounter with other denominations and other religions. Second, it must adjust to the authority of sciences, which hold the societal monopoly on world knowledge. Finally, it must engage with the premises of the constitutional state, which are grounded in a secular morality.”⁹

One may safely conclude that it is within this intellectual framework that Adrian Loretan’s thought reveals its originality. In the name of “reconciliation between modernity and religion” (p. 41) and, in a sense, in contrast to the aforementioned (and other) leading figures of pessimism/skepticism regarding the Roman Catholic Church’s affirmation of the idea of a modern constitutional state, the author, on the one hand, proposes a “revival” of the Church’s great tradition of liberty, and on the other, demonstrates implicitly the validity of Peter Abelard: *fides quaerens intellectum* (faith seeking intelligence), also in the reverse direction: *intellectus querens fidem* (intelligence seeking faith). After all, the issue today is “necessary relatedness between reason and faith and between reason and religion, which are called to purify and help one another. They need each other, and they must acknowledge this mutual need.”¹⁰ According to Loretan, neither Martin Luther’s “separation of faith and knowledge,” nor the separatist ideas of the French Revolution, nor, finally, the artificial break marked by the Enlightenment’s rejection of natural law in favor of the “law of reason” – are cognitively comprehensive enough to serve as the main paradigm in the study of the subject at hand. The author’s adoption of a different research stance is already revealed by the preliminary (hypo)thesis: “To understand the genesis of the idea of the modern constitutional state, theological, philosophical, and canonical questions of the Middle Ages cannot be ignored” (p. 43). Most importantly, this (hypo)thesis, when verified step by step, yields relevant conclusions, such as: The idea of the rule of law arose in the centuries-long dialogue between the legal sciences of church and state, in the struggle between two legal disciplines for law (*ius*) and justice (*iustitia*) (p. 69); “The ‘church of law’ was a model, even a prototype, for the rule of law. The canon law of the Western Church served as a model for the emergence and development of secular law, for example in the areas of legal certainty, formalization, legal procedures, subjective guilt, and contract and marriage law” (p. 275).

⁹ J. HABERMAS: *Glauben und Wissen*. Frankfurt a. M. 2001, p. 14.

¹⁰ H.-U. WEHLER: *Exchange between Jürgen Habermas and Joseph Cardinal Ratzinger...*

What distinguishes Adrian Loretan's ideological position from the stance primarily associated with the name of Jürgen Habermas is his credible demonstration of the existence of the centuries-long uninterrupted interaction between the history of ideas (philosophy) and the history of institutions (law), from which the idea of a liberal constitutional state developed in the West. Habermas's "classic" argument, which refers to the origins of human rights, is as follows: It is true that the history of Christian theology in the Middle Ages, especially Spanish late scholasticism, belongs to the genealogy of human rights. But it is also true that the legitimizing foundations of ideologically neutral state power ultimately derive from the secular sources of 17th- and 18th-century philosophy; only much later did theology and the Church grapple with the intellectual challenges of the liberal constitutional state.¹¹ Loretan, on the other hand, focuses his argument on emphasizing the continuity between ancient/medieval natural law and modern rational law, highlighting even more clearly the pivotal role played by Spanish Scholasticism in this process: "Popular sovereignty and human rights were already considered in the Spanish classics of natural law in the 16th century. These natural law considerations became very crucial for political theory, even though they had developed within the context of Church legal science. The secular constitutional states that emerged in Europe after the religious wars were oriented toward this Church legal culture. The French Revolution and the Catholic Church in its ultramontanist orientation since the 19th century suppressed this contribution to Western legal culture. It was rediscovered in interdisciplinary dialogue with secular sciences. With the recognition of modern constitutional development at the Second Vatican Council (DH), the way is clearly to resume this dialogue within legal sciences" (p. 526).

The author lends credibility to the aforementioned thesis on the evolutionary development of the (Church) theory of natural rights/human rights by carefully identifying turning points in the history of ideas and institutions under examination. Among these paradigmatic "turning points," the following occupy an important place: (1) The formation of the New Testament ethos of the equality of all people, which found expression in St. Paul's famous statement about the equality of brothers and sisters from the Letter to the Galatians (3:28). "The Second Vatican Council refers to this tradition /LG 32/" (p. 90); (2) The establishment

¹¹ J. HABERMAS: *Zwischen Naturalismus und Religion. Philosophische Aufsätze*. Frankfurt a. M. 2005, p. 107.

of the Cistercian Parliament in 1115 (the first international parliamentary assembly). “The Cistercians developed a new term in their interpretation of the Rule of St. Benedict, which has made world history: *parliamentum*” (p. 176). The concept of *parliamentum* had a direct influence on the development of English parliamentary history, which began with the proclamation of the *Magna Carta Libertatum* in 1215. At the heart of this concept lay canonical principle that what concerns everyone must also be dealt with and approved by everyone; (3) Thomas Aquinas’s seminal *opus magnum*: “By integrating the Aristotelian-renewed natural law tradition of Roman law into his ethics, he established legal philosophy as an independent discipline” (p. 305). “Here, natural law opens itself to a moral universalism. The ‘ought’ of natural law arises from humankind’s participation in the eternal law. The latter is mediated reflexively and appeals to humankind’s free will via reason. The ‘students of Thomas Aquinas’ [...] in the context of the Universal Declaration of Human Rights (1948) would build upon this moral universalism” (p. 308). “The dignity of a free person and the rights associated with it are not tied to the grace of baptism (Augustine), but rather they belong to all people by nature (p. 317); (4) The ideas of Spanish classical natural-law thinkers in the 16th and 17th centuries: “[...] the Spanish classics of natural law laid a foundation for the natural-law recognition of the equal dignity of all people, their equality before the law, and the resulting popular sovereignty of states. The modern constitutions of the USA and France would build upon this foundation” (p. 525).

Adrian Loretan is closely associated with the famous canonical principle *Quod omnes tangit, debet ab omnibus tractari* (Boniface VII), which affirms the subjective freedoms/rights of the individual (as a Christian and a citizen) and entered modern legal thought through Nicholas of Cusa (“That concerns everyone must be approved by everyone and come about through general consent of all, or at least the majority”). It is true that the Western Church’s tradition of freedom, which has championed the principle just mentioned, suffered a marked decline in the 19th and 20th centuries; however, that period of crisis is now behind us. As the author emphasizes, the conciliar Declaration on Religious Freedom *Dignitatis humanae* (1965) proclaims with renewed vigor the fundamental rights to individual and collective religious freedom and, at the same time, manifests the Church’s “yes” to the modern democratic constitutional state. This poses specific challenges for canon law (in the areas of lawmaking and application): in the *ad extra* sphere – a renewed awareness of its own legal tradition; in the *ad intra* sphere – activity aimed at effective and fruitful dialogue

with the sister discipline of state law. It can be said with full conviction that the author's own desiderata constitute sufficient incentive for a wide audience to read this monograph.

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