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Esteemed Colleagues and Readers!

It is with great pleasure that I present the third issue of the *Copernican Journal of Law*. With this issue we reaffirm our longstanding ambition to combine theoretical reflection with practical legal dilemmas and to publish contributions of clearly interdisciplinary reach. The six articles collected here vividly demonstrate how law today encounters new technologies, the challenges of public administration, and pressing institutional problems. A common thread running through these contributions is the question of the limits of law and the instruments available to legal communities to address contemporary challenges.

This issue features authors affiliated with five foreign research institutions—the National University of San Marcos (Peru), the University of Rome "Foro Italico" (Italy), the University of Campania "Luigi Vanvitelli" (Italy), Pavol Jozef Šafárik University in Košice (Slovakia), and Tangaza University (Kenya)—as well as one Polish institution, Cardinal Stefan Wyszyński University in Warsaw. Our editorial selection aims to offer both theoretical insights and practical tools that will be useful to scholars, and arguably even more so to practitioners and reformers of public institutions.

I wish to express my gratitude to the Managing Editor, Prof. María Alejandra Vanney (Buenos Aires), for her patient and fruitful work on the three issues of the *Copernican Journal of Law* published to date. I am also grateful for the pleasant and efficient cooperation with Magdalena Jagodzińska, PhD Candidate and Acting Director of the Scientific Publishing House of the Nicolaus Copernicus Superior School in Warsaw, and in particular for her assistance with the publication of this issue. My thanks go to all the authors for their contributions and to the peer reviewers for their substantive comments. Finally, I wish to thank our readers—this journal exists for you.

I invite you to enjoy the readings and to engage in lively discussion. I trust that the articles presented here will stimulate further research and scholarly initiatives.

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Carl Schmitt and the Mystery of the Incarnation: A Theological Interpretation of the *Rechtsverwirklichung*

• **Abstract** •

This paper attempts to understand the concept of political theology, created by the German jurist Carl Schmitt, in light of the Christological problem of the incarnation. To this goal, we will first study the approach Schmitt introduced to resolve the ontological-legal problem of what German philosophy of the time called *Rechtsverwirklichung*, a term we will translate as "the realization of the Law", a process that involves the relationship between the "Idea of Law", the State, and decision-making. Secondly, we will study the doctrine of sovereignty proposed by Schmitt as a theological solution to this problem, expressed in the relationship between the State, decision-making, and exception. As we will see, this interpretation has its origins in the secularization of Christian theology in the 12th century, centered on the problem of the incarnation, which served as a model for the development of what some historians called the "papal revolution".

Keywords: *Rechtsverwirklichung*, Sovereignty, Political theology, Secularization, Incarnation.

Introduction

Carl Schmitt's work is an attempt to grasp the presence of God within modern secularized society. Therefore, this conception does not in any way imply the restoration of a religious theocracy or the creation of a hierocratic republic, as it might seem. Schmitt believes that this presence is inherent to the very political history of the West, whether it be a religious or atheistic era. For this reason, he identifies its most important manifestation under the concept of political theology. In this sense, if we wish to be more rigorous, the expression political theology means for Schmitt "the presence of God in politics". The sphere in which this presence is

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manifested in a privileged way is the State, which actualizes the divine presence through the sovereign's decision in the face of a state of exception. But what is the presence of God according to Schmitt? Strange as it may seem, the presence of God is Law, or what philosophers call the "Idea of Law". Therefore, the apprehension of God's presence in the world can only occur through the realization of the Idea of Law (*Rechtsverwirklichung*) within society.

In this article, we will attempt to interpret Schmitt's political theology in light of the Christological problem of the incarnation. To this goal, in the first part, we will study the relationship Schmitt establishes between the "Idea of Law", the State, and decision regarding "the realization of the Law" (*Rechtsverwirklichung*). Then, in the second part, we will review the link between the State, decision, and exception regarding the realization of sovereignty. We will see that the doctrine of sovereignty developed by Schmitt is nothing other than the "theological interpretation" of a problem of legal-political ontology that German philosophy of law had identified, since the rise of Neo-Kantianism, with the concept of "the realization of the Law" (*Rechtsverwirklichung*). As we will mention, this interpretation has its origins in the secularization of Christian theology in the 12th century, centered on the problem of the incarnation, which served as a model for the development of what some historians called the "papal revolution".

Rechtsverwirklichung: A Problem of Legal-Political Ontology

State and Sovereign Decision

As is known, from a sociological point of view, the relationship between power and law constitutes the foundation of all social phenomena. On the one hand, power always implies the exercise of a capacity for domination that can eventually become unlimited; on the other hand, law always implies the regulation and limitation of all power (Coing, 1961, p. 89).

If, from a sociological point of view, this relationship is always resolved in favor of power, from a legal point of view, it is law that wins. These are two forms of monism in the relationship between law and power. For the proponents of power, law is merely a more organized expression of power; while for the proponents of law, power is incapable of acting if there is no legal idea behind it (Coing, 1961, p. 48).

Both monisms originate in positivism, one of a sociological nature, the other of a legal nature. Against both, Dilthey developed, at the end of the 19th century, his doctrine on the nature of law, preparing the ontological dualism between power and law. For him, law is nothing more than the link between the "external orga-

nization of society" and the "system of culture", that is, the institutionalized and objective expression of processes of consciousness linked to purposes and values. In this sense, law is a complex of ends founded on the connection between legal consciousness, positive law, and the "Idea of Law", objectified in the will of an institution (Dilthey, 1980, pp. 107–108).

Dilthey established the need to recognize, within reality, a new ontological sphere of an ideal nature, which he identified with the "realm of values". Law would be part of this ideal realm, conceived from now on through the concept of ought-to-be (*sollen*), as opposed to the real being (*sein*) of the concrete world (Coing, 1961, p. 120).

This demarcation between the spheres of law and power—which corresponds, respectively, to that between value (*Wert*) and reality (*Wirklichkeit*), or to that between ought-to-be (*sollen*) and being (*sein*)—has its origin in the Kantian notion of duty, and its historical theoretical continuity is found in the legal reformulation of it by neo-Kantianism: the Baden School, in the ideas of Heinrich Rickert and Wilhelm Windelband, developed by Gustav Radbruch (Kantorowicz, 1964, p. 63); and the Marburg School, based on the ideas of Paul Natorp and Hermann Cohen, developed by Rudolf Stammler (Fassò, 1983, p. 186).

Following neo-Kantian approaches, Radbruch conceived of law as a "system of values" that, while originating in social facts, could not, however, be logically grounded by them. In this sense, legal precepts could only be demonstrated by other precepts of an identical nature, not by any reference to the social forces from which they originated. However, when legal precepts constitute the axioms from which the entire conceptual edifice of law is established, they are unprovable, since their reality must necessarily be presupposed to demonstrate those that are deduced from it (Radbruch, 1944, pp. 16–17).

This perspective leads to the creation of a methodology that Radbruch himself christened "relativism". According to this methodology, it is impossible to discuss the ultimate foundations of law, that is, the values that underpin a given corpus of law. For Radbruch, it is impossible to determine, from a theoretical perspective, which legal precept is preferable to another, which does not, however, mean renouncing its practical application. Thus, from this perspective, the multiplicity of theoretical legal conceptions is affirmed (Radbruch, 1944, pp. 19–20).

However, Radbruch attempted to overcome his own "relativism", distancing himself from the positions of the "Free Law Movement" (*Freirechtsbewegung*), very much in vogue at the time, which lapsed into an extreme relativism incapable of justifying the exercise of law, as it was unable to determine the actualization of legal values in the concrete context of social reality. For this reason, he proposed

the need for a mediating, even authoritarian, body capable of imposing law on concrete reality (Radbruch, 1944, p. 109). This mediation between both worlds would be the decision, which, according to him, would constitute the true expression of the norms, which is why he came to affirm that the effective content of law is not the set of norms, but the set of decisions (Radbruch, 1944, pp. 159–160).

If the post-Kantian tradition of legal philosophy finds its first expression in the Baden School, specifically in Gustav Radbruch's "decisionist doctrine", the second expression of this tradition, embodied in the Marburg School, is represented by Rudolf Stammler's "doctrine of just law". As we shall see, Schmitt reinterpreted Radbruch's "decisionism" in light of what he called the "Idea of Law", a notion that has its origins in Stammler's philosophy of law.

Based on an application of Kantian epistemological theory to law, Stammler believes that law is not an abstraction derived from social facts, but rather their a priori condition, since without legal concepts, not only would it be impossible to think of society in normative terms, but social organization itself would also be impossible (Fassò, 1983, p. 187).

In this sense, according to Stammler, the "concept of society" contains two fundamental elements: the "social connection of individuals" (*Verbindung als solche*) through external regulation, and the social activity of individuals (*zusammenstimmende Tatigkeit*), which are part of this connection. Within the concept of society, social connection is the "logical condition" (*logische Bedingung*) of the social activity of individuals. For this reason, in Kantian terms, with respect to the concept of society, connection is the form of the concept, while activity is its matter. The form of the concept of society will therefore correspond to Law, since, as the external regulation of the social activity of individuals, it will order individual aspirations through the exercise of a single will superior to all of them (Stammler, 1930, p. 101).

For this reason, the "concept of law" is a category referring to a type of act of the human will, distinct from morality, habits, and arbitrary action. The philosophy of law will then have as its primary object of study the categories through which we think legally (Stammler, 1930, pp. 3–5). Thus, Stammler will identify four fundamental legal categories that determine the concept of law: will, bond, autonomy, and inviolability. Law will then be "an autonomous, inviolable, binding will" (*das unverleztbar selbstherrlich verbindende Wollen*) (Fassò, 1983, pp. 187–188).

However, Stammler's Kantian impetus does not stop at this point, since, if the concept of law he discovered corresponds to the theoretical principle that will unify all legal categories into a single system of legal knowledge, as occurs with the idea of God in the Critique of Pure Reason; the "Idea of Law" will correspond to

that principle that, like the Kantian categorical imperative, will completely unify human conduct in accordance with law (Fassò, 1983, p. 188).

Indeed, for German jurists of Stammler's time, the "Idea of Law" was the expression of the ethical and normative content of the legal order, that is, Justice. In this sense, it was the set of values linked to the exercise of law, such that it serves as the ideal objective of legal life. In this sense, it can be said to function as the Kantian regulative idea, distinguishing law from mere power (Coing, 1961, pp. 108, 158, 161).

Thus, the second objective of the philosophy of law will be to determine the "Idea of Law" present in legal activity described through the "concept of law". This idea is none other than Justice, that is, the principle that grants legitimacy to the concept of law. It is not enough, then, to differentiate law from other forms of exercising the will; it is also necessary to establish whether such law is legitimate and just (Stammler, 1930, pp. 4–5).

In this sense, the "Idea of Law", that is, Justice, as the unifying principle of human action carried out within positive law, lacks content and determination. It is therefore a completely a priori formal principle that makes human legal activity possible in the form of a kind of "Natural Law with variable content" (*Naturrecht mit wechselndem Inhalte*). The "Idea of Law" will thus consist of a set of legal propositions that contain the theoretically just law present in concrete social facts (Fassò, 1983, p. 188).

Schmitt will reinterpret Stammler's doctrine of "Natural Law with variable content" (*Naturrecht mit wechselndem Inhalte*) in terms of a "Natural Law without nature" (*Naturrecht on the naturalismus*). In this sense, he will introduce the conception according to which law possesses an original ethos that neither ethics nor theology can substantiate (Galli, 1996, p. 317).

Contrary to Stammler and like Radbruch, Schmitt contrasted the social fact with the evaluative precept of law, introducing a bridge between the two dimensions. However, unlike Radbruch, the Schmittian approach will not fall into resorting to pure decision, since, paradoxical as it may seem, "Schmittian decisionism" does not abolish the function of the norm as the foundation of law. Subordinating the norm to the decision would mean falling into Radbruch's relativism, since the decision, by applying the norm to a specific situation, separates itself from the universality of law. Therefore, to overcome relativism, while maintaining, however, the dualism between the Idea of Law and social facts, it is necessary that the decision be subordinated to the norm (Nicoletti, 1990, p. 19).

Starting from this dualism, Schmitt showed the impossibility of subsuming law under power, as sociologists claimed, and, conversely, the difficulty of subsuming

power under law, as positivist jurists postulated. At the root of this impossibility, according to Schmitt, was an ontological gap between the "Idea of Law" (abstract transcendence) and power (concrete immediacy) (Galli, 1996, pp. 316–317).

Therefore, according to Schmitt, between ought-to-be (*sollen*) and being (*sein*), between law and reality, between law and power, there existed an unbridgeable ontological gap in the first instance. In this sense, law, as an ideal, is not identical with positive law, since the latter arises from the activity of the State in relation to social facts; nor can it be based on the particular or social interests of individuals, since these lack, in and of themselves, any reference to autonomous regulation (Nicoletti, 1990, pp. 43–44).

Likewise, it is also impossible to sustain the conception according to which law would be the "ideal purpose" that concrete reality should achieve, since all purpose corresponds to the moment of realization and will, which belong, on the contrary, to the realm of being, not to the ought-to-be of the legal sphere. In this sense, the realization of law (*Rechtsverwirklichung*) will always correspond to an entity linked to will and decision, aspects that do not belong to law as an abstract norm (Nicoletti, 1990, pp. 45–46).

Therefore, Schmitt will propose the need to realize the "ethos of law" in the concrete world. In this sense, the autonomy of law, as a system of values, can only be realized, although always "incompletely", by the "ends of a public will" (*Willszweck*), determined socio-historically, which does not formally belong to the legal sphere. The separation between the "Idea of Law" and empirical reality thus requires an agent capable of realizing law in the world. This agent is none other than the State (Galli, 1996, p. 318).

The Idea of Law, Decision, and Positive Law

To successfully articulate the dualism between both dimensions of being without falling into relativism, Schmitt integrates decision-making within the State, transforming it into the only possible mediator between Law and social facts. The State will thus be the only subject that can embody the ethos of Law, and to this extent, decision-making, which in Radbruch prevailed in a detached manner over the norm, in Schmitt, being part of the State, will end up being subordinated to the norm. In this sense, decision-making, as an act of the State itself, will become the instrument through which the State will elevate itself to the spiritual world of Law, thus imbuing itself with its legal ethos (Calabrese, 2009, pp. 185–186).

Thus, the opposition between power and law can only be resolved through the establishment of a legal-political unit capable of creating a stable normative order

for social life: the State. Thanks to this unity, power and law can be integrated into a single institution charged with both exercising power and controlling it at the same time (Coing, 1961, p. 92).

In this sense, the sovereign decision executed by the State is not identified with "naked power", as many critics and/or supporters of dictatorship claim, since what the State carries out is not the result of arbitrariness, but of an action subordinated to the "Idea of Law". From this, the State creates positive law through sovereign decision (Galli, 1996, p. 321).

Between the evaluative dimension of legal precepts and the dimension of social facts, an intersubjective medium is thus constructed, constituted by the "ends of the will" (*Willszweck*). These "ends of the will", which allow the law to be concretely implemented in practice, are determined by historical and social circumstances, which is why they are not part of the evaluative essence of law, but of the state. In this way, Schmitt leaves aside any reference to Natural Law or ethics as the foundation of Law (Nicoletti, 1990, pp. 20–21). These ends will be embodied by the State, which, from now on, becomes the subject of the "legal ethos" that must be realized in social facts through sovereign decision (Nicoletti, 1990, p. 56).

Thanks to the State, law deploys its authority against the "naked power" that inhabits social facts, and the two ontological regions separated by the very structure of reality are articulated. The difference between ought (*sollen*) and being (*sein*) remains, but it remains linked by state mediation, although always determined by the contingency associated with the State (Galli, 1996, p. 323).

This dominance of law over the state is explained by Schmitt through a reference to Saint Augustine, who describes the Trinity present in The City of God. Thus, surprisingly enough, Schmitt uses three qualities of the Trinity to explain the imprint of law on the state, just as Saint Augustine describes the foundation of the divine city: "Das Recht ist für den Staat, um einen Ausdruck des Augustinus zu verwerten, *origo*, *informatio*, *beatitudo*" (Schmitt, 1914, p. 53).

Indeed, Saint Augustine uses these expressions to describe the action of the Trinity through the Holy Spirit in the works of God. In Saint Augustine's text, the terms *origo* (origin), *informatio* (form), and *beatitudo* (happiness) are used to characterize the City of God through the activity of the Holy Spirit, who imprints the seal of the Trinity on the works it accomplishes. Thus, origin corresponds to God the Father, form to God the Son, and happiness to God the Holy Spirit. From God the Father originates all that exists, whether created or begotten; from God the Son all things receive their form, the image of the Word; and from God the Holy Spirit all that exists obtains its happiness, teleological goodness (Agustín, 1958, p. 757).

Secondly, Saint Augustine affirms the belonging of the divine city to the Trinity. From this it follows that the divine city is an extension of God himself. Thirdly, it is said that the Trinity is insinuated to us in the works of the Holy Spirit, so that, as creations of God, we are always in relationship with him through such works. The only way this can happen is because the image of the Trinity is also found in human nature. Thus, within us, as extensions of the Trinity, lives the Divine City, which we must realize in practice if we wish to aspire to it, through the actions that Jesus demonstrated by his example in the Gospel.

Similarly, Law, according to Schmitt, is the Trinity with respect to the State, for the State draws from it its origin, its form, and its happiness—that is, its essence, its science, and its love, or, in more secular terms, its desire to live, its desire to know, and its desire to love. In this sense, the State, like all created beings, bears the Trinity imprinted in its soul. The soul of the State is constituted by the universal community of human souls; therefore, Law is the immortal Trinitarian God from whom the State draws its own nature, for the State constitutes an ontological extension of the former. The State only makes sense within the context of law, which represents the immortal trinity (Agustín, 1958, p. 761).

Precisely, the State constitutes that public will that is expressed through a specific type of personality, the personality of the State, which, as the bearer of the "ethos of law", can "materialize" legal norms in the social sphere. In doing so, it constitutes itself as the servant of the norms and transforms itself into a State of Law, introducing a new legal-political entity that did not previously exist (Calabrese, 2009, p. 185).

From this confrontation between Law and the State, two dimensions are introduced within Law itself, an ideal dimension and a positive dimension, respectively: the completely ideal "Idea of Law", which ontologically precedes the State and serves as its model, and positive Law created by State decision (Calabrese, 2009, p. 189).

In this way, the "Idea of Law", as a legal dimension prior to the State, will fulfill, with respect to positive Law, the function that was once attributed to Natural Law, but without reference to human nature (*Naturrecht ohne Naturalismus*). In this sense, the "Idea of Law" will be a fundamental, but not essential, Law, that is, a curious form of a priori Natural Law, whose function resembles the functions of the ideas of reason in Kant in its practical version (Nicoletti, 1990, pp. 50–51). The transition from one dimension to another occurs through a sovereign decision that will allow the State to "realize" (*Rechtsverwirklichung*) the "Idea of Law" in positive law (Nicoletti, 1990, p. 46).

The State will then fulfill the mission of updating this idea so that, subsequently, social forces become legalized. In this way, the State carries out two mediations

through which three spheres of legal-political reality are articulated: one between the "Idea of Law" and positive law, and another between positive law and social facts. Thus, a concrete legal form is created from the "Idea of Law" (Galli, 1996, p. 321). "Der Staat ist danach das Rechtsgebilde, dessen Sinn ausschliesslich in der Aufgabe besteht, Recht zu verwirklichen (…)" (Schmitt, 1914, p. 52).

Thus, as a point of transition between both worlds, the State becomes a fundamental element within Schmittian theory, which places it in the position of a true "mortal god" within the sphere of law, similar to that of the categorical imperative in Kantian ethics. In this sense, the mediation between the ideal world of legal values and the material world of facts operated by the State will ultimately be revealed as its theological-political function (Galli, 1996, p. 319).

The task of the State will then be to actualize the completely transcendent "Idea of Law" within concrete political praxis through state mediation between law and power. Therefore, the State will always have a subordinate role to law, although, in the face of concrete facts, it may have a rather absolute character (Nicoletti, 1990, p. 55). "La autoridad del Estado, pese a todo, no se sustenta en el Poder sino en el Derecho que pone en ejecución. Justamente porque el que lo ejecuta es el Estado, se sigue la superioridad del Derecho" (Schmitt, 2011a, p. 49).

At the same time, although the State is responsible for giving political form, through positive law, to a set of social facts originally lacking in form and organization, the value of the State lies in recognizing that the mediation it carries out will never be perfect, but rather incomplete and instrumental to the purposes of the legal form, which operates coercively on political facts (Galli, 2011, p. 24).

Therefore, the State is a "transcendental original instance" of a legal, not merely sociological, nature, which assumes the responsibility of creating the concrete situation within which the positive legal order must operate. It is the condition of possibility for legal norms to develop in society. In this sense, the State will always have the prerogative to transform the positive normative order if circumstances eventually require it (Dotti, 1996, p. 137).

The Sovereign Decision

The origin of the concept of sovereign decision, as a mediation between the ideal sphere of law and actual facts, stems, as Schmitt has emphasized on many occasions, from the legal dynamic deployed over the centuries by the Catholic Church and its supreme sovereign: the Pope. Indeed, the sovereign decision is nothing more than the secularized expression of the Catholic doctrine according to which the Supreme Pontiff is "the infallible interpreter of moral and natural laws and the

content of revelation", which is why "he has been empowered to declare that state laws that contradict natural moral laws or the *ius divino naturale* are not binding in conscience" (Schmitt, 2011a, p. 57).

From this systematization of Roman law by the Catholic Church, the figure of the sovereign was introduced in the West. However, this assimilation of Roman law into a Christian context was due to the new needs that the Christian community itself had to face from the moment it became the official religion of the empire. As is known, the connection between the invisible world constituted by the Holy Spirit and the visible world constituted by the faithful could only be realized through the sacraments, especially the Eucharist, and ethical praxis. However, when Christianity ceased to be an interior religion and became a state religion, it required the creation of a constitutional legal order capable of governing the social life of its faithful. Thus, the idea of "papal infallibility" was established, materialized in the *ex cathedra* decisions of the Supreme Pontiff, based in turn on an established *ius divinum* (Schmitt, 2011a, p. 57).

Thus, through the concept of sovereign decision, Schmitt describes the "incomplete mediation" carried out by the State between the "Idea of Law" and the actual power of social events, transforming the former into positive law (*Rechtsverwirklichung*). However, the creation of these laws is not the result of arbitrariness, since the State is subordinate to the "Idea of Law". Therefore, it is the State itself that, through sovereign decision, creates these concrete forms from the "Idea of Law". In doing so, it will insert it into the concrete order, representing it within contingency. For this reason, Schmitt will always maintain that it is the State, and not law, that has as its objective social coercion, since, being part of the concrete world, it has the capacity to do so (Galli, 1996, p. 321).

The creation of norms by the State implies the division of law into two spheres: the "Idea of Law" and Positive Law. Thanks to the State's activity, a new dynamic will be created between these two spheres within the legal dimension itself. In relation to the "Idea of Law", the State will have a subordinate position, while, in relation to Positive Law, it will have a dominant position. The "Idea of Law" will function, as we have already mentioned, as a "Natural Law without Nature" (*Naturrecht onhe Naturalismus*) (Nicoletti, 1990, p. 51).

The ontological gap between the "Idea of Law" and social facts can only be bridged by an act of decision that remains in the hands of the State, even if this act is always imperfect. If, on the one hand, the intrinsic purpose of state decision-making is the realization of the "Idea of Law", on the other hand, the consistent realization of this purpose is never completely guaranteed. The ontological gap between both spheres thus implies an insurmountable original fault

in the construction of the political unity of the modern State (Scalone, 2005, p. 334).

The act of decision-making will be reproduced in all constituent bodies of the State; thus, for example, in the case of a judicial decision, it will mediate between Positive Law and the specific case; in the case of "judicial execution", it will mediate between the specific case and the executive decision to which it is subordinated; all this thanks to the transformation of the "Idea of Law" into Positive Law (Schmitt, 2011a, p. 55).

Similarly, the State makes the decision that serves to transform the "Idea of Law" (*Rechtsnorm*) into a positive norm with the purpose of "legalizing" social reality (*Rechtsverwirklichung*). The State must engage in a double mediation with the Law: transferring the "Idea of Law" to social facts and applying the Law to the specific legal situation: through the first, positive law is created in a document; through the second, Positive Law is applied to the specific legal situation: both acts through a sovereign decision (Calabrese, 2009, pp. 156–157).

For a state decision to be truly sovereign, it must be rooted in the figure of the official in charge of making it. Otherwise, we would be faced with a mere bureaucratic administrative procedure derived from the norm, a kind of substantialist dynamization of the norm, according to which the norm itself would be applied to the facts without the need for any personal action by the official. In this sense, the example of an official who exercises sovereign decision-making in service to the law as opposed to power is the Judge, who embodies the "mouth of the law" (Schmitt, 2011a, p. 52).

The sovereign decision will thus consist of state mediation embodied by the competent official who actualizes law in the factual world. From Schmitt's perspective, it is therefore a matter of determining the role that authority plays in generating the act of decision, combining the formal aspect of the decision with the personal aspect of sovereignty (Dotti, 1996, pp. 134–135).

Now, it is necessary to emphasize once again that, for Schmitt, the State is not autonomous from the Law; that is, the State is always an instrument of the Law, even if the norm or the legal system as a whole has been suspended. To the extent that state decision-making also belongs to the Law, it is possible to avoid anarchy, chaos, or war despite the absence of norms. In this sense, as surprising as it may seem, decision-making is a condition that makes possible the regular functioning of the norm (Dotti, 1996, pp. 136–137).

For this reason, Schmitt always distinguishes between Law (*Recht*), as the "order of law" or legal organization with respect to society, and law, as "law", "legal order", or set of norms (*Gesetz*). The "order of law", embodied in the State, is thus

responsible for "normalizing" social relations and making possible the peaceful coexistence based on which the "legal order", embodied in the norms, can be applied. In this sense, thanks to the State, as the "order of law", "the set of peaceful habits and behaviors, legally regularized and predictable in a community", can be adequately developed; that is, a factual normality is established upon which normative normality is built (Dotti, 1996, p. 137).

In this way, the "order of law" provides the sovereign decision to the entire legal system, while the "legal order" provides its stable normative structure. Both elements are combined both logically and genetically, where the decision establishes the norm, and synchronously, where both moments usually occur simultaneously. The meaning of the decision is its legal purpose, that is, to make the rule of law possible (Dotti, 1996, p. 138).

Sovereign decision-making can take two forms: either it is carried out under the modality by which the legal order is "created" from the conjunction of the "Idea of Law", the State, and the *de facto* power; or it is carried out under the modality by which, within an already established legal order, this order is materialized from the interaction between positive law, the State, and social facts. This latter modality will have two moments that we will call normative decision-making, exercised in normal cases, and exceptional decision-making, exercised in exceptional cases.

An example of a normative decision can be found in Schmitt's study of "Law and Judgment" (1912), in which he focused on the "judicial decision", that is, the function of the decision within the framework of judicial praxis. In this work, the decision is subordinated to the norms, to the point that we no longer speak of the will of the judge, but rather of the "will of the law" or the "will of the legislator". Thus, in general, judicial praxis appears as an "application of the law" (Schmitt, 2012, p. 41).

Thus, what the guarantee-based conception seeks is to subordinate judicial activity to the "principle of legality", making this the criterion for the correctness of judicial decisions. This subordination is achieved by subsuming judicial rulings to the rule of law, so that the "principle of legality" always presupposes subsumption as the criterion for correcting the "judicial decision" (Schmitt, 2012, p. 61).

However, the subsumption of judicial decisions under norms is insufficient to establish the appropriate criterion for correctness in the judicial decision. Indeed, over time, practical difficulties inherent in judicial proceedings arise that affect the effectiveness of the application of the law, especially when factual exceptions arise that limit the required subsumption (Schmitt, 2012, p. 62).

On the contrary, when we look at judicial practice, we can observe that the content of the law passes through the filter of the "judicial decision", such that such

content leaves the ideal world of precepts and appears in a "new sphere" of legal reality. Thus, thanks to this filter, the result of the application of the law to a specific case is differentiated from the abstract content of the law (Schmitt, 2012, p. 50).

Schmitt denies as criteria for the correctness of a "judicial decision" both the positivists' subsumption of the law and the "weighing of pre-legal aspects" of the Free Law School. Thus, what is required of the judge for his judicial decision (his judgment) to be correct is that it satisfy the principle of "determination" of law, which, according to Schmitt, consists of the judge's ability to calculate what judicial practice considers correct based on the effectiveness of norms, positive laws, certain metapositive norms, and legal precedents (Schmitt, 2012, pp. 156–157).

Sovereignty: A Theological Interpretation of *Rechtsverwirklichung*

Sovereignty and Exceptional Decision

In his famous lectures on the "sociology of religions", those specifically dedicated to the study of Protestantism, later collected under the celebrated title "The Protestant Ethic and the Spirit of Capitalism", Max Weber attempted to demonstrate that the work ethic developed by Calvinism had ultimately produced the phenomenon of the "disenchantment of the world", and had served as the basis for the development of capitalism. The final conclusion of his diagnosis was the transformation of Calvinism's economic ethics into an atheistic instrumental rationality, which, in turn, would have allowed for the emergence of the famous "iron cage" of modernity, subordinating all spheres of human life to the economic sphere (Weber, 2011, p. 248).

Contrary to Weber's diagnosis, Carl Schmitt, thanks to his Catholic upbringing, rediscovered within this instrumental civilization a new way of approaching the legal-political dimension "neutralized" by economism and technology. To this end, a new concept of sovereignty was needed that, through the mediation of law, would restore the political sphere to its primary dimension. This concept is defined in Schmitt's famous dictum: "The sovereign is he who decides on the state of exception" (Schmitt, 2009, p. 17) (orig. *Souverain ist, wer in Ausnahmezustand entscheidet*) (Schmitt, 2004, p. 13), from which the famous neologism "decisionism" will emerge, which will serve to identify the legal-political thought so characteristic of Schmitt (Schmitt, 2009, p. 13). Specifically, to clarify the problem of the "jurisdiction of the supreme court" as opposed to the normative decision-making process ordinarily exercised in judicial decisions, Schmitt highlights the decision-making process in situations of emergency or necessity as the true core

of the problem of sovereignty. In this sense, the German jurist developed a new concept of sovereignty based on the notion of the "state of exception" considered the founding legal moment of the State. For the German jurist, this possibility was expressed not in norms but in the decision-making capacity of the competent authority within the State; therefore, this new doctrine of sovereignty will be called decisionism (Schmitt, 2009, p. 13).

Thus, according to Schmitt, the concept of sovereignty would be "einem Grenzbegriff" (Schmitt, 2004, p. 13) [a "limit concept" (Schmitt, 2009, p. 13)] of the theory of the State, that is, its definition cannot be connected to the normal case, but rather to the limit case (Schmitt, 2009, p. 13). What does this mean? In Schmitt's case, sovereignty is a "limit concept" because it lies beyond the doctrine of public law, as it lies on the border between the sphere of "the political" and the sphere of the State; at the same time and in parallel, the "Idea of Law" lies beyond Public Law, as it constitutes the boundary between the sphere of the State and that of pure Law. Therefore, it can be argued that Schmitt introduces a conception of sovereignty without reference to the State (Gómez Orfanel, 1986, p. 41).

Sovereignty is then the "condition of possibility" that supports the entire legal-political framework of State power, because it "cannot be deduced from the order that, nevertheless, it itself brings into existence, and that, in turn, cannot be directly deduced from it", which is why, insofar as it is the "concept of the extreme sphere", "sovereignty, as a decision in cases of exception, is the critical point of modern rational mediation, that is, of the nexus between legal order and politics, and between the individual and the totality" (Galli, 2011, pp. 64–65).

Now, the classic definition of sovereignty, created by Bodin, holds that sovereignty is the "absolute and perpetual power of a republic" or, more precisely, "the supreme power detached from the laws with respect to citizens and subjects" (*majestas est summa in cives ac subditos legibusque soluta potestas*) (Bodin, 1985, p. 47), so that sovereignty is conceived as a permanent and limitless power.

This means that the holder of sovereignty cannot be subject to any other power, which is why he is in the position of "giving law to the subjects and annulling or amending useless laws" (Bodin, 1985, p. 52). In this sense, the principal quality "of sovereign majesty and absolute power consists primarily in giving the law to the subjects in general without their consent". Therefore, it is necessary for the sovereign prince to have the laws under his power so that he can "change and amend them according to the circumstances" (Bodin, 1985, pp. 57–58).

This clarification about the prince's power to change laws according to circumstances is very important, since it distinguishes the modern concept of political power, based on sovereignty, from the medieval conception, in which the monarch

did not create laws, but either reached an agreement with the nobles to establish them or was guided by the laws established by religious Natural Law. With Bodin, however, the monarch became a legislator (Abellán, 2014, p. 72). Thus, Bodin's conception served as the basis for Schmitt's later reinterpretation of sovereignty: the reference to circumstances allowed Schmitt to introduce the problem of the exceptional case (Schmitt, 2009, pp. 13–14).

Thus, even though public order and security have different concrete realizations (depending on whether the subject of sovereignty is a military bureaucracy, a commercial administration, or a revolutionary party), they will always be based on a decision. Therefore, sovereignty does not consist in the sovereign's possession of certain attributes, such as those Bodin describes, but in their application, through a decision, to a "concrete situation" (*konkreten Tatbestand*) (Schmitt, 2009, p. 16).

This "concrete situation" can be none other than the case of extreme necessity, since it is thanks to it that it is possible to adequately explain the exercise of sovereign power. Only the exceptional case, which is never provided for in the current legal order, precisely because it can be classified as one of extreme necessity, actualizes the problem of the subject of sovereignty. In this sense, the exception, which precedes the norm from a logical and epistemological point of view, is the insurmountable conflict that, as an absolute beginning, is the origin of the political-legal form and of the regular norm; therefore, the decision in an exceptional case is the sovereignty that underlies the origin of the political order (Galli, 2011, p. 66).

This relationship between exception and decision stems from the fact that, in such a "concrete situation", it is not possible to clearly establish whether it is indeed a case of extreme necessity, nor to predict what should be done in such a case to control the situation. Therefore, the problem of sovereignty consists in determining who has the competence to resolve a case for which no competence has been prescribed (Schmitt, 2009, p. 16).

Sovereign, Decision and Exception

The reinterpretation of sovereignty based on the decision and the specific exceptional case has introduced a new actor into this doctrine: the sovereign. In a certain sense, we can say that we have moved from a static to a dynamic conception of sovereignty. According to this, while the first conception attempted to define sovereignty as a power in a latent state, the second seeks to define it as a current and full power (Gómez Orfanel, 1986, p. 40).

However, the Schmittian interpretation does not stop at a mere ontological definition of sovereignty, but adds to it an eschatological dimension, embodied in

the figure of the sovereign who, through his decision, unites the world of the gods with the world of men in a single "personal act". In this way, Schmitt recovers the old Roman tradition of the "sovereign pontiff" of the Romans (*pontifex maximus*), as a bridge between the two worlds.

With the arrival of Christianity, throughout the Middle Ages, this power passed from the emperor to the Pope, so that, as Hugo Ball—a personal friend of Schmitt and one of the founders of Swiss Dadaism—early stated, it would be up to the Catholic Church to develop the legacy of Roman jurisprudence to its ultimate consequences in the new incarnation of the pontifex maximus of the Romans, now identified in the Pope (Ball, 2013, pp. 233–234).

Thus, within the juridical rationality of Roman law, Latin Christianity introduced the irrationality of the Christian faith, replacing the world of the gods with the mystery of the incarnation. In this sense, ecclesial rationality will have as its limits Revelation at its highest extreme and the State at its lowest extreme (Ball, 2013, p. 233).

For this reason, the Church will assume as a presupposition the belief in the existence of God and, along with it, the need to represent this belief. In this sense, the rationality of the Church is born from an "institutional will", that is, from the claim to normatively direct society precisely through "the principle of representation", the greatest example of which is none other than the figure of the Pope (Ball, 2013, p. 234).

The Pope thus has a fundamental attribute: representation. Thanks to it, he can place himself above the established legal order and become the vehicle of a higher legitimacy that, in the case of the Church, comes from God, and which allows him to decide absolutely on the facts of his government. Representation, then, implies "making present" or "making visible" something that, by nature, is invisible; papal representation is thus the actualization of the incarnation of Christ, through which God becomes present in human history, through the Church (Nicoletti, 1990, p. 242).

The ontological dualism between the "Idea of Law" and power, constitutive of modern politics, has its remote origins in Christianity and its immediate origins in the Gregorian reform or, as some historians call it, the papal revolution. In 1075, Gregory VII decided to declare independence from the Holy Roman Empire and became head of the Western Church, legally and politically separating the Church from secular powers (Berman, 1996, pp. 11–12). As if this were not enough, Gregory VII proclaimed in his Dictatus papae the legal supremacy of the Pope over all Christians and the supremacy of the clergy over all secular authorities (Berman, 1996, p. 104).

To achieve its goals, the Church systematized the existing law of its time. Thus, a new system of canon law and new secular legal systems emerged, along with a class of professional jurists and judges, hierarchies of courts, law schools, legal treatises, and a concept of law as an autonomous body integrated and developed with principles and procedures (Berman, 1996, p. 128). Building on the Gregorian Reform, canonists of the late 12th and 13th centuries attributed supreme government of the Church to the Pope. He had full authority (*plenitudo auctoritatis*) and full power (*plenitudo potestatis*). Thus, he could promulgate laws, set taxes, punish crimes, and dispose of ecclesiastical benefices, as well as the acquisition and administration of all Church property (Berman, 1996, p. 218).

From this separation, Western kingship changed its nature, as it abandoned its Christ-like mediating nature to develop what modernity has called representative power. Paradoxically, both the Church and the Empire drifted, each in its own way, toward what later became identified with the modern State. The Church, under Gregory VII, created a centralized bureaucratic power based on canon law. The Empire, divided into national monarchies, ceased to embody the divine foundation and became the mediator of the social body with itself. Thus appeared the two constitutive principles of the modern political world: the sovereignty of Law and the representative legitimacy of the State (Gauchet, 2005, pp. 203–204).

The decisive step in the process of secularization was taken by Thomas Hobbes. His work not only describes the new reality of the State but also establishes the theoretical foundations of the new, already secularized political theory. Indeed, unlike the medieval political theology that had preceded him, Hobbes merged the two orders it presupposed. Thus, the spiritual order, assumed by the historical reality of the Church, lost its transcendent character, and in its place appeared a single institution that carried both the temporal and spiritual orders: the State (Scattola, 2008, pp. 111–112).

Unlike in the medieval world, in the emerging modern world, the supreme theological principle became part of the temporal power of the sovereign, and the objectivity of divine legitimacy that gave it consistency disappeared. From now on, the authority that once came from God would reside in the sovereign himself; thus was established what Schmitt would call "the sovereign's decision". The ancient distinction "between auctoritas and potestas disappears completely in the sovereign decision. It is *summa auctoritas* and *summa potestas* at the same time. Whoever establishes peace, security, and order is sovereign and has all authority" (Schmitt, 1996, p. 30).

Unlike the Church, which always acted on society from the outside, the State, following the disappearance of religious transcendence, introduced a separation

within the immanence of the social body itself. The State, immanent in society, was thus transformed into an unprecedented institutional machine capable of intervening in all aspects of human life from this separation (Gauchet, 2005, pp. 276–277).

However, the disappearance of religious transcendence brought dramatic consequences for the future of modernity. Indeed, according to Schmitt, the Church's continuity as an institution in history was due to its organization around a "transcendent idea personally represented" by the figure of the pontiff (Schmitt, 2011b, pp. 26–27). The Catholic Church's legal capacity derives from this representativeness, since, through law, the Church organizes the formless matter of social facts (Schmitt, 2011b, p. 17).

On the contrary, in the case of the State and its modern political forms, despite functioning with the logic transferred from the Church, representation undergoes a radical transformation. With the disappearance of the personal representation of the pontiff, based on a pre-existing metaphysical order, an unbridgeable gap is established between the representative and the represented, since the State is an artificial creation whose foundation is purely abstract and constitutes an impersonal "transcendence". For this reason, the modern political form constantly tends to lose legitimacy (Scalone, 2005, p. 340).

The foundation of representation in the modern state is, therefore, unfounded, or, in other words, groundless. For this reason, modern political forms permanently require a decision-making body to make them effective and overcome the gap inherent in the lack of representation. Thus, the origin of political modernity is determined by the abyss of constituent power, which, upon losing its personal representative, needs to be legitimized. The only way to do this is through law, as it constitutes the instrument that the modern state has created for this purpose. However, for law to legitimize constituent power, the idea of law needs to be concretized through an act of decision by the political unit that makes its positive concretion possible in representation (Scalone, 2005, p. 343).

This model would become part, not without transformations, of secular political culture and would find its first reinterpretation in the work of Thomas Hobbes in light of the religious wars that ravaged Europe at the time. However, unlike papal representation, which actualizes a divine and eternal truth within society through a specific person, the great English philosopher speaks of a person constituted by the union of a multiplicity of human beings into a single artificial entity that represents them all. Hobbes calls this entity the civitas, and it is equivalent to what we know as the State or republic. The State is thus the new sovereign and heir to papal representation, although, unlike the latter, it only actualizes a temporal and human truth (Negro, 1996, pp. 258–259).

Thus, unlike papal representation, in which the Pope directly represents Christ, in the modern political representation initiated by Hobbes, the sovereign represents a "human-artificial person" of colossal dimensions; that is, he represents the community transformed into a mass of individuals. For this reason, the new sovereign, despite his concreteness, will gradually become an "invisible person", who will operate at the very heart of the state machinery at the expense of the entire established legal system (Negro, 1996, p. 259).

Schmitt would not have been able to recover the figure of the sovereign if he had not come into contact with the political philosophy of counterrevolutionary Catholic thinkers, especially the work of the Savoyard diplomat Joseph de Maistre, who, as is well known, developed a theory of sovereignty based on "papal infallibility", from which, according to Schmitt, his decisionism was derived (Schmitt, 2009, p. 50).

In this sense, following de Maistre, Schmitt considers that, through the sovereign's decision, the fundamental theological-political problem underlying modern politics is actualized: that is, the problem of the mediation of power through authority, since, thanks to the sovereign, power can manifest itself within human society. In this sense, the sovereign, insofar as he is invested with power, "can decide absolutely when the exception is present, solely because power exists absolutely" and, consequently, "God thus presents himself, in the eyes of political theology, as the absolute power of decision and, therefore, as the sovereign par excellence" (Herrero López, 2007, p. 365).

Thus, as we have said, the sovereignty of the sovereign no longer refers to the essence or abstract nature of power, but to the authority that aims to actualize it through decision. As Castrucci has aptly described, "a sovereign is one who effectively manages to resolve the conflict for his own benefit thanks to his own decision". For this reason, it can be verified that "the root of law lies in the principle of effectiveness, that is, in a power relationship, invisible in the normal situation, but visible and disruptive in the exceptional situation" (Castrucci, 1991, p. 18).

Thanks to the sovereign's protagonism, sovereignty can be actualized in legal, and political reality, so that it now becomes a quality of the sovereign, such that acting sovereignly consists of "categorizing as exceptional a state of affairs that is reluctant to submit to the usual normalizing patterns; and, simultaneously, putting an end to it with measures that are also exceptional". For this reason, "sovereignty is a specific type of action, that is, the conduct of man considered as an ethical, free, and responsible subject in specific circumstances" (Dotti, 1996, p. 129).

For its part, the decision must be understood as an element inherent to the universe of praxis. In this sense, it is completely superfluous to appeal to knowledge

to legitimize one's actions, since the decision does not seek to solve a theoretical problem, but rather a practical one. For this reason, "the objectivity of politics is peculiar to the realm of practice: it is a construct of the will, the result of an act of freedom" (Dotti, 1996, pp. 129–130).

Thus, as an act of freedom, the decision is the expression of sovereignty, since, thanks to it, authority can achieve the purpose for which it was instituted. In this sense, the sovereign is presented as someone who possesses "the capacity to establish order, peace, and stability from a chaotic situation", which is why they have the "responsibility to safeguard the stability of the newly created situation" (Schwab, 1989, p. 45).

For his part, the concept of exception has its origin in a new metaphysical presupposition. Thanks to this, Schmitt was able to discover the effectiveness of power, such that, based on the dialectic between norm, decision, and exception, sovereignty is effectively exercised.

Thus, in the face of normal situations, only exceptional events can give rise to sovereignty, because they are capable of concretely revealing the general; therefore, only decision has the capacity to resolve them. This new metaphysical foundation was extracted by Schmitt himself from the book "Repetition" by the Danish thinker Søren Kierkegaard (Nicoletti, 1990, p. 153): "A Protestant theologian, who demonstrated the vital intensity that theological reflection could achieve even in the 19th century, said: «The exception explains the general and explains itself»" (Schmitt, 2009, p. 20).

Thanks to Kierkegaardian concept of exception, Schmitt was able to reinterpret the legal concept of the state of exception. In this way, exception and the general are opposed, just as the state of exception is opposed to the normal case. The best way to differentiate both situations is by comparing the functioning of the relationship between decision and norm in both circumstances, since decision and norm constitute the fundamental elements of law. Thus, in the state of exception, the norm is annihilated by the decision, suspending the legal order; while in the normal case, the decision disappears into the norm, while the legal order is maintained (Calabrese, 2012, p. 63).

As we have seen, the function of the State is to materialize, in social reality, the "Idea of law" contained in the positive norm (*Rechtsverwirklichung*). By fulfilling this function, the State becomes a fundamental authority within legal reality. In this sense, the realization of law implies the application of legal thought to a specific case, since the "Idea of Law" cannot be realized by itself. Every time a decision is made, it requires the State to achieve the transition from the abstract to the concrete (Schmitt, 2009, p. 30).

However, in every legal decision, there is a margin of indifference regarding the content of the norm, since the legal conclusion does not arise directly from the premises. The "Idea of Law" is never translated into reality in its entirety, precisely because the decision, by intervening in its realization, adds a new element that is not contained therein (Schmitt, 2009, p. 31).

Consequently, based on the generality of the norm, there is no way to determine "who" should actualize the "Idea of Law" through the decision. Therefore, the "mediation of an authority" (*auctoritatis interpositio*) is always required, which, although belonging to the legal sphere, is external to the legal system itself. In this way, the decision adopted by the competent authority "becomes independent" of the content of the norm and acquires its own value, even though it has been exercised for the purpose of the norm (Schmitt, 2009, p. 32).

As we can see, both the norm and the decision constitute the two essential components of legal activity; however, we must consider that "While in normal cases the autonomous element of the decision can be reduced to a minimum, in exceptional cases it is the norm that is annihilated" (Schmitt, 2009, p. 18). Even so, in both the normal and exceptional cases, we always find ourselves within the realm of law, since "between decision and norm there is a relationship, not a non-relationship: both belong within the «legal data»" (Galli, 2011, p. 68).

The law never tells us to whom it grants authority, since each legal precept only informs us of the manner in which a decision should be made, not who is responsible for doing so. At the same time, not just anyone can execute and implement the content of the norm, which would occur if there were no supreme authority. The supreme authority is never derived from the existence of the norm. Thus, the underlying problem of the decision is that of the "competence of the supreme authority" and, in this sense, it can only be clarified within the framework of the theory of sovereignty (Schmitt, 2009, p. 33).

The metaphysical concept of exception, drawn from Kierkegaard's philosophy, not only serves as the foundation for the legal concept of the state of exception, but also This also updates a problem of a theological nature that we had already seen. Indeed, if the State is analogous to God, the State's decision, implicit in the state of exception, is analogous to the miracle; and, in this sense, it is the secularization of the miracle (Galli, 2011, p. 78): "The state of exception has a similar significance in jurisprudence to that of the miracle in theology. Only by being aware of this analogy can we understand the evolution of philosophical and political ideas in recent centuries" (Schmitt, 2009, p. 37).

As a miracle-maker, the State represents an invisible reality in the visible world, a function it inherited from the Church, but which it performs by emptying the

divine substance of its theological content (Galli, 2011, pp. 78–79). The consequence of this type of decision is the total suspension of the established legal order and the establishment of a new provisional legal and political order that Schmitt identifies with dictatorship.[1]

Conclusions

1. Law and power constitute two independent regions of being: ideal being and real being, respectively. Ideal being corresponds to the realm of values, while real being corresponds to that of concrete facts.
2. Law and power can only be related through a third element embodied by an agent or authority: the State or the respective political unit, whose function is to actualize, through a decision, the norms of law in the realm of facts, that is, to implement law (*Rechtsverwirklichung*).
3. This actualization through the decision of the State always leaves a margin of discretion to the competent authority, since the relationship between law and power, when actualized by an external agent, is determined by the qualities of that agent.
4. With the intervention of the State's decision as an agent that actualizes law in concrete facts, a distinction is created within law itself between the ideal norm (Idea of Law) and the norm applied to facts (Positive Law). Positive law is thus born from the application of the ideal norm (Idea of Law) to the concrete fact through the sovereign decision of the agent or authority (State).

[1] Against all the ideological chatter about the concept of dictatorship, so widespread in our times, the Italian philosopher Giorgio Agamben was able to write: "In the doctrine of modern public law, it is a widespread habit to define as dictatorships those totalitarian states born out of the crisis of democracies after the First World War. Thus, both Hitler and Mussolini, both Franco and Stalin, are presented indiscriminately as dictators. But neither Mussolini nor Hitler can technically be defined as dictators. Mussolini was the head of the government, legally invested with that office by the king, just as Hitler was the Reich Chancellor, appointed by the legitimate President of the Reich. What characterizes both the fascist regime and the Nazi regime, as is well known, is that both allowed the existing constitutions (respectively, the Albertine Statute and the Weimar Constitution) to subsist—according to a paradigm that has been sharply defined as that of a «dual state»—placing alongside the legal Constitution a second one structure, often legally unformalized, which could exist side by side only thanks to the state of exception. The term «dictatorship» is entirely inadequate to describe such regimes from a legal point of view, just as the straightforward opposition democracy/dictatorship is misleading for an analysis of the governmental paradigms that are dominant today" (Agamben, 2005, pp. 95–96).

5. The notion of decision permeates Carl Schmitt's entire work in two fundamental forms: the normative decision, deployed within normal legal Flow—as is the case with the judicial decision—and the exceptional decision, made in emergency situations.
6. The normative decision is materialized in judicial rulings and administrative resolutions in normal legal flow; the exceptional decision, on the other hand, materializes as a dictatorial measure in emergency situations.
7. The sovereign decision describes the entire functioning of the State in its two fundamental moments: the constitution of the legal order and its ordinary execution. Ordinary execution takes two forms according to the dynamics of the decision: the exceptional decision, which constitutes the "active moment" of state power, and the normative decision, which is the "potential moment" of that same power.
8. The relationship between the norm and the decision is determined by the specific situation in which the law is exercised. If the situation is ordinary, the decision is subordinate to the norm; however, if the situation is extraordinary, the norm is subordinate to the decision.
9. When the decision is subordinate to the norm, we find ourselves in a normal legal situation (*Normalzustand*), one of whose expressions is the application of due process; when, on the contrary, the norm is subordinate to the decision, we find ourselves in an exceptional legal situation (*Ausnahmezustand*), whose expression is the state of exception.
10. The Schmittian notion of sovereignty, defined as decisionism, implies the interaction between the decision and the norm, which is resolved, through the suspension of the norm, in the confrontation with the state of exception through an exceptional decision.
11. A given situation is declared a state of exception when it constitutes a situation of necessity, that is, a situation that, because it has no place in the normative system due to its extraordinary nature, completely invalidates it, forcing the competent authority to decide on it, suspending and/or recreating the established legal-political norm (the Constitution) in its entirety.
12. For Carl Schmitt, political theology implies the theological role of state mediation (*Rechtsverwirklichung*) between the realm of the "Idea of Law" and that of the facts, which the State's decision performs to articulate the transcendent and immanent dimension of human reality.

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Beyond the Human: Generative Artificial Intelligence for the Cultural Heritage

• **Abstract** •

The evolution of artificial intelligence has come to challenge the concept of work of art as an expression of human personality, since there are processes of genuine creativity through so-called generative artificial intelligence. Thus, there is a need to analyze the legal regime of works of art created through generative artificial intelligence tools, whether individual rights can be recognized over them, addressing the role of public authorities in promoting cultural expressions to ensure the collective fruition of the intangible value they may carry.

Keywords: Human, Creativity, Individual Right, Fruition, Valorization, Cultural Heritage.

Introduction

The subject of this contribution represents a real knot of problems of an ethical-legal nature. Reference should be made to the relationship between generative artificial intelligence and creativity, as well as its impact on cultural heritage. The fundamental issues underlying this difficult relationship are essentially the following: (1) What is the legal regime of works of art created through generative artificial intelligence tools? (2) Can individual rights insist on such works? (3) What is the space of public power for the valorization of these expressions of culture, understood as an activity not merely aimed at increasing their economic value, but at ensuring the collective enjoyment of the intangible value of which they could be bearers?

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Human Creativity and the Evolution of Generative Artificial Intelligence

Art and work of art have always represented, especially for jurists, enigmatic notions, given the difficulty of outlining the legal regime of the products of human creative genius and of the consequent expressions that makes them perceptible to the community. Therefore, law must be complementary and serving to art, as only a correct legal regulation allows the work of art to acquire a materiality and to become part of the organized community and its commercial relationships. This perspective also influences the current Italian legislation on copyright law no. 633 of 22nd April 1941, which declines art as a concrete manifestation of creative ingenuity. The law is, therefore, based on the concept of originality and human creativity, necessary for the recognition and protection of moral and patrimonial rights (Muciaccia, 2021, p. 761; Giaccaglia, 2023, p. 70).

In fact, Article 1, para. 1 and 6 of the Italian copyright law emphasizes the concept of a work of art as an expression of the intellectual work and physical personality of the author. As also stated in case law,[1] the requirement of novelty and originality is not sufficient for the recognition of the right but is also necessary to assess the personal contribution of the author to the realization of the work, understood as a qualified expressive effort.

To date, however, the degree of evolution reached by artificial intelligence technologies has come to challenge the difference between a work of art and the expression of the human personality, as there are processes of real creativity through so-called generative artificial intelligence mechanisms. This is due to the combination of two factors: the increase in the computing power of machines and the increase in the amount of *input* data available (*big data*).

Generative AI, or Generative Deep Learning (GDL), is based on a vast *set* of *input* data, not previously classified (labeled), which are processed to lead to an artistic *output* of a representative nature, with the addition of significant elements of creative autonomy. GDL manifests a clear potential to produce outputs that society, and the legal system, could judge as creative, in the musical, literary, but also artistic fields (Zhou and Lee, 2024; Hutson and Harper-Nichols, 2023, p. 461; Franceschelli and Musolesi, 2022; Papa, 2019).

Reference should be made, for example, to GPT models, Midjourney, Stable Diffusion, Dream Up image generator or to Deviantart, which are tools that receive text/images from human compilation in order to generate images; or to

[1] Court of Milan, sec. Business, 19 April 2021, no. 3204; Italian Supreme Court, sec. I, 16 January 2023, no. 1107.

Google Deep Dream, which is a neural network that is based on the prior classification of *input* images, with a generative model that works in a reversible sense: the image, therefore, is not obtained as an *output*, but through continuous modifications of an image provided as *input*.

The latter represents a model of Generative Adversarial Networks (GAN), in which, for the creation of new data, is carried out an adversarial training between a generator based on false data and a discriminator based on real data, in a continuous process of adaptation in order to make the artificial *outputs* increasingly indistinguishable from the real ones. These GDL systems have led to the creation of works of art that have already had significance: in 2018, for example, the first work of art created using the GAN method (the portrait of Edmond de Bellamy) was sold at auction at Christie's in New York, for about $400,000).

Many other examples exist not only in art (literature, music, cinema), but what is relevant here is that a real revolution is deconstructing, also from a legal and not only philosophical point of view, the concepts of creation (Campione et al., 2024, p. 131), imputation, fruition, and circulation of culture.

Access to Cultural Goods Generated by Artificial Intelligence. Individual Belonging and Public Use

The concept of virtual access to cultural heritage is also crucial for creativity through AI (when GDL can have a cultural value), as well as for the digitization of cultural heritage (Forte, 2023; Lalli, 2022; Carpentieri, 2020, p. 263; Casini, 2018).

Virtuality must be understood not only as a new means of external communication or dissemination of works, but also as a tool for a new approach to culture and, therefore, for the facilitated use of cultural heritage and of its intangible public interest values. The public fruition of such works is facilitated as these values are incorporated in a digital tool, uprooted from a spatial reality and from the legal constraints of the *lex rei sitae*.

However, considering the range of intangible values expressed by the cultural heritage (Giannini, 1976, 1992; Casini, 2015, p. 987), in a relationship between the State, public user and owner (now even become multilateral, as the interests of private financiers or software owners also appear) (Casini, 2022; Timo, 2022; Gualdoni, 2019; Cavallaro, 2018; Fantini, 2014; Morbidelli, 2014; Bartolini, 2014; Barbati, 2008; Dugato, 2007), the balancing between individual, moral and patrimonial rights on cultural content and the public interest in the enjoyment of the values of which are bearers, becomes even more difficult in works generated by AI, where the knot of individual belonging is truly inextricable.

There are two dogmatic premises that must be placed. First, the concept of AI includes a variety of systems, in which the degree of human intervention diverges greatly in relation to the creative output (Muciaccia, 2021, p. 762). Such systems range from AI-assisted output, a typical manifestation of weak AI (for which in the artistic field it is easy to recall the traditional parallelism with a chisel or a brush), up to the generative models, capable of carrying out rapid and even structurally similar elaborations to biological intellectual processes.

In this sense, however, in order to counterbalance triumphalist tendencies, it must be pointed out that from a creative point of view these processes represent a mere imitation of the original and that there would not be a real strong artificial intelligence, since—according to the cognitivist theories of Searle and his well-known experiment of the Chinese room[2] (Searle, 1990)—the main property of human intelligence is intentionality, which cannot be reduced to the simple execution of computational tasks (Farina, 2021, p. 106; Comandè, 2019, p. 169).

An opposite thesis, on the other hand, taking Turing's theories as a reference, believes that it makes no sense to ask whether a machine can think like a human being, because no one really knows how the latter thinks, and that, therefore, if machines can learn, decide and create, it is right that they are legally responsible, thus emphasizing the creativity of the result and not of the creative process.

In short, most of the activities thanks to which we define ourselves as human would be only a sum of mechanical, calculable and predictable processes. Notwithstanding the fact that this debate appears far from a solution, it does not seem to be deniable, however, that the creativity of AI is largely due to the use of models that transform input into a numerical representation, associating a number with each input word on the basis of systems that capture the semantic proximity between words (encoders), and by a decoder, which generates a probability distribution that predicts which word or sequence is closest to the input one. In other words, AI would be a structurally "reproductive" and not "cognitive" intelligence. The task it performs is intelligent, according to the interpretation offered by our cognitive criteria, but it is not so for the machine that performs it to achieve an assigned goal. In this regard, it was noted that "In AI, it is the result that counts,

[2] The argument of the Chinese room, in criticism of the notion of strong artificial intelligence, was elaborated by the philosopher John Searle. It is based on a concrete fact: an Englishman sitting in a room follows instructions in English to process Chinese symbols, while a computer follows a program written in a computer language. English, therefore, seems to understand Chinese thanks to the fact that it follows the instructions for processing symbols, when in reality it will never understand Chinese. Similarly, since the computer simply does what the man in the room does—processing symbols on the basis of syntax alone—it will never truly understand Chinese.

not whether the agent or its behavior is intelligent. For this reason, AI is not about the ability to reproduce human intelligence but about the ability to do without it." (Floridi, 2022, p. 52).

Therefore, the so-called artificial creativity, despite having a sophisticated ability to elaborate truly innovative elements through an original recombination of pre-existing data, lacks self-awareness. The machine has a servant function, but does not understand what it does, carrying out the creative process with mere associations of numerical values. It lacks that metacognitive mechanism of self--observation and self-evaluation that is the critical essence of the creative process.

Generative AI would also lack the intentional and finalistic dimension (represented by the ideal or value purpose of artistic creation), as well as the so-called body dimension, for which cognitive functions are based on simulations of experiences, anchored to the system of shared values in a given context, which activate the creative process. In other words, if ChatGPT is able to (re)produce text, music and images, it does not seem to be able to understand the meaning they take.

Given the variability of the systems described above and the related philosophical and technical approaches to their potential, even in the legal field it can't be founded a consensus on an unambiguous definition of artificial intelligence, as this is left to generic or vague definitions,[3] which, if misinterpreted, could hide an empty and triumphalist tendency to *digital washing,* to the extreme in which "a blind and confused citizenry that stubbornly claims the digital chains of Plato's cave, where the fire of algorithms projects the shadows of repressed aspirations and illusions destined to remain so, unable to redeem the unfortunate consenting from his insignificance" (Gabriel, 2024).

The Legal Regime of Generative AI Works

The above-mentioned perspective of necessarily humanized creativity leaves it to the interpreter to qualify the legal regime of AI works, through the determination of the degree of human contribution considered sufficient in order to recognize an individual right. See, in this regard, the rulings of the Beijing Court of 2023

[3] Just think of the definition provided by EU Regulation no. 2024/1689 of 13rd June 2024, Article 3, para. 1, no. 1, according to which an "AI system" is "an automated system designed to operate with varying levels of autonomy and which may exhibit adaptability after deployment and which, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as forecasts, content, recommendations or decisions that may affect physical or virtual environments."

on the StableDiffusion image generator,[4] as well as the rulings of authorities operating in the field of intellectual property and of several courts (European Union, USA, Australia) that dealt with the case of the *Dabus* creative algorithm, with substantially conservative positions (Sterpa et al., 2023, p. 1120).

In Italy, decision of Supreme Court no. 1107/2023,[5] in the case of a flower processed with *AI software* for the scenography of a famous tv-show, represents one of the first examples in which a judge has addressed, albeit *incidenter tantum,* the legal issue of the work in which the technology is part of the creative process, demonstrating, however, that outside human expression, the field is totally unexplored. In this case, it has been ruled that the use of an algorithmic tool does not necessarily exclude human authorship, since the gradient of human intervention must be verified as a determining variable of the creative process.

However, under a public perspective, it does not seem to be possible to deny that works created with the help, even as a substitute, of generative AI could, like those that are pure expression of the human personality, be bearers of values under consideration. Therefore, from this point of view, the theme of individual belonging represents one of the poles of a dialectical tension between individual rights and the public interests relating to intangible goods and values, that go beyond the protection of authorship are imposed.

From a methodological point of view, it should also be specified that the cultural asset digitized by image reproduction of analogue content does not constitute an original creation, but a computer copy that is not legally autonomous from the original (hence a certain ease in admitting its precarious and non-profit use). It must also be said that the images of the cultural heritage, if not characterized by any creative contribution, could not even represent assets of the same kind as the reproduced asset (not necessarily borrowing its cultural value) and, therefore, would not represent autonomous cultural goods (in the sense of autonomous testimonies of value), but mere documents capable of conveying knowledge. It has been correctly pointed out (Forte, 2023; Carpentieri, 2020, p. 263), that the issue of digitization of cultural heritage has very little to do with AI cultural heritage, representing the former, at most, a different and new way of using the intangible value contained in a tangible asset. The problem, therefore, arises for our purposes exclusively regarding native works through AI and cannot neglect investigating the relationships between mechanisms of allocation of authorial rights and public interests in the enjoyment of the intangible values expressed in the creative-generative work.

[4] Beijing Internet Court, Civil Section—Jing 0491 Min Chu No. 11279/2023.

[5] Italian Supreme Court, sec. I, 16 January 2023, no. 1107/2023.

This is also because in the future native AI works created by exploiting the collective heritage of human knowledge as *input* may be considered testimonies with civilizational value, i.e. assets for collective use subject to enhancement processes. As is well known, valorization is an open and dynamic notion that represents a set of activities aimed at promoting knowledge of cultural heritage and at ensuring the best conditions for its use, but also the establishment of resources, structures or networks, functional to the enhancement of cultural heritage.

It is an administrative function—or, according to doctrine (Dugato, 2007), a complex activity made up of services, functions, standardization and other activities, which is objectively public (Giannini, 1993, p. 121). This objectively public activity shapes cultural goods as public in terms of use (which is distinguished from mere economic use), as they are objectively intended to satisfy certain needs of the community. Such vision, however, cannot fail to consider the delicate balance with the proprietary aspect of the underlying tangible res, even more in a reality in which portions of the external world once free of rights are the subject of growing claims aimed at paralyzing collective fruition (Resta, 2023, p. 143).

For this reason, looking at the topic of generative AI, the following questions also arise to the attention: (1) Is it possible to freely use protected works and/or works of cultural value as training *datasets* for generative models used for private profit? (2) Who (if any) will own the rights to the works generated on the basis of these processes?

As regards to question (1), four different categories of use of *input* data (works) or generative purposes can be identified: (a) training data not protected by economic rights, such as works that have fallen into the public domain; (b) protected material, but released under a permissive license or licensed directly by rights holders; (c) processes that invade the market (which threatens the market for that data); (d) processes that do not invade the market, as they have purposes (including public) unrelated to the monopoly on copyright. With reference to the process under (a), reference has to be made to works that have fallen into the public domain because of the dissolution of copyright rights. In this case, apparently, the problem of balancing individual rights with the public regime lies in countering appropriative pressures aimed at exploiting culture in the public domain, which represent a useful *input* for a generative AI process.

If the work is protected but its use has been acquired through a license agreement, which does not expressly prohibit reproduction even for generative purposes [the case under (b)], the balance is essentially left to a contractual framework, which however takes into consideration issues of allocation of economic interests. For protected works, or for those to which is granted access not in digital

form or not for the purpose of reproduction [(c) and (d)], the question remains undefined.

On this point, it does not seem to be possible to deny that if the AI model is built to imitate the *input* (with some non-substantial modifications) and this is trained on a protected work, it will itself replicate that work at least partially, since it can be considered as a direct reproduction of it. Therefore, the *output* could infringe the exclusive right of the pre-existing work, but the infringement depends on the degree of imitation, as well as on the purposes that the reproduction pursues.

In this framework, to outline an initial regulatory framework of the disruptive impact of generative AI in the creative field, various tools have been used. US case-law has applied the concept of *fair use,* propagating a theory according to which the use of copyrighted works is authorized, without prior request for a license, looking at the purpose of the use and its economic nature, at the nature of the work, at the quantity and substantiality of the portion used and at the impact of the use on its potential market (Franceschelli and Musolesi, 2022, par. 3.1).

In Europe, on the other hand, a preventive balancing has carried out by the legislator, preferred to a case-by-case approach, which has emphasized the purpose of the use, providing for the free reproduction of a work in the public domain without the possibility that related rights can be affixed to it, without prejudice to the provisions of the Code of Cultural Heritage which in any case operate within a field other than copyright.[6] It has also been inserted the provision for the making available of public data in an open format for the purpose of their free use, reuse and sharing.[7]

Reference should be made also to the extraction of images and data for the purposes of computational analysis and model training, the so-called *TDM-text and data mining*, referred to Directive no. 2019/790 and Directive no. 2019/1024,[8] transposed in Italy, respectively, with Legislative Decree no. 177 and no. 200 of 8 November 2021 (Scullo, 2021). This is because, in line with *considerando* no. 53 of

[6] See, Article 32-quarter of the Law on Copyright, inserted by Legislative Decree no. 177 of 8 November 2021, implementing EU Directive 2019/790 on copyright and related rights in the digital market and amending Directives 96/9/EC and 2001/29/EC which provides: "Upon expiry of the term of protection of a work of the visual arts, including as identified in Article 2, the material resulting from an act of reproduction of that work shall not be subject to copyright or related rights, unless it constitutes an original work. The provisions on the reproduction of cultural goods referred to in Legislative Decree No. 42 of 22 January 2004 remain unaffected."

[7] See, Article 5 of Directive 2019/790 as well as *considerando* no. 9 thereof, according to which "The intelligent use of data, including their processing through artificial intelligence applications, can transform all sectors of the economy."

[8] Directive no. 2019/1024 of the European Parliament of the Council of 20 June 2019 on open data and the re-use of public sector information.

Directive no. 2019/790, free circulation promotes access to cultural heritage and stimulates new forms of creativity.

The question, however, remains unanswered on one point: who would be the owner of the rights attached to a work of art produced by a generative model trained on protected *input* data? In the face of the substantial lack of discipline of a normative system conceived on material things for rival and excludable use, there is a contrast between the theses above: (1) the ownership regime of the individual ownership of the work IA, with the elaboration of various legal fictions; (2) the fall into the public domain, which enhances the intangible cognitive heritage that the works would release for the growth of culture, also in favoring the increase in the production of works that brings a benefit to the community.

The thesis of the fall into the public domain tends to "exploit" the above-mentioned characteristics of the current legislation which, pursuant to the copyright law, requires creation as an indefectible expression of intellectual work, suggesting that the author can only be a human. In short – since the creative character requires the physical personality of the author, also by virtue of Article 2575 and Article 2580 of the Italian Civil Code, according to which intellectual work is a mere human expression—there would be a tendency to completely exclude artificial agents from the possibility of being holders of rights of individual belonging. The fact that the manifestations of digital creativity must refer to a physical expression of the human personality also refers to the problem of the legal regime of immateriality, on which some clarifications must also be made. From the point of view of cultural heritage, every expression of immateriality is, to date, considered relevant by the legal system only for its insistence on a material good.

Reference should be made to Article 7-bis of the Italian Code of Cultural Heritage, entitled "Expressions of collective cultural identity", which, in an attempt to give prominence to the intangible component of cultural heritage also as a result of the ratification of the UNESCO Convention of Paris, ratified with Law no. 167/2007, has firmly anchored its legal value to a representation of the same by material goods.[9] On this point, a dogmatic distinction should be made between the intangible cultural value expressed by a *res* and the intangible cultural asset properly understood, investigating whether intangibility can ever be assessed in a legal system in which the legal relevance of the tangible *res* predominates.

[9] Which provides: "The expressions of collective cultural identity contemplated by the UNESCO Conventions for the safeguarding of the intangible cultural heritage and for the protection and promotion of cultural diversity, adopted in Paris, respectively, on 3 November 2003 and 20 October 2005, are subject to the provisions of this code if they are represented by material evidence and the prerequisites and conditions for applicability are met Article 10."

It is in this conceptual context that arguments could be used against the proprietary model, making collective value prevail over individual rights, identifying freedom of access and use of cultural content (including computer content) as the rule. Therefore, the fall into the public domain of the creative work through AI would be supported by a broadly appropriative power of the community, which does not reside in property, but in a function, objectively public and overriding the private dimension, of guaranteeing the fruition of the intangible value of which the works (including GDL) could be the bearers. This function is even more significant today, in which intangible *res* flourish in the immaterial dimension of the infosphere that can/will be considered as valuable testimonies of today's civilization. In other words, it can be said that the mere externalization of a product having its own autonomy results not only in a materiality to be protected with ownership of the product, but also (and especially for generative AI, where it is difficult to outline a tangible creative expression) a plurality of values and a cognitive heritage to be valued and promoted (even, regardless of a formal public declaration of cultural interest).[10] Moreover, it could be observed that a possible reservation in favor of the owners of commercial use does not automatically prevent general use for the needs of learning, study and research and, therefore, for the promotion of culture (this is the path that seems to have been followed at the European level).

Therefore, there are resources that increasingly escape a regulation based on the reality of goods (which also reveal their inadequacy, which in some ways the jurisprudence is trying to remedy)[11] and which, due to their non-rival and non-excludable character, lend themselves to benefiting the community for the progress of science, arts and culture. Furthermore, according to a doctrine, this could intercept a further profile of the function, namely valorization, understood as the economic enhancement of the work that can pursue not only the objective of ensuring

[10] Constitutional Court, 4 June 2013, no. 194, according to which "The circumstance, in fact, that a specific thing is not «classified» by the State as of «artistic, historical, archaeological or ethno-anthropological interest», and therefore is not considered as a «cultural asset», does not mean that it may, on the other hand, present, albeit residually, some «cultural» interest for a given territorial community: this interest remaining anchored, hypothetically, to an inalienable identity heritage, of ideals and experiences and even symbols, of that single and specific community."

[11] Council of State, 13 February 2023, no. 5, according to which "the notion of cultural property, in a dynamic and modern vision, must be understood in a broad sense: it, while presupposing res quae tangi possunt, can also include a quid pluris of an intangible nature. 6.1. In view of this breadth of significance, the greatest possible extension, under current legislation, of the forms of protection provided for by the legal system, which allow an «elastic» and effective protection of the cultural heritage, not limited to its material consistency, but considering it globally, for the cultural values that it expresses and carries within itself."

collective use, but also of achieving indirect economic benefits for the economic operators concerned.

Conclusions. Challenges and Opportunities in the Difficult Balance between Individual Belonging and the Public Domain of *Generative Deep Learning Works*

The thesis of the fall into the public domain of generative AI works is not exempt from "tragic" criticalities (Hardin, 1968), as the absence of individual exclusive rights, which retrocede in the face of the mere consideration of the function (and fruition), could lead to the lack of incentives for the creation, as well as the dissemination, use and improvement of valid generative AI products, with the growing risk of spreading false, distorted or otherwise low-quality material.

A further related risk is also that of the proliferation of inappropriate or low-value information, which certainly could not contribute to promoting cultural progress. The dissemination of poor-quality digital material would also lead to increasingly uniform and standardized content, possibly used for techniques of commercial persuasion (*nudge art*) or distortion of public opinion. The fundamental issue, as pointed out by a doctrine, is that cultural heritage, especially if considered in its functional aspect, constitutes a volatile area insusceptible to a unitary legal regime, towards which only measures of recognition, protection and authentication, but hardly of ownership control, can be configured (Morbidelli, 2014).

The anchoring of our legal system to materiality, moreover, is aimed at preventing a so-called *pan-culturalism* that would lead to covering the entire social life, so that everything would become heritage, even regardless of a specific declaration, thus dissolving the very notion of cultural heritage. The process of digitization of art (also through creativity by means of GDL), has accentuated this volatility, as these are assets located in an a-territorial dimension that escapes the traditional instruments of national sovereignty. The issue of defining the contours of individual belonging to these resources, therefore, is linked not only to economic aspects, but also to the development of a creativity that allows effective progress for civilization and does not reduce itself as a megaphone to convey messages aimed at protecting the commercial interests of private powers.

To counterbalance the fall into the public domain and its problematic consequences, an attempt was made, first of all, with at *fictio iuris*, to construct a condition of legal personality of the digital agent that has led to dogmatic problems.[12]

[12] See, the position expressed in the 2017 resolution of the European Parliament for the recog-

On this point, theories have been developed that turn towards the attribution of an attenuated legal personality to the machine, and therefore a legal condition that should allow it to become the center of imputation of legal situations (Farina, 2021, p. 6). Moreover, there has already been an effort by the doctrine to elaborate legal fictions of personality or to attribute legal situations to what can be defined as fictitious or peripheral subjectivities of the legal system. However, this conceptual line is more useful for the attribution of legal effects of financial liability and for the allocation of damages (so-called *liability rules*), while it provides less certainty regarding the ownership of situations that expand the legal sphere of the individual.

In the latter perspective, according to a utilitarian conception, it has been hypothesized to shift the visual angle of ownership to the natural person who has placed the necessary acts so that the work could come into existence (the user of the machine), considering sufficient for the creative act the mere completion of the conceptual or preparatory phase of a work, i.e. the conception of the essential features of a path that can generate an *output*, regardless of the execution and finalization of the same.

This perspective places eminent emphasis on the purpose of the recognition of individual rights as a stimulus to the production and dissemination of new creations. Even this construction, however, reveals its problematic nature, when it is confronted with increasingly autonomous generative artificial intelligence systems, whose opaque decision-making mechanisms are less and less attributable to human input. Again from a utilitarian perspective, attention has been paid, for protection purposes, to the economic rights deriving not so much from the creative act itself, but to the activity of the person who have allowed the organization and the activity carried out to facilitate the enjoyment of an artistic expression by a wider public.

For these purposes, it would also be crucial not so much the difficulty of identifying a possible personal expression of creativity, but, rather, the protection of entrepreneurial investment in innovation for the design and implementation of a creative AI system. This appears, however, too unbalanced on the economic side,

nition of a legal *status* for machines, aimed, at least for the most sophisticated autonomous robots, at the attribution of electronic personality. European Parliament resolution of 16th February 2017 containing recommendations to the Commission on civil law rules on robotics, calls for the "establishment of a specific legal status for robots in the long term, so that at least the most sophisticated autonomous robots can be considered as electronic persons responsible for compensating for any harm caused by them, as well as possibly the recognition of the electronic personality of robots that make autonomous decisions or interact independently with third parties."

leaving completely unexplored the moral aspect of individual protection (the moral rights of paternity, of integrity, of withdrawal and resale), in which the personal imprint is an essential requirement for accessing a form of legal protection.

Furthermore, what has been said does not solve the problem of the balance between ownership and the volatile and a-territorial public value released by creative digital works, which exploit public domain images as input and whose creativity could constitute testimony having civilizational value. In the words of Naomi Klein (2023), "what we are witnessing is that the richest companies in history (Microsoft, Apple, Google, Meta, Amazon…) They are unilaterally sequestering the sum total of human knowledge that exists in digital, archival form and isolating it within proprietary products, many of which will directly target humans whose working lives have trained machines without giving permission or consent." In other words, we need to look not only at the risks of individual appropriation of protected works, but also at those of the massive exploitation of the "sum total of human knowledge that exists in digital and downloadable form" to generate creativity.

Examining the issue from a functional perspective, an approach based on conventional international law has been proposed (Lehmann, 2023, p. 162), that would require any commercial distributor of generative AI systems trained on large amounts of publicly available content to pay a fee and, in any case, to tag GDL products. These contributions could support the creation of a system of digital commons or benefit cultural progress, such as a global fund for cultural development, also aimed at promoting territorial cohesion and the reduction of gaps.

The system would ensure that commercial actors, who benefit disproportionately from access to the "sum of human knowledge", can only do so on condition that they remedy negative externalities in relation to the public interest of this appropriation. A manifestation of digital public sovereignty is necessary, in which institutions must select intangible values from the vast *pool* of works that could represent tools of *creative input* and *output*, to preserve them and provide access to them, creating a legal framework in which the public domain forms the external limit of intellectual property (Boyle, 2008). However, in this framework, the problem always remains that of the regulation of the areas of contact between the two regimes, to avoid the extremes of the mentioned appropriative pressures, but also of a total emptying of individual rights that would deprive the concept of creativity of meaning. This is necessary to regulate an environment in which people are used to work with material in public domain but are also interested in gaining access to quality digital goods, protected by rights, which facilitate new ways of reuse that derive from their diffusivity, with the aim of creating new culture.

The challenge for public institutions is therefore to make available the goods that can be easily used also as creative *inputs* that pursue the goal of stimulating the creation of culture. Sovereign institutions, to this end, would also have another conventional tool at their disposal: they can negotiate directly with rightsholders the reuse of protected material and native digital content, to be disseminated in a protected environment where access can only be granted to registered users under certain conditions, and not to every possible user worldwide.

In short, a supranational (at least continental) approach is necessary, to balance the expropriation of culture driven by the "neo-feudal" private powers, from which derives a deconstruction of national sovereignty, in a global dimension composed of highly digitized spaces, which tend to respond to the logic of a private power that holds and knows the technological codes and the ability to affect the functionality of the network and everything that circulates in it (Colarusso, 2023).

One could think about the establishment of an Authority that regulates and supervises, at a supranational level, the legal regime of products obtained through creative AI, providing, for anyone who puts such products into circulation, the obligation to report the relative derivation of products from creative AI. However, such Authority should be able to operate within a clear framework and be equipped with the appropriate legal instruments for the purpose.

In short, if it is true that the freedom of access to AI content tends to deconstruct the traditional ownership model, it is necessary to ensure a reasonable balance between the interests involved, to prevent a total fall into the public domain, combined with the growing use of GDL, from having a negative effect on the development of new forms of culture. On this point, the challenge is to pursue a functional perspective, withdrawing attention on the issue of individual belonging and emphasizing the reuse of data also for machine learning training purposes.

The Directive no. 790/2019, in fact, allows not only the free reproduction of works in the public domain, but also, the reproductions made by research bodies and cultural heritage institutes with the purpose of extracting text and data (*text and data mining*), through an automated technique aimed at analyzing large quantities of texts, sounds, images or data with the aim of generating information aimed at acquiring new knowledge (Article 70-ter of the Italian copyright law).[13]

[13] Which provides "1. Reproductions made by research organisations and cultural heritage institutions for the purposes of scientific research, for the purpose of extracting text and data from works or other subject-matter available in networks or databases to which they lawfully have access, and the communication to the public of the results of research where expressed in new original works, shall be permitted.

Article 70-quarter of the Italian copyright law, transposing Article 4 of the aforementioned Directive, allows text *and data mining* in databases to which there is legitimate access and provided that there is no opposition from the author or owner of the database, i.e. an automated technique aimed at analyzing large quantities of texts, sounds, images, data or metadata in digital format with the purpose of generating information, including patterns, trends and correlations.

In the same conceptual line is the recent draft enabling Italian law on artificial intelligence which, in Article 24, proposes to insert, in para. 1, of Article 1 of the copyright law, the adjective human to describe the process, as well as the notation, perhaps superfluous, for which works are protected "even when created with the aid of artificial intelligence tools, as long as the human contribution is creative, relevant and demonstrable." Similarly, the law proposes to insert Article 70-septies of Italian copyright law, which allows the reproduction and extraction of works or materials through generative AI, while complying with the conditions set out in Article 70-ter and *quarter*. The law, in fact, provides as follows: "The reproduction and extraction of works or other subject-matter through models and systems

2. For the purposes of this Law, text and data mining means any automated technique aimed at analysing large amounts of text, sound, images, data or metadata in digital format with the aim of generating information, including patterns, trends and correlations.

3. For the purposes of this Law, «cultural heritage protection institutions» means libraries, museums, archives, provided that they are open to the public or accessible to the public, including those belonging to educational establishments, research organisations and public broadcasting organisations, as well as institutes for the protection of cinematographic and sound heritage and public broadcasting organisations.

4. For the purposes of this Law, research organisations shall mean universities, including their libraries, research institutes or any other entity whose primary objective is to conduct scientific research or to carry out educational activities including scientific research, which alternatively:

a) operate on a non-profit basis or whose statutes provide for the reinvestment of profits in scientific research activities, including in the form of public-private partnerships;

b) pursue an objective of public interest recognised by a Member State of the European Union.

5. Research organisations shall not be considered to be those over which commercial undertakings exercise a decisive influence such as to allow preferential access to the results generated by scientific research activities.

6. Copies of works or other subject-matter made in accordance with paragraph 1 shall be stored with an appropriate level of security and may be retained and used only for scientific research purposes, including the verification of research results.

7. Rightholders shall be authorised to apply, to an extent not exceeding what is necessary for the purpose, appropriate measures to ensure the security and integrity of the networks and databases in which the works or other subject-matter are hosted.

8. The measures referred to in paragraphs 6 and 7 may also be defined on the basis of agreements between associations of rightholders, cultural heritage protection institutes and research organisations."

of artificial intelligence, including generative ones, are permitted in accordance with the provisions of Articles 70-ter and 70-quarter." It could be said that we are moving towards the enrichment of the already varied notion of valorization with further content: the sovereign use of cultural values for the training of machine learning models for research and promotion of culture purposes.

Public institutions could therefore develop, with text and data mining, secondary products and generative AI models, created on the basis of vast available databases of certified value such as public ones, ensuring reuse in open format, with the possibility of obtaining fees for the reuse of them by third parties, to recover the costs incurred for production, the provision and dissemination of content, as well as to make a reasonable return on investments (as required by EU Directive no. 1024/2019 on the so-called open data government, implemented in Italy with Legislative Decree no. 200/2021).

The idea is that of an open, controlled and sovereign "digital cultural space", a shared environment in which users, but also large private companies, can access conditions that guarantee that collective usability can be balanced with the protection of individual exclusive rights. The theme, from this point of view, becomes not so much the philosophical question, although relevant, of the *legal status* of AI agent, but the possibility to dominate the expropriation of cultural value that is achieved by *generative deep learning* tools. These tools consubstantially lend to a serial production of low quality, whose diffusivity risks emptying of content the intangible value expressed by tangible goods that are testimony of culture and civilization, confusedly throwing them back into *massive dataset* or *black boxes*, dominated by private codes unknown to public power.

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The Value of the Principle Set Forth in c. 157 of the 1983 Code of Canon Law in the Context of Systemic Solutions of the Canonical Legal Order

• **Abstract** •

In the present study, the author reflects on the content of c. 157 of the 1983 Code of Canon Law in the context of the systemic solutions of the canonical legal order. He proves that the principle set out in this regulation concerning the free conferral of office by the diocesan bishop should be understood as a general principle, which is not exclusive in nature. In his opinion, non-exclusivity is implied in the introductory clause of c. 157, 'Unless the law explicitly provides otherwise,' which is reflected in systemic solutions regarding the direct conferral of offices by the Pope and competent superiors of institutes of consecrated life within a specific scope. On the other hand, he showed that the introduction of certain exceptions to the general rule was determined by the value of certain acts taken by the superior (the need to obtain the consent of a consultative body (consulted persons) and the specific nature of certain institutions (the autonomy of institutes of consecrated life).

Keywords: Free conferral of ecclesiastical office, Canonical legal order, Systemic solutions, Diocesan bishop.

Introduction

In the 1917 Code of Canon Law, c. 152–159 are devoted to the institution of free conferral of office.[1] In comparison to this collection, in the current codification, in Article 1 of Chapter I: "Conferral of ecclesiastical office", Title IX: "Ecclesiastical

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[1] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, 1–593 (hereinafter: CIC/17). For an English translation, see The 1917 or Pio-Benedictine Code of Canon Law available at https://www.iuscangreg.it/cic1917.php

offices", there is only one c. 157,[2] which states: "Unless the law explicitly provides otherwise, it is the responsibility of the diocesan bishop to confer ecclesiastical offices in his own particular church by free conferral." It should be noted that the equivalent of the current regulation in the first CIC/17 was c. 152, which stated: "Loci Ordinarius ius habet providendi officis ecclesiaticis in proprio territorio, nisi aliud probetur; Hanc tamen potestate caret Vicarius Generalis sine manadato speciali."

The course of the codification work shows that the current legislative solution was mainly determined by the fact that most of the provisions of the previous CIC/17 referred to the conferral of offices in a general sense, rather than to the institution of free conferral of offices in the strict sense, which is why this situation was corrected by limiting it to a single canon, namely the aforementioned c. 157 of the CIC/83 (Miñambres, 1996, p. 952).[3]

This study will not focus exclusively on an analysis of the content of c. 157 of the CIC/83, but on a more profound issue related to the value of this provision in the context of the systemic solutions of the canonical legal order. However, such a research intention first requires an explanation of the canonical concept of free choice, on which further arguments will be based.

Characteristics of the Institution of Free Conferral of Office

Since the legislator did not decide to introduce a legal definition of free conferral of office in the CIC/83, he left the question of defining this institution to the doctrine. Some commentators have taken up this thread in the literature on the subject. Luigi Chiappetta sees the free conferral of office as a direct decision of the ecclesiastical authority, by virtue of which it not only grants the title but also chooses the person to whom it entrusts the office (Chiappetta, 1996, p. 241). Similarly, Julio García Martín stated that it is a direct conferral of office without the intervention of a third party, made by the competent authority having the free and full right to confer it (García Martín, 1999, pp. 558–559). Finally, Jesús Miñambres defined this form of commission as the direct appointment of the holder of an office by the competent authority responsible for granting it (Miñambres, 1996, p. 953). It should be added that in this case we are referring to the authority re-

[2] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, 1–317 (hereinafter: CIC/83). For an English translation, see The 1983 Code of Canon Law available at https://www.iuscangreg.it/cic1983.php

[3] Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Coetus De normis generalibus. Series Altera. Sessio V. 5-7 May 1980*, "Comminicationes" 21 (1991), pp. 213–216.

ferred to in c. 147 of the CIC/83, i.e. the authority competent to establish, modify and abolish an office (c. 148 of the CIC/83) (García Martín, 1999, p. 559). It is worth adding that this institution is grounded in the doctrine of the Second Vatican Council, articulated in no. 28 of the Decree on the Pastoral Office of Bishops in the Church, which states that the bishop "should enjoy the necessary freedom in conferring offices and benefits; for this reason, laws and privileges that in any way restricted this freedom have been abolished"[4] (Horta Espinoza, 2007, p. 88; De Paolis and D'Auria, 2008, p. 456). As a result, the institution of irremovable parish priests was abolished (CD 31) (García Martín, 1999, p. 558). On the other hand, it should be noted that in opposition to the free conferral of office, there are institutions of dependent conferral of office: presentation (c. 158–163 of the CIC/83) and election (c. 164–183 of the CIC/83).

The form of commission that interests us is characterised by the fact that the designation of a person and the conferral of office are simultaneous, in the sense that we are not dealing here with two different legal acts (García Martín, 1999, p. 558). The CIC/83 contains several provisions which clearly emphasise the freedom to confer office: firstly, c. 317 does not exclude this possibility in the case of the appointment of the president of a public association of the faithful and its chaplain; secondly, this form is also associated with the conferral of the office of parish priest (c. 523), the appointment of a parish vicar (c. 547) and the conferral of the office of chaplain (c. 563); thirdly, superiors of institutes of consecrated life have such authority with regard to members of their institute (c. 626) (Miñambres, 1996, p. 953).

The Diocesan Bishop as the Entity Conferring Office

When considering the content of c. 157 of the CIC/83, it should be noted that in this regulation, the legislator's attention focuses on one hypothesis, in which the diocesan bishop is competent to freely confer offices in his own Church. When considering this issue, it must first be noted that, compared to the CIC/17, there has been a change in this case, since in the provisions of the first CIC/17, the local ordinary was the competent authority (c. 152). The main reason for this

[4] Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de pastorali episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), 673–696 (hereinafter: CD). For an English translation, see Decree Concerning the Pastoral Office of Bishops in the Church *Christus Dominus* Proclaimed by His Holiness, Pope Paul VI on October 28, 1965 available at https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html

change was the implementation of a proposal made by the consultors during the revision of the CIC/17, aimed at standardising the terminology used in the system (Miñambres, 1996, p. 955).[5]

Due to the fact that the entrusting of an office falls within the executive power, the normative term "diocesan bishop" should be referred to c. 134 § 3 of the CIC/83, according to which this term also includes all those who are systematically equated with him (c. 368 and c. 381 § 2), i.e. territorial prelates, territorial abbots, apostolic vicars and apostolic prefects, and permanently appointed apostolic administrators. On the other hand, it should be noted that, by virtue of law, the vicar general (c. 475) and the vicar bishop (c. 476) do not have such authority, since the clause "with the exception of the vicar general and the vicar bishop" contained in c. 134 § 3 has the character of a law of exclusion (c. 10). Nevertheless, the legislator did not exclude the possibility of them receiving a special mandate from the diocesan bishop in the aforementioned regulation. Therefore, they would also be entitled to make such a decision. As a side note, it should be recalled that in the CIC/17, only the vicar general could receive such a power (c. 152 and c. 1432 § 2) (Socha, 1985, ad. 157, no. 4; Piñero Carrion, 1985, p. 296).

When considering c. 157 of the CIC/83, it should be borne in mind that this provision concerns general systemic assumptions. The CIC/83 provides for a derogation from this rule. According to c. 565, the local ordinary (c. 134 § 2), and within the scope of this legal term, in addition to the diocesan bishop, the vicar general and the vicars episcopal are also included, and therefore they are also authorised to appoint a chaplain (Miñambres, 1996, p. 955).

In this context, the doctrine also raises the issue of the powers of the diocesan administrator. Referring to his status, the legislator stated in c. 427 § 1 of the CIC/83 that although he has the same authority as the diocesan bishop, at the same time he included a clause in this regulation stating "except for those matters which by their nature or by virtue of law are excluded." The current CIC/83 contains exceptions to this rule, which are expressed in c. 509 § 1, according to which the diocesan administrator cannot confer canonicates, and in canon 525, 2°, according to which he may not appoint parish priests in the first year of a vacancy in the bishopric or in the event of an impediment to the functioning of the bishopric (Socha, 1985, ad. 157, no. 5; Aymans and Mörsdorf, 1991, p. 468).

The CIC/83 contains a number of regulations which clearly emphasise the free conferral of offices by the diocesan bishop. These include: appointment to the po-

[5] Pontificia Commissio Codici Iuris Canonici Recognoscendo, Coetus Studiorum De normis generalibus. Sessio Altera (Sessio VI). 14-19 April 1969, *Communicationes 23* (1991), p. 277.

sitions of lecturers in philosophy, theology, and moral theology (c. 253 § 1–2), the appointment of a coadjutor bishop as vicar general (c. 406 § 1), the appointment of officials of the diocesan curia (c. 470), the entrusting of the office of moderator of the diocesan curia (c. 473 § 2), the establishment of a vicar general and episcopal vicar (c. 477 § 1), the conferral of the office of chancellor, vice-chancellor and notary (c. 487 § 1–2 and c. 483 § 1), the appointment of members of the presbyteral council (c. 497), appointing members of the college of consultors (c. 502 § 1), entrusting offices to canons (c. 507–509), entrusting pastoral care of a parish or several parishes simultaneously to several priests acting jointly (c. 517 § 1), entrusting pastoral care to a deacon or another person who has not been ordained a priest, or to a community of persons establishing a chaplain to direct pastoral activities (c. 517 § 2), appointing parish priests (c. 523), appointing a parish administrator (c. 539), appointing a parish moderator (c. 544), appointing a parish vicar (c. 547), appointing a rector of a church (c. 557), the establishment of a judicial vicar (c. 1420 § 1) and diocesan judges (c. 1421 § 1), the appointment of a justice ombudsman (c. 1435) (Socha, 1985, ad. 157, no. 7).

The solution found in c. 157 stems from the fact that, according to c. 381 § 1 (whose source is CD 8a), the diocesan bishop has ordinary, proper and direct power in his diocese, except for those matters which, by law or papal decree, are reserved to the supreme or other ecclesiastical authority (Socha 1985, ad. 157, no. 2; Aymans and Mörsdorf, 1991, p. 468). In the current legal order, the Pope has reserved the right to appoint auxiliary bishops (c. 377 § 4) and coadjutor bishops (c. 403 § 3).

Continuing, it should be added that c. 157 applies only to diocesan offices. The diocesan bishop has jurisdiction only over the particular Church entrusted to him (Chiappetta, 1996, 241). Therefore, he cannot confer an office outside the scope of his jurisdiction (García Martín, 1999, p. 560). Thus, the provision of c. 157 does not cover the conferral of offices in institutes of consecrated life (c. 625), in secular institutes (c. 717 § 1) and in public associations of the faithful (c. 317 § 1 and c. 312 § 1) (Socha, 1985, ad. 157, no. 6).

The Supplementary Nature of the Free Conferral of Office

In accordance with systemic solutions, under certain conditions, the free conferral of office may be of a supplementary nature. According to c. 162, if the presentation is not made within the time prescribed by law, or if two unsuitable candidates are presented, the institution of dependent presentation is replaced by the free conferral of office. C. 165, in turn, stipulates that if no election is made within

a reasonable period of three months, the competent ecclesiastical authority, i.e. the one which has the right to confirm the election or to confer the office by substitution, has the right to confer it freely (Miñambres, 1996, p. 953).

Free Conferral of Office and the Participation of Participatory Bodies

Some regulations of the canonical legal order concerning the free conferral of office indicate the need for consultation in the form of a council or the consent of participatory bodies. This possibility is provided for, *inter alia*, in c. 625 § 3, with regard to the appointment of other superiors of institutes of consecrated life, and in c. 494 § 1 concerning the appointment of the diocesan finance officer, in respect of which the legislator requires that the opinion of the college of consultors be heard. In this context, it had been noted that the general provisions, in c. 127 § 1–2, set out the rules to be applied in the event of the aforementioned hypotheses. They concern the necessity of consulting or obtaining the consent of consultative bodies. The doctrine emphasises that, from the point of view of substantive law, the decision taken in this case by the competent ecclesiastical authority is not a decision of the superior and the consultative bodies, but an act of the superior (Dzierżon, 2013b, p. 11). It have to be noted that the need for the superior to consult the council does not raise any interpretative problems, as he is not absolutely obliged to follow the opinion of the body; however, the situation is different when it comes to obtaining the consent of the body (persons), as this is required for the validity of the act (c. 127 § 1–2) (Dzierżon, 2013b, p. 11; Dzierżon, 2013a, p. 377). This situation raises a serious question: can we still speak of the free conferral of office in this situation? It seems that we cannot.

The Clause "Unless the law explicitly provides otherwise"

The basic provision of c. 157 is preceded by the clause "Unless the law explicitly provides otherwise". With regard to this reservation, it must be noted that in this case the word "explicite", translated as "explicitly", plays an important role. It should be clarified that the word "explicite" is not synonymous with the word "expresse".

Referring to the value of this clause, it is to be stated that it concerns unambiguous objective norms established by particular or customary law (Socha, 1985, ad. 157, no. 8; Aymans and Mörsdorf, 1991, p. 466). This means that in this case, regulations interpreted implicitly are irrelevant (De Paolis and D'Auria, 2008,

p. 457). It should be added that the restriction contained in c. 157 of the CIC/83 Criminal Procedure relating to the authority of the diocesan bishop does not exclude direct papal intervention in the conferral of office (García Martín, 1999, p. 561).

Continuing, it should be added that in the current CIC/83, such reservations appear in c. 523, which does not exclude the possibility of presenting a candidate for office. This applies to the appointment of parish priests from institutes of consecrated life (c. 682 § 1) and c. 497, 1°, which provides for the election of approximately half of the members of the presbyteral council (Provost, 2000, p. 210).

Conclusions

The doctrine regards the principle set out in c. 157 as a general principle relating to the power of the diocesan bishop to freely confer ecclesiastical offices within the scope of his competence in his own particular Church (De Paolis and D'Auria, 2008, p. 456; Aymans and Mörsdorf, 1991, p. 466). It seems that this understanding is consistent with the assumptions of Book I: "General Provisions" of the CIC/83, which aims, on the one hand, to provide a general introduction to codified and non-codified regulations and, on the other hand, to enable proper interpretation by establishing norms that are to become the basis for the correct reading and interpretation of existing regulations (De Paolis and D'Auria, 2008, p. 56). The general nature of the principle means that the ecclesiastical legislator consciously assumes that there will be exceptions to this rule (De Paolis, D'Auria, 2008, p. 558). The analysis shows that this possibility is provided for in c. 565, according to which the local ordinary is authorised to appoint a chaplain.

The possibility of derogations from this rule is also provided for by the normative clause "unless the law explicitly provides otherwise." The analysis shows that in some cases (not only concerning the diocesan bishop), the legislator requires that, before the competent authority takes a decision, the matter be consulted with certain bodies in the form of a council and consent. However, this legal situation raises a certain doubt: is this a case of free conferral of office? The answer to this question would be negative. The analysis carried out in this study concerning the competence of the diocesan bishop shows that the restriction introduced in c. 127 § 1–2 regarding the necessity of obtaining the consent of a consultative body for validity infringes upon his freedom of decision, as it excludes the direct adoption of a decision, in this case involving the participation of third parties. (This observation must also be applied to the competence of other ecclesiastical superiors, whose decisions require the participation of participatory bodies in the form of

consent). It should be added that this assertion is not undermined by the doctrinal thesis that, as a rule, the decision taken is an act of the superior, since consultative bodies do not participate in the final decision-making phase.

Further doubts are raised by the clause "with the consent of his own ordinary" in c. 162. It should be recalled that this provision concerns a case in which the competent authority has not presented any candidates or has presented two candidates who have proved unsuitable. The legislator provides that in such a case the office it is to be freely conferred. This means that the institution of dependent commission has been replaced by that of independent commission. In this case, the *crux interpretum* is the aforementioned clause "assientiente tamen proprio provisi Ordinario." When considering this issue, it should first be noted that commentators rarely (unfortunately) address the question of how this reservation relates to the mechanisms of the institution of free appointment of office. Miñambres noted that this clause was included in the proposed regulation during the revision of the CIC/17 by the "Physical and Juridic Persons" Team during discussions on the position of religious persons (Miñambres, 1996, p. 972).[6] From a legislative point of view, this solution seems to be appropriate in view of the autonomy of religious orders. In this context, however, the question arises as to whether this solution undermines the institution of free conferral of offices. Referring to the content of c. 162 of the CIC/83, Miñambres took the view that its content is unclear; in his opinion, it actually distorts the uniformity of the wording of this regulation (Miñambres, 1996, p. 972). De Paolis and D'Auria, on the other hand, considered this clause to be a *praerequisitum* of free conferral. However, they pointed out that in this case the principles set out in c. 127 apply. These principles indicate that while the superior may take an autonomous decision in the case of a council, the consent of the consultative body (the person consulted) is nevertheless required for the act to be valid (De Paolis and D'Auria, 2008, p. 461).

Continuing, it must be noted that the principle set out in c. 157 is not exclusive. It should be noted that the fundamental principle of the functioning ecclesiastical system is the primacy of the Pope. The Pope therefore not only has authority over the entire Church, but also has primacy of ordinary authority over all particular Churches and their groups (c. 331). By virtue of his direct authority, he is therefore competent to freely confer offices. This study also points out that superiors of institutes of consecrated life also have limited authority to freely confer offices. Therefore, it is reasonable to conclude that the hypotheses mentioned

[6] Pontificia Commissio Codici Iuris Canonici Recognoscendo, Coetus De personis physicis et iuridicis. 12–16 March 1973, *Communicationes*, *22* (1990), p. 238.

above were not included in c. 157 for various reasons: papal authority is based on primacy, while the authority of superiors of institutes of consecrated life is linked to the institution of the autonomy of institutes. In this case, one may be inclined to conclude that the lack of reference to this form of conferring offices in c. 157 is due to the nature of the matter (*ex natura rei*).

In conclusion, it should be stated that the principle set out in c. 157 is to be understood as a general principle, which is not general or exclusive in nature. In this matter, the ecclesiastical legislator, like most legislators, did not decide to introduce a legal definition, as this is dangerous; he therefore left the definition of this institution to doctrine. At the same time, in c. 157, the legislator introduced the clause "Unless the law explicitly provides otherwise," assuming the possibility of exceptions to the general rule, the occurrence of which has been confirmed in the analyses of this study. There is no doubt that the need to obtain consent for the validity of a consultative body directly undermines the direct decision-making power of the competent superior (c. 127 and c. 162), as it involves the participation of third parties. It seems that the adoption of exceptions to the general norm was mainly determined, on the one hand, by specific institutions functioning in the canonical legal order (religious autonomy) and, on the other hand, by the special value of certain decisions (the need to obtain the consent of a consultative body or individual persons).

Finally, the normative reservation "with the consent of the ordinary" in c. 162 raises serious interpretative difficulties. It cannot be disputed (which is understandable) that it is linked to the functioning of the institution of autonomy of institutes of consecrated life. It must be noted that, despite this, the term "free conferral" appears in the aforementioned regulation. The few commentators who have addressed this issue have not answered the intriguing question: why? This raises the question: should this provision be treated merely as a legislative oversight? However, it seems that it ought to be linked more to the introductory clause of c. 157, which states that "unless the law explicitly provides otherwise," thus allowing for the possibility of derogations.

The analysis suggests that the solutions adopted in some of the provisions of the current CIC/83 do not fall within the definitions of free conferral of office drawn up by canonists. This is most likely the reason why the legislator decided not to introduce a legal definition of this institution.

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The Collective Mind of the Court. Insights from a European Project on Collective Intentionality in Collegial Courts[1]

• **Abstract** •

In the labyrinthine corridors of democratic theory and legal practice, there exists a realm seldom charted: the inner workings of collegial courts, where individual judgments dissolve into the elusive 'we' of collective authority. This inquiry, conducted under the auspices of the COIN project (The emergence of COllective INtentionality in participatory decision-making processes of the courts), seeks to trace the serpentine paths by which plural intentions coalesce into binding legal norms, revealing law not as a static codex but as a performative instantiation of collective cognition. Through a triangulation of textual exegesis, judicial interviews, and ethnographic observation, the project illuminates the delicate interplay between participatory democracy, collective intentionality, and the normative force of legal entities. Here, courts emerge simultaneously as laboratories and cathedrals of deliberation, spaces where the fragile architecture of shared recognition becomes visible and operative. The present reflection is less a conclusion than a prologue, an invitation to accompany law from its philosophical lexicon to its lived judicial enactment—a realm where the 'I' is constantly negotiated into the 'we', and where legitimacy is performed rather than proclaimed.

Keywords: Collective Intentionality, Participatory Democracy, Legal Ontology, Judicial Deliberation, Social Research.

Introduction

In the words of Abraham Lincoln, democracy is "government of the people, by the people, for the people" (cf. Basler, 1953, p. 238). In other words, democratic power originates from the people and must ultimately be exercised for their benefit.

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Whether one adopts a constitutional, substantive, or procedural approach (Tilly, 2007, pp. 7–9), democracy requires that authority be rooted in human agency rather than divine investiture or 'natural' privilege (Schmitt, 2012, pp. 10–45). Yet to say that power is of human origin is not to say that it is automatically democratic: it must also be exercised by the people—or at least by their representatives—and in ways that serve the people.

This brings us to the perennial problem of legitimacy in collective decision-making. Democracies demand not only valid outcomes but also procedures that appear transparent, inclusive, and accountable. In this sense, institutions such as collegial courts face this challenge acutely: their authority rests on the law, yet their legitimacy depends on how they deliberate and decide.

And here a striking gap appears. Political theory has examined parliaments and assemblies in detail (Dalla Porta, 2011), while legal theory has focused largely on the reasoning of individual judges (Levi, 1965). But we still know little about what happens inside panels, appellate benches, or constitutional courts—precisely where much of modern jurisprudence is produced.

The COIN project (The emergence of COllective INtentionality in participatory decision-making processes of the courts) was conceived precisely to address this blind spot. Its premise is simple: a collegial judgment is not a bundle of private opinions but the product of a collective we-mode. Through deliberation, persuasion, and compromise, courts generate binding norms—transforming a plurality of voices into a single institutional pronouncement.

This inquiry is more than theoretical. In times of democratic fragility and declining trust in institutions, understanding how courts construct their collective stance has become urgent. Legitimacy depends not only on what courts decide but also on how they decide. If rulings are to command respect, we must study the processes that transform disagreement into consensus—or at least into authoritative closure.

Exploring collective intentionality in courts also reshapes debates in legal theory. Instead of treating "the court" as a black box, COIN asks how individual perspectives are transformed into an institutional voice. What distinguishes a genuine judicial ruling from a mere compromise? To what extent does law itself depend on practices of shared recognition and intentionality?

Seen in a broader frame, courts are not isolated organs but crucial nodes in the democratic web. Like parliaments, they answer to two audiences at once: the internal standards of legal reasoning and the external expectations of society. This dual accountability makes the study of their collective intentionality particularly pressing.

For this reason, the project moves across disciplines. Philosophy provides the conceptual tools of intentionality; law offers the doctrinal terrain; sociology and political theory situate courts within structures of legitimacy. Only by combining these perspectives with empirical observation—through case law analysis, interviews with judges, and studies of deliberative practices—can we capture the phenomenon in its full complexity.

In the following sections, therefore, two key concepts underlying the project will be briefly introduced: participatory decision-making and collective intentionality. The article will then present in detail the methodology adopted and the specific objectives of the COIN project.

On Democracy and Participatory Decisions

The word "democracy" carries more meanings than one might readily imagine.[1] Indeed, given the multitude of definitions it has accumulated over the centuries, it is hardly surprising that some scholars treat it as what might be called an "essentially contested concept".[2] Yet, beneath these divergent interpretations, the core intuition remains strikingly simple: if we are to be governed, let it be by ourselves. As Kelsen observed, political freedom entails that we are "subject to a will, which is not, however, a foreign, but rather one's own will" (Kelsen, 2013, p. 28). From this insight arise what one might term the minimal criteria of democracy: the people as the source of authority, equal participation, and the principle of majority (Mazzocca, 2020). But minimal definitions leave much unsaid. They tell us who decides, without clarifying how decisions are shaped, or whether citizens actually experience themselves as active participants rather than passive endorsers of pre-given options.

[1] Indeed, anyone attempting a comprehensive survey of the word's usages across the centuries might be astonished to discover that democracy has been defined in no fewer than 311 distinct ways (Neass et al., 1956).

[2] In other words, a concept that exhibits the following five characteristics: "(I) it must be appraisive in the sense that it signifies or accredits some kind of valued achievement. (II) This achievement must be of an internally complex character (…). (III) Any explanation of its worth must therefore include reference to the respective contributions of its various parts or features (…). (IV) The accredited achievement must be of a kind that admits of considerable modification in the light of changing circumstances; and such modification cannot be prescribed or predicted in advance (…) [and] (V) (…) each party recognizes the fact that its own use of it is contested by those of other parties, and that each party must have at least some appreciation of the different criteria in the light of which the other parties claim to be applying the concept in question" (Gallie, 1955, pp. 171–172).

If, in classical conceptions of democracy, as Dahl (1980, p. 27) observed, the defining feature lay in the "ability of governments to continuously satisfy the preferences of citizens within a framework of political equality," the evolution of thought on participatory public decisions marks a step further: the expansion of institutional legitimacy through the inclusion and integration of multiple perspectives. In this sense, the notion of "government with the people," formulated by Vivien Schmidt (2006, p. 6), no longer appears as an abstract aspiration, but as a practice which, while idealistic, might find expression in policies not only at local or national levels but also on an international scale. It implies a radical rethinking of democracy itself, in which individual autonomy becomes inseparable from collective responsibility. To cast a vote is not necessarily to exercise agency. Participation, in a fuller sense, requires something more: not merely choosing among alternatives but helping to create them.

Here we encounter the notion of participated decisions. At first glance, the distinction may appear subtle, almost terminological, yet it carries profound implications. To "participate in a decision" is often to operate within a framework set by others: one may choose, for instance, between two referendum options but not decide what the options should be. A "participated decision," by contrast, arises when those involved are not only players in the game but also its architects, shaping the very field of possibilities (Mazzocca, 2024a, p. 129).

The difference becomes clearer if we contrast two models of deliberation. In a competitive debate, the aim is victory: one side wins because a jury, an audience, or a set of rules declares it so (Sommaggio and Tamanini, 2020). The outcome, however rational, is imposed externally, determined by an authority outside the debate itself. In participatory deliberation, by contrast, the goal is not to defeat an opponent but to generate a shared resolution. The result is binding not because it is decreed from above, but because it emerges from within, the collective product of persuasion, compromise, and shared responsibility (Mazzocca, 2024b, p. 128).

To deserve the name, then, a participated decision must go beyond aggregation. It cannot be reduced to the arithmetics of majority voting, nor to the mere synthesis of pre-fabricated positions. Rather, it requires an inclusive process in which participants can formulate proposals, test them against others, and refine them through genuine dialogue. As James Bohman (1998) has emphasized, such processes demand equality at two levels: the formal recognition of each participant, and the substantive consideration of every reason expressed.

Of course, this model is not without risks. A proliferation of individual proposals can paralyze deliberation, making consensus elusive. Conversely, small coalitions may converge on a decision that binds all but reflects only a minority. Yet

such problems are not insoluble: ranking mechanisms, preference aggregation, and incentives for dialogue among proximate positions can help transform plurality into constructive deliberation rather than fragmentation.

In this sense, participated decisions represent both an aspiration and a corrective. They embody the idea of democracy not only of the people but also with the people. They invite participants to assume responsibility for outcomes, not as passive subjects but as co-authors. And they remind us that democracy cannot be confined to procedures of periodic voting or abstract principles: it must be lived as an ongoing collective practice, where the legitimacy of power derives from the fact that its decisions are genuinely shared.

On Collective Intentionality

At first sight, the distinction between 'what there is'—ontology—and what is what there is—metaphysics—might appear to have little bearing on the legal domain. After all, the majority of philosophical inquiries undertaken by jurists over the centuries have concerned themselves with the nature of law, suggesting, perhaps, that we ought to possess a clear understanding of the difference between the law's essence and its existence. Yet, upon closer inspection, such clarity proves elusive. The legal field, habituated as it is to the dichotomy between what is and what ought to be, struggles to accommodate the subtle complexities of ontological reflection (Sinha, 1976; Bix, 2000).

One might be tempted to commence ontological inquiry at a point of seemingly universal agreement: the so-called "materiality" of law. However, an excessively materialistic approach proves woefully inadequate for capturing the full dimensionality of legal phenomena. Consider, for instance, a physical copy of the United States Constitution. One may touch it, measure it, even weigh it, yet the tangible pages in no way exhaust the abstract content of the sentences inscribed therein. When one speaks of the Constitution, one does not refer to any particular copy, but to a literary-legal work whose properties, truths, and effects are largely independent of its material instantiation. To reduce law to its paper-and-ink substrate, then, is both epistemologically impoverished and conceptually misleading.

This is not to abandon the ontological question. The task of ontology remains that of discerning what exists, or whether something—whatever we may call it—exists at all. We can, with reasonable certainty, affirm the existence of objects such as sheets of paper or individuals such as Donald Trump: these are entities whose being is largely indifferent to our beliefs or intentions. Yet the ontological status of legal entities—contracts, offices, marriages, or US presidents—cannot be appre-

hended so straightforwardly. Unlike trees or chairs, they seem to emerge not from nature, but from our human intentionality: the capacity of minds "to be about, to represent, or to stand for, things, properties and states of affairs" (Jacob, 2019).

It might be argued, therefore, that discussing the ontology or metaphysics of legal phenomena is at best curious, at worst nonsensical, for law is not a mirror of the world but a reflection of our collective legal imagination. Rules, standards, and conventions are instruments by which humans organize their social reality. While they exert practical influence over behavior, this influence is not inherent in the rule itself, but in the collective recognition and observance of the rule. Speed limits, prohibitions, and obligations do not prevent events ex ante; they exist because, once the relevant conditions occur, the community collectively regards them as binding, enforceable, and meaningful. As Zanetti (2017) observes, law governs the realm of the lawful, not the realm of the possible: events may and do occur despite legal prohibitions; legality does not alter existence, only its normative evaluation.

Herein lies the crux: legal entities exist, ontologically speaking, insofar as there is intentionality directed toward them. However, what matters is not merely individual intentionality, but collective intentionality. As John Searle remarked in an interview with Angela Condello (2017, p. 230), indeed, every legal system "will work only to the extent that it is generally accepted by the members of the community." One may be unaware of the speed limits along a certain road, yet they exist and carry normative weight precisely because the collective intentionality of the community regards them as such.

Yet collective intentionality, while necessary, is not sufficient. Legal entities are not merely social constructs; they are 'normative entities' (De Vecchi, 2012), bearers of 'deontic powers' (Searle, 2019, pp. 216–217). These powers generate reasons for action that do not depend on personal desires, inclinations, or expedience. A working agreement between a researcher and a university, for example, imposes obligations irrespective of the parties' momentary preferences. This normative character distinguishes legal entities from other intentional objects, such as artifacts or works of art. Crucially, however, no intrinsic property of paper or ink can confer these powers; their efficacy arises solely from collective recognition and the ascription of normative significance.

From the vantage of social ontology, and in particular legal ontology, entities such as contracts, marriages, presidencies, or crimes exist only to the extent that collective intentionality recognizes both their existence and their normative force. Absent this recognition, written contracts would remain mere sheets of paper, presidents would be ordinary individuals, and crimes would be no more than events in the mundane flow of the world. Legal ontology thus reminds us that

law, while manifest in the social world, is inseparable from the web of collective intentionality that sustains it. And in this sense, this interplay between collective intentionality and normative recognition reaches its most formal and concrete manifestation in the judicial arena. When individuals gather in a court, indeed, their recognition of law and legal entities is no longer merely abstract or diffuse; it becomes a structured, performative act. In particular, collective intentionality is expressed most profoundly in the deliberations of collegial courts, where judges, by virtue of their shared authority and expertise, embody both the recognition and the enactment of legal norms. Each member of the panel brings to the table their own understanding, interpretation, and judgment; yet, it is only through their concerted deliberation that a binding decision emerges, a decision that will extend its normative force beyond the chamber and into the social world at large.

Here, one observes a fascinating convergence: the abstract mechanisms of collective intentionality, which in ordinary life remain diffuse and often unarticulated, crystallize into a formalized, performative process. In a collegial court, the law is not merely interpreted—it is co-constituted by the judges' shared intentionality. The decision, whether it be a ruling on a complex contract dispute, a criminal adjudication, or a constitutional question, is not the property of any single judge. Rather, it is the product of a collective mind, an emergent entity whose authority rests on the intersubjective recognition of all its participants. The deliberation itself becomes the medium through which collective intentionality is made manifest: reasoning, argumentation, persuasion, and sometimes dissent converge, and only at the point of consensus—formal or procedural—does a legal fact come into being.

Thus, the tribunal serves as a kind of microcosm of social ontology: a space in which individual intentionality converges to instantiate legal entities, to confer deontic power, and to render norms operative in the world. In this sense, one might even suggest, with a hint of irony, that a collegial court is both a laboratory and a cathedral of collective intentionality: a space where abstract social constructs acquire tangible force, where law is not merely recognized but actively performed, and where the ontological and normative dimensions of legal entities coalesce in the solemnity of judicial deliberation.

Ultimately, it is in this crucible—the careful weighing of arguments, the negotiation of interpretive differences, the formalization of collective assent—that one perceives the full potency of collective intentionality. Law, after all, is not merely a matter of ink and paper, nor of individual cognition alone; it is the living embodiment of what a community, through structured deliberation and shared recognition, chooses to acknowledge as binding. In collegial courts, where inten-

tionality is both plural and coordinated, the law becomes a true ontological actor: simultaneously existing, normative, and efficacious—a testament to the remarkable power of human collective cognition made manifest in institutional form. And it is precisely this transformation of diffuse intentionalities into structured collective judgments that the COIN project seeks to investigate. In doing so, the project aims to illuminate how law emerges not merely as an abstract system of norms, but as the living product of shared judicial deliberation.

About the COIN Project

If the preceding reflections have shown us anything, it is that law does not live in isolation, suspended in the ether of pure abstraction, but breathes and moves through the intentionalities of those who invoke it, dispute it, and—above all—decide it. Yet, for all the philosophical ink spilled on collective intentionality, remarkably little attention has been paid to how it takes form within judicial practice. While research has often focused on legislative bodies or the psychology of the solitary judge, the dynamics of collective intentionality in courts remain largely unexplored. In this regard, recent studies show that although collective intentionality is gaining relevance in legal scholarship (Yaffe, 2017), attention has mostly centered on legislative power rather than judicial practice (Canale, 2021).

The COIN Project was born to address precisely this gap: to ask whether, how, and under what conditions courts themselves become loci of collective intentionality. This requires more than abstract reflection; it demands an encounter with courts as they are, with their cases, routines, and judges—to follow their steps, overhear their arguments, and witness how the 'I' becomes 'we' in the crucible of deliberation.

If the previous reflections have traced the conceptual horizon—participated decisions, collective intentionality, and the peculiar role of collegial courts—it is now time to descend from abstraction to method. Philosophy, after all, is condemned to sterility if it does not touch the world it seeks to illuminate. And courts, unlike Platonic forms, are not timeless entities to be contemplated at a distance: they are institutions made of people, routines, and decisions, which can be studied with the same patience with which an anthropologist studies rituals or a philologist deciphers manuscripts.

The path begins with a modest but necessary cartography. Europe is home to a bewildering variety of collegiate jurisdictions: criminal, civil, administrative; composed of three judges, five judges, or more; national, regional, even supranational. Thus, the project's first task is one of selection of the courts. This means

gathering official data, identifying the rhythms and frequencies of collegiate proceedings, and, finally, establishing the criteria that will distinguish those courts that can truly serve as laboratories of collective intentionality.

Once this terrain is mapped, the project unfolds in successive movements, each designed to approach judicial practice from a slightly different angle, so that, taken together, they form a composite image of how collective intentionality is born and sustained. The guiding principle is triangulation: to compare the texts of law (judgments), the voices of judges (interviews), and the practices of deliberation (observations). Only by weaving together these three dimensions can one hope to capture the elusive phenomenon of judicial collective intentionality.

The textual step comes first. Judgments, though polished and formal, are not mute; they contain traces of the deliberations that produced them. The choice of pronouns ('we' versus 'I'), the presence or absence of dissenting opinions, the structure of reasoning—all these are clues to how the collective mind of the court has taken shape. By subjecting a corpus of rulings to close reading, one begins to perceive recurring patterns: when is the court a unified voice, when does it fracture, and how does it present its authority to the outside world?

The dialogical step follows. Semi-structured interviews allow one to ask not only what judges decide, but how they experience the act of deciding together. Do they perceive themselves as engaged in a genuinely collective enterprise? How do they negotiate disagreement? What role do hierarchy, persuasion, and compromise play? These questions, posed with methodological rigor but also with the humility of genuine listening, aim to reveal the texture of judicial intentionality as it is lived.

Whenever access permits, the project seeks to complement texts and voices with observations of judicial life: not the secret deliberations themselves (which remain inaccessible in most systems), but the broader practices that surround them—hearings, conferences, informal exchanges. Like the anthropologist in the field, the researcher adopts a stance of attentive presence, noting gestures, rhythms, and routines that rarely find their way into written judgments.

Data from judgments, interviews, and observations are then carefully organized, coded, and compared. The aim is not statistical generalization but conceptual illumination: to see how the philosophical category of collective intentionality is instantiated, resisted, or transformed in the actual practice of courts.

Finally, just as courts achieve legitimacy through the interplay of voices, the project itself pursues validity through dialogue: preliminary findings will be subjected to peer review, discussed in workshops, and shared with both academic and judicial audiences. This recursive process mirrors the very phenomenon it studies: collective intentionality taking form through critique, correction, and recognition.

In sum, the COIN project is not merely a research plan but an attempt to illuminate what is too often hidden: the moment when individual intentionalities, sometimes discordant, crystallize into the institutional voice of the law. If law is, as we have argued, a creature of collective intentionality, then the collegiate court is its most solemn theatre. Here, behind closed doors, the drama of the 'I' and the 'we' is played out in miniature, producing judgments that shape the lives of millions. To study this drama is to come closer to the very heart of democracy, where power is exercised not by individuals but by a chorus that must somehow sing in unison.

The COIN project unfolds in successive movements, each designed to approach judicial practice from a slightly different angle, so that, taken together, they form a composite image of how collective intentionality is born and sustained. The guiding principle is triangulation: to compare the texts of law (judgments), the voices of judges (interviews), and the practices of deliberation (observations). Only by weaving together these three dimensions can one hope to capture the elusive phenomenon of judicial collective intentionality.

The first step is cartographic: identifying which courts and which cases can serve as the theatre of inquiry. Europe, with its multitude of legal systems, offers a veritable forest of possibilities. One must therefore select carefully, distinguishing between jurisdictions where collective deliberation is a routine (for example, appellate benches or constitutional courts) and those where it is episodic. Official statistics, institutional reports, and doctrinal commentary provide the initial compass, allowing the researcher to narrow the field to a manageable set of courts where the dynamics of 'we-deciding' are most visible.

The second step is textual. Judgments, though polished and formal, are not mute; they contain traces of the deliberations that produced them. The choice of pronouns ('we' versus 'I'), the presence or absence of dissenting opinions, the structure of reasoning – all these are clues to how the collective mind of the court has taken shape. By subjecting a corpus of rulings to close reading, one begins to perceive recurring patterns: when is the court a unified voice, when does it fracture, and how does it present its authority to the outside world? Such analysis cannot reconstruct deliberation in full, but it prepares the ground for a more intimate encounter with those who deliberate.

The third step is dialogical: interviewing judges. Here, the project moves from texts to living speech, from the public façade of rulings to the private reflections of those who authored them. Semi-structured interviews—i.e. "conversation with a purpose" (Burgess, 1984, p. 102)—allow one to ask not only what judges decide, but how they experience the act of deciding together. Do they perceive themselves

as engaged in a genuinely collective enterprise? How do they negotiate disagreement? What role do hierarchy, persuasion, and compromise play? These questions, posed with methodological rigor but also with the humility of genuine listening, aim to reveal the texture of judicial intentionality as it is lived.

The fourth step is observational. Whenever access permits, the project seeks to witness judicial life directly: not the secret deliberations themselves (which remain inaccessible in most systems), but the broader practices that surround them—hearings, conferences, informal exchanges. Like the anthropologist in the field, the researcher here adopts a stance of attentive presence, noting gestures, rhythms, and routines that rarely find their way into written judgments. Such observations, modest in scope but rich in implication, help to situate collective intentionality within the daily ecology of judicial work.

The fifth step is analytic and synthetic. Data from judgments, interviews, and observations must be carefully organized, compared, and interpreted. Here the project adopts qualitative methods: coding transcripts, identifying thematic clusters, and tracing correlations across different sources. The aim is not statistical generalization but conceptual illumination: to see how the philosophical category of collective intentionality is instantiated, resisted, or transformed in the actual practice of courts.

Finally, the sixth step is reflexive and communicative. Research, like judicial deliberation, is a collective enterprise. Preliminary findings will be subjected to peer review, discussed in workshops, and shared with both academic and judicial audiences. This recursive dialogue is not ancillary but constitutive of the project: just as courts reach legitimacy through collective recognition, so too research gains authority through critique, correction, and shared understanding.

In sum, the COIN project is structured not as a linear progression but as a spiral: each movement—selection, analysis, dialogue, observation, synthesis, reflection—returns to the same central question from a slightly different angle. What emerges, if the wager succeeds, is a portrait of collective intentionality not as a metaphysical curiosity but as a lived practice: fragile, complex, yet indispensable to the legitimacy of democratic law.

Conclusions

Concluding is always risky. To conclude is to draw boundaries, to close doors, to turn an itinerary of questions into the semblance of an answer. Yet in democracy, law, and collective intentionality, closure is rarely final—and often premature. This article does not offer definitive solutions. It sketches a conceptual landscape

where democracy, participated decisions, and collective intentionality intersect, intertwining in ways that resist simple resolution.

I have moved across terrains that philosophers, jurists, and sociologists usually explore separately: from the fragile architecture of participatory democracy to the inner workings of collegial courts, from the ontology of contracts and constitutions to the lived experience of judicial deliberation. These paths spiral rather than run straight, reflecting the reality that no single perspective can fully illuminate law as a collective, normative, and social phenomenon.

This text is not self-contained. It is a prologue to a larger empirical inquiry: the COIN project, still underway. The reflections here are scaffolds, intellectual anticipations—hypotheses awaiting the test of empirical investigation. Philosophy provides the lexicon, but it is the encounter with judicial practice—the close reading of judgments, the attentive listening to judges, the patient observation of routines—that will give these notions substance.

What I have presented is, in a sense, the *ars inveniendi*. What remains is the *ars iudicandi*. Philosophy shows that legitimacy cannot be reduced to procedure, that law is more than a codex of rules: it is sustained by collective intentionality. Only the analysis of real courts—the laboratories where plural voices are distilled into binding pronouncements—can confirm whether these hypotheses illuminate or mislead.

Think of these pages not as conclusions but as thresholds. When the project concludes, a subsequent article will move from speculation to materiality: judgments showing traces of collective authorship, interviews in which judges recount their experience of 'we-deciding', and observations of practices that, though marginal, shape the very possibility of consensus. Only then can the triangulation that underpins COIN emerge: philosophy as conceptual grammar, sociology as empirical anchor, and jurisprudence as normative horizon.

This project is not a closed system. To ask whether a collegial court truly embodies collective intentionality is to reopen perennial questions about democracy, the ontology of legal entities, and the fragile legitimacy of institutions. If, as said at the beginning of this work, democracy is the government of the people, by the people, for the people, then collegial courts—those chambers where the 'I' and the 'we' are negotiated in slow, solemn ritual—represent one of its most delicate experiments.

So, this text ends where it must begin: with provisionality. I have outlined a labyrinth with no mapped exit, for the exit depends on data still to be gathered, coded, and interpreted. What I can say is that the path, however winding, is necessary. Only by tracing intentionality from theory to practice can we see law, in

its judicial form, as not merely an abstract norm but a living product of human collectivity.

These conclusions are not final. They are an invitation to pause, reflect, and follow the project from hypothesis to evidence. When the data are finally in, when judges' words and courts' practices are woven into a tapestry of findings, perhaps we will discover that the unity of philosophy, law, and sociology—so arduously invoked—was not a chimera, but the hidden architecture of the democratic drama itself. Until then, the last word remains unwritten. And rightly so.

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Handling a Cleric impeded from Ministry due to *Amentia* or Psychic Infirmity

• **Abstract** •

Mental health is a reality that must be dealt with properly in the community, both ecclesial and non-ecclesial ones. Sacred ministers too may not be immune from becoming victims of *amentia* or other forms of psychological illness. It may happen that an ordained minister suffers from some form of insanity or psychological infirmity, yet he still needs to perform acts of ministry within the community where he is assigned. The question then arises, in case a sacred minister suffers from insanity or psychological illness, does the code of canon law provide sufficient avenues protecting the sacred ministry and the Christians from the involuntary acts of the sick cleric, which may compromise the dignity of the sacred ministry and morals in the church community? This article therefore brings to light the basic legal avenues provided by the 1983 Code which the Ordinary may use to protect the dignity of sacred ministry from the involuntary acts of such a minister when under the influence of the mental condition.

Keywords: Declaration of impediment, Removal of faculties, Experts, Dispensation, Jurisprudence.

Introduction

To handle the question of ministry and sacred ministers whose mental health compromises their effectiveness in ministry or makes them perform acts that may scandalize the community upon which they are assigned to serve, the 1983 Code of Canon Law provides room for the declaration of impediment for the patient while they are in that volatile state, until they recover fully and be stable enough to carry out the acts of ministry. This paper therefore discusses three main actions

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that can be taken by the Ordinary in order to address such emergencies until the said cleric recovers. They include restriction of exercise of ministry, restriction or withdrawal of the faculties, and declaration of impediment. When one recovers, however, he has to be restored back to ministry by the Ordinary.

Provisions of the 1983 Code of Canon Law

The 1983 Code of Canon Law[1] addressing irregularities and impediments for the exercise of the order already received declares in c. 1044 § 2, 2° that one who suffers from insanity (*amentia*) or some other psychological infirmity mentioned in c. 1041, 1° is impeded from exercising the order already received, until such a time when the Ordinary, after consulting the experts, allows him to exercise the order in question. It has already been demonstrated that this impediment is incurred *ex defectu* even though the 1983 Code does not make express use of this phrase (Okello Ogutu, 2025, pp. 187–202).

We begin by underlining first that an ordained minister does not incur automatically the impediment in the said canons by a mere fact of suffering or having suffered from insanity or any form of psychological infirmity. C. 1041, 1° and 1044 § 2, 2° of the 1983 Code demonstrate that, to constitute an impediment, the *amentia* or the psychic infirmity in question must render a cleric incapable (*inhabilis*) of fulfilling the sacred ministry rightly. Second, such an impediment is incurred when the Ordinary makes an official written declaration that the cleric in question is impeded from exercising the sacred order already received. The Ordinary, having consulted an expert, makes such a declaration after judging from the expert's report and from his own evaluation of the situation of the cleric he sees that in his current state the said cleric cannot rightly fulfill the sacred ministry for which he was ordained. In other words, in addition to the existence of *amentia* or a psychological infirmity, the informed judgement of the Ordinary obtained after consulting an expert and the eventual declaration of the existence of an impediment is necessary for this impediment to be incurred because "the 'incapacitating' effect of these conditions may not be immediately evident to untrained observer" (Beal, 1996, p. 438).

[1] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, 1–317 (hereinafter: CIC/83). For an English translation, see The 1983 Code of Canon Law available at https://www.iuscangreg.it/cic1983.php

Consultation of Experts and Judgement of the Ordinary

C. 689 § 2, 1041, 1°, and 1044 § 2, 2° of the 1983 Code recognize that psychic infirmities and *amentia* can deprive a person of the ability to carry out the responsibilities that must be carried out by the ordained ministers. In these cases, the aid of experts in determining the impact of the infirmity on the ministry to be performed is necessary. The role of the experts is that of offering a diagnosis of the problem and giving an evaluation of the impact of the infirmity on the ability of the cleric to fulfil sacred ministry. The work of the expert in this case is not that of deciding about the status of the affected candidate or as to whether the affected ordained minister who has healed from the disturbance is capable of properly fulfilling the ministry (Pavanello, 1999, pp. 286–288; Gilbert, 1985, p. 729; Woestman, 1995, p. 628). The expert's task is to diagnose the illness as well as its incapacitating influence in the particular case of a cleric presented to him for evaluation. Though they form part of the discernment process used by the Church, the experts do not make decisions about the case. The decision is made by the Ordinary himself. It is the Ordinary who, after consulting with the expert and seriously considering all circumstances, makes a legitimate conclusion (Buges, 2019, p. 15; Geisinger, 2000, pp. 1215–1216; Kaslyn, 2002, p. 796). Therefore, the ordinary must conduct "a careful assessment of the implications of a disorder from which a cleric may suffer, no matter what its objective severity may be, for his ability to meet the demands of *ministerium*" (Beal, 1996, p. 436). Based on the jurisprudence set by the Apostolic Signatura in the definitive sentence *coram* Davino of 4th May 1996 it can then be legitimately concluded however, "that it is not the responsibility of the experts to bring forth a judgement on the matter, but that of the Ordinary alone, who after having consulted the experts and assiduously weighed the rest of the circumstances (c. 1579 § 1) can do so legitimately judge. If in the future the situation is overcome, the same ordinary can permit again the exercise of orders."[2]

For this impediment to be declared a psychic infirmity or *amentia* must truly be present, and they must have a negative impact on the ability of the cleric to perform acts of sacred ministry. In addition to this, the Ordinary must declare whether the incumbent psychic infirmity or insanity greatly affects the ability of the person in question from performing sacred ministry correctly. In fact, Gonzalez del Valle relating these three factors, rightly puts it that "The origin of the irregularity is the psychological infirmity and not the true or false judgement regarding its existence. Therefore, he who receives orders due to mistaken favorable

[2] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Davino, 4 May 1996, Prot. N. 23737/92 CA, n. 3.

judgement is affected by the impediment. And conversely, he who has mistakenly received an adverse judgement does not incur the impediment." (Gonzalez del Valle, 2004, p. 986).

The impact of the psychic infirmity and *amentia* must be assessed by use of experts and the decision be made by the Ordinary.[3] The law does not specify the kind of experts who are to be consulted. It does not say whether they are to be lay persons (c. 228 § 2) or clerics (c. 258), psychologists or any other kind of medical expert. This way the law leaves this part open to any persons considered experts either by profession or by experience. However, experts in psychology and psychiatry are to be the very first ones to consult (Lagges, 1996, p. 53). Other persons who are considered experts in other pertinent fields may be consulted depending on the candidate's specific situation, while protecting the cleric's right to privacy and good reputation (Geisinger, 2000, p. 1216).

There are recent doctrinal development and debates on the possibility of declaring priests suffering from pedophilia and ephebophilia as impeded from ministry based on the provisions of c. 1042, 2°. One part of the doctrine holds that a psychological infirmity can constitute an impediment only when it affects the use of will and intellect such that one can no longer act rationally and exercise the power of orders validly. On this ground, since these two infirmities do not affect the use of reason and will, they equally do not render the priests unable to fulfil rightly the ministry (Woestman, 1995, p. 626). On the other hand, some argue that an infirmity that gives rise to impediments must not necessarily have to deprive the person of the use of reason. The existence or not of an impediment or irregularity must be judged always on individual cases based on the effect of the defect on the person and the ministry to be performed (Beal, 1996, pp. 440–441, 447).

This doctrinal debate is of importance in developing reflections on this topic. For now, drawing from the reasoning anchored on the jurisprudence of the Apostolic Signatura and reflections from learned authors it becomes necessary to make the following affirmations. First, for a psychic infirmity or *amentia* to be considered as resulting to an impediment, it should be in such a way that it can eliminate or exclude the necessary imputability of the said person from committing a delict or in such a way that he cannot be blamed for some acts he does under the influence of such a condition.[4] That is, he lacks moral responsibility over any

[3] C. 224 of the 1975 *Schema* had mentioned psychic defect *qua inhabilis reddatur*. Instead, c. 994 of the 1980 Schema spoke of psychic defect *quo consultis peritis, inhabilis iudicatur*. No explanation is granted for that change.

[4] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Davino, 4 May 1996, Prot. N. 23737/92 CA, n. 2b. The argument presented is: "Again and again the undersigned have

act he does (Kaslyn, 2012, p. 796). Second, each case of psychological infirmity and *amentia* must be treated on individual basis, by taking into consideration of the gravity of the illness, its effects on the priest and his ministry, the result of the therapy of the experts, and the limiting effect of the disorder on performance of ministry.[5] Therefore, the existence of the psychic infirmity such as ephebophilia and pedophilia do not automatically render a person irregular or impeded from exercising the orders already received, but instead the impact of these psychic infirmities and *amentia* must be assessed by use of experts and be judged on individual basis before a decision is arrived at of declaring whether it constitutes an impediment or not.

Acts that May Precede the Declaration and Dispensation of the Impediment

For ordained ministers who find themselves affected by *amentia* or any kind of psychic infirmity, which gravely compromises their ability to fulfill sacred ministry rightly, the Ordinary ought to declare the existence of the impediment. The declaration, which is not obligatory, should be made after consulting the experts, and evaluated beyond reasonable doubt that the cleric is actually suffering from either of them. The ordinary then proceeds to judge whether this psychological illness or insanity has really affected the said cleric in such a manner that he is rendered incapable of fulfilling the ministry rightly (*rite*). However, while waiting for the diagnosis and reports of the experts, the Ordinary may be forced by circumstances to restrict the exercise of some ministries by the affected cleric or

thought to declare strongly that disordered sexual behavior need not necessarily or always be attributed to mental illness or defect, such that there can never be a discussion about moral responsibility or serious guilt, but a judgement must be made in each individual case after carefully considering every factor. Indeed, even when a person is afflicted with a psychic illness, there remains for him a serious obligation to make use of, to the best of his ability, all licit means for treatment and for avoiding disordered sexual actions."

[5] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Davino, 4 May 1996, Prot. N. 23737/92 CA, n. 3. It is argued that "Clerics who have sinned against the sixth commandment of the Decalogue with a minor, in certain circumstances — we repeat, — and so not always, can be considered unable (*inhabiles*) not because they have perpetrated immoral acts — it is undisputed that a moral judgement about the subject is not at stake in the present discussion — but because their behavior can be a sign of the existence of some mental disorder or a serious disturbance of the mind. Nor is a diagnosis of some illness sufficient, such as so called *ephebophilia,* that is, a sexual attraction to adolescents. There must be a consideration of the gravity of the illness, its effect on the priest and his ministry, the result of the therapy that has been undergone, measures for limiting effects of the illness, etc."

to refrain him from making use of certain faculties in order to protect the sacred ministry from abuse, or in order to protect Christians from being subjected to scandal or other cases of such genre, depending on the circumstances and the situation leading to such an action.

Two administrative institutions, that is, restriction of exercise of ministry and declaration of an impediment, may be employed by the Ordinary either in these cases, or in the case of declaring other impediments or of administrative disciplinary actions where need be. We, therefore, analyze each of these possible acts of the Ordinary when an ordained minister is officially declared impeded from the exercise of orders.

Administrative Prohibition or Restriction of the Exercise of Ministry

Administrative restriction of the exercise of ministry by the Ordinary may take two forms. The first is, the prohibition or restriction of the exercise of certain ministries by the clergy whose suitability to perform ministries is being examined,[6] the second is the revocation of the habitual faculties of the priest or restricting the exercise of these faculties to certain situations and conditions while leaving intact those faculties which are already granted by law.

During the presbyterial ordination, besides the faculties that the Ordinary grants to the presbyter, the priest obtains several faculties *ipso iure.* However, there are two specific faculties which require the intervention of the Ordinary for their exercise. That is, the granting of the faculty for administering sacramental absolution of sins (c. 966 § 1) and exercising the faculty of preaching the word of God (c. 764). Though this second faculty is granted *ipso iure,* its exercise can be restricted by the ordinary. The Ordinary therefore, has the power to revoke or restrict the exercise of the faculty of preaching or absolving the sins, as well as any other faculty granted to the priest by virtue of proper law if there is any.

When it comes to preaching, c. 764 makes it clear that priests and deacons enjoy the faculty to preach everywhere unless this faculty has been restricted or removed by the competent ordinary, or when an express permission is required by particular law. Since the Church has the duty to regulate the exercise of the

[6] Two examples of this case, we see in two definitive sentences of the Apostolic signature on this matter. The first one is Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Grocholewski, 28 April 2007, Prot. N. 37937/05 CA, published in *Ius Ecclesiae* 19 (2007), pp. 611–621. The second case is the Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Echevarria, 18 March 2006, Prot. N. 32108/01 CA.

ministry of preaching, then in case a deacon or a presbyter has been gravely by psychic infirmity or *amentia* such that he cannot rightly fulfill the teaching office, then the canon provides proper administrative remedy for this. First, depending on the condition of the said cleric, the competent ordinary of the said cleric may restrict the exercise of this faculty by the said cleric to certain occasions or groups of people. Where the condition of the cleric is so severe such that his cognitive and volitional faculties are gravely inhibited by the psychological illness or insanity, the competent Ordinary may as well remove this faculty so that the ailing cleric is barred from preaching in public as long as his condition persists. This is an administrative measure taken by the Ordinary, because the law permits him to place such administrative restrictions in certain circumstances. In this case, these administrative measures are taken based on the suitability of the cleric in question to fulfil the ministry of preaching.

Even though the canon does not describe the kinds of causes that may be admitted as justifying causes for the restriction or the removal of this faculty, the learned authors and the jurisprudence of the Apostolic Signatura have established that since the restriction or removal of the faculty to preach is a serious matter, then for this to be done there must be a just and proportionate cause (*ob quamlibet iustam et proportionatam causam*).[7] Without a just cause or where the administrative action taken is not proportionate to the motivating cause, then the validity of the restriction or removal of this faculty cannot be justified.

The second case where the intervention of the competent Ordinary is required for the exercise of sacred ministry is in matters of celebration of the sacrament of penance. C. 974 establishes that when there is a just and grave reason, the competent Ordinary may restrict or revoke the habitual faculty of a priest. From the very words of the canon, the competent Ordinary can revoke the faculty of listening to confession granted upon a priest. The revocation of this faculty is a singular administrative act. The canon demands that this revocation of the faculty must be justified by the presence of a grave cause (*ob gravem causam*), especially if the faculty is a habitual faculty or when it is annexed to an office.

The canon goes ahead even to underline the consequences of the revocation of the faculty by the various competent Ordinaries. If the faculty given by one's own proper local Ordinary (that is, the Ordinary of the place of incardination or of the place of domicile) and the revocation is done by the same proper Ordinary, the presbyter loses the faculty everywhere. That is, he remains deprived of this faculty

[7] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Grocholewski, 28 April 2007, Prot. N. 37937/05 CA, n. 10, (a).

everywhere. If, however, the revocation is made by another local Ordinary, the presbyter loses it only in the territory of that Ordinary who has revoked it. That is, the presbyter remains deprived of the faculty of confession only in the territory of that Ordinary. For the case of the religious, if the revocation is carried out by presbyter's own major Superior, the presbyter is deprived everywhere of the faculty of hearing the confessions of the members of the institute and of those who reside day and night in their respective houses. If, however, the revocation is done by another competent Superior, the presbyter is deprived of it only with respect to the subjects who are in that superior's jurisdiction.

Based on the recent jurisprudence of the Apostolic Signatura is such cases, the Ordinary's administrative decision to prohibit or restrict the exercise of ministry by a cleric is an administrative act, that is, a non-penal restriction of the public exercise of ministry by means of an administrative decree. It is not an imposition of a penalty, which in itself would demand a judicial or administrative penal process. This is well elaborated in the definitive sentence *coram* Echevarria, where we read that "The decision by which e.g. the conferring of an ecclesiastical office by a competent authority is impugned because of the lack of suitability of the candidate or the faculty either to preach or to hear confessions is revoked, respectively in accordance with c. 764 and 974 § 1, is in no way the inflicting of a penalty, for which is required moral certainty concerning a gravely imputable crime committed, but a non-penal disciplinary decision, which may be imposed because of a positive and probable doubt concerning the suitability of the cleric in matters concerned."[8]

Even though the consequences incurred in a penal administrative decree and the disciplinary non-penal decree may be so close, the two are never the same.[9] The difference between the two always has to be sorted from the motives for which the decree is produced,[10] and the procedure employed in communicating

[8] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Echevarria, 20 July 2006, Prot. N. 32108/01 CA, n. 6 (from Pamplona).

[9] For instance, the penalty of suspension (c. 1333), prohibits a cleric who is suspended from exercising all or some of the powers of orders, governance, rights, or functions inherent in his office; an expiatory penalty (c. 1336 § 1, 3°) may as well prohibit the exercise of a given power or *munus;* at the same time, a disciplinary non-penal decree granted to a cleric may prohibit someone as well from exercising all or some acts of sacred ministry. Therefore, the criteria of the consequences resulting from these two ways, cannot be used as efficient means of showing the distinction between the two. Such a confusion is seen even in the sentence *coram* Echevarria, in which, the Congregation for the clergy, had erroneously perceived the disciplinary non-penal decree of the Ordinary to be a penal decree imposing a penalty.

[10] Cf. Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Grocholewski, 28 April 2007, Prot. N. 37937/05 CA, n. 12: "Moreover, the *coetus* of consultors of the Pontifical

the decision of the Ordinary.[11] As a matter of fact, a disciplinary non-penal decree restricting the exercise of ministry or restricting the exercise of certain faculties is a singular administrative act and is subject to administrative recourse. Therefore, as a matter of fact and justice, it is necessary that there be a just and proportionate cause to justify the imposition of the restriction. This point has been emphasized by the jurisprudence of the Apostolic Signatura in the definitive sentence *coram* Fagiolo, when it said that: "Perhaps it should also have been more fully explained in what way the imposing of that examination may be reconciled with the right of every person to protect his own privacy (c. 220), and on what canonical norms is based the general ban on celebrating public liturgy."[12]

Denial of the Required Permissions to Place Some Acts of Sacred Ministry

Besides the restriction of the exercise of the faculty of preaching and revocation of the faculties of preaching and of listening to confessions, the 1983 Code still foresees other possibilities in which the ordinary could intervene administratively to limit the exercise of ministry by a cleric who is insane or who suffers from any kind of psychological illness. The Code acknowledges that the ordained minister acquires certain faculties *ipso iure*, and that their exercise may not need an express intervention of the bishop. However, there are cases where the law demands that the sacred ministers obtain permission in order to perform the ministry in a particular place. In such cases, the bishop may reserve in individual cases the granting of the permission in such cases or restrict the presbyters in charge from granting permission to such persons.

The recent jurisprudence of the Apostolic Signatura equally strengthens the administrative restriction of the exercise of certain acts of sacred ministry. There are at least four cases in the Code.

commission for revising the Code of canon law made the distinction between perpetual penalties and penalties for an indeterminate time (*Communicationes* 8 (1976), 174). Therefore, based on the alleged permanence of the revocation of the faculties, it cannot be concluded that the case truly concerns a penal matter and not a non-penal, merely administrative matter."

[11] An administrative or judicial penal procedure, for imposing a penalty may be initiated when a delict has been committed and there is no other pastoral means available for repairing the scandal, restoring justice, and amending the guilt (c. 1341); while the non-penal administrative decree is not a response to the commission of a delict and the cause of the restriction on the ministry ought to reflect this circumstance.

[12] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Fagiolo, 11 June 1993, Prot. N. 22785/91 CA.

First, we have the case of exercising the faculty to preach. Besides the restriction of the exercise of this faculty or its removal by the Ordinary, the law also foresees the possibility of exercising this faculty. C. 764 foresees the possibility of the particular laws demanding that for a deacon or a presbyter to preach in certain places they need to obtain the permission from the concerned authorities. Equally, the same canon foresees that for a presbyter or a deacon to preach, they should obtain the consent at least even a presumed one of the persons in charge of churches (rector). This way then, person in charge of the church (rector) whose consent is required for a priest or deacon to preach may refuse to grant that consent. This consent may as well be refused the insane cleric by the persons who have the responsibility to see that the word of God is preached with integrity to the people of God under his pastoral care as described in c. 528 § 1, and even the by competent religious superiors when it comes to preaching in the oratories or churches under their care (c. 765). The denial of consent or permission for an ordained presbyter or deacon to preach in these cases is a serious matter for they constraint the exercise of a faculty, hence there must be a serious reason for this. For a priest or deacon who is insane or psychologically sick, this should be done only when the situation is so serious such that the cleric is unable to carry out the teaching office rightly.

The jurisprudence of the Apostolic Signatura foresees three other cases in which such permission may as well be denied. In the Sentence *coram* Grocholewski, the Apostolic Signatura foresees the possibility of the diocesan Bishop restricting the exercise of four other faculties of a priest serving within his diocese by reserving to himself the granting of the required consent and permissions for the celebration of certain sacraments to priests who find themselves, before they administer them. this applies in the celebration of the sacraments of the anointing of the sick where a reasonable cause and permission of the priest upon whom care of souls is entrusted with respect to the faithful under his pastoral care (c. 1003 § 2). Second is assisting in marriages, where a priest requires the delegation of the parish priest or the Ordinary in order to assist in marriage (c. 1108 § 2 and 1111). Finally, we have the celebration of the eucharist in church and other public places in accordance with the provisions of c. 902, 903, 904 and 561, in cases where those in charge of churches or public places need to give consent and confirm the commendatory letters before permitting presbyters to celebrate or concelebrate in the eucharistic celebration.[13]

[13] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Grocholewski, 28 April 2007, Prot. N. 37937/05 CA, n. 10 (b-d). In this the Signatura explains that "principally the

In all these four cases, the priests in charge of the churches and care of soul may deny a cleric suffering from *amentia* or any form of psychic infirmity the permission to celebrate the sacraments or preach in the church if they see that their condition does not allow them to celebrate these sacraments or carry out the acts of ministry correctly. The Apostolic Signatura, however, goes ahead to hold that for better control of the situation and activities of the sick cleric in this case, the competent Ordinary may reserve to himself the granting of the required permissions in these cases. This enables him to keenly make a follow-up of the progress made by the sick cleric in his recovery process.

Since the denial of the permission for the sick clerics in this case to perform the said acts of ministry is of administrative nature, then it is required that this be done only when there is a just, reasonable and proportionate cause. Of which in this case, the protection of reverence due to the sacred ministry and the protection of the faith of the Christian faithful could suffice as a just cause in the case of priests who are insane or who are ill psychologically.

Communication of the Restriction or Revocation of the Faculties

The prohibition or restriction of exercise of ministry or revocation of the faculty is very serious matter hence, the action taken should be expressed in writing and be communicated by means of a decree or a precept.[14] As a mandatory component of a singular decree, even though this is not required *ad validitatem* for the emana-

celebration of the anointing of the sick appertains to the priest who has the care of soul of that sick person. Any other priest may administer this sacrament only with the presumed consent of the named priests (c. 1003), for the Signatura, an Ordinary may reserve to himself the authority of granting consent to a certain priest before he administers the sacrament to a sick person; for the celebration of matrimony, the law has it that the local ordinary or parish priest have the faculty to celebrate them (c. 1108), and those who are delegated by these two to celebrate them (c. 1111 § 1). For the Signatura, an Ordinary may decide to remove from a parish priest this faculty of delegating this faculty to others; for the sacrament of Baptism, one cannot administer baptism outside his territory without the permission (c. 862), for the Signatura, the Ordinary may reserve to himself the concession of this permission or consent to a particular priest before he administers baptism outside his territory; finally, concerning the sacrament of the Eucharist, a priest outside his diocese or religious community ought to present the «celebrate» signed by the ordinary before he is permitted to celebrate mass, according to the Signatura, the Ordinary may refuse to give the «celebrate» to his priest."

[14] In fact, according to the provisions of c. 1319 § 1 of the 1983 Code, a singular precept can also threaten a penalty in case its provisions are violated by the person. It is always advisable that a mention of the return and respective consequences to be incurred in case of its violation (c. 1371, 2°).

tion of these decrees restricting the exercise of ministry or removing the faculty, the provisions established in c. 50 and 51 of the 1983 Code should be followed for practical reasons, because such a decree contains a decision which may restrict even the exercise of some rights of the cleric and is subject to administrative recourse. The Ordinary must seek the necessary information and proof if there is a reason for restricting the ministry; he must consult at least the parties whose rights may be affected by such a decision (beginning with the affected cleric himself where he makes him to understand the reason for his action if his cognitive faculties have not been severely affected by the infirmity); it must be issued in writing; and it must be motivated, that is, it must state in a summary form at least the reasons for the decision. It must also express clearly the terms and conditions of the limitation or revocation of the faculty. These obligatory elements for a singular decree must not be left out because, given that this decree may gravely change the life of a priest or deacon, the preliminary investigation helps the Ordinary not to make arbitrary decisions. They grant the cleric as well, the opportunity to exercise his right of defense and to explain the situation from his point of view; and protects also the good name (reputation) of the cleric (c. 220) and opens the door for administrative recourse in case one feels that he has been injured by the decree of the Ordinary.[15]

Despite the different positions taken by the doctrine, the jurisprudence of the Apostolic Signatura has been consistent in holding the nullity of the singular decrees which are issued without a motivating reason at least even in summary form.[16] The Signatura, explaining on the scope of the phrase, that "the reason should be given at least in summary form", establishes that the law does not require a complete and exhaustive motive,[17] but the motive should be present at least implicitly or refer to motives expressed in another document external to the decree itself in the terms of c. 1617 of the 1983 Code.[18] That is, the motive can be given in summary form or in *per relationem* (D'Auria, 2007, p. 254; Montini, 2018, p. 124; Ortiz, 1999, pp. 80–81; Gullo, 1984, p. 96), that is, referring to the motives

[15] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Echevarria, 20 July 2006, Prot. N. 32108/01 CA.

[16] Cf. Supremum Signaturae Apostolicae Tribunal, Sententia definitiva *coram* Burke, 22 November 2008, n. 5, Prot. N. 38820/06 CA.

[17] Cf. Supremum Signaturae Apostolicae Tribunal, Decretum Congressus, 22 October 2009, Prot. N. 42125/09 CA. see also Supremum Signaturae Apostolicae Tribunal, Decree of the Congress, 27 January 2010, Prot. N. 41217/08 CA. See also Supremum Signaturae Apostolicae Tribunal, Decree of the Congress, 27 January 2010, Prot. N. 41693/08 CA.

[18] Supremum Signaturae Apostolicae Tribunal, Sententia definitiva *coram* Agustoni, 24 March 2001, Prot. N. 27795/97 CA.

contained in the decree in contention.[19] In its summary form, the motive must be sufficient, not so general and generic but must be well founded and specific, that is, it must be *ad rem*.[20] Besides all that, the reason or motive must be true.[21]

The restriction of the exercise of ministry or withdrawal of the faculty for the exercise of ministry can be temporary, indeterminate or permanent. It can also be partial or total. The developing jurisprudence of the Apostolic Signatura foresees three possibilities, that an administrative restriction can either be perpetual, for a determinate period of time, and for an indeterminate period of time. Beginning with the first kind, that is, a perpetual restriction, the Apostolic Signatura acknowledges that there are certain administrative measures and decisions taken by the Ordinaries which by nature are perpetual. This applies to cases of transfer and removal of a parish priest elaborated in c. 1740 to 1742. These are non-penal administrative measures that are perpetual by nature. Accordingly, the possibility of making perpetual prohibitions or restrictions on the exercise of power of sacred orders or of jurisdiction, was considered in the sentence *coram* Fagiolo. In this case, the Apostolic Signatura admitted that such a prohibition can be imposed only for a just and proportionate cause while that cause persists. Second, a perpetual prohibition on the exercise of power of orders or jurisdiction can only be recognized as a disciplinary precept but still with difficulty.[22]

Since the jurisprudence of the Apostolic Signatura is still growing in relation to this kind of restriction of exercise of ministry it is wise that this possibility may not be utilized by Ordinaries until it is well developed and defined by the jurisprudence. Otherwise, any decree imposing a perpetual restriction of faculties or of the exercise of ministry in general may quickly be perceived as a penal measure, which indeed may require the use of penal process to impose a penalty.

Second the restriction can be imposed for a determinate period of time (*ad tempus determinatum*). This occurs when the prohibition is given for a defined period of time, provided in the decree it is well indicated that the measure is not a penalty but rather an administrative measure given for a just cause. This gives room for re-evaluation of the situation of the sick clergy after the expiry of the period indi-

[19] Supremum Signaturae Apostolicae Tribunal, Decretum Congressus, 27 January 2010, Prot. N. 41217/08 CA.

[20] Supremum Signaturae Apostolicae Tribunal, Decretum definitivum *coram* Silvestrini, 5 May 1990, Prot. N. 18061/86 CA.

[21] Supremum Signaturae Apostolicae Tribunal, Decretum segretarii, 17 September 2009, Prot. N. 42790/09 CA.

[22] Supremum Tribunal Signaturae Apostolicae, Sententia definitiva *coram* Fagiolo, 11 June 1993, Prot. N. 22785/91 CA, n. 6.

cated in the decree. For instance, when a priest becomes insane and the Ordinary restricts the exercise of the faculty for preaching in church during Mass to community celebration of not more than three people for a period of three years. In this case, after three years he is to evaluate the progress of his situation and thereafter renew the restriction or allow him to continue with the exercise of ministry.

The restriction may as well be for an indeterminate period of time (*ad tempus indeterminatum*). This happens when the Superior imposes a restriction, not foreseeing when to remove it or to reduce their severity, hence, it endures as long as the cause endures. The difficulty in this case comes when it becomes a question of differentiating between a perpetual restriction (like in the case of a transfer from one office to another), and restriction *ad tempus indeterminatum*. The difference between the two is explained by the Signatura in *coram* Grocholewski.[23] According to this sentence, restriction *in perpetuo* (perpetual restriction) implies that the Ordinary is imposing the restriction forever. That is, the Ordinary does not foresee neither its end nor its removal nor its reduction. This could be the case for instance where the Ordinary decides to revoke the faculty of listening to confession of a parish priest who is insane and does not intend to restore him back to the office of the parish priest or grant him the faculty of listening to confession even in future because at one time he made a direct violation of the seal of confession at the very beginning of his sickness. With restriction *ad tempus indeterminatum*, instead, the intention of the restriction is to remove them at least or to reduce their severity when the cause comes to an end, even if he does not know when that moment will come. This would be the case for instance where the Ordinary revokes the faculty for confession for a priest who is insane, and he intends to restore the faculty when he heals from this.

Therefore, if the Ordinary has the intention of prohibiting the exercise of public ministry of a cleric *ad tempus determinatum*, he must always provide some space for exercise of some functions even in private, like celebration of Mass and administration of the anointing of the sick. Therefore, he may say for instance, Rev. XX is prohibited from exercising all acts of priestly ministry except either celebration of Holy Mass without the participation of the Christians or celebrate mass without the express permission of the ordinary. Without this provision or possibility

[23] Cf. Supremum Tribunal Signaturae Apostolicae, Sententia definitive *coram* Grocholewski, 28 April 2007, Prot. N. 37937/05 CA, n. 12. The judges insist in this case that "In the light of the motivating reasons together with the final cause of the decision, it appears that this was connected with avoiding the danger of civil lawsuit, such that it could in itself be revoked when the danger ceased. Hence it is not a matter of perpetual decision in the cause, but one made for an indeterminate time, that is, while the cause endures."

such a decree will not be perceived as a disciplinary decree but a penal decree, for it will be imparting a perpetual restriction.

Declaration of an Impediment

For a person who finds himself in a state of irregularity or impediment, while, in order, it is necessary that the ordinary, after he has secured himself with the presence of irregularity, declares the existence of an impediment or irregularity via a decree. This declaration is an administrative act. With this declaration, the impediment is juridically established and with this the cleric is barred from performing any act of orders except the case of absolution and remission of penalties in cases of danger of death (c. 976). The same requirements for producing a decree must be respected in this case, because this document is subject to recourse if the subject feels that he needs some administrative justice (Geisinger, 2000, p. 1223; Gonzalez del Valle, 2004, p. 986). Once declared, the impediment is officially recognized, and in order to be received back to the ministry, it is necessary that the Superior grants a dispensation from the irregularity or impediment or wait until the impediment ceases by itself.

Though the Ordinary has the power to dispense from this impediment mentioned in c. 1041, 1° it is prudent that even if the experts have given a favorable report after certain period of follow-up and journeying with the affected cleric, he can dispense the candidate in stages. That is, he may dispense the impediment but rehabilitate him back to ministry gradually depending on the situation and stability obtained in the process of healing. Whenever he judges the existence of a just cause for doing so, he may dispense him and allow him to celebrate masses in private. Then later allow him to begin celebrating masses in public if he is truly stable but maybe without the faculty to preach or hear confessions of the faithful. When the Superior assures himself that now the clergy is stable, he can now grant to him the faculty to listen to confessions and allow him to preach during Mass.

The question which remains, and which ought to be thought and reflected over is this, does the declaration of impediment prohibit all the exercise of ministry or can an ordinary impose a partial impediment? Secondly, can an impeded priest in this case, celebrate Mass in private as it happens in the case of administrative non-penal decrees or restriction of exercise of ministry. According to Woestman (1995), once impeded, one cannot exercise orders. he argues: "It is evident that a person is either impeded by c. 1044 § 2, 2° from exercising orders or not impeded. There is no middle ground. Thus, a priest could not be impeded by this impediment from celebrating the Eucharist publicly and at the same time is not

impeded from celebrating privately." Geisinger instead foresees the possibility of permitting the exercise or celebration of some private masses and other ministries like burials. He says: "If a man is declared prohibited from exercising his order, competent authority may permit exceptions by means of another administrative act (c. 59), e.g., so that a restricted priest might celebrate the funeral of one of his parents." (Geisinger, 2000, p. 1223). This therefore remains a matter of further discussion by learned authors.

Possibility of Recourse

Since the restriction of exercise of sacred ministry or revocation of certain faculties, and even the declaration of impediment is an administrative act, it is of importance to know that through such acts some administrative injustices may occur. With the decree declaring an insane priest or one suffering from psychic infirmity of whichever kind as impeded from exercising the orders already reserved, one's rights may be injured through such a decree. Hence, besides the cleric himself, some other people's rights could also be injured. Therefore, based on the provisions of c. 1737 § 1, any person who claims, or supposes, or thinks to have been aggrieved by the decree of the Ordinary in this case can initiate hierarchical recourse against the decree. This implies that the capacity to launch a recourse is enjoyed by not only him who is the direct recipient of the singular administrative act, but all other subjects whose rights or interests are presumed to have been injured by this singular administrative act.

It is therefore necessary that the person who initiates a recourse demonstrates clearly that there is actually an interest or a right that has been harmed by the decree of the Ordinary, an interest or right which is personal, actual, direct and protected by the law either directly or indirectly. He must demonstrate that with the recourse he may obtain some concrete advantage which gives him the hope of winning in the recourse and that the interest still persists, because, according to the jurisprudence of the Signatura, when the interest ceases, the recourse too becomes pending.[24]

[24] Cf. Supremum Signaturae Apostolicae Tribunal, Decretum, 18 March 2004, Prot N. 33965/03 CA; Supremum Signaturae Apostolicae Tribunal, Decretum, 15 July 2004, Prot. N. 35029/03 CA.

Dispensation of the Impediment

When one suffers from *amentia* or any other form of psychic infirmity before receiving the sacrament of orders, he becomes irregular for the reception of orders. If he suffers from the same after receiving the sacrament of orders, he is impeded from exercising the order already received but he also becomes irregular for the reception of a higher order from the one he has already received. The dispensation from the irregularity and impediment arising due to *amentia* and psychological infirmity is not reserved to the Holy See. Therefore, the Ordinary has the power to dispense it. A look at c. 1041, 1° and 1044 § 2, 2°, a question immediately emerges concerning the very nature of irregularity in c. 1041, 1°. That is, in some cases, experience and psychological analysis have shown that some kinds of *amentia* and psychic infirmities can heal completely after some treatment by psychiatrists and psychologists. In this case, it becomes so difficult to understand how a temporary condition which can cease with time with proper treatment still turns out to be an irregularity.

As an irregularity and impediment incurred *ex defectu,* like any other irregularity or impediment *ex defectu,* it ceases only when the condition of the patient ceases completely or with dispensation (Cappello, 1934, p. 519). For some scholars, this case of c. 1041, 1° is actually a simple impediment which can cease by itself, but not an irregularity, which by nature ought to be perpetual (Gonzalez del Valle, 2004, p. 985; Olivares, 1993, p. 593; Geisinger, 2000, p. 1215). Among these scholars, some maintain that in this case, in order to allow someone to assume sacred orders and even in exercising of the orders received, the question of dispensation does not come into play. Only the declaration of the Ordinary is required. Hence it is not a matter of dispensation but a matter of simple authorization to exercise ministry by the Ordinary (Gonzalez del Valle, 2004, p. 986). Other scholars hold that this condition remains irregular even if someone who was sick is healed completely, because it is the law itself which has established it as an irregularity, hence, for it to cease, the intervention of the Ordinary is necessary by dispensation (Chiappetta, 1988, p. 153; Pavanello, 1999, p. 286). For some authors, the case of psychological infirmity has to be extended to include cases of suicide as well. This way the necessity of making use of experts in determining the psychological reasons leading to such an act arises (Kaslyn, 2012, p. 797).

Despite all this, the dispensation from an impediment for the exercise of orders on the grounds of insanity or psychic illness lies with the Ordinary. It is of great importance to remember that for the Ordinary to restrict the exercise of ministry or to revoke the faculties or to declare a cleric impeded form exercise of

orders there must be a serious cause. An Ordinary should never apply any of these administrative measures without a just and proportionate cause, and for cases of revocation of faculty of hearing confession a just and grave cause is needed. Equally, once the cleric overcomes the sickness and he is judged to be fine, the restriction should be removed, the revoked faculty restored, and the declared impediment be dispensed by the competent Ordinary.

Conclusions

Even though the law provides the Ordinaries with the power to restrict the exercise of ministry by a cleric suffering from amentia or any form of sickness, or to revoke his faculties, or to an extreme to declare him impeded from exercising the orders already received in more severe cases, the Ordinary must understand that his first duty as a father is to take care of the sick cleric as part of his fatherly duty towards the clergy (c. 384). His priority should not be that of punishing the cleric or taking quick disciplinary action, but that of providing proper medical care for this sick member of his presbyterate.

The three actions and avenues provided by the law are administrative avenues. The ordinary must use his power of discretion in employing any of them to ensure that he does not cause harm to the sick cleric but rather ensure that the wellness of the cleric is worked for. He should not act arbitrarily to show his dominance over the cleric but use them as a tool of love and concern towards the sick brother. Given this then, he should be aware that any of the three administrative avenues provided are always open to recourse in case he uses them arbitrarily or when he harms the rights of the sick cleric or of others through these decisions.

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Evolution and Challenges of Public Administration for a Modern Governance

• **Abstract** •

The paper analyzes the evolution of public administration in the Italian legal order and some of its main challenges in the contemporary context. Global transformations—such as the spread of artificial intelligence, geopolitical tensions, new rights and risks, and persistent social and territorial inequalities—require a public administration capable of making decisions that are swift, effective, transparent, and accountable. However, systemic weaknesses persist, including inefficiency, regulatory overload, fragmented governance, and limited digital expertise. The analysis emphasizes the centrality of human capital, highlighting the need for merit-based recruitment, continuous training, and professional specialization to build a competent and autonomous bureaucracy. At the same time, digitalization emerges as both a structural necessity and a source of new risks, calling for careful governance and robust cybersecurity. Overall, the paper underlines that modernization is not only legal and organizational but also cultural, and that inclusiveness and equality must be core principles of a modern administration.

Keywords: Public Administration, Transformations, Human Resources, Digitalization, Public Policies.

Introduction

Since the 1990s, the Italian administrative system has undergone radical and profound changes that have defined its most distinctive features across various aspects, including regulatory simplification, removal or reduction of bureaucratic constraints on economic activities, privatization of public entities, and outsourcing of functions of general interest. Furthermore, since the XX century the Italian

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legal order has experienced a progressive quantitative growth of the public administration, which has become a polycentric and multilevel apparatus.

At the beginning of the XX century, beside the traditional models of public administration—represented by the State and the territorial levels of government—an increasing number of public entities has been instituted to encourage and strengthen the intervention of the State in the economy, through an entrepreneurial and planning logic. Progressively, at the end of the XX century, the model of the entrepreneurial State has shown its weaknesses due to unsustainable costs, imbalances in the public finances and lack of efficiency. During the following decades, also under the impulse of the EU competition policies in the market, the State has progressively launched privatization and liberalization policies, through the abolition of legal monopolies, the transformation of public entities into public limited companies and the divestment of shares held by the State, becoming a model of "regulatory" State. Meanwhile, the State has promoted a greater organizational, fiscal and administrative decentralization of the administrative apparatus at the territorial level.

In the current legal context, the multiplicity and variety of public administrations determine a complexity in the enucleation of a notion of public administration. Indeed, the Italian legal order lacks of a univocal legislative definition of "public administration" to which it may be linked a homogeneous set of rules and principles. Instead, the legal order provides sectorial laws, which define their own scope or, sometimes, laws which apply to all the public administrations, without defining what should be considered "public administration". For this reason, through a functional perspective, a notion of public administration may be identified through the scope of the sectorial administrative rules (such as the civil servant employment law, the public procurement law, the public finances law, the administrative procedural code and the administrative proceeding law) and through the analysis of the specific public activity/function exercised.

Multiple paths appear relevant to understand the evolution and the transformation of administrative law over the past thirty years to appreciate the status of contemporary public administration. Throughout the 1990s, numerous reforms have affected the overall structure of powers and the structure and functions of public bodies.

In particular, in the political context of the 1990s, characterized by events such as the dissolution of the Italian Communist Party, the disintegration of the political unity of Catholics, the disappearance of the anti-fascist parties that had founded the Republic, referendums and the 1992 political elections with the rise of the Northern League party, and "Tangentopoli" (De Bernardi, 2021; Ferla, 2021),

the identity of the State, the Nation and the loss of nation sovereignty were at the center of political discussion and eventually this has also strengthened decentralization instances.

Regions and local authorities have gained spaces of statutory, organizational and financial autonomy. The Ministries and the State apparatus have also been reformed during the last decades (especially with the so-called Bassanini laws of March 15, 1997, No. 59, and May 15, 1997, No. 127).

This evolution has subsequently led to a constitutional reform on October 18, 2001, no. 3, which redesigned the allocation of legislative powers between the State and the Regions, as well as of the administrative functions within the different levels of government (State, regions, provinces, metropolitan cities, and municipalities). Administrative functions have been allocated to the level of government closest to the citizens who are the recipients of activities and services. As legal scholars have pointed out (Falcon, 2001, p. 1150), the regionalism of 2001 emphasized regional articulation as a structural element of the State: granting Regions general legislative competence, even if not unlimited, and freeing them from the network of preventive controls meant focusing on them as an opportunity to shape the institutional design starting from the intuitions and creativity of the individual realities.

In these terms, Regions shift from a *condition of mere autonomy* to what could be described as a *state of freedom*, while the State is called to transform from the *exclusive creator* of fundamental models of action to a *guarantor* ensuring that the exercise of the various regional and local freedoms is coordinated within the framework of common progress.

Additionally, within the context of reforming public bodies, the employment relationship of civil servants has been largely brought under a privatized regime, and the role of public management has been enhanced by granting greater managerial powers and limiting the role of political leaders to functions of guidance and control, according to a principle of separation between the political sphere and the administrative sphere (Legislative Decrees No. 29/1993 and No. 165/2001).

In relation to administrative activity, it is worth mentioning that Law no. 241 of August 7th, 1990, entitled "New rules on administrative procedure and the right of access to administrative documents", consolidated a new paradigm of administrative action, already emerged in case law and theorized by legal scholars (Sandulli, 1940, p. 119; Benvenuti, 1952, p. 118; Nigro, 1996, p. 1446) strongly anchored to the principles of legality, transparency, participation, efficiency, paving the way for a new model of relationship between public administration and citizens, open to consensual approaches.

The change in organizational forms has also shifted towards a progressive reduction of public organizational apparatus through the emergence of privatistic or hybrid models, such as single-shareholder companies owned by the public sector and in-house companies, as well as through a consolidation of new administrative bodies, such as independent administrative authorities, established as a consequence of the influence of supranational law on national law, of the emergence of new fundamental interests to protect, and of the progressive opening of markets to competition.

Following the economic and financial crisis that affected the Eurozone in the first decade of the twenty-first century, processes of rationalization of public bodies, liberalization of economic activities, and adoption of spending review mechanisms aimed at containing costs were initiated, starting around 2011 and 2012. At the end of 2012, the anti-corruption law was approved (Law No. 190/2012), imposing on administrations the adoption of prevention measures and duties of publicity and transparency. In 2015, the enabling law of August 7, 2015, No. 124 (the so-called Madia law) was approved, laying the foundations for an ambitious reform of public administration, which was then only partially implemented.

In the context of the pandemic and economic crisis started in 2020, the role of the State in supporting the economy has been reaffirmed through measures of indirect fiscal incentives, the strengthening of public guarantees, and the provision of substantial resources to support private entrepreneurship.

As highlighted by some legal scholars (Averardi et al., 2021, p. 1183; Carmosino et al., 2021, p. 1037), these interventions have been based on a dual logic: compensating the damages suffered by businesses active in specific sectors or service areas through facilitated financing and non-repayable grants, and promoting the recovery of businesses operating in strategic areas of production and services.

In the contemporary context, the State and public administration are profoundly influenced by the development of technology in all main sectors of action and public services, leading to an inevitable impact on public organization, on the performance of administrative functions and on the forms of regulation of digital markets, following a process of continuous transformation which is one of the main characteristics of the Digital State (Torchia, 2023, p. 19).

Administrative law today exists in a context characterized by transdisciplinarity, where it is recognized the need to integrate knowledge from different disciplines to address the complexity of modern reality. This approach not only enriches the field of administrative law but also allows for the development of innovative and more effective solutions to contemporary challenges. Transdisciplinarity promotes interaction, dialogue, and collaboration among experts from various fields, facil-

itating authentic and sustainable progress and, as legal scholars have highlighted, "administrative law, rooted in the dimension of reality, must therefore integrate with science and technology, understand their scope and opportunities, and become their custodian and promoter. It should integrate with these fields to the extent of becoming a qualifying element, not an obstructive one" (Spasiano, 2021, p. 693).

Through the investigation of some sectors of administrative law (such as human resources, public policies, digitalization and innovation, public procurement), the paper aims to offer an overview of the historical evolution and of the main challenges faced by the Italian public administration in the contemporary context, sketching some features of a modern paradigm of public administration.

Indeed, in a legal context marked by profound transformation—such as the expansion of artificial intelligence, increasing geopolitical tensions, the emergence of new rights and risks, and the persistence of social and territorial inequalities—it becomes crucial to assess how public administration can ensure decision-making that is rapid, effective, transparent, and accountable.

The research therefore seeks to identify and analyse some systemic weaknesses that continue to hinder the modernization process, including inefficiency, regulatory overload, fragmented governance structures, and insufficient digital competence. These limitations highlight the centrality of human capital as a strategic resource for administrative reform. In this regard, the study underlines the need to strengthen merit-based recruitment, promote continuous training, and foster professional specialization, to develop a competent and autonomous bureaucracy capable of responding to the complexity of present challenges. At the same time, digitalization emerges as both a structural imperative and a potential source of new risks, calling for sound governance mechanisms and robust cybersecurity frameworks. Overall, the paper argues that modernization must not be confined to legal or organizational dimensions; rather, it must also encompass a profound cultural transformation. Inclusiveness and equality should thus be recognized as foundational principles of a modern and sustainable public administration.

Towards a New Paradigm in Public Administration

The 36th Italy Report presented by Eurispes in May 2024 opens with a chapter dedicated to "Italy at the Crossroads" (Fara, 2024, p. 17) where the different crossroads faced by Italy, as well as by many modern states, are explored in light of the multiple transformation processes and complexity as a defining element of contemporaneity.

The contemporary complexity is appreciated in the report according to at least three dimensions, necessary for understanding the phenomenological reality of Italy: the dimension of *expansion*, in terms of the increase in subjects that assume relevance concerning the production of reality. In this sense, it could be considered the role of private entities, such as large companies that dominate the technology market, alongside the emergence of new digital rights and, at the same time, new individual and collective risks (Torchia, 2023, p. 26). The second dimension of complexity is *variety* since expansion multiplies the opportunities for interaction between public and private entities, individuals and society, imposing the necessity to regulate and manage the multiple points of contact. The third dimension of complexity is *mutation*, where the change of the nature of certain problems has direct or indirect consequences on the behaviors of some subjects within the system. An example is given by science and technology and their constant and rapid development, which seem to necessitate a transversal and multidisciplinary approach to the study of reality, integrating both humanistic and technical disciplines (Fara, 2024, p. 17).

In the described complexity, a new paradigm of public administration emerges, where the PA is both an entity affected by the change and a vehicle to promote change in private and public sectors. The epochal change does not consist in the wider use of digital tools but is represented by a true transformation in the approach and organization of society and the economy, which requires significant investments, adequate skills, and the strategic capacity to manage these tools.

Moreover, one of the main and most ambitious goals of the European Union is to ensure that by 2030 all fundamental public services are fully accessible online for everyone, including the most vulnerable population groups, in a user-friendly, personalized, interoperable, efficient digital environment with a high level of security and privacy.

In this context of change and transition, the paradigm of *New Public Management*—which addressed public sector reforms in the 1990s mainly through privatizations, liberalizations, and the introduction of managerial tools borrowed from the private sector, has experienced, according to the widespread opinion of many scholars, a decline due to multiple causes, including the inefficiency and rigidity of the model, the increase in social and territorial inequalities, the weakening of modern leadership, and the richness and complexity of administrative systems (Di Mascio and Natalini, 2018, p. 11; Torchia, 2022, p. 991).

The specificity of contexts and the complexity of each administrative system has hindered the use of a rigid and holistic approach for comprehensive change, preferring a method focused on promoting some sectoral reforms that are easier

to implement (Torchia, 2022, p. 993), in the perspective – also promoted by the *New Weberian State* paradigm—that "the State is not a problem to minimize but a possible answer to collective problems" (Di Mascio and Natalini, 2024, p. 8).

Thus, it seems reasonable to agree with scholars who believe that—considering the number of reforms and, at the same time, the implementation difficulties, the territorial differences, the overlapping structures, and center-periphery conflicts—the Italian state cannot be understood except as a structure with different levels of statehood, that is, varying degrees of autonomy, differentiation, and internal coordination (Cassese, 2014, p. 355; Vincelli, 2018, p. 176).

Starting from 2020, due to the significant resources allocated to address the pandemic crisis and the resulting economic crisis, Public Administration seems to have regained a central role as the main actor for implementing the necessary interventions and investments to ensure the recovery of the productive system and to pursue ecological and digital transitions. This necessarily requires investing in human capital, promoting an idea of administrative culture based on a sense of belonging of officials to institutions, and strengthening decision-making processes aimed at ensuring a greater orientation towards achieving results to optimize resource management based on the needs of the reference communities.

In this perspective, the main axes of intervention for the Public Administration as outlined by the National Recovery and Resilience Plan are represented by the simplification and digitalization of recruitment procedures to streamline recruitment processes, attract the best talents, and facilitate a rapid generational turnover; by the promotion of good administration, i.e., the implementation of simplification policies and interventions aimed at reducing the time of administrative procedures and the burdens borne by citizens and businesses in accessing services; and lastly, by the strengthening of human capital to promote training and work organization to align knowledge and organizational skills with the needs of an efficient and modern administration.

Human Resources as an Essential Driver for a Modern Administration

The capacity of Public administrations to adopt quick, effective, coordinated, transparent, responsible, proportionate, and flexible choices while pursuing public interests is a primary challenge for modern administration especially after the pandemic emergency has brought to light several administrative inefficiencies rooted in the system, such as disorganization, regulatory overproduction, fragmentation of political decision making centers, absence of digital skills and difficulties in coordinating different decision making levels.

The essential coordinates about human resources in PA and public employment in the Italian legal order may be found in the Constitution which does not directly regulate the system of public employment but includes some provisions concerning the civil servants.

Indeed, the Italian Constitution disposes that "Any citizen of either sex is eligible for public and elected offices on equal terms, according to the requirements established by law. To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men" (Article 51, para. 1) and that the "Access to the civil service shall be through competitive examinations, except in the cases established by law." (Article 97, para. 4). Furthermore, it states that "Civil servants shall be exclusively at the service of the Nation." (Article 98, para. 1), thereby ensuring the separation between politics and administrations and emphasizing the principle of impartiality of the administration. The Constitution also contains a provision about the liability towards third parties of officials of the State or public agencies for acts committed in violation of rights (Article 28); in addition, other constitutional guarantees regarding the protection of labor and the freedom to establish trade unions are considered applicable also to the public employment regime.

Currently, a widespread belief in the Italian legal order, among both citizens and scholars, is that public administration represents an obstacle and a burden, and the everyday experience of anyone (citizen or business) who relates with administration often tends to confirm this negative opinion (Ramajoli, 2017, p. 188): from a regulatory standpoint, it seems possible to detect a trend by the legislator oscillating between interventions aimed, on the one hand, at promoting an "administration through law" which entails a compression of the administrative discretion (in the balancing of public and private interests) and a limitation of liability in concrete choices, and, on the other hand, at promoting simplification measures and reforms to enable the administration to make decisions and avoid paralysis of administrative action (Cassese, 2019, p. 4). However, legislative and regulatory production is often abundant, chaotic, occasionally contradictory and overly detailed with the consequence that the risk of failures in simplification attempts becomes more tangible resulting in a reduction of guarantees and rights for citizens (Sandulli, 2020, p. 1).

Furthermore, from the perspectives of administrative organization and of distribution of administrative functions, some scholars argue that there is a proliferation of unnecessary structures, while necessary ones are sometimes lacking, and when present, they are often governed by outdated and unproductive mechanisms (Ramajoli, 2017, p. 188) and refer to "self-destructive pluralism" (De Lucia, 2016,

p. 12) to highlight the significant degree of dispersion of administrative function among different administrative bodies. The inefficiencies and the low-quality levels of public services have also contributed during the last decades to the negative perception of the public administration's efficiency. Overall, the fear of corruption within administrations has influenced the drafting of numerous regulations, such as those regarding transparency in the exercise of administrative action and public procurement (Mattarella, 2017, p. 141).

The several implications of the mentioned issues have seemed to be understood by the post-pandemic legislator, who set among the ambitious goals of the National Recovery and Resilience Plan (NRRP) the innovation of public administration in order to make it *capable*, *competent*, *simple*, *connected* and *smart*, through the rethinking of recruitment procedures, the enhancement of administrative skills, administrative simplification, and digitization processes. The need to reform public administration has been, after all, a primary concern also at the EU level, as the European legislator itself considered the structural change of PA as one of the criteria to assess the effectiveness of NRRP, also to determine the financial contribution to be allocated to each Member State. Therefore, public administration represents, today, both the implementing subject and the object of reforms and investment, with an absolutely central role in the post-pandemic reconstruction.

Indeed, some specific lines of intervention—such as the use of internal resources through the increasing of expertise and the reduction of outsourcing or the promotion of continuous and specialized training for public employees—represent fundamental opportunities to recover the centrality of the bureaucracy in view of a truly efficient administration, able to serve and benefit the entire community in a long-term perspective and capable of implementing the numerous reforms envisaged by the legislator promptly and effectively in a short/medium term period.

The pillars of the public administration reform, in recent normative trends, concern four aspects: *access*, *good governance*, *skills*, and *digitalization*. Focusing on *skills*, the declared objective in the NRRP is to build strategic resource planning capacity of public administrations in order to match professional profiles' offer with the specific needs of each administration, as well as to create differentiated, highly specialized training paths and to increase the technical and managerial culture of administrators, in order to promote a proactive and stimulating attitude for digital transition and the recovery of ethics, prestige, and the sense of mission of the civil servant. To achieve those goals, it appear crucial and urgent to act on the training and skills enhancement paths within public administrations, since, as highlighted by legal scholars, "the main factor in improving administrative performance should be its human capital, to avoid falling into the error of considering

the normative reform process more important than the change of people" (Ramajoli, 2021, p. 451; Battini, 2021, p. 226) and also because the concrete experience and knowledge of practices and operating mechanisms, more or less useful or efficient, acquired by individuals are not to be underestimated, as they constitute a body of knowledge to be enhanced and exploited in combination with increased specialization and technical skills.

Moreover, alongside with continuous and individual training, which focuses on increasing the capacities of the officials for the exercise of assigned competencies, the goal is to induce an overall change of the belonging environment where the individual official acts (Cassese, 1989, p. 432; Saltari, 2009, p. 30).

To ensure the effectiveness of training, furthermore, the theoretical and empirical aspects should be constantly integrated, so that the learning of a theoretical model can be concretely applied and eventually perfected in practice through experience. Even setting aside for a moment the urgency determined by the pandemic and the reforms envisaged by the PNRR, it would seem reasonable and necessary to invest in the continuous training of the public sector given the disorganization and rapid change of rules in the legal system, as well as the technological revolution witnessed in the contemporary world. However, data analysis shows an opposite and unsettling trend, which could be defined as a "training emergency", generated by the progressive cut in education and training expenses for public employees and the limited percentage of public employees attending courses to enhance their digital skills.

From the final data of the Annual Account of the State Accounting Office, it emerges that over thirteen years, from 2008 to 2021, spending on the training of public employees has nearly halved, from 301 million euros in real terms in 2008 to 158.9 million euros in 2021. The number of training days has decreased from a peak of 4.9 million in 2008 to 2.9 million in 2021, less than one day on average per employee. Furthermore, regarding content, training is mainly on technical-specialist and legal-regulatory skills, while only a minority of employees have trained to increase digital skills or project management.

In light of such data, it would be desirable—also considering the flexibility and speed required in the implementation of NRRP reforms—to make a greater quantitative investment in the training of public employees and, from a qualitative perspective, to promote courses aimed at increasing digital skills, as well as stimulating cross-sectoral and interdisciplinary knowledge.

In this regard, it is possible to mention recent legislative initiatives to enhance the improvement of skills and competencies of public employees through the promotion of training by entities such as the National School of Administration

(SNA), Universities, and national research institutions, aimed at promoting and supporting qualification, requalification, growth, and professional updating of personnel throughout their career path.

Such initiative deserves a positive assessment and should be welcomed considering both the variety of continuous and permanent training courses offered, divided into thematic areas such as public management, digitalization and innovation of public administration, economy, finance, and statistics, as well as internationalization and the European Union, and the training methods used, which encompass technical knowledge and human skills, with an emphasis on behavioral approaches grounded in cognitive and social psychology (Cafaggio et al., 2021) aiming to overcome a bureaucratic attitude that, according to some scholars, "combines subordination and self-referential closure towards the external world, or, better, towards external worlds that interact with it" (Battini, 2021, p. 11).

In conclusion, the legislative trends briefly outlined seem to reconcile different but contextual needs: the awareness that enhancing skills within the public administration is a necessary but longer-term process appears to prompt the legislator to resort to an external market to ensure the recruitment of highly technical and specialized professional profiles capable of swiftly and effectively executing the complex implementation projects of the PNRR.

This choice seems a reasonable compromise between the stringent timelines for the implementation of the NRRP and the need to invest in the training of human capital within the public administration, with the aim of creating, in the medium to long term, an administration keeping pace with the ongoing digital transformation and reclaiming the image of a strong, efficient, capable, and innovative bureaucracy, even in the eyes of civil society.

Public Policies and the Challenge of the Quality of Regulation

As highlighted in scholarly discourse, until recent times, "the analysis of institutions in action, of how they make their decisions to address collective problems, remained largely in the shadows", while the debate seemed to be focused more on the struggle for power, the means to achieve it, and its distribution within the public apparatus (Capano and Natalini, 2020, p. 9).

According to one of the earliest studies on the subject in Italy (Dente, 1990), the reason for the lack of attention from Italian political science to public policies is twofold. Firstly, it is based on the difficulty of reconstructing the underlying dynamics and consequences of public choices. Secondly, it is due to the fact that the State had long been involved in regulatory tasks and, therefore, the way of

designing and implementing public policies had fundamentally uniform characteristics, identifying with the operating rules of the State. Conversely, as the range of interventions expands, as well as the size of public organizational structures, and the complexity of interventions (e.g., regional policies, distributive policies), the possibility to provide public policies with uniform characteristics had become more unlikely.

In the subsequent decades, some scholars (Cassese, 2013, p. 2) have highlighted the inadequacy of the tools used by Italian governments, even when compared to other European experiences, in meeting the modern governance needs at all stages of the policymaking process. These stages include policy direction-setting, design, formulation and decision-making, implementation, impact evaluation, and any necessary corrective actions.

However, these organizational and methodological inadequacies have not halted the continuous trend over the past decades by governments of all political parties to enact reforms across all sectors of public intervention. This trend is driven by a decrease in citizens' satisfaction levels with the performance of public institutions, which are not deemed capable of solving collective problems (Capano and Natalini, 2020, p. 9).

Indeed, with specific reference to the administrative reforms that have occurred in Italy since the 1990s, scholars have emphasized a general inadequacy in the design of policies used during the reform processes. This inadequacy stems from a reliance on normative interventions concerning transversally all public administrations without considering the specificities of each one. Furthermore, it has been noted that the processes of change have not been accompanied by adequate implementation plans and governance mechanisms. This highlights the weakness of national programs for administrative reform (Vecchi, 2020; Butera and Dente, 2009).

Only in the last few decades, the evaluation of public policies and related studies have become an institutional challenge for the Italian system, partly as a result of the process initiated in 1995 by the OECD through the adoption of "The Recommendation on Improving the Quality of Government Regulation", providing a response to the concerns for the quality and transparency of government regulation, which is crucial for government effectiveness and the efficient use of economic resources.

Since 2005 (Law No. 246/2005), several tools have been introduced into the Italian legal system to make the analysis and evaluation of public policies more systematic and structured: firstly, the Regulatory Impact Analysis (AIR), which involves the preventive assessment of the effects of proposed regulatory interventions on the activities of citizens and businesses, as well as on the organization and

functioning of public administrations. It entails comparing alternative options and serves as support for the decisions of the top political body of the administration regarding the necessity of regulatory intervention. AIR applies, with some exceptions, to draft regulatory acts adopted by the Government. Secondly, the Regulatory Impact Assessment (VIR), which consists of the evaluation, including periodic assessment, of the achievement of objectives and the estimation of costs and effects produced by regulatory acts on the activities of citizens and businesses, as well as on the organization and functioning of public administrations.

A subsequent directive of the President of the Council of Minister of February 26th, 2009 has then provided a systematic framework of rules and procedures that the Government must follow to ensure "quality regulation" and to guarantee the implementation of the Government's program, emphasizing that "regulatory quality" is a common term indicating regulation that adheres to formal standards, is content-wise adequate, coherent with constitutional and systematic parameters and, ultimately, effective in pursuing governmental policy objectives, and it also constitutes a priority of Government activity to be pursued through adequate planning.

Furthermore, the decree of the President of the Council of Ministers dated September 15th, 2017, No. 169, concerning "Regulation on the discipline of regulatory impact analysis, regulatory impact assessment, and consultation" intervened to strengthen the planning activity and improving the quality and timing of programming. This Regulation was further integrated by the directive of the President of the Council of Ministers dated February 16th, 2018, approving the Guide to regulatory impact analysis and assessment, which reformed the Regulatory Impact Analysis (AIR) and the Regulatory Impact Assessment (VIR). The reforms were inspired by the following principles: (a) *Programming*: enhancement of annual programming of regulatory activities, essential for effectively conducting regulatory analysis, with a corresponding link to Regulatory Impact Analysis; (b) *Selection*: modification of the scope of the two tools, reducing the number of measures subject to analysis and focusing on measure with the greatest impact on citizens and businesses.; (c) *Consultation*: introduction, for the first time, of a discipline on consultation within the scope of the two tools, including specific rules on public consultation; (d) *Comparison*: between all the feasible alternative options for intervention and not only of the preferred one; (e) *Transparency*: guarantee of greater transparency in procedures, achieved through the publication of AIR and VIR reports on institutional websites.

Although the objectives pursued by the more recent reforms, as well as the higher degree of coordination between the different tools, were valuable, the con-

crete application of these tools in the biennium 2020–2021, through the analysis of the data, has left unsatisfied both for the limited improvement in the quality of the contents and, in some cases, for the lack of utilization and transmission of the reports to the competent bodies for verification (Zaottini, 2022, p. 35).

The causes of the incomplete implementation of better regulation have been insightfully expressed in the opinion of the Advisory Section for Normative Acts of the Council of State (no. 01458/2017 — June 7th 2017) on the Draft Decree of the Prime Minister, where it was noted that the shortcomings of the AIR were not to be found in the theoretical framework of its discipline, but in the deficiencies of its practical implementation, mainly due to the difficulties faced by legislative offices in conducting an inquiry going beyond a mere legal-formal approach and allowing the public decision-maker to envision a reliable scenario of the future functioning of the rules, based on the analysis of the data available at the time of their construction. In addition to the mentioned "formalistic approach", the causes of the shortcomings, in the opinion of the Council of State, were to be found in "cultural deficiencies or resistance" and were probably also attributable to training gaps among the staff in legislative offices, who have an almost exclusively legal--administrative background and few knowledge and awareness of the functioning and utility of these multidisciplinary tools for improving the quality of regulation.

The described scenario has recently become more complex due to extraordinary events—such as the Covid-19 pandemic and the national and European efforts to revive economies deeply impacted by its effects, as well as the Russo-Ukrainian conflict, which has led to increased prices of energy and raw materials and supply challenges—that have encouraged decision-making dynamics characterized by a rush to make quick decisions.

Indeed, these decisions have been aimed at addressing unforeseen events and crisis situations (mainly dealt with decree of the President of the Council of Ministries and law decree by the Government, with a substantial marginalization of the Parliament, also when affecting fundamental rights of the citizens), as well as fulfilling the commitments and obligations assumed by the Italian State through the National Recovery and Resilience Plan (NRRP).

However, according to some scholars (Di Porto and Esfa, 2022, p. 18), this trend clearly conflicts with the tools necessary for regulatory quality, which require time to understand and to consult all the stakeholders, as well as to conduct *ex ante* assessments of the impact of new norms and to elaborate appropriate measures for conducting ex post evaluations.

This trend highlights "the paradox of our times, seemingly unsolvable, where the pursuit of quality, established in recent decades, clashes with a world that

is increasingly fast-paced, interconnected, and complex. In such a world, democratic societies constantly acquire new sensitivities, which are not always easy to reconcile. The complexity and multitude of interests and values requires thoughtful choices—which the rapidity often hinders or excludes—capable of considering all aspects and repercussions of a normative provision" (Di Porto and Esfa, 2022, p. 18).

From another perspective, a positive mention should be recognized to legislative interventions concerning the Governance and the implementation of the Italian NRRP (decree law no. 77/2021, converted into law no. 108/2021) that seem to acknowledge that the concrete and progressive implementation of the Plan represents a unique opportunity and a necessary challenge to ensure the country's access to economic and financial resources over the coming years and, in order to assure it, have established new structures (such as the Unit for Rationalization and Improvement of the Regulation; Unit Mission for NRRP; Central Service of NRRP within the Minister of economy and finance) or assigned new functions to existing ones (such as the Court of Auditors) in order to carry out tasks of monitoring and providing periodic information on the progress of PNRR interventions.

The attention to the monitoring phase is crucial to ensure the success and effectiveness of the Plan for a set of reasons: firstly, short-term monitoring (6 months) allows for evaluating the effectiveness of actions and implementations and intervening with corrections or adjustments in critical situation. Moreover, monitoring fosters transparency towards citizens, who have the right to be informed about the progress of initiatives and the use of public resources. This contributes to building trust between the administration and citizens, promoting participation and active involvement in public life. Lastly, monitoring facilitates coordination among the various actors involved in the implementation process, enabling more efficient resource management and better coordination. This appears, indeed, particularly important in complex contexts involving multiple institutions or organizations.

In conclusion, as highlighted in the literature, in order to avoid the ineffectiveness of public policies, it is crucial to consider them as the result of a circular decision-making process based on empirical evidence, aimed at identifying problems and needs, defining the objectives to be achieved, selecting the most suitable intervention tool or tools, writing interventions based on drafting criteria, verifying the adequacy in concrete terms of such tools, and their eventual revision, taking into account the new technological tools available (such as artificial intelligence) and the evolution of regulated markets, which may require new forms of regulation (Corso et al., 2022, p. 158).

Digitalization and Innovation as a Functional and Structural Transformation for Public Administrations

The digitalization of public administration in the Italian legal order represents both a means and a fundamental objective to enable the structural transformation of administration in a digital and modern context. Therefore, the process of digitalizing public administration is primarily focused on creating digital infrastructures for public administration, developing data interoperability, providing digital services, and ensuring cybersecurity (Perin and Galetta, 2020, p. 4; Marchetti, 2022, p. 75).

In addition to these efforts, from a general perspective, measures for innovating public administration are also implemented, primarily focusing on enhancing the personnel and administrative capacity of the public sector, as well as simplifying administrative activities and procedures.

As far back as the late 1970s, administrative law scholars highlighted that "information systems are no longer merely useful to administrations for internal management purposes, but are necessary in order to administer" (Giannini, 1979, p. 14). This keen observation foresaw one of the major challenges that would later confront modern public administration: beyond using information technology for documentation, preservation, and communication of administrative acts as a means to simplify interactions between administration and citizens and to make administration more efficient and effective, technology can be used to determine the content of an act and to make decisions, in other words, to administer (Simoncini, 2020, p. 5; Follieri, 2017, p. 7).

Among the most significant recent regulatory measures, the National Recovery and Resilience Plan has provided a decisive boost to the relaunch of the country's competitiveness and productivity, dedicating Mission No. 1 to digitalization, innovation, competitiveness, culture, and tourism and allocating 9.72 billion euros for the digitalization, security, and innovation of public administration. The stated goal of the mission is to render Public Administration the best "ally" of citizens and private companies, offering efficient and easily accessible services.

To this end, according to the Plan, it is necessary to intervene in digital infrastructure towards a migration to the cloud for administrations, developing interoperability between public entities, simplifying procedures according to the "once only" principle—whereby public administrations must avoid asking citizens and businesses for information already provided previously—and strengthening cybersecurity defenses.

Additionally, the Plan aims to expand the offer of digital services to citizens, in order to improve accessibility and align central administrations with

the standards shared by EU Member States. The effort in terms of innovation in infrastructure and the extension of services is accompanied by investments related to the specific digital skills training for the human capital of the PA. Therefore, the component concerns the Public Administration in a widespread manner, with implications for technological resources, human and infrastructural capital, its organization, procedures, and the methods of delivering services to citizens.

Consistently, the Italian Strategy for Artificial Intelligence 2024–2026, adopted in April 2024, acknowledges that artificial intelligence, in a short to medium-term perspective, already offers a wide range of technologies to stimulate and develop the country's innovation, identifying four main guidelines: Scientific Research, Public Administration, Enterprises, and Education. The Strategy represents a comprehensive program of the Government (Department for Digital Transformation) and the Agency for Digital Italy with ambitious objectives, albeit referring to a short biennial period.

With specific reference to Public Administration, the Strategy appears to emphasize two aspects: firstly, it prioritizes a systematic and structured approach to the digital transformation of PAs, aiming to overcome individual and fragmented initiatives of each public entity and to promote specific projects of national interest. The need to identify unified solutions and application methods, providing a general framework within which individual administrations will be able to later develop their own initiatives, therefore leads towards a reduction of decision--making centers to avoid fragmentation of decision-making and, ultimately, of the innovative solutions. Secondly, the Strategy aims to accompany "technical" actions on infrastructures with "supporting" actions that, considering the competencies and knowledge not yet widely spread within the Public Administration, can promote a fruitful use of AI and channel procurement actions and solution development, enhancing their reuse and the sharing of best practices.

Among the most relevant sectors that will contribute to enabling the digital transition of public administration in the coming years, public procurements assume crucial relevance. This sector has been recently reformed, in implementation of the NRRP, with the adoption of Legislative Decree No. 36/2023, which adopts an innovative approach in public procurements law by prioritizing the achievement of results, i.e. the awarding and the execution of the contract promptly and through the best balance in terms of quality and price, respecting principles of legality, transparency and competition (Spasiano, 2024, p. 206).

Through the introduction, in the sector of public procurement, of the innovative principle of result (as well as other important principles, such as principle of

trust and digital rights) the Italian legislator adopts a substantive approach to the principle of legality. Here, legality is not (only) merely understood as compliance with the rules governing the public procurement procedures, but it is intended as the necessity of effectively achieving the results that the Administration aims to pursue through the initiation of a tendering procedure, in the interest of the community and to achieve the objectives of the European Union. It is indeed relevant to consider that the complexities, uncertainties in application, and formalism in the interpretation of public procurement regulations by administrations and judges, along with a general fear spread among public employees to decide in order to avoid liabilities, have resulted in past years in profound inefficiencies in the sector and delays in the construction of essential public works crucial for the community and the progress of the country. In this context, the effective execution of public works in a timely manner has become crucial to realize all the projects outlined in the National Recovery and Resilience Plan (PNRR), which will modernize the country.

The achievement of results permeates all phases of the "life cycle" of public contracts, including the planning phase, contractor selection, awarding, contract execution, and subsequent disputes. In the meantime, the digitalization principles, as outlined in Article 19 of the Code, involve all phases of public procurement procedures and aim to digitalize the entire process by acquiring data and creating native digital documents through digital platforms. This approach enables interaction with existing databases and allows for enrichment with new data from individual procedure.

In this context, the digitalization of procedures and the life cycle of contracts is a fundamental challenge and lever for innovation as it allows the reduction of times in the procedure and of margins of error while pursuing the desired outcomes. However, beyond procedural changes, the new paradigm will also require organizational and cultural changes within the public administration, which, with some exceptions, still lacks technological knowledge and seems reluctant to the use of digital infrastructure.

The digitalization of PA, indeed, influences activities and procedures in the different area of action of the administration, as well as the organization of the public institution itself, through the creation of new subjects/figures in the administration (such as the Cybersecurity Agency, the Italian Digital Agency, and the responsible for the digital transition) or the change of internal structures within existing administrations.

The major digitalization challenges that Administrations will face also need to consider and respect some principles that have emerged in the case law of Italian

administrative judges, regarding the topic of algorithmic legality, and that have recently been incorporated in the new public procurement code (Article 30 of the leg. decree no. 36/2023 concerning the use of automated procedure in the life cycle of public procurements).

In particular, the Council of State ruled on a case where the Ministry of education had entrusted a third party with the construction of an algorithm to determine the assignment and transfer to the workplace of hired teachers. Due to unreasonable and erroneous outcomes produced by the algorithm (of a rule-based type that operates according to a deterministic logic capable of generating predetermined outputs by the programmer using an if-then logic), the machine's decision was contested.

The administrative court (from decision no. 2270/2019, and after with decisions no. 8474/2019; 30/2020; 881/2020; 7891/2021), while recognizing that a higher level of digitization of public administration is fundamental to improve the quality of services provided to citizens and users, and therefore that the use of robotized procedures is a coherent expression of the principle of good governance of the PA stated in Article 97 of the Italian Constitution in the current technological evolution, has nonetheless emphasized, for the first time, that the algorithm must adhere to the general principles of administrative activity, such as those of publicity and transparency (Article 1 of Law No. 241/90), reasonableness, and proportionality, thus ensuring both *ex ante* administrative control and judicial review afterward. Following this case law, the subject being affected by a decision must be fully informed of the application criteria and the model used; the decision must be attributable to the authority holding the power, which must also be able to carry out the necessary checks of the logic and legitimacy of the choice and outcomes entrusted to the algorithm, following the "humans in the loop" approach.

In conclusion, judicial rulings and recent legislative reforms exhibit a willingness to incorporate technological tools into the decision-making processes of public administrations, whether constrained or discretionary. However, such advancements should not jeopardize well-established protective principles and guarantees deep-rooted within Italy's legal and cultural heritage concerning the interplay between freedom and authority. This is why current discussions surrounding the potentials and limitations of artificial intelligence appears very complex and still very open, requiring not only legal considerations but also philosophical, ethical, and cultural dimensions, in the common belief that this progress and its challenges are upcoming and relentless.

Conclusions

As emerged from the analyzed paragraphs, the evolution of public administration represents an ongoing transformative process in which the public administration itself is subject to necessary reforms to implement the main investments and projects in various sectors of the national economy.

In the complexity of the contemporary world, characterized by the advent of artificial intelligence, geopolitical challenges, the emergence of new rights and risks, and cultural, territorial, and economic inequalities, it is necessary to have a public administration capable of making quick, effective, coordinated, transparent, responsible, proportionate, and flexible decisions to pursue public interests and address the primary needs of the communities.

The conducted analysis shows that the transformation of public administration faces a reality characterized by deeply rooted critical issues within the system, such as administrative inefficiencies and disorganization, excessive regulatory production, fragmentation of decision-making centers, lack of technological competence among public employees, difficulties in coordinating different centers of power, territorial and social disparities, as well as a spread conception of administration as an obstacle to the country's growth and to the satisfaction of collective needs. In this context, some preconditions for ensuring the necessary transition to a modern administration have been outlined in various paragraphs.

The recruitment of human resources in public administrations is crucial, both at the stage of selection of personnel through public competitions and after the selection, through a continuous training process that allows employees to be updated and face new challenges. In this sense, the idea shared by some scholars (Fracchia et al., 2021, p. 1) emphasizes that public competitions, as the primary recruitment tool for public employees, should be seen as a way to select the best professionals, based on a less formalistic and more substantive evaluation of the qualities, capacities, and skills of the candidates, to be a truly meritocratic way to access public career. The goal is to form a competent bureaucracy, selected according to merit criteria (i.e., based on the actual ability to perform functions), for which training and professional specialization paths are provided, in order to progressively decrease political influence.

Moreover, a reform aimed at increasing the staffing levels of public administrations, enhancing their technical and professional preparation and valuing the professional and social prestige of public employees, also through appropriate salary levels, can be an effective formula to combat the so-called "fear of signing", which is the fear of public employees to make decisions, even on a technical level, that

entail significant legal and financial responsibilities for the administrations and, consequently, in terms of administrative and accounting responsibility for public employees, leading to overall inefficiency of the administrative apparatus (Police, 2021, p. 2; Sandulli, 2020, p. 2).

As legal scholars have highlighted, the modernization of public action relies on a *progressive construction*, and the success of the processes of adaptation of the public sector to the underlying reality depends on how these processes are administratively implemented, even more than how they are legislatively outlined (Ramajoli, 2017, p. 189). In this logic, the training and qualification of public employees transcend the individual sphere of the single recipient and serve primarily a public interest, benefiting the entire community. In other words, it is a matter of institutional culture (Ramajoli, 2017, p. 189; Melis, 2016, p. 165; Cassese, 1971, *passim*; Cassese and Torchia, 2014, p. 36; Cassese, 2010, *passim*).

Furthermore, the digitalization of public administration is decisive, representing both a means and a fundamental objective to enable the structural transformation of administration in a digital and modern context. The phenomenon is pervasive and relevant in—at least—two dimensions: digitalization is the way to simplify and increase the efficiency of administrative action; on the other hand, it increases risks that are much more significant when the subject of digital transformation is the public administration itself, which must comply with the principles of legality, participation, transparency, motivation, and justiciability, as reiterated by the administrative judge (Marchetti, 2022, p. 77). It is also worth noting that one of the necessary preconditions to ensure the digitalization process of the country is to guarantee cybersecurity which, as highlighted by the National Cybersecurity Strategy 2022–2026, is an essential element of digital transformation, aiming to achieve strategic autonomy in the sector and promoting a cyber-resilient digital transition for the public sector and the productive fabric. The issue is central considering that in the last few years, hostile activities in the national cyber space increasingly targeted the digital infrastructures of public entities, particularly those related to the central administrations of the State and National Institutes and Agencies.

As highlighted in the previous paragraphs, the national debate surrounding the potentials and limitations of artificial intelligence appears very complex and still very open, requiring not only legal considerations but also philosophical, ethical, and cultural dimensions, in the common belief that this progress and its challenges are upcoming and relentless.

In conclusion, among the multiple themes intersecting PA transformation, the ability of public administration and administrative law to support greater social and economic justice is crucial. As some authors have pointed out, public admi-

nistration should not be an obstacle to the exercise of legitimate freedoms but a catalyst for growth, in a participatory and supportive logic, to ensure the best living conditions for communities, starting with the most vulnerable groups (Spasiano, 2021, p. 690; Franchini, 2021, p. 36). In this sense, the National Recovery and Resilience Plan (PNRR), is directed towards pursuing transversal priorities related to generational, gender, and territorial equal opportunities, conditioning the evaluation of projects and future investments to their impact on the potential recovery of youth, women, and territories, and providing opportunities for all without any discrimination, fully implementing the principles outlined in the Italian Constitution.

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