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ARTICLE

Power and its exercise in the Vatican City State

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Abstract

The problem of relations between Church and state has existed from the very beginnings of Christianity and has evolved over centuries. The dominant model today is one of separation between the state and religious communities. In the context of the Roman Catholic Church, the Vatican City State remains the only exception to this principle. This article examines the tensions inherent in the way in which the Roman Pontiff, as head of the Vatican City State, exercises both religious and secular power, and how rule of law principles operate to constrain the operation of power as between the various organs of this state.

Keywords: Roman Catholic Church; reform; rule of law; reception of law; Vatican City State

Introduction

Following Vatican II, the Roman Catholic Church relinquished the idea of a Catholic state. This decision was a departure from the traditional doctrine of the Catholic Church with regard to its attitude to the state and, in particular, to the principle of religious freedom. This principle – once condemned as heretical – has been affirmed (at least since the pontificate of John XXIII and the Second Vatican Council) as a fundamental human right, while at the same time becoming the foundation of the Holy See's contemporary activity in the international arena.

The Vatican City State now remains the only Catholic state. The purpose of its existence is to guarantee to the Roman Pontiff full independence in the exercise of his religious functions. However, this state's operation extends beyond the strictly religious framework, and it carries out a number of functions which are the hallmarks of modern secular states.[1]

Contrary to what it may seem, the exercise of this power is not connected simply with the small territory of the Vatican City itself, or the relatively few citizens who reside there. Each year, hundreds of thousands of people who visit

[1] It is worth noting that in recent years there have been several valuable publications containing the legislation that make up the sources of Vatican law by J I Arrieta: *Codice penale Vaticano* (Roma, 2020), *Codice di Norme Vaticane* (Roma, 2021), and *Codice Vaticano di procedura penale* (Roma, 2022).

churches located in the Vatican find themselves under the jurisdiction of this state. This, in turn, affects a number of issues connected with the keeping of public order, the provision of health care, and the maintenance of appropriate infrastructure. Furthermore, in recent years the Vatican has been struggling with many problems that test its regulatory and criminal institutions. These include crimes of sexual abuse, embezzlement, organised criminal groups, espionage, or claims brought by employees of various Vatican agencies.

In this article I shall first provide an overview of the Vatican legal order. I shall then move on to consider the concept of office and authority in Roman Catholic canon law before examining the relationship between the Pope and the organs of the Vatican City State. Finally, I shall analyse how the rule of law is applied to Vatican City State organs, including the Pope, and how this constrains the exercise of power in the Vatican City State.

Brief overview of the Vatican legal order

The foundations of the state

The State of the Vatican City was founded with the signing of the Lateran Treaty between the Holy See and the Kingdom of Italy on 11 February 1929.[2] The Treaty established the Vatican City State, with the Holy See having the exclusive, unlimited and sovereign authority and jurisdiction over it (Art 3). The relations between the Kingdom of Italy and the Vatican City are based on international law (Art 23). The Italian State has the right to punish offences committed within the Vatican City only at the request of the Holy See or by its delegate (Art 22). Apart from the territory of the Vatican City, the privilege of extraterritoriality is enjoyed by other patriarchal basilicas (Basilicas of St John in the Lateran, St Maria Maggiore, and St Paul's outside the Walls), as well as by the Papal Palace of Castel Gandolfo and several other buildings that are located in Italy, but are important for the functioning of the Holy See. These places are visited by many pilgrims and tourists who come to the Eternal City, which means that hundreds of thousands of people find themselves under the jurisdiction of the Vatican each year.

Sources of law

Presently, the sources of law in the Vatican City State are regulated by the Law of 1 October 2008 ('the 2008 Law on Sources of Law', issued by Pope Benedict XVI),[3] which replaced the Law of 1929.[4] Under Art 1.1 of the 2008 Law on Sources of Law, the primary source of Vatican law, and at the same time the primary criterion for interpreting all legislation, is the 'canonical order' (*ordinamento canonico*). Consequently, canon law in the Vatican City is not only applied in ecclesiastical matters, but is also enforced by the bodies which regulate 'secular' matters. The

[2] Trattato fra la Santa Sede e l'Italia, Acta Apostolicae Sedis (hereafter: AAS), 21 (1929), 209–274. An English translation of the treaty can be found here: <https://www.rightofassembly.info/assets/downloads/1929_Lateran_Treaty.pdf>, accessed 28 May 2024.

[3] Legge sulle fonti del diritto 1 ottobre 2008, AAS, Supplemento per le Leggi e Disposizioni dello Stato della Città del Vaticano (further suppl.) 1 (2009), 131–136.

[4] Legge sulle fonti del diritto 7 giugno 1929, AAS. Suppl. 21(1929), 5–13.

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canonical order encompasses the entirety of Church legislation, i.e. the codices of the Latin Church and Catholic Eastern Churches, as well as all other legislation constituting the source of law for the Church.[5] Furthermore, the Pope pronounced that the main sources of law (apart from the state constitution) were the laws issued for the Vatican City by the Pope or the legislature (i.e. the Pontifical Commission for Vatican City State ('the Commission')), or by other bodies vested with legislative power (Art 1.2). In addition, decrees, regulations and other normative dispositions issued in accordance with the law in force were recognised as sources of law (Art 1.3).

In matters that are not regulated by this form of legislation, the Commission may adopt laws and other normative dispositions issued by the Republic of Italy (Art 3) provided such laws do not contradict the precepts of divine law (*precetti di diritto divino*), general principles of canon law (*principi generali del diritto canonico*), and the provisions of the Lateran Pacts and other regulations concerning relations between the Vatican State and the Republic of Italy (Art 3.2). Sarais explains that these premises – which he calls 'the Vatican public order clause' – must be taken into account by both the legislator and law enforcement authorities.[6] In other words, the Commission may adopt the provisions from Italian law only after it has been established that they comply with the principles mentioned above. So, those principles constitute a kind of 'filter' through which Italian laws must pass in order to be binding in the territory of the Vatican State.[7] Italian legislation does not have the force of law in the Vatican City unless it has been formally adopted by the Commission.

Civil, penal and administrative law

The 2008 Law on the Sources of Law addresses some issues regarding the reception of civil, penal, and administrative law in the Vatican City State.

As for civil law, Pope Benedict XVI declared that the Italian Civil Code of 16 March 1942 would apply in the Vatican, except for matters concerning citizenship, the issuance of birth, marriage and death certificates, and employment regulations. Marriages and dispositions of ecclesiastical goods, as well as wills and pious wills, were to be regulated by specific canons of the Code of Canon Law. The Pope also obliged the President of the Governorate (the governing body of the Vatican City State) to appoint notaries from among the advocates of the Holy See, while the Technical Service Directorate was responsible for organising the 'land and mortgage registry office' (*le funzioni conservatore delle ipoteche*) (Art 4). The Vatican Code of Civil Procedure of 1 May 1946 was retained to regulate the civil procedure (Art 5). Furthermore, Pope Benedict XVI declared that if a civil case could not be resolved on the basis of laws in force, the judge could decide it by referring to the principles of divine law, natural law or general principles of the Vatican legal order (*i principi generali dell'ordinamento giuridico vaticano*) (Art 6).

[5] J M Seranno Luiz, *In vigore la nuova legge sulle fonti dei diritto*, 'L'Osservatore Romano', 31 December 2008, 7.

[6] A Sarais, *Le fonti del diritto vaticano* (Citta del Vaticano, 2011), 147.

[7] J I Arrieta 'La nuova legge vaticana sulle fonti del diritto' (2009) 1 *Ius Ecclesiae* 236, 231–242.

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In the field of penal law, Pope Benedict XVI declared that the provisions of the 1889 Italian Penal Code (which had been adopted by the Vatican in 1929) would still apply, in keeping with the general rules of reception. It is noteworthy that, even today, the Vatican State does not have an act that would comprehensively regulate the substance of criminal law, as criminal law provisions are scattered across many other dispositions. However, recent years have seen a noticeable improvement of Vatican criminal legislation, mainly in the area of the criminalisation of various types of sexual abuse.[8] The Commission has, in addition, empowered a judge to decide a criminal case on his or her own in the absence of a specific norm of positive law. This is in accordance with Art 9 of the 2008 Law on Sources of Law, which states that when an act is committed in violation of religious or moral principles, public order or the security of persons or property, the judge – if there is no criminal provision that criminalises such an act – may resort to the general principles of the legislation concerned to impose a fine of up to €3,000 or imprisonment of up to six months, applying, if necessary, the alternative sanctions set out in Law No. 2027 of 14 December 1994. Under this disposition, the judge has the power to issue a decree imposing a special fine on the offender.[9]

The Commission extensively adopted the Italian legislation in the field of administrative law. According to principles set out in Art 3 of the 2008 Law on the Sources of Law, Italian law provisions are in force in the Vatican, along with international agreements signed by the Republic of Italy concerning: measures and weights; inventions, patents and trademarks; railways; post; telecommunications and related services; power transmission; aviation; road traffic; protection against infectious diseases; police; hygiene and public health.

Fundamental Law

Over the history of the Vatican City State, three laws have been issued that are known as 'Fundamental Laws' (1929, 2000 and the current 2023). This legislation, as discussed in more detail below, relates to the fundamental principles of the Vatican City State's organs of government and to the nature of the authority of the Bishop of Rome in the State.

The concept of office and authority in canon law

Ecclesiastical office

Regulations concerning the concept of ecclesiastical office were included in the no longer operative Code of Canon Law of 1917 (CIC/17)[10] and the current 1983 Code

[8] In this context, it is worth pointing out, in particular, the Act of 11 July 2013 n VIII – Legge recante norme complementari in materia penale (Law on Supplementary Rules in Criminal Matters), AAS Suppl. 20 (2013), 77–108 on certain criminal law norms. This provides for the penalisation of offences such as the exploitation of children for prostitution; sexual violence against children; sexual acts with children; and child pornography.

[9] The mechanism provided for in Art 9 of the 2008 Law on Sources of Law is the equivalent of Art 23 of the Law of 1929, which was inspired by Canon 19 of 1917 Code of Canon Law.

[10] *Codex Iuris Canonici. Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, AAS 9 (1917), pars II, pp 1–521 (hereafter: CIC/17).

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(CIC/83).[11] A comparison between these two Codes highlights differences as to the way in which the concept of 'ecclesiastical office' has been defined historically in Roman Catholic canon law.

In the 1917 Code, the definition of ecclesiastical office is found in Canon 145 § 1. It introduced both a 'wide' and a 'strict' interpretation of the term 'ecclesiastical office'. In a wide sense, *officium ecclesiasticum* denoted any responsibility (*munus*) 'exercised legitimately for a spiritual end'. In a strict sense, ecclesiastical office was defined as 'a divinely or ecclesiastically ordered responsibility, constituted in a stable manner, conferred according to the norms of the sacred canons, entailing at least some participation in ecclesiastical power, whether of orders or of jurisdiction'. According to Canon 145 § 2, ecclesiastical office is taken in the strict sense, unless it appears otherwise from the context of the words. At any rate, the exercise of an office was linked to strictly defined powers of governance.[12]

The current 1983 Code of Canon Law does not distinguish between 'wide' and 'strict' definitions of ecclesiastical office. Pursuant to Canon 145 § 1, an ecclesiastical office is 'any function constituted in a stable manner by divine or ecclesiastical ordinance to be exercised for a spiritual purpose'. Furthermore, Canon 145 § 2 provides that: '[t]he obligations and rights proper to individual ecclesiastical offices are defined either in the law by which the office is constituted or in the decree of the competent authority by which the office is at the same time constituted and conferred'.[13]

It is worth noting that both Codes use virtually identical terminology using the term '*officium ecclesiasticum*' to denote ecclesiastical office and '*munus*' to express its essential character. As Polish canonists Józef Krukowski and Remigiusz Sobański point out, referring to their use in church documents, *officium* can mean 'function', 'office', 'duty' (most often), as well as 'obligation', 'activity', and 'position'.[14]

Both Codes share the legal construction of ecclesiastical office. An office is any duty instituted by divine or ecclesiastical ordinance in a stable manner. It is a task serving a spiritual purpose, and thus related to the mission of the Church.[15] Common to both Codes is the distinction between ordinary power of governance (associated with an office by law) and delegated power (granted to a person not through an office): cf. Canon 197 § 1 CIC/17 and Canon 131 § 1 CIC/83. Both Codes recognise that the ordinary power of governance can be proper (exercised in one's own name) or vicarious (on a person's behalf): cf. Canon 197 § 2 CIC/17 and Canon 131 § 2 CIC/83.

[11] *Codex Iuris Canonici. Auctoritate Ioannis Pauli PP. II promulgatus*, AAS 75 (1983), pars II. Appendix (hereafter: CIC/83).

[12] See G Caviogioli, *Manuale di Diritto Canonico. Seconda edizione* (Torino, 1939), 229–230.

[13] See D Cenalmor and J Miras, *El Derecho de la Iglesia: Curso básico de Derecho Canónico* (Navvara, 2021), 224–225.

[14] J Krukowski and R Sobański, *Komentarz do Kodeksu Prawa Kanonicznego, Tom 1. Księga 1. Normy ogólne,* (Poznań, 2003), 45.

[15] P Gherri, 'L'ordinamento canonico: norme e strutture' in M J Arroba Conde (ed.), *Manuale di Diritto Canonico* (Città del Vaticano, 2014), 54–55.

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Since the 1983 Code, unless forbidden by divine or canon law, an ecclesiastical office can be assumed by the lay faithful. Pursuant to Canon 274 § 1 CIC/83, only clerical persons can obtain offices for which either the power of holy orders or of ecclesiastical *governance* is required. The current Code provides that those who have received sacred orders are qualified by law to exercise the power of governance (also called the power of jurisdiction (Canon 129 § 1 CIC/83)). Under the 1983 Code, ecclesiastical power is divided into the power of orders (resulting from the sacrament of priesthood) and the power of governance (resulting from the granting of an office or a mission). The power of governance is basically attached to the power of orders, so, as a rule, the lay members of the faithful may only hold offices that do not require the power of orders and the power of governance – unless they hold offices through which they cooperate in the exercise of the power of governance.[16]

Ecclesiastical offices are not only performed *within* church structures, but are intended to build up the Church and carry out the *mission* entrusted to it by Christ. This relationship was specified by the Second Vatican Council, which stated in no. 8 of the Dogmatic Constitution *Lumen Gentium* that the Church – which is the Mystical Body of Christ, a communion of faith, hope and love – is a visible organism, equipped with 'hierarchical organs' (*organis hierarchicis*). In this context, 'organ' refers to those faithful who make up a hierarchically structured system, thus carrying out special tasks stemming from the continuation of the mission Christ entrusted to his apostles. Hierarchical organs are therefore subjects of power in the Church. The 1983 Code does not refer to them as 'organs' but as 'authorities', as mentioned above.[17] Nevertheless, under canon law, an organ (authority) should be understood as a physical (natural) person or a grouping of physical persons who are the subject of legislative, executive or judicial power, who undertake actions in the name and on behalf of ecclesiastical juridical persons.[18] A specific physical person acquires the status of an organ upon taking possession of an ecclesiastical office to which an aggregate of competences is attached resulting from official participation in the mission of Christ and the Church.

Ecclesiastical authority

The 1917 Pontifical Commission for the Reform of the Code of Canon Law committed itself to a better recognition of the three functions of ecclesiastical authority: legislative, judicial and executive (administrative).[19] These assumptions

[16] C J Errázuriz, *Justice in the Church. A Fundamental Theory of Canon Law* (Milan, 2009), 191–192. A clear example of this is the participation of the lay faithful in the collegiate bodies created in the diocese of the Catholic Church, i.e. the council for economic affairs and the council for pastoral affairs.

[17] See P V Pinto, *Diritto amministrativo canononico. La Chiesa: ministero e instituzione* (Bologna, 2006), 117–119.

[18] J Krukowski, *Administracja w Kościele. Zarys kościelnego prawa administracyjnego* (Lublin, 1985), 59–60.

[19] A Interguglielmi, *I decreti singolari nell'esercizio della potesta' amministrativa della chiesa particolare. Studio giuridico-pratico sulla potesta' amministrativa del vescovo diocesano con schemi di decreto* (Città del Vaticano, 2012), 29–30.

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were incorporated into the current Code, as manifested, for example, in Canon 135 § 1 CIC/83, pursuant to which the power of governance encompasses the legislative, executive and judicial powers. However, it is not a classic tri-partite system of power.[20] In the context of ecclesiastical law, rather, we should speak of three *functions* of power. This is because the Church, essentially, exercises a single authority, entrusted to it by Jesus Christ – that is, sacred authority (*potestas sacra*). Although this term was only introduced into the Magisterium and canonical studies with the teaching of the Second Vatican Council, reflection on the nature of authority in the Church is evident from the very beginning of Christianity. Piotr Skonieczny summarised previous views on the subject under three theories: unitarian, bi-polar (classical and separating) and tri-polar. The unitarian theory (chronologically the first) rests on the premise that there is only one authority in the Church, given by Jesus Christ to the apostles and their successors. The essence of the bi-polar theory is the clear distinction between the power to ordain and the power to govern. The tri-polar theory, on the other hand, amounts to the adoption in canon law of the classical division of powers, assuming separately the powers of sanctification, teaching and governing.[21]

Traces of each of these concepts can be found in both Codes of Canon Law. It is perhaps unnecessary to resolve the validity of each of the above-mentioned theories of ecclesiastical authority. It is arguably more helpful to assume the *unity* of ecclesiastical authority, variously embodied as legislative, executive and judicial powers. In the Church, as stipulated in ecclesiastical doctrine, authority springs from no other source than its founder, Jesus Christ. That is not to say, however, that this authority cannot be exerted in different ways, assuming that this is done legitimately.

It is important to note that the system of the Vatican City State is not identical with the hierarchical system of the wider Church; therefore, with the exception of typical 'church units', such as parishes, the canons relating to the exercise of *potestas sacra* are not directly applicable: see, for example, Canons 129 § 1 and 145 CIC/83. Thus, the Vatican legal order distinguishes between typically church structures and the system of state authorities. Vatican City State, however, in order to make clear the relationship between the state bodies and the Roman Pontiff, applies canonical regulations concerning the power of governance; the possession, exercise and limits of ordinary power (*potestà vicaria*); and the exercise of legislative, executive, and judicial powers.[22] The Vatican organs, as a rule, are not established to pursue a 'spiritual goal', but the purpose of the state, i.e. to guarantee the full and visible independence of the Holy See.

The Roman Pontiff has full legislative, executive and judicial powers in the Vatican City State, but both the previous and current Fundamental Law provide

[20] J Hahn, 'The Power of the Law – the Law of Power: On the Significance of Canon Law for Issues of Power in the Church' (2020) 2 *Concilium. Politics, Theology and the Meaning of Power* 58.

[21] See P Skonieczny, 'Potestas sacra według Klausa Mörsdorfa – założenia teologiczne, struktura, sposób przekazywania i charakter' (2013) 9 *Annales Canonici* 18.

[22] J I Arrieta, *Corso di Diritto Vaticano* (Roma, 2021), 176–177.

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for certain bodies intended to ensure their exercise. This state of affairs, though, does not involve a tripartite division of power – as it would be understood by the modern philosophy of law – but a canonical *distribution* of functions.

The relationship between the Roman Pontiff and the organs of the Vatican City State

Pursuant to Article 1 of the current Fundamental Law of the State of the Vatican City of 13 May 2023,[23] the Roman Pontiff as Vatican's sovereign has the fullness of the power of governance, which encompasses legislative, executive, and judicial powers. The 1983 Code (like the 1917 Code) provides that 'just as by the Lord's decision Saint Peter and the other Apostles constitute one college, so in the like manner the Roman Pontiff, the successor of Peter, and the bishops, the successors of the Apostles, are united among themselves' (Canon 330). The Roman Pontiff, in turn, 'in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the Pastor of the universal Church on earth'. For that reason, 'by virtue of his office he possesses supreme, full, immediate, and universal ordinary power, which he is always able to exercise freely' (Canon 331). Therefore, by virtue of his office, the Roman Pontiff not only exercises authority over the whole Church, but also has the primacy of ordinary power over all particular Churches and their groupings, whereby his proper, ordinary and immediate authority – which bishops in the particular Churches entrusted to their care possess – is confirmed and protected (Canon 333 § 1).

The fullness of power of the Roman Pontiff is manifested, among others, by the fact that he is the supreme judge in the Church, above the structure of the ecclesiastical judiciary, and 'no appeal or recourse is permitted against a sentence or decree of the Roman Pontiff' (Canon 333 § 3). This means that his sentences are final, while particular Churches vest the power to judge in the diocesan bishop and the superiors of structures equal in law to the diocese. The Roman Pontiff and the diocesan bishop – by divine law – are judges by the very fact of holding their offices (Canon 1417 § 1 and Canon 1419 § 1).[24]

The Pope's powers in the appointment of state officials has obvious implications for securing the independence of certain state officials, such as the judiciary.

The Pope's role in appointing officials prior to 2023

The Fundamental Law of 1929 stipulated that the governor was to be appointed and dismissed by the Roman Pontiff, and that he answered solely and directly to the Pope (Art 7). A corresponding regulation was introduced for the State

[23] Legge fondamentale dello Stato della Città del Vaticano (13 May 2023), <https://www.vatican.va/content/francesco/it/motu_proprio/documents/20230513-legge-fond-scv.html>, accessed 10 April 2024.

[24] Z Grocholewski, 'Zasady inspirujące Księgę VII "de processibus" KPK' (1999) 4 *Ius Matrimoniale* 155.

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Counsellor General (Art 8). The Pope also had the exclusive right to nominate and dismiss judges (Art 10). The Law on the System of Administration of 7 June 1929 provided that the Pope was free to rescind each administrative act that is contrary to laws, general or special rules of procedure (Art 2). Significantly, pursuant to this legislation, the State Counsellor General, judges and judicial officers did not have to assume Vatican citizenship (Art 8),[25] and anyone performing any function in the Vatican City State had to take an oath of fidelity. By taking the oath one pledged allegiance to the Roman Pontiff, to closely follow his ordinances, orders of superiors, state laws, and to diligently discharge the duties of one's office (Art 14).

The 1946 judicial rules of procedure also required all judges to take, before accepting office, an oath of fidelity, in which they pledged to obey the Roman Pontiff and to carry out their duties with diligence and loyalty, as well as to maintain office confidentiality (Art 13). The obligation to take an oath in the same formula was replicated in Art 9 of the 1987 Law on the Judicial System of the Vatican City State, which defined the position of Vatican judges.

When reviewing the history of the Vatican legal order, we see the development of guarantees of judicial independence over time. However, this does not mean that, before these guarantees were in place, the Pope had the right to order a judge to give a specific ruling on a case. The Pope may decide any case himself, but he is to do so personally. He is not, and never has been, entitled to instruct a judge or even less to order him to make a particular decision. Besides, in practice, Popes exercise their authority very reticently, leaving the administration of justice or the issuing of administrative decisions to the authorities appointed for this purpose.

The 2023 reforms

By contrast, according to the current 2023 Law on the Judiciary, judges are hierarchically subordinated to the Pope, but in the performance of their duties they are bound only by the laws (Art 2(1)), and while in office they are citizens of the Vatican City State (Art 4). In so doing, the Vatican legislator resolved not to specify the manifestations of jurisdictional activity, introducing a general formula whereby judges are subject only to the laws whenever they perform their function. What is new here, importantly, is the obligation to exercise judicial authority in an impartial manner, on the basis and within the limits established by the law (Art 2(2)). Guarantees of judicial impartiality – besides the right of defence and the adversarial nature of parties to a trial – are also included in the current Fundamental Law (Art 21(4)).

The current Fundamental Law also contains guarantees of the stable performance of the judicial office. Judges may lose their office only through voluntary surrender or in other cases provided for in the law in question (Art 2(3)). The surrender of the judicial office is effective provided that the Pope consents (Art 10(3)). Additionally, at the end of the judicial year, judges who turn 75 are required to submit their resignation, but it takes effect only after

[25] This rule was changed by the judicial rules of procedure of 1946.

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the Pope's approval (Art 10(1)). In so doing, the Pope may order judges to continue their service (Art 10(2)) and may dismiss – even temporarily – a judge who has been found unable to serve (Art 10(4)).

The current Fundamental Law also introduced solutions intended to secure the economic independence of judicial authorities. Pursuant to Art 3(2), these organs enjoy autonomy in spending the funds allocated for their activities. This autonomy is limited by the State's accounting regulations. The remuneration of ordinary judges is determined by the Commission (Art 11(1)). While the Commission – in its exercise of legislative and executive authority in the name of the Roman Pontiff – is responsible for regulating the legal status of judges and the rules for the exercise of their functions, this in no way implies the possibility of influencing their adjudicatory capacity.[26] In contrast, trainee judges receive an annual salary determined by the president of the Tribunal (Art 11(2)). The law of March 2020 law granted the Vatican's judicial authorities the option to directly use the judicial police (Art 3(1)). In addition, in 2023, Pope Francis extended the financial guarantees for judges, especially with regard to their retirement pension.[27]

Ordinary judges of the Tribunal are appointed by the Pope (Art 8(1)), chiefly from among professors (including retired ones) of juridical sciences. In every case, judges must enjoy good reputation and have a proven track record of representing parties or adjudication in civil, criminal or administrative cases (Art 8(2)). An employee of the Holy See or the Governorate of the Vatican City State cannot be appointed judge – these positions cannot be combined (Art 8(4)). Interestingly, in keeping with the criteria indicated here, should a 'special need' arise, the Pope has the option to appoint one or more trainee judges for a period of three years (Art 8(3)). Qualifications of candidate judges are verified by the Secretariat of State, which also submits nomination proposals to the Pope (Art 8(5)).

In any case, the evolution of legislation and the structure of the Vatican's authorities to date clearly indicates that the State is drawing increasingly on the principles underlying modern democratic states, especially relating to guarantees of individual rights, church–state separation, and the operation of governmental agencies within the limits of the law. The 2023 Fundamental Law declares that the Vatican City State is separate from the Roman Curia and other institutions of the Holy See (Art 2(2)), with the proper functions of the state performed by the Governorate of the State on the basis of laws and other normative dispositions (Art 2(3)).

These reforms now lead to a clear position that the Roman Pontiff, who possesses full legislative, executive and judicial powers, can independently take advantage of all the attributes of governing power, but does not have the right

[26] See G Dalla Torre, 'L'indipendenza della giustizia vaticana Note sui magistrati addetti al Tribunale' (2019), *Stato, Chiese e pluralismo confessionale. Rivista telematica* (www.statoechiese.it), 25, 28.

[27] Francesco, *Lettera Apostolica in forma di <motu proprio> recante modifiche alla Legge sull'ordinamento giudiziario, alla Legge recante disposizioni per la dignità professionale e il trattamento economico dei magistrati ordinari del Tribunale e dell'Ufficio del Promotore di giustizia e al Regolamento Generale del Fondo Pensioni*, <https://www.vatican.va/content/francesco/it/motu_proprio/documents/20240327-motu-proprio.html>, accessed 23 May 2024.

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to directly interfere in the operation of various state bodies, for example, by instructing the tribunals to issue a particular ruling. This does not change the fact that by taking up an office in the Vatican City State, a person undertakes a duty of loyalty to the Pope (which entails a kind of loyalty rather than submission to the personal will of the Roman Pontiff).[28] The 'duty of loyalty' to the Holy See implies a ban on conduct that is inconsistent with the fundamental principles of Catholic morality, protected by Vatican laws, and harmful to the objectives and interests of the State.[29]

The 2023 reforms indicate that the development of Vatican legislation is evidently evolving towards further-reaching guarantees of autonomy for bodies exercising state power, especially the judiciary.

The rule of law and Vatican City State

The Vatican City State – especially as an enclave within the territory of Italy and, by extension, within the European Union, and as a recognised actor of international relations that supports the need for human rights protection – necessarily grapples with the paradigm of the rule of law. The idea of the rule of law is currently present in the official teaching of the Catholic Church, and its formulation owes much to those Popes who were also the sovereign of the Vatican City State. For example, the *Compendium of the Social Doctrine of the Church*[30] quotes the teaching of John Paul II in his encyclical *Centesimus Annus*, according to which 'it is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the "rule of law", in which the law is sovereign, and not the arbitrary will of individuals' (para 408).

The idea of the rule of law can be traced as far back as ancient Greek philosophy, in which it was understood as the subordination of citizens to the legal norms established and observed by them. To simplify – given the scope of this article – let us note that already in the early stages of philosophical reflection on law, the rule of law was considered not so much as the mere observance of the law, regardless of its content, but some idea of law understood as the basic regulator of social life, serving such fundamental values as peace and justice.[31]

It is worth observing here that even scholars who reject the claim that the idea of the rule of law has pre-modern origins, instead tracing it to 18th century German academia, agree that one of the pillars of this concept was the assumption that the purpose of the state is the fullest possible realisation of all

[28] See for example Art 18 § 1 Decreto della Pontificia Commissione per lo Stato della Città del Vaticano con il quale è promulgato Regolamento Generale per il personale del Governatorato dello Stato della Città del Vaticano (21 November 2010), AAS suppl. 24 (2010), 93–164,

[29] See C Ventrella, 'La Corte d'appello dello Stato della Città del Vaticano e alcuni aspetti della sua competenza in materia disciplinare' (2017) 2 *Diritto e Religioni* 268.

[30] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, <https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html>, accessed 27 April 2024.

[31] See M Burnay, *Chinese Perspectives on the International Rule of Law Law and Politics in the One-Party State* (Leuven, 2018), 11–44.

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'human capabilities' and ensuring the harmonious co-existence of its citizens. This concept is closely related to Grotius' concept of natural law, which pre-supposes the centrality of man's nature and his understanding of right and wrong, and rationalism expressing man's ability to make the right decisions according to a rational discernment of the social order.[32] In any case, while the theory of the rule of law was developed in opposition to the assumptions of the absolutist state, the idea of the rule of law itself is much older, as demonstrated, for example, by an idea – strongly advocated in the Middle Ages – that both rulers and subjects are obliged to preserve the 'good old law' as sanctioned by tradition.[33]

Our present understanding of the rule of law derives largely from concepts developed in English, American and German constitutionalism, hence based on both positive law and precedents. In the English legal tradition the essence of the rule of law is the assurance of limits to the sovereign's influence on the making of legal norms through Parliament and the creation of mechanisms, exercised by impartial courts, for the objective control of the legality of the activities of the government and its functionaries.[34] In the German tradition, on the other hand, the idea of the rule of law, or rather the 'state of law' (*Rechtsstaat*), can be reduced to a firm acceptance of the need to preserve the separation of powers and the equality of all subjects before the law, and at the same time the state's robust position as the maker of legal norms governing the rights and freedoms of its citizens.[35] On this account, the rule of law is understood as a way of exercising power based on legal orders that possess such attributes as generality, prospectivity, non-contradictoriness, feasibility and stability.[36]

Nowadays, from the principle of rule of law, one infers specific principles such as: the stipulation of a punishable act in the law, the definiteness of the elements of a prohibited act, the ban on retroactive application of the law, and the prohibition of analogy in criminal proceedings;[37] in the ECHR jurisprudence, the principle of the rule of law includes the predictability of the decisions issued by authorities, legal certainty, equality of individuals before the law, the right to appeal to the court and the right to a fair trial.[38]

These ideas are also found in the Church's present Magisterium. By referring to the teaching of Leo XIII in his encyclical *Centesimus Annus*, Pope John Paul II stated that the proper organisation of state authorities is a condition for ensuring the

[32] M Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian "Tradition"' (2019) 1 *European Journal of International Law* 30.

[33] See A M Kuskowski, 'The Time of Custom and the Medieval Myth of Ancient Customary Law' (2024) 1 *Speculum* 163.

[34] B Z Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 237–239.

[35] See B Z Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge, 2004), 114–126.

[36] J Filipkowski, 'Praworządność', in *Encyklopedia Katolicka*, vol. 16 (Lublin, 2012), coll 316–317.

[37] A Sarais, 'La legislazione penale vaticana: principi e linee evolutive, anche in raffronto al diritto canonico' (2014) 1–2 *Il Diritto Ecclesiastico* 305.

[38] D Melkonyan, 'Concept of the rule of law in the case-law of the European Court of Human Rights' in G Ghanizyan and A Haykyants and Y Kirakosyan (eds), *Materials of Conference Devoted to 80th Anniversary of the Faculty of Law of the Yerevan State University* (Yerevan, 2014), 340.

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development of human activities. The *trias politica* model was considered such a system as corresponding to a realistic vision of the social nature of man, which, according to John Paul II, requires adequate legislation to protect the freedom of all. In this context, the Pope stated in his encyclical that the rule of law principle involves granting supreme authority to the law and not to the volatile rule of people, while ensuring mutual balancing by state authorities, which have different scopes of competence. Simultaneously, John Paul II strongly emphasised that the law must affirm values based on a transcendent truth, which is the only principle that can ensure the fairness of human relations. This argument was developed by Benedict XVI, who, while speaking at the UN headquarters on 18 April 2008, stated: 'Experience shows that legality often prevails over justice when the insistence upon rights makes them appear as the exclusive result of legislative enactments or normative decisions taken by the various agencies of those in power'.[39] For the Catholic Church, the idea of the rule of law is first and foremost a means of protecting one of the fundamental values, which is human dignity.[40] Thus, in the light of the Church's teaching, only those acts that relate to justice can be considered laws – which, in turn, means that on canonical grounds the rule of law does not involve a formal dependence between norms, but above all their compliance with Church's teaching.[41]

At the same time, the Holy See is committed to promoting the idea of the rule of law at the United Nations, pointing out, among other things, that this idea 'is the mechanism by which international organisations and national governments are called upon to ensure the effective recognition of the dignity of all persons regardless of their social, economic or political status'. According to the Holy See:[42]

> the rule of law must be based on a unified and comprehensive vision of the human person, appreciating the complexity and richness of the interrelationships between people and ensuring the certainty and stability of the legal relations created in communities through a broadly harmonious set of rules and institutions.

The 1917 Code of Canon Law did not express the principle of the rule of law explicitly, but we can find elements of it in Canons 10, 19–20 and Canon 2195 §

[39] Benedict XVI, *Allocutiones ad delegatos Nationum Unitarum*, <https://www.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit.html>, accessed 1 October 2023.

[40] S F Fischer, 'Catholic Social Teaching, The Rule of Law, and Copyright Protection' (2009) 1 *Journal of Law, Philosophy and Culture* 66.

[41] See J Carlos and M Erràzuriz, *Corso fondamentale sul diritto nella Chiesa. Introduzione i soggetti ecclesiali di diritto* (Milano, 2009), 132.

[42] Intervention of the Holy See at the 63rd session of the UN General Assembly on 'The rule of law at the national and international levels', statement by HE Archbishop Celestino Migliore, permanent observer of the Holy See, New York, Tuesday 14 October 2008, <https://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081014_rule-of-law_en.html>, accessed 27 April 2024.

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1.[43] Canon 10 – paralleled by Canon 9 CIC/83 – provides that laws refer to the future, not the past, unless they explicitly stipulate about past things. According to Canon 19 CIC/17, criminal laws restricting a right or creating exceptions were subject to strict interpretation. Canon 20 CIC/17 established the principle that in the absence of an express prescript on a given matter, it was necessary – except in matters concerning the application of a penalty – to surmise the law by (1) reference to laws concerning similar cases, then (2) the general principles of law observed with canonical equity, then (3) the style and practice of the Roman Curia, and then finally (4) the general opinion of scholars. Furthermore, Canon 2195 § 1 contained a definition of 'delict' as an external and 'morally imputable violation of a law to which a canonical sanction, at least an indeterminate one, is attached'. Such interventions are well summarised by Pope Francis' assertion that the principle of the rule of law is intended to serve the realisation of justice, which is the basis for the construction of universal fraternity.[44]

In the doctrine developed before the Vatican State's current Fundamental Law became effective, the rule of law principle and the closely related principle of the right to a fair trial are inferred in the 1983 Code from Canons 221[45] and 38.[46] The former – absent from the 1917 Code – stipulates that the faithful have the right to legally assert their rights in the Church and defend them 'in the competent ecclesiastical forum, according to the norm of law' (Canon 221 § 1). In addition, if summoned before the court by the competent authority, the faithful also have the right to be tried with the provisions of the law, applied in adherence to the equity principle (Canon 221 § 2). Essentially, then, this canon articulates the principle of due process, based on pursuit of truth, the determination of which is crucial for an accurate judgment.[47] Also, the faithful have the right 'not to be punished with canonical penalties except according to the norm of law' (Canon 221 § 3). Canon 38 of the current Code of Canon Law addresses the issue of administration in the Church. It follows that an administrative act, even if it is a rescript issued *motu proprio* (that is, on the personal initiative of the Pope), 'lacks effect insofar as it injures the acquired right of another or is contrary to a law or approved custom, unless the competent authority has expressly added a derogating clause'. A right of the faithful that can also be successfully applied in the Vatican City State is the right to a good name and protection of privacy (Canon 220).

However, when analysing the criteria for the legitimacy of the activities of the Vatican City State authorities, we should not omit Canon 135 CIC/83, which is

[43] P Sadowski, *Il principio di legalità nel diritto penale canonico* (Roma, 1999), typescript held by the Library of the Pontifical Gregorian University in Rome, 86.

[44] Meeting with the Members of the General Assembly of The United Nations Organization, *Address of the Holy Father*, United Nations Headquarters, New York, Friday 25 September 2015, <https://www.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150925_onu-visita.html>, accessed 27 April 2024.

[45] G Dalla Torre, *Lezioni di diritto vaticano* (Torino, 2018), 51, 77.

[46] Arrieta (note 22), 174.

[47] See G Boni, 'Il diritto penale della Città del Vaticano. Evoluzioni giurisprudenziali' in G Dalla Torre and G Boni, *Il diritto penale vaticano. Evoluzioni giurisprudenziali* (Torino, 2014), 98–99.

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currently the basic regulation of the power of governance, which should always be exercised 'in the manner prescribed by law'. In the case of the legislative branch, the possibility of delegating power by the subordinate legislator is generally precluded. Nor can it pass a law that is contrary to a higher law (Canon 135 § 2). Judicial power, which judges or judicial colleges possess, must be exercised in the manner prescribed by law and cannot be delegated except to perform acts preparatory to some decree or sentence (Canon 135 § 3).

In addition, principles underpinning the rule of law were incorporated into the Vatican legal order with the adoption of the Italian Penal Code of 1889.[48] According to its Articles 1 and 2, no one could be punished for an act that was not expressly defined as an offence by the law in effect at the time of its commission. The law also specified penalties applicable to a particular offence.

In this respect, Vatican law notes that the Enlightenment interpretation of the rule of law principle (*principio di legalità*) – the binding by the law of the organs of state authority to protect the rights and freedoms of man in his relationship with the sovereign – cannot be easily transferred to the reality of the Vatican City State, mainly owing to its unique nature. In this State, the fullness of legislative, executive and judicial power is vested in the Roman Pontiff, who nonetheless cannot be considered an absolute ruler. Just like all those subject to the jurisdiction of the Vatican City State, he must abide by divine law, both natural and positive. On the other hand, the formal compliance of the actions taken by the authorities with the laws is not sufficient to effectively guarantee personal rights; far more important in this regard is the application the principles of natural justice through these laws.[49]

For these reasons, Dalla Torre argues persuasively that the Vatican City State – despite the absoluteness of its system – meets the basic requirements for the rule of law.[50] This follows from the fact that the Pope does not independently exercise all the competences of the legislative, executive and judicial powers – at the same time, their exercise by the organs appointed for this purpose is strictly defined in laws, which in turn prevents arbitrariness in the exercise of power.[51] For this reason, the 'fullness' of the Pope's authority in the Vatican City State can by no means imply its arbitrary exercise – both in law-making and adjudication of specific cases. Besides, all the Vatican City State bodies, acting in the name of the Pope, do that only within the limits of their statutory competences, which – as rightly noted back in the 1930s by Federico Cammeo – allows the Vatican City State to be called a 'legal state'. After all, in democratic systems of government, too, it is widely accepted that the head of state, for example, has power of

[48] See F Caponnetto, 'In margine al deficit di "tassatività" nel diritto penale vaticano e confronto con altre esperienze giuridiche' in R Granata and FS Rea (eds), *Diritto vaticano e diritto secolare. Autonomia e rinvii tra ordinamenti giuridici* (Stato della Città del Vaticano, 2020), 18; P A Bonnet, 'Lo spirito del diritto penale vaticano' (2015) 2 *Ephemerides Iuris Canonici* 352.

[49] See Sarais (note 37), 304–305.

[50] Dalla Torre (note 45), 54–55.

[51] A Vitalone, 'Il Pontefice sovrano dello Stato della Città del Vaticano' (2007) 1 *Diritto e Religioni* 332.

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clemency, which is in many ways parallel to the Pope's power to personally decide any case.[52]

In this context, as discussed above, significant changes to the Vatican legal order were introduced by the Fundamental Law in May 2023, which makes several references to categories pertaining to the rule of law. We saw that this now includes that functions proper to the state are performed by the Governorate of Vatican City State on the basis of laws and other normative dispositions; the Pontifical Commission for Vatican City State exercises its powers on the basis of laws and other normative dispositions; and judicial impartiality has been guaranteed.

On this account, it is clear that practically all organs of power of the Vatican City State are now required to act within legal norms. However, the legitimacy of their operation must always be assessed by referring, first and foremost, to canonical norms, taking into account the Church's teaching – especially its moral and social dimensions – and, in the second place, the norms of Vatican law, including those that have been adopted in this order from Italian and EU legislation.

Conclusion

The Vatican City State, as the Lateran Treaty makes clear, was created to ensure the independence of the Holy See. At the same time, the legal system of this State is based on canon law, which in turn can never contradict the teaching of the Catholic Church. The problem of assessing the legality of the action of the authorities of the Vatican City State must be assessed in this context. First and foremost, such institutions are obliged to respect – fundamental to canon law – the norms of divine (natural and revealed) law. Statutory law, in force in the Vatican City State, must also always be in conformity with them.

In the Vatican City State, the Pope exercises his authority through bodies established for this purpose, having strictly defined competences for their legislative, executive and judicial functions. The 2023 Fundamental Law, by virtue of the principle of the separation of the Vatican City State from the Roman Curia and other organs of the Holy See, significantly affirms the independence of the State's organs. While power itself in the Vatican City State is homogeneous, there is a clear tri-partite division of its functions – with ever-growing guarantees of the independence of judicial authorities, and the canonical–secular dichotomy.

The fullness of legislative, executive and judicial power rests with the State's sole sovereign, the Roman Pontiff. But this does not mean that his authority is unlimited. From the canonical perspective, the Pope's exercise of this authority is constrained primarily by divine law and Church doctrine. Canon law incorporates the basic content that provides for the modern idea of the rule of law, such as no retroactivity, the need for a statutory determination of the elements of a criminal act, the functioning of state authorities only on the basis

[52] F Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano. Ristampa anastatica 1932* (Stato della Città del Vaticano, 2005), 78–79.

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of the law, and the possibility for legal subjects to legally assert their rights before an impartial tribunal. The current Fundamental Law of May 2023 explicitly expresses such guarantees as the impartiality of the court and the adversarial nature of the parties to proceedings. This shows the direction in which the Vatican legal order is evolving, set by principles which underpin the rule of law.

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