FROM ROME TO PARIS, LOOKING FOR ADMINISTRATION

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To the contemporary observer, administrative law is inextricably linked to a system of administrative justice that assesses whether State conduct conforms to the parameters of legality. However, from a historical perspective free from the fallacy of presentism, the issue is not to search the past for precursors of today's administrative justice, but rather to inventory the various social contexts in which 'administering' was primarily a vehicle of normativity – that is, a method of dealing with things, people, and actions, of managing, evaluating, and ultimately organizing them. We can broadly identify two distinct legal genealogies of administration. One developed in the shadow of the State; the other, more dispersed both institutionally and discursively (including canon law, pastoral care, oeconomica, and the literature of the good paterfamilias), evolved – strictly in legal terms – under the aegis of property. This article briefly retraces key stages of both genealogical lines, focusing in particular on the dialectical relationship between dominium *and* administratio*, which Roman legal sources convey with remarkable clarity: administration emerges as the counter-power to ownership.*

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I. A LITTLE BIT OF AUTOBIOGRAPHY (SORRY)

In the beginning was the philosophy of law, a discipline whose usefulness seemed to me to be inversely proportional to the abusively preparatory role that it was – and still is – recognised as having in the Faculty of Law at the 'La Sapienza' University of Rome. And yet, for those who didn't have a legal genealogy behind them, nor aspired to imagine one in the future, that exam occupied a two-fold space: it acted as a gateway before delving into the typically institutional subjects, but also provided an escape route from the rote knowledge of the manuals to be digested with compulsive retching. For years I cultivated this internal illusion, in total disagreement with what was actually the cultural contribution offered by that discipline in that faculty. Once I realised, after countless attempts, that the mere idea of raising a glimmer of critical debate was viewed with suspicion, I decided, as they say in these cases, to look around. Also because Nicodemism cannot be an intellectual and psychological strategy that one practises indefinitely, under penalty of a paralysing dissociation.

In Italy, you don't choose your academic parents any more than you choose your natural parents, rather you find them among the tenured professors of the faculty where you complete your studies. Deviating from those tracks to test other routes on the national territory is a choice less likely to fail than to be impossible. Endogamy is the first rule, which is not necessarily always to be rejected: if the initiator is a worthy scholar, he or she can often create a 'school', in the best sense of the word, which becomes a real intellectual training ground in which highly talented researchers grow up, not enslaved to the repetition of dogmas. This was not the situation I found myself in, as the so-called head of the school had only one inexhaustible resource: mediocrity. Hence the instinctive rather than calculated decision to include the option 'abroad' in the application for a postgraduate specialisation and advanced training grant: looking around meant crossing borders. As chance would have it, I obtained that scholarship and chose Paris as my destination because the author I was working on was Michel Foucault. I would like to make it clear from the start that I never recognised myself in the rhetoric of the 'brain drain', already very much in vogue at the time. This is an easy-to-use, victimising formula improperly extended to every type of educational experience in another country without any consideration for the specificity of individual experiences. The idea of a suitcase of books tied up with string, based on the model of the migrations that in the 50s and 60s of the last century transplanted thousands of southern workers to the north, seemed to me disrespectful towards those stories marked by material hardship and profound social discomfort. Mine, on the other hand, was still part of the opportunity for intellectual tourism, unfortunately unconcerned about the outcomes of that privilege. Moreover, I'm not sure that in the eyes of those who could have cultivated a career locally, that choice to leave did not appear as a sign of weakness or at least of inadequacy in that academic environment. But law

faculties, at least those that I had the opportunity to get to know more closely, are factories of the typical; it is rare that they stimulate a vocation in those who do not have one of their own or through family tradition. I have no trouble recognising that the most valuable baggage I brought with me was not my university education but my high school education. Going away, and moreover to a city like Paris, amply satisfied my ambitions, which to tell the truth were never so exuberant as to push me into the terrifying arms of socio-academic Darwinism. One must also have the temperament to fight in that kind of arena, which, moreover, according to the spirit of the present times, seems to be the ideal place to measure 'merit'.

So it was that I set off on a journey punctuated by fairly fortuitous events and I got to know Yan Thomas, a historian of Roman law who taught at the *Ecole des Hautes Etudes en Sciences Sociales* (EHESS), who had kindly decided to tutor me when I arrived in Paris. Before I consulted the course booklet available at the French consulate in Rome, Thomas's name was completely unknown to me, also because Roman law had been for me a required subject and nothing more. But having chosen to enrol in that internationally renowned institution, especially for the research produced in history, anthropology and sociology, I had to adapt to a very limited set of offerings in the field of law, a discipline never too welcomed or understood by the social sciences. In fact, to be honest, law represented the counter-example of formal and institutionalised knowledge from which to distance oneself if one wanted to restore centrality to flesh-and-blood actors and their experiences as an insurmountable basis for understanding human beings in society. It was therefore logical that there weren't many jurists within the walls of Boulevard Raspail, the Parisian address of the EHESS. Between an expert in labour law and a scholar of Roman law and legal tradition in the West, for the 'philosopher of law' that I was, the choice was not difficult.

The chance meeting with Yan Thomas, brought about only by my letter and his response without the shadow of the slightest academic mediation (today this is normal, but back then it was much less so and I emphasise this just to stress how Thomas was unfamiliar with this way of thinking), remains the mark that I would describe as almost sanctifying a relationship that lasted from 1991 to 2008, the year of his premature death. When I proposed to him as a research topic '*la police et l'ordre public*', which I imagined I could develop along Foucauldian lines while remaining on an abstractly conceptual level, that is, with topics taken from mainly theoretical literature, the correction he proposed to me was crucial for two reasons. By inviting me to reconstruct the meaning of 'police' in France under the *ancien régime*, starting first and foremost from the normative sources, he indicated a methodological path that initially seemed difficult to follow, but that soon proved to be incredibly fertile. And then that change in methodological perspective made me realise once and for all that the road to reaching the Hegelian labour of the concept, when legal norms are at stake, must keep apodictic theoretical discourse as far away as possible in order to give primary attention to the voice of the sources,

enlightened by the '*bonne question*', the appropriate question. Only then did the '*montée en généralité*' (the way of generalization) that leads to conceptual abstraction become a legitimate and desirable path. I was looking for nothing more than to confirm my doubts about the fruitfulness of the philosophy of law practised in Italy the only country globally where this subject is taught in isolation and not associated with another subject of positive law. These doubts also extended to the scientific sustainability of disciplinary separation between the history and philosophy of law, given that only a comparison with the discourse of legal norms, situated in their contextual dimension allowed more 'abstract' questions to be asked: in other words, the elaboration of a sense beyond their positive stage, which usually does not interest the traditional legal historian.

As the work progressed and Isambert's legislative collection[1] at the *Bibliothèque nationale* could be happily consulted, the conviction gradually took shape that the history of law, classically oriented towards the institutions inherited from Roman-canonical tradition (civil law *in primis*), approached with a certain detachment, if not completely ignored, another continent of normativity: the police regulations of the material and moral life of a municipal community. Those meticulous and repeated instructions that the police authorities adopted with systematic zeal to regulate the markets and in particular the cereal trade, the exercise of professions, poverty, the road and building plan, natural and health disasters, hygienic prevention, the publication of printed sheets, the circulation of foreigners, entertainment, etc required the jurist to interpret them appropriately. While taking into account the caution and reticence of social history in dealing with that material of hypothetical rules, it was nevertheless necessary to recognise a regime of historicity different from that of the social fact. Between the life of the norms and the life of the actors, an approach that fell back on a binary vision had to be avoided: on one side the concreteness of empirical behaviour, on the other the abstract schemes of the action deposited in the texts. Several years later, with all due respect to the social sciences, the disagreement was clarified and resolved once and for all by Yan Thomas, who assigned an autonomous historical status to the process of *mise en ordre abstraite* of social relations:

> 'If we do not understand that the history of law is part of a history of techniques and means by which the abstract shaping of our societies was produced, we miss almost everything about the singularity of this history and everything about the specificity of its object'.[2]

However, the study of police measures under the *ancien régime* showed that the normativity of the law, of a law that derived from public authority, was exposed

[1] F.A. Isambert, *Recueil général des anciennes lois francaises depuis l'an 1420 jusqu'à la révolution de 1789* (Paris: Belin-Leprieur, 1821-33).

[2] Y. Thomas, 'La valeur des chosess. Le droit romain hors la réligion' *Annales. Histoire, Sciences Sociales. 57e année*, 1433 (2002).

to confrontation with an order that the actors created with their own action, ignoring, transforming, adapting the official rules. This led to a pragmatic regularity that was often considered by the social sciences as the only historical factor worthy of attention. This wide sense of normativity would hardly have presented itself to me as a challenge without the encounter with the social sciences on the one hand and the comfort of Thomas's lesson on the other. It had been necessary to leave a law school, accustomed to reading the world only *sub specie iuris*, to sketch a dual level of normativity, the legal and the social. This dualism seemed simplistic and over time it seemed more appropriate to reconvert it into a vision that recognised a single container of normativity. In a similarly hasty formula, we could say that before law there is normativity, in a sense that is more logical than chronological, because law is one of the manifestations, undoubtedly the most technically and formally equipped, of the general category of normativity within which other criteria for ordering things, persons and their actions are conceivable and operative. Hence the need to adopt a perspective capable of reasoning in terms of comparative normativities, which leads to an analysis of the combination of systems of different natures, without forgetting that legal normativity possesses a kind of intrinsic *clinamen* to regain in each circumstance the role of hegemonic catalyst. It is thus on the terrain of polyhedral normativity that the law can assert and think through its own way of constructing social fact. History, past and present, is of course the framework within which such a comparison can be made, but it is also the place where different models and strategies can be verified pragmatically. Clearly, we are talking here about comparative normativity and not about comparisons between state legislations or between international and state order.

II. CORPUS IURIS ADMINISTRATIONIS

In the perspective that only became clear to me at EHESS, normativity appeared to be a genus containing different species including law. A further articulation within law began to take shape: the subspecies of administrative normativity. It was a sphere that could only be identified by shaking off the current classifications in the teaching and dogmatic systems of contemporary law, in which administration is defined as the subject around which administrative law revolves. In the eyes of the contemporary observer, administration becomes a subject of law, generating administrative law, from the moment its actions can be submitted to judicial review, where a judge evaluates whether the State has remained within the limits of legality. In light of this criterion, a historical investigation is conducted retrospectively, searching the past for the institutional precursors of contemporary administrative justice. The obvious error of this approach is presentism, while we should rather proceed to an inventory of the different social situations in which 'administering' was first and foremost the

matrix of a normativity, that is, a way of dealing with things, persons and actions, of managing them, evaluating them and consequently putting them in order. At that point, for historical-conceptual reconstruction, the relationship to sources becomes crucial: in which *sedes materiae* should we look for this administrative practice in its diffuse state, before it thickens into the all-encompassing structure of the State that is the Administration?

In general terms, one can think of two types of legal genealogy for the notion of administration[3]. One develops in the shadow of the State, the other is much more dispersed in institutional and discursive terms and must take into account sources of a different nature: civil law, canon law, monastic law, theological-pastoral literature, 'oeconomica' in the sense of what was called in the 16th century the literature of the good father of the family. This second genealogical strand did not develop in the shadow of the State but rather in that of property. In this sense, it can be said that 'administration' occupies the space of internal dialectisation within the category of *dominium*, which designates power over both public and private matters.

If we focus on the statist genealogy of administration, particularly in the context of the continental European states of the *ancien régime*, the police represented the first supporting structure of a general political unit or a municipal faction whose purpose was to provide the power of command with objectives that included the care of the material and moral well-being of subjects. Administration gradually replaced the term police, inheriting its universal vocation. In the second half of the 18th century, the term 'bureaucracy' emerged as a concept that Max Weber would elevate to a symbol of the division of managerial and rationalised labour in both the State and the capitalist enterprise. This genealogical axis of administration is well known and there is no need to return to it. It is more interesting, however, to retrace the formation of the other, starting no longer from the apodictic unity of the State but from the very practice of administering, which has been progressively juridified as a result of its link with the institution of property.

III. FRENCH ADMINISTRATION IN THE 18TH CENTURY

The starting point of this backwards journey – at least regarding the French context, which is my primary focus – can be found at the turning point in the second half of the 18th century, when the official documents of the monarchy began to use the word 'administration' with an increasingly precise and unambiguous technical meaning: the management of assets and finances belonging to public bodies. Notably, the phrase '*régie et administration*' was often used in the form of

[3] For a complete analysis see L. Mannori and B. Sordi, *Storia del diritto amministrativo, dalle origini dello Stato moderno ai giorni nostri. Modi di agire degli apparati pubblici ed esercizio dell'autorità pubblica* (Roma-Bari: Laterza, 2001).

hendiadys, in order to emphasise the identification of the latter term with this activity which, according to Abbé Girard,

> 'relates solely to temporal goods entrusted to the care of someone in order to use them for the benefit of another to whom they belong, and for which an account must be given from Clerk to Master'.[4]

However, the most important document on this subject – if only because of its impact on Europe – appeared a few years later: Jacques Necker's *Compte rendu*, published in 1781. This was a detailed account of the administration of finances addressed to Louis XVI, with the immediate intention of encouraging public credit, thus supporting spending on the war against England, and more generally publicising the results of the work accomplished, in addition to the programmes to be put into action. The author planned to publish it every five years. Divided into two parts, the document presented a list of reforms, accompanied by an analytical translation of the budget sheet. These reforms concerned

> 'the current state of finances and all operations relating to the Royal Treasury and public credit (...) operations that had combined significant savings with administrative advantages (...) measures whose sole aim was the greater happiness of his people and the prosperity of the State'.

The initiative had a dual significance: firstly, it formally established the link between administration and accounting, as demonstrated by the accounting laws advocated by the ambitious treasurer:

> 'I have proposed to V.M. a first law on this subject, which will provide a way of knowing, with ease, at all times, what the ordinary or extraordinary income and expenditure of the State were in each year; an essential arrangement which had never existed, because of the divisions established in accounting, and because of the failure to make the Royal Treasury a common center to which all the departments relate'.

Moreover, the report shows that administration is the area in which policy is best understood publicly, since it is reduced to objective and communicable knowledge. Ten years after the presentation of the document, Necker, now on the fringes of political life, emphasized the socio-political importance of this act:

> 'in this way, he (the King) established public confidence on the most solid of foundations, he called upon the Nation to learn about and examine public administration, and he thus, for the first time, made the affairs of State a

[4] See 'Régie', in G. Girard, *Synonymes français leurs différentes significations, et le choix qu'il en faut faire pour parler avec justesse* (Paris: Le Breton, 1769) .

matter of common concern'.[5]

In the same year that Necker presented his budget sheet, the *Dictionnaire de jurisprudence* by Prost de Royer emphasised the revealing power of administration. Thus, in line with physiocratic thinking, we find the contempt for politics that alienates and the exaltation of the economic interest that brings people together. Prost, a keen observer of the institution, takes up the distinction between politics, a place of obscurity and mystery (the arcana of the State), and administration, seen as transparent and visible. This account is particularly interesting because the author was a police lieutenant-general in Lyon. He insists on the murky and unmentionable aspects of the police:

> 'I will state the Laws of the Police with a tenebrous reserve, without developing its spirit, without discovering the springs by which I have seen how it moves'.[6]

Administration was enlightened by political economy, which was not identified with the inescapable dogmas of the physiocrats, but with much more elementary arithmetical principles, as can be seen in this admonition from the Parliament of Paris in March 1780:

> 'Economy is a rich and inexhaustible fund. Economy alone can re-establish between incomes and expenses this wise proposition, which is the foundation of all good administration'.[7]

Administration's first objective is to be able to develop its own system of values in order to technicalise and depoliticise government action. In this way, it will have no need of external parameters to justify its actions, it will be independent of any particular interests that might draw it into the political game and will above all represent the State at work. It is for this reason that Prost de Royer can maintain that

> 'every administration is accountable to itself (...) for in administration everything comes down to calculation; and in politics itself, the surest art consists in balancing efforts against means, products against advances, and false glory against public happiness'.

The power of numbers can thus be seen to have a dual purpose: firstly, they identify administration as a public subject whose activity is externalised in a new way; secondly, they lay down the discursive conditions for a critical judgement to

[5] J. Necker, *Sur l'administration de M. Necker. Par lui-même* (Paris: Hôtel de Thou, 1791), 16.
[6] P.J. Brillon et al, *Dictionnaire de jurisprudence, ou nouvelle édition du Dictionnaire des arrêts et jurisprudence universelle* (Lyon: La Roche, 1781-1788), 19.
[7] ibid 851-853.

be formed on the basis of certain data. Necker's *Compte rendu* was therefore all the more significant in that it sought to reconcile, in the field of administration, the need for clear rules for policy and the conditions for public recognition, over and above agreement on specific points. The veracity of the income and expense numbers was fiercely contested, and the author was accused of having compared different items for a single financial year, so as to inflate incomes and reduce expenses. But these violent reactions in no way deny the neutralizing force that administrative rationality introduces into the relationship between sovereignty and society. At the very most, they confirm the emergence of a new area of conflict that can be managed by the authorities.

The traditional functioning of political and administrative power has reached a turning point. The question facing sovereignty is no longer confined to the formula 'what should be done or not done' to secure a population and a territory under government control. It is now a question of 'what can and must be known', in order to achieve this objective with the least possible tension. This fundamental passage can also be understood from the point of view of normative argumentation. What the preambles to the police ordinances justify under the guise of a philosophy of assistance, exalted above all by the appeals for the happiness of the people that recurred under Louis XVI, the *Compte rendu* now makes visible in the writing of a governmental arithmetic. The good order of society depends on the material and moral arrangements implemented by the police. The good order of politics depends on the possibility of formally representing administrative activity in a numerical language. The scope and purpose of 'public service' are reassessed. Through the analytical exposition of the State's resources and their use, the exercise of sovereignty takes its cue from the technical impersonality of administration. Compared with police interventions aimed at disciplining everyday life, the publication of the State's budget sheet is also a government intervention, but of a different nature. We are now dealing with a kind of 'macro-statement', which describes what the administration is doing and, at the same time, opens up a space for confrontation and mediation between the level of political decisions and the movement of social criticism. This is where the added value of the *Compte-rendu* lies. Disclosure of the administrative accounts therefore shifts the center of gravity of what is at stake in government. We move from the munificent plan of a visible and constant intervention, embodied by the ubiquity of the police, to one that inaugurates a new tangibility of the sovereign action – more discreet in content – and, for this reason, exerting a different impact on society. In other words, society is 'invited' to recognize the government within the analytical framework of public revenues. In this way society is less exposed to conflicting impulses, and more involved in the process of legitimizing power.[8]

This idea that administration resides in incomes and expenses – the accounting and financial vision of the concept – likely suggests another legal

[8] See F. Monnier, *Les débuts de l'administration éclairée* (Napoli: Prismi, 1985), II, 104.

genealogy of administration. Hence the need to probe other plots of what might somewhat pompously be called a *corpus iuris administrationis*, an object it goes without saying that no source returns to us as such because it is a heuristic hypothesis, the fruit of the reconstruction of the interpreter. Such reconstruction obliges us to reckon with the sources of Roman law from which it is possible to derive the twofold path that characterises the history of administration, if by this term is meant not only the personification of the State at work as Lorenz von Stein used to say, but a practice that, by dealing primarily with things, ends up relating to the destiny of persons. It is not the apparatus, the Weberian *Anstalt* that we have to consider here, but administration as a practice of safeguarding and caring for corporeal and incorporeal things.

IV. THE *ADMINISTRATIO* IN ROME: SOME OUTLINES

Before dealing with some of the sources of the *Corpus iuris civilis* that seem particularly significant for illustrating the 'proprietary' genealogy of administration, it is useful to give a brief overview of the use of the noun *administratio* and the verb *administrare* in theoretical and institutional language.

In its most generic meaning, the word *administratio* has been used down the centuries as a synonym for political conduct, for the 'management' of the State, and it is probably this common usage that obscures its specific semantic meaning. In Latin, *administratio* indicates the act of holding hands over something in the form of a service. Roman law used the term to designate the general function of magistrates in the government of the republic. A more specific characterisation can be found in recurring expressions used by Cicero and Caesar, such as *administrare rem bellicam* or *administrare bellum*, which consistently linked the term to *administrare exercitum*, the conduct of military operations, right up to the time of Ulpian.[9]

At the beginning of the Principate, the word took on a wider range of meanings. On the occasion of a famine, Augustus recognised himself as the man in charge of administering supplies. The duty to provide for the community gives the concept of *administrare* a formal profile with variable content – the simple position of exercising a power – while at the same time providing the concrete and particular translation of such a prerogative: putting in place instruments, disposing of persons, things and places in such a way as to achieve a specific practical objective. The activity of the *administratio* is thus not limited to guaranteeing what exists, to ensuring the invariability of the state of affairs, but also aims to multiply the objects over which it is deployed, and to improve their allocation. Administering

[9] See S.A. Fusco, 'Verwaltung (Antike)', in O. Brunner et al eds, *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (Stuttgart: Klett-Cotta, 1992), VII, 16-17.

therefore implies conservation that promotes the development of the reality in question. Naturally, in the context just mentioned, *administrare* is the prerogative of the *curator*, a multifaceted figure to whom classical civil law assigns various tasks depending on the context (the original institutions are the care of the insane (*cura furiosi*) and the care of the prodigal (*cura prodigi*). In the post-classical era, this was consolidated around the *cura* for minors. One of the curator's duties – and this is a matter of debate in the literature – was to administer the minor's property, in other words to manage his or her affairs, focusing on the patrimonial component of the *cura prodigi*. The management of affairs in the interest of someone, extended to the community, became the *procuratio rei publicae* mentioned by Cicero in his *De Officiis* (1, 85): the exercise of government in representation of the people for the purposes of collective utility.[10]

There are therefore two important semantic variations of *administratio*. The first is broad and undifferentiated, expressing only the potential of those who hold public office. We find this typology in Augustus' expression and in an expression such as *administrare tutelam*, reported by the Digest (27.3.13). It is the aspect of 'service', of procedure, that, at first sight, structures the fact of *administrare*. Alongside this generic use, *administratio* also indicates a particular way of exercising one's readiness to care for persons and things, as suggested by the passage quoted from Augustus, but also by expressions such as *administrare patrimonium* (Cicero) or *administrare rem familiarem* (Quintilian). In this sense, *procuratio rei publicae* represents the projection of the *cura-administratio* (in a restricted context) onto a political scale. This broadening is attested to, for example, in a felicitous expression by the same Cicero, who speaks of '*(d)um me reipublicae non solum cura, sed quaedam etiam procuratio multis officis implicatum et constrictum tenebat*'.[11]

V. INCURSIONS INTO CASE STUDIES: THE MODEST *PICCINELLI*

Bearing these basic indications in mind, we can now more specifically identify some salient passages of the *Corpus iuris civilis* that restore administration to us as a practice of safeguarding and caring for the world of things. For an object with such loose boundaries the sources are not only juridical, because as is well known for the administration of intangible things such as the soul or ideas, pastoral theology and canon law have, since ancient times, activated a flourishing panoply. But if we stick to the level of corporeal things, the indications that Roman law offers us are inevitably fragmented: we are dealing with administration with reference

[10] On the institution of the *cura*, see S. Solazzi, *Scritti di diritto romano* (Napoli: Jovene, 1st ed, 1957), II, 1-80.

[11] That is, the obligations attached to the care (*cura*) owed to the State and to the charge (*procuratio*) of the person who provides it see M.T. Cicero and O. Plasberg, *M. Tulli Ciceronis scripta quae manserunt omnia. 42, Academicorum reliquae cum Lucullo* (Lipsiae: Teubner, 1922), 5.

to the role of the guardian who takes care of the ward's patrimony, of the mandatary, of the *negotiorum gestio*, of the husband who manages his wife's dowry, of the depositary of movable property, of the usufructuary, etc. To progress in this rather exotic terrain for me, I made use of the research of an Italian pandectist from the end of the 19th century, Ferdinando Piccinelli, a modest author and certainly of secondary importance compared to the calibre of his German and Italian colleagues who were followers of the same school. The book in question is entitled *Studî e ricerche intorno alla definizione 'Dominium est ius utendi et abutendi re sua quatenus iuris ratio patitur'*.

It is a derivative work, and moreover it was produced by a jurist not adequately equipped to tackle such a crucial subject, as Luigi Capogrossi Colognesi reminds us. In the preface to the 1980 re-edition, he justifies the revival of this secondary figure exclusively for its significance as 'testimony to a certain culture and a certain method'.[12] For my part, I certainly did not intend to valorise Piccinelli's anachronistic obsession with a property understood as almighty sovereignty. Reviewing authors and texts that reveal the legal eternity of the *ius utendi ac abutendi*, Piccinelli lines up, without the slightest historical distance, Roman jurists, Middle Ages glossators and commentators, and jurists of legal humanism up to the threshold of the French Revolution. If for Piccinelli the problem was to reaffirm the theory of proprietary individualism threatened at the end of the 19th century by socialist theories, for us his study is of documentary interest only: it is a question of taking advantage of the large repertoire of sources mobilised by the author to propose a different interpretation. Instead of stating that from the beginning property was built around the dogma of the absolute dominion of the owner, according to the liberal ideology dear to pandectism, it is rather a question of grasping the impasse of that vision in the light of the concept of administration. Since I cannot challenge that reading of the sources, which are primarily ancient, because I lack the skills of a Romanist or a medievalist, I have tried to propose an interpretation *en creux*, that is, emphasising an implicit – between the lines – meaning of those documents that the dominant pandectist approach leaves silent. This is enough to show how far our operation is from any historiographic and philological rigour in the treatment of sources. In fact, we rely on a handful of clues that invite us to look at the shadow inevitably created by the light projected elsewhere. Symptomatic reading, if you will, with all the limitations that this entails.

Rummaging through the texts brought to light by Piccinelli with a focus on *administratio* rather than the dogma of sovereignty of the owner, it appears clear that Roman jurists use this term to qualify different juridical situations: *administratio* adapts itself to multiple contexts, while remaining the same. Here is a very eloquent example of how the same practice, *administration*, covers situations that the law qualifies differently, in this case *tutela* and *negotiorum gestio*. The passage is a

[12] F. Piccinelli and L. Capogrossi Colognesi, *Studî e ricerche intorno alla definizione 'dominium est ius utendi et abutendi re sua quatenus iuris ratio patitur'* (Napoli: Jovene, 1980), 12.

commentary by Ulpian (170-228) on the praetor's edict (book 35) and is taken from the aforementioned D 27.3.13:

> '*Si tutor post pubertatem pupilli negotia administraverit, in iudicium tutelae veniet id tantum, sine quo administratio tutelae expediri non potest: si vero post pubertatem pupilli is qui tutor eius fuerat fundos eius vendiderit, mancipia et praedia comparaverit, neque venditionis huius neque emptionis ratio iudicio tutelae continebitur. Et est verum ea quae conexa sunt venire in tutelae actionem: sed et illud est verum, si coeperit negotia administrare post tutelam finitam, devolvi iudicium tutelae in negotiorum gestorum actionem: oportuit enim eum a semet ipso tutelam exigere. Sed et si quis, cum tutelam administrasset, idem curator adulescenti fuerit datus, dicendum est negotiorum gestorum eum conveniri posse*'.
>
> ('Where a guardian administrates the affairs of his ward after puberty, he will be liable to an action on guardianship only for the amount without which his administration could not be conducted. Where, however, the guardian of a ward after puberty sells his property, or purchases slaves and land; an account of said sale or purchase will not be included in the action on guardianship; and it is true that only those matters which are connected with the guardianship are embraced in a proceeding of this kind. It is also true that if the guardian continues to administer the affairs of the trust after the latter has been terminated, the action on guardianship becomes merged in that of voluntary agency; for it becomes necessary for the guardian to exact from himself what is due by reason of the guardianship. Where, however, anyone after administering the guardianship is appointed curator of a minor, it must be said that he can be sued on the ground of voluntary agency').

Here is an exemplary text for the problem at stake: another story of the noun *administratio* and the verb *administrare* unravels before our eyes, because these two terms, together with others from the same semantic family, gain their full legal intelligibility from the comparison with the position of those who are the owners of private assets. Therefore, we are facing not only the *administratio* of public office – an abstract form of the exercise of political power – but the *administratio* as a matter of calculation, of measuring the value of things, and of accounting for the incomes and expenses of assets. This is exactly what an anti-politician like Prost de Royer eventually meant by speaking of 'administration' in 1781: he was aware that he was touching on the primitive archaeological layer of the notion.

Following Piccinelli's study through decontextualised case studies, the risk was that I might adopt the typical pandectist attitude: to show the diachronic development of a dogma already existing *in nuce* in the Romanist sources and whose final epiphany, passing through the gloss, is sealed by German legal science which from Savigny onwards will end up triumphing in the second half of the 19th century. I

took this risk to the extent that it was possible to parasitise the pandectist method in its formidable capacity to scrutinise the sources, which were however taken in their casuistic dimension and not with the aim of deriving a general theory on this or that institute. The question of 'what it is for' in the case prevails over the 'what it is' of dogmatics; the first approach makes law project itself outwards into the socialisation of its real abstractions, while the second encloses it in self-referentiality. This is why the pandectist material had to be read with a different approach, letting it express a discourse that substituted the more discreet attention to that 'minor' being that was the *administrator* for the obsession with the unlimited power of the *dominus*.

Instead of interrogating the sources with the ideological stance of searching in the past for the idea of the almighty subject *vis à vis* his own property, it was necessary to reorient our gaze: these sources also showed us a more nuanced truth that attested less to the triumph of the subject's will over the thing than to an impasse. And the revelation of this impasse was not the simple realisation that the general category of belonging encompasses both *dominium* and other rights of enjoyment that function as a limit of the former.[13] No, the revelation of the impasse was precisely the notion of *administratio*. In other words, a tension emerged between *dominium* and *administratio* that seemed to me to be quite instructive, whereas this tension remained totally unnoticed in the pandectist reading, which was more interested in consecrating the unlimited power of the *dominus*. I would like to propose here a few texts that, it seems to me, describe this moment of internal division – perhaps even a crisis – of *dominium* as compact power. In other words, with the exception of a few instances in which the term *administratio* (or its synonyms) describes the content of the exercise of property, this term typically does not appear to clarify what *dominium* consists of. The *dominium* presupposes a direct relationship with the thing, and in this relationship, some activity of administration may be implicitly included. However, in such cases, the administration is absorbed in the enjoyment of the property and therefore is not explicitly named.

It is rarely specified in sources that the owner of an asset is also its manager. Indeed, having *dominium* over things does not mean administering them, but fully enjoying them. Such enjoyment, which may also involve administration, entirely coincides with the fact of being the owner of an asset. In this case, the *administratio* is only a contingent possibility, not a necessary condition for

[13] See Pomponius' commentary (l. 35) on Sabinus, reported in the last book of the Digest, section 'De verborum significatione', D. 50.16.181: '*Verbum illud "pertinere" latissime patet: nam et eis rebus petendis aptum est, quae dominii nostri sint, et eis, quas iure aliquo possideamus, quamvis non sint nostri dominii: pertinere ad nos etiam ea dicimus, quae in nulla eorum causa sint, sed esse possint*' (The verb, 'To belong', has an extremely broad signification, for it not only applies to such things as are included in our ownership, but also to those which we possess under any title, even if they are not ours; and we say that articles belong to us to which we have no title at present, but to which we may subsequently acquire one).

identifying the ownership situation. The *administratio*, on the other hand, is openly called into question to define the prerogative of a subject who is not the *dominus*. It consists of a task to be carried out not so much in the interest of the latter but rather of his patrimony, with the primary aim of satisfying the claims of third-party creditors. Beyond formulas such as Ulpian's, *administrare tutelam* (D. 27.3.13), openly autological because the verb *administrare* here designates the exercise of a power whose content, protection, is precisely an administration, the *administratio* refers less to a principle of reflexive identity of the *dominus* than to a gap, to a decoincidence of his identity. In other words, the *admnistratio* postulates the necessity of another from the proprietary self, a necessity that appears perfectly visible when the minor being of the *administrator* matches the condition of absolute minority that is that of the slave. In fact, we know that as the Roman empire expanded beyond Italy, huge fortunes accumulated among the members of the agricultural aristocracy and traders, whose management was entrusted to family members who were often slaves. Hence the emergence of the figure of the *survus actor* who was responsible for administering the assets of the *patronus* by negotiating with tenants and landlords, lending money, purchasing tools and animals for work, including slaves. As evidence of the decisive importance of the *administrator*'s role, the sources attest that among the testamentary clauses, there is often a condition of manumission for the slave requiring him to be accountable.[14] In other words, administration leads to freedom, which, both in socio-economic and legal terms, is a result whose value could hardly be underestimated.

One could raise an objection, explaining the absence of *administratio* to qualify the *dominus* by arguing that it was implicit for the owner to be able to take care of his property, to manage it. However, this is an explanation based on excessive common sense that doesn't help us understand the real problem: for Roman law – we are referring here to the property ex iure *Quiritium* model protected by civil law – the exercise of the right of ownership was limited to the judicial reclaiming of ownership of the contested asset, but it did not specify what this position of power really consisted of with regard to the asset itself. It therefore made little difference what the owner did with his property or what specific behaviour characterized the status of his ownership into practice. Holding *dominium* over something didn't mean performing a series of operations that could be reduced to its administration, but rather fully enjoying it, as such enjoyment represented the complete essence of ownership. In other words, the *dominus* did not enslave himself by obligating himself to specific tasks that justified his lordship over the world. To dispose is to enjoy, to the extreme form of *plus-jouir*, which is to dissipate an attitude that, only with legal Humanism towards the mid 16th century, would be encapsulated in the formula *ius utendi ac abutuendi*.

[14] V. Arangio-Ruiz, *Il mandato in diritto romano* (Napoli: Jovene Editore, 1965), 8. On the slave as a business manager see A. Di Porto, *Impresa collettiva e schiavo «Manager» in Roma antica (II sec. a. C. -II sec. d. C.)* (Milano: Giuffrè, 1984).

In order for the figure of the good owner to take shape, it was not necessary to suppose an awareness of the *dominus* who, with self-reflective attitude, managed to think of himself as a good *dominus* to the extent that he behaved in one way rather than another. Instead, it was necessary to go through the mediation of another figure, the *administrator*, who, aware of the alien nature of the things entrusted to his care, gave the owner an example of the good use of his patrimony. In other words, the inability to dispose of the property that characterises the *administrator* was the condition for knowing what the *dominus* ignores. And when does this *administrator* character usually appear? When, for whatever reason, the owner cannot or does not want to take care of his fortunes. The support of the *administratio* intervenes when something goes wrong in the immediate subject-object relationship, then it is necessary to call upon another person whose task is to take care of this or that good of the *dominus*, if not of all his assets. Here are some sample texts that illustrate the vulnerable moment of the *dominium* and the emergence of administrative practice to its rescue. *Administratio* in these examples functions as a warning term: not only does it summarise a more or less defined set of behaviours inherent to a patrimony, but it also certifies a precarious condition of the *dominium*. A dominion that cannot be reduced to one's own but encompasses the presence of others. This subjective splitting is perfectly visible, for example, in a constitution of Constantine (letter to the praetorian prefect Volusianus, c. 314) reported in the Code of Justinian (C. 4.35.21):

> '*In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est. Nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit: aliena vero negotia exacto officio geruntur nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est*'.
>
> ('In cases of mandate, not only the money which is the especial object of the action on mandate, but also the risk of loss of reputation is at stake; for anyone who is the owner, and has control of his own property, does not transact all his business, but the greater portion of it, according to his own will. The affairs of others must, however, be attended to with the greatest care, and nothing connected with their administration which is neglected or improperly done is free from guilt').

The terms used offer interesting semantic nuances of the administrative activity that here falls on the agent: *moderator*, synonymous with *rector* and *gubernator*, basically indicates the ability to govern something, while the role of *arbiter* refers to the power to make good or bad use of something. On this text it is useful to recall the interpretation offered by the Medieval Gloss. Regarding the passage '*In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est*' the Gloss specifies that

existimationis, '*id est famae. Sic accipitur Dig. De var., cog., l. pen damnatus ergo mandati directa est infamis*'. An agent who does not fulfil his task properly damages not only the property of the owner but also his reputation. While on *periculum est. Nam suae quidem quisque rei moderator atque arbiter*, the Gloss comments as follows*:* '*scilicet existens id est dispositor: proprie enim non potest arbiter qui esse in sua re*': the arbiter is the one who disposes; in the proper sense, one is not arbiter of one's own affairs.[15]

From the Gloss we can clearly see the difference between an agent and an owner, the latter being *dispositor*, a term that differs from *moderator* in the type of power that can be exercised over things: the former can make use of his goods for good or for evil, while the latter ensures the order and good governance of the same. By extension, while the agent is responsible if he neglects to take care of the business entrusted to him, the owner is not at fault if he does not take care of his own property, not having to account to anyone other than himself for his lack of administration. From this constitution of Constantine the dialectical profile of the administration of the mandatary with regard to the *dominium* clearly emerges, but not so much in the form of the negative, as in an unreflective deviation, an implicit faculty but not one characterising the role of the *dominus*.

Administration is a latent faculty, composed of a bundle of prerogatives, which only the presence of another person external to the entitled can fully realise. Administration thus reveals itself as an indication of a defect in the *dominium*, whose holder, by choice or necessity, turns to a third party who restores his awareness of the limits that the subject encounters in the free disposition of what belongs to him. It should be pointed out here, however, that Roman jurists were unable to think of the limits to *dominium* only in terms of the administration of a third party; this is the perspective we adopt here to emphasise the counter-power that administration holds with regard to ownership. The pandectist interpretation, like that of Piccinelli, obviously cannot avoid noting the limits of *dominium*, but uses them as a sign of an exception to the principle according to which *dominium* consists in the use and abuse of the property possessed, in its *plena potestas*. Let's look at this passage from Gaius' *Institutes*, 1, 53-53, which celebrates the good use of property:

> (52) 'Servi in potestate sunt dominorum quae potestas iuris gentium est nam apud omnes gentes animadvertere possumus dominis in servos vitae atque necis potestatem esse'.
>
> (53) 'Sed hoc tempore neque civibus Romanis nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine ulla causa in servos suos saevire. Nam ex constitutione imperatoris Antonini, dominus qui sine caus servum suum occidit culpa teneri iubetur non minus quam si alienum servum occiderit. Eiusdem principis constitutio etiam nimiam

[15] See F. Piccinelli and L. Capogrossi Colagnesi, n above 12, 39-41.

asperitatem domino rum coercet. Nam consultus a quibusdam praesidibus provincia rum de his servis qui ad fan deorum vel ad statuas principium confugiunt, praecepit ut, si intolerabilis videatur domino rum saevitia, cogantur servos suos vendere, et utrumque recte fit : male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum suorum administratio'.

(52) ('Slaves are in the power of their masters, and this power is acknowledged by the Law of Nations, for we know that among all nations alike the master has the power of life and death over his slaves, and whatever property is acquired by a slave is acquired by his master').

(53) ('At the present time, however, neither Roman citizens nor any other persons who are under the empire of the Roman people are permitted to employ excessive or causeless severity against their slaves; for by a constitution of the Most Holy Emperor Antoninus anyone who kills his slave, without good reason, is not less liable than one who kills the slave of another; and the excessive harshness of masters is restrained by another constitution of the same Emperor; for he, having been consulted by certain governors of provinces with reference to slaves who flee for refuge to the temples of the Gods or the statues of the Emperor,[1] ordered that if the cruelty of masters appeared to be intolerable, they should be compelled to sell their slaves; and in both cases he acted justly, for we should not make a bad use of our rights, in accordance with which principle the administration of their own property is forbidden to spendthrifts').

How should we interpret this passage by Gaius? In several ways, of course, the most common being that it highlights the jurist's sense of humanity and his support for the imperial philanthropy of Antoninus Pius in the context of the debate on slavery that was taking place at the time. Or as evidence of the limits of property and the abuse of law.[16] Far be it from me to transform my ignorance into quality: I simply come to the reading of this source as a non-specialist, and therefore not marked by the philological stratification that Romanists bring as a dowry, like a weight that can sometimes cripple a less burdened interpretation. On the one hand, we have the necessary historical contextualisation of the source within the Roman policy on slavery; on the other hand, the theme of the abuse of rights and the limited or unlimited nature of property on which the pandectist tradition is sensitive. To these readings, we can add a further level of problematisation that I think is essential for understanding the genealogy of the forms of power in the West. It concerns the relationship of discordant complicity that has been established between the two categories of *dominium* and *administratio*. Roman law bases its support on administration, not to describe

[16] V.U. Agnati, '«*Persona iuris vocabulum*». Per un'interpretazione giuridica di «persona» nelle opere di Gaio' *Rivista di diritto romano*, 1, 27-28 (2009).

in concrete terms the ways in which the owner can use his assets. Instead of the term *administratio* to define the exercise of being owner, we often find oblique indications that translate into limits to the power to dispose of the asset as one wishes. For example, in another of Constantine's constitutions contained in the Theodosian Code, 8.5.2, partially taken up by the Justinian Code, 12.41.1, we read:

> 'Quoniam plerique nodosis et validissimis fustibus inter ipsa currendi primordia animalia publica cogunt quidquid virium habent absumere, placet, ut omnino nullus in agitando fuste utatur, sed aut virga aut certe flagro, cuius in cuspide infixus brevis aculeus pigrescentes artus innocuo titillo poterit admonere, non ut exigat tantum, quantum vires valere non possunt. Qui contra hanc feceritsanctionem promotus, regradationis humilitate plectetur: munifex poenam deportationis excipiat'.
>
> ('Since most (coachmen) with their gnarled and very strong sticks, in the very first stages of the race, force the public animals to use all their strength, it is desirable that no one should use a stick at all to drive, but either a rod, or at least a stick, at the tip of which a short thorn embedded in the point reminds the lazy limbs with a harmless tickle, so that no more is demanded of them than their strength can give. He who does not accept will suffer the humiliation of regression: he who abounds in this type of behaviour will receive the penalty of deportation').

The emperor sets an example of how public property should be treated, prohibiting certain behaviours, as if to convey to everyone the same type of attitude in the exercise of ownership over private assets. The proper treatment of animals is certainly motivated by the preservation of a 'workforce' essential for trade and travel, but it still limits the unscrupulous use of the animal. This is a form of control internal to the owner's position that is not qualified as *administratio*, a term that is instead used when it is necessary to protect things from possible prejudices to the advantage of third parties, creditors and heirs of the owner, who may claim rights. We saw this in the text by Gaius quoted above, when the administration of another person intervenes to prevent the profligate squanderer from depleting his own resources through improper use of his right of ownership (*qua ratione et prodigis interdicitur bonorum suorum administratio*). The *administratio* thus confirms its auxiliary role, integrating the position of the *dominus*, as the etymology of the word reminds us. It is also a polemical signal regarding the alleged self-sufficiency of property. Roman law finds its functional centre of gravity in the safeguarding of property and therefore of third parties, the protection of the owner is secondary. Administration is not the negative of property, but the revealer of its decoupling: the master's awareness, as Hegel showed, passes through the work of the servant, whose *administratio* defines the primordial layer of what will only be called administrative law at the beginning

of the 19th century. At the end of that same century, the notion of 'public service' would make the utilitarian and widespread nature of administrative work clear to the State. From that moment on, in order to conceive himself as *dominus*, the sovereign power would have to declare himself administrator of public utilities. Maurice Hauriou will have the privilege of realising that the State is an administrator not only because it asserts its command, but because through the promotion of public services it transforms the administration into an enterprise:

> 'The administrative enterprise must be considered as a legal enterprise for the management of affairs. On the one hand, when the administration organises and carries out a public service, it acts on behalf of the public; on the other hand, it is not a representative of the public and has not entered into a contract with the public. It acts by virtue of its autonomy and its sovereignty; it is the administration that takes the initiative to intervene in the matter. These are, indeed, the essential elements of business management'.[17]

The two genealogies of administration, which we have tried to outline, are thus recomposed in the symbolic unity of a law – or, to put it better, of an administrative normativity – that knows only the plot of techniques and obeys very little to the great divide public-private. Once again, the origin is the goal.

[17] M. Hauriou, *Précis de droit administratif et de droit public* (Paris: Librarie de la Société Sirey, 10th ed, 1921), 341.