**Mariano Croce, Marco Goldoni, *The Legacy of Pluralism. The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati*, Stanford University Press, Stanford 2020, pp. 264, $ 70.00, ISBN 9781503612112**

*Alvise Capria, Università degli Studi di Padova*

The indisputable fact of the last century seems to be that the modern state, who should have appeared as the house of harmonisation between the political and the social, with the help of normative processes, is in fact studded with a series of fractures and cracks. This is an effect of the disintegration to which the constitutional fabric is subjected by the extreme centrifugal decomposition and precipitation of the autonomisation of its members, which are unable to trace the reasons for their being to their belonging to the unifying moment dictated by the statehood. If we are talking about a house, then, it is certainly a vaguely Usher house; and consequently, it seems at least sensible to seek the recovery of a whole range of manifestations of the political order that seek to declare what is untrue in the pretend statist stolidity of a structurally agglutinated and solidly congealed organigram, if only to be able to declare ourselves bearers of that evidence just mentioned: grammar is not (anymore) suitable for language. In other words, if we are witnessing the luxuriance of drives and debates that stress complexity rather than uniformity, claims for processes of autonomy and recognition of what is particular in the social fabric as opposed to a pretentious monolithism, the cause of this lies precisely in the crisis of a political paradigm that finds its fulcrum and *raison d'être* in sovereignty. This is exactly where Croce and Goldoni's text fits in, and it does so by proposing in backlight two uncomfortable but necessary questions. The first one: what are we talking about when we talk about "pluralism"? And the second, consequently: how is it possible to rethink a unity in a structurally plural way? The authors propose an answer through an accurate traversal of three authors, Santi Romano, Carl Schmitt and Costantino Mortati, who in different ways and sometimes very different styles try to provide an answer to what seems to be a real *vulnus* in the leviathanic body: the emergence of pluralist tendencies that shake up a number of forces which require, for their accommodation, rather than an appeal to the political force of the

state, a recourse to a juridical apparatus that knows how to calm and harmonise them while maintaining their institutional identity. The first chapter takes the reader, by means of an intelligent genealogical approach, to the heart of the problem of how, during the Nineteenth Century, the need for a legal science that can protect or at least cope with the onset of pluralism becomes apparent. It is interesting to note how the pluralist claim leads in parallel to the rise of legal theory as a discipline, and how this intersects with the complex discourses around the conceptual constellation between legal, political and social. This shows, from a legal-philosophical point of view, how the diatribe polarizes in the *Auseinandersetzung* between Jurisprudential and Juristic, i.e. respectively between "conceptions that located the source of all law within the state" which are "naturally inclined to view pluralism as a societal phenomenon requiring political treatment" and "conceptions that denied there being a separation between the social and the legal" and therefore "believed pluralism to the dire consequence of the state's grabbing legal power from sub- and suprastate entities" (pp.13-14). These pages are necessary to pave the way for the first author chosen by Croce and Goldoni to provide a systematic response to this problem: Santi Romano, the subject of the second chapter.

Here analyses already devised elsewhere (Croce 2018; Santi Romano 2018) are re-proposed and reinforced, but, in this case, they are seen as a concrete historical response (with an interesting wink to the contemporary) to the issues outlined above. Ever since his work *Lo Stato moderno e la sua crisi*, Romano disengages himself from the proposals that preceded him by both rejecting the dichotomy between practical and legal normativity and by refusing a mixture between legal science and a sociological approach. In this sense, the construction of a "purely" juridical point of view that could account for the social complexity laying ahead became necessary. The solution had to be always and only juridical, because only in law are the continuous mechanisms of social construction evident. These can incorporate the vital concreteness of a system without necessarily exacerbating a formalist statism tending towards chauvinism, and therefore not at the expense of that very fabric that in-formally constitutes the intricate nature of society: pluralism is first juridical pluralism, and only subsequently social pluralism (p.55). Law here is, as Croce and Goldoni well expound, a field in which the forces in play cannot be suppressed, but articulated, precisely

because they find themselves again in their interaction with what is also their intimate essence (p.60). This is a process that finds its completion in *L'ordinamento giuridico*. Here, law is revealed precisely as a structure generating and generated by interactional and organisational networks, a process that makes it not a static form and object of exploitation by state regulation, but a true equivalence with the idea of organisation, i.e. what is autonomously placed in the social context and that social context helps to outline: Institution (p.65ff). Of course, authors note that this did not save Romano from accusations of crude sociologism. But it is undeniable that Romano proposes a very effective solution to the relationship between Institution and State, by virtue of something unwritten which has the effect of a symptomatic Freudian repression: there is no law without institution, there is no institution without pluralism, this is the "Juristic Point" that should be kept in mind right from the start.

The chapter on the *Kronjurist* advances a thesis that has been a favourite of the authors for some time now (*e.g*. Croce and Salvatore 2013). The institutionalist Schmitt differs greatly from that of the "decisionist" vulgate: evidence of this is the long juvenile legal works that references more to the emergence of legal practices than to the person of the final decision-maker of these practices. This parenthesis is, for the authors, almost negligible and not excessively relevant, if not for the biographical interest that linked Schmitt's name to the infamous interpretation of the exception. A tendence that, during the maturity years and always with the *leitmotiv* of opposition to Normativism, since *Verfassungslehre* will give more attention to the formation of praxis and to group dynamics and the concrete order, only to decline disastrously in the Nazi years. Here the thought of and about the institution makes itself heard loudly, in order to think of a law and a normalization not only as the product of an external decision-maker suspended over the abyss of juridical and existential nothingness, but as a concrete decision inherent in the processes of the community (p.112); and it is not only here that there is the interface (at times predatory, at times opportunistic, but often misunderstood) with the works of Hauriou and Romano, who show how the Institution (or the *konkretes Ordnungsdenken*) is primarily for Schmitt another way of desperately defending himself from legal and political pluralism by subduing it and annihilating it to the point of pure racial biopolitics. This is also because, Croce and Goldoni note, linking Schmitt's approach to

Romano, the *Kronjurist* takes on, in a strongly concretist sense, what in institutional activity remains at an exclusively procedural level (p.134). In other words, Schmitt's unity would still be too full of the substantiality that Romano tries to avoid at all costs in order not to fall back into the statist conglomerate that annihilates difference. Be that as it may, Schmitt's lesson is important beyond its drifts, we are made to understand, because it demonstrates how the social fabric lives on its conflicts and plural forms, and how the state, if it wants to try to survive, must nevertheless carefully take them into account.

Finally, Costantino Mortati, especially in *La costituzione in senso materiale*, allows us to think of the organisational process as closely linked to the notion of constituent power: precisely as the source and as other face of organisation, the Constitution assumes the fundamental role of generator, and at the same time immanent force, of the dynamics of differentiation. As with Schmitt's *Verfassungslehre* (with whom Mortati is intensely confronted), constitution is institution. The *Verfassung*, not a simple sum of positive laws like the *Konstitution*, in the constituent moment makes the differential and special moments its own precisely because, as a concrete expression of the life of a people, it is itself those same processes. At the very moment in which one speaks of the organisation of the political community, that same political community already has in itself the rules that contribute to its unity: the constituent power is left with the task of working on the duration of that unity (p.156). The institution, in its constitutive procedure, already becomes law: the return to the unity of the process occurs at the moment in which secondary dispositions spontaneously apply to what has already been organised through the diffusive force of the institution. This is a vision that is not only "legal", as noted by the authors, because it must include in its design the figure of the political (exemplified by the party, p.166) as a mediating moment between its parts. This is a necessity due to the embarrassment of avoiding not so much the autism of a tautological foundation that would see constituent power founding itself and self-directing without dispersing its disruptive charge, but to be able to achieve a homeostasis between juridical regulation and political creativity.

The last chapter collects and develops in an appealing and original direction what has been said: the Juristic versus Jurisprudential approach is enriched by pivoting around an imaginary graph, whose abscissae and ordinates would be the dynamic relational

pairs Juristic-Political and Matter-Nomic Force (p.185). Reread in this sense, the proposed authors seem to proceed within this tension by offering a peculiar trend: we move from the exaltation of the role of legal science in the composition of the social while maintaining the idea that the same daily practices are not normative *per se*, because they always need an epistemic moment that can accompany them and, at the same time, become practice itself (Romano); we pass through a legal science that over the years moves from a conceptual genealogy of the legal to an expression of the interaction of norm, decision and concrete order, all seen from the jurist's point of view as an enzymatic moment that can rise *catechontically* to a force restraining the slackening of the *Gesamtordnung* through its interpretation of praxis (Schmitt); in order to arrive at a legal science that is the instrument and discovery of institutional facts, i.e. of those phenomena that have the character of permanence and duration, since political forces can aggregate around certain institutions drawing nomic force from them without necessarily having to automatically produce legal knowledge, since those facts are automatically facts full of norming; at the most, legal knowledge acts as a shoring up of what the institution expresses by itself (Mortati). Based on these reconstructions, a legal science that wants to be able to understand and propose concrete solutions, Croce and Goldoni say, must necessarily pass through these authors, who remain in all their disruptive force as "classics".

Just one note on what is an intelligent and well-reasoned book, as well as punctual in its explanations and original in its proposals. What is straightforward from a legal-philosophical point of view creaks bleakly from a philosophical-political point of view: it does not seem sufficient to focus on plurality in order to propose "pluralist" solutions; in all three authors pluralism is always thought of within the horizon of the logic of modern sovereignty (and therefore of the decision-representation axis). This ensures that the discourse of the three does not leave the unitary background already realised by the forming decision. There is no negation of the state by Santi Romano, there is only a re-dimensioning of its role and an attempt to integrate it (the famous "Institution of Institutions"); as well as in Mortati, since the order is linked in a double way with the theme of state command and the coercion that constituent power entails at the level of social practices that are configured as "concrete decisions"; in Schmitt, finally, there is attention to the overcoming of the state only in the

form of a nostalgic despair that makes him cling to the element of the knowable present in the practice of the Institution only to avoid sinking into the abyss of a neo-liberal philosophy of history that makes the state a necessary moment for the schizoid affirmation of capitalist interest, thus losing all its protective character with regard to the political with respect to the non-normativity of the social. So perhaps the real kind of "pluralism" (whereby plural organisation is not only accepted and recognised but is also elevated to the rank of political singularity that contributes to the formation of the order in which it is channelled), does not require new conceptualisation and dissolution, but rather decipherment that knows how to fruitfully channel it beyond a mere and constantly uncomfortable return of the removed. Perhaps only in this way can the hereditary defect weighing on the Usher family find a definitive burial in the light of the new day.

**Bibliografia**

Mariano Croce, Andrea Salvatore, *The Legal Theory of Carl Schmitt*, Routledge, Abingdon 2013
Mariano Croce, *La tecnica della composizione*. *Il pluralismo operativo di Santi Romano*, «Jura Gentium», 2, 2018, pp. 19-25
Costantino Mortati, *La costituzione in senso materiale*, Giuffrè, Milano 1998
Costantino Mortati, *La teoria del potere costituente*, a cura di M. Goldoni, Quodlibet, Macerata 2020
Santi Romano, *L'ordinamento giuridico*, a cura di M. Croce, Quodlibet, Macerata 2018
Carl Schmitt, *Le categorie del politico*, a cura di P. Schiera e G. Miglio, Il Mulino, Bologna 1972
Carl Schmitt, *Dottrina della costituzione*, a cura di A. Caracciolo, Giuffrè, Milano 1984
Carl Schmitt, *I tre tipi di scienza giuridica*, a cura di G. Stella, Giappichelli, Torino 2002

**Link utili**

https://www.sup.org/books/title/?id=28690