The Obsession with Order

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Abstract

The book by Mariano Croce and Marco Goldoni retraces in a punctual, detailed way, and consistent with the methodological and theoretical premises they directly expounded, the question of the dynamics amongst law and politics in three great figures of modern legal thought. Their focus is on the way Santi Romano, Carl Schmitt and Costantino Mortati address the difficult relationship between the centripetal attraction of a supreme political entity and the centrifugal plurality of social life. Pluralism represents for all three of these authors a problem and a challenge, which calls into question the role of the state and its relations with non-state normative entities. The teaching of these masters, apparently distant in time, can indeed be highly instructive for addressing contemporary issues.

I. Three Lawyers, One Obsession

Mariano Croce and Marco Goldoni deal with a topic of primary relevance for legal and political philosophy, proposing an in-depth and largely innovative reading of three great figures of twentieth-century continental legal philosophy: Santi Romano, Carl Schmitt, and Costantino Mortati.

In the essay I'm going to discuss, points of contact and differences between 'three towering figures of Continental jurisprudence' emerge clearly. The thesis that I will try to support from the reading of the text is that these three figures, although very different from each other, developed their theories on the basis of a common problem, that I would call an 'obsession with order'. The fuel of this obsession is the apprehension about the outcome of the trial they perceive as decisive: the challenge of pluralism. And while giving a different interpretation of the same term, all three explore the salvific nature of the 'institution', as a 'barrier to contingency, a measure for the survival of that which wants to resist the wear and tear of time and the ravages of fortune'.[1]

Although chronologically contiguous, each of the three authors can be inscribed in a specific stage of twentieth-century history. I am not claiming that the work of these authors does not embrace even very broad periods (for example, Schmitt's essays cover the Wilhelmine era, the Weimar Republic, the

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[1] M. Croce, 'Dentro la contingenza. Santi Romano e Karl Llewellyn sui modi dell'istituzione' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, I, 181 (2021) (my translation).

National Socialist regime, the Federal Republic). I mean something different: each of them contributed in a crucial way to the interpretation of a particular moment — of crisis — of the twentieth century, regardless of the date of their scholarly contributions, which sometimes may have been contemporary, sometimes later, and sometimes even earlier.

Santi Romano is the interpreter of the crisis at the beginning of the century, revealed in the swarming of antiparliamentary, socialist, communist and anarchist movements, and in the emergence of new political subjects — such as trade unions and corporations — capable of activating energies outside the perimeter of liberal state; a stage, therefore, in which the state is questioned in its wholeness, and in particular in its capacity to definitively and unquestionably structure social reality through its juridically strongest instrument: the statute.

Carl Schmitt, on the other hand, is the interpreter of the end of the Weimar Republic, of the failure of parliamentarianism and of the inability of liberalism to provide political answers to a troubled time, in a political scenario that was about to be invaded by National Socialist ideology. This Schmitt cannot be reduced to the cliché of 'Schmitt the decisionist'. With respect to the doctrine elaborated in the 1920s, he undertakes a rethink: a decisive and resolute 'turning point', which must not, however, be interpreted as a moment of total rupture with his previous intellectual performance. This turning point is expressed in Schmitt's adhesion to a model *lato sensu* 'institutionalist', albeit 'with different characteristics compared to the canon of authors such as Maurice Hauriou and Santi Romano.

Finally, Costantino Mortati is the interpreter of the crisis of the immediate post-war period and of the problem of founding a new democratic state and a new constitution: a 'material' constitution that can be placed alongside the formal constitution, noting that law is not a set of inert legal forms but is a construction animated by historical substances. In the changed context — a pluralistic context — of the post-World War II period, Mortati felt the need to identify new mediation tools, capable of regulating the (very high) tensions crossing society and making them converge towards a new constitutional pact. The need to put an end to the civil war took the form of the decision to coexist peacefully, founding a pluralistic constitutional democracy, within which political conflicts were possible but where it was no longer possible to identify absolute enemies.

Three crucial moments, therefore, which obliged to reflect on what was, however, a sole problem: building or rebuilding a legal-political order that was endangered, faltering and fading.

It strikes me as particularly interesting that the figures of these scholars have long been sidelined, especially in the Anglo-Saxon world. But also in the continental histories of the philosophy of law they have often been underestimated. There are many reasons for such an oblivion. The main one, it seems to me, is the difficulty of placing these thinkers in the theoretical grid that is still considered the primary reference point for legal theorists today: the opposition between

natural law and legal positivism. Romano, Schmitt and Mortati are authors who are even more interesting in that they cannot be ascribed to this 'great dichotomy'. All three are — to varying degrees — interpreters of that 'classic legal institutionalism' which, as Croce and Goldoni claim, stated a 'counterhistory' of law. This is an awkward counterhistory, because it forces us to think about law from a perspective that is far removed from the nirvana of normativism, in which state and law do not coincide, and in which the relationship between politics and law is iridescent and capable of hybridising in very different ways.

II. A Reading Key

From the very first pages of their volume, Croce and Goldoni make it clear that their theoretical interest in these three protagonists of twentieth-century legal science is driven by the need to clarify the 'double relation of juristic versus political conceptions of law and the interplay between matter and nomic force'. The theme, in other words, is the degree of autonomy (striated: from absolute dependence to full independence) of law in relation to politics.

Outlining a rigorous theoretical distinction, the authors define juristic conceptions as those approaches that tend to minimize the dependence of law on politics. In this perspective, the world of law and the world of politics are separate realities. Law, therefore, is independent of politics at both the substantive and procedural levels. As the authors note, this independence is reconstructed by the supporters of this approach, almost exclusively on the basis of the idea that law is a science, an autonomous knowledge based on the concrete analysis carried out by a class of experts who, over the centuries, have developed an armory of properly 'juridical' concepts and categories, clearly distinguishable from the domain of another knowledge. Law is thus essentially a 'law of the jurists', who oversee the production and application of legal norms.

On the opposite side, advocates of political visions claim that law is always linked to the political structure of society. Law does not originate from an internal source, but is triggered by political decisions. Proponents of this approach do not unanimously share a common view on the degree of dependence of law on politics, but they do find common ground in the absence of an effective autonomy of legal reality, which is necessarily dependent on decision-making and institutional processes outside of it.

The distinction between juristic and political conceptions proposed by Croce and Goldoni is absolutely essential to framing the differences and points of contact between Romano, Schmitt and Mortati. If the three authors are in some ways connected by an openness towards concreteness as a criterion for the construction of the legal system, the results they achieve are different (and in some cases irreconcilable).

The primary difference concerns the understanding of the role of legal

science. Romano advances a 'juristic' conception that emphasizes the role played by legal science in the composition of tensions crossing the social world. Schmitt moves, in a 'political' perspective, from an idea of legal science as the interplay of norm, decision, and concrete order. Mortati, combining the work of its predecessors in an original way, looks at legal science as instrumental in the consolidation of institutional facts.

Their understanding of the relation between the juristic and the political affects, latterly, the different way they deal with the connection between matter and nomic force. In Romano, matter is not nomic in itself, because its normative charge needs a particular type of knowledge (in this regard, the authors meticulously reconstruct his attention to the autonomy of legal science and to methodological issues). The law makes normative entities compatible within a pluralist framework. In Schmitt's concrete-order thinking, nomic force is an innate property of social practices that people produce in everyday life. Law is a selective machinery, that does not produce normativity but restrains the pluralist trend towards self-differentiation in a monist framework. Mortati thinks that legal knowledge plays the function of consolidating nomic force, but political aggregation does not 'require' it, because political aggregation itself produces the institutional facts that serve as a recognition grid for the nomic force of an institution.

In the following pages, I will try to retrace the itinerary proposed by the authors, dwelling on what seem to me to be the most important stages of their interpretative proposal.

III. Santi Romano

Santi Romano is the architect of the most original theoretical approach developed in Italy in the first half of the 20th century: the so called 'dual theory' of institutionalism and legal pluralism. *Pace* the academical philosophers of law, Romano was an expert in administrative law. It was certainly not legal philosophy — in its various forms — that made a decisive contribution to the development of Italian administrative law, but rather the opposite.

As Maurizio Fioravanti has so effectively argued,

> 'Santi Romano's approach to the problems of the state was not originally that of general theory, but that of administrative law and its science, which was apparently more circumscribed and modest, but in fact very fertile'.[2]

If this is not the time to examine the complex developments of the 'working

[2] M. Fioravanti, *La scienza del diritto pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento* (Milano: Giuffre`, 2001), I, 406 (my translation). Also by the same author, see Id, 'Per l'interpretazione dell'opera giuridica di Santi Romano: nuove prospettive della ricerca' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 169-219 (1981).

hypothesis' formulated by Fioravanti, we can at least grasp one aspect of it. The theory elaborated by Santi Romano can be interpreted as the coherent outcome of a reflection originated not by purely speculative concerns, but by the concrete need to systematize those institutions of positive law that he considered to be at the basis of the 'administrative state'.

Beyond the many different assessments of Romano's work, one thing seems undeniable: Romano opened the way for a 'different conception of law'[3] based on the groundbreaking notion of institution. Criticizing the theses sustained by a wide range of positivists, Santi Romano asserts that understanding law as a complex of norms is only an expedient. In order to understand what a legal system really is, it is necessary to capture its 'characteristic note', the 'nature of this whole', the *quid* that allows it to be recognized in its own unity. Because the legal system cannot be the mere sum of its parts but it is a unity. A unity that for Romano is not artificial but rather spontaneous, effective, 'concrete'.[4] The legal system of a state is therefore not the sum of the rules produced by the competent legislative body, represented by the official collections of laws and other normative acts. The legal order in Romano is something far more living and animated. It consists of the numerous mechanisms or gears linked to authority and force that 'produce, modify, enforce, guarantee legal norms, but cannot be identified with them'.[5]

Law is law if, before being a norm, it is 'an organization, a structure, a position of the very society in which it develops and that this very law constitutes as a unity, as an entity in its own right'.[6] Romano thus comes to introduce the concept of 'institution' as a sufficient and necessary concept to express that of law: 'Any legal order is an institution, and vice versa, any institution is a legal order: the equation between the two concepts is necessary and absolute'.[7] Law is therefore an institution, a system understood in its unity and complexity.

In Romano's perspective, only a properly juristic approach can express the profound sense of law: a law that is seen as an indispensable tool for reducing and governing social conflicts. In the magmatic context of the early years of the twentieth century, crossed by the explosion of pluralistic instances of various kinds, law is called upon to ensure the conditions of peaceful coexistence between subjects with conflicting interests. The vision of a 'neutral' law emerges, a law capable of going beyond contingency, which cannot and must not be the privilege of predetermined subjects.

A problematic element of this reconstruction is inherent in Santi Romano's biography. The Sicilian jurist's attention to the emergence of pluralistic instances

[3] A. Sandulli, *Costruire lo Stato: la scienza del diritto amministrativo in Italia, 1800-1945* (Milano: Giuffrè, 2009), 156.

[4] Cf A. Salvatore, 'A Counter-Mine that Explodes Silently: Romano and Schmitt on the Unity of the Legal Order' *Ethics & Global Politics*,' 50-59 (2018).

[5] S. Romano, *The Legal Order* (Abingdon, UK: Routledge, 2017), 7.

[6] ibid 13.

[7] ibid.

should be read in the light of the consideration that he was not just a jurist, but a scholar of administrative law (so much so that he became president of the Council of State during Fascism).[8] In other words, Romano's acknowledgement of the new social complexity produced by pluralistic instances should be read within the project of constructing a public law system referable, in the first instance, to the State, the 'unique' subject of the modern legal tradition. It would be this need that would guide Romano towards purely juridical positions, capable of overcoming the sociological or realist implications connected to other approaches. While starting from a historical-empirical point of observation, Romano would attempt to elide all extra-legal elements from his elaboration: a proposal that would thus aspire to be an 'aproblematic' theory of positive law.

Compared to the interpretation just mentioned (and that we can consider largely dominant, not only in Italy), Croce and Goldoni offer a very different analysis. Through a detailed reconstruction of some passages of *The Modern State and Its Crisis,*[9] read in parallel with some well-known places in *The Legal Order*, the authors confirm that in Romano social tensions are absorbed through the order: but this order is 'neither an act of fabrication nor a compromise between social forces'.

Santi Romano focuses on the organization in its totality, neutralizing the voluntaristic moment of the state on the one hand and the naturalistic drifts on the other. In other words, his approach recovers the idea of a law inherent in the concreteness of the order: a law in which the sovereignty of the state persists but is limited, and which does not admit a superior law over the State-person. He brings out a pluralist vision, diagnosing the social conflicts that new social actors can generate.

Several scholars have seen as a counterbalance to this position the anxiety to compress (and even conceal) the dynamic moment that marks society, which Romano wants 'pacified' *ab origine*: but this is not the only possible route of interpretation. Romano certainly rejects the normativistic solution, marked by the centralization and monopolisation of legal production, but in the face of the danger of disorder he does not entrench himself in the position of a state that is in any case capable of 'deactivating' pluralist tensions thanks to its being an order and organization. Croce and Goldoni's interpretative proposal moves within the different perimeter of a constitutional state that is capable of absorbing (and not rejecting) social tensions, thanks to a law that is not 'a stable body of norms and principles that is created as the outcome of a process of organization but *the process of organization itself*' (p 60).

With this move, Romano achieves a further result. Through the definition

[8] Cf G. Melis, 'Il Consiglio di Stato ai tempi di Santi Romano', in A. Romano ed, *La giustizia amministrativa ai tempi di Santi Romano presidente del Consiglio di Stato* (Torino: Giappichelli, 2004), 58, 39–58.

[9] S. Romano, 'Lo Stato moderno e la sua crisi,' in Id ed, *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale* (Milano: Giuffre`, 1969)

of law as order-institution-organization, Romano can build an exquisitely publicist legal method, capable of freeing itself from the secular yoke of private law science. As already mentioned, Romano maintains that rules always come after organization: they are a means of the activity of the system, and not an element of its structure. Behind this assertion can be grasped the thesis in favour of the primacy of public law with respect to private law. As an identity qualification of the system, public law — which does not coincide with state law — appears as a stable but elastic element for its objective legal qualification, while the (private) norms that govern subjective legal relations are labile. It's a reversal of the traditional theoretical perspective, in which public law was the most volatile (and 'political') and private law the most stable. But this stability of public law is ensured by its peculiar elasticity, not by its rigidity.

In his intention (his obsession?) of pacifying the system, Romano conceives of an organization that is already given, but which does not disregard the effectiveness that consists in the behaviour of the members of the community. The law, with his compositional force, ceaselessly produces new conformations of the social: the order can be always 'reinvented' as new issues arise. In Romano — already in *The Modern State and Its Crisis* — law is the *locus* where 'reality can be renegotiated and reframed' in an incessant manner (p 61).

Again, the reading key proposed by the authors allows us to see in Romano's juristic method a law that does not correspond to a body of rules but is, instead, a process:

> 'the law from the juristic point of view is the process of finding the *legal* answer to both recurrent and emerging problems, whether normal or exceptional ones' (p 96).

Even exceptional problems are therefore susceptible to legal responses. And even the phenomenon commonly considered as the most remote from order — revolution — presents a series of institutions, connected in an embryonic state organization (insofar as it wants to replace the existing state). Romano goes so far as to say that revolution is violence, but still legally regulated violence. His obsession with order thus seems to go to the very edge of legal reality. But, as the authors argue, this is not the case, for the simple reason that law as a process of which Romano speaks 'has no specific boundaries' (p 96).

In Romano's perspective, the law and just the law guarantees the composition of contrasting forces. For this reason, his approach is wholly 'juristic': only a law as autonomous as possible from politics could satisfy his demand for order.

IV. Carl Schmitt

Carl Schmitt is generally remembered as the champion of decisionism and exceptionalism. In March 1922, Schmitt published the first edition of *Political*

Theology,[10] which is often considered the manifesto of Schmitt's theory.

In that book Schmitt compared two antithetical theoretical models: decisionism and normativism. But in 1933, in the preface to the second edition, Schmitt made a clear change in this orientation:

> 'I now distinguish not two but *three* types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one. I have come to this conclusion as a result of discussions of my notion of 'institutional guarantees' in German jurisprudence and my own studies of the profound and meaningful theory of institutions formulated by Maurice Hauriou'.[11]

What in 1933 was a minimal but significant hint became the specific subject of an essay the following year: *On the Three Types of Juristic Thought*.[12] In Schmitt's reconstruction, each of these three models — normativism, decisionism, and institutionalism — is linked to a different conception of law, which can therefore be understood as a norm, a decision, and finally as an order. And, with respect to the preface to the second edition of *Political Theology*, in *On the Three Types of Juristic Thought* the name of Maurice Hauriou is joined by that of Santi Romano.[13]

This 'turning point' in Schmitt's theoretical path was expressed in his adhesion to an 'institutionalist' model. This is a very clear paradigm shift, claimed many times by Schmitt himself, but often forgotten in the numerous studies dedicated to him.

It is precisely to 'Schmitt the institutionalist' that Croce and Goldoni turn in their book, proposing an alternative interpretation of his thought compared to the vulgate.[14] According to the authors, Schmitt's adhesion to institutionalism profoundly affected the whole structure of his thought. To support this hypothesis, they also conduct a detailed examination of his writings prior to the 1930s, tracing scattered traces of an institutional inflection, which show how the problem of the concrete constitution of the social is a recurrent trope in his theorizing.

While the decisionist approach saw social normativity as totally dependent on political contingency (according to the scheme whereby the decision creates

[10] C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2006).

[11] ibid 3-4.

[12] C. Schmitt, *On the Three Types of Juristic Thought* (Westport, CT: Praeger, 2004).

[13] The two authors are remembered by Schmitt as 'masters and predecessors' in one of his last interviews with Fulco Lanchester: cf 'Un giurista davanti a se stesso' *Quaderni costituzionali*, 19 (1983).

[14] Mariano Croce has been conducting for several years, often in collaboration with Andrea Salvatore, an important series of studies in this perspective: the most extensive and structured outcome can be considered M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (Abingdon, UK: Routledge, 2013). But I would also like to mention the recent M. Croce and A. Salvatore, *L'indecisionista. Carl Schmitt oltre l'eccezione* (Macerata: Quodlibet, 2020).

normality), the institutionalist turn allows for a reassessment of the moment of effectiveness (normality is material). Certainly – unlike Romano – legal thinking for Schmitt reflects a particular juristic-political conformation: but this conformation is not the expression of the will of a capricious sovereign, because it is instead the manifestation of concrete and institutional practices. The legal order is no longer the creation *ex nihilo* of legal normality through a decision. While in the previous exceptionalist framework, normality was the product of a groundless decision on the part of a sovereign, in the institutional thinking, normality becomes the lynchpin of a society's concrete order (p 122).

Croce and Goldoni consider *Political Theology* as the expression of a transitory phase in Schmitt's thinking. Already in *The Concept of the Political*[15] – a seminal text almost invariably read in tune with *Political Theology* – it is in fact possible to detect a paradigm shift. Croce and Goldoni propose a different reading from the mainstream one, insisting on the attention that Schmitt in that essay devotes to the dynamics with which a human community comes into life. Schmitt, in their opinion, intends to address the problem of the innate plurality of social life by proposing a particular reconstruction of the generative moment of social groups. Taking up a thesis supported by Ernst-Wolfgang Böckenförde,[16] Croce and Goldoni argue that Schmitt's aim is to 'relativize' domestic conflicts, making possible an effective peaceful coexistence in accordance with procedural standards of argumentation and public discourse.

Contrary to readings that crush the perspective on the problem of the enemy and war,[17] the authors insist on the question of the jurisgenerative force of a community conceptualizing itself as a group facing an incipient threat: in other words, Schmitt's problem – his obsession – is that of the friend and the community's internal stability.

As early as 1928 Schmitt seems to be aware that the decisionist perspective was incapable of telling what a friendship relation is: it couldn't identify the bonds that hold a community together, explain how they are formed and how they put together the members of a given political reality. His idea of the sovereign decider had underrated the eruptive force of social practices: the order is not created *ex nihilo*.

With great theoretical acumen, the authors follow this path, also through the rereading of often forgotten texts such as *Freiheitsrechte und institutionelle Garantien der Reichsverfassung* (1931) and *Grundrechte und Grundpflichten* (1932), up to the fundamental 1934 essay *On the Three Types of Juristic Thought*.

[15] C. Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2007).

[16] E.W. Böckenfo¨rde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory' 10(5) *Canadian Journal of Law & Jurisprudence*, 5-19 (1997).

[17] For more on this subject, see M. Croce, 'The Enemy as the Unthinkable: A Concretist Reading of Carl Schmitt's Conception of the Political' 43(8) *History of European Ideas*, 1016-1028 (2017).

Re-reading that text – which can be considered the clearest formulation of Schmitt's theory of the concrete order – it is possible to see how Schmitt had profoundly re-evaluated that 'thinking by norms' which twelve years earlier, in *Political Theology*, he unhesitatingly branded as a form of 'degenerate positivism'. His theory of the *konkrete Ordnung* now attempts to express a synthesis between the legal order and decision. This is an important twist, which will have decisive consequences on the development of Schmitt's thought. The combination of decisionism and institutionalism in Schmitt's theoretical path would later have two fundamental theoretical outcomes: the formulation of the *Großraumtheorie* in response to the crisis of state sovereignty, and the reflection on the end of the *jus publicum europaeum* and the consequent approach to a 'Nomos theory'.

The 'institutionalist' path followed by Schmitt does not, however, coincide with that of Romano. As the authors demonstrate, Schmitt forces the reading of *The Legal Order*, causing the text to say something that Romano did not aim to say. In Romano, the legal order is associated to a spontaneous mechanism of self-production. Unlike Romano, Schmitt sees the legal order as nothing more than the shelter of a concrete social form: legal rules are instrumental in promoting some lifestyles. The legal order gives unity to the norms and produces them as the result of a process of generalisation of exemplary conduct. The result is that the order secures a substantive, ethical, even ethnic unity. But, as the authors point out, this is not what Romano meant.

Whereas in Romano the institution coincides with law, in Schmitt the institution has not a legal but a 'protolegal' nature and must be preserved by 'legal' means. Portrayed as reiterated and recognizable patterns of conduct, institutions are social strategies capable to turn individuals into agents sharing interactional practices: what can be said to be 'friends' (p 124).

In *Political Theology* normality explained nothing and the exception everything. In the institutional frame designed by *On the Three Types of Juristic Thought*, the legal order is based on 'institutional standards', behavioral models stabilized by legal norms. The legal order is called upon to protect the uniformity of that concrete order. In this sense, normality is different from normativity: 'though the former is the cradle of the latter, these two spheres remain distinguished and distinguishable' (p 131).

That is not all: the law, besides being the product of a selection of institutional standards drawn from practice, is managed by practitioners through the recourse to 'general clauses'. But these general clauses are related to the overall vision of a leader and to the constant scrutiny by loyal officials who secure social homogeneity by selecting practices in accordance with the instructions of the leader himself. Order is the result of a process of social selection under the guidance of a political head: 'this makes Schmitt's institutionalism an 'institutionalist decisionism', as the conjunction of an antipluralist state monism with an amended decisionism' (p 133).

Schmitt's obsession with order is thus revealed not in the ablation of the concrete dimension of social life, but in the sublimation of the natural plurality of social subjects into political unity. Political power, in his vision, is called upon to fulfil the function of governing the complexity and plurality of society to exclude those practices that could jeopardise the political homogeneity: without this consistency, order cannot stand.

V. Costantino Mortati

Costantino Mortati's work can be read as an attempt to take seriously Romano and Schmitt 'by going *with them, beyond them*' (p 136). Mortati follows in the wake of Romano and Schmitt, proposing a third original institutionalist reading. In his view, Romano's approach is juristic but not realist; Schmitt's approach is realist but not juristic. Therefore, Croce and Goldoni qualify his theory as *realist institutionalism*:

> 'when he addresses original and autonomous legal orders, his theory pivots on the synthesis between the legal order and the political system' (p 147).

The most common doctrines of the constitution appeared to Mortati unproductive. Hence the spring of his research, which moves from the firm belief that, to locate the historically concrete basis of the constitution, one cannot stop at abstract formulas that, rather than clarifying, conceal the real constitutional processes. In the rejection of positivistic formalism, Mortati's name, as well as that of Santi Romano and Carl Schmitt, can rightly be compared to that of Hermann Heller, Rudolf Smend, Maurice Hauriou and Léon Duguit: all well-known authors with whom Mortati, in the pages of *La costituzione in senso materiale*, opened a dialogue.

The crisis of the state at the turn of the century had already made it impossible to rest on the certainties of the liberal order. The sovereignty of the state now seemed to waver, crushed by the mass of corporate pressures, fed by the representation they were able to obtain from parliamentary representation and multiplied by the impact that the enlargement of suffrage had on the structure of the political forces in parliament. The state, in its unity, had become a problem. There was an urgent need to understand how to regenerate it. An answer came from fascism.

During the years of Mussolini's regime, Mortati had already insisted on the centrality of the political party as a material constitutional force.[18] Having moved

[18] Argues for a strong link between Mortati and Fascism M. La Torre, 'The German Impact on Fascist Public Law Doctrine: Costantino Mortati's Material Constitution', in C. Joerges and N. Singh Galeigh eds, *Dark Legacies of Europe* (Oxford: Hart, 2003), 305-325. For a balanced

beyond the historical borders of fascism and projected into the new constitutional coordinates of democracy, that intuition was recovered and enriched on a theoretical level. After the fall of the fascist regime and the end of WWII, Mortati was elected as member of the Constituent Assembly in 1946 – contributing to the writing of crucial articles of the Italian Constitution[19] – and, later, became a judge at the Constitutional Court. His effective contribution to Italy's constitutional development is consistent with a basic tenet, well outlined by Croce and Goldoni:

> 'Mortati believed legal thought to be instrumental in the establishment of a particular political-constitutional setting, in the sense that it contributes to identifying those institutional facts that bring the legal order about' (p 7).

Mortati also has his obsession: rebuilding and stabilizing a legal order in a country without political homogeneity and exposed to centrifugal pressures. In the new post-war era, the constitution is called upon to perform the very difficult task of integrating a divided society into the unity of state life.

For nineteenth-century constitutionalism, the state was the driving force behind the constitution and politics: both were derivatives of each other. Mortati's new vision overturns this perspective: politics is the determining force of the constitution and the state. In substantial continuity with Carl Schmitt,[20] Mortati argues that the political cannot be defined on the basis of the State, but that what can be called the State must be understood on the basis of the political. The legal order, in Mortati, does not grow from the outside of society. Rather, it's embedded in societal formation (and *vice versa*).

Mortati, in this regard, affirms that a concrete state cannot be thought of as existing if not as the legal organisation of a community ordered according to a political idea. The 'politicization' of law – and particularly of constitutional law – is accompanied by an awareness of the necessary enhancement of the material content of the constitution. The political end, which is the animating spirit of the 'material constitution', is not limited to certain areas, because there is no problem of collective life which, when it becomes the terrain of a political struggle for dominance, cannot at some point become 'constitutionalized'. The state is the theatre of a never-ending political contest that results in the constitutionalisation of hegemonic forces.

and particularly detailed general framework, cf I. Stolzi, *L'ordine corporativo. Poteri organizzati e organizzazione dei poteri nella cultura giuridica dell'Italia Fascista* (Milano: Giuffre`, 2007).

[19] Cf F. Bruno, 'Costantino Mortati e la Costituente', in F. Lanchester ed, *Costantino Mortati. Costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 135-156.

[20] Cf A. Catania, 'Mortati e Schmitt', in A. Catelani and S. Labriola eds, *La costituzione materiale. Percorsi culturali e attualità di un'idea* (Milano: Giuffre`, 2001), 109-128. For an overview see M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (Abingdon, UK: Routledge, 2013), 124-139.

The key passage of Mortati's constitutional vision is in the elaboration of the idea that, in political society, what counts are the relationships that are factually established and that already give it an order, based on domination and oriented towards certain political ends. Society, from a constitutional point of view, is not an organic unity or an undifferentiated whole, but is a reality structured on the basis of the fundamental differentiation between the dominant and the dominated.

The category of 'differentiation' plays a central role in Mortati's theory (here, in some ways, not too distant from Gramsci's notion of hegemony). This differentiation is built as much on material force as on ideological force. The moment a force in the field asserts its superiority, a new constitutional order is determined: what Mortati calls the constitution in the material sense. The notion of constitution in the material sense lends itself to being adapted to the most varied contexts and the ever-changing forms of political domination, surviving even the declining era of party politics. The party, understood as the political formation historically known by this name, is by no means an essential ingredient of the doctrine of the material constitution: in Mortati's thought, what is essential is differentiation.

The constitution is the achievement of the 'winning side'. This position is not far from the Schmittian political idea, but it does not match it. Schmitt's theory appears to Mortati unable to maintain order and stability, because it does not underline the necessity of institutional constraint. Mortati's vision, in fact, evidently tends to concede not a little to pluralism, although it highlights how pluralistic-social states are exposed to the danger of a loss of any normative and directive function of the constitution. The constitution emerges from a social organisation that must already be politically ordered, albeit in broad terms, according to a distribution of the forces operating in it in positions of supra- and subordination.

The problem is to conjoin the plurality of social interests recognised by the Constitution with the spirit of transformation outlined in the Constitution itself: to coordinate and route specific interests in accordance with the general interest inferable from the essence of the constitutional project. Pluralism is tenable only within the normative framework of a material constitution embedding fundamental aims, and desirable only if its energy can consolidate political unity. Pluralism can be tolerated, but only if instrumental in achieving principles and values at the core of the legal order.

Mortati's solution is open to an integration of pluralism into the legal order. Nevertheless, Mortati's realist institutionalism provides the background for understanding the issue of pluralism in a distinctive, but not authentically 'pluralist', way. In Mortati's perspective, the ruling class can never encompass the whole of society: the profound meaning of the constitution rests on the differentiated dominance of one party. Mortati seems to be able to combine the

static unitary institutional moment with the dynamic pluralistic one, without sacrificing sovereignty as the political will of the subjects within the legal system. Pluralism as a social instance finds its place in the parties; the unity of the institution is realized through their constitutionalization: the party is a factor of social integration, it synthesizes and gives voice to the pre-legal social reality, but it is also a direct actor and participant in the constitution of the political orientation of the state.

In the reality of constitutional life, every form of state is the result of a struggle for differentiation, which incessantly aggregates and disintegrates the ruling classes: groups, prevailing by virtue of the *de facto* power exercised, which seek in the constitution the appropriate instrument for the protection of their interests. In *La costituzione in senso materiale*, those dominant political forces, the 'bearers' of the constitution, are identified in the parties, as an instrument of involvement and integration in the life of the state.

This perspective can be defined as realist, in the meaning that it does not attribute the genesis of the constitutional order to abstract entities such as the people or the nation, but to actually dominant forces. And it is a perspective in which there is a constant concern – or obsession – for the consolidation of the principles of associative life that best serve the stabilisation and a disciplined development of power.

Mortati's realist institutionalism combines political realism and legal institutionalism: a 'peculiar blend' that regognizes the supremacy of the constitutional order and the importance of a material constitution producing 'fundamental political aims whose normative strength would serve as an internal limit for its political bearers' (p 178).

His solution addresses the problem of pluralism, but not in a really pluralist way. As stated by the authors, Mortati's approach undervalues the factors that have a 'horizontal' impact on societal formation. His attention is not focused on an understanding of the material background of the legal order but is seized by the question of the autonomy of the political.

Mortati recognises that the structure of society is striped and striated, but this recognition is exclusively functional to the construction of political unity. In other words, Mortati stresses the importance of certain forms of pluralism, opening spaces for political participation, but these are limited by the need of homogeneity necessary for a well-functioning constitutional order.

Like Romano and Schmitt, Mortati also pushed the boundaries of legal thought, dealing with issues such as the state of siege and the declaration of war. As the authors point out, even in the face of emergency and exception, Mortati attempts to save the constitutional order by claiming that such extraordinary moments can – and must – also be governed *contra legem* but *secundum constitutionem*. The pluralist challenges could only be tackled by consolidating the supremacy of the constitution. And only this 'political law' can

ensure the stability of a perimeter within which a certain degree of pluralism, preserving the necessary vitality of political action, can coexist with the need for order. Pluralism is admissible to the extent that it serves to strengthen the order, but it is not an end to the order itself.

VI. Conclusions

The book by Mariano Croce and Marco Goldoni proposes a reading of the work of three great protagonists of twentieth-century legal thought, through a new and extremely interesting key.

Their focus is on the way Romano, Schmitt and Mortati address the difficult relationship between the centripetal attraction of a supreme political entity and the centrifugal plurality of social life. Pluralism represents for all three of these authors a problem and a challenge, which calls into question the role of the state and its relations with non-state normative entities.

If the problem is the same, the answers are different. This diversity is linked not only to the different approaches with which these authors attempt to give an answer to the problem of pluralism, but also to the particular historical moment in which this problem comes to their attention. In other words, each of them captures and portrays the specific form taken by the legal order as a response mechanism to the challenge of social pluralism. They diverge on the degree of political direction needed to govern the tension between the state and other actors. But they converge on the need to reflect on what the role of law might be in ensuring or restoring order.

Through the 'double key' juristic *versus* political and matter *versus* nomic force, Croce and Goldoni highlight how the relationship between social facts and the legal order is conceived by Romano, Schmitt and Mortati as a relationship consisting not (only) of norms, but of institutions. What changes between these scholars is the role attributed to the law/politics dynamic.

Thus, Romano becomes the champion of a vision fiercely opposed to the idea that the political is the condition of existence of the legal order, and instead exalts its autonomous semiotic force, which must be kept separate and protected from the political. His obsession with order is an obsession with an order that is continually being constructed, thanks to a law that is not only capable of governing social tensions, but also ceaselessly produces new forms of social life.

The distance between Romano's juristic institutionalism and Schmitt's political concrete-order thinking can thus be grasped. According to Schmitt, pluralism is not consubstantial to order, but is always a danger that only a political vision of law can curb. And if it is no longer demiurgic decisionism that guides Schmitt in this perspective (with the miracle of the sovereign who confers nomic force to whatever he pleases), there is however the idea that social practices, in order to have normative power, must be compatible with a

basic vision of an apparatus of power (the general clauses responding to the leader's view of the community) that guarantees the inalienable political homogeneity, without which no order is thinkable.

Finally, Mortati summarises the theories of his two predecessors with originality. His political conception of law captures the fundamental interplay of material and nomic force. If Mortati, like Schmitt, emphasises the need to ensure the homogeneity of the social body, unlike Schmitt he interprets it as a juristic construction: it's a juristic act that requires juristic wisdom. As the authors so effectively state:

> 'The political and the juristic coincide when it comes to the inception of the material constitution: normative facts furnish the material content that political forces are meant to turn into the set of fundamental aims that enliven the legal order. The political is juristic' (p 195).

Croce and Goldoni's interpretative proposal retraces in a punctual, detailed way, and consistent with the methodological and theoretical premises they directly expounded, the question of the relationship between law and politics in three great figures of modern legal thought. This is a study that reads the works of Romano, Schmitt and Mortati in an original way, and in a perspective that goes far beyond mere reconstruction. It is not, therefore, a 'rediscovery' conducted only with philological taste and in an 'antiquarian' perspective. Nor is it just an attempt to fill the gap in knowledge of these authors in the English-speaking world. The teaching of these masters, apparently distant in time, can indeed – as the authors claim – be highly instructive for addressing contemporary issues. Croce and Goldoni's text confirms that to do history of the philosophy of law and politics *is to do* philosophy of law and politics.