

Vatican City as a Free Society. Legal Order and Political Theology

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“[Jesus] Nihil egit vi, sed omnia suadendo et monendo” (St. Augustine, *De vera religione*)

“Let us consider what a church is. A church, then, I take to be a voluntary society of men, joining themselves of their own accord in order to the public worshipping of God in such manner as they judge acceptable to him, and effectual to the salvation of their souls. I say it is a free and voluntary society” (John Locke, *A Letter concerning Toleration*)

This paper on Vatican City has the purpose to analyze its peculiar elements, related to its small dimensions and especially to its historical origins and nature (not primarily ‘political’, but ‘religious’). Topic of extraordinary importance *per se*, Vatican City is even very stimulating for the scholars interested in finding experiences and models of a *social order without coercion*, based on the respect of the rules necessary to protect individual natural rights and to guarantee legitimacy. In fact, if these features miss, a legal system is only a criminal and aggressive organization.

A careful investigation of this reality would require a juridical research more detailed and a deeper philosophical inquiry about the relationships between ‘sacred’ and ‘profane’ in the history of Catholicism. In the space of this article I will have only the possibility to give some general ideas, and my hope is that they would be useful as suggestions to further investigations of other scholars.

1. Vatican City: legal and political features

1.1 Historical origins of the Treaty of 1929

Vatican City has been created on February 11, 1929, by the Treaty of Conciliation signed by Benito Mussolini and the cardinal Pietro Gasparri, State Secretary of Pius XI (Ambrogio Damiano Achille Ratti, 1922-1939). After Italian occupation of Rome in September 1870 (and after the Italian annexation of Papal States), the Pope decided to retire in the Vatican palaces. He refused the status quo consequent to the military occupation (*debellatio*) and he further strengthened the opposition of the Roman Catholic Church toward the Italian groups engaged in the unification of the country. This division between Catholicism and Italian national movement has been stated again and again by Pius IX (Giovanni Maria Mastai Ferretti, 1846-1878) and it was reaffirmed in 1864 by the *Syllabus*. The struggle of the Church against the Italian elite of the *Risorgimento* had found an even more drastic expression in the *Non expedit* (October 11, 1874). In this document, in fact, the

Pope denied legitimacy to the Italian Kingdom and imposed to the Italian Catholics to not take a part in the political life of the new institutions.¹

In this period the relationships between Italian Kingdom and Roman Catholic Church were ruled by the Law of Guarantees, a unilateral act of the Italian government with the purpose to give to the Pope the full control of his palaces (in Vatican and outside) and a wide autonomy of action.² But it was a decision exclusively Italian and it was never accepted by the Pope, who immediately rejected this act. Moreover, in the encyclical *Ubi nos* (May 15, 1871) he asserted that this Italian decision was not in condition to assure to the Holy See the minimum of secular independence, necessary to respect its freedom.³

In the decades after the end of the Papal State there will be several efforts to solve the dispute and to realize a compromise. In his allocution *Episcoporum Ordinem* (May 23, 1887), for instance, Leo XIII (Vincenzo Gioacchino dei conti Pecci, 1878-1903) invites the Italian government to change its position. He refuses the status quo, seeking “to establish a state of affairs where the Pope is not subjected to the power of anyone and he can enjoy of a full and real liberty as his rights require”.⁴ The situation will not change mainly because of the intransigence of the Italian masonry, on one hand, and of the Jesuits, on the other hand.

For these reasons, only during the first and the second decades of the 20th century the relations between State and Church begins to change. The general transformation of the Italian society was creating the conditions for a radical change also in this sector. The enlargement of the franchise to vote (in 1912 it will be granted to all the men) opens the road to the so-called “Gentiloni agreement”⁵ and to the birth of a real Catholic party: the Popular Party created in 1919 by Luigi Sturzo, a Sicilian priest. At this point the complete overcoming of the “Roman question” is very close and in the period 1919-1920 government (led by Vittorio Emanuele Orlando and then by Francesco Saverio Nitti) take some positive contacts. But at this point of the Italian history, the parliamentary system approached its end: in this situation Mussolini, needed to strengthen his political regime (in 1926 he had destroyed the old legality and the representative democracy), exploits this opportunity.

With the agreements of 1929 the tension between the Italian Kingdom and the Catholic Church is dissolved: the Roman question is definitely and explicitly closed. An essential element of the entente is just to find in the Italian recognition of a full independence for the tiny geographical area – completely internal to the city of Rome – where there are the Vatican buildings (with their complement of gardens and other spaces related). The Pope obtains the official recognition of Vatican independence, but – in his turn – he has to admit a situation that had been accepted from a long time: the quitclaim on the wider territory controlled until 1870. In addition to it, Holy See accepts that Rome is the legitimate capital of the Italian Kingdom.

¹ In fact, it was the confirmation – with an even more rigid formulation – of the ordinance dated February 27, 1868, because in that text Pius IX suggested to Catholic Italians to avoid every political engagement. It is important to note that on January 29, 1877 – in a message addressed to Giovanni Acquaderni, president of the “Società della Gioventù cattolica” – the *non expedit* became a *non licet*, and it was changed in an absolute prohibition.

² Law n. 214, called “Law of Guarantees” (May 13, 1871).

³ Forty years later, Emilio Visconti Venosta (the most important author of this norm) will reaffirm that the act was a decision of “national legislation”, pointing out “its nature of element constitutive of the Italian State law, which refuse every kind of ‘internationalization’”; Giovanni Spadolini, *Giolitti e i cattolici (1901-1914)* (Milan: Mondadori, 1974), p.217.

⁴ Leo XIII, “Allocuzione del 13 maggio 1887”, in R. Bonghi – S. Jacini, *Su la Conciliazione* (Milan: Treves, 1887), p.87. Latin version is: “Romanus Pontifex nullius sit potestati subiectus, et plena, eaque veri nominis libertate, prout omnia iura postulant, fruatur”.

⁵ The “patto Gentiloni” was an electoral alliance between some center-right sectors of the Italian élite and some important leaders of the Catholic movement, which for the first time accepted to play an active role in the Italian political system.

Vatican City has been often considered the direct prosecution of the Papal State. In fact, it seems evident that the specific ways of the constitution of this new entity – besides the long interruption (since 1870 to 1929) of the Church's secular power – oblige to consider Vatican City as a reality entirely different, autonomous and distinct, provided with elements completely peculiar and characteristic.

This theme of the continuity has been remarked just by some Catholic scholars persuaded that the admission of this strong link could be useful to see in this minuscule entity in the center of Rome a State among the others. Vatican City would be a State because it would be the restoration, in a different political context, of the Papal State, whose existence had been interrupted in 1870 by the invasion of the Italian army. But in fact it is impossible to accept this idea of the continuity, and it is not sure that it would be enough to attribute State characters to the new Vatican institutions.⁶

To recognize this discontinuity between the old Papal State and the City of Vatican does not mean, anyway, to ignore the role played by the Holy See as “bridge”. During the sixty years separating the breach in the Porta Pia and the signature of the Lateran Treaty, in fact, the Holy See continued to act as international person, although of a special kind. The creation of Vatican City and the recognition of its complete independence resolves (or seems to resolve) every debatable aspect of this theoretic and doctrinal controversy. Also the birth of Vatican City, in any case, the Holy See continues to be the diplomatic and international expression of the Catholic Church. As the French jurist Joël-Benoît D’Onorio remarked, it is still “to the Holy See (and not to the Vatican City) that the ambassadors of the foreign States are accredited”.⁷

It is important to point out that in the preamble of the Treaty (composed by 27 articles) it is evident the purpose to underline the common will to eliminate every reason of disagreement and to assure to the Holy See an absolute independence, necessary to pursue its own spiritual mission. Vatican City has been created with the aim to achieve these results. The instrument to obtain it is explicitly stated: “it has appeared necessary to institute, with special modalities, the Vatican City, recognizing to the Holy See the full property, the exclusive and absolute power and the sovereign jurisdiction on it” (these expressions will be repeated by the article 3).

Vatican City sees the light chiefly for the will of the Holy See and with the consent of the Italian Kingdom, which accepts the Holy See as sovereign on this new institutional reality. The value of this sovereignty of the Holy See over the Vatican is well explained by the article 4. In fact, it says that “the sovereignty and the exclusiveness that Italy recognizes to the Holy See on the Vatican City means that Italian government cannot exercise interference in this city and that there is only the authority of the Holy See”. The hypothesis of a Catholic Church threatened – just in Rome – by the domination of a political power (as it happened in Avignon, in the 14th century) is explicitly and definitely prevented. Italy confines itself openly and it makes stronger this will with the acceptance of an international juridical status completely new for the area of Vatican.⁸

⁶ Some historians of the modern age think that in the Papal territories the construction of State institutions was very difficult and it was bristling with difficulties. See: Peter Partner, “The Papal State: 1417-1600”, in M. Greengrass (ed.), *Conquest and Coalescence: The Shaping of the State in Early Modern Europe* (London: Edward Arnold, 1991), pp.25-47.

⁷ Joël-Benoît D’Onorio, “Introduction” to *La diplomatie de Jean Paul II* (Paris: Les éditions du Cerf, 2000), p.10.

⁸ The reasonableness of this decision is underlined – with reference to the occupation of Rome during the second world war (by the German army and then by the Anglo-American army) – by Carlo Cardia, interested to remark the differences between the Law of Guarantees (1871) and the Lateran Treaty (1929): “anyone examines the two regulations (the first one of 1871 and the second one of 1929) in the light of the events of the second world war is easily in condition to understand that the first one would be fit to allow, during the war, actions and interventions reducing the independence of the Holy See”; Carlo Cardia, “Vaticano e Santa Sede dal Trattato lateranense a Giovanni Paolo II”, in Pietro Agostino d’Avack, *Vaticano e Santa Sede* (Bologna: il Mulino, 1994), p.38.

The signature of the Lateran Treaty is contextual to the settlement of two other important agreements. The first is the Concordat between Italy and the Holy See, signed with the purpose to resolve every dispute about the relationships of the Italian Kingdom and the Italian Catholic spheres. The second agreement concerns a financial compromise on the consequences of the taking of the ecclesiastical properties. This last aims to give a solution to several problems: it is enough to think to the freedom of education, since some decades a reason of conflict between the ruling minority (related to the masonry) who achieved the Italian unification and the vast mass of the Catholic people.

But the topics of this paper are not these arrangements of 1929, strongly wanted by Mussolini, and the historical relationships between the Church and the Italian regime. In this essay I take up the Lateran Treaty only because it created a new institutional reality. For this reason, it remains very important for people interesting to understand its political nature.

1.2 A debate between jurists

In 1929 and in the following years, in the Italian juridical university departments but also in some other cultural areas (above all in France) there is a wide discussion about the peculiar features of the Vatican City. After the results of the agreement between the Holy See and the Italian Kingdom it appeared clear that “both the contracting parties of the Lateran Treaty were aware to have create something of abnormal, a *mirabile monstrum*, as it is the custom to say about the Law of Guarantees”.⁹ Before the anomalies of an institution that with difficulty can be brought back to the well-known canons, the jurists are not in condition to find a general consent and to give a clear definition of what was happened.

In spite of several discussions, anyway, the predominant thesis is that Vatican City has to be considered a State, given that it is possible to recognize in it the essential elements of every State institution. But this topic is so crucial that it is necessary to dwell on it.

At the morrow of the signature of the Treaty, the American jurist Charles G. Fenwick is very outspoken when he reveals the perplexity of the international law experts before the new institution. In a note of *The American Journal of International Law* he writes: “the treaty signed on February 11, 1929, by the representatives of Italy and of the Vatican creates a new international person and creates a technical, and possibly a practical, problem in diplomacy for most of the governments of the world”.¹⁰ Fenwick remembers that, after the breach of Porta Pia and the annexation of Rome by the Italian Kingdom, from many parts it comes the question if the Pope (at this point deprived of territory and subjects) could still behave as an actor of the international law. As the American scholar underlines, in fact, the Pope continued to behave as an international juridical subject and in anyway the Holy See loose its diplomatic status previously recognized to the old Papal State.

In spite of it, for many jurists since 1870 to 1929 the Holy See remained destitute of “any international character”. Undoubtedly there were Catholic authors persuaded that the minimum of autonomy unilaterally given by the Law of Guarantees was enough to permit the definition of an international status; and other jurists admitted that at least “the Holy See had a ‘quasi-international’ position” (Oppenheim) or “a ‘special’, ‘particular’ sovereignty” (Fauchille).¹¹ But the debate remained open and the *negation* of the international character of the Holy See, because it was not a State (and it was without territory), was obstinately supported by the ideology of the legal positivist school.

⁹ Francesco Ruffini, “Lo Stato della Città del Vaticano. Considerazioni critiche” (1931), offprint of the *Atti della Reale Accademia delle Scienze di Torino*, LXVI, 1931, p.2.

¹⁰ Charles G. Fenwick, “The New City of the Vatican”, *The American Journal of International Law*, 23 (1929), p.371.

¹¹ Charles G. Fenwick, “The New City of the Vatican”, p.371.

Fenwick shares these theses and it is very important to him that the Lateran Treaty creates a new State: “henceforth international law must take account of the new state as a legal entity”. He is persuaded that “technically speaking, a new state now enters the family of nations and diminutive though it be, takes its place beside the other independent sovereignties which are the subjects of international law”.¹² The American jurist here expresses an opinion that, in the next years, will be more and more prevalent among the experts of the international law.

In the same 1929, the *Rivista di Diritto Internazionale* publishes an important series of essays written by some of the most known Italian jurists of the time: Dionisio Anzilotti, Giulio Dena, Arturo Carlo Jemolo e Gaetano Morelli.¹³ All these texts share the opinion that, after the treaty, we are in front of a new State reality. As Giulio Dena points out, when the agreement comes into effect “the Holy See obtained legally a territory and people and in this way it became to exercise on both its rights of sovereignty”. The consequence is that “nothing lacks in the territory given by Italy to the Supreme Pontiff and named ‘Vatican City’ to be considered as a State fully sovereign”.¹⁴

It is necessary to point out that all the people engaged in the formulation of the Treaty, particularly on the Vatican side, made all the possible to design – with the Italian consent – a new person explicitly recognized as a State. It is interesting to note that, with a choice really unusual, Vatican City is called a “State” also in its official denomination¹⁵; and it is also evident the care to equip this new entity of (almost) every element that it easy to find in the modern States.¹⁶

In the preamble, the Treaty explains that it has been subscribed with the purpose to “warrant to the Holy See the absolute and manifest independence”. In his wide analysis of the Vatican legal order, Federico Cammeo annotates this passage in this way: “The absoluteness and specially the *visibility*, namely the general notoriety, of the guarantee could be obtained by the two parties only by the constitution of an Entity universally known and recognized, as it is a State”.¹⁷ The jurist of the University of Florence speaks very frankly: the choice to call “State” the Vatican City comes from exigencies well-understandable, related to the necessity of the Holy See to obtain an international status to assure full independence and freedom of action.

In its realism and its consummate experience, the ruling class of the Catholic Church was aware that, in an age dominated by a statist theory of the law by the reduction of the international life to the diplomatic relations among the States, it was in the interest of the Church to give to the Vatican City this kind of juridical status. If the legal hegemonic culture (it is enough to think to Georg Jellinek, but not only to him) asserted that only the States are international juridical entities,

¹² Charles G. Fenwick, “The New City of the Vatican”, p.374.

¹³ Danilo Anzilotti, “La condizione giuridica internazionale della Santa Sede in seguito agli accordi del Laterano”, *Rivista di Diritto Internazionale*, XXI (1929), pp.165-176; Giulio Dena, “La Santa Sede e il diritto internazionale dopo gli accordi Laterani dell’11 febbraio 1929”, *Rivista di Diritto Internazionale*, XXI (1929), pp.177-187; Arturo Carlo Jemolo, “Carattere dello Stato della Città del Vaticano”, *Rivista di Diritto Internazionale*, XXI (1929), pp.188-196; Gaetano Morelli, “Il Trattato fra l’Italia e la Santa Sede”, *Rivista di Diritto Internazionale*, XXI (1929), pp.197-236.

¹⁴ Giulio Dena, “La Santa Sede e il diritto internazionale dopo gli accordi Laterani dell’11 febbraio 1929”, p.180. Morelli holds the same opinion and he writes: “Vatican City, because it is a State body, has the characters typical of the State, not only in its material elements (territory and population), but also if we consider the autonomous organization of its government and the determination of the goals to pursue” (“Il Trattato fra l’Italia e la Santa Sede”, p.217).

¹⁵ In fact, the new institution is called “Stato della Città del Vaticano” (State of Vatican City).

¹⁶ In this way the authors of Vatican institutions run the risk, in some occasions, to become ridiculous every time that they imagine norms destined, very probably, to remain dead letter (for the specificity and the small dimensions of Vatican). On this subject, Anzilotti wrote that Vatican City can be considered “a parody of State” (Danilo Anzilotti, “La condizione giuridica internazionale della Santa Sede in seguito agli accordi del Laterano”, p.168).

¹⁷ Federico Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano* (Florence: Bemporad 1932), p.25.

The Catholic Church had the exigency to prepare a complete *mise-en-scène* with the purpose to represent the Vatican as a State reality, with all the frills and the superficial brilliance which are necessary to this performance. And it is not surprising that the Catholic scholars are those ones that accept with a more firm conviction the thesis that Vatican City would be a State, while when we find objections they come from authors of lay culture or openly anti-clerical.

So, Vatican City will be a State and, more specifically, an absolute and elective monarchy.¹⁸ When the Pope becomes the sovereign of this new institution, the rules of the election of the Pontiff are considered “constitutional norms” and the distribution of tasks and responsibilities is a peculiar element of a legal-political order constantly identified with European modern States. Also the scholars interested to deny the State character of Vatican City have underlined that is not strange that “Holy See does its best to model internal and external organization along the lines of the States”.¹⁹

On these premises, a scholar of administrative law as Federico Cammeo wrote a book of more than 500 pages in which he develops a legal accurate analysis of every aspect of the new order: distinguishing and examining separately the bodies of the State, the judiciary system, the criminal legislation and its code of procedure, the civil legislation and its code of procedure, the administrative system, and so on.

In this way is evident that the small Vatican City has all the elements that, in the legal culture of the time, are considered necessary to define a State: a *people*, even though very modest (less than a thousand of citizens: cardinals, bishops, priests, nuns, Vatican employees and their families); a *territory*, although very small (only 44 hectares); an *organization*, and this term here defines a legal system; the sovereignty, explicitly admitted by the Treaty; a typical goal, consisting in “assuring to the people – in the context of the territory – order, welfare and civilization, also by the use of the coercion”.²⁰

Also at the level of the most naive analysis it is clear that Vatican has an army (although it is of very small dimensions), a currency and an autonomous postal system, courts and jails. It is true that taxation does not exist, but it could essentially proceed from the special character of the Vatican citizenry (in the City there are less of a thousand people and they are almost all to the service of the Church). In this situation, taxation would be a simple cash transfer and it would be absurd to give 150 to a Vatican employee and then to ask him 50 as tax; in this context, it is more logic to give 100 and eliminate every kind of duty.

In spite of it, at the first glance the organization leaded by the Pope could seem a normal State and the modest dimensions of the territory and the people are not enough to overthrow this diffused and deep-rooted belief.

1.3 Is Vatican City really a State?

In spite of the fact that the thesis that Vatican City would be effectively a State has been accepted by (almost) all the jurists, on the other hand it is interesting to remark that all the scholars underlined the absolute exceptionality of this institution. And if Anzillotti pointed out the special link between the legal order and the religion (“it is a State, but built in the context of the Catholic Church and at the service of it”²¹), Diena put in evidence the *instrumental* character of the City,

¹⁸ “The S. C. V. [State of Vatican City] is an absolute monarchy” (Federico Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano*, p.8).

¹⁹ René Jarrige, *La condition internationale du Saint-Siège avant et après les Accords du Latran* (Paris: Rousseau, 1930), p.302.

²⁰ Federico Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano*, p.37.

²¹ Danilo Anzillotti, “La condizione giuridica internazionale della Santa Sede in seguito agli accordi del Laterano”, p.176.

because “it is evident that the repurchase of a territorial sovereignty was not, for the Holy See, a goal in itself; it was only a way to permit to the Holy See to wield with full security, in absolute and visible independence, its supreme spiritual mission in the world”.²²

In this sense, it is very strange the position of Carlo Arturo Jemolo, one of the most important Italian jurists of the 20th century. On one hand he notices as, after the Lateran Treaty, for the States “there is no the problem to recognize a new entity that they previously didn’t know, but simply to recognize a new attribute or modality of an entity with which they had regular relations in the sphere of the international law”; but on the other hand he does not give up the to say that “the State rises *ex novo* with the treaty of February 11, 1929”, also if “it rises merging it with a pre-existing reality, that lived already in the sphere of the international law”.²³

Not only. In 1929 it was “the rising of a State which is the object of the sovereignty of another entity, the Holy See, personified by the Pontiff”.²⁴ Consequently, this State is marked by the peculiarity to “not be an end in itself, *as all the other States are*, because its goal is the free activity of the central organizations of the Catholic Church”.²⁵ However, it is well known that every State properly said is characterized by the fact to be a purpose in itself (as Jemolo admits). But the consequence of it, against the thesis of the Italian jurist, is that Vatican is not a State!

These judgements expressed in 1929 and in the following years about the *diversity* of the State of Vatican City can be found again in the writings of contemporary jurists interested to this special institution. Before D’Onorio, for instance, the purpose of Vatican City consists in “showing and putting into concrete form the sovereignty of the Holy See in the international law, with the aim the assure the independence of the supreme Authority of the Church in front of any other power of this world”. On the basis of these considerations (deriving directly from the special goals whose talks the article 3 of the treaty), the French catholic jurist defines Vatican City as a “support State” (*État support*).²⁶

When we wonder if this new entity – Vatican City – can be really considered a State and if this term is adequate to define this institution, some preliminary considerations become imperative. The term “State” can be accepted if, as often it happens, it is used with a “vague and generic meaning so to include every kind of political human association, from the barbaric hordes to the Greek *polis*, Roman Empire and contemporary State communities”. But if, on the contrary, “we refer to something of concrete: the State where we now live and where since some centuries lives the Western world, to the State furnished of some characters, as territoriality, sovereignty, and so on”²⁷, in this case it seems very questionable that we can consider a State this special entity named Vatican City. If we are confronted with a State unlike any other (special, completely instrumental, functional to the protection of a religious organization), we must wonder if it is correct to define it as a ‘State’: especially if we remember that it is not an active *subject* of sovereignty, but a passive *object* (and that is subordinate to it).

²² Giulio Diena, “La Santa Sede e il diritto internazionale dopo gli accordi Laterani dell’11 febbraio 1929”, p.186. In a similar way, Miele pointed out that “the true character of Vatican City, an element which distinguishes it by any different State”, must be recognized in the goal itself at the origins of its birth, its *raison d’être*, its first condition of life”; Mario Miele, *S. Sede e Città del Vaticano* (Pisa: Vallerini, 1933), p.68.

²³ Arturo Carlo Jemolo, “Carattere dello Stato della Città del Vaticano”, pp.189-190.

²⁴ Arturo Carlo Jemolo, “Carattere dello Stato della Città del Vaticano”, p.194.

²⁵ Arturo Carlo Jemolo, “Carattere dello Stato della Città del Vaticano”, p.196 (the Italics is mine).

²⁶ Joël-Benoît D’Onorio, “Introduction” to *La diplomatie de Jean Paul II*, p.9. This idea has been confirmed by Jean-Paul II, who in November 2000 enacted a new ‘constitution’ in substitution of the old *Fundamental Law*. The reform comes from the “necessity to give a systematic and organic form to the changes introduced in the legal order of the State of Vatican City” and its purpose is “to make it more and more adapt to its institutional goals and (...) assure the real and visible independence of the Roman Pontiff in the exercise of His mission in the world”.

²⁷ Giorgio Balladore Pallieri, *Dottrina dello Stato*, (Padova: Cedam, 1958), p. 37.

In order to examine this issue, it is necessary to realize a clear distinction between the wide group of the *juridical-political orders*, the groups less vast of the *coercive orders* and, even smaller, of the *State orders*. There no is doubt that States are juridical-political orders and that they use coercion. But at the same time it is necessary to underline that not all the coercive orders are States and, this is even more important, not all the juridical-political orders use aggression, coercion and an illegitimate force.

The thesis of this text is that Vatican City is undoubtedly a political and legal order, but is not a coercive order and, even more so, it is not a State order. The aim of this article is to show that Vatican City is not a State, and then to remark that it is not a coercive organization. But in spite of it Vatican City is a political institution and a legal system: for this reason it is a reality of great interest for all the people working to imagine ways to live together without the State and, in addition to it, free by the constraint.

But first of all it is necessary to concentrate on the relationship between the State logic and the Vatican institution, in order to examine why and in what sense this latter appears devoid of the elements which are characteristic of every State.

1.3.1 The sovereignty.

The topic of sovereignty is definitely the central problem: the goal of the Treaty was to free the City by the Italian sovereignty. After the famous definition given by Jean Bodin, sovereignty is the attribute of an absolute and perpetual power, which does not admit other authorities over itself. Sovereignty is the highest power of command.²⁸ Later Burlamaqui suggested again this idea when he said that sovereignty owns the right to “direct the actions of the members of the society because it has the right of coercion, a right to which all the individuals are obliged to submit themselves without that one of them can oppose resistance”.²⁹

But the so-called State of Vatican City is another thing, in particular because it does not conceive itself as over-positioned by relationship to religion; on the contrary, it finds its nature and its goal in an evident subordination to the Catholic faith.³⁰ In this sense it is emblematic the archaic use, at the beginning of the Treaty, of the expression “in the name of the Holy Trinity” which in the past was “of common use in the treaties among Christian powers”³¹ (as Anzilotti remarks) and it was the survival of the society before the modernity: of that Christian Middle Age ignoring the modern sovereignty and where the same term “State” didn’t exist (in our political meaning). From the beginning, it is evident the will to show the particular character of this entente and, even more, of this legal entity destined to become a reality by it.

If we analyze how sovereignty is described in relationship to Vatican City we see immediately that every standard definition of the State is not fitted to this new institutional entity. As D’Onorio has remarked, in fact, “the State of Vatican City is bearer of a sovereignty that precedes and absorbs itself: this is the Holy See that – in spite of the fact it was temporarily devoid of every territory (1870-1929) – never ceased to be a sovereign reality of international law and an

²⁸ “Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins called *maiestas*; The Greeks *akra exousia*, *kurion arche*, and *kurion politeuma*; and the Italians *signioria* ... while the Hebrews call it *tomech shévet* – that is, the highest power of command” (Jean Bodin, *On Sovereignty: Four chapters from the Six Books of the Commonwealth*, edited and translated by Julian H. Franklin, Cambridge, Cambridge University Press, 1992, p.1.

²⁹ Jean-Jacques Burlamaqui, *Principes de droit politique* (Amsterdam: Zacharie Chatelin, 1751), t. I, p.43.

³⁰ In this sense, it is interesting to recall that since 1929 to today the popes have wielded their political powers almost only in a formal way, because they have preferred to delegate to other bishops the administration of the State of Vatican City, in order to have the time for things *more important*.

³¹ Danilo Anzilotti, “La condizione giuridica internazionale della Santa Sede in seguito agli accordi del Laterano”, p.166.

actor of international relations”.³² It is subordinated to the Holy See and thence to the Church, whose it is a support, a guarantee of independence.

In this sense, it is to share Jemolo’s opinion when he says that Vatican City “differs from the other States because it is object of the sovereignty of the Pontiff, and it is not a subject of sovereignty”.³³

But the (modern)³⁴ State is not, and it cannot be, subordinated to anyone, nor can consider itself as a mere support! For this reason, the so-called *State-support* doesn’t have that dimension (the sovereignty) marking the essence of the State and conditioning – especially in its tragic outcomes – the contemporary history.

From the start, it was evident that Vatican City had been created as a mere instrument, strictly and indissolubly bound to the Catholic Church (and not as a restoration, even though very reduced of a temporal power that – in the tradition – added the statute of a regal dignity to the high spiritual authority of the Pope). Since his message of 1929 the Supreme Pontiff put the topic exactly in these terms. From a side, he remarks that the power of Vatican City is very restricted in the space (only 44 hectares), but from the other side he points out that it appears “spiritualized by the boundless, sublime and really divine spiritual might that it is destined to support and serve”. Then the Pope adds: “some territorial sovereignty is a worldly admitted and necessary requirement to every real jurisdictional sovereignty: so the minimum of territory which needs to the exercise of the sovereignty: that territory is necessary since if it lacks, that independence could not exist, because it would not know where it must rest”.

With this message, Pius IX emphasizes two themes. In the first place, the reminder to the so-called sovereignty of the Holy See is completely functional to the exigency to defend the freedom of the Church, safeguarding the liberty of the Pope. This new political institution – which will self-describe as a ‘State’ and for this reason will be largely accepted by the jurists of the time – does not have other goal than the protection of the Pope and, in this way, the mission of the Church.

Secondly, in the analysis of Pius XI there is another element of interest. In a word which is not in condition to imagine independent jurisdictions without a territorial basis, Catholic Church requires its own territory only in the perspective to have an area of autonomy, necessary to its task of evangelization.³⁵ The considerations corroborate what we come to say about the peculiar (not state) nature of Vatican City, since the Holy See is over-placed with regard to the temporal power.

This special relation between the Vatican City and the notion of sovereignty comes to the surface also by the analysis of a partially marginal, but however emblematical, problem. The article 22 of the Treaty asserts that, *on request of the Holy See*, “Italy will provide to the punishment of the felonies committed in the Vatican City, except when the author of the felony took refuge in the Italian territory, because in this case the authorities will proceed against him in conformity with the Italian laws”. By this article it comes out that the capacity to repress the crimes (one of the elements that historically marked the triumph of the Hobbesian State) does not play an important role in the philosophy inspiring the Vatican City since its origins. Vatican institutions abdicate to any claim in the case of the author of the crime committed in the City takes refuge in Italy; and also in the

³² Joël-Benoît D’Onorio, “Introduction” to *La diplomatie de Jean Paul II*, p.9.

³³ Carlo Arturo Jemolo, *Lezioni di diritto ecclesiastico* (Milan: Giuffrè, 1962), p.204. This thesis has been supported also by D’Avack, who spoke of a “natural and necessary subordination” of Vatican City in front of the Holy See (Pietro Agostino D’Avack, “Il rapporto giuridico fra lo Stato della Città del Vaticano, la Santa Sede e la Chiesa Cattolica” [1939], in *Vaticano e Santa Sede*, p.234).

³⁴ I use here the good graphic solution introduced by Gianfranco Miglio, with the goal to point out that the State is an institution *typical* of the modern age.

³⁵ This same thesis has been proposed again on October 2, 1979, in the speech of Johannes Paulus II to the United Nations: “This sovereignty (of the Holy See) is relegated – as for the territorial extension – to the small State of Vatican City, but it is justified by an exigency of the Papacy, which must exercise freely its mission and, about it is possible, must deal with each of them independently by other sovereignties” (quoted by Joël-Benoît D’Onorio, “Introduction”, *La diplomatie de Jean-Paul II*, p.24).

hypothesis that he does not try to escape, it remains open the possibility that an Italian intervention be requested.

It is interesting to register that, according with the Italian doctrine, in these cases the Italian judge must enforce Italian laws, rather than Vatican laws: not only because it is considered unjust to permit to the subject the choice between two different legal orders, but especially because the Italian judge is called to enforce only the Italian laws.

Therefore, according to many points of view, we can say that Vatican resigns some attributes usually considered as typical of the sovereignty and, for this reason, of a State commonly understood.

The same presence of the Holy See in the international order is rather particular and odd, because this institution is always oriented by a religious inspiration. In particular, the opposition of the Catholic Church to any kind of aggressive wars comes from its traditional idea that moral rules must guide the political decisions. In fact, in the Christian tradition we have ethical laws refusing legitimacy to some conflicts and other laws that, in the case of defensive and legitimate wars, define the admissible behaviors of the opposite armies.

In the Catholic tradition these elements are very important, because by “the ineluctable relation between God and the City depends the future of our society”.³⁶ In this sense it is interesting to remember that the pontifical ambassadors “exercise another form of pastoral office” and they “are not less priests or bishops than their brothers of the dioceses”.³⁷ For this reason, they are not at the service of a supposed Vatican sovereignty (that does not exist), but instead of a real Papal authority (which is a fundamental matter of the Catholicity).

1.3.2 *The people*

Another essential element of the State is the presence of a people. But we don't have to believe, as some jurists seem do, that is enough to find a people (a set of individuals) related to an institution to have actually a State. Since the Treaty of 1929, Vatican City obtains its people; but the relation between this small group of men and the Vatican legal order avoids recognizing in it the typical features of the modern State.

Since the birth of the Vatican City someone, as the jurist Ruffini, noticed that about the people there is “a material anomaly, not for the small number (few hundreds of people), but because this people is composed by officials, with the consequence that it has been possible to talk of a *nationalité de fonction* or *fonctionnelle*”.³⁸

But this element, even if important, is not the most meaningful. If Vatican City is a reality of service, it does not exist in first place for this thousand of people recognized as Vatican citizens by the international law, but rather to be an instrument for the wider Catholic community, diffused in every continent.³⁹ In this sense, the idea of a Vatican State at the same time says *too much* (because this institution does not exercise a true sovereignty over this small Vatican society) and *not much enough* (because Vatican City is an instrument of the Catholic Church, which has the ambition to announce the Truth to the world, beyond the small boundaries of a territory including only some palaces and gardens).

If there is no a Vatican nation, nevertheless there is a huge people – in condition to justify the same existence of the Vatican – which is beyond the frontiers and the State jurisdictions.

The analysis of the relation linking the City to the few hundreds of people with a Vatican passport shows – once again! – that this institution is absolutely unique. In his negative comments

³⁶ Johannes Paulus II, speech to the diplomatic corps (January 11, 1999), quoted in Joël-Benoît D'Onorio, “Introduction”, *La diplomatie de Jean-Paul II*, p.24.

³⁷ Joël-Benoît D'Onorio, “La Papauté, de la romanité à l'universalité”, p.25.

³⁸ Francesco Ruffini, “Lo Stato della Città del Vaticano”, p.325.

³⁹ “Holy See, the central government of the Catholic Church, is the institution that represent more than a billion of people (the 17% of the world people)”; Joël-Benoît D'Onorio, “Introduction” to *La diplomatie de Jean Paul II*, p.7.

on Ruffini (who compares Vatican to the medieval cities and Calvinist Geneva), Cardia points out that “in the State of Vatican City we don’t have, and we never will have, an active people in condition to behave as a collectivity, and not only for the small number, but also for the fact that the citizenry is given temporarily, for a function or a grant, and so in order to realize a goal well-defined in its content and in the time”.⁴⁰ A peculiarity of the Vatican City, that for this reason cannot be considered theocratic and consequently illiberal, would consist in the fact to be “avoid of the communitarian element”.⁴¹

By the way, as Cammeo wrote, the status of citizen can be given back “voluntarily, namely for spontaneous abandonment of the residence; for instance, if an official resigns and leaves the territory of the State, if a son – also before to be 25 years old – leaves the home to go out of the City for his job”.⁴² People obtain the citizenry only by invitation and by free will, and at the same time they can lose it.

But if it is possible a voluntary individual secession and if the Vatican political and legal organization in any time can establish its own people, it is evident that this institution named State of Vatican City cannot be taken back to the statist model. It lives only for the free will of the individuals that give their personal contribution (cardinals, priests, officials and so on), elaborating rules and decisions or adapting them.

1.3.3 The territory.

The territory is insufficient to define a State, but anyway it is a necessary element. But also from this point of view, we must recognize that the problem of the territory of the Vatican City is not easy to define (and, another time, not primarily for the smallness of the frontiers). What has been said about the people (internal and external) can be repeated about the space. The Vatican and the Church do not conceive their mission in relation to the 44 hectares of their exclusive jurisdiction, but rather to the entire world where they must diffuse the Gospel, because this is their essential task.

The few hectares of this *enclave*, completely interior to the city of Rome, are only the mere spatial support to a reality – the Catholic Church – that essentially develops its life somewhere else: in countless societies of all the five continents. Nevertheless, Donati was not wrong when he remarked that in the definition of the so-called *sovereignty* of the State of Vatican City the accent was placed on the territory, and not on the people: “the territory has a position of primary object, while the citizens are the subordinate object”.⁴³

The peculiar territoriality of the Vatican City can be understood only if we examine as in this case it is absent an entity that, by means of an *eminent domain*, can consider itself in condition of expropriate, control by regulation and tax the real estates of the country.

Since 1929 the small Vatican territory, in fact, is completely owned by the Holy See and by the ecclesiastical institutions related.⁴⁴ For this reason, at the moment of the signature of the Treaty

⁴⁰ Carlo Cardia, “Vaticano e Santa Sede dal Trattato lateranense a Giovanni Paolo II”, p.21.

⁴¹ Carlo Cardia, “Vaticano e Santa Sede dal Trattato lateranense a Giovanni Paolo II”, p.14.

⁴² Federico Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano*, p.54.

⁴³ Donato Donati, *La Città del Vaticano nella teoria generale dello Stato* (Padua: A. Milani, 1930), p.31.

⁴⁴ Somebody could object that we have certitude that the 44 hectares were, in 1929, a legitimate property of Vatican. However it is evident that the burden of the proof concerns people interested to demonstrate this thesis. The presumption of innocence is a valid rule also with regard to the debates about the ownership. Unless a proof of the contrary, an owner is not a thief. In this sense, as Rothbard wrote, it is clear that “even if we can show that the origin of most existing land titles are in coercion and theft, the existing owners are still just and legitimate owners if (a) they themselves did not engage in aggression, and (b) if no identifiable heirs of the original victims can be found. A fortiori, of course, if we simply don’t know whether the original land titles were acquired by coercion, then our homestead principle gives the current property owners the benefit of the doubt and establishes them as just and proper owners as well”; Murray N. Rothbard, “Justice and Property Rights” (1973), in *Egalitarianism as a Revolt Against Nature and Other Essays*, (Washington: Libertarian Review Press, 1974), pp.67-68.

there were not individuals that – in the presence of the possibility to leave the Vatican (resigning the citizenry) – could lose their patrimony, remained under the control of the legal organization that they want to abandon.

In this sense it is very surprising that, in the opinion of Jemolo, there were no interesting characteristics in the fact that in Vatican City “all the territory is owned by the State, so that sovereignty and property of the land coincide”.⁴⁵ On the contrary, just this element helps us to recognize the nature no statist of the Vatican, because of its organization is entirely voluntary and exercises a claimed territorial sovereignty that, in reality, is only the right to manage freely the geographic area legitimately owned.⁴⁶ About it, the Treaty is very unequivocal when it underlines the role of the property and, but only in the second time, the importance of the sovereignty (as we said, the text ascribes “to the Holy See the full property, the exclusive and absolute power and the sovereign jurisdiction”). An admission, this one, having a special significance, because it aims at removing Vatican goods from the control of Italian Kingdom, oriented to legislate about them, imposing taxes or making other claims.

In this situation, using terms as “exclusive and absolute power” and “sovereign jurisdiction” means only the will to claim an absolute ownership, complete and without limits. If William Blackstone wrote that *allodium* “is property in its highest degree”⁴⁷, we are authorized to define Vatican City as an *allodium*. And it is interesting to remember that following some authors this word comes the Greek expression *ἀλλ̄ δε Διος* (meaning *but from God*).

The impossibility to put Vatican City into a Hobbesian framework emerges clearly also by the special status of Saint Peter square, which by means of the article 3 of the Treaty remains “subjected to the powers of the Italian authorities”. This solution seems justified by practical exigencies of security (the borders of the place, in fact, mark also an ‘international’ frontier between Italy and Vatican), but also and especially by the attitude of the Holy See to consider the Italian police (and the justice system, as it has been remarked previously) as a ‘private’ agency, useful if suitably employed.

Vatican City doesn’t conceive itself as an organization to ensure security and it can, without problems, to entrust this burden to other institutions.

2. *Auctoritas v. potestas*

In Carl Schmitt’s opinion, people interested to understand the State must recognize its function as instrument of neutralization in front of the different cultures and, especially, in front of the religions. It is true that the history of the modern State begins before religion’s wars and before the dissolution of the Catholic unity of the Old Continent. But we cannot ignore that the State imposed a system of political organization (of the space and of the society) largely dependent by a secular vision of the associated life. The principle of sovereignty was considered the condition of the peace and the end of any confessional conflicts.⁴⁸ As Gianfranco Miglio pointed out, the

⁴⁵ Arturo Carlo Jemolo, “Carattere dello Stato della Città del Vaticano”, p.190.

⁴⁶ This situation has been recognized by Cammeo, persuaded that an objection against the State character of the Vatican City can be found in the fact that “all the territory is its private property” (Federico Cammeo, *Ordinamento giuridico dello Stato della Città del Vaticano*, p.48).

⁴⁷ He added: “the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*, in his own demesne”. See: William Blackstone, *Commentaries on the Laws of England*, Book the Second, ch. 7, (Philadelphia: 1859), p.468 (original version: p.105).

⁴⁸ In this sense it is not surprising that the State has become (and it continues to be) the catalyst of a belief inspiring ‘religious’ passions, exactly when it reduces the importance of the historical faiths. Political Gnostic ideologies derive from it their deepest inspiration and their evident origins. About this topic, the arguments of Schmitt are very interesting: “the altogether incomparable, singular historical particularity of

sovereignty triumphed when the Christian religion “was degraded by the state from a guide for all European humanity to a private matter – to a body of subjective beliefs incapable to generating political behavior”.⁴⁹

Since 1929 a number of jurists have been surprised by some aspects typically *not modern* of the Vatican City, because they are not reconciled with the logic of the State. The new institution born with the Lateran Treaty is not in condition to create a ‘secular’ space (neutral, ‘free’ by any possible conflict of the different *Weltanschauungen*), but on the contrary it wants to be a legal apparatus of a specific religion and its organization. Avoid of a sovereign dimension and prevented from being at the same distance from any different faith, the small political community of the Vatican City is an institution outspokenly confessional and for this reason it challenges some typical dogmas of the contemporary political culture.⁵⁰

It is useful to remember that in the period 1859-1860 Cavour tried an agreement with the Pope and he proposed a solution providing for “the waiver of the Papacy to the temporal power” in exchange of “the waiver of the Italian State to its jurisdictional power in the matter of religion”.⁵¹ The Italian Prime Minister, in fact, had a definite project aiming to realize two different autonomous worlds, completely *divided*, with the purpose to ensure to the State and to the Church to remain sovereign in their own field. But as we remarked, Pius IX was aware of all the possible consequences and implications of this solution, oriented to confine the Christian life into the walls of the sacred buildings and into the narrow space of the theological disputations. On this subject, Pierre Manent is right when – influenced by the lesson of Leo Strauss – remarks that the contemporary separation between religion and legal order is the outcome of a tragic evolution, condemning us to live in a world where *the opinion is without power and the power is without opinion*.⁵²

Although it is tiny, marginal and not fully understood by the same Catholics, the new institutional entity of the Vatican City overthrows the traditional statist schemes. Rather than the secularization of the theological concepts at the center of the political modernity, we have here the consistent and obstinate persistence of a vision refusing to lessen the importance of the faith, putting it in the ambit completely *private* (the mind, the family, the parish). With regard to these problems, it is necessary to remember that even Ludwig von Mises did not realize the error (and the illiberal character) of any lay conception of the State and of the society. In Mises’ opinion, “where the

this phenomenon called ‘state’ lies in the fact that this political entity was the vehicle of secularization. The conceptual elaboration of international law in this epoch had only one axis – the sovereign territorial state. It eliminated the holy empire and the imperial house of the Middle Ages. It also eliminated the pope’s *potestas spiritualis* and sought instrumentalize Christian churches for its own political ends. The Roman Catholic Church assumed a lesser position as a mere ‘*potestas indirecta*’ and, as near as I can determine, no longer spoke of an *auctoritas directa*. Other historical and meaningful institutions in the medieval *respublica Christiana*, such as the ‘crowned heads’, also lost their place as well as their typical character and became instrumentalized by the developing state. The king, i. e., the sacred bearer of a crown, became a sovereign head of state”. See: Carl Schmitt, “The Land Appropriation of a New World”, *Telos*, n.109 (Fall 1996), p.68 (English translation of the chapter II [“Die Landnahme einer neuen Welt”] from *Der Nomos des Erde im Volkerrecht des Jus Publicum Europaeum*, (Berlin: Duncker & Humblot, 1974 [1950]).

⁴⁹ Gianfranco Miglio, “Beyond Schmitt”, *Telos*, n.100 (Summer 1994), p.123.

⁵⁰ About the relation between beliefs and politics, it is important to remember that “values are the web in which political obligation is embroiled, and every value position is also a political position. The creation of a new value seeks immediately to destroy existing political arrangements” (Gianfranco Miglio, “Beyond Schmitt”, p.126).

⁵¹ Giuliano Colliva – Giacomo De Antonellis, *Un Concordato per gli anni Settanta. Rapporti fra Stato e Chiesa dal 1848 ad oggi* (Milan: Bramante, 1969), p.10.

⁵² At the end of the process of neutralization of the modern age Pierre Manent sees “the paradox of a city that, refuting the power of the Christianity and – for this reason – the power of a particular opinion, undertakes forever to deprive the power of any opinion and to deprive the opinion of any power”; Pierre Manent, *Histoire intellectuelle du libéralisme* (Paris: Calmann-Lévy, 1987), pp.14-15.

principles of church interference with secular issues is in force, the various churches, denominations and sects are fighting one other". For this reason, he was persuaded that "by separating church and state, liberalism establishes peace between the various religious factions and gives to each of them the opportunity to preach its gospel unmolested".⁵³ Here the great Austrian economist underestimates the ideological nature of the supposed statist neutrality and he is not in conscious of the legitimate claim of the religious communities, longing for expressing themselves inside the social life. Refusing to imagine legal orders *beyond the State* and *without the State*, Mises was obliged to accept the logic of laicism and the idea of a clear separation between the religion and the legal-political order.⁵⁴

While modern political thought imagined confessional entities confined to their rites and avoid of a social presence, the Catholic Church never ceased to claim he reasons of its missionary nature, in every sector of the society: economy, law, culture, arts. Catholic hierarchy was persuaded that a Church without resources and freedom of action was not in condition to announce the Gospel. At this regard, in the allocution *Maxima quidem laetitia* of June 9, 1862, Pius IX said that the Pope cannot be free if he loses every secular power. Against the project of a mutual neutralization of politics and religion (an idea at the heart of the *Risorgimento*), the Church expressed a strong resistance. When 19th century Catholicism refuses liberalism, it condemns chiefly this unacceptable and statist separation between religion and morality, between religion and law.

Rejecting a secular vision of the society, the Church is very realist, aware of the deep link uniting the religious dimension and the political one. Since the time of Gregorius VII and the conflicts between Papacy and Empire, the Catholics know that their mission can be fully realized only in an order assuring liberty and independence. In fact, the religion cannot survive an absolute power longing for cross every border and denying any limit.

In this sense, in the history of Catholic experience it is possible to find a continuous request of liberty in front of the power. This claim has been supported also by the fact that the Church boasts of a primacy not necessarily designed to change in coercion, violence, domination. Just with the purpose to understand the peculiarity of Vatican and its roots in the history of Christianity, it can be useful to call the attention to the fundamental division between *auctoritas* and *potestas*, as it has been inherited from the Roman culture and newly interpreted by the Fathers of the Church.

When we understand that in Vatican City the principle of sovereignty is missing (an absence that generates a special idea of territory and people), it is necessary to grasp that in 1929 the Pope created a political organization resting essentially on the *auctoritas*, and not on the *potestas*. He Pope exhibited the ambition to lead the Catholic people using only the prestige and the consent coming from the fact to be the successor of Peter.⁵⁵

⁵³ Ludwig von Mises, *Human Action. A Treatise on Economics* (Auburn: The Ludwig von Mises Institute, 1998 [1949]), p.152.

⁵⁴ During the last century, the same problems paralyzed the discussion in the Catholic field too. Theologians and political philosophers have been often confronted with a very dramatic dilemma, resulting by the dogmatic approval of the modern State as a fact not debatable. On one hand, the idea of a power completely 'secular' (refusing to put the society *under God* and imposing a radical separation between faith and society) makes impossible a religious life. In that case, as Keith J. Pavlischek said in an article about Catholic theologian John Courtney Murray, "one of Murray's great fears – that the Church would be restricted to the sacristy – would be realized". However, on the other hand, if "the state is a moral entity and as such is responsible for, and the ultimate guarantor of the common good, and the common good includes spiritual as well physical well-being, then there is no a priori way to determine how thick that good will be, nor can it determine a priori what religio-moral actions will be legally prohibited as a violation of that good". See: Keith J. Pavlischek, "John Courtney Murray, civil religion, and the problem of political neutrality", *Journal of Church and State*, vol. 34, issue 4 (Autumn 1992), p.744.

⁵⁵ In this sense, it is useful to remember that the term-concept *auctoritas*, as *auxilium*, comes from the Latin verb *augere* (to widen, to enlarge, to increase).

People having a recognized authority are not interested to impose their will, because they are in condition to obtain a free and voluntary obedience. Moreover, in the Roman legal culture “to be *auctor* before someone (*alicui auctorem esse*) wanted to say giving him an advice”.⁵⁶

About the Roman roots of the notion of *auctoritas* it is interesting to notice that, according to Theodor Mommsen, the Senate –when it is in front of a magistrate – “arrogates to itself only the *auctoritas*, corresponding approximately to our recommendation”: the Senate (the *auctoritas* par excellence) never “gives orders, as the popular decisions do, but it only exhorts with simple expressions oriented to save the liberty of judgment and action of the magistrate”.⁵⁷ For this reason, in the Roman world it was not easy to understand *if* and *in what sense* the *auctoritas* had a coercive nature. Mommsen believes that the “*auctoritas* is more than an advice and less than an order: it is an advice whose compliance it is not easy to evade, as when the professional man gives a suggestion to the king or the parliamentary leader to his followers”.⁵⁸ But these examples recalled by the great German historian are not in condition to dissolve any doubt: if in the first case, in fact, the free rationality of the sovereign induces him to follow the influential advice of the expert, in the second case the parliamentary leader and his men can be related by a relationship of power and domination.

However, Franz Wieacker seems to prefer the first of the two hypothesis of Mommsen, because he defends the idea that the expression *auctoritas iuriconsulti* means “the importance of a legal advice, by virtue of the competence and the political prestige of a great jurist”.⁵⁹ It is precisely in this sense that for Cicero “who had *auctoritas*, he was an *auctoritas* himself”; in addition, he “extended the notion from the legal and political field to the scientific one”.⁶⁰

For all these reasons we can say that *auctoritas* wan on the edge between the legal world and the social life, the beliefs, the customs. It is in condition to influence the decisions by its prestige. Therefore, people refusing the *auctoritas* can ignore it, but they know that by the decision they are out of the community.

Auctoritas was a form of limitation of power because, because “people having *potestas* cannot refuse *auctoritas*”: during the Republican age, in Rome “there was the moral obligation to ask the counsel of advisors fair and ethically qualified”.⁶¹ In conclusion, possible arbitrary acts of the magistrate were often avoided by the obligation to seek the advice of people known as wise and competent, as in the common law systems the judge decision is limited by the necessity to regard the record (the sentences of the past).

In 1929 the Catholic Church gets up from its long history this kind of social relation, consistent with the Evangelic teaching and especially with the dignity of each single man (free by God’s will). Frank van Dunn has pointed out that “God is the archetypal Other in orthodox Christianity”⁶² and for this reason the Gospel, in the course of ages, has often been used as premise for a radical criticism of any pagan culture celebrating power and domination.⁶³ Much more than

⁵⁶ Theodor Eschenburg, *Dell’ autorità* (Bologna: il Mulino, 1970), p.8; Italian translation of *Über Autorität* (Frankfurt am Main: Suhrkamp Verlag, 1965). At this regard, it is significant that a Marxist as Max Horkheimer refused any kind of authority, described as an ‘accepted dependence’ and nevertheless confused with the violence and the aggression (not differently by Adorno, who does not distinguish between authority and authoritarianism). The refusal of any authority is correlated to an illiberal vision of the social relations and, for instance, to the impossibility to adopt teachers and masters.

⁵⁷ Theodor Mommsen, *Disegno del diritto pubblico romano* (Milan: Celuc, 1973), p.387; Italian translation of *Abriss des römischen Staatsrecht* (Leipzig: Duncker & Humblot, 1893).

⁵⁸ Theodor Mommsen, *Römisches Staatsrecht*, vol. III (Tübingen: Wissenschaftl. Buchgemeinschaft, 1952 [1888]), p.1034.

⁵⁹ Franz Wieacker, *Vom Römischen Recht* (Stuttgart: Kohler, 1961), p.13.

⁶⁰ Theodor Eschenburg, *Dell’ autorità*, p.16.

⁶¹ Theodor Eschenburg, *Dell’ autorità*, p.21.

⁶² Frank van Dun, “Natural Law, Liberalism, and Cristianity”, *The Journal of Libertarian Studies*, vol. 15, n.3 (Summer 2001), p.9.

⁶³ From a historical and theological point of view, it is useful to point out that in the Gospel the term *exousia* is feminine participle of the verb *exestin*, ‘it is free (or open)’, ‘it is permitted’, and so it means the legitimacy

the *potestas*, the logic of authority is in harmony with the deep exigencies of the Christian society. With reference to it, Richard Heinze has underlined that “auctoritas, for its own nature, is not prejudicial to the liberty; nobody is obliged to follow and advise, even if he asked it”. This scholar remarks as in the Roman society there was an epistemological justification of the authority: “What there is at the basis of the auctoritas? The idea is that nobody understands all, and particularly not alone”.⁶⁴

Anyway it is evident that this notion of *auctoritas* becomes successful in the Christian society because of the influence of the Fathers of the Church (Tertullianus, Cyprianus, and Augustine). For our purposes, it is interesting to pay a special attention to the reception that these concepts obtained in the sermons and the works of the founders of Latin Christianity. In the texts of Christian authors, the civil *auctoritas* of the Roman law becomes *auctoritas divina*, because there is only one *dominus*: God himself. In Tertullian it is evident that we can recognize this auctory in the Bible and in the other canonical writings, which are in condition to help us to define a dogmatic order (against any form of heresy). In Cyprianus, the same prestige invests the episcopacy. When Cyprianus says that there is no safety out of the Church (*salus extra ecclesiam non est*) he remembers that cannot be considered Christian people refusing the authority of the bishops. A notion of legal origins, *auctoritas*, is used to satisfy the exigencies of a religious community more and more organized and institutionalized.

With Augustine the concept of *auctoritas* gets a dimension more specifically Christian. In his writings we find a careful analysis of the relation between the *auctoritas* of the Scriptures and the human *ratio*, where the second one is subordinated to the first one, but at the same time it is an instrument of basic utility to understand what Revelation asks us to believe.⁶⁵ In Augustine, the analysis of the social role of the authority derives from these essential remarks about the link between faith and reason. In fact, if you want to understand the decisions of an authoritative institution it is necessary to grasp its nature, and the Church aims “to be recognized by the believer as an authority in condition to say something, so he does not feel his faith and his obedience as duties, but he obeys with pleasure”.⁶⁶ And, of course, spontaneously.

At that time the Church does not yet have its own ways of coercion, but when – with Theodosius I – the Roman Empire adopts the Christianity as official religion, in many situations the secular power puts the armed *potestas* at the disposal of the spiritual *auctoritas* incarnated by the Church and the bishops. In addition, in this age the absence of a central ecclesiastical power (because the bishop of Rome was a bishop among the other ones, even though he had a special prestige) allows to the Emperors to regard themselves the supreme chiefs of the Episcopal oligarchy. Only with Leo I (440-461) the Roman bishop acquires the role of Patriarch of the West. In fact, he begins to consider himself *pontifex maximus* and *vicarius Christi*. From then on, the

with which one acts or decides, the absence of legal constraints or external hindrances to one’s initiative (Latin *auctoritas*)” (Richard J. Dillon, “«As one having authority»: The controversial distinction of Jesus’ teaching”, *Catholic Biblical Quarterly*, vol. 57, issue 1 (January 1995), pp.92-113, ???).

⁶⁴ Richard Heinze, *Vom Geist des Römertums* (Leipzig-Berlin: Teubner, 1938), pp.20ff. The importance of this expertise has been emphasized also in the religious field. A theologian as Wilfrid Philip Ward, for instance, “distinguished blind trust from the intelligent use of authority, which he called ‘rational trust’, and noted that such trust is a normal occurrence in everyday social life”. He added that “the individual depended on the expertise of others; in religion this expertise was embodied in the tradition, and authority functioned as the guardian of the tradition”. In this sense, “authority represented the cumulative and enduring wisdom that outweighed the narrow range of knowledge available to personal experience” (Jo Ann Eingelsbach, “Re-Thinking Authority: Imaginative Options and the Modernist Controversy”, in Richard Penaskovic [ed.], *Theology & Authority. Maintaining a Tradition of Tension*, [Peabody: Hendrickson, 1987], p.38).

⁶⁵ With regard to this topic, see: Karl-Heinrich Lütke, *Funktion und Wesen des auctoritas-Begriff in den ersten Schriften Augustins bis zur Schrift “De utilitate credendi”* (Tübingen, ???, 1964).

⁶⁶ Karl-Heinrich Lütke, *Funktion und Wesen des auctoritas-Begriff in den ersten Schriften Augustins bis zur Schrift “De utilitate credendi”*, p.101.

reference to the passage of the Gospel of Matthew (16, 18-19) becomes the Scripture's ground to the recognition of the authority of the Rome's bishop over the whole Church.

This evolution will know another decisive passage with Jelasius I (492-496), because this pope asserts – even only at the theoretical level – the idea of a mutual subordination between Church and Empire. In fact, the first one is pre-eminent in the spiritual affairs (*spiritualiter*), while the second one is more important in the secular affairs (*temporaliter*). The distinction introduced by Jelasius I follows surely the opposition between a religious *auctoritas* and a political *potestas*. But when it intends to complete the progressive desacralization of the imperial power accompanying the success of the Christianity in the Roman society, it lays the foundations of that opposition between *sacerdotium* and *imperium* destined to mark deeply a wide part of the medieval civilization.⁶⁷ With regard to this, the decision of the Emperor Zeno to depose the Antiochian bishop is extremely significant, because in that occasion Jelasius himself asserted that no bishop cannot be removed – in his sacerdotal role – by a secular power.⁶⁸ Therefore the compromise prospecting two separate subordinations knew very important difficulties and from the beginning it showed all its ambiguity.

After twenty centuries of Christian history we are in condition to admit that there is no space for a free and religious authority in a society controlled by a political power. *Potestas* and *auctoritas* are not compatible, because the first one is oriented to pretend a full control of the individuals, the communities, the ideological debate, and so on.

3. Conclusion: a society without State, a community without coercion

Despite its official self-description, the State of Vatican City is not a State. In 1929 he adopted this denomination because the 20th century legal culture was not in condition to accept the idea of a political institution refusing the State model. However Vatican City is exactly a free organization (not coercive) oriented to realize its projects in the international arena. With the Lateran Treaty, post-Christian idea of secular sovereignty did not modify the theology of the Catholic Church. For this reason, Vatican City is not a sovereign State. Moreover, the Holy See exercises its formal sovereignty over the City and for this reason when we consider Vatican City as a State we are obliged to imagine a State which is not a *subject* of sovereignty, but an *object* (a real absurdity, in the logic of the contemporary legal and political culture).

Legal positivism induced the Catholic Church to adopt a State terminology, especially in the prospect to be accepted by the international community. But this religious institution cannot be classified in the group of the modern State organizations. On the contrary, it is possible to put Vatican City in the set of legal and economic entities marked by a voluntary collaboration of individuals (as the families, the companies, the associations, and so on). Vatican City is the outcome of free and spontaneous relationships, in absence of any kind of violence, and there is a big difference between this type of interactions and the bounds imposed by a State with the violence and the threat.

If Catholic people of the different countries would understand the nature of the organization charged to defend the independence of the Pope and his preaching, they could act with more determination for the transformation of their political institutions.

The hope to live in societies not completely dominated by an arrogant ruling class would be more concrete.

⁶⁷ About this opposition, it is interesting this paper: Othmar Hageneder, "Das Sonne-Mond-Gleichnis bei Innocenz' III. Versuch einer teilweisen Neuinterpretation", *Mitteilungen des Instituts für Österreichische Geschichtsforschung*, 65 (1967), pp.340-368.

⁶⁸ Erich Caspar, *Geschichte des Papsttums*, vol.II, (Tübingen: Mohr, 1933), p.63.