

THE OPEN STATE AND THE IMPERATIVE OF FREEDOM

About Ernst-Wolfgang Böckenförde's political philosophy (part I)

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*The liberal, secularized state lives on the basis
of assumptions that it itself cannot guarantee.
(E.-W. Böckenförde, 2016²: 60).*

There are concepts and realities that are almost a hermeneutical riddle and imply many and contrasting interpretations, often irreconcilable. Such is the idea or reality of the state, as a historical creation and also as an inevitable social and political entity.

Let us consider, just as an example, what Hegel says, according to K. G. von Griesheim's *Nachschrift*: "God's way through the world is what makes the State. It is the power of Reason that is realized as Will. [...] The State is not a pure work of art. It is in the world, in the sphere of arbitrariness, chance, error; a bad intention can disfigure it in many ways" (Hegel, 2000/2006: 618).

We see that Hegel insinuates the need and excellence of politics as a rational and practical intent but always incomplete, the will to promote and impose law in the concrete structures of collective life, to encourage freedom and justice; but he also stresses the insufficiency and fragility of such achievement in history.

Thus, the possibility arises of multiple and disparate accents (often negative) in the view of the State: as organization of a class that dominates over others through conquest and subjection (thus for Franz Oppenheimer, 1922: 5); or as political instrument of power of a ruling class for the imposition of its interests, according to the Marxist vulgate (Klaus / Buhr, 1975: 1163). And the list could be extended.

Aware of the range and of the inevitable conflict of theories of state from Plato and Aristotle to M. Weber, C. Schmitt, J. Rawls, N. Luhmann and others, not to mention the 17th century and 18th century classical authors, we will address the political reflection by Ernst-Wolfgang Böckenförde, a German jurist. His ideas and concerns are most relevant today, as the moral assumptions of the liberal state are being questioned from within and from the outside: from within by populist political parties, and from the outside by foreign powers. The multiplication and consolidation of democracy was an obviously relevant process of the 20th century; but we must take into account that democracy is a god that fails, if not sustained from within by citizens endowed with a firm belief in the imperative of freedom.

Böckenförde's writings have been translated in the USA (1991) and, since 2000, in Italy, Spain, France and England. His work is becoming the subject of academic debate, inside and outside Germany, as regards legal and constitutional theory, the relationship between politics, law and bioethics; there is much to say about his influences and his intellectual interlocutors such as Thomas Hobbes, G.W.F. Hegel, Lorenz von Stein, Hermann Heller and Carl Schmitt. It is predictable that the bibliography around his work will multiply.

One year after his death, among unprecedented world changes and huge uncertainties, it is relevant to revisit and evaluate his lasting contribution. Here, our interest focuses exclusively on the notion of the State and some of its implications; we will leave for another paper his interpretation of the historical evolution of law and the Constitution, his position on issues of bioethics, and his vision of the European Union project and globalization.

1. E.W. Böckenförde's questioning of the State

In an early essay entitled *The birth of the State as a process of secularization* (1967), which has elicited positive and negative reactions, Böckenförde enunciated a paradox that became famous: "*The secularized liberal state lives on assumptions that it cannot guarantee*" [without calling into question its own liberal nature] (2016b: 60). The paradox assumes that

democracy is nourished by principles, purposes, and cultural and ethical values that abide in the citizens in view of mutual support, recognition of peace, security and the expression of freedom as autonomous people; in other words, society lives from the consensus among citizens on common ideas and purposes to act in a solidarity way. On the other side, the liberal state cannot impose any *ethos* on its citizens; as a unit of power and decision, it must just enable personal life to go on, secure personal identities, guarantee peace and protection against violence, and ensure order of coexistence and grant concrete freedom; for without freedom of action there is no law.

Böckenförde was a constitutionalist expert, a professor of Law and a Judge of the German Federal Court and his essays outline a clear and balanced notion of the State. As a political institution, he stressed, the State originated in modern Europe, and evolved into a rule of law and a democratic entity; therefore, what matters is not the State as an abstract greatness, but as a social organization in its concrete manifestation, and with the structural and legal transformations that resulted in current democratic regimes.

There are several motives for paying attention to Böckenförde's theory of the state. First, as populist and nihilistic trends grow in Western democracies, we need a renewed legitimation and justification of democracy, stressing that the ethical faith of democratic men and women is the key to overcome democratic inconsistencies.

We live in a complex situation in which the solution of old problems is often postponed, and new and unexpected ones are not tackled. The contemporary world presents dizzying challenges. Scientific and technological knowledge develops at such an intense pace and we are confronted daily with an exponential growth of information on a global scale, with unforeseen consequences, and with the threats and dangers that may arise from the unregulated and anti-humanist use of technology and 'Big Science'

Issues such as identity and security, sustainability, multiculturalism and interculturality are at the heart of the political debate. The global and the local, the universal and the singular, tradition and modernity, short and long term in social and political decisions, competition, justice and respect for all, routine and progress, are in conflict in a very

convoluted world reality. Everything forces us to refuse already made recipes and hurried pseudo-solutions and requires us to think and create a common emancipatory destiny.

Democracy lives an ambiguous condition. The Italian philosopher N. Bobbio, examining the disparity between the promises of democracy and its effective fulfilment, listed some unfulfilled aims (1997: 21-33). The initial inspiration for democratic society was individualistic and, consequently, emphasized the intervention of singular wills. Democracy, alas, has slid to the opposite pole: the politically relevant subjects are, increasingly, groups, organizations, corporate associations, unions and parties, and less and less individuals.

Instead of a more cohesive and more supportive society, committed to a community of destination, we have a centrifugal society, with many focuses of power, a polycentric society, entangled in cultural struggles and offering lifestyles and meanings of life which favour individual choice, but also generate perplexity and disorientation.

Representative democracy is centred in national interest, but interest groups tend to capture the general interest; the State, too often, limits itself to be a mediator between parties; in a neo-corporate society, solutions of social conflicts no longer depend on political representation, but more and more on large organizations. Basically, they care about representing and defending interests, through inter-peer agreements, and neglecting the common good.

The formal aspect of democracy – such as elections and scrutiny by checks and balances – is certainly relevant, as it presupposes and enables the participation of all; but it does not mean that the oligarchic power infiltrated in the social fabric is eliminated. One should stimulate the education of citizens and combat the growing apathy of young people and raise groups, centres and movements with different objectives that lead to discussion and transparency. This will hamper the presence of occult powers (pressure groups, economic cartels, even mafias) and the spread of corruption among political elites.

2. Law and freedom

At the end of his famous 1967 essay, *The birth of the state as a process of secularization*, Böckenförde asks. “Of what does the state live, where does it find the strength that sustains it and guarantees the homogeneity and intrinsic virtues that regulate freedom, which it needs, since for it the force derived from religion is no longer, nor can it be, essential?” (2016b: 59)?

In the old regime, before 1789, religion was a profound binding force upon the political order and state. The Western state, however, is not a universal concept; it is rather the result of a political metamorphosis, which took place between the 13th century and the end of the 18th century. It emerged out of a stormy secularization process – started in the 11th and 12th centuries (Question of Investitures, 1052-1122) – leading to the emancipation of political order from traditional religious authorities and obligations.

Along such path, the process focused on the individual and his freedom, and culminated in the Declaration of the Rights of Man and Citizen. A question, alas, inevitably arises: how can we find a new homogeneity now, so that the State is not just an aggregate of selfish individuals, exposed to disintegration? The idea of nation, with its concept of unity, was a principle of integration and a substitute for the old religious unity; it enriched and densified the State with emotional and existential content, making it a kind of sacred ‘secular’; it raised a “community of conviction” (*Gesinnungsgemeinschaft*), and inspired a form of homogeneity, of political nature (1999: 22).

Now, the individualism resulting from human rights, as they were conceived, not only liberates and emancipates the individual from religion, but also from the nation as a homogeneous force. K. Marx has made this reproach in the *Jewish Question* of 1843 – a formula that Böckenförde adopts and adapts up to a point. The state faces a threat of internal disaggregation. The rule of law (*Rechtsstaatlichkeit*) cannot renounce its liberal nature neither can it claim an organic uniformity, cohesion and wholeness as in totalitarian regimes. After Auschwitz, the state cannot engage in wars of religion, official ideologies; it cannot even revive the Aristotelian tradition of the polis neither and proclaim a system of objective values. Any of these setbacks would destroy the

imperative of freedom at its founding. The state is forbidden to go from 1789 backwards, without annihilating itself as an order of personal freedom.

Now, if the State cannot rely on natural morality, imposed or regimented, will it necessarily restrict itself to provide and satisfy the eudemonistic expectations of its citizens? If the political foundation once resided in *homo religiosus* (in line with the horizon and the suggestion of political theologies), can it now focus on the *homo hedonicus*? Is there no more to guarantee than the satisfaction of personal desires? Do we have nothing but the exclusive promotion of “possessive individualism” (Macpherson: 1962) to guarantee the harmony of freedoms and a certain consensus about values?

2.1 *The image of man implicit in the legal system*

Böckenförde’s analysis in his brief and dense essay *The image of man in the perspective of the current legal system* (1991: 58-66), shows how society is implied in the prevailing law, and impregnated with Enlightenment principles; the legal order of Western democracies conditions and configures our experiences and understanding of ourselves. Let us see some of the characteristics of this legal order.

a) We see the individual, based on the self, entangled in multiple social and community relations, but an entity endowed with *a prior* dignity and not an outcome of society. In this sense, the subject of the law is the mere individual, and not for example, the family or any kind of social group. Another person, another individual, a counterpart, does not appear as a condition, incentive and necessary partner for a true human existence, but only as a limit and barrier of particular legal freedom, whose rights must be respected.

b) Thus, there is no transcendental dimension; the individual with legal freedom emerges alone to seek, choose and, eventually, miss his destiny. The basic content of rights does not provide an orientation for freedom; it does not indicate how to attain and realize its nature; it refers to freedom of religion, assembly, opinion, etc. “The law and the legal order guarantee only the condition of its possibility” (1991: 60). The law emphasizes *subjective* freedom in the sense of free choice and

specific emancipation; the ethical-moral contents are put in brackets as a blind content of the legal order that guarantees life, security and personal autonomy. There is no mediation between subjective legal freedom and the contents of its realization.

c) Current democratic constitutional order raises *pluralism* in world-view and ethics as the core that legally structures public life. Concrete existence, thought and action thus refer to individual subjectivity, with scarce participation in the universal; the State becomes, basically, a means and instrument that preserves and enables the exercise of freedom.

The consequences are obvious: in the public sphere and collective life any common commitment may emerge as divisive, consensus is scarce and there is no unanimous orientation. The claim of truth of Christian faith appears, in this pluralistic context, only as one claim among others. As the basis lies in subjective freedom, there is, strictly speaking, objective content, but only the possibility of identifying, or not, such content. Certain aspects such as the respect for human dignity and the fundamental right to life go beyond the guarantee of subjective freedom, but their meaning no longer depends on a horizon of truth, but on the consensus and the game of political powers, namely.

d) Considering the philosophical uncertainty about the dignity of man that is stated in the Constitutions of democratic regimes and the 'malleability' of the law resulting from power games of political majorities and coalitions, there is another unwanted and perverse effect: "Current legal regulations – as a reflection of the growing social differentiation – refer, more and more and in general, to human beings no longer as people, but as certain roles and functions" (1991: 65). In other words, the instrumentalization of law prevails upon its fairness and rectitude; the essential fungibility of everyone is imposed and cultivated in the social sphere; only in privacy, as an active subject, can an individual consider himself a person. Now, is it possible for a democracy without democrats to persist, i.e. without people that deeply respect the other? Does not such democracy run the risk of becoming a scarecrow, unable to repel its inner adversaries and enemies from the outside?

2.2 *The mutuality of freedom and law*

In his essay *Freedom and Law, Freedom and State*, Böckenförde turns to Kant, Hegel and (tacitly) the young Marx, as critics of the individualist anthropology underlying the Declaration of the Rights of Man (2016b: 42- 57).

a) There is a necessary conditionality of freedom and rights. A truly human life, therefore a free life, cannot be realized outside of an order with no legal form and shape; a world without law would be the realm of barbarism and pure arbitrariness. Anyway, freedom cannot be conceived as an individual and absolute category, abstracting from the external world, which it needs for its fulfilment. Freedom must therefore be integrated into such an order, whose goal is also freedom. How does Böckenförde expands this argument?

Human relations are not exclusively of harmony and cooperation, but also of competition and conflict. Freedom demands law as a stabilizing social structure and a condition of itself; normative regulation is imperative for establishing the scope and limits of the individual's free activity. Without the law, there would be the triumph of the strongest. "Freedom has, and finds in the law, the form that enables and mediates it." (2016b:43).

b) However, the mere existence of the law is not enough to achieve freedom. This must be the goal of the legal configuration; the law must contain it, because only when it becomes effective, beyond the necessary condition of freedom, does it become a sufficient condition of freedom. (2016b:44)

There is, therefore, a mutuality of freedom and law: law is a condition of freedom and freedom is the objective of law. What freedom, though? If it is only *subjective* freedom – freedom of choice, negative freedom, freedom from restraints and impediments, absence of physical and psychic external coercion – then the law comes from outside, as a constriction. The content appears in article 4 of the 1789 Declaration of Rights (2016b: 45), that is, the selfish and isolated man, social monad, without knots and ties, as Marx had denounced in *The Jewish Question*.

The current climate of opinion holds freedom as individual's self-determination, without coercion and constraints, a capacity to configure a lifestyle; the law appears as something extrinsic, coming from the

outside and limiting. Actually, freedom and law have an intrinsic connection. To be safe and secure, freedom must be formulated and recognized as law. Without it, it doesn't exist; the law establishes freedom by marking limits, which are imposed to guarantee the freedom of all.

The possibility of each individual being a person, with conditions for self-development, presupposes an intersubjective space. "Objective and subjective moments are, therefore, connected" (1999: 235). One should note the indispensable difference between *objective* freedom (freedom for), scope of the realization of the personal project, and *subjective* freedom, necessarily within limits. The law does not only exercise a function of delimitation in relation to the spheres of subjective freedom; it also serves to establish goals, the content of freedom and to frame interactions between individuals.

Two problems arise: What is the source and the certainty about man's objective determination? Since the end of the 18th century, revealed faith and a metaphysical concept of human nature do not give guarantees, in spite of a proliferation of ideological, humanistic, liberal, socialist projects in the context of coexistence.

There is a second problem: What is the relationship between such content and subjective freedom in the current climate of carelessness and a certain "post-truth" and "culture of cynicism", according to the relevant expression of Richard Stivers (1994: 169)? In a world where there are baseless and meaningless norms that, for instance, do not confront the traffic of human organs, of destructive weapons, of drugs, etc.; and everyday life seems to be reduced to an empty and inane search for power and satisfaction, how can we guarantee everyone's freedom? How can the State proceed in the face of pluralism?

3. The democratic state, in its structure and purpose, as guarantor of freedom

3.1 State's crisis or opportunity?

Böckenförde's research occurs in the great tradition of the German *Staatslehre*, attentive to the nature and history of the State; to its constitutional structure and its internal and external relations, taking place

within the scope of the nation-state, but extending to supranational institutions, namely the European Union. Associating the ethical-philosophical horizon with the legal-constitutionalist perspective, he never loses sight of the German fundamental law (23.05.1949) [*Grundgesetz*] under whose influence he interprets the function of law and ethics in the State.

In the dense 1978 essay, *Der Staat als sittlicher Staat*, Böckenförde declares that it is necessary to think of the State as an ethical State, that is, “with a meaning that goes beyond mere functional value, with authority and responsibility” (2017: 29). The unexpected consequences of globalization and late-modern assumptions about individualism, created a crisis of the nation-State; and yet, the state means more than a national state, linked to culture, language, traditions and even religion; it cannot yield to substitute forces, such as the current populisms or to follow the whims of leaders or groups. An open state (*Staatlichkeit*) is required, which overcomes nationalist tribalisms, sensitive to the deep motivations of groups and people and attentive to the possibility of integrating them, in order to create peace and bring about the possible balance between different values, mentalities and worldviews, even antagonistic ones.

The mediation of the state between human beings and freedom is indispensable to democracy. It requires a relative ethical homogeneity, but no unanimity. Without a state, there would be no political modernity, that is, a structure with the legal capacity to impose decisions and apply sanctions, able to defend individual coexistence, and to demand the recognition of parties involved in social and political processes.

The State is a peace unit (*Friedenseinheit*), for the resolution of conflicts between individuals or groups, through legally regulated procedures; it is also a decision-making unit (*Entscheidungseinheit*) to carry out its peace mandate; and, subsequently, a power unit (*Herrschaftseinheit*) for the exercise of security and sovereignty as the holder of the last word (2017: 32ff.).

As a system of domination and governance (*Herrschaftsordnung*), as a normative instance for the coexistence of all, the state must combine the imperative of security with the imperative of freedom; this combination abides in specific social conditions and it must be legally

guaranteed and limited. “A ‘total’ freedom, without limit or restriction, means only the unlimited power of the strongest, the unrestrained performance of natural forces that bring inequality. Freedom for all stems only from the limitation of natural excess, the effective defence and custody of this limitation” (2017: 38). If necessary, this limitation may be enforced, with violence, against terrorism, for instance

The purpose (*Um-willen*) of the State – and the opportunity to incessantly reinvent and renew itself – is to restrict the predominance of private interests, though presupposing them as terms of its action and intervention. For the conservative and timorate observer, the neutral state appears as a political power closed to ethics; for the revolutionary and boastful activist, right or left, it is a deficiency of the state not to assume an ideology in order to fully protect people’s lives. The democratic and secular state, though, renounced the use of coercion in religious and moral matters, and defends freedom of conscience by declaring it inviolable in constitutional terms.

Böckenförde rejects the ideologically defined state; he wants a state marked by the ethos of freedom at two levels: that of guaranteeing external freedom and security in view of creating the conditions for the possibility of individual well-being; and a state that internally creates the opportunity for cultural and spiritual development. He quotes Lorenz von Stein: “Freedom is an effective freedom only for those who have their conditions, the possession of material and spiritual goods as a precondition for self-determination” (2017: 47). The State was not created and conceived to serve itself, but to serve the basic ends of human life, once external peace is guaranteed, culture is accommodated, and right is defended. Through rules, provisions and concrete measures, the state guarantees freedom to all in the name of inclusion, responsibility and values. These objectives are “the ethical-spiritual principle of the State, which establish its reasonableness and the character of general entity [...] The principle of equality and legal subjectivity, that of the recognition and defence of the individual in his position as subject, in his peculiarity and uniqueness, are constitutive prerequisites of the universality of the State.” (2017: 42).

3.2 Purpose, scope and limits of the State

a) Let us also insist on the scope of the state organization and its responsibility. It exists to defend and foster common interests, to safeguard fundamental rights, human dignity and freedom of conscience, to establish the conditions for the viability and opportunity of individual development for all. This is a minimal assumption, with restricted anthropological content, concerning the described imperatives. In the current condition of a “democratic rule of law”, of a secular and neutral persuasion, this is perhaps the core state ethics and the *ethical state*; after the process of secularization, we have no recourse to religion or metaphysics as an agglutinating element or instance of intimate demand and universalization.

Böckenförde, in the wake of the social-democrat thinker Hermann Heller, insists on the relative homogeneity and commonality (*Gemeinsamkeit*) of the state. Despite the echo of Tönnies and more obviously of C. Schmitt, to whom politics is above all authority, decision and will, Böckenförde opposes Schmitt: as there is no original community, homogeneity must have a laboratorial, building dimension. Some Hegelian ethics is active here, that is, *the sharing of the subjective and the objective*, a structure that unifies *the different modes of practical reason*. The state is not to be muddled with society; in the civil society predominate interests, individual arbitrariness and what Hegel calls mere subjectivity and “barbarous will” (1986: 51); the state must contain these dimensions within the universal, although Hegel still uses a theological reference – nowadays inapplicable.

For Böckenförde, the State, ethical and rational in its constitutional foundation, in its function and in its exercise, in its decision-making power and domain (through parliaments, governments and courts), must create conditions so that formal freedom and substantial freedom come together to make their administration effective and include in their will (*Staatsville*) the principle of self-determination of individuals (2017: 43-44).

Only then the capacity to legislate and the performance of governing will be seen by citizens as intrinsic and not imposed exclusively from outside. Otherwise, there is a gap between the political class – *they, the*

government and the deputies – and the political population, without achieving, not even aiming at the union of individual wills in general will – which constitutes the greatest legacy from Rousseau to democracy in favour of citizenship.

The purpose of the State requires the participation of citizens in the construction of political objectives and the decision-making process. The liberal movement in the 19th century created the Constitutions as instruments for individual involvement in the formation of the general will, in rupture with the state order of the Old Regime. The legislator became the people, as the will of the State embraced the principle of self-determination. The appeal and vision for individual freedom and self-determination, alas, remains empty and formal, until public policies materialize their implementation. On the other hand, the existence of the regulatory State is a necessary condition, but not sufficient, for the realization of freedom. The great liberal illusion is to think that it is enough for the State to be a regulator; on the contrary: it has to create tools and measures to achieve its objectives, subjecting them to accountability procedures.

The purpose of the state is to promote the freedom of all; not to guarantee anyone's happiness – a substantive content – but to define its conditions of possibility. Beyond the dimension of external freedom and security, and in addition to the sphere of the State of need and consensus, there is the sphere of cultural and ethical-moral freedom, of the self-realization of individuals. The State must contain in itself the moment of *exteriority*, the renunciation of violent interference in the subjectivity that must be defended and enabled; and it must contain the refusal to include subjective details in the general law of the common good. Its foundation, its leaven and its union lies in the law, that is, in the recognition of individual autonomy (2017: 52-53; 61 and 69).

b) It is now relevant, as an epilogue, to envisage the scope and limits of state action. The first obligation of the state, as a *state of necessity and consensus* (*Not- und Verstandesstaat*), is the creation of formal peace, containing violence and limiting selfishness, ensuring external freedom and security, avoiding civil conflict, in order to provide substantial

peace as a space for the realization of lifestyles and the needs of human nature. The state must be prepared to respond to threats, external or internal (terrorism, agitation of radical forces, populist harassment, invasions etc.), which democracy cannot yield to, even if it has resource to force.

The state, in the perspective of Böckenförde, attentive to the tradition of Hobbes, Locke, Rousseau, Kant and Hegel, presents itself as a unit of conflict resolution, through decision and power in which domination and freedom are articulated. It exercises sovereignty in the confrontation between individuals or groups of citizens who claim rights, in order to defend common interests and impose the respect and inclusion for all, and not just for some; in doing so, it fulfils political functions and, in addition, ethical functions. (2017: 49).

A question then arises, related to the famous dilemma – “*the secularized liberal state lives on assumptions that it cannot guarantee*”. Can the state have competences and exercise functions in the sphere of the substantial and objective orientation of freedom? Can it instil a shared inner conviction as a spiritual principle of legitimation? In the light of the surprising evolution of the democratic and social state, and faced with the horrors of totalitarian historical experience in the 20th century – *Auschwitz never again* – democracy has learned to make room for fundamental principles and values in which the will of the state is self-limiting, and thus, to make room to human person.

The state cannot propose a system of mandatory values with legal validity, a political faith; it would be more an ideology fed by the state, as it happened in totalitarian regimes. If that were the case, we would have a state political ideology (2017: 52-53) and the total denial of the functional neutrality of the state, of its open status.

After the process of secularization, Christianity became one religion among others in civil society. Situated among multiple conceptions of the world, the modern state renounces the single thought, a unitary faith or worldview. It is incumbent upon it to prevent the unifying function of religion from being replaced “by the (imposed) unity of thought or worldview” (2017: 61-63). Its task is to protect, guarantee and support, it is not constitutive or foundational; it should not, by its decision, fix the basic ethical-spiritual attitudes and convictions.

The example of the democratic state to guarantee and promote human rights must come from within. The procedure of sovereign bodies will not be guided by the principle of achieving maximum profit with minimum commitment; everything goes wrong when the state fails to promote civil virtues in public institutions and in its own actions. The state has a duty to guarantee and protect the development of life and cultural activity, without privileges or exclusive domains, as free processes in which individual conscience expresses itself. Its vitality, even more in times of change and uncertainty like ours, and its opportunity to assert itself, lies in nurturing with transparency and integrity the cultural and ethical assumptions that encourage citizens to support each other and recognize values that allow the freedom of each and everyone.

In the face of the intense *pluralism* Böckenförde repeatedly denounced the materialistic and pragmaticist myopia of today's society, and some philosophical misanthropies (post- and transhumanism). As regards the perhaps irreversible crisis of the notion of political autonomy, triggered by the processes of globalization, Europeanization and individualization, his judgment and appeal to humanism disturbs factual powers. He wrote: "A state devoted to the individual's freedom and self-realization finds its reference in the formation and awakening of the *humanum*, in the person who has the power to express a judgment and to self-fulfil in accordance with reason – in a person who, before the spiritual and social environment, serves the community at the same time as he develops his identity. This is the essential legacy of Humanism" (2017: 64-65).

The famous constitutionalist philosopher wanted to renew the state's concern for freedom, based on law, justice and the promotion of the individual's ethical-spiritual spontaneity, within the community. The state sustains, regulates and conditions, but does not grant or offer any foundations; so as is vacuous and sterile the wild individualism that surrounds us. Have we, then, a state baseless and "suspended in the air" (2017: 71)?

Again: despite criticisms, some of them very harsh, Böckenförde saw no reason to reject his theorem: "*The liberal, secularized state lives on the basis of assumptions that it itself cannot guarantee*" (2017: 70).

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