

# TWO GENERATIONS OF ITALIAN PUBLIC LAWYERS COMPARED: VITTORIO EMANUELE ORLANDO E SANTI ROMANO

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**Abstract:** *In the first decades of the 20th century, in Italy, there was a lively debate within the school of public law on the transformation of the Liberal State into an Administrative State. The main architects of this dialogue were Vittorio Emanuele Orlando and Santi Romano. The former is the standard bearer of the purism of the legal method for which political, social and historical problems have no right of citizenship in the science of public law. For Santi Romano, on the other hand, the boundary between state and society, between the legal order and the political order tends to blur and, therefore, historical reality also appears within the narrow confines of scientific reflection.*

**Keywords:** *20th century, Italy, Liberal State, Administrative State, Vittorio Emanuele Orlando, Santi Romano*

Two generations of Italian public lawyers compared: Vittorio Emanuele Orlando and Santi Romano.

1. In the first decades of the 20<sup>th</sup> century, Italian public<sup>1</sup> law was the scene of intense and fruitful discussions that, on the one hand, sought to overcome the legacy of the Risorgimento, which was still imbued with the idea of the nation, and, on the other hand, attempted to construct a model of the State that, by overcoming the constraints of contractualism and natural law, would affirm itself as an integral product of law.

The theme of the 'social question', on the other hand, found very little space in this debate. In Germany, on the other hand, where Italian public

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<sup>1</sup> On Italian public law after national unification, see: M. Galizia, *Profili storico-comparativi della scienza del diritto costituzionale*, in *Archivio Giuridico*, CLXIV, 1963; S. Cassese, *Cultura e politica del diritto amministrativo*, Mulino, Bologna 1971; G. Cianferotti, *La crisi dello Stato liberale nella giuspubblicistica italiana del primo Novecento*, in A. Mazzacane (ed.), *I giuristi e la crisi dello Stato liberale in Italia fra Otto e Novecento*, Liguori editore, Napoli, 1986; P. Costa, *La giuspubblicistica dell'Italia unita: il paradigma disciplinare*, in A. Schiavone (ed.), *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, Laterza, Roma-Bari 1990; P. Grossi, *Scienza giuridica italiana: un profilo storico 1860-1950*, Giuffrè, Milano, 2000.

law turned its gaze in admiration, with the contributions of Lorenz von Stein and Gustav Schmoller, it had become widely known.

However, and this is what we intend to demonstrate in the following pages, in the reflection of two of the major exponents of the new school of Italian public law, Vittorio Emanuele Orlando and Santi Romano, the social problem emerges with overbearing force even if not as an autonomous object of analysis but as a collateral effect of the crisis of the 19th century liberal state.

Obviously in the two authors the problem takes on different contours (often antithetical), and a different incidence: barely hinted at in Orlando, more conspicuous in Romano. It is our intention to highlight this presence and not to evaluate its role, in relation to the overall proposal of the two authors (a theme that cannot be exhausted within the limits of a brief intervention).

2. In 1910, at the University of Rome, Vittorio Emanuele Orlando<sup>2</sup> read a speech for the inauguration of the academic year dedicated to the analysis of the concept of State. A very conventional speech that oscillated between philosophy of law and history of political and legal doctrines. Nothing more than a good academic exercise. It was only at the end (*in cauda venenum!*) that the professor's pompous language gave way to the polemics of the careful and acute observer of political and social phenomena:

*«Certo è, però, che in nessuna epoca, come nella presente, lo Stato ha avuto nei suoi cittadini altrettanti creditori e così molesti, così arroganti, così inesorabili: ogni giorno è una cambiale che scade e che si protesta con violenza, non scompagnata da villania. Individui e collettività premono, stringono, urgono: chiedono con minaccia, accettano con dispregio. Sono individui, che covano o proclamano propositi di folle ribellione tra l'indifferenza, se non tra l'indulgenza, dell'universale: sono collettività che, pur di conseguire un proprio interesse, non esitano a ferire a morte quelle che sono le condizioni essenziali per la salute e la vita dello Stato»<sup>3</sup>.*

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<sup>2</sup> On the education and thought of Vittorio Emanuele Orlando see: G. Cianferotti, *Il pensiero di Vittorio Emanuele Orlando e la giuspubblicistica italiana fra Ottocento e Novecento*, Giuffrè, Milan, 1980; M. Ganci, *Vittorio Emanuele Orlando*, La navicella, Rome, 1991; A. Galatello-Adamo, *Liberalismi: cultura del giovane Vittorio Emanuele Orlando*, Giappichelli, Turin, 1995; M. Fotia, *Il liberalismo incompiuto. Mosca, Orlando, Romano tra pensiero europeo e cultura meridionale*, Guerini, Milan, 2001, pp. 77-120.

<sup>3</sup> V.E. Orlando, *Sul concetto di Stato*, in Id., *Diritto pubblico generale. Scritti vari (1883-1940) coordinati in sistema*, Giuffrè, Milano, 1940, p. 21. This is a speech read on 5 November 1910, at the inauguration of the academic year at the University of Rome.

It is not difficult to perceive Orlando's discomfort and annoyance towards certain tendencies characterizing the tumultuous Italian social reality in the first decade of the century, although he considered them transitory. However, it is impossible not to notice how not even the most lucid supporter of the autonomy of the science of public law is able to escape the pressure that organised interests exert on every field of social sciences.

About fifteen years after his 1910 paper, Orlando tackled the theme of the "Stato sindacale"<sup>4</sup> with greater theoretical breadth and intensity. This work is a long dialogue with his pupil Santi Romano and with what the latter had theorised in *Lo Stato moderno e la sua crisi* and *L'ordinamento giuridico*.

However, it must be made clear that the Sicilian jurist's intention was exactly the opposite of that of Santi Romano. For the latter, in fact, the time was ripe for the legal recognition of the presence of organised interests<sup>5</sup>. Moreover, the pluralism of legal systems and interests, to which Romano's institutionalist theory tended, went beyond the classical schemes of the Italian school of public law. For Orlando, on the contrary, the whole theme of the union state was not at all foreign to the science of traditional public law.

Orlando is explicit in declaring that the problem raised by the presence of organised interests can "be considered in the same way as those principles of traditional science that summarise a long course of studies and a large number of studies"<sup>6</sup>. In fact, in the first place, the principle according to which the individuals of a collectivity tend to constitute smaller collectivities for the defence of particular ends is also widely recognised by traditional doctrine. The most delicate aspect would concern the case in which the sub-collectivities put forward a request for institutional recognition of their own interests. But also this hypothesis is not extraneous, in Orlando's opinion, to public law. When the organisation and the activity of a group, constituted on a professional or economic basis to protect its own interest, are recognised as institutes of law, the same sub-collectivity becomes "an organic element of the composition of the

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<sup>4</sup> V. E. Orlando, *Lo Stato sindacale nella letteratura giuridica contemporanea*, in *Rivista di Diritto pubblico*, Rome 1924, republished with the same title in Id., *Diritto pubblico generale. Scritti varii (1883-1940) coordinati in sistema, op.cit.*, pp. 319-333. On the subject of the *Stato Sindacale*, see the essay by S. Cassese, B. Dente, *Una discussione del primo ventennio del secolo: lo Stato Sindacale*, on *Quaderni Storici*, A. VI, III, September- December 1977, pp. 943-961.

<sup>5</sup> On the representation of interests, see: J.K. Kaiser, *La rappresentanza degli interessi organizzati*, Giuffrè, Milano, 1993; A. Scalone, *Rappresentanza politica e rappresentanza degli interessi*, Angeli Editore, Milano, 1996; L. Ornaghi, S. Cotellessa, *Interesse*, Mulino, Bologna, 2000.

<sup>6</sup> *Ibidem*, p. 320.

State". With this, any heterodox character of the theory of the trade union state is defused and brought back into the fold of the reassuringly traditional theory of modern public law.

Vittorio Emanuele Orlando inherited from post-unification Italian public law the conceptual framework dominated by the State-society opposition (which dominated the entire nineteenth-century European disciplinary field), in which the image of the social field is clearly positivistic. This approach conceives of the social sphere as an organism composed of groups, with specific internal dynamics, whose relations contribute to creating a whole that can be conflictual or collaborative, depending on the case. In any case, in this model the complexity of the social and the need for continuous analysis, preparatory to the elaboration of the public discourse, is never in doubt.

Orlando's theoretical move consists in depotentiating the richness and irreducibility of the elements that make up society, contracting and concentrating the binomial society-state in that of romantic and historicist ancestry, people-state. Savigni's concept of the people, devoid of internal economic-professional articulations, is particularly homogeneous with an organicist vision, such as Orlandi's, of the state. In this vision, the people cannot even be analysed outside of the link with the state, because it is only in the state that the irrationality of the multitude is realised and offers itself to the gaze and investigation of the theorist. From the people one 'jumps' directly to the State, which thus becomes the unquestionable foundation of legal and public knowledge. It is obvious that in such a paradigm conflict appears as an essentially degenerative phenomenon, as the failure of the state's ability to organise and govern the antagonistic and insufferable forces of society. Orlando's state-centric vision is therefore a political-ideological choice functional to the reaffirmation of a traditional reading of public law, which, in front of the economic-political upheaval of the first decades of the 20th century, instead of a radical re-elaboration requires, in Orlando's opinion "only" a partial revision, moreover in the wake of a reassuring continuity with the assumptions of the discipline elaborated in the period following the French Revolution.

The diaphragm between the state and society cannot be broken, nor can the related diaphragm between the legal order and the political order. It follows that everything that is upsetting in the economic, productive and social spheres at the turn of the nineteenth and twentieth centuries can, at most, have an effect on the political orientation of the state, but can never overflow from it and affect the legal life of the state, which is completely impervious to the swirling effervescence of social relations.

3. A year before Orlando's essay, *Il concetto dello Stato* (The Concept of the State), Santi Romano<sup>7</sup> tackled with much greater insight and complexity the theme of the crisis of the liberal state as a consequence of the affirmation, within it, of intermediate bodies carrying specific organised interests. The start of Romano's reflection is of a strictly legal order. The formation of the State-person as a mature product of the great German school of public law during the 19th century. What is the fundamental principle of modern public law? Santi Romano answers that it consists in «the impersonality of public power, or rather the personification of power by means of the State, itself conceived as a person [...] an immaterial person, but a real one; an entity that is not fictitious and imaginary, but that, despite not having a body, succeeds by means of delicate and marvellous juridical devices, in forming, manifesting and imposing its own will; not a shadow or spectre, but a true principle of life, operating, if not by means of an organism, in the true and strict sense of the word, with the aid of a set of institutions adapted and harmonised for this purpose. A marvellous creation of law»<sup>8</sup>.

Although the Italian jurist considers the State to be the product of law, he does not fail to emphasise, partly contradicting himself, that the origin of the State lies in a delicate balance of social forces that are the result of a long historical process. In fact, he writes that the State does not want to be and appear to be the organ of a class and the expression of its domination, but «a complete synthesis of the various social forces; the highest expression of that cooperation between individuals and groups of individuals, without which there is no well-ordered society; supreme regulatory power and therefore a powerful means of balance»<sup>9</sup>. This balance is manifested in the aim of public institutions to ensure the collective wellbeing, an aim which in turn is rooted in the «sentiments of equity, humanity and solidarity»<sup>10</sup> characteristic of the present age.

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<sup>7</sup> On Santi Romani see: S. Cassese, *Ipotesi sulla formazione de L'Ordinamento Giuridico di Santi Romano*, in *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, n. 1, 1972, pp. 243-283; M. Fioravanti, *Per l'interpretazione dell'opera giuridica di Santi Romano: nuove prospettive di ricerca*, in *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, no. 10, 1981, pp. 169-219; AAVV, *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano*, Giuffrè, Milano, 1977; M. Fotia, *Il liberalismo incompiuto. Mosca, Orlando, Romano tra pensiero europeo e cultura meridionale*, *op.cit.*, pp. 121-178.

<sup>8</sup> S. Romano, *Lo Stato moderno e la sua crisi, inaugural speech of the academic year 1909-1910*, University of Pisa, published in *Rivista di diritto pubblico*, Milan, 1910. The quotation, taken from the volume bearing the same title and published by Giuffrè in Milan in 1969, is on page 8.

<sup>9</sup> *Ibidem*, p. 9.

<sup>10</sup> *Ibidem*, p. 11.

Well, this admirable creation is, for Santi Romano, at the dawn of the 20th century, in a phase of rapid decline. The reason for this eclipse is due to the accentuation of formidable social contrasts. Contrasts arising from the constitution, within the modern state, of associations that group individuals together on the basis of their economic interests. There is nothing artificial or induced about this resurgence of corporative tendencies. It is a necessary process due to a limitation of European liberalism which, after the French Revolution, gave rise to a simplistic state architecture. It recognised only two social actors: the state and the individual. This caution stemmed from the fear that the intermediate associations against which the state had fought a long and strenuous battle to assert itself might resurface and weaken the unity of state sovereignty.

Santi Romano defines these corporative tendencies (which are necessary in societies that have reached a high level of complexity), which strongly emerge in the bosom of society and disrupt the institutional structure of the state, as syndicalism. With the specification that «if we want to use the word syndicalism to refer to such a phenomenon, this word should be used in a very broad sense, and not only to designate workers' organisations and, even less, those among them that are more or less revolutionary»<sup>11</sup>.

The outcome of this process is, for Romano, the increasingly accentuated disconnection between state and society (the distinction between state and society is one of the cornerstones of the modern Italian school of public law). Society, in fact, progresses, in its fundamental lines, outside the law, according to its own criteria that, at a given stage of its development, are in contradiction with a legal system that is no longer homogeneous with them. The legislator and jurisprudence have had to take note of this process and adapt. The result is, as Romano effectively writes, that «modern public law does not dominate, but is dominated by a social movement, to which it is hardly adapting, and which in the meantime governs itself with its own laws»<sup>12</sup>.

Romano's hope is that corporative tendencies, instead of stripping the modern state of its foundations, will help to fill the gaps that constitutively accompany it, completing it and adapting it to the new tasks that modern society calls upon it to perform.

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<sup>11</sup> Ibidem, p. 13. Shortly before, Romano had briefly listed these associations: «*they are federations or workers' unions, patronage unions, industrial, mercantile, agrarian and civil servants' unions, cooperative societies, mutuality institutions, chambers of work, resistance or welfare leagues, all constituted on the principle indicated, from which they derive their collective physiognomy*», Ibidem, p. 12.

<sup>12</sup> Ibidem, p. 15.

However, it is the firm conviction of the Italian jurist that the unavoidable need for a superior entity that encompasses and coordinates intermediate organisations is still valid and that this need can only be represented by the State.

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