Institutionalism and Plurality of Legal Orders Between Legitimacy and Constitutional Axiology

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Abstract

This paper addresses the issue of legal pluralism and the plurality of legal systems starting from the book 'The legacy of pluralism. The continental jurisprudence of Santi Romano, Carl Schmitt and Costantino Mortati'. In particular, through the valuable leitmotif introduced by the Authors, consisting of the double relationship between 'juristic and political conceptions of law' and between 'matter and nomic force', the contribution of the doctrine following the publication of 'L'ordinamento giuridico' by Santi Romano is analysed, with particular attention to the comparison with Carl Schmitt and Costantino Mortati, focusing on the axiological innovation of the Republican Constitution.

I. Legal Pluralism and Plurality of Legal Orders

The scholarly influence that the institutionalist theories of Santi Romano, Carl Schmitt and Costantino Mortati have had on twentieth-century legal science and constitutional law is clearly a complex topic,[1] which, however, the authors of '*The legacy of pluralism. The continental jurisprudence of Santi Romano, Carl Schmitt and Costantino Mortati*' analyse with originality and through a precious *leitmotiv*, consisting of the dual relationship between '*juristic and political conceptions of law*' and between '*matter and nomic force*'.

The reason is quickly stated. According to the Authors

> 'it is vital to keep in mind the distinction between the juristic and the political because it is at the heart of our account of Romano's, Schmitt's, and Mortati's theories. For the juxtaposition of these authors epitomizes the movement from one end to the other hand of the continuum. We will account for the relationship of the juristic to the political by exploring how these three jurists conceptualized pluralism'.

Legal pluralism is therefore at the heart of the discussion and requires, in

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[1] On the relationship between Santi Romano and the early masters of the republican age, including Costantino Mortati, see C. Pinelli, 'La Costituzione di Santi Romano e i primi maestri dell'età repubblicana' *rivistaaic.it*, 1-26 (2012).

the author's opinion, a distinction with the different – but obviously related and often used as equivalent – concept of plurality of legal orders. The latter, according to Corsale's definition, corresponds to

> 'a factual situation, ascertained and possibly described, or hypothesized and possibly demonstrated, of coexistence of a multiplicity of legal orders whose reciprocal relations give rise to problems to be analysed with the tools of legal science or sociology (according to the purposes that such an analysis aims for)'.

On the other hand, the expression 'legal pluralism' traditionally refers to one or more theoretical models, marked by an evident anti-statism, whose starting point is represented by the ascertainment of a plurality considered impossible to eliminate, as a constant datum of legal experience.[2]

The distinction, apparent at first glance, often conceals a desire to address the issue from a purely legal rather than socio-political perspective. However, it will be useful when we tackle the problem of pluralism through the prism of the Constitution. The distance between the constitutional rules, which incorporate legal pluralism in various forms, and the plurality of systems, will thus be evident. Its recognition will only be possible through a careful interpretation of both the theory itself and the constitutional principles. As Corsale argues,

> 'the essential feature of the pluralist model is the recognition of the plurality of legal orders and the consequent definition of the relationship between these systems and the State'.[3]

The Authors of the Volume also argue that

> 'Constitutional pluralism is one of the other streams of thought that have addressed questions of ordering under conditions of pluralization of legal sources. According to this approach, the tension between order and pluralism would be managed by constitutionalizing the relation between legal orders. These streams of thought have clearly enriched the debate but, with a few notable exceptions, they have fallen prey of two important epistemic limits. They have adopted – quite controversially – the point of view of the global order and have not addressed the issue of how legal orderings, in conditions of rising pluralism, shape societal formations'.

With the recognition of social pluralism in the Constitution, pluralistic theories have indeed had new applications. And yet, if on the level of the general theory of public law there have been many developments of Santi Romano's theory,

[2] M. Corsale, 'Pluralismo giuridico' *Enciclopedia del diritto* (Milano: Giuffrè, 1983), XXXIII, 1003.

[3] ibid 1014.

starting with Massimo Severo Giannini's review, constitutionalists have not tackled the issue in a general perspective, with the exception of a specific work by Gaspare Ambrosini and some ideas found in the 'Institutions of public law' by Costantino Mortati, both Constituent.[4] The subject of the transformation of constitutional orders is a widely known issue, on which Italian legal doctrine has dwelt since '*Lo Stato moderno e la sua crisi*'. The authors have the merit of having analysed the problems inherent in pluralism. They have highlighted the connections and differences also and above all with Costantino Mortati. The author has sought, particularly in his work on the function of government and on the material Constitution, the tools through which to channel social and political change into the relationship between fact and law, with specific reference to the Constitution.

The theory of the plurality of legal orders, which constitutes an indispensable precedent in this perspective, has had developments and applications in multiple fields of law that could perhaps find strong dissent even from the Author of '*L'ordinamento giuridico*'. However, Gino Giugni, a few years after contributing to the development of Romano's theory through the development of the 'inter-union judicial system', warned that 'doctrines walk on their own feet and by their own strength, independently of the authors who enunciated them'.[5]

From this viewpoint, in this author's opinion, it is indispensable to add a piece to the important work of the Authors, marked by the 'solutions' proposed by the Constitution to the same problems inherent to pluralism, which have occupied the scholars of public law since the beginning of the 20th century. First, however, it will be necessary to retrace some of the stages of institutionalism and the plurality of legal orders as they have asserted themselves in reality and as they have been used by legal doctrine.

II. Universal Order and Particular Orders

While on a theoretical level it is a notion that became established in the 20th century, the plurality of legal orders is nevertheless a phenomenon that characterises all medieval legal experience. In the Middle Ages, as Santi Romano put it,

> 'that society was broken up into many different communities, often independent or weakly connected. Here the phenomenon of the plurality of legal orders became so evident and impressive that it was impossible not to take it into account'.[6]

[4] These issues are the starting point for my work published in September 2020: D. Martire, *Pluralità degli ordinamenti giuridici e Costituzione repubblicana* (Napoli: Jovene, 2020).

[5] G. Giugni, 'Il diritto del lavoro', in P. Biscaretti Di Ruffia ed, *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano* (Milano: Giuffrè, 1977), 178.

[6] S. Romano, *L'ordinamento giuridico* (Florence: Sansoni, 2nd ed, 1967), 108; the Author thus concludes: 'Apart from others, which were also markedly autonomous, it is sufficient to recall

The Middle Ages are characterised by an unquestionable juridical pluralism, at the basis of which, however, lies the problem of the split between legitimation and effectiveness; by virtue of the unitary principle of legitimation, the power of the local authorities derives from the emperor, whose power in turn derives from God.

The question of the legitimacy of power represents, in the author's opinion, the fundamental pivot of the relationship between the general order and autonomous bodies, which allows us to investigate the relationship between the former and the latter which coexist with it, but which precede it chronologically and logically. As we shall see later, the problem of legitimation and the related relations will be central also in the debate in the Constituent Assembly, where the Constitution will assume the role of the sole legitimating element of state power, of autonomous orders, as well as of orders that are axiologically opposed to it.

In the feudal political view, on the other hand, the *potestas* of the Empire is not the power of the political institution but, rather, *principium ordinis*, the source of legitimation of society. In this perspective, the related *potestas* of particular orders repeats (and it cannot be otherwise) from that ordering principle its own legitimacy and juridicity.

This representation (mostly ideal and abstract) ends up constituting a *fictio* in contrast to reality. In reality, however, in contrast to the formal sovereignty of the emperor, the effective sovereignty of the particular orders is affirmed, which therefore legitimise themselves.[7]

The problem of pluralism and the plurality of legal orders therefore already arises in the context of the universal order of the *societas christiana*. The legal orders that are the expression of late medieval legal particularism do not have totalitarian pretensions. They are not antagonistic to common law. Within their scope and order, they supplement, specify and even go so far as to contradict common law. They never go so far as to contradict it (nor do they ever want to). On the contrary, they presuppose it, placing themselves in a dialectical position – ie in a patently or latently close relationship – with this immense wealth circulating everywhere and constituting the *ius*, the *ius* par excellence; and then appearing, with different characteristics, in the system affirmed with the emergence of the modern State.[8]

The system just described, characterized by a 'coexistence' between the various orders, goes into crisis, as widely known, with the advent of the modern sovereign State. The Peace of Westphalia in 1648 marked the beginning of a process – which, conventionally, would end in the mid-20th century – aimed at affirming the supremacy of the State over every other entity and organisation. The State progressively but inexorably acquires, according to Weber's teaching,

Church law, which certainly could not have been considered as part of the law of the State'.

[7] F. Modugno, *Legge - ordinamento giuridico - pluralità degli ordinamenti. Saggi di teoria generale del diritto* (Milano: Giuffrè, 1985), 188-189.

[8] P. Grossi, *L'ordine giuridico medievale* (Roma-Bari: Laterza, 2004), 226.

the monopoly of the exercise of force[9] and, consequently, the instrumental monopoly of juridical production, until the definitive affirmation of the equivalence between statehood and juridicality.[10]

In the absolute State, intermediate bodies therefore continue to exercise power and to be protagonists of a pluralism marked by ordinal autonomy. The main point, however, that differentiates this form of state from the medieval order is precisely the foundation of orders other than the general one. In fact, intermediate bodies lose their self-legitimisation as described above, since it is the Sovereign who attributes to them the fraction of *iurisdictio* within which to exercise their power.

For this reason,

> 'in the transition from the Middle Ages to the modern era, marked by the crisis of the universal order, the particular orders that constituted its pluralistic structure suffered two different fates: either they were destined to take the place of the universal order and to transform themselves into as many self-validating sovereign orders, or, on the contrary, to be compressed and subordinated within the scope of the former, while continuing to constitute its articulated and pluralistic internal structure'.[11]

III. Santi Romano's Theory. From the Crisis of the Modern State to the Plurality of Legal Orders

The problem of the split between legitimacy and effectiveness in the medieval order then arises in clearly different terms for the modern State, which constructs a different legitimacy from the imperial one, linked moreover to a different notion of effectiveness.[12] The State constitutes a

> 'rigorously unitary reality, where unity means, on the material level, the effectiveness of power over a territory guaranteed by a centripetal apparatus of organisation and coercion, and, on the psychological level, a totalitarian will that tends to absorb and make its own every manifestation, at least inter-subjective, that takes place in that territory'.[13]

[9] M. Weber, *Economia e società. Teoria delle categorie sociologiche* (Milano: Edizioni Comunità, 1995), I, 53.

[10] The confirmation of the gradual nature of this path is found in the passage of the first theorist of state sovereignty, Jean Bodin. See J. Bodin, *I sei libri dello Stato (1576)* (Torino: UTET, 1988), III, VII, II, 286 (translated by M. Isnardi Parente and D. Quaglioni).

[11] F. Modugno, *Legge* n 7 above, 190.

[12] See ibid 199.

[13] P. Grossi, *Un diritto senza Stato (la nozione di autonomia come fondamento della costituzione giuridica medievale)* (Milano: Giuffrè, 1996), 270.

The *potestas* of *princeps* becomes *summa legibusque soluta*, it is self-legitimising and finds no justification except in itself. The modern state, with respect to individuals and communities, is

> 'an entity in its own right that reduces the various elements of which it is composed to a unity. It is not confused with any of them. It stands before them with a personality of its own, endowed with a power, which it does not repeat except by its very nature and strength. Its strength is the strength of the law'.[14]

The end of the wars of religion, first the Peace of Augsburg and then the Peace of Westphalia, sealed the principle of *cuius regio eius religio* and, with it, of an international order based on a plurality of state orders linked to a given territory.

The modern State is then first of all the result of a legal order pluralization, of what has been called monotypic plurality. By virtue of it, we transition from the one order (the original universal order) to the multiplicity of orders, which nevertheless all present themselves as being of the same type. This legal order plurality is therefore linked to a multiplicity of territories, within which state legal orders with equal characteristics are affirmed: sovereignty, independence, exclusivity, impenetrability.[15]

If, therefore, on the one hand the so-called monotypic pluralism of legal orders is a consequence of the disintegration of the Empire, on the other hand, first the absolute State and then, even more clearly, the liberal state represent forms of negation of the plurality of legal orders, in its so-called polytypical expression.

The achievement of modern legal unity is the result of a conception of sovereignty as external and internal independence and, secondly, of a link between the state and individuals (who later became citizens) marked by profound abstractness.

The pretended unity, indivisibility and unlimitedness of sovereignty, proper to the absolute state, becomes a typical characteristic also of the order established following the French Revolution. From the prince, sovereignty is attributed to the nation, to the people, to individuals (no longer subjects but citizens). Its relative meaning remains unchanged, the result of the abstract link between the State and the individual. The monopoly of force and law is also linked to the (also modern) dogma of the clarity and completeness of the legal order itself: law is and must be an exclusive product of the State.

The first consequence of the uniqueness/exclusivity of the legal evaluations

[14] S. Romano, *Lo Stato moderno e la sua crisi* (Milano: Giuffrè, 1969), 7-8.

[15] The distinction between monotypic and polytypic pluralism is by A.E. Cammarata, *Formalismo e sapere giuridico* (Milano: Giuffrè, 1963), 136, and taken up both by V. Crisafulli, *Lezioni di diritto costituzionale* (Padova: CEDAM, 1984), 16, and by F. Modugno, *Legge* n 7 above, 190; see then F. Modugno, 'Pluralità degli ordinamenti giuridici' *Enciclopedia del diritto* (Milano: Giuffrè, 1985), XXXIV, 1; on the principle of exclusivity see C. Pinelli, *Costituzione e principio di esclusività. Percorsi scientifici* (Milano: Giuffrè, 1989), I.

of the State is constituted then by the negation of the so-called intermediate communities or social groups, by the negation of polytypical pluralism.[16]

Throughout the 19th century the supremacy of the bourgeois class and the liberal ideology connected with it, on the one hand entails political unity and formal and abstract equality, while on the other hand and by opposition it determines a social pluralism that 'in the same way as the only state legal order is disavowed as legal pluralism'.[17]

The internal and impenetrable structural unity of the modern state, as has been effectively asserted, rests, however, on a fiction, in the

> 'purported identity of State, nation and people, in the attribution of sovereignty to that mythical entity that had been the "nation" '.[18]

The transformation of society, triggered by the industrial revolution in the second half of the 19th century, led to the crisis of the modern state through the emergence of a multiplicity of social systems. The clear dividing line between political and civil society generates that tendency, highlighted by Santi Romano in his 1909 Pisan prolusion, of 'a very large series of social groups to constitute each an independent legal circle'.[19]

The problems relating to the organisation of work caused by the entry of large-scale industry into commerce and the production system highlight the phenomenon of so-called integral trade unionism. This term describes all those organisations (not only workers' and/or revolutionary organisations) whose main aim is to bring together individuals belonging to the same profession or having the same economic interest in order to oppose and overthrow the general state order.

The inadequacy of the state constitutional structure is, in Santi Romano's view, made evident by the excessive simplicity of the modern State legal order. The latter

> 'believed it could overlook a number of social forces, which it either deluded himself into thinking had disappeared or to which it attached no importance, considering them mere historical survivals, destined to disappear in a very short time'.

[16] It is not surprising then that the Le Chapelier Law, the expression of an antipluralist and anti-associationist ideology, dates from June 1791. Moreover, the Declaration of 1789 had replaced the rights and privileges of the classes with the principle of submission to a unitary right for all citizens. The recognition of individual freedoms and equal rights, in that perspective, is closely linked to the unity of the nation, which necessarily entails the elimination of the 'bodies' and 'orders' typical of the *Ancien Régime*.

[17] F. Modugno, *Legge* n 7 above, 192.

[18] S. Romano, *Lo Stato moderno e la sua crisi* n 14 above, 9-13; F. Modugno, *Legge* n 7 above, 194-195; P. Ridola, *Democrazia pluralistica e libertà associative* (Milano: Giuffrè, 1987), 136.

[19] S. Romano, *L'ordinamento giuridico* n 6 above, 113 and Id, *Lo Stato moderno* n 14 above, 12. On the Pisan prolusion and on the crisis of the State, see C. Pinelli, 'La Costituzione di Santi Romano' n 1 above, 5.

This organisation is therefore 'totally deficient in regulating, indeed often in failing to recognise, the groupings of individuals'.[20]

The legal irrelevance of the intermediate bodies referred to by Romano is the basis for the separation and non-recognition of these phenomena by the state legal order. The latter tends to relate exclusively to the individual

> 'apparently armed with an endless series of emphatically proclaimed and inexpensively extended rights, but in fact not always protected in their legitimate interests'.[21]

It is in this non-recognition that the problem of the polytypical multiplicity of social systems within and even outside the territory subject to the sovereignty of states takes root.

The crisis of social homogeneity at the basis of the liberal system induced legal science, and first of all Santi Romano, to develop a theory aimed at overcoming Kelsenian normativism and the statist point of view, considered insufficient to describe social reality.

In the doctrine of Santi Romano there are two theories, which according to Bobbio should be kept distinct: the theory of law as an institution, which is opposed to the normative theory, and the theory of the plurality of legal orders, which is opposed instead to the monistic or statist theory. According to the author

> 'there is in fact no necessary link between the theory of the order and pluralism, just as there is between the theory of the norm and monism. There is no incompatibility between order theory and monism, just as there is none between norm theory and pluralism. Although the most well-known institutionalist theories are in fact also pluralist, the conjunction between institutionalism and pluralism as well as that between normativism and monism is not a rule. Augusto Thon, the prince of normativists, is also a pluralist. The prince of institutionalists, Maurice Hauriou, Romano's main if soon to be abandoned source, has no interest in the pluralistic consequences of his doctrine. Staying close to home: Croce is well known to be a convinced pluralist, but if I had to answer the question of whether he was an institutionalist or a normativist I would feel awkward'.[22]

In the sphere of Romano's theories, it is in fact possible to discern a basic ambiguity, characterized by the two souls that seem to coexist in his thinking. On the one hand, in an evidently statist context, which the author himself

[20] S. Romano, *Lo Stato moderno e la sua crisi* n 14 above, 13-14.

[21] ibid 14.

[22] N. Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano', in P. Biscaretti Di Ruffia ed, *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano* (Milano: Giuffrè, 1977), 25; on Hauriou see the recent work by C. Pinelli, 'Il diritto come "édifice artisique" ', in A. Salvatore ed, *La personalità giuridica di Hauriou* (forthcoming).

contributed a great deal to reinforcing, there is clearly a plurality of social groups. On the other hand,

> 'modern public law does not dominate, but is dominated by a social movement, to which it is hardly adapting, and which meanwhile governs itself with its own laws'. Therefore, that 'luminous conception of the State (...) seems to have been eclipsed for some time now, becoming more intense by the day, so that it might not be entirely superstitious to draw unhappy omens from it'.[23]

The Pisan Prolusion and '*Lo Stato moderno e la sua crisi*' then represent in Romano the moment of fear towards such social orders and as proof of this, we can detect for the first time the absence of criticism of French revolutionary constitutionalism. For Romano, saving the modern State means first and foremost carrying out the work of 'juridical construction', which presupposes a different attitude towards modern constitutions. Their shortcomings are a good thing today, as this will enable the fight against them to take on a different character. This will happen when it will see that it is taking place in a field where there are no trenches to be torn down but only defences to be erected. Those new edifices, once constructed,

> 'will not contrast with the solid and severe architecture of the modern State, but will rest on the same foundations and form an integral part of it'.[24]

Romano's attitude changes completely in '*L'ordinamento giuridico*'. Here he carries out a theoretical work that goes beyond the positive law. On a theoretical level, he asserts a superiority not only of the state system, but also of other systems that he does not hesitate to define as original. However, it is significant that in the section on the relationship between legal systems there is no significant reference to social systems, but only to the State, the international legal system, the church and even private international law.

This is the framework for the thesis of Santi Romano, whose pluralistic theoretical model already contains the premises for bringing the plurality of legal orders back to the unity of the State. As has been rightly observed in the conclusion, it states that, whatever social transformations are taking place, one cannot renounce the principle of a superior organisation that unites, conciliates and harmonizes the minor organisations into which the former is being specified. This superior organisation must yet again be the 'modern State'.[25] Theoretically pluralist, ideologically monist, Bobbio will say.[26] One can only agree.

[23] S. Romano, *Lo Stato moderno e la sua crisi* n 14 above, 387 and 383.
[24] ibid 391.
[25] N. Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano' n 22 above, 41-42.
[26] ibid 42.

The first part of the work, on the other hand, is aimed at explicating the concept of legal order closely connected to that of institution. From the notion of legal order, understood precisely as organisation and institution, Romano deduces that 'there are as many legal orders as institutions'.[27]

One of the main innovations of this work, compared to the Pisan Prologue, lies in the object of its analysis. What was previously contemplated in factual terms and in terms of social pluralism, in 'The Legal Order' becomes legal pluralism, plurality of legal orders. Where there is organisation and institution there is also objective law. This, therefore, cannot be anything but plural.

The observed plurality of legal orders leads Romano to question the relationships that may exist between the various orders. For Romano it is indeed essential to maintain a juridical point of view.

A further consideration then concerns the relationships between the two parts that make up Romano's volume. While on the one hand there is the institutionalist theory that embraces the institution and the social body, on the other hand, in the second part, there is an analysis that presents many aspects that can be traced back to the normative moment, to the relations between orders understood this time as relations between rules.

For Giannini,

> 'the majority of jurists did not accept the equivalence between organised groups and the legal order, as they attributed relevance only to the normative element. Santi Romano himself left the notion of organisation undeveloped. In his later work, he only emphasised the normative element. Probably if he had been able to complete his work, he would have developed the aspects pertaining to the organisation as well'.[28]

In fact, Romano observes that the analysis of the relations between orders is resolved in the legal relevance that one order has with respect to another, a relevance that is determined when 'the *existence* or the *content* or the *effectiveness* of one order is conditioned with respect to another order, and this on the basis of a *juridical* title'.[29]

For Romano, the thesis based on the assumption that original orders are exclusive and, in themselves, unique, cannot be accepted. The principle that each original order is always exclusive must be understood in the sense that it may, and not necessarily must, deny the legal value of any other. In other words, one order may ignore or even deny another order. A system may take it into account by giving it a character other than that which it attributes to itself. It can therefore be considered as a mere fact. It is not clear why it cannot

[27] S. Romano, *L'ordinamento giuridico* n 6 above, 106.

[28] M.S. Giannini, 'Sulla pluralità degli ordinamenti giuridici', in C. Gini ed, *Atti del Congresso internazionale di sociologia*, IV, (Roma: Istituto Poligrafico dello Stato, 1950), 467-468.

[29] S. Romano, *L'ordinamento giuridico* n 6 above, 145.

recognise it as a legal order, albeit to a certain extent and for certain effects, and with such qualifications as it may see fit to confer on it.[30]

The 'juridical titles' by which one order acquires relevance for the other can be of five types: a) the state of subordination of one order with respect to another; b) the state of presupposition; c) the condition of independence of one with respect to the other, but of dependence of both with respect to a third party superior to them; d) the state of partial subordination, in relation to some aspects of content or effectiveness; e) the succession of one with respect to the other.

The confirmation of the consideration for which the second part of the volume is marked by the normative aspect is to be found in the very words of the Author when he states that 'a greater unfolding of these principii could be obtained only after having outlined a theory of the sources of the legal orders'.[31]

IV. Santi Romano and Carl Schmitt

> 'The decisive problem of our current historical context concerns the relationship between State and politics. A doctrine formed in the sixteenth and seventeenth centuries, inaugurated by Nicolò Machiavelli, Jean Bodin and Thomas Hobbes, attributed an important monopoly to the State: the classical European State became the sole subject of politics. State and politics were inseparably related to each other, in the same way as, in Aristotle, "polis" and politics are inseparable. The classical profile of the State vanished when its monopoly of politics disappeared and new, different subjects of political struggle, with or without State, with or without State content (*Staatsgehahe*) took over'.[32]

Carl Schmitt started from this point to reason on the crisis of the liberal state and highlighted the change in politics, which changed from state to party politics and consequently posed the fundamental question of its unity.

In the context of the relationship between '*juristic and political conceptions of law*' highlighted in the introduction, the Authors argue that

> 'It is evident that Romanos conception dwells in one end of the continuum and Mortati on the other, while Schmitt moved from the former to the latter. It is interesting to note, thus, that these authors' understanding of pluralism was significantly affected by the role they attributed to the juristic, and in particular to legal knowledge'.

Schmitt positions himself, therefore, somewhere between the 'juristic' and

[30] ibid 146. See also C. Pinelli, *Costituzione e principio di esclusività* n 15 above, 19.
[31] S. Romano, *L'ordinamento giuridico* n 6 above, 146.
[32] C. Schmitt, *Le categorie del politico* (Bologna: il Mulino, 1972), 23-24.

the 'political' conceptions. In fact, as Bobbio pointed out, Schmitt was among the first to grasp the importance of Santi Romano's theory of the legal order. His theoretical reconstruction of institutionalism, however, showed some problems because it was exposed, on the legal level, in a very imprecise way compared to that formulated by Romano, which, as we have seen, already presented some ambiguities; moreover, as the Authors also state, he arrived at an 'institutionalist' orientation only depending on overcoming the decisionist perspective he had developed in the 1920s.

The doctrine usually includes in the area of institutionalism the theses that, more or less directly, presuppose the concept of Constitution in the material sense, as opposed to that of the Constitution in the formal sense. This is because, very generally speaking, the state legal order is based on certain substantive principles, which are to be found in society or, as they say, in the 'political' sphere. In the original version of Schmittian decisionism, the Constitution represents the total decision on the type and form of the political unity of a people, whose foundation is not normative, but purely existential. All other rules are based on compliance with that fundamental political decision.

As Bobbio noted, taking his cue from Gurvitch, the peculiarity of the pluralist model in contesting statualism consists in denying legitimacy to an exclusive relationship between the political dimension and the legal dimension.[33] In other words, the pluralistic model contains, within itself, the contestation of the thesis of the so-called autonomy of the politician.

After all, the Authors hit the nail on the head when they claim that

> 'It is our claim that Schmitt's overall theory was profoundly affected by his thoroughgoing revision of the role of the order in the creation and maintenance of a political community. Needless to say, at no point was he a supporter of the idea of a system, as he fiercely chastised the systematic idea of law advocated by his fiercest intellectual adversary, Hans Kelsen. However, Schmitt's critical take on the concept of a system changed significantly at the end of the 1920s, as he gave an institutional twist to his theory of law and politics. This chapter will investigate this major theoretical change whereby Schmitt dispensed with his famed theory of the exception and put forward a theory of the concrete order. The scrutiny of the different types of criticisms he leveled at the normativity of the system will allow us to show that his main concern was with pluralism as an ongoing threat of dissolution. While Schmitt's persisting obsession was with the homogeneity of the political community, he importantly changed his mind as to how it can be attained and how it should be preserved. This analysis will also shine a light on the difference with Santi Romano's idea of order, especially as to

[33] N. Bobbio, *Prefazione a G. Gurvitch, La dichiarazione dei diritti sociali* (Milano: Edizioni di Comunità, 1949), 16.

how their disagreeing conceptions of it led to disagreeing conceptions of pluralism'.

Juxtaposing Schmitt with Romano, however, raises a number of questions, already highlighted years ago by the doctrine.[34] These are undoubtedly two profoundly different 'jurists' who, moreover, started from different premises and set themselves different objectives. Romano proposed a *tout court* legal point of view, immune from sociological and political interconnections. The same certainly cannot be said for Schmitt. Giannini, in his report to the Conference 'The Legal Conception of Carl Schmitt' in 1986, anticipating his own conclusions, even claimed that 'Carl Schmitt's conception in the legal sense probably does not exist, because Schmitt is essentially a political scientist'.[35] If this were the conclusion, surely analysing the theses of Santi Romano, Schmitt and Mortati would make little sense.

Without reaching such conclusions, however, there is no doubt that the political contamination of Schmittian thought is so strong as to contrast it sharply with that of Romano and Mortati. After all, it seems to me that the Authors' conclusion is similar, especially when they state that

> 'depoliticization of conflict through the juristic point of view could not be farther from Schmitt's institutionalism, which ironically the latter somewhat regarded as the continuation and the overhaul of Hauriou's and Romano's institutional theories. Therefore, moving on to Schmitt's conception of law will also be of help in better understanding Romano's pluralist institutionalism'.

The Authors use an analysis of the Plettenberg political scientist's texts to argue that

> 'we concerned ourselves with Schmitt's telling revision of his own legal theory, and the comparison with Romano's proved enlightening in a few junctures. While either was always reluctant about the notion of law as system, Schmitt was the one who pushed the notion of law as order to the extreme. Romano was obviously on the side of the order versus the system, but his view made no room for the idea that law incorporates a form of life and promotes social homogeneity. While for Romano the task of law is that of making orders compatible with each other through technical forms of negotiation, Schmitt tasked law with preventing the rise of an order *vis-à-vis* another within state borders. The law, Schmitt believed, is an instrument

[34] See for all A. Catania, *Il diritto tra forza e consenso* (Napoli: Edizioni Scientifiche Italiane, 1987), 137.

[35] M.S. Giannini, 'La concezione giuridica di Carl Schmitt: un politologo datato' *Quaderni costituzionali*, 447 (1986).

> for the leader and his loyal officials to tease out the institutional standards that feed into the ethnic homogeneity of the people and shore it up. The order, then, graphs onto a form of life that has an ethical and an ethnic nature. Therefore, it is hardly surprising that two theories of law as order, despite many key aspects in common, came to irreconcilable visions of pluralism'.

There is no doubt that such visions of pluralism are irreconcilable. There is equally no doubt that Santi Romano

> 'transmitted to the young his map like the greatest Masters, whose strength does not consist in imparting doctrines, but in indicating the different relevance of the objects of knowledge. The result was partial assimilations, adaptations, and distances that increased as we approached the subject of the constitution. At the time, in spite of growing disquiet, it was not easy to foresee the coming end of a world; yet from those reactions arose constructs that would soon aid, in the way of jurists, the advent of a new one'.[36]

Among these there was Costantino Mortati, who is probably the scholar who most sought to fuse the two approaches to Italian public law – the historical-political approach of Franco-British origin and the legal-positivist approach of German origin – into a theory of the Constitution. From this point of view, the continuity with Romano is certainly more fruitful.

V. Santi Romano and Costantino Mortati. Plurality of Legal Orders and the Italian Constitution

Romano's institutionalist theory famously had extremely formalistic traits. However, as has been rightly stated,

> 'to infer the consequence of its reversal "in concrete legal thought" appears to be the fruit of a deterministic dialectic'. The only one to support it was, as we have seen and as the Authors report, 'not by chance always and only in a strictly theoretical way, Schmitt, praising Romano for having seen in the state organization "the concrete order" productive of rules. Not so Romano himself, who was able to follow from the inside, starting from that premise, "the movements" that were taking place there, and even less so his young followers or students, who (...) all moved away from the premise more or less quickly'.[37]

[36] C. Pinelli, 'La Costituzione di Santi Romano' n 1 above, 1.

[37] Ibid 20; C. Schmitt, n 32 above, 260. On the formalism of S. Romano see M. Dogliani, *Indirizzo politico. Riflessioni su regole e regolarità nel diritto costituzionale* (Napoli: Jovene, 1985), 164-165.

Mortati, already in his first work, *L'ordinamento del governo* (1931), studied what he called 'grey zones' of constitutional law, in which the relationship between law and politics appeared more problematic and connected. Here the reference to the anti-formalist methodology was evidently stronger and would lead him, in his later studies, to identify the political party as the origin of all institutional arrangements and to a position very close to Romano's institutionalism.

The Constitution in the material sense is understood as the set of fundamental political goals supported and implemented by the dominant political forces and, therefore, as the basis for the validity of all other rules of the legal system. It then addresses the issue of principles and values that can be deduced from a given historical and social framework, which are binding on institutional actors. This reflection, together with that of other young public law experts (among them, Carlo Esposito, Vezio Crisafulli and Massimo Severo Giannini) will be decisive in preparing the debate at the Constituent Assembly and the subsequent development of Italian constitutionalist doctrine.

As far as we are concerned, Mortati's reflections will be decisive for the knowledge of Emmanuel Mounier's personalism, which will strongly influence Catholic politicians and jurists (in particular Giuseppe Dossetti) and, consequently, constitutional principles (starting from Art 2 Constitution).

Christian-social pluralism, the German organicist conception, as well as Santi Romano's 'constitutional' pluralism are present in Mortati's reflections and are already evident in the reports to the first subcommittee (Constitutional Problems) entitled 'On the Declaration of Rights. General considerations' and 'On subjective political rights',[38] in which he hypothesizes a system of rights, referring not only to individuals, but also to groups, the autonomy of local authorities, and the recognition of political, professional and economic associations.

Like him, although with different outcomes and developments, Giannini – a pupil of Romano's – deals with another of Romano's notions that remained in the background for many years,[39] that of internal order, divided into the two forms of sectional legal order and, later, of state legal order.

Giannini's works, as well as Mortati's, are a useful tool to understand the connection between the doctrinal developments of that time and what will be affirmed in the Republican Constitution, in relation to the pluralism of the legal order. On the one hand, Giannini is one of the authors who most innovates Romano's theory. On the other hand, the social pluralism that will be the subject of disputes within the Constituent Assembly and that will result in many constitutional provisions also has Giannini among its architects. In fact, he was to be the author, together with Adriano Olivetti, of the constituent project

[38] G. Amato and F. Bruno, 'La forma di governo italiana: dalle idee dei partiti alla Costituente' *Quaderni costituzionali*, 49 (1981).

[39] At least until the work of V. Bachelet, *Disciplina militare e ordinamento giuridico statale* (Milano: Giuffrè, 1962).

dedicated to the problem of local autonomies.

It is also necessary to note how the development of the sectional order proceeds hand in hand with the development of Romano's theory of the legal order in the strict sense. The connection between institution and social body justifies, in its perspective, the criticisms of indeterminacy, apriorism and tautologism made by the doctrine of the time, which, however, were initially overcome on the basis of the relative simplicity of the systems taken into consideration.

The first applications of the pluralistic theory of law in the field of international law and canon law (themes already dealt with, as we have seen, by Romano), since they were 'collected' systems, made it possible to set aside the problem of determining the institution. The inadequacy of the theory comes to light, however, when Giannini sets out to analyse the sporting phenomenon. This implies a deeper understanding of the elements of the legal system. In a later work he will configure the legal system as a liminal legal notion, whose content can only be derived from other realities, especially sociology. Since these are liminal concepts,

> 'the legal qualifications which are applied by means of such a concept are not creative of legal reality, but merely a recording: it is the facts which require the rights to take on some of their *data* as content of *legal qualifications*'.[40]

There are three constituent elements of legal orders: plurisubjectivity, normativity, and organisation. The first is constituted by the existence of a determined number of subjects (individuals, entities) bound together by the respect and observance of a series of rules, considered binding for all. This body of rules represents the legislation. The organisation, on the other hand, is that grouping of people, of personal services and of real services, of all those services that are performed through things or means.

The peculiarity of its reconstruction lies in the consideration that organisation and legislation are linked by 'very close ties'; by virtue of a sociological conception, that is called simultaneous interaction. The organisation sets the rules; the rules create the organisation, so 'any modification of one is a modification of the other'.[41]

As I have always argued, of the three elements of the legal order, plurisubjectivity is the one that, as structured by Giannini, appears most controversial. Although it is, like the others, an indispensable element, it differs

[40] M.S. Giannini, 'Sulla pluralità degli ordinamenti giuridici' n 28 above, 458. On this and other aspects of Giannini's theory see C. Pinelli, 'Massimo Severo Giannini costitutionalista' *Rivista trimestrale di diritto pubblico*, 853-854 (2015).

[41] M.S. Giannini, 'Prime osservazioni sugli ordinamenti giuridici sportivi' *Rivista di diritto dello sport*, 13 (1949), as well as Id, 'Gli elementi degli ordinamenti giuridici' *Rivista trimestrale di diritto pubblico*, 219 (1958).

from the other two in that it is 'the raison d'être of an order, as well as its reason for existing' and at the same time as

> 'the legally inert datum of the order (...) a necessary feature of the order, but (...) characteristic of it: it is, after all, precisely the legislation and the organisation that qualify the individual as a subject: *the subject in itself, legally, does not exist*; there will exist realities, natural or artificial, to which the offices of the order, in application of the order's rules, will recognize the quality of subject, by means of an appropriate procedure'.[42]

Giannini, for that matter, shared the pluralistic inspiration of Adriano Olivetti's ambitious design.[43] The latter, certainly distant from the plurality of Romano's orders, represented that current of thought that was the expression of a pluralism and of an open, post-state, non-organicist communitarianism.

The debate in the Constituent Assembly and the resulting rules confirm the connection with the pluralistic approaches (including Romano's) affirmed at the beginning of the twentieth century.

The question that took on fundamental importance was first of all the relation between public power, generically understood, and society, its interests and its organisation. The connection with what was widely discussed throughout the first half of the 20th century and illustrated by the Authors in the Volume is immediately evident.

According to Gaspare Ambrosini, an illustrious Constituent, the Italian Constitution placed the doctrine of the plurality of legal systems at the base of the State's relations and behaviour *vis-à-vis* social groups. From the fact that the Constitution places alongside man as an individual, the 'social groupings' of which he is naturally part for the achievement of common purposes with other men, it follows that these groupings must be considered as entities correlatively and naturally endowed with irrepressible rights and guarantees.[44]

According to Ambrosini, the plurality of legal orders, as theorized by Santi Romano in '*L'ordinamento giuridico*', not only represented for the Constituents a constant point of reference in the debate, but was also acknowledged by the constitutional rules, starting from Art 2 of the Constitution.

According to the author, the Republican Constitution recognises the principle of pluralism. It is an irrepressible characteristic of the human being. This overturns the approach of the general order to social (and even legal) orders, of

[42] M.S. Giannini, 'Gli elementi degli ordinamenti giuridici' n 41 above, 221. See D. Martire, 'Pluralità degli ordinamenti giuridici e Costituzione repubblicana. Spunti di riflessione alla luce dell'esperienza costituzionale' *Diritto pubblico*, 868 (2017) and Id, *Pluralità degli ordinamenti giuridici e Costituzione repubblicana* n 4 above, 4 e 55.

[43] A. Olivetti, *L'ordine politico delle comunità. Le garanzie di libertà in uno stato socialista* (Milano: Edizioni di Comunità, 1970).

[44] G. Ambrosini, 'La pluralità degli ordinamenti giuridici nella Costituzione italiana', in G. Abbamonte et al eds, *Studi in onore di Giuseppe Chiarelli*, I (Milano: Giuffrè, 1973), 5.

relations to sociality and the spontaneity of the formations set up by individuals, and thus of the State in relation to groups. The connection with the studies of Mortati, Giannini and Romano referred to above is evident.

The Constitutional system creates an order that recognises the rights of the individual as an individual, but also as an individual in society. A subject, therefore, open to interaction with others, with an intrinsic relational dimension. An approach, therefore, that overcomes the individual-group dichotomy and, on the level of principles, the personalism/pluralism dichotomy, seeking to reduce the multiple social realities to unity, through a continuous process of reunification between the social and the juridical.

In the debate on Art 2 of the Constitution, there was opposition between those who emphasised the artificial character of the State and those who, instead, extolled the social aspect of man. Abandoning La Pira's project, which was too imbued with ideologism, both philosophical and religious, insofar as it was linked to an organicism of society, the Dossetti agenda was directed towards saving its essential presuppositions: a) the essential precedence of the human person over the State and the latter's role in serving the former; b) the recognition of the necessary sociality of all persons, destined to complete and perfect themselves through a natural economic and spiritual solidarity, first and foremost through intermediate communities; c) the affirmation of the existence of both the fundamental rights of persons and the rights of communities prior to any concession by the State. The result was a compromise rule that recognized the autonomy of social groupings and the connection of that group autonomy with individual rights.[45]

As Ridola stated,

> 'it would be a mistake, however, for anyone to draw the conclusion, from an examination of the preparatory work, that the recognition of a collective dimension of the exercise of fundamental rights remained extraneous to the constitutional text'.[46]

Despite not being accepted, the subsequent amendment tabled by Moro, aimed at affirming the protection of the collective profile that had been lacking in Art 2, was recovered in Art 18 of the Constitution.[47] After all, constitutional jurisprudence will soon embrace this perspective.[48]

If, then, the collective profile is intrinsically connected to the individual profile, attention should be given to that connection that Art 2 Constitution poses with the

[45] See E. Rossi, *Le formazioni sociali nella Costituzione italiana* (Padova: CEDAM, 1989), 32; P. Ridola, n 18 above, 208.

[46] P. Ridola, n 18 above, 210.

[47] L. Basso, 'Intervento sull'art. 18 Cost.', available at https://tinyurl.com/4rdabmxu (last visited 31 December 2021).

[48] Just think of the two rulings on the sports order, nos 49 of 2011 and 160 of 2019.

social, considered certainly prior to the State and, for this reason, recognized and not granted. The use of that term cannot, in fact, be underestimated, representing the compromise between the need for unity, proper to any pluralism, and the necessary 'social freedom' of the individual. And so the reason for the institutional recognition by the Constitution finds its foundation in the recognition of the inseparability of the two dimensions, individual and collective, of the rights of the person and, therefore, of the dimension of axiological originality of each institution. That originality, proper to the group that becomes an order, constitutes the presupposition of the constitutional recognition, operated through Art 2 Constitution which, through such recognition, legitimises but at the same time re-qualifies originality in autonomous terms, as a distinct but not impenetrable order.

The Constitution then explicitly addresses the issue of pluralism and attributes, *statically*, *relevance to the social and legal order considered in itself*, as an original system distinguished by *aseity* and *axiological speciality* (originality); on the other hand, the relevance legitimises and *dynamically modifies the nature of the orders*, reclassifying them as *derivative* and subjecting them to constitutional purposes and principles.

The Authors of '*The Legacy of Pluralism. The continental jurisprudence of Santi Romano, Carl Schmitt and Costantino Mortati*' state that

> 'a related claim is that these accounts were not only able to favor an alternative juridico-political scenario at the time – their considerations on how the state should cope with radical pluralism are particularly relevant to present-day politics as well'.

I am convinced that these words are confirmed by the perspective taken by the Constitution and, no less importantly, by the experience of the Republic.