The Vatican criminal trial and the guarantees of 'fair trial'. Reflections on the sidelines of a recent ruling by the Vatican Tribunal

Il processo penale vaticano e le garanzie del 'giusto processo'. Riflessioni a margine di una recente sentenza del Tribunale vaticano

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ABSTRACT

The conduct of a recent criminal trial in the Vatican City State brought to the attention of the doctrine and the question of the legitimation, on the level of international law, of the sentences pronounced by its judicial authorities. According to some opinions, in fact, the criminal procedural system, borrowed from the Italian one of 1913, and the judicial system do not ensure the fundamental rights of defense of the accused, the guarantees of independence, autonomy of the jurisdiction and the presumption of innocence of the accused. The analysis of the procedural system, especially in light of the numerous reforms introduced by Pope Francis which have profoundly transformed the regulatory fabric, demonstrates, however, that the doubts are not well founded. The regime of evidence formation and the cross-examination ensured during the hearing, in fact, are adequately monitored by the limits of usability of the investigative documents; the selection mechanism of the magistrates and their irremovability, then, guarantees the impartiality and impartiality of the judges in a manner corresponding to what happens in other countries.

KEYWORDS

Fair trial; judge; autonomy and independence of the jurisdiction.

RIASSUNTO

Lo svolgimento di un recente processo penale presso lo Stato della città del Vaticano ha proposto all'attenzione della dottrina e la questione della legittimazione, sul piano del diritto internazionale, delle sentenze pronunciate dalle sue autorità giudiziarie. Secondo alcune opinioni, infatti, il sistema processuale penale, mutuato da quello italiano del 1913, e l'ordinamento giudiziario non assicurerebbero i fondamentali diritti di difesa degli imputati, le garanzie di indipendenza autonomia della giurisdizione e di presunzione di non colpevolezza degli accusati. L'analisi del sistema processuale, soprattutto alla luce delle numerose riforme apportate da Papa Francesco che hanno profondamente trasformato il tessuto normativo, dimostra, tuttavia, come le perplessità non sono fondate. Il regime di formazione della prova ed il contraddittorio assicurato nel dibattimento, infatti, sono adeguatamente presidiati dai limiti di utilizzabilità degli atti di indagine; il meccanismo di selezione dei magistrati e la loro inamovibilità, poi, garantisce imparzialità e terzietà dei giudici in maniera corrispondente a quanto avviene negli altri Paesi.

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Giusto processo; giudice; autonomia e indipendenza della giurisdizione.

SUMMARY*: 1. The Vatican legal system and the European Convention on Human Rights - 2. The 'fair trial' and the Vatican trial - 3. (continued). The reforms made by the Vatican legislator - 4. The impartiality of the judges - 5. The* rescripta *- 6. Conclusion.*

1. The Vatican legal system and the European Convention on Human Rights

For a few years, since the Vatican jurisdiction also began to deal with more important cases and its decisions became of interest to public opinion[1] and to scholars engaged *in utroque iure*, it has been raised the problem of their 'legitimation' ' to be recognized by International Law[2].

As is known, the Holy See has not signed the *European Convention on Human Rights (ECHR)*, considered a sort of *magna chart* on the basis of which the 'rightness' of the decisions pronounced by the jurisdictions of the States can be measured.

The art. 6 of the ECHR proclaims the so-called *fair trial* rights, establishing, in particular, the right of every accused person *"to a fair and public hearing";* to be judged *"within a reasonable time"*, *"before an independent and impartial tribunal established by law";* to be treated as innocent until his or her guilt is legally established; to timely information on the nature and reasons for the accusation against him or her; to have adequate time to prepare the defense; to be able to exercise self-defense and to be admitted to "*interrogate"* or *"have interrogated"* the witnesses against him or her and to obtain the summons and interrogation of the witnesses on his or her behalf "*on equal terms with the witnesses against him or her*".

The European Court of Human Rights (ECtHR), over the last few years, has carried out a check on the effective application of these principles by the various national systems, deciding on individual appeals pursuant to articles 34 and 35 of the Convention. The Secretary General of the Council of Europe, then, making use of the powers referred to in art. 52 of the same Convention, through the acquisition of information from the States on the ways in which their domestic law ensures the effective application of all the provisions contained therein, has, in turn, carried out an important preventive function in terms of protection of human rights.

Through this system made up of rules and tools for controlling their implementation, European states recognize themselves in the common sharing of values and principles that constitute a sort of 'natural' or 'universal' justice and accept a limitation of their sovereignty for the benefit of freedom rights of their citizens.

As mentioned, the Holy See has not signed the ECHR. Nevertheless, through the adhesion to other agreements that refer to ECHR (such as the Monetary Convention between the Vatican City State and, on its behalf, the Holy See and the Italian Republic on behalf of the European Community, signed in Rome on 29 December 2000), some of those principles are not extraneous to Vatican legal system.

Nonetheless, the failure to accept the entire normative *corpus* through which the human rights protection system is structured in the European context could lead the Vatican legal system outside of this community and, for this reason, many have asked whether all this could lead to a sort of isolation of the Vatican legal system from the international community that expressed and defends those values.

The problem, evidently, is not just theoretical, because it has enormous practical implications.

A warning of what could be the consequences of such marginalization has already appeared in a well-known case that has come before the ECtHR, which established that the Italian judicial bodies, before executing and deliberating a canonical sentence declaring the nullity of a concordat marriage, must

[1] See, *ex multis*, FRANCA GIANSOLDATI, *Vaticano, canonisti in rivolta: «Nel tribunale del Papa non c'è giusto processo». E si allunga lo spettro della Corte Europea,* in Il Messaggero, 18 March 2024.

[2] See, recently, PAOLO CAVANA, *Osservazioni sul processo vaticano contro il Cardinale Becciu e altri imputati,* in *Stato, Chiese e pluralismo confessionale,* Online Journal (*www.statoechiese.it*), 4, 2024, pp. 1-31*;* GERALDINA BONI, MANUEL GANARIN, ALBERTO TOMER, *Il 'processo del secolo' in Vaticano e le violazioni del diritto,* in *Stato, Chiese e pluralismo confessionale,* Online Journal (*www.statoechiese.it*), 5, 2024, pp. 1-135.

ascertain that within the ecclesiastical process the parties have benefited from a fair procedure which fully respects the principle of contradictory[3].

But the effects on international cooperation would be even more deplorable.

For years, in fact, since crime took on transnational manifestations, States have understood the importance of strengthening the collaboration of their jurisdictions and police forces to create what, in the lexicon of Euro-unitary legislation, is defined as area of freedom, security and justice.

In the first part of the century, in criminal matters in general and in procedural matters in particular, the European Union intervened in an increasingly massive manner to replace the traditional instruments of judicial collaboration, mediated by the intervention of the political authority (as the maximum expression of the affirmation of the sovereignty of States in judicial cooperation), with more streamlined institutions that allow direct dialogue between judicial authorities.

All this was able to happen precisely because of the common sharing of those aforementioned principles which represent, in fact, the guarantee for sovereign States that in no way the execution of a measure adopted by an organ of another State will be able to undermine the freedom rights of its citizens or its fundamental interests.

This approach can be found, for example, in the preambles of the framework decision 20002/584/JHA of 13 June 2002, relating to the *European arrest warrant and the surrender procedures of the Member States*, which can be considered the first real intervention of the European Union in what was once defined (at the time of the Treaties of Maastricht and Amsterdam) as its third pillar.

The new collaboration instrument ('ratified' in Italy, as known, with Law 22 April 2005, no. 69) is based on the high, mutual level of trust that the European Union States recognize in each other and, in particular, on the entrustment of compliance, by each of them, with the principles enshrined in the art. 6 par. 1 of the Treaty of the Union (the reference was evidently, at the time, to the wording contained in the version envisaged by the Treaty of Amsterdam), in which, as is known, it was solemnly proclaimed that «the Union is founded on the principles of freedom, democracy, respect for human rights and fundamental freedoms, and for the rule of law, principles which are common to the Member States».

Similarly, it happened more recently with Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 relating to *the European Criminal Investigation Order*. This Directive, introducing a new judicial collaboration tool for the collection of evidence within the EU which replaces the traditional one of letters rogatory, assumes that the creation of an area of freedom, security and justice in the Union is based on mutual trust and a presumption of conformity on the part of all Member States, Union law and, in particular, fundamental rights.

Other examples could be adduced to demonstrate how the sharing of some general principles and the entrustment of their respect by all the judicial bodies of a given community is the basis of the creation of the judicial space.

The Holy See did not participate in these agreements. For this reason the judicial collaboration with the international community remains entrusted to the traditional instruments of letters rogatory and extradition, as regards the acquisition of evidence abroad and the delivery of persons wanted because they were drawn from coercive personal measures or final judgments.

These mechanisms - extremely cumbersome and very often inadequate to combat criminal phenomena (which, instead, take advantage of the bureaucratic slowness of the reactions of the repressive

[3] Cf. EUROPEAN COURT OF HUMAN RIGHTS, 20/07/2001, Pellegrini c/Italia, in *Il Diritto ecclesiastico,* 2, 2001, p. 305.

action by national systems) – are not only subordinated to the political control of the requested State (which can always refuse, on the basis of an assessment by top administration which is insusceptible to any union), but they are also subjected to a rigorous assessment of a jurisdictional nature aimed at verifying, among other things, the respect by the requesting State of the fundamental principles of the person and it is precisely in relation to this conformity screening that failure to adhere to the ECHR could lead to its most deleterious effects.

The articles 705 and 724 of the Italian criminal procedure code, for example, provide respectively, in terms of extradition and letter rogatory, that the court of appeal pronounces a contrary sentence if, for the crime for which proceedings are being prosecuted, the person has been or will be subjected to a trial that do not ensure respect for fundamental rights, or if there are well-founded reasons to believe that considerations relating to race, religion, sex, nationality, language, political opinions or personal or social conditions may influence the conduct and on the outcome of the trial.

To avoid any misunderstanding it should be underlined that from the jurisprudential panorama of the Italian Court of Cassation it emerges not only that «the mere violation of the procedural rules of the requesting State does not determine contrary to the fundamental principles of the [Italian] legal system»[4], but that, for the purposes of executing the request of the foreign state, «the procedural guarantees corresponding [to the Italian ones] are not necessary», as it is sufficient «that the foreign legal system ensures the fundamental needs of the defense»[5]. For example, the Italian jurisprudence of legitimacy has deemed the aforementioned impediment clause applicable for the opposition to the fundamental principles of the national legal system, in the presence of a contumacial proceeding which does not allow the appeal of the final sentence when the accused has not been put in a position to know its existence[6].

Outside of these borderline cases, however, collaboration is not denied, demonstrating that the principles of fair trial to which reference must be made are not those that are implemented by this or that national legal system.

This clarification is important because, in this regard, it was also underlined how the 'legitimacy' of Vatican decisions should be examined in accordance with the most rigorous criterion set out in the art. 733 c.p.p. which, regarding the recognition of foreign criminal sentences, in an even more emphatic manner, provides among the prerequisites for recognition (in addition to the non-existence of racial, religious discrimination, etc.) that the sentence was pronounced by an independent and impartial judge, that the accused has been summoned to appear in court before the foreign authority and that he or her has been recognized the right to be questioned in a language he or she understands and to be assisted by a lawyer[7].

Although this provision certainly contains a more rigorous parameter of conformity than that which is required for the purposes of providing collaboration between judicial authorities (justified by the fact that through recognition the foreign qualification is made to produce effects similar to those of a decision pronounced in Italy), it is very clear that it is not relevant (and, therefore, inappropriately referred to) with respect to the topic in question because the aforementioned provision has a totally different field of application: the recognition of the sentence pronounced by a judicial authority foreign for the limited purposes referred to in the art. 12 Italian penal code.

It, however, can be taken as a synthetic and effective representation of the essential parameters of the fair trial on which the verification of legitimacy of a decision pronounced in another system can be based.

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[4] Cf. COURT OF CASSATION, Sixth Section, 15 January 2007, Trifu, in *Cassazione penale,* 2008, p. 2012.
[5] Cf. COURT OF CASSATION, Sixth Section, 21 September 1995, Di Maio, in *Cassazione penale,* 1996, p. 3022.
[6] Cf. COURT OF CASSATION, Sixth Section, 24 June 2005, Karamaschev, in *Cassazione penale,* 2006, p. 3529.
[7] See PAOLO CAVANA, *op. cit.*, p. 27.

2. The "fair trail" and the Vatican trial

From what is highlighted in the previous paragraph, "independence and impartiality of the judge", "right of defence" (in its various manifestations of technical defense and self-defence) and "contradictory" (this too in its different manifestations, that is to say: in the formation of the evidence and in the dialectical-argumentative contribution with respect to the judge's decision), constitute the three pillars on which the guarantees of a fair trial rest[8] and on which, in short, the 'correspondence' must be verified - regardless of the chosen model (accusatory or inquisitorial) - of a procedural system based on values shared by the international community.

As known, due to a singular coincidence of history, the code of criminal procedure adopted in Italy in 1913 (the so-called Finocchiaro-Aprile code, named after the Minister of Justice who proposed it) remained in force in the Vatican City State[9]. A liberal code, as it has been defined, promulgated in the Giolittian period of the monarchy; "not loved by practitioners" despite, overall, it had received a certain consensus which, however, perhaps also in consideration of the authoritarian drift taken by the government in the years immediately following its entry into force, encountered soon «lively opposition, in which brought together corporate resistance and underlining of objective sources of discomfort, above all due to many ambiguities and complications to which the spirit of compromise (rather than of composition) between the various instances ended up giving rise»[10].

In fact, the examination of the overall system highlights the adoption of a mixed system and, above all, the coexistence, in a single regulatory *corpus*, of three rites: the rite for crimes falling under the jurisdiction of the Court of Assizes (to which, moreover, in line with the particular trust that was felt for popular juries, a particularly significant competence had been attributed), preceded by formal instruction and presided over by the investigating judge; the rite for crimes within the jurisdiction of the court, preceded by the summary investigation, entrusted to the public prosecutor; the rite, finally, for crimes within the jurisdiction of the magistrate preceded by an instruction (modulated on the basis of the summary one) entrusted to the same judging body.

Beyond the possible criticism that could be raised in relation to this excessive variety of models regulated within a single code, the regime of the so-called contumacial rite is certainly inadequate if compared to the principles developed by the jurisprudence of the ECtHR regarding the participation of the accused in the trial. The contumacial rite is inadequate not only due to the lack of sufficient guarantees in relation to the actual knowledge of the pending trial to proceed in his absence, but particularly due to the fact that, to exercise the right to proof, his appearance was required before the start of the proceedings speeches (art. 414 c.p.p.).

3. (continued). The reforms made by the Vatican legislator

[8] About the principle recepted by art. 111 Const. see PAOLO FERRUA, *Il 'giusto processo',* III ed., Zanichelli, Bologna, 2012; GIULIO UBERTIS, s. v. *Giusto processo (dir. proc. pen.),* in *Enciclopedia del diritto,* Annali, II, t.1, Giuffrè, Milan, 2008, p. 419.

[9] On this topic, please refer to ALESSANDRO DIDDI, *I novant'anni del codice di procedura penale dello Stato vaticano*, in *Diritto e Religioni*, 1, 2019, pp. 169-196.

[10] See MARIO CHIAVARIO, s. v. *Codice di procedura penale*, in *Digesto delle discipline penalistiche,* UTET, Turin, 1988, vol. II, p. 259. About the Italian criminal procedure code of 1913, see also PAOLO FERRUA, *Un nuovo processo penale dopo il codice Zanardelli: il codice 1913 e le origini del «garantismo inquisitorio»*, in SERGIO VINCIGUERRA (ed.), *Codice penale per il Regno d'Italia (1889),* CEDAM, Padua, 2009, p. CXCVII ff.

Rather than linger in the analysis of the original text of the criminal procedure code of 1913, it is necessary to turn attention to the procedural system that finds application in the Vatican City State.

It must be noted, in fact, that although the structure of that text in its essential lines has remained substantially unchanged, multiple reforms have 'renewed' it, adapting it to the needs of protecting those values which, in addition to characterizing the most modern procedural systems, permeate the whole Vatican legal system. According to the art. 1 of the Law on the Sources of Law, as known, the Vatican legal system recognizes in the canonical system the first normative source and the first interpretative reference criterion. The guarantees of fair trial are certainly not extraneous to the canonical system.

It is obvious, therefore, that any evaluation of the compliance of the Vatican procedural system with those natural and universal principles - on which modern systems for exchanging mutual collaboration in the criminal field are based today - cannot ignore a brief examination of the main regulatory interventions that have interested the 1913 Code.

A first consideration must be addressed to the reform implemented with the Law dated 21 June 1969, no. L which, among other things, abolished the courts of assizes and introduced significant and (taking into account the times in which they were conceived) very modern rules inspired by the protection of the accused, while in those years in Italy the attention was paid to the replace of the Rocco Code.

The art. 28 of the aforementioned Law. no. L of 1969, in fact, established that the judge, if he or she deems it useful for justice or the speed of the proceedings, can: a) allow the party to directly ask questions to the person to be questioned or examined; b) provide for any derogation from the provisions of the criminal procedure code which are not established under penalty of nullity, inadmissibility or forfeiture; c) extend, in favor of the accused, any procedural deadline.

In this concise and partial reconstruction of the new regulations that interested the procedural matter, the *Apostolic Letter in the form of Motu Proprio* dated 16 February 2021 and the Law dated 6 September 2022, no. DXXXI cannot fail to be remembered. These normative interventions have abolished the contumacial rite and the provisions that limited the exercise of the right to proof by the accused who had not personally 'appeared' in court.

The art. 35 of the Law 11 July 2013, no. IX, one of the first Pope Francis' laws[11], deserves a separate mention, also due to the relevance it assumes in the context of the problem that we are examining. This provision was responsible for the introduction of the art. 350-*bis* establishing the principle of legality of the trial, its reasonable duration and the guarantee of the presumption of innocence of the accused[12].

These values not only echo those contained in the art. 6 of the ECHR but they are also reiterated and further specified by the art. 21 of the recent *Fundamental Law of the Vatican City State*, promulgated on 13 May 2022, which stated that «in every trial the impartiality of the judge, the right of defense and cross-examination are guaranteed between the parts»[13].

The result that can be obtained from this brief regulatory excursus is a procedural system which in its essential features does not differ at all from the Italian one, especially when compared with the current

[11] Particular attention was also paid to these reforms by Italian procedural criminal law doctrine. See, for example, MARIO PISANI, *"Giusto processo" e "presunzione di innocenza" nella recente legislazione vaticana*, in *Criminalia*, 2013, p. 609.

[12] On this topic see GIUSEPPE PIGNATONE, *Innocente fino a prova contraria: la presunzione di non colpevolezza nell'ordinamento italiano*, in AA. VV., *Diritto penale canonico. Dottrina, prassi e giurisprudenza della Curia Romana,* Libreria Editrice Vaticana, Vatican City State, 2023, p. 219.

[13] See MARIA D'ARIENZO, *La nuova Legge Fondamentale dello Stato della Città del Vaticano del 2023*, in *Diritto e Religioni*, 2, 2023, p. 261 ff.; EAD., *Indipendenza e centralismo. La nuova Legge fondamentale*, in *Il Regno-Attualità*, 14, 2023, pp. 423-425.

one and resulting from the numerous transformations to which the original accusatory model conceived in 1988 after years of gestation it was subjected.

Although, in fact, the presence of a single file (the public prosecutor, together with the request for summons from the accused deposits the documents of the proceedings in the registry of the Court) and, therefore, the fact that the trial judge is brought to the knowledge of the documents of the investigation constitute elements of strong discontinuity compared to the Italian system, nevertheless the evidence that can be used for the purposes of the decision is only that formed in the hearing in the cross-examination of the parties.

In fact, it is envisaged that the parties must present the lists of witnesses they intend to have heard (art. 367 c.p.p.); the judge can order the reduction of excessively extensive evidence and eliminate testimony that is not admissible by law (art. 371 c.p.p.).

The hearings are public under penalty of nullity (art. 373 c.p.p.); the parties, as mentioned, according to the art. 28 of the Law. no. L of 1969, proceed directly to the examination of the declaratory evidence.

The recovery of documents formed during the investigation through their reading, pursuant to art. 404 c.p.p. (also recently amended by Law no. DXXXI of 2022), can only take place with the consent of the parties, in the presence of situations of objective impossibility of repetition (such as death, infirmity or unavailability of the witness).

To guarantee the right of defence, the assistance of the defender is provided, also in this case under penalty of nullity (art. 73 c.p.p.), and free legal aid is ensured.

To protect the prerogatives that must inevitably be ensured to the accused, it is also envisaged that the summons is void if there is absolute uncertainty about the title of the crime, the facts that determine the accusation or the authority from which the acts or measures emanate, or before which the accused must appear.

A first opinion which, therefore, can be expressed from this synthetic and inevitably summary framework, is that, despite being over a hundred years old, the procedural model outlined by the 1913 code - above all thanks to the adaptations and reforms to which it has been subjected to conform it to the values which, as seen, inspires the Vatican legal system - responds perfectly to the canons of fair trial sanctioned by supranational sources.

And this conclusion exactly reflects the decisions taken by foreign judicial authorities (Italian and Swiss) before which various defendants - interested in opposing initiatives promoted by the Vatican promoter of justice's office in the context of investigative activities - have objected, precisely, the absence of fair trail guarantees to prevent the requested collaboration[14].

It testifies how the Vatican legal system, contrary to what has been attempted, has passed the scrutiny of the international community.

4. The impartiality of the judges

Although, therefore, there can be no doubt that the procedural model applicable in the Vatican is certainly based on respect for the principles that constitute the natural basis of the fair trial, in the context of the debates, scientific and not scientific, which have developed on the margins of the decision issued

[14] We are referring to the decisions that were taken in the context of the rogatory procedures initiated by the Office of the Promoter of Justice to acquire evidence abroad.

following a recent trial by the Court[15], doubts have been raised about the effectiveness of the guarantees applied in the trials which take place, fearing the risk of a possible isolation of the Vatican jurisdiction in the context of the international community with the repercussions, as mentioned, on the operation of the collaboration tools essential for the contrast of those phenomena of international crime which, unfortunately, can also touch the Vatican City State.

Taking inspiration from the aforementioned art. 733 c.p.p. (which, however, it is repeated, does not seem to be referred to appropriately) it has been underlined the inadequacy of the decisions taken by the Vatican jurisdiction to bind the countries from which it could request cooperation (among which, first and foremost, especially due to the geographical location, Italy) because the autonomy and independence and, therefore, the impartiality of the judging body would not be adequately ensured.

This criticism would find its inspiration, rather than from the analysis of the legal provisions underlying the constitution of the judge, on what happened in the context of the process which, as has been said, saw the Supreme Pontiff intervene with four *rescripta ex audientia* through which would have been 'rewritten' some procedural rules that may have *«potentially caused a serious damage to the independence and impartiality of the judges»*[16].

The argumentative path which has led to doubt the impartiality of the judge as a result of the issuing of the aforementioned pontifical provisions is not, to be sure, very linear. The *rescripta* of the Holy Father, in fact, have in no way affected, as will be said, the rules of the trial, the principle of legality that the art. 350-*bis* c.p.p. has established as the basis of the judicial assessment ("*every defendant has the right to a trial to be carried out according to the rules of this code*"), i.e. the nucleus of those guarantees which, for example, as a result of the provisions of the art. 111 of the Constitution, constitute the cornerstone of the Italian procedural system (*"jurisdiction is implemented through due process regulated by law"*). The *rescripta* have only regulated some aspects of the instruction.

Before addressing this aspect and verifying the possible repercussions that these measures have determined on the conduct of the trial, some reflections must be carried out on the way in which the Vatican legal system has regulated this important and essential moment of the fair trial.

In this regard, a clarification is necessary because the level of impartiality (and partiality) of the judge, i.e. of the natural persons who administer the jurisdiction, must not be confused with that of the autonomy and independence of the judging body[17].

The trial recently concluded with the 2023 sentence did not highlight any symptom of a lack of serenity and objectivity of the court which, moreover, if it had manifested itself, could have been detected through the recusal of the judges who composed it, which, also in the 1913 code, represents the tool for verifying the impartiality of the judge.

The problem that some opinions highlight is, however, of an organizational nature and concerns the selection mechanism of the magistrates who make up the judging body and their possible dependence on the Supreme Pontiff who, according to the art. 1 of the Fundamental Law of 13 May 2022, is the «Sovereign of the Vatican City State and has the fullness of government powers which includes legislative, executive and judicial power».

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[15] I allude to the judgment dated 16 December 2023, issued as part of the procedure. no. 49/19 RGP by the Vatican City State Court (on which the criticisms of the authors cited in note 2 were focused), whose motivations, at the time of drafting this contribution, were not yet filed.

[16] PAOLO CAVANA, *op. cit.,* p. 21.

[17] On this topic (widely covered by jurisprudence) see NICOLÒ ZANON, FRANCESCA BIONDI, *Il sistema costituzionale della magistratura,* III ed, Zanichelli, Bologna, 2011, p. 17 ff. e 57 ff.

This provision has been read as a sign of an absolutist form of State incapable of ensuring autonomy of judgment and objectivity to the bodies to which the exercise of the power of the Supreme Pontiff is entrusted in individual procedures.

The problem obviously cannot be exhausted in a few words although some considerations on the two aspects that characterize it can also be carried out to clear the field of some regrettable inaccuracies.

With reference to the first of them, it should first of all be remembered that in a writing by Professor Giuseppe Dalla Torre, President of the Vatican City State Court for over 20 years, we can draw, beyond the explanation, also the personal testimony of the profound validity of the rules that govern the choice of the magistrates who make up the offices of the Vatican Tribunal[18].

Regarding the selection mechanism, it was explained that the chosen criterion - that of nomination *intuitu personae* by act of the Supreme Pontiff - is not based on arbitrary decisions, because it is the law itself that predetermines the admission criteria suitable for ensuring that natural professionalism which, in turn, represents a precondition for ensuring the qualities of the body: belonging to the role of university professors and proven experience in the judicial and forensic field, on the one hand, and the gained experience of at least one of the magistrates of the offices in Canon and Ecclesiastical Law, on the other.

These are requirements which, in addition to ensuring cultural and ideological pluralism within the judicial bodies, include, upstream, the completion by the candidates of a very high quality training course in the forensic and/or university fields.

Moreover, even in the highest bodies of jurisdiction in Italy (think of the Constitutional Court), the selection criterion is not the competitive one but that of the individual nomination of candidates who, in fact, belong to the role of university professors, lawyers and magistrates.

With regard, however, to the autonomy and independence of magistrates, it must be remembered that the provisions of the Vatican judicial system which proclaimed their hierarchical dependence on the Supreme Pontiff, including art. 2 of Law 16 March 2020, no. CCCLI (which replaced Law no. CXIX of 1987), not only were recently repealed, but, as a whole, they did not at all affect the natural values on which fair trail requires that jurisdiction must be regulated[19].

First of all, it must be remembered that, today, any provision on this topic must be read in light of what the art. 21 of the Fundamental Law establishes. It, as mentioned, guarantees the impartiality of the judge in every trial with a prescription which, upon closer inspection, follows the same guarantees enjoyed by magistrates in the Italian legal system in accordance with the articles 101, 104 and 108 of the Italian Constitution.

The hierarchical dependence that the Law affirmed, therefore, did not concern the exercise of the judge's functions but simply the organizational aspect.

To understand this profile, it is enough to remember that, in Italy, art. 69 of the r.d. no. 12 of 1941 establishes that the public prosecutor exercises, under the supervision of the Minister of Justice, the functions that the law attributes to him.

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[18] GIUSEPPE DALLA TORRE, *L'indipendenza della giustizia vaticana*, in *Stato, Chiese e pluralismo confessionale,* Online Journal (*www.statoechiese.it*), 25, 2019, pp. 21-33.

[19] About the provision introduced by the Law no. CCCLI of 2020 see RICCARDO TURRINI VITA, *Il nuovo ordinamento giudiziario vaticano*, in AA. VV., *Diritto penale canonico. Dottrina, prassi e giurisprudenza della Curia Romana,* cit., pp. 795-818.

A provision of this kind, if read in isolation, could lead to the belief that the Italian body in charge of mandatory criminal prosecution is dependent on the executive, a dependency which, obviously, in the new Italian constitutional structure would also be aberrant just to think.

The autonomy and independence of the public prosecutor's magistrate is ensured by art. 108 of the Constitution (which gives the public prosecutor in the special jurisdictions the same guarantees of independence enjoyed by other magistrates); from its belonging to the judiciary (and, therefore, to the autonomous and independent order from any other state power referred to in art. 104 of the Constitution) and, again, with reference to the exercise of its functions, from the obligatory nature of the criminal action (art. 112 Constitution).

In line with these principles, the art. 2 of the aforementioned Law no. CCCLI of 2020 required that magistrates must be subordinate to the law *in the exercise of their functions* and required that they exercise their powers impartially must be based on the limits of *competence established by law*. The art. 13 of the same law, in turn, prescribed (and prescribes) that *the office of the promoter of justice exercises the functions of public prosecutor in autonomy and independence.*

It was (and is) the law, therefore, and not the will of the Supreme Pontiff, that guided the work of the magistrates, both the promoter of justice and those of the judicial bodies.

It was a precise self-limitation, if looked at from above, of the Sovereign's power, and an absolute guarantee, if looked at from below, of the possibility of the Supreme Pontiff interfering in the concrete exercise of jurisdiction.

Furthermore, it should be considered, as mentioned, that these guarantees were further strengthened with the *Motu Proprio* dated 16 February 2021 and, above all, with that of 12 April 2023.

As a result of the *Motu Proprio* of 12 April 2023, in fact, it has disappeared not only any reference to the hierarchical dependence of magistrates on the Supreme Pontiff, but also any possibility of the magistrate's dismissal from office per *factum principis* has been eliminated.

This last aspect deserves particular attention in this extremely concise reflection on the topic.

The safeguard of independence and autonomy is certainly the immovability. The art. 101 of the Constitution establishes it and responds to a rule of intuitive evidence. The magistrate may not feel inspired only by his or her conscience and by the law if he or she were to fear being removed in the case that the decision was not pleasing to the Supreme Pontiff.

As the professor Dalla Torre had always pointed out «gives strength to their independence» the fact that the Vatican magistrates, in addition to being people with their own professionalism, «have a defined legal status outside the Vatican reality»[20].

But the doubt that the Vatican magistrates can be removed *ad libitum* by the Supreme Pontiff must certainly be dispelled. In this regard it was noted that, pursuant to art. 2, paragraph 2, of Law no. CCCCLI of 2020 magistrates could terminate "*exclusively by sovereign will",* which would have meant that they could effectively lose their office overnight[21].

On the sidelines, even in this case, a partial reading of the rules would have been offered because that will was, in any case, self-limited by the presence of the causes of termination provided for by law (and, therefore, by the provisions of art. 10 of the cited Law n. CCCCLI of 2020); it should rather be noted that the recent reforms introduced by the *Motu Proprio* dated 12 April 2024 have completely redesigned

[20] GIUSEPPE DALLA TORRE, *op. cit.,* p. 23.
[21] PAOLO CAVANA, *op. cit.,* p. 19.

the scope of the art. 2 prescribing, as mentioned, that «*magistrates exercise their powers impartially, on the basis and within the limits of the competences established by law*».

In fact, as a result of this reform, today the Vatican magistrates cease to hold office at the end of the judicial year in which they reach their 75th birthday, simply without prejudice to the "*sovereign will*" to confirm, *donec aliter provideatur,* in the office the magistrate who has reached the age of seventy-five.

5. I *rescripta*

As mentioned, despite this solid regulatory framework, the effectiveness of the procedural system in concretely ensuring the guarantees of a fair trial has recently been questioned.

The *casus belli*, as mentioned, was offered by what happened during the trial which recently concluded in the first instance with sentence of 16 December 2023. According to some opinions, this decision would have been profoundly influenced by some interventions of the Supreme Pontiff which would have ended up affecting the autonomy of the jurisdiction and the impartiality of the judges[22].

As we have already had the opportunity to observe, it is not clear the argumentative path through which it's possible to conclude that the measures in question may have disturbed the serenity and autonomy of judgment of the magistrates and the regular conduct of the trial (which, incidentally, took place over the course of two years, with the holding of approximately 90 hearings which occupied entire days and the acquisition of several dozen witnesses from the prosecution and defense and with the holding of interrogations and of spontaneous declarations of all the accused).

In order to correctly frame the problem, it is necessary to remember the content of the Holy Father's provisions and, above all, to precisely define the scope of their application.

It should, in fact, be underlined that at the beginning of the investigations the Supreme Pontiff had issued four *rescripta ex audientia*, by which certain procedural aspects were regulated to impact exclusively during the inquiry phase without any repercussion on the trial proceedings.

The Holy Father's *rescripta* "filled in" certain normative gaps and regulated areas of uncertainty left open by the application of the criminal procedure code.

It must, in fact, be remembered that with the *rescriptum* dated 2 July 2019 (the first) the Holy Father had established that, for the investigation activities, the Promoter of Justice could proceed under summary rite with the faculty to adopt any type of a precautionary measure.

he reason for this provision lies in the fact that until that moment it was uncertain - for the crimes that fell within the jurisdiction of the Court of Assize (and for which the 1913 Code of Criminal Procedure provided for formal instruction), if the art. 14 c.p.p. would still be applicable after the suppression of the Assize Courts by art. 27 of Law no. L. of 1969 - whether the investigative activities should be carried out by the investigating judge or by the promoter of justice.

As mentioned, the 1913 code initially provided for three different procedures (depending on whether jurisdiction over offenses lay with the court of assizes, the tribunal, or the pretor). For offenses falling under the jurisdiction of a jury trial, formal instruction was mandatory and had to be carried out by the investigating judge under penalty of nullity.

Quid iuris, however, once the Vatican legislator established, through a general provision, that the tribunal should be considered a substitute for the court of assizes? Did this substitution also affect the

[22] PAOLO CAVANA, *op. cit.,* p. 21.

procedure, meaning that proceedings before the tribunal could have been preceded by a new formal instruction?

This was a question that had arisen years earlier during the trial against former executives of the *Istituto per le Opere di Religione* (in which money laundering and self-money laundering offenses under art. 421-*bis* c.p. were contested for the first time, punishable by a maximum penalty exceeding 10 years, thus falling under Article 14 c.p.p. and the jurisdiction of the court of assizes).

The reason for this interpretative knot lies in the technique with which the Vatican legislator intervened in this matter (but also in others, such as that of avocation), not expressly indicating the abrogated articles of law, but rather establishing the abolition itself of the institutions, thus leaving the interpreter with the difficult task of identifying the provisions actually interested by the abrogation process.

In that instance, the broader interpretation was opted for, namely that the abolition of the Court of Assizes also entailed, beyond expanding the jurisdiction of the tribunal, the elimination of the procedure foreseen for it, and the consequent extension of the powers of the public prosecutor who, under the code's scheme, had the authority to conduct investigations in the form of summary inquiries for all offenses falling under the tribunal's jurisdiction. Despite the defensive stance (also represented by authoritative lawyers and university professors), the issue was not raised.

Nevertheless, the problem could not be said to have been resolved. In fact it has found a definitive solution only with the reform introduced by Law No. DXXXI of 2022, which provided for formal instruction by the investigating judge only for offenses punishable by a sentence exceeding 15 years.

Therefore, the clarification of this non-marginal procedural aspect, which – it is reiterated – had no impact on the trial (the actions of the prosecutor are inherently inadmissible as evidence and cannot be acquired through reading), forms the basis of the first *rescriptum* of the Supreme Pontiff, which essentially requested an authentic interpretation of the rules to be applied.

Moreover, this provision necessitated providing normative coverage for another closely related aspect, namely that of functional jurisdiction to issue precautionary measures.

The *rescriptum* dated 2 July 2019 resolved the issue by assigning the power to apply precautionary measures to the public prosecutor, and in this case too, there was no compromise on the guarantees offered to the defendant.

Incidentally, it should be noted that the option of granting the public prosecutor - namely the organ of the public prosecutor's office - precautionary powers cannot be censured in terms of fair trial rules. It is recalled that in Italy, until 1988, even the Public Prosecutor could issue arrest warrants; and today, under the same legal system, the public prosecutor can issue detention orders.

Without delving into the effectiveness of the precautionary system introduced by the 1988 code (which has been the subject of debates for years and is still a target for potential significant and radical transformations, despite numerous reforms), the supranational guarantee on precautionary measures is provided for in Article 5 of the ECHR, which does not exclude the possibility that the public prosecutor may adopt measures restricting personal liberty ("a judicial officer authorized by law to exercise judicial functions" is, in fact, the organ designated as having precautionary powers in the Convention's lexicon).

The fundamental guarantee provided for in Article 5 of the ECHR, as is well known, is that a person deprived of their personal liberty «has the right to bring proceedings before a court, so that it may decide without delay on the lawfulness of his detention».

Therefore, Vatican procedural law provides that during the investigation, the investigating judge may order release for lack of evidence; art. 334 of the Vatican Code of Criminal Procedure provides that the investigating judge may grant provisional release. Furthermore, art. 342 of the Vatican Code of Criminal Procedure provides that appeals may be made against the orders of the investigating judge, and finally, art. 346 of the Vatican Code of Criminal Procedure provides that appeals in Cassation may be made against the decisions pronounced on appeal.

A system of guarantees, therefore, which, regardless of the organ that may adopt the fundamental measure of restricting personal liberty, ensures comprehensive judicial protection for persons subject to coercion in full conformity with the provisions of International Law.

With a second *rescriptum* dated 5 July 2019, the Supreme Pontiff allowed the Promoter of Justice to adopt suitable technological tools for intercepting fixed or mobile lines.

The intervention in this case, as well, was necessary to align the guarantees concerning the violation of confidentiality and freedom of correspondence with the stricter international protection standards.

It must be recalled that the 1913 code provided in art. 170 that communications interceptions could be carried out by the judicial police.

It is not possible to reconstruct here the history of the challenging journey (which is not yet concluded) that has been undertaken from the 1970s to the present day by the Italian legislature to align the rules governing interceptions with the guarantees provided in art. 15 of the Constitution.

However, one fact that cannot be overlooked is that an important outcome achieved by Italian legislation was the removal from the legal system of the power to intercept communications by the judicial police.

What was provided for by the *rescriptum* dated 5 July 2019, in this case as well, was an anticipation of what was subsequently introduced by Law No. DXXXI of 2022, which incorporated into the Vatican Code of Criminal Procedure art. 259-*bis* to 259-*decies*, constituting a complete regulatory framework modelled on that provided in art. 266 et seq. of the Italian Code of Criminal Procedure regarding interception of communications.

Other *rescripta*, however, do not directly affect the rules of the trial process because the one of 9 October 2019 is essentially an authorization to acquire and use acts covered by secrecy; that of 13 February 2020 is essentially an extension of the effectiveness of the previous provision of 2 July 2019.

It is quite evident, therefore, that none of these measures – intervening only on certain procedural issues by providing an authentic interpretation of certain provisions of uncertain application and filling an existing normative void at the time concerning interceptions – impacted the rules of fair trial, the impartiality of the judge, and, more generally, the guarantees of the accused.

Furthermore, legislative interventions in ongoing procedural matters and to remedy distorted or inadequate application of practices are not uncommon. In Italy, for example, the legislature was recently compelled to intervene to regulate the effects of the Supreme Court's decision that deemed inapplicable the special regime provided for telephone interceptions ordered in the context of organized crime offenses under art. 13 of Legislative Decree no. 152 of 13 May 1991, in relation also to offenses committed with terrorist purposes or to facilitate the activities of associations provided for by the same article. With art. 1 of Legislative Decree no. 105 of 10 August 2023, it was established that the applicative prerequisites provided for by the special discipline with respect to the codified discipline should also apply to offenses not contemplated by the art. 13.

It is significant that the Italian Supreme Court considered that this provision has the nature of an interpretative norm (even in the absence of a formal attribution of the interpretative character of the norm) and, as such, is applicable with retroactive effect, namely with the possibility of specifying, in ongoing processes, the scope of application of the rules governing the legitimate criteria for resorting to specific means of evidence collection, without such retroactivity leading to the violation of the principle of reliance on legal certainty and respect for the functions constitutionally reserved to the judiciary power[23].

In this regard, the Italian Court of Cassation explains that the possible undermining of the citizen's reliance on legal certainty does not find relevance in this context, «as there can be no assumption, within criminal investigations and the acquisition of evidence, of procedural burdens with prejudicial effects for the defendant, or prejudice to the legitimate reliance of the parties themselves in the conduct of the trial, according to the rules in force at the time of the performance of the procedural acts». What happened in the Vatican trial exactly corresponds to the orientations embraced by the Italian case law; indeed, in this case, the procedure followed was even more protective because, instead of *post facto*, the regulatory intervention at the normative level occurred *ex ante*, indicating to the investigation body, even before the investigative action, the rules to adhere to.

6. Conclusion

This brief excursion into the Vatican procedural system and, above all, the assessment of its compliance with the guarantees of due process, provides the basis for formulating some concluding reflections.

The analysis conducted has allowed us to verify that the 1913 Code applied in the Vatican City State, despite its age, has been reshaped through various reforms, especially those in the last decade under the pontificate of Pope Francis. In this way, it is capable of meeting the compatibility standards with the guarantees that are considered essential today for ensuring mutual recognition of judicial decisions at the international level: right to defense, adversarial process, and impartiality of jurisdiction.

Despite not participating in the ECHR, the Holy See does not position itself outside the international community and does not at all deny the principles it espouses.

Confirmation of this is primarily seen in its adherence to other international agreements (such as the monetary convention mentioned, as well as the Merida and Palermo Conventions, aimed respectively at combating corruption and transnational organized crime), through which the Holy See has embarked on a path of inclusion in that Community, demonstrating its shared commitment to the goals and strategies of these endeavours.

Secondly, the analysis conducted thorough the reforms that have impacted the Vatican procedural system has highlighted that the developmental pathways they have drawn upon, despite the absence of formal adherence to ECHR and well before the actions of the Italian legislature (consider the modernity of the solutions contained in Law no. L of 1969), align exactly with those upheld by the international communities and the construction of the judicial space withing the European Union.

Moreover, this conclusion should not come as a surprise, considering that these principles, which today modern States recognize, are part of the history, roots, and cultural traditions of the Christian Church, of which the Holy See is certainly the most authoritative custodian.

[23] Cf. COURT OF CASSATION, Second Section, 28 September 2023, no. 47643.