

Izvirni znanstveni članek/Article (1.01)

Bogoslavni vestnik/Theological Quarterly 83 (2023) 3, 623—635

Besedilo prejeto/Received:06/2023; sprejeto/Accepted:07/2023

UDK/UDC: 27-1:342.7

DOI: 10.34291/BV2023/03/Zepic

© 2023 Žepič, CC BY 4.0

Vid Žepič

Pope Benedict XVI's Critique of Legal Positivism with Special Regards to the Role of Tradition in Contemporary Legal Systems

Kritika pravnega pozitivizma papeža Benedikta XVI. s posebnim ozirom na vlogo tradicije v sodobnih pravnih sistemih

Abstract: Pope Benedict XVI's 2011 address to the Bundestag can be interpreted as a comprehensive synthesis of his perspective on the foundations of law as a subsystem within society. He underscored the paramount importance of constitutional democracy and the state, governed by an implementation of the rule of law that is both free and dedicated to upholding human dignity. Furthermore, he exhorted politicians and citizens alike to persistently pursue justice, to critically assess the law as responsible individuals, and to aspire to higher moral standards. In addition to this, he cast doubt on the adequacy of scientific legal positivism and scientism in comprehending law and the realm of reason. Stemming from his scepticism concerning the sufficiency of positivism in the formulation and interpretation of law, he emphasized the significance of European "legal heritage". According to Benedict, this tradition originated from the cultural triangle of Jerusalem, Athens, and Rome, and serves as an indicator of a "rational legal order". As Pope Benedict XVI's address was directed towards scholars in the field of jurisprudence and legal historians, my analysis of the speech is accompanied by a brief examination of the role of the notion of "legal tradition" within the selected European contemporary legal systems.

Keywords: legal tradition, Benedict XVI., constitutional democracy, human rights, criticism of legal positivism, natural law, Bundestag Speech, European cultural triangle

Povzetek: Nagovor papeža Benedikta XVI., ki ga je imel v nemškem zveznem parlamentu leta 2011, lahko razumemo kot sintezo njegovega razumevanja temeljev prava kot družbenega podsistema. V njem ni orisal le pomena ustavne demokracije in svobodne pravne države, ki naj bi bila zavezana predvsem spoštovanju človekovega dostojanstva, temveč je politike in državljane pozval k doslednemu iskanju in prevpraševanju pravičnosti ter k odgovorni kritičnosti posameznika do

pozitivnega prava. Podvomil je v zadostnost znanstvenega pozitivizma na področju prava in scientizma v sferi znanosti. Izhajajoč iz dvoma o zadostnosti pozitivizma pri postavljanju in razumevanju prava je kot enega od kazalcev ‚razumne‘ pravne ureditve omenil tudi ‚evropsko pravno dediščino‘. Ta se je po prepričanju Benedikta napajala iz izkušenj kulturnega trikotnika s topografskimi oglišči v Jeruzalemu, Atenah in Rimu. Ker je z opisano mislijo nagovoril tudi pravne teoretike in zgodovinarje, poleg analize papeževega govora v prispevku prikazujem sodobni pomen pojma ‚pravno izročilo‘ v izbranih evropskih pravnih sistemih.

Ključne besede: pravno izročilo, Benedikt XVI., ustavna demokracija, človekove pravice, kritika pravnega pozitivizma, naravno pravo, govor v Bundestagu, evropski kulturni trikotnik.

1. Introduction

The intellectual legacy of Pope Benedict XVI's pontificate (2005–2013) extends beyond his extensive written works such as monographs, encyclicals, and apostolic letters. As noted by Joseph H. H. Weiler (2015, 93), a significant part of his legacy resides in the speeches he delivered before political and scientific institutions. Particularly noteworthy are his addresses at the United Nations General Assembly, St. Bernard's College in Paris, Westminster, Regensburg, and Berlin. These speeches revolved around a critical examination of the concept of law as a social subsystem. The aim of my research is to provide a contextual analysis of one of Benedict's speeches titled "The Listening Heart: Reflections on the Foundations of Law", delivered on 22 September 2011 at the German Bundestag (Benedict XVI 2011b). In this address, the Pope did not merely delineate the meaning of a free state of law; rather, he presented a comprehensive synthesis of the understanding of legal foundations and the mission of law itself (2011b). He urged members of the German Bundestag to consistently uphold the principles of constitutional democracy and encouraged every individual to actively engage as citizens, thereby expressing a critical stance towards established positive law. Pope Benedict XVI emphasized that relying solely on scientific positivism is inadequate for the application of law, and likewise, scientism alone is insufficient in the realm of science. In the concluding section of his address, the pope emphasized the significance of the European legal tradition as an indicator of the reasonableness of legal principles. This aspect of Pope Benedict XVI's discourse was intended to engage not only scholars in the field of jurisprudence but also legal historians, who share a common curiosity regarding the role of legal tradition within the framework of interpretation in the modern legal system.

2. On the Responsibilities of Politicians and Citizens

Benedict XVI began his Berlin address by recalling the words of King Solomon after God had appeared to him in dreams and invited the young King Solomon, on

his accession to the throne, to make a request. Solomon replied: "So give your servant a discerning heart to govern your people and to distinguish between right and wrong. For who is able to govern this great people of yours?" (1 Kg 3:9) Therefore, Benedict stressed that a politician who desires to be wise should choose the gift of prudence above all, rather than chasing after material success. It is the "listening heart" (*cor docile*) that enables the individual to discern between good and evil, and that is the cornerstone of a righteous government. This concept resonates with the sentiments expressed by Roman jurist Ulpian in D. 1, 1, 1, 1 (Ulp. 1 inst.), where jurists are metaphorically compared to priests (Žepič 2022, 115). Just as priests cultivate justice and possess knowledge of what is good and appropriate, jurists discern between what is just and unjust, distinguishing the lawful from the unlawful. Through their pursuit of justice and discernment, they embark on a journey towards uncovering true and genuine philosophy (*vera philosophia*).

According to Pope Benedict XVI, the will of politicians to implement the proper law (*Willen zum Recht*) and their understanding of what is right (*Verstehen für das Recht*) are key factors in ensuring social peace. This idea echoes with the well-known statement by Ulpian, who defined justice as "the constant and perpetual will to render to each person his or her due". This emphasizes the significance of politicians having a resolute dedication to upholding justice and ensuring that every individual receives their rightful entitlements (D. 1, 1, 10 pr. Ulp. 1 reg.). By embodying these principles, politicians contribute to fostering a just and harmonious society. When referring to Augustine's *dictum* (*De civitate Dei*, 4.4) that "the state without justice is a band of robbers", the Pope alluded to the Nazi experience, where "power became divorced from right, how power opposed right and crushed it, so that the State became an instrument for destroying right".

Serving the law implies a constant fostering of resistance to injustice, even in the democratic process. This is where the majority principle plays an essential but, as Benedict XVI notes, not sufficient role. Adherence to the majoritarian principle (*pars maior*), which was, in constitutional history, an extension of consensual decision-making, underwent a fundamental transformation in medieval canon law. According to canon doctrine, the minority always had the possibility of overturning an unreasonable, albeit majoritarian decision, if the decision of the minority proved to be sounder (*pars sanior*). The votes were not necessarily "counted" but exceptionally "weighed", where the criteria of weight consisted of the reputation and authority of the voter (*auctoritas seu dignitas, meritum*), his intellectual abilities (*ratio*), moral qualities (*pietas*), the purity of his motives (*bonus zelus*), and the fairness of his judgement (*aequitas*) (Elsener 1956, 108ss). Although the democratic principle is indisputably based on consideration of the opinion of the political majority, it is an unsatisfactory criterion for the exercise of a modern democracy, especially one which bears the adjective "constitutional". As noted by Hassemer (2003, 214ss), "constitutional democracy" is a new form of democracy that "defines nothing less and nothing more than the limit of the democratic principle; it expresses that the assessment of whether the decisions of the majority are correct is henceforth subject to a fundamental reservation, namely the reservation of whe-

ther these decisions are in accordance with the Constitution.” This is particularly crucial when it comes to safeguarding the rights of minorities, as their status has consistently served as a litmus test for assessing the fairness of a legal system. Throughout history, various minority groups, including early Christians during times of persecution and dissidents under oppressive regimes like the Third Reich, have played a vital role in challenging unjust social structures. As Pope Benedict XVI observed, the courageous dissenters against Nazism demonstrated that positive laws, proposed by Nazis, were illegitimate, highlighting the importance of an obedient heart of every citizen in recognizing it.

On several occasions, Benedict XVI has stressed the importance of an individual having a critical stance as an active citizen when assessing political reality. “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.” (Benedict XVI 2011b) The critical tone and distrust in the actual implementation of international human rights instruments was evident in the Pope’s speech before the UN Assembly, where he emphasized that legal texts and the procedures foreseen for the case of infringements of human rights are useful but insufficient tools to ensure that legislation is not turned into an instrument of iniquity (2011a). According to him, the pursuit of justice cannot be accomplished by merely establishing a fixed set of written principles. It is an ongoing and dynamic endeavour, a continuous and unending struggle against injustice. In this perpetual fight, the central figure is a living individual, a subject. It is each one of us who plays the role of the protagonist in this never-ending and boundless battle against injustice (Cartabia and Simoncini 2015, 16). The Pope considered that the key to control lies in the commitment and sensitivity to the truth of everyone, and in paying attention to whether the legal regulation follows “nature and reason”. Rhonheimer (2015, 80) has expressed concerns regarding this stance, suggesting that the Pope seemed to advocate for questioning the principle of majority only in cases where it would contradict the teachings of natural law as espoused by the Catholic Church (CIC can. 747 § 1; DH 14, 3). This interpretation of the Pope’s message however appears to contradict his own critique of an excessive emphasis on Catholic natural law doctrine, which, in extreme cases, can be seen as “overly infused with Christian content”. Ratzinger has critically observed that such a situation hampers the imperative of seeking compromises between Church and State (Ratzinger 1987, 191).

3. On Legal Positivism and Scientism

At a later juncture the Pope’s discussion revolved around the methodological challenge of comprehending “nature and reason”. Kelsen (1963, 5) has provided a starting point in jurisprudence by defining nature as “a collection of objective facts interconnected by cause and effect,” while reason encompasses scientifically verifiable and refutable aspects. As noted by Benedict, in contemporary discour-

se, ethical and religious arguments that transcend positivistic rationality are not considered a valid source of law (Benedict XVI 2011b). The concept of natural law, as noted by Ratzinger, has undergone a significant reduction in its scope and influence. It has been relegated to the status of a mere *katholische Sonderlehre*, receiving limited serious discussion beyond the realm of Catholic moral philosophy. It seems to Ratzinger that there is often hesitation or reluctance to mention or refer to the natural law in a world that demands empirical-natural scientific foundations for every argument. Normative-scientific positivism, advocated by Kelsen's "pure theory of law", thus reveals an insurmountable gap between nature and law, "Is" (*Sein*) and "Ought" (*Sollen*). He argued that the mere existence of something does not imply a legal obligation, and conversely, the fact that something should be in a certain way does not make it a reality. He stated that values cannot be derived from objective reality, nor can reality be derived from values. Kelsen claimed that the distinction between *Sein* and *Sollen* cannot be explained as it is directly inherent in our consciousness (Kelsen 2017, 28–29). It should be noted that scientific (legal) positivism is not associated with a disregard of universal human values; it simply involves the rejection of the possibility of scientifically knowing ethical and moral values upon which law is built. Humans live in accordance with morality and ethics, but the reach and content of these cannot be scientifically justified (Spieler 2011, 336). Kelsen has therefore rejected a metaphysical approach to law and sharply distinguished positive law from morality, natural law, or any other evaluative criterion that would serve as a substantive measure of legality.

While Benedict XVI. has not outright opposed the positivistic view on law, he has expressed the belief that positivism alone is insufficient and advocated for its augmentation. Undoubtedly, his scepticism towards the adequacy of scientific positivism echoes Radbruch's criticism of positivism. Radbruch argued that positivism, with its rigid adherence to the notion that "the law is the law", had left the German legal profession defenceless against Nazi laws that were arbitrary and even criminal in nature. Furthermore, positivism itself lacks the ability to provide a valid justification for the legitimacy of laws (Radbruch 1946, 107). Ratzinger's perspective aligns with this critique, highlighting the limitations of a purely positivist approach to understanding and evaluating the law.

The Pope also criticized "reductionist scientism", which according to him diminishes human greatness and threatens human nature and can be disguised under various pretences. According to Benedict's figurative language, we enclose ourselves in "a concrete bunker with no windows, in which we ourselves provide lighting and atmospheric conditions, being no longer willing to obtain either from God's wide world" (Benedict XVI 2011b). He has called for a transcendent "opening of windows" and a holistic perspective on the world, encompassing "both heaven and earth". Benedict has also argued that self-limitation by humans needs to be transcended in the understanding of the nature of law. Therefore, he has suggested introducing the concept of "ecology of man" (*Ökologie des Menschen*) into legal discourse, like the approach taken in environmental matters. "Man too has a nature that he must respect and that he cannot manipulate at will. Man is not

merely self-creating freedom. Man does not create himself. He is intellect and will, but he is also nature, and his will is rightly ordered if he respects his nature, listens to it and accepts himself for who he is, as one who did not create himself. In this way, and in no other, is true human freedom fulfilled.” (2011b).

According to the Pope Benedict XVI, even Kelsen himself recognized the inadequacy of the positivistic view of law at a conference on natural law in Salzburg in 1965. During the conference, the renowned theorist of the pure theory of law stated the following: “Norms could only flow directly from nature if one presupposes a belief in the existence of a just divinity, whose will is that created nature is not only transcendent but also immanent.” (Kelsen 1963, 1) He added: “Discussing the reality of this belief (in the existence of divinity) is completely pointless.” With these words, Kelsen of course rejected all attempts at a “scientifically rational foundation of natural law”. As emphasized by Dreier (2011, 1152), he did not abandon or even relativize the dualism of the pure theory of law. In response to Kelsen’s “pointlessness of discussing the existence of divinity”, Benedict has answered, “Is it really? – I find myself asking. Is it pointless to wonder whether the objective reason that manifests itself in nature does not presuppose a creative reason, a *Creator Spiritus*?” The Pope has subsequently claimed that the enduring belief in a Creator God within European cultural heritage (*kulturelle Erbe Europas*) has been instrumental in shaping rational concepts such as human rights, equality before the law, the recognition of the inherent dignity of every individual, and the awareness of personal responsibility.

4. Jerusalem, Athens, and Rome – Europe’s Cultural Triangle

Benedict spoke about how to understand the reasonable (*Vernunft*) in the speech he was to give at the opening of the academic year at the University of Rome La Sapienza. Quoting John Rawls¹, he mentioned that one of the legitimate criteria for the recognition of the “reasonable”, also in the case of legal argumentation, involves the teachings of a responsible and doctrinally supported (legal) tradition.² As noted by El Beheiri (2014a, 36), it was the harmonious beauty of the musical and visual arts that provided a special insight into truth for Ratzinger. As for works of art, it is only the temporal dimension that separates the wheat from the chaff, so too it is the “true” content of law that can be revealed to us by, to borrow Windscheid’s (1904, 75) words, “the legal work of the centuries” (*Rechtsarbeit der Jahrhunderte*).

¹ “Egli [Rawls] vede un criterio di questa ragionevolezza fra l’altro nel fatto che simili dottrine derivano da una tradizione responsabile e motivata, in cui nel corso di lunghi tempi sono state sviluppate argomentazioni sufficientemente buone a sostegno della relativa dottrina.” (Benedict XVI. 2008a)

² “[I] riconoscimento che l’esperienza e la dimostrazione nel corso di generazioni, il fondo storico dell’umana sapienza, sono anche un segno della sua ragionevolezza e del suo perdurante significato.” (Benedict XVI. 2008a)

“The culture of Europe arose from the encounter between Jerusalem, Athens and Rome – from the encounter between Israel’s monotheism, the philosophical reason of the Greeks and Roman law. This three-way encounter has shaped the inner identity of Europe. In the awareness of man’s responsibility before God and in the acknowledgment of the inviolable dignity of every single human person, it has established criteria of law: it is these criteria that we are called to defend at this moment in our history.” (Benedict XVI 2011b)

It was Israel that endowed Europe with the notion that God alone created the world; it was Greek philosophy that first questioned the origin of natural law; and Roman law was law that reflected reason (*ratio recta*). The concept of the European cultural triangle was first articulated by Theodor Heuss, the one-time President of the Federal Republic of Germany. He expressed the idea that “there are three hills from which the West has emerged: Golgotha, the Acropolis in Athens, and the Capitol in Rome. The West has been profoundly influenced by all three, and it is essential to perceive them as a unified whole.” (Heuss 1956, 32) What all three cultural sources share, so to speak, as the sources of rationality of European man, is that they do not convince with physical force and sanctions, but with the “spirituality”, by the authority of the argument of tradition resting on two millennia of experience. The ideas of human rights, equality before the law, the recognition of the inviolability of human dignity and the responsibility of man for his own actions, according to Ratzinger, are rooted in “the belief in the existence of a creator God”. Moreover, Christian theologians merely combined “socially oriented natural law” of the Stoic philosophers and “leading teachers of Roman law” (Benedict XVI 2011b).³ This pre-Christian fusion of law and philosophy paved the way for the Christian Middle Ages and the Enlightenment and provided the basis for the 1949 Declaration of Human Rights and the concern expressed within German Basic Law (*Grundgesetz*)⁴ for “inviolable and inalienable human rights as the basis of every human society, peace and justice” (2011b).

Within Benedict’s elaborated topographical triangle, however, there is no room for Paris or Philadelphia. In other words, in the Pope’s speech we are vainly looking for “the normative project of the West”, as the German historian Heinrich August Winkler called Western values. In another place, Ratzinger has written that the Enlightenment was marked by a spirit of scientific rationality which characterised and transformed Europe. However, this rationality of the Age of the Enlightenment excluded religion from the sphere of the rational (*Vernunft*) and embedded it in the sphere of the sensible (*das Fühlen*), which led directly to the renunciation of the public relevance of religion (Ratzinger 2005, 76). Where sole-

³ On this and two other occasions, the Pope referred to the work of Wolfgang Waldstein, *Ins Herz geschrieben: Das Naturrecht als Fundament einer menschlichen Gesellschaft* (2010), 11; 31–61.

⁴ See the preamble of German Basic Law (*Grundgesetz*): “Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt, als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen, hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben.”

ly “positivist reason” has the primacy, all other cultural realities, including religion, are demoted to the level of a subculture (Benedict XVI 2011b). In 2006, Benedict XVI expressed the view that reason that is closed off to the divine and marginalizes religion as a mere subculture is inapplicable to intercultural dialogue.

For Benedict XVI, the dominant positivist culture, which places the questioning of the transcendent in the framework of the subjective, is “a capitulation of reason, a renunciation of its higher capacities, which leads to the collapse of humanity”. Moreover, he has enunciated the opinion that it was precisely the search for God (*Deum quaerere*) and the willingness to listen to him that grounded early European culture (2008b). According to Pope, the faith in reason promoted in the Age the Enlightenment cannot be understood as a specific antipode to Christianity, which itself was a religion of *logos* (Ratzinger 2006, 47ss). Therefore, for Benedict the legal source according to Christian doctrine is not revelation or the word of a religious authority (*ipse dixit*), but rather the result of intertwined reason and nature – *logos* (Cartabia and Simoncini 2015, 5). This is said to be indicated by the words of Paul the Apostle: “Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law. They show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts sometimes accusing them and at other times even defending them.” (Rom 2:14-15) Therefore, Paul the Apostle believes that even pagans have the ability of rational moral judgment, as it is independent of religious beliefs. Consequently, ethics are something universal and a characteristic of every human being (Globokar 2010, 375).

5. (European) Legal Tradition as a Source of Law?

In his discourse, Benedict XVI subtly addressed the role of legal tradition as a significant legal source. This section contains an overview of the role of legal tradition, referred to as “*Überlieferung*” in German and “*izročilo*” in Slovenian, within contemporary legal systems.

One of the last popes to explicitly address the role of Roman law was Benedict XV, in his papal bull *Providentissima Mater Ecclesia* (1917). For him, Roman law stood as a “glorious monument of ancient wisdom, rightfully called written wisdom (*la ragione scritta*)”. He posited that the Church, relying on divine guidance, refined and perfected it in accordance with Christian principles to such an extent that it supplied a substantial corpus of legislation for the Middle Ages and the modern era, coinciding with improvements of private and public life (PM). It is noteworthy to underscore that within the framework of the “old canon law,” Roman legal norms were employed as supplementary provisions (*in via suppletiva*) to church norms, insofar as they did not contravene the spirit of church law (Cavalaglio 2014, 379). With the publication of the Pius-Benedictine Code of Canon Law (1917), territorial private law assumed the function of subsidiary law. However, Roman law persisted within contemporary canon law, especially through in-

terpretative principles. Canon 6 § 2 of the Code of Canon Law stipulates that the canons of the code encompassing the old law (*ius vetus*) should be interpreted with consideration given to canonical tradition (*traditio canonica*) (Meyer 2012, 141). Through this provision, the Code of Canon Law underscores the continuity with the old canon law (*ius vetus*), in which Roman law played a significant role, particularly within the purview of general legal principles (*regulae iuris*) (Žepič 2021, 298; Petrak 2020, 259).

In certain modern European legal systems, legal tradition occupies the status of some sort of an auxiliary legal source. As per Article 1, paragraph 3 of the Swiss Civil Code of 1907, in cases where a legal gap exists, the court is obligated to render decisions based on customary law. If customary law does not cover specific circumstances, the court must fashion a legal rule as if it were the legislator, while adhering to established (prevailing) legal doctrine and tradition (*“Es folgt dabei bewährter Lehre und Überlieferung”*). In Swiss law, “established doctrine” refers to the consistent and recognized legal opinion developed by national or foreign legal scholars, courts, and other legal actors. The tradition of *ius commune* is considered to be an established doctrine (Honsell 2014, 32). Contrastingly, the so-called “tradition”, *die Überlieferung* (fr. *la jurisprudence*, it. *la giurisprudenza più autorevoli*) encompasses judicial practice (Honsell 2014, 32; Dürr 1998, 409ss). Both of these hold persuasive authority in legal interpretation and decision-making (Huber 1911).

The third article of the Slovenian Courts Act (ZS) explicitly mandates the subsidiary application of principles derived from legal traditions (*izročilo*) within the Slovenian legal system, drawing inspiration from the Swiss Civil Code. In cases where a civil law matter cannot be resolved through the application of existing regulations, the court (excluding the Constitutional Court) is required to give priority to provisions governing analogous cases, commonly known as legal analogy (*analogia legis*). If the resolution of the matter remains legally uncertain even after employing legal analogy, the court must make its decision in accordance with the general principles of the national legal order (*analogia iuris*), while adhering to legal tradition and relying on established legal doctrine.⁵ It is widely recognized that the Slovenian legal system originates from the Roman-Germanic continental legal culture, with received Roman law representing its oldest component (Zimmermann 2007; Waldstein 2008, 125). Consequently, this provision serves as a guiding principle for judges, where they are directed to seek a legal resolution that aligns with the doctrinal principles of the Roman-Germanic legal tradition when addressing legal gaps through legal analogy. In this way, one could claim that the legislator tends to mitigate the challenges associated with the amalgamation of legal-cultural phenomena and potential drawbacks of transplanting legal principles from common-law or other legal traditions.

⁵ Art. 3, 2 of Courts Act: “Če se civilnopravna zadeva ne da rešiti na temelju veljavnih predpisov, upošteva sodnik predpise, ki urejajo podobne primere. Če je rešitev zadeve kljub temu pravno dvomljiva, odloči v skladu s splošnimi načeli pravnega reda v državi. Pri tem ravna v skladu s pravnim izročilom in z utrjenimi spoznanji pravne vede.”

Prior to the enactment of the Slovenian Courts Act, a comparable function was fulfilled by § 7 of the Austrian General Civil Code. In this provision it is stipulated that in cases where a legal matter cannot be resolved by applying the literal wording or the inherent meaning of any specific law, recourse should be made to similar cases explicitly determined by legislation, as well as to the rationales presented in other related laws. Should the legal case remain uncertain, a decision should be reached by carefully considering and evaluating the relevant circumstances in light of natural legal principles. In the General Civil Code,⁶ as per the prevailing doctrinal view, natural law is invoked as a supplementary interpretive criterion. Nevertheless, the precise intended significance of this reference continued to elude scholars. Slovenian legal philosopher Furlan (1931, 69) had a distinct interpretation of the “natural legal principles”. For Furlan, these principles did not imply the consideration of legal analogy, the intent behind legislation, nor the general legal principles within positive law. Rather, he regarded them as a call to uphold the “idea of justice” as stemming from “the principle of coexistence based on equal recognition of human dignity among all members of society. This principle stands as the highest guiding principle for judges in all their actions, ensuring not only legality but also fairness.” (69) According to Furlan, a decision can be deemed in line with natural legal principles only if it upholds the overarching principle of respecting human dignity. However, Austrian legal historian Paul Koschaker (1966, 346), building upon Hoffmann’s commentary on the General Civil Code, has offered a different perspective on the derivation of “natural legal principles” compared to Zeiller’s speculative approach involving the “philosophy of law” (1811, 65). Koschaker argued that it is unnecessary to seek an intangible “absolute natural law” solely based on “reason”, as Zeiller suggested.⁷ Instead, he emphasized the importance of a tangible and historically discernible concept known as “relative natural law”. This understanding can be extracted strictly through a historical analysis involving a comparison of the legal systems contributing to the development of European law (Waldstein 1967, 1ss; Petrak 2007, 180ss). According to Koschaker, Roman law holds a central position among these legal systems, representing a form of “relative, European natural law”.

Koschaker’s perspective is in consonance with the ideas expressed by Pope Benedict XVI. Although Roman law no longer represents a binding corpus of rules

⁶ Pffaf and Hoffmann (1877, 171), in discussing the significance of natural legal principles, rely on the viewpoint expressed by Rotteck (Staatslexikon, s.v. “Naturrecht”): “Roman legal legislation, in its prevailing character (excluding institutions derived from particular political, religious, and moral conditions), is ... a closer determination of the law of reason.” Additionally, Zachariä (1805, 7) asserted that “in general, Roman law is largely an exposition of natural law presented through its logical implications.”

⁷ During a session of the legislative commission responsible for drafting the General Civil Code, Zeiller reportedly stated on December 21, 1801: “The law is not a human invention, and the rulers are not creators of law, nor legislators. All rights originate from reason. The legislator is the organ, the applying interpreter of legal reason. Reason, however, leaves no question unanswered within its scope, and its pronouncements are immutable and universal.” (Ofner 1976, 6) In his own commentary, Zeiller (1811, 23) explained that the civil legislation of European countries is similar due to the same source, which is encompassed by natural law in Roman law: “... that is why all states agree on many legal statutes, and that is why the Roman law, which was adopted long ago and derived from reason, still forms the basis of the newest legal codes.” (“... aus der Vernunft geschöpfte, vorlängst angenommene, Römische Recht noch immer die Basis der neuesten Gesetzbücher aus.”)

in contemporary European legal systems, its significance when addressing fundamental issues, where solutions cannot be derived directly from existing legislation, should not be underestimated. The utilization of Roman law principle as a reference provides substantial evidentiary support for the soundness of a given legal conclusion. Roman law stands as the culmination of extensive research conducted by eminent legal scholars, representing the accumulated wisdom of centuries and serving as the foundational basis for many continental legal systems (Acton v. Blundell, 152 Eng. Rep. 1223, 1234 (1843)).

Abbreviations

CIC – Code of Canon Law 1983.

DH – Second Vatican Council 1965 [Declaratio de libertate religiosa dignitatis humanae].

PM – Benedict XV. 1917 [Providentissima mater].

References

- Benedict XV. 1917.** Providentissima mater. Bolla. Vatican. 27. 5. https://www.vatican.va/content/benedict-xv/it/bulls/documents/hf_ben-xv_bulls_19170527_providentissima-mater.html (accessed 5. 1. 2023).
- Benedict XVI. 2006.** Faith, Reason and the University: Memories and Reflections: Address to the representatives of science during the apostolic journey to Munich, Altötting, and Regensburg (September 9–14, 2006). Vatican. 12. 9. https://www.vatican.va/content/benedict-xvi/en/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg.html (accessed 3. 1. 2023).
- . 2008a. Lecture by the Holy Father Benedict XVI. at the University of Rome 'La Sapienza'. Vatican. 17. 1. https://www.vatican.va/content/benedict-xvi/en/speeches/2008/january/documents/hf_ben-xvi_spe_20080117_la-sapienza.html (accessed 3. 1. 2023).
- . 2008b. Meeting with representatives from the world of culture. Vatican. 12. 9. https://www.vatican.va/content/benedict-xvi/en/speeches/2008/september/documents/hf_ben-xvi_spe_20080912_parigi-cultura.html (accessed 3. 1. 2023).
- . 2010a. Meeting with members of British society, including the diplomatic corps, politicians, academics, and business leaders. Vatican. 17. 9. https://www.vatican.va/content/benedict-xvi/en/speeches/2010/september/documents/hf_ben-xvi_spe_20100917_societa-civile.html (accessed 3. 1. 2023).
- . 2010b. *Licht der Welt, Der Papst die Kirche und die Zeichen der Zeit: Ein Gespräch mit Peter Seewald*. Vienna: Herder.
- . 2011a. Meeting with members of the General Assembly of the United Nations organization. Vatican. 18. 4. https://www.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit.html (accessed 3. 1. 2023).
- . 2011b. The Listening Heart: Reflections on the Foundations of Law. Vatican. 22. 9. https://www.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html (accessed 3. 1. 2023).
- Cartabia, Marta, in Andrea Simoncini.** 2015a. *Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law*. Cambridge: University Press.
- . 2015b. A Journey with Benedict XVI through the Spirit of Constitutionalism. In: Cartabia in Simoncini 2015, 1–30.
- Cavalaglio, Lorenzo.** 2014. Traditio Canonica and Legal Tradition. *Monitor Ecclesiasticus* 129:377–408.
- Code of Canon Law.** 1983. Vatican. https://www.vatican.va/archive/cod-icris/canonici/cic_index_en.html (pridobljeno 23. 6. 2023).
- Dreier, Horst.** 2011. Benedikt XVI. und Hans Kelsen. *JuristenZeitung* 66, no. 23:1151–1154. <https://doi.org/10.1628/002268811798379289>
- Dürr, David.** 1998. Art. 1. In: Peter Gauch and Jörg Schmid, eds. *Kommentar zum Schweizerischen Zivilgesetzbuch*, 241–424. Zürich: Schulthess.

- El Beheiri, Nadja.** 2014a. ‚Natur und Vernunft als die wahren Rechtsquellen‘ aus der Perspektive von Joseph Ratzinger/Benedikt XVI. und Wolfgang Waldstein. In: Nadja El Beheiri and János Erdödy, eds. ‚*Ins Herz geschrieben*‘ *Die Grundlagen des freiheitlichen Rechtsstaates*, 27–44. Budapest: Pázmány Press.
- . 2014b. Das Naturrechtsverständnis von Wolfgang Waldstein: Überlegungen anlässlich der Rede von Benedikt XVI. im Deutschen Bundestag. In: P. Szabó Béla and Újvári Emese, eds. *Universitas ‚unius rei‘: Tanulmányok a római jog és továbbélése köréből*, 107–121. Debrecen: OE ÁJK.
- . 2014c. Ein Gespräch mit Wolfgang Waldstein. 7. 11. <https://forhistiur.net/2014-09-el-beheiri> (accessed 3. 1. 2023).
- Elsener, Ferdinand.** 1956. Zur Geschichte des Majoritätsprinzips (Pars maior und Pars sanior), insbesondere nach schweizerischen Quellen. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung* 42, no. 1:73–116. <https://doi.org/10.7767/zrka.1956.42.1.73>
- Essen, Georg.** 2012. Eine wahre Ungeheuerlichkeit: Die Bundestagsrede des Papstes in historischer Perspektive. In: Georg Essen, ed. *Verfassung ohne Grund?*, 7–17. Freiburg: Herder.
- Furlan, Boris.** 1931. Naravna pravna načela (§7 avstr. drž. zak.). *Slovenski pravnik* 45, no. 1:18–38; no. 3–5:57–74.
- Geyer, Christian.** 2012. Die Gefahr der Hypertrophie. In: Georg Essen, ed. *Verfassung ohne Grund?*, 27–33. Freiburg: Herder.
- Globokar, Roman.** 2010. Pokoncilsko iskanje specifičnosti krščanske etike. *Bogoslovni vestnik* 70, no. 3:365–377.
- Hassemer, Winfried.** 2003. Ustavna demokracija. *Pravnik* 58, no. 4–5:207–226.
- Heus, Theodor.** 1956. *Reden an die Jugend*. Tübingen: Wunderlich.
- Honsell, Heinrich.** 2014. Art. 1. In: Heinrich Honsell and Christian Fountoulakis, eds. *Zivilgesetzbuch I. Art. 1–456 ZGB*, 5–32. Basel: Helbing Lichtenhahn Verlag.
- Kelsen, Hans.** 1927. Diskussionsbeitrag. In: Erich Kaufmann and Hans Nawiasky, eds. *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 des Reichsverfassung. Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Münster*, 53–55. Berlin: De Gruyter.
- . 1963. Die Grundlage der Naturrechtslehre. In: Franz-Martin Schmölz, ed. *Das Naturrecht in der politischen Theorie*. Vienna: Springer Verlag.
- . 2017. *Reine Rechtslehre: Mit einem Anhang: Das Problem der Gerechtigkeit*. Tübingen: Mohr Siebeck.
- Koschaker, Paul.** 1964. *Europa und das römische Recht*. München: Beck.
- Meyer, Christoph H. F.** 2012. Probatii auctores: Ursprünge und Funktionen einer wenig beachteten Quelle kanonistischer Tradition und Argumentation. *Rechtsgeschichte* 20:138–154. <https://doi.org/10.12946/rg20/138-154>
- Ofner, Julius.** 1976. *Der Ur-Entwurf und die Beratungs-Protokolle des Österreichischen Allgemeinen bürgerlichen Gesetzbuches*. Vol. 1. Glashütten im Taunus: Auvermann.
- Petrak, Marko.** 2007. The Significance of Ius Commune in the Contemporary Croatian Legal System. *Slovenian Law Review* 4:171–190.
- . 2020. Kanonsko pravo i hrvatski pravni sustav (I): Pravni izvori i pravna načela. *Zbornik PFZ* 70, no. 2–3:251–286. <https://doi.org/10.3935/zpfz.70.23.03>
- Pfaff, Leopold, and Franz Hoffmann.** 1877. *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche*. Vienna: Manzschke k. k. Hof-Verlags.
- Radbruch, Gustav.** 1946. Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristen-Zeitung* 1, no. 5:105–108.
- Ratzinger, Joseph.** 1987. Christliche Orientierung in der pluralistischen Demokratie? In: *Kirche, Ökumene, Politik: Neue Versuche zur Ekklesio-logie*, 183–197. Einsiedeln: Johannes Verlag.
- . 2005. L’Europa nella crisi delle culture. *Diocesi Firenze*. 20. 9. <http://www.diocesifirenze.it/leuropa-nella-cri-si-delle-culturetesto-integrale-della-conferenza-tenuta-venerdi-1-aprile-2005-a-subiacco-al-monastero-di-santa-scolasticadi-joseph-ratzinger/> (accessed 3. 1. 2023).
- . 2006. *Christianity and the Crisis of Cultures*. San Francisco: Ignatius Press.
- Rhoneimer, Martin.** 2015. The Secular State, Democracy, and Natural Law: Benedict XVI’s Address to the Bundestag from the Perspective of Legal Ethics and Democracy Theory. In: *Cartabia in Simoncini* 2015A, 79–92.
- Rudolph von Jhering.** 1866. *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*. Leipzig, Breitkopf und Härtel.
- Second Vatican Council.** 1965. Declaratio de libertate religiosa, Dignitatis humanae. *Vatican*. 7. 12. https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_lt.html (accessed 7. 1. 2023).
- Spieler, Willy.** 2011. Irren ist päpstlich: Zur Bundestagsrede von Benedikt XVI. *Neue Wege: Beiträge zu Religion und Sozialismus* 105:335–337.

- Waldstein, Wolfgang.** 1967. Vorpositive Ordnungselemente im Römischen Recht. *Österreichische Zeitschrift für öffentliches Rechts* 17:1–26.
- —. 2008. Zur Bedeutung des Naturrechts in der Entwicklung des Römischen Rechts. *Iustum Aequum Salutare* 4, no. 4:113–128.
- Weiler, Joseph, H. H.** 2015. From Regensburg to Berlin – Holiness and Reason: A Reflection on Pope Benedict XVI's Public Lectures. In: *Cartabia in Simoncini* 2015a, 93–105.
- Windscheid, Bernhard.** 1904. Die geschichtliche Schule in der Rechtswissenschaft. In: Paul Oertmann, ed. *Gesammelte Reden und Abhandlungen*, 66–80. Leipzig.
- Zachariä von Lingenthal, Karl Salomo.** 1805. *Versuch einer allgemeinen Hermeneutik des Rechts*. Meissen: Erbstein.
- Zeiller, Franz.** 1811. *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Oesterreichischen Monarchie*. Vienna: Geistinger.
- Zimmermann, Reinhard.** 2007. Roman Law and European Culture. *New Zealand Law Review* 2:341–372.
- Žepič, Vid.** 2021. Corpus iuris canonici: nastanek in pomen srednjeveške zbirke cerkvenega prava v klasični dobi kanonistike. *Pravnik* 76, no. 138:273–306.
- —. 2022. Etimologija kot argumentacijski topos v rimski pravni literaturi. *Keria: Studia latina et graeca* 24, no. 2:113–151.