

## History and Projects

### From Pluralism to the Material Constitution and Back

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It is a pleasure and an honour for us to produce this Introduction to the symposium that *The Italian Law Journal* has kindly devoted to our recent book *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford: Stanford University Press, 2020). The book was written with at least a twofold aim in mind. First, it was meant to revive the theoretical potential of the long-lost tradition of legal institutionalism (sadly an almost unknown one in Anglo-Saxon academia). As Stefano Pietropaoli argues convincingly in his discussion, legal institutionalism offers an invaluable entry point to the debate on the nature of legal orders as well as institutions that is not constrained by the conventional opposition between natural law and legal positivism. Santi Romano, Carl Schmitt, and Costantino Mortati possibly represent the pinnacles of the institutionalist stream of thought,<sup>1</sup> and yet they remain relatively unknown in the Anglo-Saxon world (with the notable exception of Schmitt, who however is seldom studied as a representative of legal institutionalism).<sup>2</sup> Because of this, such a rediscovery is not only of a lost tradition, but of authors whose contribution to legal science can be deemed to be of the highest sophistication. Yet, the book is not a general introduction to the legal thought of these jurists. Rather, it offers an analysis of the main building blocks of their legal thinking, and it does so by asking a specific question: How did these theorists address the challenge of the rising pluralism that was unfolding before their eyes? The question is of great salience today because it offers a way into the contemporary question of the multiplication of legal orders and institutions and the reconfiguration of the state authority that derives from it.

We are very grateful to Stefano Pietropaoli, Dario Martire, and Marco Brigaglia for having engaged with the book in stimulating ways.<sup>3</sup> Pietropaoli's

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<sup>1</sup> Given the specific angle of the analysis, a systematic treatment of the work of Maurice Hauriou (indisputably another giant of legal institutionalism) was not included in the volume because of his limited engagement with the issue of pluralism.

<sup>2</sup> Evidence of this neglect is the recent translation (only after one hundred years from its original publication) of Santi Romano's *The Legal Order* (Abingdon: Routledge, 2017).

<sup>3</sup> We regret that other three scholars who were invited to contribute to the symposium

comment revolves around the red thread of the notion of order, which he defines in terms of an obsession. It is indeed an effective perspective for an analysis of legal institutionalism for at least two solid reasons. The first is dictated by the historical context, and it relates to the challenge of pluralism. Romano, Schmitt and Mortati (among others) were concerned that the lush normativity of social groups could undermine the political unity of the state. Social and legal orders were thus threatened by the lively effervescence of movements, unions, parties, and other forms of association. The second reason is that reference to *order*, as opposite to *system*, allowed legal institutionalists to criticise normativism in its legal positivist variation. Legal systems are conceived as comprised of cluster of norms, often hierarchically assorted, with an ultimate norm performing the function of maintaining the unity of the system itself. Legal orders obviously also comprise norms, but these are not the only building blocks. Crucially, legal institutionalists believed that norms were necessary but not sufficient instruments for the ordering of social life. In other words, norms could not, by themselves, account for the phenomenon of social ordering. As is well known, social organisation through institutions is at the centre of the institutionalist conception of ordering. This starting point allowed legal institutionalists to thematise the degree of autonomy of law from politics while remaining focused on the issue of societal order. Pietropaoli is right in identifying in the main organising axes of the book (juristic vs political conceptions of law; material vs nomic normativity) our way of mapping the different positions adopted by Romano, (the institutionalist) Schmitt, and Mortati on the status of law in relation to politics. While all these three authors share a concretist understanding of the relation between social formation and legal ordering, their views on the autonomy of law differs under interesting and insightful respects. Pietropaoli summarises this spectrum of views with reference to 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’.

One of the stakes of the mapping is indeed the identification of *legal science as an active ordering force*. This affects the other organising axis of the book: the connection between *materiality* and *nomic force*. According to Romano, Schmitt and Mortati, legal science is always productive of some form of ordering, but its

could not meet the deadline. Still, our informal conversations with them have been theoretically enriching and have provided us with materials to think about for our future project. This is even more regrettable because the unavailability of their contributions makes this symposium gender imbalanced.

relation *vis-à-vis* social matter varies significantly. Romano is the most radical among legal institutionalists as he denies any active role for matter (ie, matter is not nomic in itself) and emphasises the autonomy of legal knowledge. Schmitt believes that nomic force is intrinsic to the substance of social practices and in his institutionalist phase maintains that legal practice and science operate as a selective device that restrains the innate pluralist of society's self-differentiating mechanisms. Mortati supported the view that legal knowledge strengthens or consolidates nomic force.

Our main argument in the book is that the working of legal science is closely connected to the status of pluralism in contemporary legal orders (with their tendency to proceed by relentless processes of mitotic separation and autonomisation). The rise of pluralism does not only concern the stability of already established legal orders, but also the status of official legal science (which is to say, the knowledge that is practiced by legal experts). Dario Martire takes up this double challenge in his contribution by focusing on the constitutional level. He notes that one of the most precious insights by legal institutionalists can be found in the attention paid to the fact of pluralism. After reconstructing the distorted reading of Romano put forward by the institutionalist Schmitt, Martire emphasises the 'fruitful' continuity of Romano's work with that of later representatives of Italian legal institutionalism. His suggestion is that two figures – Mortati and, perhaps even more incisively, Massimo Severo Giannini – have provided a potential solution to the riddle of pluralism. Martire suggests that while existing versions of pluralist legal theories such as global legal pluralism and constitutional pluralism do not offer a way out of the impasse brought about by the pluralist impact over positive legal orders, there is a constitutional way of stabilising the order without quashing pluralist impulses. In Martire's view, Giannini's work redeems Romano's institutional theory ('theoretically pluralist, ideologically monist', Martire notes, quoting Bobbio with approval – and this is certainly something we cannot agree on) by dismantling the overlapping of institutions on social groups. This is a valuable addition to the string of theories we have juxtaposed in the volume, in that Giannini, by taking his cues from Romano's conception of the institution, identifies the main unit of analysis in the notion of the internal order, which comes to be seen as comprised of sectoral legal orders and general legal orders (like the State legal order). Giannini contributes extra elements to the notion of organisation, and this allows him to formulate the thesis of the 'simultaneous interaction' between organisation and legislation. This means that organisation and rules are mutually implicated: a modification of one entails an automatic modification of the other. According to Martire, Giannini's revision of the notion of legal order is of great help for accounting for, and accommodating, legal pluralism. Not only are legal fields like international law and canon law revisited, but other systems are enlightened

with a legal beam.<sup>4</sup> Finally, Martire notes that some of the insights of this Romano's pupil (and of other authors gravitating around legal institutionalism, like Adriano Olivetti and Gaspare Ambrosini) inspired some of the solutions imagined by the Italian Constituent Assembly during the drafting of the republican constitution.

Marco Brigaglia is one of the most renowned experts and interpreters of Mortati's work.<sup>5</sup> His comment zooms in on the question of continuity in Mortati's legal thought, in direct conversation with our book. According to Brigaglia, legal orders are understood by Mortati as will-based (rather than pure reason or desire). In a nutshell, Brigaglia identifies a close connection between the establishment of a normative will and legal ordering (connection aptly named, by Brigaglia, as 'will to order'). Two conditions must be met for identifying a normative will as the ground of a legal order: 1) the will should not switch randomly from one direction to another (its aim ought to be stable); 2) the will should be integrated by a rational plan concerning the organisation of activities for pursuing the aim. In other words, the 'external' ordering of social groups reflects a psychological internal structure. While the intensity of the connection between 1 and 2 can change according to the specificity of the aims pursued by a legal order, the structural aspects of Mortati's idea of the legal order have persisted throughout his life. The material organisation of social order (the aggregation of a multiplicity of interests) might be more or less tight, but it always requires bearing and committed subjects gathering around fundamental political aims. Nonetheless, Brigaglia detects an important shift in the last phase of his thought, and it is not by chance that this turn is concomitant with Mortati's change of attitude toward the development of the Italian constitutional order. With the perspective of a weakening of social organisation and a lack of transparency of its substance, for Mortati it becomes extremely difficult to achieve the level of centralised political coordination that is necessary for stabilising the legal order and avoiding the nefarious effects of centrifugal social forces. In other words, in this last phase of Mortati's work, it gets increasingly difficult to identify the fundamental aims of an order and even more difficult to pinpoint the bearing subjects of the legal order. Brigaglia notes that with the increase of social complexity comes the weakening of the material constitution and this opens up a new space of intervention for the jurists. In Mortati's last writings, juristic science abandons the political conception of the legal order to become one of the true sources of the law. In this new context, Brigaglia notes, jurists are 'unbounded' and 'they may recover their true task, the task of creatively searching for latent paths of integration within current social arrangements'.

This latter point allows us to specify the second aim behind our book to

<sup>4</sup> Famously, Giannini's work contributed to the recognition of sport associations as legal systems.

<sup>5</sup> See his monograph *La teoria del diritto in Constantino Mortati* (Milano: Giuffrè, 2006).

which we alluded in the first paragraph. Brigaglia aptly points out that the increase of social complexity makes it very difficult to preserve the political unity (in both Schmitt's and Mortati's grasping of this notion) of the legal order. Indeed, the book ends with the suggestion that, under current conditions of legal development, Romano's theory of institutionalism offers the most promising insights for analysing contemporary legal institutions. It is indeed in the weakening of the capacity of organised politics to make order of social complexity that other forces find a space for moulding societal formation. When the formal structure of the state, comprising its political forces (to build on Mortati's language), becomes patently insufficient as an ordering engine (in favour, to stick to Mortati's language, of other less defined entities, such as the ruling class), other forms of societal ordering emerge and grow. Legal knowledge (as practiced by judges and experts belonging to different agencies and even legal firms) is one of these ordering forces, but clearly not the only one.<sup>6</sup> In the final pages of our book, we hint at a way of reducing this complexity by looking at the continuity between Romano's institutionalism and Luhmann's systems theory. This is also the first building block of our future project, which aims at updating the main tenets of the three authors examined in the volume by 'contaminating' legal institutionalism with contemporary conceptions of ordering such as societal constitutionalism and the new materialisms.<sup>7</sup> The main intent is to rethink the two organising axes of the book (political vs juridical conceptions of the law; matter vs nomic force) by taking up thorny contemporary issues of pluralism (for example, new forms of kinship or the expansion of monetary pluralism). However, before plunging into this new exploration, we had to pave the way for it by retrieving the rich and sophisticated path broken by Romano, Schmitt, and Mortati.

<sup>6</sup> Another obvious candidate is technology, as already adumbrated, more than twenty years ago, by L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

<sup>7</sup> See, for an introduction to societal constitutionalism, P. Blokker and C. Thornhill eds, *Societal Constitutionalism* (Cambridge: Cambridge University Press, 2017); on new materialism, see C. Vismann, *Files: Law and Media Technology* (Stanford: Stanford University Press, 2008); B. Latour, *The Making of Law* (Cambridge: Polity, 2010). We have already started doing methodological work in preparation of the future volume: see, for example, M. Croce, *Bruno Latour* (Roma: DeriveApprodi, 2020); M. Goldoni and M. Wilkinson eds, *Cambridge Handbook on the Material Constitution* (Cambridge: Cambridge University Press, forthcoming 2022).