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Edited by Marta Cartabia and Andrea Simoncini

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A JOURNEY WITH BENEDICT XVI THROUGH THE SPIRIT OF CONSTITUTIONALISM

Marta Cartabia and Andrea Simoncini

INTRODUCTION

In this book legal scholars from many different places and cultural backgrounds discuss the legal thought of Pope Benedict XVI.

Where did the idea for this project come from? Benedict XVI is neither a jurist nor a legal scholar, and probably never intended to be. Yet, throughout his pontificate he was invited to dialogue with political, civil, academic, and cultural authorities, and the speeches he delivered in these contexts reveal a striking sensitivity to the fundamental problems of law, justice, and democracy. This book collects some of the speeches in which the Pope Emeritus reflected most explicitly on these issues along with the comments of a number of legal scholars: it means to respond to the invitation to engage in public discussion on the limits of positivist reason in the domain of law that Benedict launched in his address to the Bundestag.

Each of the speeches considered here was intended for a particular audience, and their contents are framed according to their respective contexts. For example, the lecture at Regensburg took place in an academic environment; there, Benedict focused on the relationship between faith and reason. The speech to the Collège des Bernardins in Paris was addressed the cultural elites of France, a country that, since its foundation, has cultivated a secular culture that distrusts religion; in that context, Benedict described the historical contribution of the Christian faith to the development of European civilization, pointing to the work done by Benedictine Monasteries after the fall of the Roman Empire and the Barbarian devastation. At Westminster Hall in London, Benedict found himself before the

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oldest Parliament in all the western democracies, and in the place where Sir Thomas More was condemned to a cruel death in the name of religious discord; there he expressed enthusiastic appreciation for the liberal democratic tradition, without downplaying his concern for an authentic protection of religious freedom in the West, even today, from any form of subtle threat. When he was invited to the United Nations in New York, Benedict praised the project of human rights, which developed particularly in the post-World War II period with the approval of the Universal Declaration of Human Rights (UDHR) in 1948, and yet did not spare observations that were critical of the contemporary practices of international institutions in protecting rights. And, in his speech before the Bundestag of Berlin, he went straight to the heart of the matter, addressing the foundation of the legal order and the limits of legal positivism, which has dominated the European continent throughout the twentieth century.

The topics vary, as they were designed for and addressed to different audiences; nevertheless, they are joined by a series of core ideas, which Benedict sketches, unpacks, and develops in a coherent way, in the end nearly formulating a sort of organic “public teaching” on the topic of justice and law. None of them is about the so-called nonnegotiable values. Although he was invited to talk to legislators and other civil authorities of western secular democracies, Pope Benedict XVI did not touch upon issues of family, gender, life, abortion, and so on. He rather goes to the foundation of the law, and addresses a set of methodological questions.

The speeches have another common characteristic as well: all were addressed to institutions rooted in the legal and political principles of the western liberal democracies.

In a variety of his writings, Benedict has demonstrated that he is well aware of the phenomenon he calls the “intercultural dimension” of human existence today¹ – the fact that today’s world is host to cultural and anthropological traditions that are radically different from those derived from the encounter between Jewish, Greco-Roman, and Christian thought, which we tend to classify as

¹ J. Habermas, J. Ratzinger, *The Dialectics of Secularization: On Reason and Religion*, San Francisco: Ignatius Press, 2005, 73 ff.

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“western.” These include Islam; Indian culture, or more precisely, the Hindu and Buddhist cultures; and the great tribal cultures of Africa and South America. “In many ways, these seem to call Western rationality into question; and this means that they also call into question the universal claim of Christian revelation.”² For this reason, it is still more important to return to the question of the foundation of legal thought as it has developed in the context of liberal democracies; only a clear awareness of one’s own identity allows for a true openness to dialogue with the various “other” cultures. This dialogue represents the pivotal challenge of the new, globalized millennium.

LAW, REASON, AND REVELATION

“In history, systems of law have almost always been based on religion: decisions regarding what was to be lawful among men were taken with reference to the divinity. Unlike other great religions, Christianity has never proposed a revealed law to the State and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law – and to the harmony of objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God.”³

This excerpt is among the best-known passages from the speech delivered before the Bundestag of Berlin on September 22, 2011, and with good reason. It captures the heart of Benedict XVI’s thought on religion’s contribution to public debate and, in particular, to the construction of the legal juridical order.

The originality of Christianity with respect to other religions is self-evident in this thought – an originality that is often overlooked, not only by secular commentators, but by Christians themselves: it is not revelation, but “reason and nature in their interrelation” that form “the universally valid source of law,” as Benedict says a few lines later in the same speech.

² Id., at 75.

³ Pope Benedict XVI, Visit to the Bundestag, Reichstag Building, Berlin, September 22, 2011.

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On September 17, 2010, at Westminster Hall, he had proposed a similar concept in these terms: “The Catholic tradition maintains that the objective norms governing right action are accessible to reason, prescinding from the content of revelation. According to this understanding, the role of religion in political debate is not so much to supply these norms, as if they could not be known by non-believers – still less to propose concrete political solutions, which would lie altogether outside the competence of religion.”⁴

With these statements, Benedict clears up a persistent misunderstanding in contemporary culture, which has influenced and continues to influence the debate on the relationship between religion and public reason. Benedict XVI overturns the assumption that the contribution of Christianity to the public debates derives from the command of an authority – *ipse dixit*. In political and legal disputes he does not rely on the statements of the religious authority, but on the authority of reason.

Most people believe, to this day, that religious people intervene in democratic discourse on the basis of authoritative dogmas. Therefore they would violate the fundamental rule of every deliberative democracy – *dialogos* among the different positions – and would act as discussion stoppers, irreparably distorting the democratic dynamic⁵. There is a fear that religious authority may contend with the democratically constituted civil authority for the power to set legal norms, leading to an irremediable incompatibility between the two sources of authority. The inevitable conclusion is that “it is precisely the exile of any *Ipse dixit* from the realm of public discussion, the ostracism of all faiths, which guarantees the common ground of the *dialogos* and the mutual equality of all as co-citizens,” with the resulting requirement that “The entire public sphere be emptied of God,” so that a neutral ground for dialogue is preserved.⁶

⁴ Pope Benedict XVI, Meeting with the representatives of British society, Westminster Hall, Westminster, September 17, 2010.

⁵ See, among many, P. Flores D’Arcais, “Laicità tout court, laicità debole, laicità tradita,” *MicroMega*, 1, 2013, 49–59; G. Zagrebelsky, *Imparare democrazia*, Turin: Einaudi, 2007.

⁶ D’Arcais, “Laicità tout court,” 55, 59.

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The case for God's exile from the public square comes from the belief that religious groups' intervention in the democratic dialectic would take the form of a series of prescriptions or commandments derived from a higher will, eternal and unquestionable: indeed, an *ipse dixit*. But nothing seems more alien to Benedict's thinking. He demands that Catholic people engage in a thorough use of reason; he does not allow them to deprive themselves of the beauty and the appeal of using their own reason nor does he permit them to hide behind the authority of the Church, or of the commandments, or of religious precepts. He requires Christians to take part in the democratic *dialogos* using arguments open to everybody, believers and nonbelievers alike: reason and nature, in their interconnection. Because of his certainty that the divine, as *logos*, may be reached through the rational search for truth, Benedict does not hesitate to require the faithful to enter public democratic dialogue with tools that are universal and accessible to all: reason and nature in their interrelation. From this point of view, contrary to a widespread bias, admitting religion into the public square is not tantamount to introducing a fideistic principle into democratic dialogue; nor does it imply relying mechanically on religious precepts as the source of regulation for social, political, and legal problems. Benedict's primary, fundamental point is to remind us that the ultimate sources of law are found in reason and nature and not in a command, no matter what its source.

In the Pope Emeritus' thought we find praise of human reason that is rooted in an understanding of Christianity as the religion of the *logos*, linked since the Old Testament – and more precisely since the translation of the Septuagint into Greek – with Greek culture, with philosophy, and with the “devout enlightenment” of Socrates, who was at once enlightened and in search of God.⁷

⁷ On Socrates, see Joseph Ratzinger, *Truth and Tolerance: Christian Belief and World Religions*, San Francisco: Ignatius Press, 2004. See also the speech that Benedict XVI intended to give in the course of his visit to the Università degli Studi “La Sapienza” in Rome, which was scheduled for January 17, 2008, and then canceled.

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The originality of Benedict's view on Christians in the public square derives from a vision of Christianity as a universal religion, oriented toward everyone, which trusts in the possibility that reason can transcend reason's own abilities.⁸ Benedict makes this point in the words of Saint Paul: "[W]hen the Gentiles who do not have the law [the Torah of Israel] by nature observe the prescriptions of the law, they are a law for themselves even though they do not have the law. They show that the demands of the law are written on their hearts, while their conscience also bears witness" (Romans 2:14).⁹

Because he holds in high regard the value of reason, Benedict offers an interesting response to the dilemma that has persistently dogged contemporary culture in recent decades: that of the role of religion in public democratic discourse. There have been two significant developments in this debate in our contemporary, post-secular era: first, there is a push to rehabilitate religion as a presence in civil life after years of ostracism, which recognizes the contribution religion makes to public dialogue and social life. At the same time, this openness to religions' participation opens up new issues that must be addressed. Indeed, the second prominent aspect is that those who are most sympathetic to the religious phenomenon run into the challenge of communicating doctrines of religious origins to all citizens through a universal language.

The first aspect represents a significant evolution in the debate, which was for decades dominated by a secularist culture that was openly suspicious – if not hostile – to any public expression of religion. This secularist culture sprang from the early theories of John Rawls, who famously believed it is necessary to exclude all "comprehensive conceptions of the good," especially religious ones, from public discourse.¹⁰ Rawlsian theories, although soon mitigated

⁸ For more thorough treatment of the idea of reason freed from positivist reduction and the relationship between religion and reason, see Ratzinger, *Truth and Tolerance*.

⁹ English Biblical quotations were taken from *The New American Bible*, Wichita: Fireside Bible Publishers, 1998.

¹⁰ J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993.

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by the author himself,¹¹ have deeply influenced the cultural mindset of the western liberal democracies, at both the theoretical and the practical levels. More recent developments, however, reveal a new attitude – one that is decidedly more sensitive to the contribution of religious traditions to public decision making. This openness – which can be found even in the more recent thought of Rawls himself – has been developed further by such scholars as Jürgen Habermas and Charles Taylor¹² For Habermas “as long as religious communities play a vital role in civil society and the public sphere, deliberative politics is as much a product of the public use of reason on the part of *religious* citizens as that of *nonreligious* citizens.”¹³ Similarly, Taylor holds that “the general principle is that religious groups must be seen as much as interlocutors and as little as menace as the situation allows.”¹⁴ Both authors, beginning with a realistic consideration of the fact that “vibrant religious communities” or “spiritual families” are present in social life, underline the urgent need of every regime wishing to remain democratic to include them in the decision-making process, given that they are, in fact, components of the social fabric.

The reduction of religion to the private sphere and its exclusion from public debate, propagated by the earliest theorists of the secular state, appear to have now been overcome on the basis of the same fundamental principles of liberal democracy, which originally seemed to lead to the opposite conclusions. Nevertheless – and this is the second significant aspect of the recent debate – this dramatic change generates new issues that must be addressed. If public life opens itself

¹¹ J. Rawls, “The Idea of Public Reason Revisited,” *The University of Chicago Law Review*, 64, 765–807.

¹² See the debate that took place at New York University in October 2009, now published in E. Mendieta, J. VanAntwerpen (eds.), with contributions of J. Butler, J. Habermas, C. Taylor, C. West, *The Power of Religion in the Public Sphere*, New York: Columbia University Press, 2011.

¹³ J. Habermas, “The Political – The Rational Meaning of a Questionable Inheritance of Political Theology,” in E. Mendieta and J. VanAntwerpen (eds.), *The Power of Religion in the Public Sphere*, 23.

¹⁴ Ch. Taylor, “Why We Need a Radical Redefinition of Secularism,” in E. Mendieta and J. VanAntwerpen (eds.), *The Power of Religion in the Public Sphere*, 36.

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up to the religions, how can the “neutrality” of the state be preserved with respect to each creed, be it Christian, Muslim, Jewish, Marxist, Kantian, Utilitarian, and so on? By the same token, how can the possibility of dialogue between citizen believers and nonbelievers be maintained?

Habermas responds to these concerns by proposing a “translation proviso”: on the one hand, he asserts that “all citizens should be free to decide whether they want to use religious language in the public sphere”; on the other, however, he holds that “the potential truth contents of religious utterances must be translated into a generally accessible language before they can find their way onto the agendas of parliaments, courts, or administrative bodies and influence their decisions”¹⁵ For Taylor there is, in principle, no difference between religious and secular discourse, both being legitimate modes of participation in public debate, even in parliaments and courts. But he, too, finally comes to recognize that the formal acts of public organs, such as enacting laws, passing administrative regulations, or pronouncing judicial decisions, should be formulated in a neutral language, common to the various faiths and traditions, because these measures express “the official language of the State.” Although the two authors differ in where they draw the borders of the “free zone,” they agree on the requirement that arguments inspired by religion, once allowed into the public debate, must divest themselves of their religiousness in order to become accessible to all and usable in the official language of the state.

Benedict XVI resolves this difficulty at its root by asserting that the source of legal norms is not revelation, but reason and nature in their interrelation; that is, as the then-Cardinal Ratzinger had explained in many places prior to his election to the pontificate, “History is, so to speak, the kingdom of reason; politics does not establish the Kingdom of God, but it certainly ought to be concerned about the just kingdom of man,” in order to remind Catholics engaged in politics that “politics is the sphere of reason.”¹⁶ From this perspective, the issue of translating religion-based arguments

¹⁵ J. Habermas, “The Political,” 25.

¹⁶ J. Ratzinger, *Europe: Today and Tomorrow*, San Francisco: Ignatius Press, 59–60.

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into comprehensible language, or the neutral language of official acts of the state, is a question that does not even need to be asked.

Benedict's thought, free from all epistemic discrepancy between knowledge and belief, reason and faith, offers a simple and truly persuasive response to one of the most complicated problems faced by contemporary democracies, which are called on to govern over a social fabric that is highly complex and diverse. He invites Christians to make their contribution to political and legal life on the basis of what they share with all humankind, "but never forgetting that the contribution of Christians can be effective only if knowledge of faith becomes knowledge of reality, the key to judgment and transformation."¹⁷

DEMOCRATIC RELATIVISM AND PRINCIPLES OF JUSTICE

This understanding of the Christian presence in civil life, that relies on reason rather than revelation, has unexpected consequences. Pope Benedict, who was presented to the public as a conservative theologian, the enemy of cultural relativism, and the Pope of nonnegotiable values, surprised many people when, in the speech he delivered to the Bundestag, he asserted that "[f]or most of the matters that need to be regulated by law, the support of the majority can serve as a sufficient criterion." In essence, this statement expresses an appreciation (a realistic appreciation!) for democracy, with its processes based on the principle of the majority and the method of consensus, which – abstractly speaking – are traditionally ascribed to precisely the relativistic culture that Cardinal Ratzinger firmly opposed. From the time of Hans Kelsen on, western legal culture has explicitly asserted that "relativism is the *Weltanschauung* that the *democratic idea* presumes."¹⁸

¹⁷ Benedict XVI, Address to the 24th plenary session of the pontifical council for the laity, Consistory Hall, May 21, 2010.

¹⁸ H. Kelsen, "Vom Wesen und Wert der Demokratie," Mohr, Tübingen, 1929; "Democracy and *Weltanschauung*," in A. Jacobson and B. Schlink, Weimar: A Jurisprudence of Crisis, 2000, 108.

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There is something unexpected in Benedict's esteem for a political doctrine that contains the seeds of relativism. And yet, there is nothing at all surprising about this conclusion, in light of the premises laid out in the preceding paragraph. In reality, Ratzinger's thought is much richer and more articulate than it would seem from reductionist media portrayals. There are two essential cornerstones of his vision of civil life and politics: the first is rooted in the idea that the legal and political order belongs to the realm of what is human, and as such is not an absolute. In the original Christian tradition a distinction is drawn between the *Civitas Dei* and the *civitas mundi*.¹⁹ This supports a "healthy relativism" when it comes to secular choices, which concern politics and law, and an appreciation for the rule of the majority in the ordinary functioning of governments. On the other hand, and this is the second cornerstone, this relativism cannot, in itself, be absolute without becoming the uncontrollable province of the majority: "Yet it is evident that for the fundamental issues of law, in which the dignity of man and of humanity is at stake, the majority principle is not enough: everyone in a position of responsibility must personally seek out the criteria to be followed when framing laws."²⁰

The drift toward totalitarianism that took place, particularly in Germany and Italy, between the two World Wars, of which Benedict is constantly aware, including from life experience, attests to how the rule of the majority can easily turn into brute force, which does not hesitate to order or consent to the most atrocious acts. In this awareness, Benedict's thought bears a striking similarity to certain recent developments within contemporary European constitutionalism, which arose during the post-World War II period in response to the atrocities that were brought about by uncontested domination by pure majority rule.

Constitutionalism emerged on the European continent in France in the late eighteenth century, with the "sovereignty" of Parliament, as

¹⁹ We refer here to St. Augustin, *Civitas Dei*; the relationship between politics and theology and its evolution over time has recently been revisited by M. Borghesi, *Critica della teologica politica – Da Agostino a Peterson: la fine dell'era costantiniana*, Marietti, Milano, 2013.

²⁰ Pope Benedict XVI, Visit to the Bundestag.