The Will to Order:
In Conversation with Mariano Croce and Marco Goldoni on Costantino Mortati's Account of the Legal Order and the Material Constitution

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Abstract

In this article, taking my cue from the insightful analyses contained in the book The Legacy of Pluralism, by Mariano Croce and Marco Goldoni, I reconstruct in outline Costantino Mortati's conceptions of the law as a legal order and of the material constitution. I focus on the problems pointed out by Croce and Goldoni: the emergence of legal normativity, the problem of radical pluralism, and the role of jurists *vis-à-vis* politics. In sections II, III, and IV, I describe the general framework that, however much detailed and adjusted over time, Mortati adamantly maintained from his earlier works in the 1930s to his last ones in the mid-1970s. In section V, I describe the significant shifts that took place in the way he fine-tuned his general framework in an attempt to capture the changing events of Italian politics. On the basis of my account, I will argue in favor of an interpretation of the view Mortati had of the role of jurists *vis-à-vis* politics significantly different from the one defended by Croce and Goldoni.

I. Premise

The Legacy of Pluralism, by Mariano Croce and Marco Goldoni,[1] is a beautiful, insightful book. Taking their cue from the problem of radical pluralism and the crisis of the liberal state, with the relative homogeneity of its ruling class, the authors guide the reader to the roots and paths of 'classic' legal institutionalism – one of the main alternatives to formalistic and normativistic views of law in Continental legal theory between the closing decades of the 19th century and the first half of 20th century – focusing on the thought of three leading institutional jurists: Santi Romano (1875-1947), Carl Schmitt (1888-1985), and Costantino Mortati (1891-1985).

In the attempt to conceptualize the relation between the law of the state

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[1] M. Croce and M. Goldoni, *The Legacy of Pluralism* (Stanford: Stanford University Press, 2020).

and the phenomenon of radical pluralism, these authors, Croce and Goldoni maintain, developed illuminating perspectives on two of the main issues in legal philosophical inquiry.

The first issue concerns the *role of jurists in relation to politics*: whether and to what degree, in the context of contemporary states, the role of jurists is, and ought to be, 'conditional on (or independent from) the political structure of society'.[2] This is what Croce and Goldoni call the opposition (a continuum, rather than a sharp distinction)[3] of juristic and political understandings of the law.[4] According to political conceptions,

> 'the legal realm and its operators are granted limited autonomy. For the law to be produced, applied, and amended, political power and procedures are needed. The relation with politics is intrinsic'.[5]

According to juristic conceptions,

> '(t)he law does not need political power either to be produced and amended or to be applied. The relation with politics, as it were, is extrinsic'.[6]

The second issue concerns the *emergence of (legal) normativity*. Under what conditions does a social practice come to acquire a normative dimension? What is the threshold beyond which it makes sense to call a normatively structured practice 'legal'? This is, roughly, what Croce and Goldoni call the interplay between *matter* (or *materiality*) and *nomic force* (or *nomic power*),[7] respectively understood as 'the set of practical activities a certain entity engages in' and 'the entity's potential for producing normativity'.[8]

One of the book's aims, Croce and Goldoni state, is to offer an approach that will be 'effective in reviving knowledge of three authors who (with the partial exception of Schmitt) have been largely neglected in the Anglophone tradition'.[9] This is an enormous and praiseworthy endeavor they have been engaged in for years. In addition to yielding a long series of original contributions, it has led to the first English translation of Santi Romano's seminal book *L'ordinamento giuridico*[10] (*The Legal Order*), by M. Croce[11] – the first since 1918! – and to the first English

[2] ibid 4.
[3] ibid 4-5.
[4] ibid 4.
[5] ibid 4.
[6] ibid 4.
[7] ibid 4.
[8] ibid 5.
[9] ibid 7.
[10] S. Romano, *L'ordinamento giuridico* (Macerata: Quodlibet, 2018). The first edition appeared in 1917-18, and the second one, supplemented with new notes and comments, in 1946.
[11] S. Romano, *The Legal Order*, edited and translated into English by M. Croce (Abingdon-New York: Routledge, 2017).

translation (in progress) of Costantino Mortati's most famous work, *La costituzione in senso materiale*[12] (*The constitution in a material sense*), by M. Goldoni.

This is not the place to dwell on the reasons for the lack of knowledge of, and interest in, such important chapters of Continental legal theory on the part of Anglophone scholars. But, as the publication of *The Legacy of Pluralism* shows, it is never too late.

In this paper, I will focus on the author I am most familiar with, Costantino Mortati.[13] I will attempt to provide a general reconstruction of his conception of the law as a legal order, and of his understanding of the 'constitution in a material sense' – hereinafter, the material constitution – paying special attention to the issues that occupy a prominent place in Croce and Goldoni's book: the emergence of legal normativity, the problem of radical pluralism, and the role of jurists *vis-à-vis* politics. As we shall see, these three issues essentially translate as follows in the context of Mortati's work: the role of the 'will' of a collective entity – a 'dominant political force' bearer of the material constitution in the case of states – understood as the source of the normativity of the legal order; the degree of integration of the dominant political force; and the degree to which jurists' activities are conditional upon that force.

I very much appreciated the interpretation of Mortati's ideas developed in Croce and Goldoni's book. They are able to convey the sense and import of Mortati's work, and its place in the context of Continental legal theory in the first half of the 20th century. The reconstruction they provide of his peculiar understanding of the legal order and the material constitution are accurate and, in my view, correct. Although the approach I take is somewhat different from theirs, most of what I will say is consistent with their account, and seeks to complement rather than criticize it. There is, however, a significant point of divergence. They see Mortati's theory as a paradigmatically political conception of the law,[14] to which, they maintain, he remained loyal throughout his career.[15] I will argue instead in favor of a more nuanced interpretation, one that sees Mortati's views as shifting from a paradigmatically political conception to a juristic one. As I see it, this shift is part and parcel of a wider adjustment that Mortati's ideas went through in his attempt to capture over time the transformations of the Italian political context.

What comes into play here, then, is the issue of the degree of continuity or discontinuity in Mortati's thought[16] – whether, over the course of his long career, his core ideas remained substantially the same or came under radical revision.

That question cannot be answered neatly. There is a significant strand of

[12] C. Mortati, *La costituzione in senso materiale* (Milano: Giuffrè, 1998, originally published in 1940).

[13] See M. Brigaglia, *La teoria del diritto di Costantino Mortati* (Milano: Giuffrè, 2001).

[14] M. Croce and M. Goldoni, n 1 above, 6, 147.

[15] ibid 153.

[16] ibid 141.

continuity in the core claims about the legal order and the material constitution, but there are also important changes – as I see them, adjustments rather than revisions – in the ways Mortati framed his views over time,[17] under the influence of changing political conditions. He originally elaborated his account taking as paradigms the one-class regimes of 19th century liberal states, their crisis, and the emergence of the one-party regimes of the first half of the 20th century. Once the political context radically changed, he readjusted the aspects of his theory more strictly linked to the original paradigms, while maintaining other, more general ideas.

These developments suggest a two-layered interpretation.

On the first layer, we find a broad conception of the legal order and of the material constitution, refined over time in order to achieve such a level of generality as to account for the most diverse kinds of social and political arrangements. Although this conception was formulated in the most explicit, comprehensive, and systematic form at the end of his career, it builds on some core views that Mortati adamantly maintained since his earlier works, and can therefore be considered as a strand of continuity in his thought. Sections II, III, and IV will be devoted to its reconstruction.

On the second layer, we find the changing forms taken by Mortati's core views when applied to concrete, and highly diverse, political arrangements. This is the strand of discontinuity in his thought discussed in section IV. It is to this layer, I will argue, that Mortati's views on the role of jurists *vis-à-vis* politics need to be situated. Rather than remaining loyal to a political conception, he moved along the continuum between the political and the juristic conception depending on the specific features of the political context at hand.[18]

[17] Although Croce and Goldoni (ibid 141) seem to agree with this general diagnosis, we do not seem to share the same view of what the relevant changes are and how significant they are (see n 18 below and accompanying text). In spite of this misalignment in our views, we all belong in the large group of commentators who see Mortati's theory of the material constitution as one that, from the outset, was meant to apply not just to Fascist, totalitarian, or one-class states, but to modern states at large. See eg G. Zagrebelsky 'Premessa', in C. Mortati ed, n 12 above, VII-XXXVIII; M. Fioravanti, 'Dottrina dello Stato-persona e dottrina della costituzione. Mortati e la tradizione giuspubblicistica italiana', in M. Galizia and P. Grossi eds, *Il pensiero giuridico di Costantino Mortati* (Milano: Giuffrè, 1990), 45-185, especially 165-185; S. Bartole, 'Giudici, funzione giurisdizionale e interpretazione del diritto: glosse ad alcuni testi di Costantino Mortati', in M. Galizia and P. Grossi eds, *Il pensiero giuridico di Costantino Mortati* (Milano: Giuffrè, 1990), 511-533; P. Grossi, *Scienza giuridica italiana. Un profilo storico: 1860-1950* (Milano: Giuffrè, 2000), 292; G. Della Cananea, 'Mortati and the Science of Public Law: A Comment on La Torre', in C. Joerges and N. Singh Ghaleigh eds, *Dark Legacies of Law in Europe* (Oxford and Portland: Hart Publishing, 2003), 321-335.

[18] The two-layered interpretation of Mortati's trajectory I will be defending in this paper is an update on one I provided years ago, arguing for a reading of relevant changes and adjustments, on top of a significant underlying continuity in the core views (M. Brigaglia, n 13 above, 199-200). Interestingly enough, M. Croce and M. Goldoni, n 1 above, 221, no 18, have understood me to advance a claim about discontinuity in his thought, while, in a review of my work, I have on the contrary being criticized for allegedly defending its continuity, failing to appreciate how deeply

A caveat. In this paper, I will take a merely exegetical stance. My concern is to provide a charitable but truthful reconstruction of Mortati's views, and not to assess them by pointing out their weaknesses or strengths. What motivate my reconstruction, however, are a conviction that contemporary legal scholars have a lot to learn, for good or ill, from this controversial chapter in the history of Continental legal theory, and the hope of kindling some curiosity in them, so that they may want to find out more about it. This would be a modest contribution to Croce and Goldoni's enormous endeavor.

II. The Legal Order as a Normatively Organized Practice

Mortati's notion of the material constitution is part of a wider understanding of the law as a legal order, very much indebted to Santi Romano's seminal account,[19] whose ideas, however, are developed in different, original directions.[20]

In a first approximation, Mortati's legal order can be described as a normatively organized practice that on the whole is teleologically oriented toward a certain configuration of interests, the 'aim' of the practice.

The state, Mortati maintains, is best conceived as a legal order – a highly structured and nested one that in a superior unity embraces a plethora of overlapping practices, many of which count as such as legal orders with a more restricted scope. This unity, constitutive of the very existence of the state and of its identity, is obtained through the efforts of a political force in a dominant position of power, a force that on the whole succeeds in coordinating those many divergent practices within a more comprehensive organization, oriented toward a unitary aim. This aim is the material constitution of the state, its 'basic norm' – in a sense very different from Kelsen's.

Mortati initially developed his views as an account of the state and of its material constitution. His wider account of the legal order came later, in an attempt to transform the framework developed with reference to the state into a

his positions changed through time, S. Pajno, 'Recensione a M. Brigaglia, *La teoria del diritto di Costantino Mortati*' *Rivista di diritto costituzionale*, 424-431 (2007).

[19] S. Romano, *L'ordinamento* n 10 above.

[20] See M. Croce and M. Goldoni, n 1 above, 136. They also offer an insightful account of how Mortati was able to creatively develop ideas drawn from other leading Continental legal scholars of his time – Schmitt, Hariou, Smend, Heller, and even Kelsen. On locating the genesis and role of Mortati's theory in the history of Italian and Continental legal theory see also F. Lanchester, 'Costantino Mortati e la 'dottrina' degli anni trenta', in F. Lanchester ed, *Costantino Mortati, costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 89-134; D. Schefold, 'Mortati e la 'dottrina tedesca' ', in F. Lanchester ed, *Costantino Mortati, costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 111-134; M. Fioravanti, n 17 above; F. Lanchester, 'Il periodo formativo di Costantino Mortati', in M. Galizia and P. Grossi eds, n 17 above, 187-229; I. Staff, 'Costantino Mortati: Verfassung im materiellen Sinn' *Quaderni fiorentini per la storia del pensiero giuridico*, 265 (1994); M. La Torre, 'The German Impact on Fascist Public Law Doctrine. Costantino Mortati's 'Material Constitution', in C. Joerges and N. Singh Ghaleigh eds, *Dark Legacies of Law in Europe* (Oxford and Portland: Hart Publishing, 2003), 305-320.

general conception of the legal domain in all of its forms. As hinted above, this conception was presented in the most systematic form at the end of his career,[21] but it implicitly lay in the background from the beginning. The entire evolution of Mortati's views happened along the lines of this conception. What follows is a sketchy – but I hope accurate – reconstruction of its basic contours.

A legal order is (i) a network in which the activities of a plurality of individuals are, as a whole, stably coordinated toward a certain aim – call such a network an 'organized practice'[22] – (ii) and in which the coordination is sustained and strengthened by means of normative pressures.[23] In short, the legal order is a normatively organized practice. Let us have a closer look at both aspects, the organizational and the normative.

Very roughly, the basic elements making up the organization of the practice are as follows: (i) a collection of coordination mechanisms (shared habits and routines, decision-making procedures, division of roles and tasks, explicit rules, etc) combined in an (ii) organizational structure, the overall framework within which the coordinated activities unfold; (iii) the aim, a certain view about the specific way in which the practice should be organized in order to foster a certain coherent and sufficiently determined configuration of interests;[24] and, finally, (iv) a critical number of participants in the practice who are disposed to make the sustained effort needed to ensure that the activities unfold within the bounds of the organizational structure and are oriented toward the aim. Call them 'custodians'.[25]

In a legal order, custodians carry out their task, at least in part, by means of normative pressures.[26] They cannot, however, be reduced to formal authorities.

[21] See, in particular, C. Mortati, *Istituzioni di diritto pubblico. Tomo I* (Padova: CEDAM, 9th ed, 1975), chapters 1 and 2.

[22] The expression 'organized practice' is mine. Mortati's preferred term, borrowed from Santi Romano, is 'organization'. This noun, however, is to be interpreted in the broad sense indicated in the text, as referring not only to intentionally and centrally coordinated groups of people, but also to non-intentionally and non-centrally coordinated networks of activities – as with certain widely followed rules of etiquette sustained by normative pressures (ibid 12). See n 46 below and accompanying text.

[23] The above definition applies, more precisely, to the most important kinds of legal orders, social ones. Differently from S. Romano, n 10 above, 70, even individual existence, for Mortati, counts as a legal order if properly organized. C. Mortati, n 21 above, 5, fn 1. See below, section III.

[24] See C. Mortati, n 12 above, especially 87-113.

[25] The term 'custodian' does not belong to Mortati. He instead speaks of 'authorities' (n 21 above, 6). This is a term he uses in two senses. In a first, broad sense, acting as an authority simply means acting as a custodian, whether this role is distributed among all participants (or a large number of them) or is concentrated in the hand of a restricted group. The latter are 'authorities' in the narrow sense (ibid 11-12). The same ambiguity can be found in the idea that the organization of the practice implies at least a minimal 'differentiation' of roles. In the first, broad sense, this simply means that one and the same person may take on two different roles: the role of mere participant or the role of custodian. In the second, narrow sense, it means that only a restricted number is entitled to, and has the power to effectively exercise, the function of custodian.

[26] Normative pressures may involve, but do not necessarily involve, coercion (resort to physical force). Although Mortati refers to 'sanctions' as an essential feature of the legal order,

Many legal orders are not formalized, and even in highly formalized legal orders, as we shall see, the custodial task necessarily exceeds, according to Mortati, any possible formalization.

In fully developed legal orders, moreover, the custodial task concerns not only single activities, or steps thereof, within an organizational structure taken as a given, but also the organizational structure itself, which could and should be adjusted in order to restore or improve the overall realization of the aim. Let us call 'stewards' those custodians who are engaged in the highly flexible, prospective, and creative task of monitoring the practice as a whole, adjusting its organizational structure. The stewardship task within the organization of the state is what Mortati calls 'government'.[27]

In complex legal orders, custodial tasks are carried out by a large number of people, driven by very different motivations. In bureaucratically organized legal orders, for instance, much of the custodial task is carried out by employees in a chain of command – individuals strongly motivated to execute directives coming from higher levels simply in virtue of their source, and, to a certain degree at least, independently of the merits of their content. A distinctive feature of Mortati's approach, however, is the emphasis he puts on the custodial and especially the stewardship role played by those who are deeply committed to the aim, and are therefore strongly and independently motivated to be actively and flexibly engaged in its pursuit. These people are, in Mortati's terms, the 'bearers' of the aim.

The aim is the core of the legal order, the proper *telos* that informs the entire organization of the practice and governs its development, imparting a unitary character to it. If all the stuff out of which the organized practice is made counts as a unitary legal order, it is only because, on the whole, the practice is coordinated toward a single, sufficiently determined aim. This is particularly true in the case of complex legal orders such as states, which are made by a congeries of different, overlapping, potentially diverging practices, and whose organizational structure is often articulated into quite independent branches.[28]

But the aim does not work on its own, or by means of spontaneous or blind mechanisms. The aim works through its bearers – through their engagement as custodians and stewards of the practice, and through the capacity for effective influence – or power – they have within it. This makes it possible to describe the legal order in intentional terms, as sustained by the 'will' of a collective entity,

he understands this notion in a very broad sense, including by way of simple expressions of disapprobation (n 21 above, 12). See on this point M. Croce and M. Goldoni, n 1 above, 151-152.

[27] C. Mortati, *L'ordinamento del governo nel nuovo diritto pubblico italiano* (Milano: Giuffrè, 2000), originally published in 1931. See M. Croce and M. Goldoni, n 1 above, 155-161; M. Fioravanti, n 17 above, 114-142; T.E. Frosini, 'Mortati e l'indirizzo politico (negli anni Trenta), in M. Galizia ed, *Forme di stato e forme di governo: Nuovi studi sul pensiero di Costantino Mortati* (Milano: Giuffrè, 2007), 561-591.

[28] See, eg, C. Mortati, n 12 above, 136-137.

the group of people who, in a dominant position of power,[29] 'bear' the aim.[30] (In the next section, I will come back in greater detail to Mortati's notion of 'will', and to the ascription of a will to collective entities.)

A final aspect of a legal order's organization worth dwelling on is its stability. A certain degree of stability is a definitional feature of the organized practice, and hence of the legal order. But the required stability is not homogenously distributed throughout the organization. The maximum degree of stability is required at the level of the aim. The aim should, in the first place, remain structured around the same core interests – and, as we shall see, this implies the stability of the 'will' of its bearers. In the second place, the practice as a whole should remain oriented toward the aim – and this implies the maintenance of the dominant position of the aim's bearers. A certain degree of stability is also required for the overall organizational structure and for some of its nodes. Organizational details, coordination mechanisms, and the activities concretely carried out are instead more flexible, allowing for a rapid adaptation of the practice to the constantly changing circumstances.

Such an interplay of stability and flexibility confers a dynamic character on the legal order: the order can be subjected to significant change and yet still maintain its identity, because of the persistence of the aim, of its bearers, and of some key components of its organizational structure.

Among the many factors contributing to the stability of the legal order are the cultural homogeneity of the participants in the practice, the attunement of their attitudes and habits to the organizational structure, and a self-reinforcing distribution of power that favors the aim's bearers (they are in a dominant position of power, and this very fact tends to increase the extent of their domination). The crucial stability factor, however, is the normativity that permeates the practice at any level of its organizational structure.

The kind of normativity Mortati has in mind essentially amounts to the fact that some people tend to have negative attitudes toward those who deviate from given patterns of behavior, to apply pressures for conformity, and to feel justified in, or even committed to, doing so. Patterns of behavior linked to this cluster of dispositions count as 'norms'.[31]

[29] So as to emphasize the relevance of the element of power in Mortati's conception of the legal order, Croce and Goldoni (n 1 above, 147) call it 'realist intitutionalism'. This label aptly sums up much of what Mortati added to classic institutionalism, while also conveying the sense he had of his own contribution. C. Mortati, n 21 above, 27. See also A. Catania, 'Santi Romano e Costantino Mortati' *Sviluppo economico*, VI, 45 (2002).

[30] Mortati openly endorsed an intentional model of the legal order, captured by the motto '*ubi voluntaris ordo, ibi ius*'. See C. Mortati, n 21 above, 5, no 1.

[31] Mortati seems often to conceive norms in imperativistic terms, as commands. See M. Croce and M. Goldoni, n 1 above, 151. In my view, Mortati's imperativism is better seen as a form of psychologism very close to certain versions of contemporary expressivism: a pattern of behavior N counts as a norm 'accepted' by X, if X has, regarding N, a cluster of psychological attitudes similar to the ones elicited by an imperative that prescribes N. See A. Gibbard, *Wise*

Norms permeate a legal order's organization from the bottom up: not only by way of explicit and formal rules, but also by way of implicit and informal norms.

Most of the single patterns of behavior and decision-making out of which the organizational structure is made have the status of norms. Some of them are formal rules, ie, rules explicitly prescribed by formally identified authorities through formally regulated procedures, supported by formally regulated pressures. In fact, most legal orders in contemporary societies involve complex systems of formal rules, including rules that regulate the production and enforcement of other rules. Such systems of formal rules, however, emerge from, and are interpreted by means of, a background of 'implicit norms' (in Mortati's terms, '*norme inespresse*').[32] I suggest to interpret this notion as follows: implicit norms are patterns of behavior that are regularly followed without any explicit prescription, often in a spontaneous, almost automatic fashion, but are nevertheless normative insofar as, outside any formal regulation, their violation tends to elicit pressures for conformity perceived as justified, and this very fact increases the probability that those patterns of behavior will be followed, thus reinforcing their regularity.[33]

This, it seems to me, is one of the main tenets of the institutional accounts of both Santi Romano[34] and Carl Schmitt.[35] The legal order's normative dimension cannot be reduced to systems of formal rules, but also involves a fine-grained background of implicit norms. The custodial function, necessary for the existence of a legal order, cannot entirely rely on formal authorities, but needs to also rely on the sparse activities of informal custodians.

What Mortati adds to this picture is his emphasis on, and treatment of, the aim's normative status.[36] As hinted above, a critical group of people within a legal order – the aim's bearers – are strongly and independently motivated to actively engage in its pursuit. It is because of this motivation that they tend to apply pressures, felt as justified, to maintain the practice within the bounds of its organizational structure (custody), and to adjust the latter in order to improve or restore its capacity to achieve the aim (stewardship).

Again, the function played by the bearers of the aim cannot be reduced to that of formal authorities. In complex legal orders such as states, as we shall see, the bearers of the aim are not single individuals, but rather members of more or less organized interest groups – political forces – in a dominant position of power. Usually, top formal authorities are recruited from the ranks of the

Choices, Apt Feelings (Oxford: Clarendon Press, 1990).

[32] C. Mortati, n 21 above, 10; n 12 above, 97-98.

[33] For an account of the differences between explicit rules and implicit norms, I refer the reader to M. Brigaglia, 'Rules and Norms: Two Kinds of Normative Behaviour' 30 *Revus*, 33 (2016).

[34] S. Romano, n 10 above.

[35] C. Schmitt, 'I tre tipi di pensiero giuridico', in Id ed, *Le categorie del politico* (Bologna: il Mulino, 1972), 245-275. This chapter is a later version of the essay *Über die drei Arten des Rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlangsanstalt, 1934), revised by the author on the occasion of its Italian translation.

[36] See in particular C. Mortati, n 12 above, 105-107.

dominant political forces. But the latter determine the behavior of the former, and not the other way around.[37]

Again, the aim's normative status may be either explicit or implicit. It might be the case that the aim is partially formulated in an explicit set of principles that prescribe advancing the relevant configuration of interests. But it might also be the case that no such explicit formulation exists. The role of explicit formulations is in any case limited.[38] The bearers often lack full awareness of their own aim, especially of the very complex aims pertaining to comprehensive legal orders such as states. First, some of the relevant interests do causally contribute in producing, in a regular and predictable way, the normative attitudes of their bearers, but they do so unconsciously. Second, the aim results from the composition of different, often conflicting interests. This composition is for the most achieved by specifying which interests should prevail over others in the event of conflict. Such a specification cannot be exhaustively made in advance, but is a work in progress, continuously adjusted in the face of new, unexpected circumstances. Finally, the aim emerges from the unpredictable, dynamic interactions of different bearers, who on the one hand share some core interests but otherwise may have further competing interests. In such a context, a formulation produced at any given moment is destined to be later reinterpreted or reformulated, on the basis of a more accurate awareness of the aim, of its progressive specification, or of a new consensus resting on a different distribution of power among the bearers of the aim.

This is, roughly, what the normative dimension of Mortati's legal order amounts to.

If we wanted to stress the importance and pervasiveness of the normative element, we could simply describe the legal order as a normative order, an organized network of norms and normative behaviors: not an 'ideal' – ie, merely conceived – but rather a 'positive' – ie, effectively realized – normative order, and a 'concrete' one, that is, an order whose structure essentially depends on a background of implicit norms, and is by no means reducible to systems of explicit rules; not only a 'formal' normative order, which simply allocates normative powers, but a 'material' one – in one of the senses in which Mortati uses this expression – that is, an order that imposes substantive constraints on any activities falling within its scope. Constraints of this kind are ultimately teleological: they depend on the aim's normative status. The legal order is in this sense a teleological normative order, a functional unity hinging on the aim, which normatively governs its entire existence and fixes its identity: the legal order can be treated as a unity because, as a whole, and to varying degrees of integration, the multiplicity of organized behaviors out of which it is made is normatively oriented toward a single aim.[39]

[37] See eg ibid 121.
[38] ibid 115-123.
[39] ibid 82.

To convey the role of the aim as the normative foundation of the legal order *qua* a unitary normative practice, Mortati often refers to it as the legal order's 'fundamental norm', or its 'constitution', or, better yet, its '*material* constitution', to distinguish it from the formal one. In its broadest sense, his most famous notion refers precisely to the foundational normative role of the aim in *any kind* of legal order. In its more specific and more usual sense, it refers to the foundational normative role of the aim in *a specific type* of legal order, the state. I will come back to this shortly.

III. The 'Will' as the Source of the Legal Order

As hinted above, Mortati represents the legal order in intentional terms, as an order propped up or sustained by the 'will' of a collective entity: a legal order exists thanks to the efforts of a collective entity in a dominant position of power, an entity which 'wants' the practice to be organized in such a way as to foster a certain configuration of interests, and which to this end puts in an effort, and succeeds at it. The aim, constitutive of a legal order, is the content of the will of a collective entity, the aim's bearer.

On the other side, in the aim lies the normative foundation of the whole legal order. The aims' normative force relies on the fact that it is the content of the will of a collective entity in a dominant position of power. The will, Mortati argues, is capable of conferring normative force on its content, because it is in itself normative – it is a 'normative fact', defined by Mortati as 'a fact which has in itself its own law and the guarantees of its persistence in the future'[40] (English translation by Croce and Goldoni).[41]

In the previous section, I indirectly suggested that this quite obscure passage is best interpreted as a convoluted way of conveying the crucial role that, within the practice, is played by the normative attitudes and behavior of a certain, more or less organized, group of people. I will now attempt to further clarify this point.

In a few pages of an early work published in 1935,[42] Mortati draws a sketchy but insightful account of what counts as an individual's 'will'.

X, an individual, can be said to properly 'want' something P if she is not only affectively inclined toward P (a mere 'desire' for P) but has also devised a strategy to obtain P and is able and ready to exert effortful self-control in order to act according to the strategy.

X's will is rational if (i) it does not chaotically switch between different, unstable directions but is stably oriented toward the realization of a coherent

[40] C. Mortati, 'La costituente', in C. Mortati ed, *Raccolta di scritti. Tomo I* (Milano: Giuffrè, 1972, originally published in 1945), 3-343, 12.

[41] M. Croce and M. Goldoni, n 1 above, 176.

[42] C. Mortati, 'La volontà e la causa nell'atto amministrativo e nella legge', in C. Mortati ed, *Raccolta di scritti. Tomo II* (Milano: Giuffrè, 1972, originally published in 1935), 471-613, 476-480.

and sufficiently determined configuration of interests – X's aim – and (ii) X has developed a more or less articulated and rational plan about how to organize some of her own activities in order to achieve her aim.

X's will is normative, in Mortati's sense, if (i) X feels committed to executing the plan – adjusting it whenever required by the ever-changing circumstances, and keeping her will focused on the aim – and (ii) that sense of commitment reinforces stability and strength of X's will, thus contributing to motivating X to orient her efforts toward the aim.

The normative structuring of X's will can be described in terms of a self-directed norm prescribing that X pursue the aim.[43] Such a norm, Mortati adds, is self-warranted and self-sustained: its justification, as well as its efficacy, rests on the very existence of the will it is part of, and from which it draws its motivational force.

Once a will of this kind – a peculiar psychological structure – is in place, it will regularly cause X to effectively act in pursuit of the aim, executing and updating her plans. X's behavior, in other words, will acquire a stable order. However, such an 'external', observable order has its source in, reflects, and is explained by the 'internal' order of X's attitudes, the fact they have reached the stage of a rational and normative will. This, Mortati maintains, is the simplest form of legal order – the intentional order of (a part of) individual existence, sustained by her *will to order*.

Mortati extends the same pattern of explanation to social legal orders. In particular, he represents social legal orders as having their source in the will of a collective entity, the bearer of the aim. And he seems to imply that the notion of will he applies to collective entities is closely linked to the just-sketched notion of the will of an individual.[44] He does not explain, however, what the relevant link is, or what the conditions are under which one can legitimately ascribe a certain will, and the related intentional actions, to a certain group of people.

In my view, the best way of interpreting his ideas is as follows. A certain will and certain intentional actions may be ascribed to a collective entity if (i) the activities of the group as a whole, in virtue of their level of coordination, are strictly analogous to those of an individual who has a will of the same content as that ascribed to the collective entity, and (ii) a critical number of its members, individually, want and feel committed to act, and effectively act, in pursuit of an aim sufficiently close to the content of the will ascribed to the collective entity.

[43] In Mortati's imperativistic terms, a self-directed and self-binding *command* (C. Mortati, n 12 above, 89). This means, basically, that X's will is captured in an abstract representation that produces the typical psychological effects of an imperative issued by an external authority, that is, a motivation, and a sense of commitment, to conform (see above, n 31). This also applies to political forces: their 'will' to achieve a certain political aim functions as a self-directed norm or command, binding them to act in pursuit of the aim. C. Mortati, n 12 above, 155. See on this point G. Zagrebelsky, n 17 above, XXXIII.

[44] see eg C. Mortati, n 21 above, 3-4; n 27 above, 9.

Condition (i) establishes a functional analogy between the will of a group and that of an individual. Condition (ii) anchors the legitimacy of this analogy to the existence of the appropriate individual wills within the group.

The latter definition covers a spectrum of importantly different situations.

At one end of the spectrum, we have the case of a group of people whose members want and feel committed to the pursuit of closely similar aims through largely compatible actions. They lack any intentional coordination, or else their attempts to coordinate are sparse, improvised, not centrally guided. Even so, their actions converge, by means of spontaneous and reliable mechanisms, toward a tacit strategy conducive to a result P sufficiently close to their individual aims. In this case, the group as a whole can be ascribed the will to achieve P, which counts as the aim the group as a whole is a bearer of. Apply this to a group of custodians and stewards, and you will have a possible path – call it 'bottom-up' – for the emergence or maintenance of a legal order, through the spontaneous coordination of the intentional efforts of a collective entity, which counts as the bearer of the aim.[45]

At the other end of the spectrum, we have the case of a group of people intentionally and centrally coordinated toward a certain aim, one that to a significant degree corresponds to the interests and views of the group's members, where the correspondence is usually greater at the level of the leaders, and lesser at the level of the executors. Frequently, the common aim will be construed by way of discussions and negotiations, and some disagreement may remain among the members. Still, a critical number of them will accept the common aim as their own, and will feel committed to its pursuit. The sense of commitment is reinforced by the feeling of belonging to the organized group, a feeling accompanied by social emotions (loyalty in particular) and by expectations of reciprocal pressures for conformity, further motivating members to pursue the aim and reducing the load on their self-control. Again, in such a context the group as a whole can be ascribed the will to pursue the aim. Apply this to a group of custodians and stewards, and you have a very different path – call it 'top-down' – for the emergence or maintenance of a legal order, by way of intentional coordination of the intentional efforts of a collective entity, that counts as the bearer of the aim.

Between the two extremes, we have a fine-grained spectrum of intermediate possibilities: on the one side, the coordination of the group at hand may be more or less intentional or centralized, and be more or less effective; on the other side, different forms of coordination may combine in countless ways.

If my interpretation is correct, beneath the seemingly unitary claim that the legal order is sustained by the will of a collective entity, the bearer of the aim,

[45] Saying that a legal order may emerge or be maintained from the bottom up, thanks to the spontaneous – ie, non-intentional and non-centralized – coordination of a group of custodians, does not imply that the legal order emerges or is maintained through the spontaneous coordination of all participants, where 'spontaneous' is understood to mean 'free from any pressures'. Resort to pressures, normative ones in particular, is a conceptual feature of Mortati's legal order.

lies a spectrum of very different possibilities as to the degree to which the collective entity's coordination is intentional and centralized. Briefly put, the collective entity that is the bearer of the aim may be *more or less* organized— implying that where the coordination is intentional and centralized, the organization is greater.

Mortati's conception of the legal order, I claim, develops along this spectrum. At the one end of the spectrum, we have legal orders sustained by collective entities having such a low level of organization that it is a bit of a stretch to describe them as unitary agents. Think of customary practices. At the other end of the spectrum, we have legal orders sustained by collective entities with a relatively high level of organization.[46] It is at this end of the spectrum that one can find highly developed legal orders such as states. But the organization of the political forces sustaining the state, the bearers of its material constitution, as well as their integration, also comes in degrees. This is something that Mortati acknowledged slowly, in an attempt to adjust his theory so as to account for the ways in which the Italian political situation was changing. These adjustments, as will shall see, left traces in his vocabulary. The political forces that are bearers of the material constitution were at first referred to as 'parties' (corresponding to the highest degree of organization and integration), then 'classes' (a lower degree of organization) and parties in a constitutional 'compromise' (the minimal degree of integration compatible with the existence of a stable material constitution). These shifts are very important in this context, because, as we shall see (below, sect. V) they reflect important changes in the ways in which Mortati treated radical pluralism, and, in particular, in his view of the role of jurists.

IV. The Material Constitution as the Will of the Dominant Political Force

The notion of a legal order just sketched is very general indeed: it covers *any* social practice with the requisite organization, stability, and normativity.

There are many possible, sensible criteria for distinguishing between types of legal orders. One of the most important is the aim's degree of specificity or generality.[47] Some legal orders – eg, sports associations – have very specific aims, and embrace only the well-defined range of activities closely connected to those aims. Other legal orders have quite general aims, encompassing complex networks of interests, relevantly connected to a wide, open-ended range of activities. That is the case with 'political' legal orders.

Political legal orders are aimed at organizing in a certain, specific way the overall existence of a given community, so as to foster a certain, sufficiently determined and hierarchically ordered configuration of interests. Such an aim

[46] In Mortati's terms, we have, on the one side, 'fluid', 'sparse', 'horizontal' legal orders, and, on the other side, 'concentrated', 'authoritative' (vertical) ones (C. Mortati, n 21 above, 11-12).

[47] C. Mortati, n 21 above, 19.

is too complex, articulated, and dynamic to be specified in detail once and for all. It is better seen as an outline, sufficiently determined so as to endow the legal order with its peculiar identity, but amenable to being integrated and modified so as to embrace new interests emerging within that community, and new organizational formats required by its unpredictable changes.[48] Given the nature of their aim, then, political legal orders potentially embrace whatever possible activity within that community.

The most important kinds of political legal orders are states. The state is defined by Mortati as the political legal order with supreme authoritative and coercive power over the overall existence of a community living in a certain territory.[49] In this otherwise traditional definition of the state, the originality of Mortati's contribution lies precisely in his conception of the legal order. The state exists as a legal order only insofar as the jumble of practices out of which the life of that community is made are effectively integrated, to a sufficient extent, into a more comprehensive organization, oriented toward a specific, political aim – a sufficiently determined view about the way in which the community as a whole should be organized, and about the configuration of interests that should be promoted within it.[50]

The political aim that effectively informs the life of the state as a whole, giving it the unitary character of a legal order, is what Mortati calls the state's 'material constitution'. The aim of a legal order, recall, does not work on its own, by means of spontaneous mechanisms. It works through its bearers, their engagement as stewards of the practice, and the dominant position of power they hold within it. This is particularly true in the case of the material constitution. Here the notion of a 'political force' enters the scene. A political force is a collective entity structured around a certain political aim. Once a political force has gained a dominant position of power – granting it sufficiently wide and deep control over the community so as to keep it, on the whole, within the bounds of its aim – the community becomes a state proper, a unitary legal order, and the aim acquires the status of the state's material constitution. The material constitution is, in this sense, the aim of the dominant political force – the content of its 'will'.[51] The only difference between a merely political aim and an aim that has

[48] C. Mortati, n 12 above, 74, 117, 206.

[49] C. Mortati, n 21 above, 23; Id, n 12 above, 54-55.

[50] As M. Fioravanti (n 17 above, 134) puts it, this is a 'new conception of the unity of the state' as a 'teleological unity'; 'the state exists only insofar as (…) it constitutes a teleological unity' (ibid 146) (my translation).

[51] In other words, the material constitution is the *existential unity* of the aim and its bearer, the dominant political force. C. Mortati, *Le forme di governo* (Padova: CEDAM, 1973), 7. This idea, Mortati argues (n 12 above, 42), determines Schmitt's correct but vague and deceptive claim that the core of the constitution lies in a 'people's decision for a form of political existence', C. Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1928). Instead of a 'people', we have a dominant political force. Instead of a decision, we have a normative will. See A. Catania, 'Mortati e Schmitt', in A. Catelani and S. Labriola eds, *La costituzione materiale. Percorsi culturali e*

acquired legal status, becoming a material constitution, is that the latter does not simply exist 'ideally', as the content of a will, but also exists 'positively' – ie, it has, to a sufficient extent, effectively informed the life of the state.[52]

Apart from some scattered attempts to elaborate a general taxonomy of historical types of states,[53] Mortati was almost exclusively concerned with a single one: modern states, ie, the Western-type states formed after the French Revolution.[54]

Modern states have two important features. The first is a huge, centralized but finely articulated authoritative apparatus – apart from the top institutions (an elected parliament, king or president, premier, etc), the various branches of the administrative apparatus, the judiciary, the military, etc – capable of reaching into almost every fold of the state community. The second feature is the 'politicization' of the community – the spread of political ideas among large masses, their increased pressure to take active part in the government, the emergence of a 'public opinion', the grant of active electoral rights to much wider classes of citizens, the increased role of elected assemblies in shaping the activities of state's apparatuses.[55]

These two features put peculiar constraints on political forces. In order to realize their aim, political forces need to gain control of the state's apparatuses and to obtain the active or passive consent of large masses. To this end, political forces tend to organize themselves around an attractive political program, a sketchy formulation of the form of society they purport to realize and of the interests they prioritize.[56]

Crucially, an important part of political struggles in the context of the modern state – aside from the attempts to gain economic and cultural hegemony, and to infiltrate the state's apparatuses – is electoral competitions. To participate in these competitions, attempting to gain access to, and control of, the parliament, political forces tend to organize into formal parties.

However, the political forces as such – which Mortati, in his early years, misleadingly called 'parties' – are much wider than the formal parties that represent them in electoral competitions: call the latter 'parliamentary parties'. First, Mortati maintains, some parliamentary parties are better seen as 'factions' of one and the same political force: they share a core political aim, even if they disagree on less central issues.[57] Second, the political forces extend much beyond

attualità di un'idea (Milano: Giuffrè, 2001), 109-128.

[52] Politics pertains to the formation of the aim, and to the processes leading it to acquire the status of a material constitution. Once this happens, we are in the realm of law (C. Mortati, n 12 above, 107, 161).

[53] See C. Mortati, n 21 above, part I, chapter 5; C. Mortati, n 51 above.

[54] C. Mortati, n 12 above, 70.

[55] ibid 70.

[56] ibid 71.

[57] ibid 72-73, 101-102; C. Mortati, 'Sindacati e partiti politici', originally published in 1952, now in Id, *Raccolta di scritti. Tomo III* (Milano: Giuffrè, 1972), 83-103, 87; Id, *Istituzioni di*

the parliament. They result from the coordination and integration, more or less intentional and centralized, of a plurality of interest groups.[58]

This, in broad outline, is Mortati's conception of the material constitution. Let me add some further details to the picture.

I begin by briefly attempting to better clarify how Mortati conceives the structure of the political aim, and hence of the material constitution, and the sense of his claim that this constitution encompasses the whole existence of the community. Both points can be easily misinterpreted. Mortati, we have seen, conceives the political aim, and hence the material constitution, as an outline that needs to be specified, but is, at the same time, sufficiently determined to place constraints on its subsequent specifications.[59] What Mortati has in mind here is, in important respects, similar to what contemporary constitutional courts imply when, in the whole body of constitutional principles, they isolate some principles that are more fundamental than the others, so fundamental that they cannot be legitimately revised even by constitutional laws: a revision would entail a change in the form of state, and hence a change in the whole framework of constitutional legitimacy.[60] This set of 'hyper-fundamental' principles, it is further maintained, provides the normative standard for reinterpreting the whole constitutional framework, for recognizing within it new principles that have hitherto not been expressly stated, and for deciding how to balance principles when new, unforeseen conflicts arise between them.[61] In sum, constitutional principles are conceived as a dynamic hierarchy hinging on some core values, and this is very close to how Mortati envisaged the material constitution.[62]

diritto pubblico (Milano: Giuffrè, 5th ed, 1960), 69.

[58] On this notion of party, and its difference from mere parliamentary parties, see C. Mortati, n 12 above, 71-73; Id, 'Sulla posizione del partito nello Stato', originally published in 1941, now in Id, *Raccolta di scritti. Tomo III* (Milano: Giuffrè, 1972), 497-515, 507. For useful comments see S. Bartole, 'Costituzione materiale e ragionamento giuridico' *Diritto e società*, 605, 610 (1982); S. Bonfiglio, 'Mortati e il dibattito sul concetto di regime durante il ventennio fascista', in F. Lanchester ed, *Costantino Mortati, costituzionalista calabrese* (Napoli: Edizioni Scientifiche Italiane, 1989), 394-407, 407; P. Grossi, n 17 above, 221.

[59] C. Mortati, n 12 above, 74.

[60] See, eg, Corte costituzionale 15-29 December 1988 no 1146.

[61] For an account of this interpretive framework, with special attention to the jurisprudence of the Italian Constitutional Court, I refer the reader to R. Guastini, *L'interpretazione dei documenti normativi* (Milano: Giuffrè, 2004), 298-306, and G. Pino, *Diritti e interpretazione* (Bologna: il Mulino, 2010), 146-163.

[62] Needless to say, the similarity does not extend to the background assumptions about the nature of constitutional principles and their normative force. While in the referred conceptions they are usually conceived as 'objective' (moral) values, for Mortati the only thing that matters is that they are (part of) the content of the 'will' of the dominant political force. On the application of Mortati's views to the Italian Constitutional Court see in particular C. Mortati, *Istituzioni di diritto pubblico. Tomo II* (Padova: CEDAM, 9th ed, 1976), 1470-1474. For useful comments see A. Pizzorusso, 'La giurisdizione costituzionale secondo Mortati', in M. Galizia and P. Grossi eds, n 17 above, 535-566; F. Politi, *Sentenze di accoglimento e indirizzo politico*, in M. Galizia ed, n 27 above, 827-860.

Let us come to the comprehensive nature of the state's aim – an aim that sometimes, in an infelicitous choice of terms, Mortati calls 'total'. Indeed, this might have the ring of a totalitarian ideology, and, in Mortati's earlier works, comes packaged with a rhetoric riddled with totalitarian marks. But the substance is not necessarily totalitarian. Again, what Mortati has in mind is something very similar to the process that leads courts to apply constitutional principles to private relationships.[63] The constitution is treated as a general project concerning the overall life of the community at hand, which should, as far as possible, be informed by some favored values – Mortati's political aim, or material constitution. Some material constitutions attach great value to the autonomy of individuals; others – like totalitarian ones – do not. Regardless, both are, in Mortati's sense, 'total'.

Another important point about the material constitution is that – as with the overall aim of any legal order, as we have seen – it cannot be fully captured by the formulations contained in its formal statement, or in other documents.[64] Mortati was keenly aware of the limits of formal conceptions of the law. He pointed to the inescapable role of implicit norms and juristic constructions in legal interpretation,[65] and underlined how substantive principles tend to function as constraints on the discretionary powers of legal authorities at any level, as well as on private autonomy.[66] Crucially, he stressed the role of the material constitution as the implicit normative standard underlying the most controversial public law institution, the state of exception. The state of exception is something different from a *coup* or a revolution, insofar as it involves the direct intervention of a political force, outside the formal distribution of power, to protect or restore the threatened material constitution.[67]

In sum, it is the material constitution that governs the institutional and the legal dynamics of the state, as well as its overall existence. In Maurizio Fioravanti's words, Mortati's state as a legal order appears as a great network of discretionary powers, both public and private, held together not only by a unitary criterion for the formal attribution of normative powers, but also, and especially, by a substantive,

[63] See eg Corte costituzionale 24 June 1970 no 122. See R. Guastini, n 61 above, 306-309.

[64] C. Mortati, n 21 above, 34; n 12 above, 115-123.

[65] See eg C. Mortati, n 12 above, 152-187.

[66] See in particular C. Mortati, n 27 above; see also 'Note sul potere discrezionale', originally published in 1936, now in Id, *Raccolta di scritti. Tomo III* (Milano: Giuffrè, 1972), 999-1020. See C. Bersani, 'Appunti su amministrazione e costituzione in Costantino Mortati', in M. Galizia ed, n 27 above, 141-171; G. Della Cananea, n 17 above, 329-331; M. Fioravanti, n 17 above. According to Fioravanti, the crucial shift Mortati contributed to is that from a view of the administration as a normatively organized body functioning in a politically neutral way to a view of the administration as shaped by, and oriented toward, a political aim, the material constitution.

[67] C. Mortati, n 27 above, 14, 133-148; n 12 above, 152-155; n 40 above, 32; Id, 'Dottrine generali sulla costituzione', originally published in 1962, now in Id, *Raccolta di scritti. Tomo II* (Milano: Giuffrè, 1972), 79-242; Id, 'Brevi note sul rapporto tra costituzione e politica nel pensiero di Carl Schmitt', originally published in 1973, now in Id, *La teoria del potere costituente* (Macerata: Quodlibet, 2020), 129-152, 136-137. On this aspect see L. Carlassare 'Stati d'eccezione e sospensione delle garanzie costituzionali secondo Mortati', in M. Galizia and P. Grossi eds, n 17 above, 479-490.

teleological normative constraint, the material constitution.[68] It is the material constitution, its overall effectiveness, that provides the basic criterion by which to fix the identity of the state, its political regime, and to determine, beyond the appearance of mere changes in the form of government, whether what has come about is a change in the deep political regime – what Mortati calls the 'form of the state'.[69]

Borrowing Kelsen's phrase, one could refer to the material constitution as the state's 'basic norm'. Mortati's basic norm, however, is very different from Kelsen's.[70] While Kelsen's basic norm simply confers on the supreme authority the power to issue norms of any content whatsoever, Mortati's basic norm usually also establishes teleological constraints: these are substantive (or 'material', in a first sense of this term), and they apply to formal authorities as well as to informal custodians and stewards. While Kelsen's basic norm is a 'presupposed', nonpositive norm, a mere condition for the intelligibility of the legal order *qua* a unitary entity, Mortati's basic norm is not merely 'ideal' but 'positive', ie, effectively realized, to a sufficient extent. Finally, the existence of Mortati's basic norm is a matter of sheer social facts (it is 'material' in the second sense of this term): it merely exists as a (largely implicit) normative standard stably embedded in the attitudes of a critical number of the members of the state community and, specially, in the attitudes of the members of the dominant political force that bears it. In a nutshell, Mortati's basic norm, the material constitution, is a complex socio-psychological fact, crucially involving a network of power relations.

In this perspective, the formal existence of the state as a fictive person to which rights and duties are imputed should be carefully distinguished from the material existence of the state as a legal order. The latter cannot be simply inferred from the former. Some formally existing states, then, are not states in a material sense: they just have the appearance of a state.

On closer inspection, the state's material existence is a matter of degree, because it depends on the effective establishment of a material constitution, and the effective establishment of a material constitution is, in many respects, a matter of degree.[71] Where a sufficiently integrated political force has become dominant, the state exists in full. Where the dominant political force is not sufficiently integrated, or where its hegemony is limited and unstable, the state exists, so to speak, faintly. This point, as we will see in a while, has very important consequences on Mortati's conception of the role of jurists.

A final observation concerns the different types of pluralism that can be found in Mortati's framework, and the attitudes he had toward each of them.

[68] M. Fioravanti, n 17 above, 147.

[69] C. Mortati, n 12 above, 186-200.

[70] C. Mortati, n 21 above, 25. For Mortati's treatment of Kelsen's views, see C. Mortati, n 12 above, 22-25; n 21 above, 24-25. For an accurate analysis of the relations between Mortati and Kelsen, see V. Frosini and F. Riccobono, 'Mortati e Kelsen' *Materiali per una storia del pensiero giuridico*, XXIX, 407 (1999).

[71] C. Mortati, n 12 above, 116, 131.

The first type of pluralism lies in the plurality of legal orders. The notion of a legal order endorsed by Mortati implies that nested within a state is a multiplicity of overlapping legal orders.[72] Any practice unfolding within the state's borders ranks as a legal order so long as it exhibits the proper degree of organization, stability, and normativity: this applies not only to organizational units of the state apparatus but also to private companies, illegal organized practices such as the Mafia, and so on. The state exists insofar as the activities of the many subordinate legal orders are on the whole integrated, to a sufficient extent, within its organizational structure, and effectively informed by its material constitution.

The second type of pluralism lies in the presence, within the state, of different political forces, bearers of incompatible political aims. This is what Croce and Goldoni call 'radical pluralism'. In the modern state, radical pluralism is, according to Mortati, an undeniable matter of fact, arising from the high degree of politicization of large masses.[73] There is simply no way to avoid it. What can be avoided, and should be avoided in order for the state to exist, is a clash in which adversary political forces cannot work out their differences, and none of them achieves the requisite dominant position of power. If the latter happens, the state community has no stable material constitution, and the state as a legal order does not exist, or it exists faintly. In the best case, the state apparatuses keep running, but they cannot go beyond ordinary administrative activity – and this usually means the (unstable) conservation of the old order.[74] In the worst case, they begin to veer and swerve in different, unstable, uncoordinated directions, while the degree of independence of local powers increases, as does the level of outright fighting, inexorably leading to covert or overt civil war.

The third type of pluralism, closely connected with the former, lies in the possibility of a state with a pluralistic material constitution, resulting from the contribution of different political forces, bearers of different, largely incompatible aims. I will come back to this peculiar political situation in next section. For the moment, it suffices to note that, according to Mortati, this possibility exists only insofar as formerly adversary political forces come to be integrated into a unitary whole, by way of a compromise that finds a new, accepted synthesis among their different political visions.[75] When this happens, the new material constitution cannot be said to be 'radically pluralistic', because the component political forces have left their radical oppositions behind. On the other hand, the new material constitution can indeed be said to be 'pluralistic' insofar as the integration is still

[72] C. Mortati, n 21 above, 11-18. Here Mortati follows S. Romano, n 10 above, chapter II.

[73] Mortati expends much effort in arguing that the material constitution, especially in the context of the modern state, cannot be conceived as the expression of the will of the community as a whole, because there is no such thing. The community is the theater of countless political conflicts, which cannot be resolved except where one force (or else a group of forces that have come to an agreement) prevails over the others. See C. Mortati, n 12 above, 33-51.

[74] C. Mortati, n 21 above, 38.

[75] C. Mortati, n 40 above, 37-40.

incomplete and fragile (the former divisions are still salient, and powerful).[76] Regimes where a rotation exists among different parliamentary majorities are no exception to this rule. In these regimes, according to Mortati, the rotating parliamentary parties are typically 'factions' belonging to a single, not fully integrated, political force.[77]

V. The Shifts in Mortati's Thought in the Context of Italian Political Affairs

The framework outlined in the previous sections is sufficiently general to cover the entire development of Mortati's thought – in it lies the strand of continuity in his work. Within this framework, however, important shifts in focus, terms, and concepts occurred over the years. I have already hinted at some of them. Now we are in a position to explore them in greater detail.

The most important changes concern the following aspects: (i) the presupposed degree of organization and integration of the dominant political force; (ii) the presupposed level of transparency of the material constitution; (iii) the degree of effectiveness of the material constitution (and hence the degree of existence of the state); and (iv) the role of jurists and their relation to the political forces.

The shifts in Mortati's views result from his attempts to adjust his theory to the changes in Italian political and constitutional affairs, which changes he experienced from within, first as a member of the Constituent Assembly (1946–1948),[78] then as a judge of the Constitutional Court (from 1960 to 1972).

Following a suggestion from Mario Dogliani,[79] I will break Mortati's trajectory down into three periods.

The first period unfolds during the one-party Fascist regime, until its fall, on July 25, 1943. The most representative work of this period is *La costituzione in senso materiale*[80] (1940). Other important contributions are *L'ordinamento del governo nel nuovo diritto pubblico*[81] (1931) and *La volontà e la causa*

[76] In other words, although Mortati assumes that, for a material constitution to exist, it should be supported by a *sufficiently integrated* political force, he sees this integration as a matter of degree, and so allows for the possibility of a *certain degree* of political pluralism within the dominant political force. This is precisely what happens in the case of a constitutional compromise between former political adversaries. This point is overlooked by those who interpret the material constitution as an all-or-nothing matter: either the political force is fully integrated (monistic) and the material constitution does exist, or political forces are not integrated (pluralism) and the material constitution does not exist. See eg G. Zagrebelsky, n 17 above, XXXIII-XXXIV (in a different passage of the same work, however, Zagrebelsky comes closer to my interpretation, ibid XXX).

[77] C. Mortati, n 12 above, 72-73.

[78] Elected from the ranks of the Catholic Party (DC, Christian Democracy), Mortati was a member of the so called *Committee of the 75* (Commissione dei 75), the restricted group entrusted with drafting the constitution.

[79] M. Dogliani, *Introduzione al diritto costituzionale* (Bologna: il Mulino, 1994), 332-343.

[80] C. Mortati, n 12 above.

[81] C. Mortati, n 27 above.

nell'atto amministrativo e nella legge[82] (1935).

The second period goes from the liberation of Italy from the Nazi-Fascists in 1945 and the works of the Constituent Assembly to the late 1950s. The opening years are those in which a constitutional compromise was reached among political forces divided by deeply conflicting interests and views, but allied in the fight against Nazi-Fascism. These forces, later called 'Constitutional Arch' (*Arco costituzionale*), were basically the Communist Party (PCI), the Socialist Party, the Catholic Party (DC, Christian Democracy), the Liberal Party (PLI), and the Republican Party (PRI). The following decade is marked by the beginning of the Cold War and the emergence of the postwar bipolar world order. Its most apparent consequence in Italian politics was a split in the Constitutional Arch: on the one side were the Communists, on the other the pro-NATO parties, DC, PLI, and PRI, together with the right-wing Socialists (PSDI), and in between were the left-wing Socialists (PSI). (The PCI Communists, for all their electoral strength, together with the varied galaxy of far-left communist parties, were excluded from government from 1947 all the way to 1996, this thanks to a changing set of unstable alliances the other parties forged under the so-called *conventio ad excludendum*.) But the 1950s were also the season when the new constitutional order set up under the compromise among political forces within the Constitutional Arch began to find room in the work of state apparatuses. In particular, in 1956, the newly established Constitutional Court came into operation, and in its first pronouncement,[83] it made clear that it would interpret its review powers as extending to any law found to be in contrast with any norm contained in the Constitution – a doctrine the Court understood to also apply to laws enacted before the Constitution's entry into force, and to include, in particular, cases of conflict with its most controversial part, Title III, devoted to economic relationships. This meant that liberal and Fascist legislation could be invalidated if judged to be incompatible with the societal project outlined in the Constitution – a project, recall, that was the result of the compromise between the forces within the Constitutional Arch. The most representative work of this period is *La costituente*[84] (1945).

The third period, in the 1960s and in 1970s, is the age of the enhanced contrast between workers organizations and left-leaning extra-parliamentary political movements on the one hand, and economic elites and government on the other. These are the so-called Years of Lead, plagued by continuous violent confrontations between far-left and far-right movements, and terrorist actions by both far-left and far-right underground organizations – the latter, in particular, responsible for a series of massacres, some of which realized with the involvement of part of internal and foreign secret services, and with unconcealed support, or

[82] C. Mortati, n 42 above.
[83] Corte Costituzionale 5 June 1956 no 1.
[84] C. Mortati, n 40 above.

lack of serious contrast, from some sectors of the state apparatuses.[85] In these years, at least one right-leaning coup was attempted (the so-called Golpe Borghese), and at least another one was planned (the so-called Golpe Sogno). The most representative works of this period are the entry 'Costituzione dello Stato'[86] (1962), *Brevi note sul rapporto fra costituzione e politica nel pensiero di Carl Schmitt*[87] (1973), and the 9th edition of *Istituzioni di diritto pubblico*[88] (1975).

In the first period (1931–1943), Mortati's political force is referred to as a 'party' (a term that, as noted, is meant in a sense different from the usual one).[89] The terminological point betokens a conceptual one. Political forces as parties are conceived as highly organized and deeply integrated. The organization is supposed to rely on a militant elite, strongly attached to the aim, and capable of steering the whole organization toward taking over the state's apparatuses. This picture is tailored to the mass-based parties of the first half of the 20th century—especially to the reality and the ideology of the Italian Fascist party—and is deeply influenced by the Leninist model for parties.

In this period, Mortati also takes for granted the transparency of the material constitution and of the political forces behind it. The political force is the party as it presents itself in the political arena. Its aim is clearly manifest not only in the formal constitution but also in the party's various declarations of intents, and, above all, in the clear directions taken by its politics.[90]

What could the position of jurists be in a similar framework? The reconstruction of the law which jurists are engaged in requires, at any step, decisions about the criteria for identifying legally valid rules and interpreting them, as well as for assessing the legal correctness of both private and public activities. The material constitution places normative constraints on these decisions: it establishes the formal criteria that ought to be followed in identifying formally valid legal rules, but also the substantive criteria for determining their content, solving their antinomies, filling their gaps, and justifying derogations from them, as well as the criteria for assessing the legal correctness of any possible arrangement or activity, on top of, and sometimes against, what is prescribed by formally valid rules.

The material constitution, recall, has both a political nature and a legal status. On the one hand, it is a political aim, a view about the overall organization of the statal community and the configuration of interests that should be promoted within it. On the other hand, it is the only normative standard that can be said to be 'legal' in a positive sense, that is, *effective* – it is, recall, the political aim

[85] See, among all, M. Dondi, *L'eco del boato. Storia della strategia della tensione 1965-1974* (Roma-Bari: Laterza, 2015); B. Tobagi, *Piazza Fontana. Il processo impossibile* (Torino: Einaudi, 2019).

[86] C. Mortati, 'Dottrine generali' n 67 above.

[87] C. Mortati, 'Brevi note' n 67 above.

[88] C. Mortati, n 21 above.

[89] C. Mortati, n 12 above, 71-73.

[90] ibid 138-144.

that has come to inform, to a sufficient degree, the life of the state community, prevailing over other conflicting views, thanks to the dominant position of power achieved by the political force that bears it. It is the material constitution, therefore, that ultimately fixes the boundaries of the 'positive' law, the law as it effectively is. If jurists want to operate within these boundaries, they need to let their operations be guided, in the last resort, by the material constitution.

Jurists may accept to move within the frame of the material constitution because they endorse it. But they may also accept it simply because they subscribe to a conception of their role on which they are bound to operate within the boundaries of 'positive' law, and the boundaries of 'positive' law are ultimately fixed by the material constitution. In both cases, they act as custodians of the material constitution. In the former case, they are a proper part of the political force. In the latter case, they carry out their activities as jurists detached from their own political preferences, according to the demands of the professional identity they have paid allegiance to. If, instead, they openly or covertly adopt standards that are incompatible with the material constitution, they are simply moving outside the boundaries of positive law. Their activity cannot count as legal science properly, that is, as a science of positive law. It is, at most, political activity, carried out in the name of a political aim which has not reached the legal status of a material constitution.

Such an account of the role of jurists is a paradigm of a political conception of the law: the space of operation of jurists *qua* legal scientists is entirely fixed by the material constitution, that is, by the will of the dominant political force. Up to this point, Croce and Goldoni are perfectly right.

In the second period (from 1945 to the late 1950s), Mortati's picture of the political force widens as to include the possibility of a compromise between formerly opposed forces[91] – an idea clearly inspired by the Constitutional Arch and the work of the Constitutional Assembly. The compromise is 'material', for it deals with the aim. It cannot be reduced to an agreement to keep 'fighting it out', only in the parliamentary arena rather than with guns. According to Mortati, a formal compromise of this latter kind could only work against a backdrop in which the main electoral forces have come to a sufficient degree of substantive agreement on the political aim.[92]

The political force arising from a material compromise is marked by a weak, unstable integration. The old oppositions are still present, though they are tempered by the new, emerging agreements. The material constitution does exist, but it is faint, and its degree of effectiveness tends to be relatively low. It is an extremely delicate period of change, jeopardized by the many forces

[91] C. Mortati, n 40 above, 37.

[92] C. Mortati, 'Brevi note' n 67 above, 150; n 51 above, 67; n 21 above, 37. On this point see M. Dogliani, n 77 above, 336-337.

attempting to disrupt the compromise from both sides.[93] In such a time, the role of the formal constitution, which usually channels the compromise, is of the most importance. The document's emotional salience strengthens the compromise, and the authoritative force that legal texts in general, and the formal constitution in particular, tend to have on jurists may help in securing their allegiance to the fragile material constitution.

And the jurists' allegiance is needed. While, in the abstract, the roles that jurists might take on are the same as the ones discussed above, their scope of action and their importance is, in a similar context, much larger. They can effectively contribute to helping the faint material constitution work its way into the legal practice, thereby increasing its effectiveness. Here the decisions made by even small numbers of jurists may have significant consequences. In face of a deeply established political force they are individually averse to, single jurists cannot but bear witness to their aversion, without relevant practical consequences. But under a material compromise, the situation is much more unstable, and even individual choices may make a big difference. The very existence of the material constitution is sensitive to attitudes and behavior of a relatively small number of jurists. We are not within a juristic conception of the law, but neither are we within the paradigm of a political conception.

The third period (the 1960s and 1970s) opens with a terminological turn. What in the first period was called 'party' is now called 'class'. The once 'dominant party' becomes the 'ruling class'.[94] Again, the terminological point betokens a conceptual one. Classes are represented by Mortati as having a much lower degree of organization – sparse groups that share quite similar and largely compatible interests, which tend to converge toward a common aim, to a significant extent through bottom-up processes. For a class to become the ruling class, it first needs to be the case that its component groups occupy local positions of power, and second that they find some form of top-down, intentional coordination. The relative weight of top-down processes, however, is much lesser here than it was in former parties, as is the degree to which shared interests and views are integrated into a coherent political project.[95]

The political force's lower degree of organization and integration corresponds to a much lesser transparency, if not opacity, of its consistency and of its aim. In particular, publicly declared political programs are suspected of not corresponding to the interests around which the class coalesces – they are formulas designed to attract consent, but what comes through from a critical number of members of the class is an inadequate commitment to them.[96] The possibility of a deep political dissimulation – so deep as to also affect the consciousness of the very same class,

[93] C. Mortati, n 40 above, 39.

[94] C. Mortati, 'Dottrine generali' n 67 above, 130-131. Croce and Goldoni give this terminological shift the importance it deserves (M. Croce and M. Goldoni, n 1 above, 177).

[95] See G. Zagrebelsky, n 17 above, XXX; S. Bartole, n 17 above, 526-527.

[96] C. Mortati, n 21 above, 406.

most of whose members misrepresent their true motivating interests (false consciousness) – calls into question the very prospect of reliably identifying the material constitution. What is it that matters more: a declared project of societal transformation which part of the ruling class is committed to, or the interest in preserving the actual distribution of power, which seems to drive the class as a whole?

Finally, in his last period Mortati concretely faces the possibility of a material constitution even fainter than the one created by a material compromise – so much fainter, in fact, that perhaps it does not even exist. To Mortati's eyes, the deeply conflicting views existing within the parliament and within society jeopardize the very possibility of a stable integration. The material unity of the state collapses into a melee of local powers and conflicts.[97] It is the triumph of radical pluralism, but, in Mortati's view, it is also the collapse of the state.

In a similar context, however, jurists are finally unbounded. They may recover their true task, the task of creatively searching for latent paths of integration within current social arrangements – the task of identifying deep social needs that are not consciously perceived, bringing them to awareness, endowing them with a legal status, and in this way helping to make it so that from the very structure of social practices a proper material constitution may emerge. In this way juristic science, Mortati says,

> 'discloses its true essence as an active part of the legal experience, as the true source of the law. Its influence is the more effective the more its inquiries are able to reach into the living texture of society, to capture the most pressing needs, and to find the solutions that satisfy them the most'.[98]

Mortati plumps for a juristic model of the law. And this model, quite surprisingly, is now proffered as capturing the 'true essence' of the jurists' role.

[97] C. Mortati, n 21 above, 37-38.
[98] C. Mortati, 'Brevi note' n 67 above, 152 (my translation).