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A PERSPECTIVE FROM ITALY

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The Administrative Law of the Roman Catholic Church.
A Comparative Inquiry

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The New Public Law in a Global (Dis)Order – A Perspective from Italy

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a "Call for Papers" and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of "Administrative Law," "Constitutional Law," or "International Law," but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper.
The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*
Sabino Cassese, *Judge of the Italian Constitutional Court*

Prologue:
The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals ("Rivista trimestrale di diritto pubblico" and "Giornale di diritto amministrativo"). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled "The New Public Law in a Global (Dis)Order – A Perspective from Italy" – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[♦].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*
Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*
Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

♦ Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D'Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo: Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at http://www.irpa.eu/index.asp?idA=302.

THE ADMINISTRATIVE LAW OF THE ROMAN CATHOLIC CHURCH. A COMPARATIVE INQUIRY

By Edoardo Chiti*

Abstract

This paper proposes a comparative inquiry on differences and similarities between two bodies of administrative law: the administrative law of the Roman Catholic Church - an institution that combines elements typical of legal-rational authorities with a number of charismatic and traditional features - and the administrative laws of those States and regulatory systems beyond the State that are mainly legal-rational in nature. The comparison between canon administrative law and the administrative laws of mainly legal-rational regimes is developed by considering four inter-connected aspects: i) their process of emergence and development; ii) their constitutive «materials»; iii) their position within the legal order; iv) their overall explanatory paradigms. The inquiry reveals that canon administrative law is based on a complex combination of religious and statal elements, which gives rise to an unstable regulatory framework crossed by several internal tensions. On a more general level, the comparative inquiry sheds some light on the links between the features of administrative law and the types of power (legal-rational power, charismatic power and traditional power) that the administrative law serves and regulates.

* Professor of Administrative Law, University of La Tuscia, Italy, edoardo.chiti@libero.it. An earlier draft of this paper has been presented at the Institute for Research on Public Administration (IRPA) and New York University Jean Monnet Center Seminar "The New Public Law in a Global (Dis-)Order. A Perspective from Italy" (New York, September 19/20 2010). The Author would like to express his gratitude to the participants to the Seminar, and mostly to the discussants of the paper, Professors Benedict Kingsbury and Joseph H.H. Weiler, who have commented critically and helpfully on many aspects of the argument developed in the paper. The usual disclaimer applies.

TABLE OF CONTENTS

1. **Terms and Purpose of a Comparative Inquiry**

In the last years, comparative administrative law has reached a previously unknown breath and extension, exemplified by the *Comparative Administrative Law* volume edited by Susan Rose-Ackerman and Peter L. Lindseth, where comparisons of the United States, continental Europe, and the British Commonwealth are complemented by contributions focusing on the European Union (EU), Latin America, Africa, and Asia.[1]

Yet, the administrative laws of certain legal systems continue to escape comparison. This is the case, among the others, of the administrative law of the Roman Catholic Church.[2] Administrative law scholars, traditionally linked to the experience of the administrative State, have paid little if no attention to the administrative law of the Roman Church. And in some cases they have even called into question its very existence.[3] Canon law scholars, on their side, got increasingly engaged in the reconstruction of the features of the Church administration, as well as in the development of the main chapters of the administrative law governing its functioning. This engagement has given rise to an abundant production, as testified by the several monographs and handbooks produced in the last five years.[4] The administrative law of the

[1] S. Rose-Ackerman and P. L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar, Cheltenham, UK Northampton, MA, USA, 2010).

[2] This expression is used here and throughout the paper to refer to a specific segment of the Christian Church. As a whole, the Christian Church includes the orthodox churches, the oriental non-Chalcedonian churches (that do not accept the Council of Chalcedon of 451), the ramificated world of the churches of the reformation and the Catholic Church. The latter, on its turn, is articulated in two great traditions, that of the Western Church – the so called Roman Catholic Church - and that of the Eastern Catholic Churches. These two traditions differ one from the other not only as far as liturgies are concerned, but also as for the law governing their functioning (as it is exemplified by the existence of two different codes of canon law).

[3] In the Italian scholarship, for example, the inexistence of an administrative law of the Roman Catholic Church was argued by one of the most influential administrative lawyer of the XXth century, Massimo Severo Giannini. In his *Diritto amministrativo* (Giufrè, Milano, 3d ed., 1993) vol. 1, p. 87, Giannini writes that «il diritto canonico non conosce un diritto amministrativo, né un'attività amministrativa giuridicamente propria; vi è invece un'organizzazione dell'ordinamento che può dirsi amministrativa in quel significato atecnico e improprio che abbiamo trovato negli ordinamenti generali anteriori al sorgere degli Stati».

[4] *See*, for example, I. Zuanazzi, *Praesis ut Prosis. La funzione amministrativa nella diakonía della Chiesa* (Jovene, Napoli, Jovene) 2006; P.V. Pinto, *Diritto amministrativo canonico. La Chiesa: mistero e istituzione*, Bologna, Edizioni Dehoniane Bologna, 2006; and J. Miras, J. Canosa and E. Baura, *Compendio di diritto amministrativo canonico* (Subsidia Canonica, Roma, 2007); see also the less recent works by E. Labandeira, *Tratado de Derecho Administrativo Canónico* (Eunsa, Pamplona, 2d ed., 1993), and F. D'Ostilio, *Il diritto amministrativo della Chiesa* (Libreria Editrice Vaticana, Città del Vaticano, 1995). Among the monographic studies dedicated to specific issues

Roman Catholic Church, however, has been studied mainly *per se*, excluding any comparison with the administrative law of the State and with the emerging administrative law of regulatory systems beyond the State, such as EU administrative law and global administrative law.

While this paper has not the ambition to fill this lacuna, it nevertheless aims at opening a comparative reflection between the administrative law of the Roman Catholic Church, on the one hand, and the administrative law developed within the State and in the legal systems beyond the State, on the other.

Admittedly, this comparative attempt presents many pitfalls, which makes it necessary to clarify the terms of the comparison as well as its purpose.

As for the terms of the comparison, the administrative law of the Roman Catholic Church is here considered from a specific angle, i.e. as a body of law governing the functioning of a multi-faceted power, which combines elements that are typical of legal-rational authorities with a number of traditional and charismatic features.[5] Several aspects should be highlighted in this regard. *Firstly*, the Roman Catholic Church is not to be reduced to the State of Vatican City or to its governing institution, the Holy See, but it may rather be represented as the organized community of the believers. Such community is worldwide spread out, is regulated by a complex body of law, and finds in the Vatican its highest institution.[6] It is called to carry out many

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of canon administrative law, see, for example, A. Bettetini, *Il silenzio amministrativo in diritto canonico* (Cedam, Padova, 1999); J.I. Arrieta, *Diritto dell'organizzazione ecclesiastica* (Giuffrè, Milano, 1997); and the works concerning judicial review, such as P. Moneta, *Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico. I. Profili di diritto sostanziale* (Giuffrè, Milano, 1972); and R. Bertolino, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico* (Giappichelli, Torino, 1983) p. 53 et seq.

[5] The reference is obviously to the ideal types of power developed, with reference to the experience of the State, by Max Weber in his *Theory of Social and Economic Organization* (Oxford University Press, New York, 1947), p. 328 et seq. (originally published in 1922).

[6] The legal nature of the Roman Catholic Church has been debated by the Italian public law science since the early Thirties of the XXth century: see, in particular, the contributions by F. Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano* (Bemporad, Firenze, 1932, reprinted by Libreria Editrice Vaticana, Roma, 2005); and P.A. d'Avack, "Il rapporto giuridico fra lo Stato della Città del Vaticano, la Santa Sede e la Chiesa Cattolica", in *Chiesa e Stato: studi storici e giuridici per il decennale della conciliazione tra la Santa Sede e l'Italia* (Vita e Pensiero, Milano, 1939) vol. II, p. 67 et seq.; among subsequent contributions, see in particular A.C. Jemolo, *Chiesa e Stato negli ultimi cento anni* (Einaudi, Torino, 3 ed., 1971). The debate on the legal nature of the Roman Catholic Church has been accompanied by the discussion on its international subjectivity, referred by some authors to the State of Vatican City or to its highest governing institution, the Holy See (A. Gioia, *Manuale breve di diritto internazionale* (Giuffrè, Milano, 2006) p. 290 et seq.; and S.M. Carbone, "I soggetti e gli attori nella comunità internazionale", in

functions, ranging from the administration of sacraments to the management of properties, but the heart and the centre of its mission lies in the perpetuation, transmission and renovation of the teachings and memories, at the same time historical and faithful, of Jesus Christ.[7] *Secondly*, the Roman Catholic Church can be considered as a multi-faceted power because its foundation and functioning are partly legal-rational, partly traditional, and partly charismatic. The Roman Church is partly legal-rational as it does rationally pursue a number of objectives defined by its institutions and it operates within the limits and boundaries established by legal principles and rules. At the same time, it is partly traditional because it is essentially oriented to the transmission of a set of teachings and memories throughout history, and its highest institutions find in tradition one important source of legitimacy. And it is partly charismatic in the specific sense that it decisively relies on a supernatural, superhuman, divine force, represented by the Holy Spirit. *Thirdly*, the legal-rational, traditional and charismatic features do not simply co-exist in parallel, one next to the others, but they are combined together in several ways and give place to an intricate and nuanced pattern. For example, the provision by the Church of a service of transmission of memory and faith is a very rational task, which is regulated by rules that may be rediscussed and modified. But its legal regulation also assumes that the process of communication of memory and faith is possible only in so far as it is sustained by the

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S.M. Carbone, R. Luzzatto and A. Santa Maria (eds.), *Istituzioni di diritto internazionale* (Giappichelli, Torino, 3d ed., 2006) p. 3 et seq., p. 23), and by other authors to the Church as an organized community operating in a variety of ways in the international community (see, for example, B. Conforti, *Diritto internazionale* (Editoriale Scientifica, Napoli, 5th ed., 1997), p. 30).

[7] The clearest indications are provided by the Second Ecumenical Council of the Vatican, which identifies the fundamental purpose of the Church in the communication of the historical and faithful memory of Jesus Christ. This service implies both an activity of evangelization, consisting in the announcement and testimony of Christ, and the pastoral care of the believers, through spiritual assistance and the administration of sacraments. See, for example, the Dogmatic Constitution on Divine Revelation *Dei Verbum*, promulgated by Pope Paul VI on November 18, 1965, according to which the office of the Church «serves it [the word of God], teaching only what has been handed on, listening to it devoutly, guarding it scrupulously and explaining it faithfully in accord with a divine commission and with the help of the Holy Spirit» (§ 10); see also the overall construction of the Dogmatic Constitution on the Church *Lumen Gentium*, promulgated by Pope Paul VI on November 21, 1964; among the various encyclical, see the encyclical by Pope John Paul II, *Redemptoris Missio. On the permanent validity of the Church's missionary mandate*, published on December 7, 1990. This interpretation of the mission of the Church is confirmed by the most accomplished theological reflection, which identifies in a communicative process the functional foundation of the Church; see, in particular, the overall work by Severino Dianich, ideally synthesized in his *Trattato sulla chiesa* Queriniana, Brescia, 2002).

transcendent force of the Holy Spirit. This is the perspective, just to make one example, of the Dogmatic Constitution *Lumen Gentium*, where the function of the Church is constantly interpreted within the context of an essentially mystical experience driven by the Holy Spirit.[8] Analogously, the Church's ways of functioning are mainly governed by a body of law, the canon law, made up of positive rules. But such rules recognize to some ministries a charisma-based authority, as it happens in the case of bishops, who «are to be respected by all as witnesses to divine and Catholic truth [...], speak in the name of Christ and the faithful are to accept their teaching and adhere to it with a religious assent».[9] And part of canon law is considered to have a divine, supernatural foundation.

Also the second term of the comparative inquiry - the administrative law developed within the State and in the legal systems beyond the State - is considered in this paper from a specific angle, i.e. as a body of law governing the functioning of powers that are not less differentiated and multi-faceted than the Church, but in which the legal-rational dimension prevails over the traditional and charismatic features. This is certainly the case of the EU and the emerging global regulatory systems, that are mainly legal-rational powers in so far as their existence and functioning are legitimated and oriented essentially by a complex set of legal provisions and practices. Admittedly, the experience of the modern and contemporary State is a much less clear-cut one. States often combine legal-rational features with traditional and charismatic characteristics, as it is demonstrated not only by theocracies, but also by the many western democracies referring in their constitutional charters to supernatural forces such as the Holy Trinity, the Divine Lord Jesus Christ, and God. Yet, administrative law has originally emerged, has gradually consolidated and has been fully exploited within the context of administrative States, in continental Europe and in Northern America, that have historically tended to minimize

[8] Dogmatic Constitution on the Church *Lumen Gentium*, cit. See, among the many relevant passages, § 4, where it is stated that the «Spirit dwells in the Church and in the hearts of the faithful, as in a temple. In them He prays on their behalf and bears witness to the fact that they are adopted sons. The Church, which the Spirit guides in way of all truth(15) and which He unified in communion and in works of ministry, He both equips and directs with hierarchical and charismatic gifts and adorns with His fruits.(16) By the power of the Gospel He makes the Church keep the freshness of youth.Uninterruptedly He renews it and leads it to perfect union with its Spouse».

[9] Dogmatic Constitution on the Church *Lumen Gentium*, cit., § 25.

their traditional and charismatic features in favour of their legal-rational dimension. While recognizing the huge complexity and diversity of State arrangements, it is such specific experience that will be considered in the paper.

The comparative inquiry which is proposed in this paper is therefore animated by a fundamental distinction: that between, on the one hand, a composite, multi-faceted power, the Roman Catholic Church, which is partly legal-rational, partly traditional, and partly charismatic, and on the other hand, powers that are mainly legal-rational, exemplified by the national systems where administrative law has developed and reached its full maturity and by the emerging regulatory systems beyond the State. To what extent does the administrative law of the Roman Catholic Church correspond to the administrative law developed, respectively, within those States and regulatory systems beyond the State that are mainly legal-rational in nature? And to what extent does it differ from them? Does the administrative law of the Church reflect their values, techniques and principles of administrative laws? Or does it rather develop its own peculiar set of instruments? And what are the reasons explaining similarities and differences?

The purpose of such comparison is twofold.

Firstly, comparison could lead to a reconsideration of some usual representations of the administrative law of the Roman Church. Canon administrative law is usually described in two radically alternative ways: either as a body of law based upon religious mystery, or as a body of law that can be entirely traced back to the consolidated tradition of the administrative State in Europe, and in particular to its French variant. Yet, a comparison between canon administrative law and the administrative law of mainly legal-rational regimes could show that both representations are too rudimental to give full account of the complexity of the administrative law of the Roman Catholic Church. And it could reveal a well more nuanced pattern, based on a complex combination of different elements, partly peculiar to the experience of the Church, partly in line with the tradition of the national and non-national legal systems in which administrative law has developed and consolidated.

Secondly, the proposed comparative inquiry could contribute to the wider reflection on the features of «general administrative law». In particular, it could contribute to verify how

functional administrative law is, and whether administrative law changes its features and overall patterns depending on the objectives and the self-understanding of the polity that it serves. Of course, the exploration of the functional dimension of administrative law is not at all a novelty in administrative law science. Several studies, in many different contexts, have highlighted the adaptation capacity of administrative law and its dependence on the features of the public functions to be carried out, on the under-lying interests, and even on the wider social and political context. The comparative inquiry which is proposed in this paper could develop such functional understanding of administrative law by verifying whether administrative law changes its features according to the type of power (composite power, or mainly legal-rational) that it serves and regulates or whether its basic patterns remain constant, and in either case, what possible explanations may be identified.

In order to begin a comparative inquiry between canon administrative law and the administrative law of mainly legal-rational regimes, this paper will focus on the following four questions. i) What are the elements that may explain the foundation of canon administrative law? Is it the product of forces that are similar or different from those that have led to the development of national and international administrative law? ii) Of which «materials» is canon administrative law made? Are they peculiar materials or do they reflect the various components developed within the administrative law of mainly legal-rational regimes? iii) What is the position that administrative law has taken within the Roman Catholic Church legal order? And what are the similarities and the differences with respect to the position of administrative law within the legal orders, respectively, of the State and of regulatory systems beyond the State? iv) Can the principles and rules of canon administrative law be organized around one or more overall explanatory paradigms? Do such paradigms present certain peculiar features or do they reflect to the patterns of the administrative law of mainly legal-rational regimes? And on what grounds can the analogies and differences be explained?

The effort, as these questions illustrate, is to focus comparison on certain specific aspects of the legal systems. This implies also an attempt to consider each term of the comparison as a differentiated and articulated body of law, internally based on a plurality of legal disciplines and

interpretations. And it will be necessary to take into account that canon administrative law and the administrative law developed within the State and in regulatory systems beyond the State do not represent two reciprocally impermeable realities, but have been and still are called to dialogue and interact in many different ways.

The order in which the comparative questions have been presented above corresponds to the order that will be followed in the paper. The next two paragraphs will be dedicated to identifying the elements leading to the emergence of canon administrative law (§ 2) and to describe its various components (§ 3). Then the position of administrative regulation within the Church legal order (§ 4) and the elements of its emerging overall patterns (§ 5) will be discussed. Finally, the main conclusions of the inquiry will be summarized, in order to provide some preliminary answers to the general comparative questions and to reflect on their possible implications (§ 7).

2. **The Foundation of Canon Administrative Law**

What elements have led to the emergence of an administrative law of the Roman Catholic Church? Are such elements analogous to those that have led to the birth of the administrative law of mainly legal-rational regimes? Or is canon administrative law the product of a particular set of circumstances?

The genesis of national administrative law is a well known story. National administrative law, as widely recognized in legal history studies, develops for the first time in the very specific context of the French State, with the Revolution and the Napoleonic Empire[10]. Such

[10] *See*, in particular, F. Burdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)* (Puf, Paris, 1995) p. 41 et seq.; and S. Cassese, "La costruzione del diritto amministrativo: Francia e Regno Unito", in S. Cassese, *Il diritto amministrativo: storia e prospettive* (Giuffrè, Milano, 2010) p. 3 et seq., p. 14 et seq. (originally published in S. Cassese (ed.), *Trattato di diritto amministrativo, Parte generale* (Giuffrè, Milano, 2d ed., 2003) vol. 1, p. 1 et seq., p. 11 et seq.). Other scholars, as it is well known, have stressed the continuity between the administrative experience of the *ancien régime* and the revolution, on the basis of the general interpretation provided by A. de Tocqueville in his *L'ancien régime et la révolution* (1856), now in *Oeuvres complètes* (Gallimard, Paris, 1964): see, in particular, J.-L. Mestre, *Introduction historique au droit administratif français* (Puf, Paris, 1985) p. 9 et seq. For a radically different view, identifying in East Asian law a pioneer experience, see J. Ohnesorge,

development is inherently connected to the emergence of a genuinely autonomous administrative space, that is of a set of organizations characterized by particular competences and professional skills, and carrying out a function distinct both from policy-making and from justice.[11] Moreover, administrative law develops as an instrument of a public sphere that is at the same time distinct from the private sphere and superior to it.[12] And its consolidation is heavily supported by the joint effort of an *élite* made up of judges, public officials, legal scholars and policy-makers.[13] These elements, which provide an institutional and cultural environment favourable to the birth of administrative law, are on their turn the result of a long-term process leading, through centralization, regulatory homogeneization and power specialization, to the gradual emergence of one variant of the «administrative State» in Europe.[14]

The emergence of an administrative law of the regulatory systems beyond the State is a less studied event. Its origins may be traced back to the last quarter of the XIXth century, when a number of international organizations have been set up. Some of them, designed as mechanisms

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"Administrative law in East Asia: a comparative- historical analysis", in S. Rose-Ackerman and P. L. Lindseth *supra* note 1, p. 78 et seq.

[11] On the development of a *societé administrative* and of a *bureaucratic type* in the French XIXth institutional history see P. Legendre, *Histoire de l'administration* (PUF, Paris, 1968) p. 409 et seq.; on the process of distinction of public administration from the other powers of the State see M.S. Giannini, "Profili storici della scienza del diritto amministrativo" (1940), now in M.S. Giannini, *Scritti* (Giuffrè, Milano, 2002) vol. II, p. 79 et seq.; see also E. Garcia de Enterria, "Verso un concetto di diritto amministrativo come diritto statutario", *Rivista trimestrale di diritto pubblico* (1960) 317; more recently, L. Mannori and B. Sordi, *Storia del diritto amministrativo* (Laterza, Bari-Roma, 2001) p. 201 et seq. and p. 225 et seq.

[12] On the distinction between public and private sphere, and the supremacy of the former on the latter, see S. Cassese, "La costruzione del diritto amministrativo: Francia e Regno Unito", *supra* note 10, p. 26, and G. Napolitano, *Pubblico e privato nel diritto amministrativo* (Giuffrè, Milano, 2003), p. 5 et seq.; see also L. Mannori e B. Sordi, "Giustizia e amministrazione", in M. Fioravanti (ed.), *Lo Stato moderno in Europa. Istituzioni e diritto (*Laterza, , Bari-Roma, 3d ed., 2004) p. 59 et seq., p. 73 and pp. 77-78.

[13] This aspect is highlighted by S. Cassese, "'Un des formes de l'Etat nouveau du monde' – Riflessioni sul diritto amministrativo francese", in S. Cassese, *Il diritto amministrativo: storia e prospettive*, *supra* note 10, p. 126 et seq., p. 134 et seq. On the specific contribution of legal scholarship see L. Mannori and B. Sordi, *Storia del diritto amministrativo*, *supra* note 11, p. 270 et seq.

[14] On the overall development and features of the administrative State see S. Cassese, "The Rise of the Administrative State in Europe", in A. von Bogdandy, S. Cassese and P.-M. Huber (eds.), *Ius Publicum Europaeum. Grundlagen staatlichen Verwaltungsrecht in Europa* (C.F. Müller, Heidelberg, 2011, forthcoming) vol. III, where the «cyclical» development of the administrative systems in Europe is reconstructed in all its complexity: «from common foundations to national differentiation, and then from national differentiation to unifying trends» (p. 30 of the manuscript). See also L. Mannori and B. Sordi, *Storia del diritto amministrativo*, *supra* note 11, p. 182 et seq. and p. 305 et seq.

of administrative cooperation among national authorities, are called to carry out mainly administrative tasks.[15] Some others are entrusted with policy-making functions requiring the setting up of complex administrative services that often gain on the ground a certain degree of independence from the member States.[16] In both cases, the institutionalization of the world community presents a significant administrative dimension. It brings with itself the establishment of an international administrative space, based partly on composite or a-national administrations and partly on national administrations acting as decentralised international agents. Moreover, the establishment of an international administrative space is accompanied by the gradual emergence of an international administrative regulation. Such regulation is articulated in two main components: firstly, the set of rules addressed to national administrations and affecting their domestic administrative laws; secondly, the principles and rules applying to the administrative bodies of the international organizations themselves. Admittedly, the emergence of an international administrative law is a complex event, having several possible explanations. It may be connected to the «´colonizing´ force» of national administrative law[17] and to the influence exerted by the model of the administrative State: both of them provide national policy-makers, despite the limited role played by the legal science of the period,[18] the background to consider

[15] This is the case of the so called international administrative unions, exemplified by the General Postal Union established in 1874, the Central Office for International Railway Transport established in 1890, and the International Union for the Protection of Literary and Artistic Works established in 1886. The distinguishing features of such administrations, together with the differences from certain contiguous models, such as the Rhine Commission of the Convention of Mannheim, are discussed by S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale* (Giuffrè, Milano, 2003) p. 22 et seq.; see also B. Kingsbury, N. Krisch and R.B. Stewart, "The Emergence of Global Administrative Law", 68:3-4 *Law and Contemporary Problems* (2005) 15, p. 19 et seq.

[16] The reference is obviously to the League of Nations, to its international secretariat and to the international civil service; the literature on this experience is too wide to be usefully recalled here; see however the historical reconstruction by F.P. Walters, *A History of the League of Nations* (Oxford University Press, Oxford, 1952), and the thorough analysis by S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, *supra* note 15, p. 47 et seq.

[17] To use the expression of S. Cassese, "'Le droit tout puissant et unique de la societé': Paradoxes of Administrative Law", 23 *European Public Law Review* (2011) forthcoming, § 9.

[18] The difficulties of the legal science in conceptualizing certain international public law developments in administrative law terms are highlighted by S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, *supra* note 15, p. 30 et seq.; see, however, P.S. Reinsch, "International Administrative Law and National Sovereignty", 3 *American Journal of International Law* (1909) 1; J. Gascón y Marin, "Les transformations du droit administratif international", *Recueil des cours*, 1930, 7; as well as the pioneer works by Lorenz von Stein

the establishment of an international administrative space and regulation as a necessary consequence of the process of institutionalization of the world community. But the development of an international administrative law certainly responds also to the functional exigency of setting up legal mechanisms capable of structuring and managing the problematic game of forces between the international organizations and their member States, oriented the former to the consolidation of institutional autonomy and the latter to the affirmation of national control.

The elements that have led to the development of an administrative law of the Roman Catholic Church are at least partly different from those related to the experience of national and international administrative law.

Already in the second decade of the XXth century some of the typical features of the national administrative law tradition can be found in the canon legal order. Thus, the Church can rely on a long-standing organization, at times provided with authoritative powers and taking measures addressed to other subjects. And a rudimentary system for the composition of controversies concerning administrative acts is in place. However, review is insufficiently developed, as the 1917 *Codex iuris canonici* excludes in principle the possibility to act before the Apostolic Tribunal of the Roman Rota against the ecclesiastical authorities[19] and administrative recourses are envisaged only in a limited number of expressly indicated cases[20]. These administrative elements of regulation, moreover, are not represented by the Code as an autonomous body of canon law. The consolidated function of *iurisdictio*, traditionally at the heart of the canon legal order[21], may be certainly considered multiform and ramified. But it

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cited by B. Kingsbury, N. Krisch and R.B. Stewart, "The Emergence of Global Administrative Law", *supra* note 15, p. 19.

[19] See canon 1601, which excluded action before the Roman Rota against «Ordinarium decreta». The canon rejected several proposals put forward at the beginning of the century and oriented to enhance judicial review of the measures of the Church authorities. On the case-law of the Roman Rota, that did not interpret its role under the new Code restrictively, see C. Bernardini, "Problemi di contenzioso amministrativo ecclesiastico specialmente secondo la giurisprudenza della S.R. Rota", in *Acta Congressus iuridici internationalis (12-17 novembre 1934)* (Apud Custodiam Librariam Pont. Instituti Utriusque Iuris, Roma, 1937) IV vol., p. 357 et seq.

[20] See, for example, canon 2142 et seq., concerning the removal of parish priests.

[21] A reconstruction of the historical evolution of the notion of *iuridisdictio* in the Church legal order is provided by I. Zuanazzi, *Praesis ut Prosis. La funzione amministrativa nella diakonía della Chiesa*, *supra* note 4, p. 93 et seq.

nevertheless maintains a unitary character, absorbing in itself administrative rules and institutions.

The emergence of a canon administrative law is thus a more recent phenomenon. More precisely, it is the result of the complementary action of two different forces that have been at work within the canon legal order since the early Sixties.

The first force is scientific reflection. With growing explicitness, since the Sixties a part of canon law science has begun to suggest that an autonomous administrative function exists within the Church legal order.[22] Moreover, both through legal interpretation and proposals of reform, this part of canon law science has advocated the introduction within the Church legal order of a number of categories and principles belonging to the administrative law of the State, and in particular to the French model of administrative law. An example is provided by the notion of canon administrative act, developed in connection with the establishment in 1967 of a mechanism of judicial review and constructed as an authoritative, unilateral and coercive act.[23] The development of an administrative regulation within the canon legal order is considered as a sound functional solution to the dual need to increase the efficiency of the Church administration and to grant legal protection to the addressees of administrative action.

Arguably, the most striking feature of this scientific operation is the strict dependence on the continental tradition of administrative law. In spite of the frequent calls for attention to the Church specificities, rules and principles of canon administrative law are not developed with reference to the peculiar exigencies of the canon order. Rather, they are mainly imported from

[22] *See*, *ex multis*, A. Consoli, *L'attività amministrativa della Chiesa nel diritto italiano* (Giuffrè, Milano, 1961); C. Lefebvre, "Pouvoirs judiciaire et pouvoirs exécutif dans l'Eglise postconciliaire", *Apollinaris* (1970) 345; L. Spinelli, "Sul concetto di funzione amministrativa in diritto canonico", in *Studi di diritto canonico in onore di M. Magliocchetti* (Officium Libri Catholici, Roma, 1975) p. 1009 et seq.

[23] The reference is to the Apostolic Constitution *Regiminis Ecclesiae Universae*, that establishes a special section of the Supreme Tribunal of the Apostolic Signatura; the new section (*Sectio Altera*) is granted jurisdiction over «contentiones ortas ex actu potestatis administrativae ecclesiasticae» (preamble of the Apostolic Constitution). See for example P. Moneta, *Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico*, *supra* note 4, p. 80 et seq.; A. Ranaudo, "Gli atti amministrativi canonici", *Monitor ecclesiasticus* (1968),701; F. D'Ostilio, "Natura e tipologia del provvedimento amministrativo", *Monitor ecclesiasticus* (1974), 51; and M. Zurowski, "Gli atti amministrativi nel diritto della Chiesa", in *La norma en el derecho canónico (Actas del III Congreso Internacionál de derecho canónico)* (Eunsa, Pamplona, 1979) vol. I, p. 899 et seq.

the French tradition of administrative law, on the basis of two justifying assumptions: firstly, the Church should be regarded as an institution essentially equivalent to a State;[24] secondly, certain elements of administrative law can be applied beyond their original national context, as they are categories of a general theory of administrative law[25]. Both assumptions, however, are obviously problematic, as the precise legal nature of the Church is itself a matter of scientific discussion, and the reference to a general theory of administrative law underestimates the continuous changes of the administrative machinery as well as the difficulties of legal transplants.

The second force leading to the emergence of canon administrative law is that of positive law reform. Although built through a long-term process, regulatory reform has been concretised essentially between the early Sixties and the mid Eighties, when the Dogmatic Constitutions of the Second Ecumenical Council of the Vatican and the new Code of Canon Law were adopted.[26] The Code, in particular, does not envisage a specific title on canon administration. Yet, for the first time in the history of canon law, a clear-cut taxonomy of the various canon functions is established, as the power of «governance» is formally articulated in legislative, executive, and judicial.[27] And a fully accomplished regulation governing the exercise of the executive function is laid down, designed as a specific body of canon law:[28] one may refer, for example, to the rules concerning the administrative competences of the ecclesiastical authorities (based on the distinction between «ordinary» and «delegated» power of governance» envisaged by canon 131);

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[24] This legal representation was strictly linked to the theological notion of the Church as a *societas perfecta*, elaborated in the XIX century and affirmed, for example, in the constitution through which Pope Benedict XV promulgates the 1917 Code; see also the constitution *Mystici Corporis* adopted by Pope Pius XII in 1943. On the limits and implications of such notion see, respectively, C. Fantappiè, *Introduzione storica al diritto canonico* (Il Mulino, Bologna, 1999) p. 228 et seq.; Id., *Chiesa romana e modernità giuridica* (Giuffrè, Bologna, 2008) vol. II, p. 1112 et seq.; and P. Grossi, *L'ordine giuridico medievale* (Laterza, Bari-Roma, 2d ed., 2006) pp. 111-112.

[25] *See*, for example, A. Vitale, "Note sul problema della distinzione fra giurisdizione e amministrazione nel diritto canonico", *Il diritto ecclesiastico* (1961), 320.

[26] The Dogmatic Constitutions of the Second Vatican Council (1962-1965), as it is well known, are four: the *Lumen Gentium*, the *Sacrosantorum Concilium*, the *Gaudium et Spes* and the *Dei Verbum*. For an overall comment, with particular attention to the *Lumen Gentium*, see G. Philips, *La Chiesa e il suo mistero nel Concilio Vaticano II. Storia, testo e commento della Costituzione* Lumen Gentium (Jaca Book, Milano, 1986).

[27] Canon 135/1.

[28] As recognized by several canon lawyers; see, for example, J. Miras, J. Canosa e E. Baura, *Compendio di diritto amministrativo canonico*, *supra* note 4, p. 52; and I. Zuanazzi, *Praesis ut Prosis. La funzione amministrativa nella diakonía della Chiesa*, *supra* note 4, p. 442.

to the rules directly governing the exercise of administrative tasks, such as those concerning administrative measures and administrative proceedings; to the rules on administrative and judicial review over administrative action.

Not differently from the inspiration of the scientific reflection recalled above, this move essentially aims at responding to the functional exigencies of the Church. In the general architecture of the Code, however, administrative law is functional not only to strengthen administrative efficiency and individual protection, as advocated by a part of the canon law science. It is also functional to the more complex exigency of deepening cohesion and integration among the various subjects of the canon order, in line with the traditional understanding of the Church as an articulated pattern of inter-individual relationships through which the *salus aeterna animarum* may be achieved.[29]

This double purpose is reflected by the somehow ambivalent construction of administrative regulation within the Code. On the one hand, the 1983 Code follows the path previously indicated by part of canon law science, transposing in the Church legal order certain principles of national administrative law. Such operation is explicit and concerns, for example, the principles of separation of powers, legality and judicial review. On the other hand, the Code reaffirms the fundamental link between canon law and the fundamental mission of the Church, by revising the general features of the canon order in accordance with the overall theological construction of the Second Vatican Council and its central idea of the Church task as service provision. This influences directly the features of canon administrative regulation, which, far from being a mere replication of national administrative law, is designed to serve the overall «paradigm of service».[30] This implies, for example, a joint responsibility of all the members of the people of the believers in the exercise of the Church tasks, the blurring of the distinction between a public and a private sphere, the preference for non authoritative powers over the *potestas regiminis*, and

[29] The highly communitarian anthropology underlying the experience of the Roman catholic Church, as well as its strict relationship with the long-term choice of the Church for juridification, have been particularly stressed by P. Grossi, *L'ordine giuridico medievale*, *supra* note 24, pp. 113-114.

[30] On the paradigm of service see in particular I. Zuanazzi, *Praesis ut Prosis. La funzione amministrativa nella diakonía della Chiesa*, *supra* note 4, p. 451 et seq.

the establishment of procedural instruments to enhance solidarity and mutual trust, exemplified by the consultation of the believers in the proceedings leading to certain important acts involving a specific community, such as the appointment of the diocesan bishop and the entrustment of a vacant parish.

As a whole, therefore, such process of emergence of a canon administrative regulation presents several differences with the processes that have led to the development of administrative law within the State and within the regulatory systems beyond the State.

Firstly, canon administrative law develops considerably later than the administrative laws of mainly legal-rational regimes: while the latter emerge and consolidate in the period comprised between the end of the XIXth century and the first two decades of the XXth century, the former develops only in the last decades of the XXth century. Canon administrative law is therefore a «late-comer», whose emergence takes place when the administrative laws of mainly legal-rational regimes are already well established.

Secondly, canon administrative law develops for specific reasons. National administrative law, as it has been recalled, is the product of certain very peculiar structural and cultural circumstances of the French history, such as centralization, regulatory uniformity and bureaucratic specialization. And international administrative law may be considered mainly as a functional response to the need of managing the complex game of forces between international organizations and their member States. The emergence of administrative canon law, instead, is essentially functional to the double purpose of strengthening administrative efficiency and individual protection in the canon legal order, on the one hand, and of guaranteeing cohesion and integration among the various subjects of the Church, on the other. Such double purpose is rooted both in the intellectual and institutional history of the Church: in the intellectual history, because the exigency of introducing in the canon legal order a number of administrative law mechanisms aimed at ensuring administrative efficiency and individual protection is advocated by a part of the canon law science; in the institutional history, because the exigency of improving and enriching the tools through which the Church may actually work as a genuine *societas fidelium*, based on a ramified web of inter-individual relationships, is a consolidated and long-

term objective of the Church, which finds in the Second Vatican Council a relaunch and a new foundation.

Such specificities, however, should not induce to consider the development of canon administrative law as a process purely internal to the intellectual and institutional history of the Church. There is a clear connection between the emergence of canon administrative law and the experience of the administrative laws of mainly legal-rational regimes, and in particular of national administrative law. As it has been observed, certain rules and principles of canon administrative law, such as the principles of separation of powers, legality and judicial review, are directly imported from the French tradition of administrative law. Moreover, canon administrative law is a functional response to exigencies that are partly peculiar to the Church mission (the need to support cohesion and integration within the *societas fidelium*), partly common to the experience of the modern State in Europe (the exigency to ensure administrative efficiency while guaranteeing individual protection). On a more general level, the underlying idea that the progressive institutionalization of the Church implies the development of an administrative regulation reflects also the strength of the model of the administrative State in Europe and its capacity to impose administrative law as an essential regulatory dimension of modern institutions.

3. **A Composite Nature**

The history of canon administrative law is too short to allow a sound assessment of its development over the time. We can ask, however, of which «materials» the administrative law of the Roman Catholic Church is in the process of being made, and whether these materials are peculiar or reflect the various components gradually developed within the administrative law of mainly legal-rational regimes.

The two hundred year life of national administrative law is characterized, as it has been recently observed, by a «tumultuous growth».[31] Born in a particular country, France, as the product of specific circumstances of its cultural and institutional history, administrative law has consolidated within the context of one of the two models of modern State in Europe.[32] The continental model, exemplified by France as well as by some «second-generation»[33] administrative States, is characterized by centralization, uniformity, strength of the executive power, and prominence of equality over freedom.[34] Yet, administrative law does not remain confined to such model. In a relatively short period of time, it extends to the English legal order, in connection with the fiscal, military, colonial and industrial exigencies of England, that produce a favourable context to the emergence of an administrative culture, a complex administrative machinery and a rich administrative legislation. Such process reaches its full maturity at the half of the XXth century.[35] And it is paralleled by an analogous development on the other side of the Atlantic, where the organizational and functional instruments of the regulatory State have been gradually established since the last quarter of the XIXth century.[36]

Quantitative growth, moreover, is accompanied by qualitative complication. Born as an instrument for giving full effectiveness to the administrative action and securing obedience from the collectivity, national administrative law has later been charged with a richer set of

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[31] As it has been recently pointed out by S. Cassese, "'Le droit tout puissant et unique de la societé': Paradoxes of Administrative Law", *supra* note 17, § 3.

[32] The distinguishing features of the two models of the European modern State, France and England, are discussed by S. Cassese, "The Rise of the Administrative State in Europe", *supra* note 14, § 2: on the intellectual and political origins of the two models and on the complex dynamics of their subsequent evolution, characterized by convergence and divergence, see S. Cassese, "La costruzione del diritto amministrativo: Francia e Regno Unito", *supra* note 10, p. 10 et seq. On the building of an autonomous system of administrative law within the experience of the administrative State in Europe, see G. Napolitano, *Pubblico e privato nel diritto amministrativo*, cit., pp. 56-63.

[33] To use the expression of S. Cassese, "The Rise of the Administrative State in Europe", *supra* note 14, § 5.

[34] S. Cassese, "La costruzione del diritto amministrativo: Francia e Regno Unito", *supra* note 10, p. 8.

[35] The point of view of the legal science of that period is exemplified by the leading work by B. Schwartz, *Law and the Executive in Britain. A Comparative Study* (New York University Press, New York, 1949).

[36] On the emergence of a body of administrative law in the U.S. legal order see the pioneer work by F.J. Goodnow, *Comparative Administrative Law* (G.P. Putnam's Sons, New York, 1893), in particular vol I, p. 53 et seq., and vol II, p. 190 et seq.; for a general overview, R.B. Stewart, "The Reformation of American Administrative Law", 88 *Harvard Law Review* (1975), 1669 et seq.; and M. d'Alberti, *Diritto amministrativo comparato* (Il Mulino, Bologna, 1992) p. 93 et seq.

objectives.[37] While remaining instrumental to the action of public powers, it has become also a mechanism to remove arbitrary power and to protect citizens against the administrations, with potential developments in the direction of administrative democracy.[38] And it is gradually oriented towards the achievement of a number of collective goals, supporting the emerging social functions of the State. In its two hundred year life, therefore, national administrative law has proved highly flexible and capable of great adaptation: it has differentiated its objectives, combining the exigency of effective administrative action with that of control over public power and with the demands of equality; it has absorbed some of the main ideologies of the last two century – authoritarianism, liberalism, socialism and, although only indirectly, democracy – and their inherently problematic interactions.

The administrative law of the regulatory systems beyond the State has gone through a similar process of quantitative growth and qualitative transformation.

Quantitative growth is linked to the increasing need to address transnational issues, to the consequent proliferation of mechanisms of transgovernmental regulation and administration, to the strengthening of the reciprocal links among regulatory systems beyond the State, and to the deepening of their relationships with the member States. In the second half of the XXth century, and with an acceleration in the last two decades, administrative action beyond the State has become crucial in an ever wider set of fields.[39] It has included rule-making and adjudication. And it has led to the development of a great deal of principles, standards and practices of procedural participation and review, both within the context of supranational systems, such as the European Union, and within other types of systems beyond the State.

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[37] S. Cassese, ""'Le droit tout puissant et unique de la societé': Paradoxes of Administrative Law", *supra* note 17, §§ 4-5.

[38] This is the case, for example, of the U.S. experience, where the establishment of a rich set of procedural guarantees through the 1946 Administrative Procedure Act did not only develop the liberal component of administrative law well beyond the European standard of that period, but it also introduced in rule-making proceedings a surrogate of democratic political discourse. On this development, its reasons and its shortcomings, see obviously R.B. Stewart, "The Reformation of American Administrative Law" *supra* note 36; Id., "Madison's Nightmare" 57*University of Chicago Law Review* (1990) 335.

[39] B. Kingsbury, N. Krisch and R. Stewart, "The Emergence of Global Administrative Law", *supra* note 15, p. 16; and S. Cassese, "Il diritto amministrativo globale: una introduzione", in Id., *Oltre lo Stato* (Laterza, Bari-Roma, 2006), p. 42 et seq.

The qualitative transformation of the administrative law beyond the State has involved first of all a complication of its structure and sources. International administrative law has become only one of the many types of administrative regulation beyond the State. And a new notion, that of «global administrative law»,[40] is proposed to refer to those administrative regulations established by sources often different from the classical sources of public international law and regulating the interactions among a set of regulators and regulatees going well beyond the States and involving both the global and the domestic levels. Such new and more complex administrative reality implies also a complication of the objectives of administrative regulation. If traditional international administrative law is essentially called to serve the reasons of inter-State pluralism, global administrative law emerges as a more articulated instrument. It may develop as a means to control global administrative action and to protect the rights of affected private parties and public powers, including States, can be protected. At the same time, global administrative law is an instrument potentially capable of reinforcing administrative action and securing compliance.[41] Liberalism and authoritarianism, and their uneasy game of forces, are inherent to the emerging global administrative law and seem destined to shape its features in the next future.

Canon administrative law presents some similarities as well as some differences with such framework.

As the administrative laws of mainly legal-rational regimes, canon administrative law has a composite, non-unitary nature. Moreover, it shares with legal-rational regimes some of its constitutive materials. In particular, canon administrative law has been developing a liberal and an authoritarian component. The liberal component results, for example, from the rights granted

[40] The reference is obviously to the leading work by Sabino Cassese, Benedict Kingsbury and Richard B. Stewart. For a general account of the main achievements in this field, see 17 *European Journal of International Law* (2006) and 68:3-4 *Law and Contemporary Problems* (2005), dedicated, respectively, to *Global Governance and Global Administrative Law in the International Legal Order* and to *The Emergence of Global Administrative Law*; see also 37 *New York University Journal of International Law and Politics* (2006).

[41] On this aspect see in particular A. Von Bogdandy, R. Wolfrum, J. Von Bernstorff, P. Dann and M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*(Springer, Heidelberg, 2010).

to the believers *vis-à-vis* the ecclesiastical authorities: traditionally neglected in the canon legal order,[42] such rights have been widened and strengthened by the emerging administrative regulation, which limits the discretionary power of the ecclesiastical authorities and obliges them to respect several principles of administrative action.[43] The authoritarian component of canon administrative law, instead, results from those rules and principles emphasizing administrative power and the position of ecclesiastical authorities. This is the case, for example, of the provisions of the 1983 Code concerning administrative acts, designed as authoritative and coercive measures, and unilaterally affecting the legal position of the interested parties.[44] In addition to this, one might argue that canon administrative law encapsulates also a social dimension. Although equality and liberation from need are not, as such, objectives of the canon legal order, the commandment to *love thy neighbour*, which applies to any subject of the legal order, leads ecclesiastical authorities to respond to the demands of solidarity, for example through the organization of charity and philanthropy.

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[42] An example is provided by the 1917 rules governing the administration of the sacraments. The Code envisaged the believers' right «recipiendi a clero…spiritualia bona et potissimum adiumenta ad salutem necessaria» (canon 682). But at same time it made the exercise of such right subject to a discretionary assessment of the ecclesiastical authorities on the idoneity of the applicant (canons 968 and 973). This ambivalence was reflected by the scholarship of that period, that actively discussed the issues of the believers' rights, taking two almost opposite views: on the one hand, the very restrictive view asserting that individual interests were not relevant in the canon legal order, directly aimed only at achieving collective goals (a clear formulation of such thesis is provided in a short but important article by A.C. Jemolo, "Esiste un diritto dei fedeli al sacramento?", *Rivista di diritto pubblico* (1915) II 133, p. 141 et seq.; see also Id., "L'interesse dei fedeli alla venerazione di una immagine sacra", *Rivista di diritto pubblico e della pubblica amministrazione in Italia* (1919) II 146; and P. Fedele, *Discorso generale sull'ordinamento canonico*, (Cedam, Padova, 1941) p. 158 et seq.); on the other hand, the view asserting the crucial importance of the interests of each believer within the collectivity (see, for example, P. Ciprotti, "Considerazioni sul "Discorso generale sull'ordinamento canonico" di P. Fedele", *Archivio di diritto ecclesiastico* (1941) 467; G. Olivero, *Intorno al problema del diritto soggettivo nell'ordinamento canonico* (Giappichelli, Torino, 1948); P.A. D'Avack, *Corso di diritto canonico. I. Introduzione sistematica al diritto della Chiesa* (Giuffrè, Milano, 1956)).

[43] One may think, for example, of the procedural rules laid down by the 1983 Code with reference to certain administrative proceedings, such as those concerning the removal or transfer of pastors (canons 1740-1752) and the dismissal of a member of an institute of consecrated life (canons 694-704). In these cases, as well as in other special proceedings, several procedural rights are now recognized: the addressees of the administrative measure, in particular, have the right to know that the proceedings has been opened (canons 1742/1, 1748, 1750, 695/2, 697/1), to be heard and to offer defenses (canons 1745, 1749, 698), to access to some of the relevant documents (canons 1703/2 and 1705/3). The liberal component of canon administrative law is highlighted by several authors: see, for example, J.P. Beal, "Confining and Structuring Administrative Discretion", *The Jurist* (1986), 70.

[44] *See* canon 35 and et seq.

These components of canon administrative law, however, coexist with another component that is peculiar with respect to the administrative laws of mainly legal-rational regimes. What makes canon administrative law peculiar is its instrumentality to a project of redemption and salvation. Such project, lying at the heart of the Church's mission, has several distinguishing features. It has, firstly, a genuinely communitarian nature, as believers can reach redemption from sin and salvation exclusively within a *societas*, which encourages and structures a number of inter-individual relations. Secondly, as it has been previously recalled, it finds its basic functional centre in the transmission of the historical and religious memory of Jesus Christ and in the communication among the believers of their shared faith in revelation[45]. Thirdly, it has a supernatural foundation: salvation refers to eternal life, as recalled by the Latin phrase *salus aeterna animarum*; and participation to the process of communication of the religious and historical memory of Jesus Christ is an essentially mystical experience made possible by the Holy Spirit. Admittedly, none of these elements is *per se* extraneous to the experience of mainly legal-rational regimes, that may be very communitarian and also oriented towards the achievement of spiritual goods. In the experience of the Roman Catholic Church, however, the project of redemption and salvation is not simply one of the tasks in which a complex institution is engaged, but the very foundation of the overall functional mission of the organized community of the believers. And it represents at the same time an ideal and a practical project, around which the various aspects of the life of Church are to be organized.

It is in such project that canon law, since its foundation at the beginning of the XIIth century, has found its *raison d'être*.[46] And the same is true for its recently emerged administrative segment. Canon administrative law is not only a regulation aimed at governing

[45] *Supra* § 1.

[46] The purely instrumental character of canon law, that is not an objective *per se* but is functional to the *salus aeterna animarum*, is stressed by P. Grossi, *L'ordine giuridico medievale*, *supra* note 24, p. 119; see also the classical essay by G. Capograssi, "La certezza del diritto nell'ordinamento canonico", in *Ephemerides iuris canonici* (1949) 9. The instrumental character is emphasized also by the Apostolic Constitution *Sacrae Disciplinae Leges*, 1983, where the new Code is qualified as «an indispensable instrument» that «fully corresponds to the nature of the Church, especially as it is proposed by the teaching of the Second Vatican Council» and «a great effort to translate … the conciliar ecclesiology, into canonical language».

certain purely managerial or technical tasks. It is one also of the channels through which the Church seeks to operate as a community and thus make redemption and salvation possible. Canon administrative law, for example, provides a number of procedural and organizational instruments oriented to structure cooperation between the believers and the ecclesiastical authorities in such a way to enhance solidarity, mutual trust and common engagement in the transmission of the memory of Jesus Christ.[47] It encourages conciliation and amicable composition of controversies between the individual and the administration.[48] It makes both the ecclesiastical authorities and the believers subject to a set of supreme rules considered as having a supernatural foundation, such as the commitment to charity.[49]

Canon administrative law, therefore, is made up of materials that are partly correspondent to those of the administrative laws of legal-rational regimes, partly peculiar to the Church legal order.

Such combination of similarities and differences has elusive reasons. While peculiarities are obviously connected to the very specific functional foundation of the Church, the similarities between canon administrative law and the administrative laws of mainly legal-rational regimes have less clear explanations. One might point to the historical analogies between the organization of the Roman Catholic Church and the continental model of the modern State in Europe. For example, it could be highlighted that the Church is an institution characterized since the XVth century by a remarkable centralization, developing within its own order also a statal dimension,

[47] This is the case, for example, of the already mentioned consultation of the believers in the proceedings leading to certain important acts involving a specific community, as it happens for the appointment of the diocesan bishop and the entrustment of a vacant parish (see, respectively, canons 377 and 524). Another example is the general right of the believer to dialogue with ecclesiastical authorities (see canon 212/2-3, concerning the right to put forward requests and to express his or her opinion to the ecclesiastical authorities). Cooperation is also often envisaged as an instrument to allow the joint action of more ecclesiastical authorities: one may think, for example, of the cooperative mechanisms among the dicasteries of the Roman Curia and between the latter and other external authorities laid down by special rules on the Curia and ranging from the exchange of documents to opinion giving and to collegiate bodies composed of representatives of different offices; for a survey of these mechanisms see I. Zuanazzi, "Organi centrali di governo della Chiesa", in *Digesto delle discipline pubblicistiche* (Utet, Torino, 1995) vol. X, *ad vocem*, 488.

[48] *See* canon 1733.

[49] The legal implications of charity have been developed mainly by S. Berlingò, *Giustizia e carità nell'*economia *della Chiesa. Contributi per una teoria generale del diritto canonico* (Giappichelli, Torino, 1991).

represented by the papal monarchy,[50] and capable of exercising an influence at least indirect on the process of emergence of the modern State in Europe.[51] Moreover, the Roman Catholic Church is probably the first institution in Europe having experienced a process of differentiation of its administrative bodies from courts,[52] anticipating a general tendency of the history of the modern State in Europe. In addition to this, it has been argued that classical canon law is one of the sources that can be found at the origin of national public law[53] and also, more specifically, of national administrative law. Several basic principles and notions of traditional French administrative law may be considered as transpositions of canon law categories.[54] This is the case, for example, of the notions of administration (*administratio*), public utility (*utilitas publica*) and public entity (*universitas*), imported into French public law. All these elements form a common substratum in the administrative regulations developed, in the times and ways previously recalled, in the statal and in the canon legal order. Distant as they may be in many regards, the two experiences share some hidden but nevertheless important institutional foundations. And it comes therefore unsurprisingly that they tend to converge around analogous poles, the authoritarian one and the liberal one. At the same time, however, it should be recognized that such line of reasoning is based on a set of complex, controversial and still largely unexplored historical issues. Such issues include the precise content of centralization in the ecclesiastical organization, characterized by a complex and perhaps unsolved combination of concentration and dispersion, hierarchy and polysynody;[55] the extent to which the roots of the

[50] On the papal monarchy, see P. Prodi, *Il sovrano pontefice. Un corpo e due anime: la monarchia papale nella prima età moderna (*Il Mulino, Bologna, 2d ed., 2006).
[51] *Ibidem*, p. 130 et seq.
[52] This aspect is highlighted by P. Cappellini, "Privato e pubblico. b) Diritto intermedio", in *Enciclopedia del diritto* (Giuffrè, Milano, 1986) vol. XXXV, *ad vocem*, 660.
[53] *See*, in particular, G. Le Bras, *La Chiesa del diritto. Introduzione allo studio delle istituzioni ecclesiastiche*, (Il Mulino, Bologna, 1982) p. 246 et seq.; see also F. Olivier-Martin, "Quelques exemples de l'influence du droit canonique sur le droit public de l'ancienne France", in *Actes du Ier Congrès de droit canonique* (Letouzey et Ané, Paris, 1950) p. 362 et seq., pointing to notions such as those of privilege and *jurisdictio*; and E. Caparros, "Les racines institutionelles des droits occidentaux dans le droit ecclésiastique", in *Ius ecclesiae* (1995) 425 et seq.
[54] *See* the classical essay by G. Le Bras, "Les origines canoniques du droit administrative", in *L'évolution du droit public. Études offertes à Achille Mestre* (Sirey, Paris, 1956) p. 395 et seq.
[55] This point is developed in E. Chiti, "L'amministrazione della chiesa cattolica romana: una introduzione", in *Rivista trimestrale di diritto pubblico* (2009) 555, at p. 576 et seq.

authoritarian and liberal component may be found in classical canon law; the directions of the historical process of differentiation of national administrative law from classical canon law, parallel to the process of an ever clearer separation between the Church and the State.

The canon administrative law construction is not only difficult to explain. It also presents many ambiguities. One concerns the very uncertain development of the religious component. Canon administrative law, as it has been observed, is also an instrument through which the Church seeks to operate as a community and achieve redemption and salvation for its members. But many of its principles and techniques could be improved and developed. One example is provided by procedural regulation, whose potentialities in terms of enhancing common engagement in the transmission of the memory of Jesus Christ are far from being fully exploited[56]. A second ambiguity derives from the unresolved tension between the various materials of canon administrative law, and in particular between the liberal and the religious component. Such components may positively interact as mutually correcting forces: the religious component by systematically orienting the functioning of the ecclesiastical machinery towards a moral and spiritual tension that is uncommon in mainly legal-rational regimes, the liberal component by recalling that the spiritual mission of the Church is nevertheless carried out by highly fallible human beings, deserving careful attention and control. Yet, the interaction among the various components does not necessarily establish a fruitful game of forces. The authoritarian and liberal components, on the one hand, and the religious one, on the other, are also potentially competing and perhaps even mutually exclusive forces, encapsulating different understandings of the role of individuals within a society and of their relationships with the institutions. This makes the edifice of canon administrative law structurally unstable, and it prefigures future changes and reform.

[56] *See*, for example, the restrictions to the participation of believers, both as individuals and as groups, to many administrative proceedings leading to measures directly relevant for a specific community (for example, the erection, suppression and alteration of a parish, envisaged by canon 515). The insufficient development of the potentially promising procedural mechanisms is highlighted in particular by P. Moneta, "La tutela dei diritti dei fedeli di fronte all'autorità amministrativa", in *Fidelium iura* (1993) 281.

4. The Position within the Canon Legal Order

The observations made so far on the emergence and nature of canon administrative law raise the further issue of the position of the administrative regulation within the canon legal order. Is it taking a place analogous to that occupied by administrative law in mainly legal-rational systems? Or is its position different?

The place of administrative law in statal legal orders is essentially defined by its relations with constitutional law and civil law, as well as by its link with the national territory. Yet, none of these relations is fixed and stable. Each of them has changed considerably throughout history. And their transformations make the position of national administrative law within the legal order mobile, dynamic and «uncertain»[57]. Administrative law is originally clearly distinct from constitutional law. It has a different object, the administrative machinery. And the development of its founding principles and rules takes place irrespectively of the overall constitutional design, which does not exercise any framing capacity over the new branch of law. During the XXth century, however, administrative law has gone through a significant process of «constitutionalization». It has increasingly begun to depend on constitutional law principles, as it is witnessed in particular by the many constitutions of the second after war that have laid down some fundamental principles of administrative action. Administrations have become intermediate bodies between the political power and the collectivity. As for the relations with civil law, administrative law is originally a fully autonomous legal system. But a process of reciprocal contamination has soon begun. Administrative law has lost its archetypical features and developed rules that combine public law and civil law techniques, while at the same time it has proved capable to export some of its techniques in civil law. Administrative law has been subject to a process of «privatization», and civil law to a parallel process of «administrativization».[58] In addition to these deep and long-standing transformations, administrative law has progressively lost its exclusive anchorage to the national territory. National legal systems have reciprocally

[57] S. Cassese, "'Le droit tout puissant et unique de la societé': Paradoxes of Administrative Law", *supra* note 17, § 5.

[58] For an overall account of these processes, see G. Napolitano, *Pubblico e privato nel diritto amministrativo*, *supra* note 12, *passim*.

opened to each other. An increasing number of mechanisms of dialogue and exchange have been established.

The administrative law of the regulatory systems beyond the State is characterized by analogous movements, which confirm how misleading a static representation of the position of administrative law within the legal order may be. Firstly, administrative law beyond the State has a variable relationship with constitutional law. In some cases, such as in the European Union legal order, administrations are called to respond to a set of higher institutions exercising the executive power, and the regulation governing their functioning is framed by a growing set of higher rules. In other cases, and in particular in the case of global regulatory systems, administrations are not led by any government or group of higher institutions, but respond to a plurality of sectoral sub-governments.[59] These administrations, as well as the administrative law regulating their functioning, emerge and consolidate without a genuine constitutional foundation. Secondly, administrative law beyond the State is not developing as a legal system clearly distinct from civil law. Rather, it often relies upon private actors and it makes recourse to market-based mechanisms. Contamination between administrative law and civil law techniques is a constitutive element of large fields of the administrative law beyond the State.

Confronted with these overall features of the administrative laws of mainly legal-rational regimes, canon administrative law immediately reveals certain peculiarities.

One is that its position in the canon legal order is not defined by its relations with constitutional law and civil law.

To begin with, one may doubt that a genuine constitutional law exists within the canon legal system. It is certainly true that the canon legal order, as an expression of a long-standing and spiritually rooted *societas*, is founded on a patrimony of shared social practices and moral patterns of behaviour. Moreover, the canon law science often refers to a «constitutional dimension» of the Church order, pointing to a set of higher and not modifiable rules, establishing

[59] *See* the overall account provided by S. Cassese, "Lo spazio giuridico globale", in Id., *Lo spazio giuridico globale*, (Laterza, Bari-Roma, 2003) 3, and B. Kingsbury, N. Krisch and R. Stewart, "The Emergence of Global Administrative Law", *supra* note 15, pp. 20-27.

the fundamental principles of the life of the community.[60] Yet, this identifies a «constitution» only in a loose and absolutely generic sense. There has not been, within the canon legal order, any proper constitutional dynamic, based either on radical transformation or on gradual evolution, leading to the identification of a set of fundamental positive rules from the whole of values and practices of the community. The fundamental law of the Church is not the result of the self-organization capacity of a community, but it has had, since the beginning of the canon law's life,[61] the heteronomy of a law given by Jesus and, ultimately, by God.

Moreover, canon administrative law is not called to interact with a civil law counterpart. Arguably, the public-private distinction is not extraneous to the canon legal order. Although such distinction is traditionally a matter of discussion within the canon law science,[62] we can at least identify certain fields of canon law, such as part of canon family law, regulating the relations that take place between the believers outside the mediating intervention of an administrative body. However, this does not at all imply the existence of two (public and private) clearly distinct bodies of legal principles and techniques. And it does not even imply a sharp distinction between a public and a private sphere, as both ecclesiastical authorities and lay believers are called to

[60] The existence of a constitution and a constitutional law of the Roman Catholic Church is argued, for example, by J. Hervada, *Diritto costituzionale canonico* (Giuffrè, Milano, 1989) p. 7 et seq. (see also the introductory essay by G. Lo Castro, "Il problema costituzionale e l'idea di diritto", p. VII et seq., at p. XXXVI et seq.), and by P. Lombardía, *Lezioni di diritto canonico* (Giuffrè, Milano, 1985) p. 91 et seq. Other authors identify a set of «constitutional principles» (see, for example, C. Cardia, *Il governo della Chiesa* (Il Mulino, Bologna, 3rd ed., 2002) or refer to a «constitutional order» of the Church (see, for example, R. Bertolino, S. Gherro and G. Lo Castro (eds.), *Diritto 'per valori' e ordinamento costituzionale della Chiesa* (Giappichelli, Torino, 1996)).

[61] The reference is in particular to the systematizing work carried out in the XIth century by Ivo of Chartres, on which see P. Grossi, *L'ordine giuridico medievale*, *supra* note 24, p. 116 et seq., and P. Fournier, "Un tournant de l'histoire du droit: 1060/1140" (1923), in Id., *Mélanges de droit canonique* (Theo Kölzer, Aalen, 1983) vol. II, 373.

[62] The most famous, and important, formulation of the critique to the existence of a public-private divide is that of Pio Fedele. Moving from the ultimate objective of the Church, this author proposed throughout his works an interpretation of canon law as a purely public law system, where the *bonum publicum* of *salus animarum* prevails over the positions of the single believers. See P. Fedele, *Discorso generale sull'ordinamento canonico*, *supra* note 42. For an account of the overall discussion, see G. Lo Castro, "'Pubblico' e 'privato' nel diritto canonico", in R. Bertolino, S. Gherro and G. Lo Castro (eds.), *Diritto 'per valori' e ordinamento costituzionale della Chiesa*, *supra* note 60, 119. See also J. Llobell, "Pubblico e privato: elementi di comunione nel processo canonico", in *La giustizia nella Chiesa: fondamento divino e cultura processualistica moderna* (Libreria editrice vaticana, Città del Vaticano, 1997) 47, at p. 60 et seq.

contribute to the exercise of the tasks of the Church.[63] The public-private divide may therefore highlight some constitutive aspects of the life of the Church.[64] But it is not useful in defining the position of administrative regulation within the canon legal order.

What elements, then, do actually define such position? The key point, in our view, is that canon administrative law is a branch of canon law, whose overall features it reflects. And the place that it occupies within the legal order may be characterized on essentially functional grounds, by referring to the object of its regulation. The strict link between canon administrative law and general canon law derives from the theoretical unity of the latter. Canon law is articulated into several sets of regulations, gradually emerged as autonomous bodies of law throughout the history of the Church. These bodies of law are devoted to different aspects of the life of the Church and respond to different rationales. But they nevertheless share a number of essential features and operate as parts of a unitary construction. Two inter-twined aspects of this construction are of particular relevance in shaping the overall features of canon law. Firstly, canon law is a body of legal principles and rules that always have to be coherent with a supra-positive, divine plan, revealed by Jesus Christ and oriented towards the salvation of souls. Secondly, it is a body of law that is composed both of human and divine rules, although the precise sense of the divine quality of part of the regulation is an issue highly debated by canon law science.[65] Canon administrative law shares these essential overall features of canon law. It is

[63] While the ecclesiastical authorities represent, so to say, the professional and stable component of the Church organization, the lay believers contribute to the exercise of the ecclesiastical mission by virtue of the sacraments of baptism and marriage, for example witnessing their faith, coordinating pastoral activities, educating their children. On the importance of lay members within the Church, see the decree on the apostolate of the laity *Apostolicam Actuositatem*, § 1 and 2, where their «proper and indispensable role in the mission of the Church» is stressed: «[i]n the Church there is a diversity of ministry but a oneness of mission».

[64] As it is often argued; see, for example, M. Visioli, *Il diritto della Chiesa e le sue tensioni alla luce di un'antropologia teologica* (Editrice pontificia università gregoriana, Roma, 1999) p. 89 et seq.

[65] The XXth century canon law science has given a plurality of answers to the issue of the divine nature of canon law. On the one hand, canon law has been represented as a body of law having a direct divine foundation, in which it remains absorbed. On the other hand, it has been argued that all canon legal rules are human rules, their divine quality essentially consisting in the circumstance of being oriented to interpret and structure the supernatural message of revelation. Other theses lay somehow in the between these two extremes: see, for example, the position by Hervada, *Diritto costituzionale canonico* (Giuffrè, Milano, 1989). For an overall account of the debate in the second half of the XXth century, see in particular S. Berlingò, "Diritto divino e diritto umano nella Chiesa", in R. Bertolino, S. Gherro and G. Lo Castro (eds.), *Diritto 'per valori' e ordinamento costituzionale della Chiesa*, *supra*

itself called to comply with the over-arching divine dimension, and it is made up of partly human and partly divine rules. Its specificity with respect to other branches of canon law is therefore essentially functional and relates to its object, which consists in the functioning of the ecclesiastical authorities responsible for the exercise of administrative functions, as well as in their relations with the believers.

This essentially functional anchorage differentiates canon administrative law from the administrative laws of mainly legal-rational systems. While the position of the latter within the legal order derives from the relationships with constitutional and civil law, the place occupied by canon administrative law is defined only by its object and function. Its mainly functional anchorage, however, does not imply that the position of canon administrative law is more stable than that of the administrative laws of legal-rational regimes. Actually, the boundaries of the administrative functions and tasks are somehow elusive. The 1983 Code provides a clear-cut taxonomy of the various canon functions, by establishing that the power of governance is distinguished as legislative, executive, and judicial.[66] The scope of the executive function, however, is not well established by positive rules. The executive function certainly includes a number of acts expressly qualified as executive acts. However, the dividing line between executive and legislative acts is at times nuanced. The executive function is to be reconstructed on a residual basis, as the whole of measures falling outside the scope of the legislative and judicial functions. And the canon legal system lacks a precise notion of ecclesiastical administrations, as the Code does not provide any legal definition of administration and an ecclesiastical authority may be qualified as an administration only on the basis of the executive task carried out by it. This makes the position of canon administrative regulation somehow fluid, and subject to potential growth or restriction, depending on the interpretations of the executive function given by the various subjects of the legal order.

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note 60, 87; see also G. Lo Castro, *Il mistero del diritto. I. Del diritto e della sua conoscenza* (Giappichelli, Torino, 1997) p. 21 et seq.

[66] Canon 135/1.

5. **Emerging Patterns**

Though often directed towards classification and systematization, the forty year long scientific reflection on canon administrative law has essentially paid attention to the single principles and chapters of the matter, without engaging in the search for an underlying general construction. The issue, however, deserves to be raised: how do the different constitutive materials of canon administrative law combine one with the others? Is it possible to organize the principles and rules of canon administrative law around one or more overall explanatory paradigms? If so, do such paradigms present certain particular features or do they reflect the patterns of the administrative laws of mainly legal-rational regimes?

Statal administrative law, as it is well known, has historically consolidated around a model that has become, at the end of a long process,[67] the general scheme of action for statal administrations and the «fundamental paradigm»[68] of public law. This model is centred on the dialectics between the pole of «authority» and that of «liberty». It implies, on the one hand, a separation and an opposition between the public sphere and the private sphere, on the other hand, the primacy of the former over the latter.[69]

In the second half of the XXth century, however, such model has gone through deep transformations. Its overall features have been significantly reshaped. And its explanatory capacity has been gradually attenuated. In the dialectical dynamic between authority and liberty, the liberal and equalitarian dimension of administrative law has been progressively strengthened starting from the half of the past century. Administrative law has maintained its original features as a «special» regulation. But such speciality has become more complex. Public administrations

[67] For an overall account of the process of formation of an autonomous system of administrative law, founded on specific legal principles and rules and centred on the public powers' privileges, see in particular G. Napolitano, *Pubblico e privato nel diritto amministrativo*, *supra* note 12, p. 24 et seq. and p. 52 et seq., and L. Mannori and B. Sordi, *Storia del diritto amministrativo*, *supra* note 11, p. 305 et seq.

[68] S. Cassese, "L'arena pubblica. Nuovi paradigmi per lo Stato", in *Rivista trimestrale di diritto pubblico* (2001) 601, at p. 604.

[69] M.S. Giannini, *Diritto amministrativo* (Giuffrè, Milano, 2d ed., 1993) vol. II, p. 228; previously, S. Romano, *Corso di diritto amministrativo. Principii generali* (Cedam, Padova, 3d ed., 1930) p. 81 et seq., and M.S. Giannini, *Lezioni di diritto amministrativo* (Giuffrè, Milano, 1950) p. 71 et seq. (on which see the reflections by S. Cassese, *Cultura e politica del diritto amministrativo* (Il Mulino, Bologna, 1974), p. 120 et seq., as well as by B.G. Mattarella, *L'imperatività del provvedimento amministrativo* (Cedam, Padova, 2000), p. 165 et seq.).

are still provided with *pouvoirs exorbitants*. At the same time, the exercise of these prerogatives has been made subject to limits and constraints unknown to the civil law system.[70] Moreover, the traditional distinction between the public and private sphere has become more nuanced as public administrations, through outsourcing, public-private partnerships and a great deal of other techniques, has been increasingly relying upon private actors in order to implement public policies.[71]

The transformations of the traditional model have been also accompanied by further developments. In connection with the ever more incisive opening up of national administrative law to the influence of supranational regulation, a new paradigm, alternative to the traditional one and (provisionally) defined of the «public arena»,[72] has been gradually emerging. In the new paradigm, the traditional bilateral relationship between the State and the citizen is substituted or complicated by a richer web of relations, involving a plurality of public and private subjects and less founded on the opposition between public and private interests. And the functioning of public powers tends to shift from the consolidated patterns to market based mechanisms.

Such development characterizes also the evolution of the administrative law of the regulatory systems beyond the State. The «public arena» model is inherent to the recent developments of European Union administrative law and its growing combinations with national laws. Analogously, this model represents one of the most evident features of global administrative law, although obviously this does not exclude that certain sectors of the global legal space may reproduce, though in forms not perfectly correspondent to those of the statal experience, the traditional dialectics between authority and freedom.[73]

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[70] *See* G, Napolitano, *Pubblico e privato nel diritto amministrativo*, *supra* note 12, p. 36. For an overall discussion of these developments, S. Cassese, "Le trasformazioni del diritto amministrativo dal XIX al XXI secolo" (2002) now in Id., *Il diritto amministrativo: storia e prospettive*, *supra* note 10, 477, in particular at p. 486 et seq.; and Id., "Il cittadino e l'amministrazione pubblica", in *Rivista trimestrale di diritto pubblico* (1998) 1015.

[71] *See* S. Cassese, "Le prospettive", in L. Torchia (ed.), *Il sistema amministrativo italiano* (il Mulino, Bologna, 2009) 507, at p. 515.

[72] S. Cassese, "L'arena pubblica. Nuovi paradigmi per lo Stato", *supra* note 68, p. 607 et seq.

[73] See, for example, the interesting case of global military security, governed by an administrative regulation characterized by a complex pattern of similarities and differences with the traditional statal model; on this case-

Compared with the models of mainly legal-rational regimes, canon administrative law immediately reveals one specificity. A tension towards pluralization, variety and differentiation characterizes the administrative laws of mainly legal-rational regimes, which gradually move from a single overall pattern, represented by the authority and liberty opposition, to a plurality of models, responding to the different functional needs of hyper-complex societies, inspired to various rationales and co-existing within the same legal order. Canon administrative law, on the contrary, seems provided with a higher degree of stability, in so far as it is functional to the essential and historically stable exigencies of a worldwide spread but highly homogenous community. At the same time, however, canon administrative law is still in search of its own overall patterns. Possibly because of its limited consolidation and state of advancement, possibly because of the lack of a mature scientific reflection on the field, canon administrative law has not yet produced any genuinely consistent regulatory model.

This does not mean, yet, that it is not possible to identify a number of elements around which certain patterns of canon administrative law are slowly emerging. Two elements, in particular, are prominent and should be highlighted.

The first is the *rationale* of integration underlying several rules and techniques of canon administrative regulation. Differentiated and composite as it may be, canon administrative law is in many of its parts designed as one of the instruments through which the Church may actually operate as a *societas* oriented to the *salus aeterna animarum* of its members. Canon administrative law, in particular, structures and governs a set of relations, between believers and ecclesiastic administrations, which are crucial to the communitarian project of redemption and salvation on which the mission of the Church is based. It establishes instruments functionally directed to facilitate the processes of transmission of the historical and religious memory of Jesus Christ between these subjects. It organizes the relations between the believers and the ecclesiastical authorities on a solidaristic basis, in the perspective of minimizing contrasts and of

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study, see E. Chiti, *The European Security and Defense Administration within the Context of the Global Legal Space*, New York University School of Law, Jean Monnet Working Papers, No. 7/2007.

developing mutual confidence, inter-dependence and common engagement, within the framework of the common faith in God and Jesus Christ.

Among the various possible examples, one may recall the many provisions referring to *prudentia* as a principle of administrative action.[74] *Prudentia* implies a wise and right evaluation of the specific circumstances of a case by the relevant ecclesiastical authority. According to this principle, the competent official is required to exercise his tasks *vis-à-vis* the believers relying not only on his intellectual and moral capacities,[75] but also on his spiritual virtues, specifically meant as those virtues predicated by Jesus Christ, such as charity, and possible only through the action of the Holy Spirit. Other examples are provided by the duty imposed on the believers to manifest their opinion to the pastors and to the rest of the Christian faithful «with reverence toward their pastors, and attentive to common advantage and the dignity of persons»;[76] by the duty imposed to the «organs of participation or consultation» to express the concern and participation «of all the members for the good of the entire institute or community», and to observe «wise discretion» in setting up the means of consultation and participation;[77] by the provision of unanimity voting in case of adoption of a decision of a collegiate body affecting the position of all believers.[78]

This dimension of canon administrative law represents a peculiarity of canon administrative law *vis-à-vis* the administrative laws of mainly legal-rational regimes. Admittedly, the latter rely on a great variety of co-operative instruments, based on collaboration and interdependence between public powers and private actors, rather than on their separation and opposition. And social integration is certainly one of the purposes of contemporary statal administrative law. In the canon legal order, however, the achievement of a high degree of interdependence and solidarity among all subjects of the *societas* are fundamental and necessary objectives of the administrative regulation, as this is instrumental to a plan of salvation whose

[74] *See*, for example, canons 351, 378, 529 and 677.
[75] *See* for example canon 478/1.
[76] *See* canon 212/3.
[77] See canon 633.
[78] See canon 119/3: *Quod omnes tangit, debet ab omnibus approbari*.

constitutive elements include interdependence and solidarity among the members of the Church. Moreover, the communicative mechanisms set up in the canon legal order are qualitatively different from those existing in legal-rational regimes, in so far as they imply the exercise of Christian virtues and they are assumed to be possible only within the context of a supra-positive, divine plan and through a mystical experience driven by the Holy Spirit. This peculiarity of canon administrative regulation may be explained with reference to the functional specificities of the Church. In particular, it seems to be strictly connected to the ecclesiology established by the Second Vatican Council, of which it incorporates the essential idea of the mission of the Church as service provision.[79]

The second element that is worth pointing out is the particularly wide and flexible character of the administrative power. This derives mainly from the principle of *aequitas* traditionally at the heart of canon law. Such principle, as it is well known, requires ecclesiastical authorities to balance their action, both in the production and in the application of law, to the specific situation and spiritual needs of the single believer. On the administrative side, it implies, among the other things, the power of the relevant ecclesiastical authority to range from severity (*rigor*) to moderation (*temperatio*) in the application of a canon, as well as the power to set aside, in a specific case, positive law provisions considered *peccati enutritivae* or inadequate to the personal and factual position of the interested believer. Even beyond the principle of *aequitas*, moreover, ecclesiastical authorities charged with executive tasks are often provided with a wide margin of appreciation and discretion. The exercise of administrative tasks by ecclesiastical authorities is subject to several legal constraints, such as those laid down by the principle of legality and those resulting from the individual rights counter-balancing administrative power. Yet, ecclesiastical officials are always called to interpret and apply canon law in the light of the over-arching target of redemption and salvation of the single believer, which implies the power

[79] See, in particular, the Apostolic Constitution *Sacrae disciplinae leges* and the *Prefatio* of the 1983 Code; see also the Apostolic Constitution *Pastor bonus*. The so called paradigm of service is highlighted by several authors; see for example V. Gómez-Iglesias, "Acerca de la autoridad como servicio en la Iglesia", in *Ius in vita et in missione Ecclesiae* (Libreria editrice vaticana, Città del Vaticano, 1994) 193; and E. Molano, "«Sacra Potestas» y servicio a los fieles en el Concilio Vaticano II", in *Fidelium iura* (1997) 9.

to go beyond the fulfilment of their institutional tasks and the duty to engage in the personal care of the believer.

One example of the scope and flexibility of the administrative power is provided by dispensations, a specific type of individual measure allowing an ecclesiastical authority granted with executive tasks to set aside the existing laws in a specific case, when this is required to achieve the spiritual good of the faithful.[80] The general power to grant a *dispensatio* is made subject by the 1983 Canon to some conditions: for example, a diocesan bishop is able to dispense neither from procedural or criminal rules nor from those rules whose dispensation is reserved to the Apostolic See or to some other authority;[81] and the exercise of such power cannot subvert the overall *rationale* of the legislative system.[82] In spite of these limits, however, dispensations represent a sharp instrument to adapt a legal system of general and uniform rules to the very specific personal situation of the believer. The *ratio peccati vitandi* requires several techniques of flexibilization of the legal system, one of which is the possibility for the ecclesiastical authorities to set aside one or more existing legal provisions.

Even this second element of canon administrative regulation represents a peculiarity of the ecclesiastical order. Mainly legal-rational regimes are obviously based on several mechanisms of legal flexibility, which - through interpretation, dialogue and negotiation - make the principles of uniformity and certainty of law less absolute than it is sometimes assumed. Yet, the canon legal order stretches such flexibility mechanisms in the application of law to the point of providing ecclesiastical authorities with the power to set aside the relevant rule in a specific case and of treating identical facts in opposite ways. Moreover, it links flexibility to the very specific reason of the spiritual *utilitas* of the believer, identified in his or her eternal salvation. This link also makes it clear that the wide and flexible character of administrative power is a specificity directly connected to the overall mission of the Church. In this sense, it comes unsurprisingly

[80] On this specific type of *actus particularis*, developed in the canon legal order since the XIIth century and now regulated by the 1983 Code as a manifestation of the *potestas exsecutiva* (see canon 85), see in particular I. Zuanazzi, *Praesis ut Prosis. La funzione amministrativa nella diakonía della Chiesa*, *supra* note 4, p. 542 et seq.; and J. Miras, J. Canosa and E. Baura, *Compendio di diritto amministrativo canonico*, *supra* note 4, p. 275 et seq.
[81] See canon 87.
[82] See S. Berlingò, "Dispensa (dir. can.)", *Enciclopedia giuridica* (1989) *ad vocem*.

that canon administrative regulation is developing at the administrative level some features that have been characterizing general canon law since its foundation, that is its «elasticity», «fluidity» and capability to adapt to the needs of every single human being on his or her path towards redemption from sin and salvation.

Lastly, it should be observed that the emerging patterns of canon administrative law present some ambiguities. As it has been already highlighted,[83] the administrative instruments through which the Church seeks to operate as a *societas* oriented to the *salus aeterna animarum* of its members are only rudimentary and could be significantly developed, especially on the procedural side. Moreover, the flexible character of the administrative power, based on the search of the spiritual *utilitas* of the believer, is so over-emphasized to conceal a paternalistic conception of the project of redemption and salvation at the heart of the Church mission. And the risks of this paternalistic conception are not adequately minimized by any set of instruments aiming at positioning the flexible character of the administrative power within the context of the communitarian enterprise established by the Second Vatican Council.

6. **Conclusions**

In this paper, we have tried to start a reflection on the differences and similarities between the administrative law of the Roman Catholic Church and the administrative laws of mainly legal-rational regimes, exemplified by the national systems where administrative law has developed and reached its full maturity and by the emerging regulatory systems beyond the State.

The analysis carried out in the previous paragraphs has led to four main comparative conclusions.

Firstly, the process of emergence of an administrative law of the Roman Catholic Church differs from that of the administrative laws of legal-rational regimes as for both its timing and driving forces. Canon administrative law develops only in the last decades of the XXth century, when the administrative laws of legal-rational regimes are already well established. And its

[83] *Supra*, § 3.

emergence may be considered as a functional response to specific exigencies of the institutional and intellectual life of the Church, that is the exigency of strengthening administrative efficiency and individual protection within the canon legal order, on the one hand, and the exigency to guarantee cohesion and integration among the various subjects of the *societas fidelium*, on the other. At the same time, however, the development of a canon administrative law is not a process purely internal to the intellectual and institutional history of the Church. Its foundation is at least indirectly linked to the experience of administrative law in mainly legal-rational regimes, and in particular of national administrative law, which proves to be a source of inspiration for canon law science and reformers.

Secondly, canon administrative law is made up of «materials» partly analogous to those of the administrative laws of mainly legal-rational regimes, partly peculiar to the Church legal order. Similarly to the administrative laws of legal-rational regimes, canon administrative law has been developing a liberal and an authoritarian component. Yet, the liberal and the authoritarian components coexist with a further dimension: the instrumentality of canon administrative regulation to the project of redemption from sin and salvation that represents the very fundamental mission of the community of the believers. The combination of similarities and differences with the nature of the administrative laws of legal-rational regimes is difficult to explain: while the peculiarities of canon administrative law are clearly linked to the specific functional foundation of the Church, the similarities have more elusive explanations, essentially connected to the historical processes of formation of the organization of the Roman Catholic Church and of the continental model of the modern State in Europe.

Thirdly, the position of canon administrative law within the Church legal order is different from that held by administrative law in mainly legal-rational systems. While the position of the latter within the legal order derives from their relationships with constitutional and civil law, the place occupied by canon administrative law is essentially defined by its object and function. Due to the theoretical unity of canon law, the emerging administrative regulation reflects the overall features of general canon law and develops as one of its functional branches. The specificity of the administrative branch with respect to other bodies of canon law relates to its very regulatory

object, which consists in the functioning of the ecclesiastical authorities responsible for the exercise of administrative functions, as well as in their relations with the believers. Given the uncertain boundaries of administrative functions under current canon law, however, the position of canon administrative regulation within the legal order is fluid and subject to potential growth or restriction.

Finally, canon administrative law differs from the administrative laws of legal-rational regimes as for its overall explanatory paradigms. The administrative laws of legal-rational regimes historically have been producing general models, increasingly characterized by pluralization, variety and differentiation. Canon administrative law, instead, is developing certain general patterns of administrative action, but it has not yet produced any consistent regulatory model. Moreover, the emerging patterns of administrative action present several peculiarities *vis-à-vis* the founding models of the administrative laws of legal-rational regimes. On the one hand, they are oriented towards a communitarian plan of redemption and salvation that implies the achievement of a high degree of interdependence and solidarity among all subjects of the *societas ecclesiae*, the exercise of Christian virtues and the reference to a supra-positive, divine design. On the other hand, they rely upon particularly incisive mechanisms of flexibility in the application of law, linked to the spiritual *utilitas* of the believer. Although administrative regulation of mainly legal-rational regimes makes large use of instruments of co-operation and flexibility, in the canon legal order such instruments are particularly accentuated and directly connected to the overall mission of the Church.

Admittedly, these conclusions are only a preliminary step in a research aimed at comparing the administrative law of the Roman Catholic Church and the administrative laws of legal-rational regimes. The comparative analysis carried out in this paper presents many «empties» and should be further developed in several regards. In particular, the processes of historical formation could be analyzed in greater detail than it is done in the previous paragraphs. And the inquiry on the similarities and differences between contemporary canon administrative law and the administrative laws of legal-rational regimes should focus on single principles and rules. Only a

microanalysis of the various administrative techniques would allow to shift from a rough sketch to an accurate comparative account.

In spite of their preliminary character, yet, the proposed conclusions suggest some general observations, in two different directions.

Firstly, the comparative inquiry carried out in the present paper induces to refine the usual representations of canon administrative law. The administrative regulation of the Roman Catholic Church is not a body of law radically different from the administrative laws of mainly legal-rational regimes, as it is sometimes argued on the basis of the spritual mission of the Church and of the divine foundation of canon law. Nor it is a body of law that can be entirely traced back to the French tradition of the administrative State in Europe. Rather, it is a composite and nuanced regulation. On the one hand, it shares certain features, and in particular a liberal and an authoritarian dimension, with the administrative laws of legal-rational regimes. And since its very foundation, as it has been recalled, it has found a remarkable source of inspiration in the experience of the administrative law of the State. On the other hand, canon administrative regulation has emerged in response to specific exigencies of the institutional and intellectual life of the Church; it serves a peculiar project of redemption and eternal salvation; its position within the legal order is not defined on the basis of its relationships with constitutional law and civil law; its emerging regulatory patterns are based on elements that cannot be found in mainly legal-rational regimes, such as the exercise of Christian virtues, the spiritual *utilitas* of the believer and the reference to a supra-positive plan. The result of the combination of religious and statal elements is not only a nuanced and complex regulatory body. It is also an unstable edifice, crossed by several internal tensions. This is the case, in particular, of the uneasy interaction among the authoritarian and liberal components, on the one hand, and the religious component, on the other; of the uncertain position of canon administrative law within the legal order; of the rudimentary development of the co-operative administrative mechanisms; and of the ambiguous constraints on the exercise of administrative authority.

Secondly, the comparative inquiry that has been carried out may be relevant also beyond the boundaries of canon administrative law. Although its preliminary character does not allow to

draw out a set of true «Roman lessons», the inquiry sheds some light on a number of elements that might contribute to a wider reflection on the functional dimension of general administrative law. Three elements, in particular, deserve to be highlighted.

To begin with, administrative law is not a legal phenomenon limited to mainly legal-rational systems. Historically, it is a product of legal-rational regimes, where it finds a formidable development. But it emerges and consolidates also within other types of regimes, such as the Roman Catholic Church, which combines elements that are typical of legal-rational authorities with a number of charismatic and traditional features. The exam of the canon legal order thus suggests that composite regimes (partly legal-rational, partly traditional, and partly charismatic) are not impermeable to administrative law. And it confirms the capacity of administrative law to root in highly different institutional systems, provided that an autonomous administrative space, structurally and functionally distinct from policy-making and jurisdiction, is at work. The rooting capacity of administrative law, however, raises on its turn difficult issues. The most obvious is the extent to which the strength of administrative law is connected to the strength of the model of the modern State in Europe. The exam of canon law shows that the development of an administrative regulation within the Roman Catholic Church is mainly due to reasons that are internal to the history of the Church itself. Yet, the statal model has certainly exerted an influence on the processes leading to the formation of administrative regulations in non-statal systems. To what extent, then, does the force of administrative law derive from the colonizing force of the modern State in Europe? And to what extent is it ascribable to elements internal to the systems in which administrative law is established?

Moreover, the comparative inquiry shows that administrative law is subject to a peculiar dynamic. On the one hand, administrative law presents a great flexibility and adaptability. It proves capable of growing in different systems. It takes a position within the legal order that changes from case to case, according to the overall features of the legal system. And it develops materials that are peculiar to the various single contexts, such as the component of canon administrative law directly instrumental to the communitarian project of the *salus aeterna animarum* of the members of the Church. On the other hand, some of its components, and in

particular its authoritarian and liberal components, tend to recur in the various systems. Administrative law, thus, can be considered as a plastic law, capable of connecting with a plurality of ideologies as well as of serving a variety of purposes. But it is also a law characterized by certain recurrent contents, which combine with the other materials giving rise to complex and not necessarily coherent mixtures. This dynamic of adaptation and repetition should warn of the risks of over-simplification in contemporary administrative law scholarship. In particular, it suggests prudence in emphasizing the elements common to the various administrative laws, which are inextricably linked with the materials peculiar to a specific system. And, at the same time, it seems to contradict the thesis according to which administrative law is absolutely unique to the various single societies.

Finally, and in strict connection with what has just been said, the features of administrative law partly depend on the type of power (composite, or mainly legal-rational) that the administrative law serves and regulates. The exam of canon administrative law suggests that qualitatively different types of power are not served and regulated by radically different types of administrative law, since certain basic (authoritarian and liberal) patterns of administrative law remain constant throughout the various systems. At the same time, however, the foundation of the power, far from being a neutral element, exerts an influence on the features of administrative regulation, as it is exemplified, in the case of the Roman Catholic Church, by the development of rules and principles oriented towards the *salus aeterna animarum*. Thus, administrative law varies according to the type of power that it serves and regulates, although such variation does not give rise to a clear-cut distinction between the administrative law of mainly legal-rational regimes and the administrative law of composite, multi-faceted powers. An observation that can be proposed only as a hypothesis for further research, to be tested and verified not only by deepening the investigation on canon administrative law, but also by extending the comparative inquiry to other composite, non purely legal-rational systems, both of statal and non statal nature.