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Authoritarian Constitutionalism: an Oxymoron?
The Case of Costantino Mortati's Early Writings (1931-1940)

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Authoritarian Constitutionalism: an Oxymoron? The Case of Costantino Mortati's Early Writings (1931-1940)

Orlando Scarcello*

Abstract

In this paper I claim that "authoritarian constitutionalism" is not an oxymoron as it may seem. A series of authoritarian practices have always characterized constitutionalism. Among them, I examine the case of calls for executive dominance in the context of a limited, although not fully erased, separation of powers. After briefly showing that these calls are well alive today, I consider the ideas of the Italian constitutional lawyer Costantino Mortati (1891-1985). A leading scholar in his country, who contributed to drafting of the current Constitution, in his early writings in the Thirties he tried to conceptualize Italy's transition from a liberal State to the Fascist regime and to reconcile some degree of separation of powers with a strong executive governing in an effective manner, instead of merely executing the will of the Parliament. This, I argue, exemplifies how calls for executive dominance are not new in modern constitutionalism, but part of its "dark" legacy.

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1. Introduction

In the last few years, the problem of authoritarian tendencies within democratic nations has become widespread enough to reach the mainstream media.[1] Similarly, the issue of authoritarian (or illiberal) constitutionalism has been widely discussed in the specialized legal scholarship.

"Authoritarianism" can be defined as a system of government in which "all decisions can potentially be made by a single decision maker whose decisions are both formally and practically unregulated by law, though as students of authoritarian constitutions have emphasized, they might be regulated by conflicts of power, even rather structured and predictable conflicts".[2] If one considers the famous definition of "constitutionalism" according to which "constitutionalism has one essential quality; it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law",[3] the contrast results immediately striking. The two notions seem in open contradiction and the very idea of authoritarian constitutionalism has been consequently defined in part of the relevant literature as "an oxymoron".[4]

Not everyone agrees with this apparently straightforward conclusion though. An alternative view focuses on the combination of typically constitutionalist and typically authoritarian elements as the characterizing features of authoritarian constitutionalism. This would therefore be not an oxymoron, but a sort of intermediate system of government extrapolating elements from both traditions. "Authoritarian constitutionalism", exactly as its rivals, would be a legal ideology, a set of strictly connected beliefs, values, and tropes which guide legal argumentation and

[1] <https://www.nytimes.com/2018/05/08/opinion/democracy-authoritarian-constitutions.html>.
[2] M. Tushnet 'Authoritarian Constitutionalism – Some Conceptual Issues' in T. Ginsburg - A. Simpser *Constitutions in Authoritarian Regimes* (CUP 2014) 44-45.
[3] C. McIlwain *Constitutionalism: Ancient and Modern* (Cornell University Press 1947) 20-21.
[4] G. Halmai 'Populism, authoritarianism and constitutionalism' 20 *German Law Journal* (2019).

interpretation of existing institutional settings or drive their reform.[5] Ideologies can be dominant or recessive within a certain (legal) culture and coexist with competing ones.

Pivotal studies have focused on the mixture of typically constitutional settings (separation of powers, judicial independence, freedom of speech and of the press) and of authoritarian tendencies (sedition and libel laws, electoral rules) in countries outside the typically European-North American core of modern constitutionalism.[6] It is my view, however, that it is worth focusing on the core too,[7] thus on the countries often perceived as yardsticks to evaluate the adherence to constitutionalism of others.[8] Recent scholarship has in fact already started to investigate the authoritarian tendencies of countries well within the heartland of Western constitutionalism.[9] These include the intrinsically authoritarian character of the constituent power, emergency powers and states of emergency, prerogative powers, even discretion of the administration or the exclusionary character of militant democracies.[10] There may be debate on the heuristic power of pooling together such diverse phenomena, but the general point is that even the core of the Western tradition of constitutionalism is not exempt from some degree of authoritarian constitutionalism. In what we call "liberal democracies" authoritarian constitutionalism is usually a

[5] D. Kennedy 'Authoritarian constitutionalism in liberal democracies', in Helena Alviar García - Günter Frankenberg (eds) *Authoritarian Constitutionalism Comparative Analysis and Critique* (Edward Elgar 2019).

[6] See the in-depth study of Singapore by M. Tushnet 'Authoritarian Constitutionalism' 100 *Cornell Law Review* (2013). See also the literature on the rule of law backslide in Eastern Member States of the European Union. E.g. L. Pech- K.L. Schepple 'Illiberalism Within: Rule of Law Backsliding in the EU' 19 *Cambridge Yearbook of European Legal Studies* (2017); P. Castillo Ortiz 'The Illiberal Abuse of Constitutional Courts in Europe' 15 *European Constitutional Law Review* (2019); M. Smith 'Staring into the abyss: A crisis of the rule of law in the EU' 25 *European Law Journal* (2019).

[7] See the historical analysis of the notion of "constitution" by D. Grimm 'The Origins and Transformation of the Concept of the Constitution' in *Constitutionalism* (OUP 2016).

[8] Consider, for instance, the recent book by S. Bartole on the role of the Western European tradition of constitutionalism in shaping the transition of Eastern Europe towards liberal-democratic constitutionalism. See S. Bartole *The Internationalization of Constitutional Law* (Hart Publishing 2021) 33-42.

[9] G. Frankenberg 'Authoritarian constitutionalism: coming to terms with modernity's nightmares' and D. Kennedy 'Authoritarian constitutionalism in liberal democracies' both in H. Alviar García - G. Frankenberg (eds) *Authoritarian Constitutionalism Comparative Analysis and Critique* (Edward Elgar 2019). See also G. Frankenberg, *Authoritarianism* (Edward Elgar 2021), especially chapter 3. Kennedy even uses the wording "gallery of shame" to denote authoritarian practices in Western constitutions. See 'Authoritarian constitutionalism' 175.

[10] The list is extrapolated from the third chapter of G. Frankenberg's *Authoritarianism*.

recessive legal ideology among officials, scholars, practitioners, and citizens at large.[11] However, a recessive ideology is an ideology nonetheless and it can condition both institutional settings and the interpretation of existing legal provisions.[12] Thus, "authoritarian constitutionalism" would be far from being an oxymoron as it refers to legal orders in which a certain amount of institutions or practices typically approved by authoritarian systems too, is deployed.

In the rest of the paper, I wish to focus on one typical aspect of authoritarian constitutionalism frequently transposed into liberal democracies, namely the concentration of powers in the hands of the executive and its dominance over other powers. I argue that one of the main features of authoritarian constitutionalism, perhaps the most important one, is that it pushes the balance of powers towards the executive and attempts to make it the center of governmental action. This is one way to understand why the notion of "authoritarian constitutionalism" is only apparently self-defeating: authoritarian constitutionalism becomes full-fledged authoritarianism only when it calls for erasure of the separation of powers, but there are intermediate steps between the latter completely collapses.

To show this, I will proceed as follows. I will first focus on the separation of powers, give a brief characterization of it, and define the "unbalance" towards the executive or executive domination as one of the main traits of authoritarian constitutionalism. I will also briefly recall a couple of recent contributions by prominent scholars in the very core of Western constitutionalism (USA and UK) as they exemplify calls for a much-strengthened executive, although not with the aim of decisively subverting the current constitution of their respective countries. In this very specific sense, they are instances of authoritarian constitutionalism (§2). I will then consider the roots of these ideas: this "genealogical" exposition will serve two aims. First, it confirms that a certain degree of authoritarian constitutionalism *qua* executive dominance is not

[11] Kennedy 'Authoritarian constitutionalism' 162: "In spite of the problem of definition, both A[uthoritarianism] and republicanism (or simply R) understand A to be marginal and transgressive in relation to R as the dominant legal/political culture of 'the West'".

[12] Here I am relying on the distinction between a legal provision *per se*, the legal text, and the interpretation (legal norm): from the same text(s) various norms may follow. On such distinction see F.P. Schecaira 'Sources of Law Are not Legal Norms' 28(1) *Ratio Juris* (2015).

new in Western constitutionalism. Second, it allows understanding in more depth a few current calls for a strengthened executive (§3). I will then introduce the much neglected yet extremely interesting case of an author performing the same task one hundred years ago: it is the case of the Italian constitutional lawyer Costantino Mortati in his early writings. I will examine how he tried to make sense of the deep constitutional transformation and executive strengthening that Italy faced during the Fascist era, while at the same time maintaining that the country remained a *Rechtsstaat* based on some degree of separation of powers. (§4). Some remarks will be added in the conclusion (§5), connecting Mortati's theory to contemporary authoritarian constitutionalism.

2. Authoritarian Constitutionalism and the Separation of Powers

The separation of powers is notoriously one of the central tenets of Western constitutionalism. "Separation" does not merely refer to strict autonomy of one power from the other, but also to the interaction between them.[13] The judiciary reviews legislation and administrative acts, the executive appoints judges, the legislative holds the executive accountable through confidence votes and parliamentary committees. These interactions generate a sort of "balance" between powers.[14] Indefinite and hard to measure as this concept surely is,[15] it restitutes the intuitive idea that there is some equilibrium between the powers of the State in liberal-democratic orders.

In so-called legal constitutionalism, the emphasis is on the judiciary as the ultimate guardian of the constitution; political constitutionalism focuses on the legislative as

[13] Some even speak about "cooperation" between separate powers. See. A. Kavanagh 'The Constitutional Separation of Powers' in D. Dyzenhaus - M. Thorburn (eds) *Philosophical Foundations of Constitutional Law* (OUP 2016) 221-239.
[14] C. Möllers 'Separation of Powers' in R. Masterman - R. Schütze *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 238-239.
[15] A. Sajó - R. Uitz *The Constitution of Freedom – An Introduction to Legal Constitutionalism* (OUP 2017) 127-139.

the dominant power.[16] The case of arguing for the centrality of the executive is different and more problematic. The executive is notoriously a particularly dangerous branch: to quote Philipp Dann, "[g]overnments can pose a threat to constitutional authority. As institutions, they pre-date constitutional regimes and are structurally least sympathetic to its limitations".[17] Constitutional theories calling for a shift in the balance of powers towards the executive are, therefore, usually regarded with suspicion. Kim Lane Scheppele, for instance, is crystal-clear in specifying that "[l]oosening the bonds of constitutional constraint on executive power through legal reform is the first sign of [what she calls] the autocratic legalist" and that "[t]he move from hardball democrat to legalistic autocrat is achieved by undermining constitutionally entrenched checks on executive power".[18]

More deference towards the administration by the courts, vast delegation of legislative powers to the executive through Henry VIII-style clauses by Parliaments,[19] prolonged emergency powers in periods of crisis are all familiar (and often widely accepted) measures that reinforce the executive and generate a sort of executive dominance without violating the classical separation of powers. When exactly the erosion of the legislative and the judiciary becomes so pronounced to make of the latter mere empty shells, is not easy to determine. At some point, executive dominance will become mere authoritarianism. Also, proponents of a constitutional form of authoritarianism may still secretly favor proper authoritarianism under the

[16] J.A.G. Griffith 'The Political Constitution' 42(1) *The Modern Law Review* (1979) and R. Bellamy *Political Constitutionalism* (CUP 2007). On the distinction between the two see A. Kavanaugh 'Recasting the Political Constitution: From Rivals to Relationships' 30(1) *King's Law Journal* (2019) 66: "[...] political constitutionalism can be described loosely as a general pro-Parliament/anti-court outlook on public law issues, whereas legal constitutionalism may be grounded in a more supportive orientation towards judicial power and a sceptical view of elected politicians". See also R. Bellamy 'Constitutionalism' in *Encyclopedia Britannica* (2019) available at <https://www.britannica.com/topic/constitutionalism>. The view that such distinction is exaggerated is supported by A. Latham-Gambi 'Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?' 40(4) *Oxford Journal of Legal Studies* (2020).

[17] P. Dann 'Governments' in R. Masterman - R. Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 361. See also A. Sajó - R. Uitz *The Constitution of Freedom* 267-269.

[18] K. Lane Scheppele 'Autocratic Legalism' 85 *The University of Chicago Law Review* (2018) 549 and 581.

[19] Here I am using the typically British wording used to refer to particularly wide discretion left to the executive in cases of delegated legislation. See P. Leyland *The Constitution of the United Kingdom – A Contextual Analysis* (Hart Publishing 2016) 80-81. Under different etiquettes, similar problems arise in other jurisdictions too.

cloak of the former: there is no easy way to distinguish the sincere supporters of a stronger executive from authoritarians in disguise. However, distinguishing the two theories is not easier than distinguishing political constitutionalism from a doctrine of the supremacy of the Parliament so pronounced to give rise to the tyranny of the majority. Most importantly to our aims, however difficult to determine, a conceptual distinction between the two is possible.

Note that authoritarian constitutionalism is in tension with *liberal*, not necessarily with *democratic* constitutionalism:[20] the growingly empowered executive will consider its legitimacy as directly or indirectly derived from the people through ballots, referendum, plebiscites, and even acclamation or silent approval. It is the liberal variant of constitutionalism, with its emphasis on limited and functionally separated power and on rights guaranteed in court against administrative action,[21] that is mostly at odds with authoritarian constitutionalism.[22]

A couple of recent contributions by prominent Western legal scholars show the kind of shift towards the executive in the balance of powers that may fall under the etiquette of "authoritarian constitutionalism", in the limited sense just defined. Here I am referring to a mixture of proper academic works and short articles or posts addressed to a wider audience. This makes them interesting as they combine the accuracy and length of proper academic works with the vast audience that short articles and blogposts can reach. In other words, the message seems directed to both specialized addressees and to the public opinion at large. Moreover, the contributions I am referring to were conceived, respectively, by American and British scholars. The USA and the UK are, as previously suggested, well within the core of Western (liberal) constitutionalism: the fact that such works were conceived in the heartland of the tradition they attempt to profoundly modify is particularly interesting.

[20] See the distinction in R. Schütze 'Constitutionalism(s)' in R. Masterman - R. Schütze (eds) *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 54-60.

[21] Despite the various forms that liberalism can assume (and in fact has assumed), the idea that human beings are endowed with (at least some) rights and that these must be preserved from the State by separating powers, even against the will of the majority, seems to belong to a common core of most varieties of liberalism. See A. Ryan *The Making of Modern Liberalism* (Princeton University Press 2012) 21-30 and 38-40.

[22] K. Lane Scheppele 'Autocratic Legalism' 557-563.

I am specifically referring at the claims recently made by prominent scholars as Adrian Vermeule (in the USA) and John Finnis and Richard Ekins (in the UK).

Vermeule explicitly states that it is possible to divorce democracy from liberalism and experiment (and praise) forms of "illiberal democracy" as in the case of Poland or Hungary.[23] Recently a kind of "illiberal legalism" under the label of "common good constitutionalism"[24] was even proposed as a new conservative theory of constitutional interpretation for the USA.[25] In method, it shall be a Dworkinian doctrine, looking for a moral reading of the Constitution, but its main value shall not be the maximization of individual autonomy or the minimization of abuse of power (pillars of liberalism), but the realization of a common good. This is summed up by the triad "peace, justice, and abundance", grounded on solidarity and subsidiarity among people, and opposed to individual self-realization as the main goal to be reached by interpreting the constitution.[26] The main institutional tool for this deep societal transformation through legal interpretation shall be "a powerful presidency ruling over a powerful bureaucracy": "[b]ecause the *ragion di stato* is not ashamed of strong rule, does not see it as presumptively suspect in the way liberalism does, a further corollary is that *authority* and *hierarchy* are also principles of constitutionalism".[27] The separation of powers must (partially) bend to the needs of

[23] <https://thejosias.com/2018/05/09/liberalisms-fear/>.
[24] <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>
[25] An extensive explanation of Vermeule's conception of the common good can be found in C. Casey '"Common-Good Constitutionalism" and the New Battle over Constitutional Interpretation in the United States' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725068>.
[26] Accordingly, "[t]he [Supreme] Court's jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable under a regime of common-good constitutionalism. The claim, from the notorious joint opinion in Planned Parenthood v. Casey, that each individual may "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after". So will the currently dominant views on free-speech, free-speech ideolog, and property and economic rights "insofar as they bar the state from enforcing duties of community and solidarity in the use and distribution of resources".
[27] See also <https://mirrorofjustice.blogs.com/mirrorofjustice/2019/03/bureaucracy-and-mystery-.html>; <https://iusetiustitium.com/the-living-voice-of-the-law/>.'

good government that the executive is in the position to ensure.[28] Judges, in particular, shall be as deferent as possible to the executive.[29]

On the other side of the Atlantic, the British debate was mostly triggered by the Brexit process. On the "Judicial Power Project", hosted by the conservative think-tank Policy Exchange, in 2016 Richard Ekins published a sort of *manifesto*:[30] the judicial power in the UK, driven by the Court of Justice of the European Union (and to a minor extent by the European Court of Human Rights), is running out of control. Leaving the EU would finally free the UK from the subjection to the CJEU's integrationist jurisprudence and from the pernicious influence of EU law (especially its Charter of Fundamental Rights) on British judges. In the long run human rights' reform should continue by amending the Human Rights Act, governing (and reducing) the influence of the ECtHR on domestic judges, and perhaps at some point even repealing the European Convention itself. Mostly this program is justified in terms of restoration of full Parliamentary sovereignty,[31] but the interpretation of what "parliamentary democracy" means turns out to be a rather tricky issue: in 2019, a commentary by Finnis on the UK Supreme Court's voiding of PM Johnson's decision to force parliamentary prorogation[32] in a crucial phase of the Brexit negotiation was telling.[33] Prorogation was in Finnis' view an act of high politics to be decided by the Government and the Court simply minimized "the high and burdensome responsibility of carrying on the government of the United Kingdom on behalf of the

[28] See also a couple of academic works which substantively argue in favor of a less-limited executive branch: A. Vermeule 'Optimal Abuse of Power' 109(3) *Northwestern University Law Review* (2015); Id. 'The Publius Paradox' 82(1) *The Modern Law Review* (2019). In other works, he described in detail the expansion of executive authority in American constitutional law. E.g. E. Posner - A. Vermule *The Executive Unbound: After the Madisonian Republic* (OUP 2010).

[29] <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/a-confusion-about-deference.html. >.

[30] <http://judicialpowerproject.org.uk/wp-content/uploads/2016/07/R-Ekins-Brexit-and-judicial-power-21-July-2016.pdf >.

[31] "Brexit promises to free the UK from subjection to the rule of the CJEU, which is an important dimension in the restoration of parliamentary democracy", *ivi* 2.

[32] R (Miller) v Prime Minister [2019] UKSC 41, [2020] AC 373 ('Miller II').

[33] <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf>. For a critique of Finnis' reading of Miller II, see M. Elliot, 'Constitutional Adjudication and Constitutional Politics in the United Kingdom: The Miller II Case in Legal and Political Context' 16 *European Constitutional Law Review* (2020) 635-641.

free people that has elected its government by electing members of Parliament".[34] The Court unlawfully treated the Government as an administrative agency subject to judicial review. Again, the emphasis on the centrality of the executive and the unquestionability in court of its decision is strong.

These remarks share some common characteristics on both sides of the Atlantic. First, they seem to praise democracy over liberalism, meant as the political doctrine aimed at safeguarding individual rights (especially through courts). Second, they look at a strong executive as the proper recipient of the democratic mandate (although it is easier to understand the connection between the electorate and the executive in the US, where the presidency has independent legitimacy).[35] Finally, they also seem to be exploiting inner features of their own liberal democratic legal orders to transform them "from the inside" rather than explicitly calling for radical reform. A more prominent role of the executive over other powers is proposed, but other institutions are not going to be packed or subjugated. They will maintain most of their institutional powers and shall participate in the pursuit of the "common goal". The key role in making substantive choices on what the common good is and actively implement them, will belong to the executive.

To summarize, the views I have just recalled call for a reinforced executive legitimized by the popular will, one of the typical traits of "authoritarian" views of public law; yet they also instantiate forms of constitutionalism, for no project to radically move beyond the clearly liberal and democratic orders is elaborated. They exemplify the kind of shift towards the executive that move a legal order towards the apparently oxymoronic status of "authoritarian constitutionalism".

[34] Ivi 10. This is consistent with the view previously expressed by Finnis according to which limitations on government are desirable only to a certain extent, as long as they do not prevent government from successfully realizing the common good. See J. Finnis 'Limited Government' in Id. *Human Rights & Common Good, Collected Essays: Volume III* (OUP 2013).

[35] Thomas Poole even called the Finnis-Etkins view the "Executive Project" rather than the "Judicial". <https://www.lrb.co.uk/blog/2019/april/the-executive-power-project?referrer=https%3A%2F%2Faeon.co%2F >.

3. Old Ideas in New Clothes?

As it often happens in history, old ideas find new clothes. Executive dominance, one of the main features of authoritarian constitutionalism, is no exception. In this paragraph I argue that there are precedents in Western constitutionalism that can help us understanding the shift towards the executive upheld in remarks like Finnis' and Vermeule's.

One of the intellectual roots of both Finnis' and Vermeule's works recalled in the last paragraph surely lies in the natural law tradition of philosophers like Aristotle or Aquinas.[36] According to this view, the state shall create the conditions for the flourishing of human beings in all their natural dimensions: physical and intellectual growth, friendship, marriage, religious and cultural bonds. Flourishing will not regard people as individuals but most importantly as members of basic communities such as families, associations, local and religious communities. Only there it can properly happen. If a powerful executive with an articulated bureaucracy is the most effective instrument to promote the communities which are fundamental to human flourishing, so be it.

A second root of calls for executive dominance has been identified in conservative Catholicism.[37] Indeed, both Vermeule and Finnis are outspoken Catholics and a sort of revival of Catholic integralist legal and political thinking has been happening for years now.[38] The hierarchical, church-like structure of modern bureaucracies is seen as a powerful tool to promote the common good:[39] the executive in fact predates the liberal constitutional State and is now endowed with the immense power of the administrative state.[40] This stance does not represent the entire community of

[36] Casey makes the case for Vermeule's intellectual belonging to this tradition ('"Common-Good Constitutionalism" and the New Battle over Constitutional Interpretation in the United States' 22-23). As for Finnis, his belonging to the natural law tradition is extremely well know. See inter alia J. Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980).
[37] Kennedy 'Authoritarian constitutionalism' 165-167.
[38] M. Schwartzman – J. Wilson 'The Unreasonableness of Catholic Integralism' 56(4) *San Diego Law Review* (2019).
[39] <https://thejosias.com/2018/03/16/ralliement-two-distinctions/ >.
[40] A. Sajó - R. Uitz *The Constitution of Freedom* 284-287.

Catholic intellectuals nor the Church itself and it has been criticized internally too.[41] It remains, however, one of the most likely intellectual roots of the "executive" turn in public law.

A third root is more straightforward and easy to grasp for lawyers: it is the name of Carl Schmitt that comes out quite soon when trying to understand the propositions previously commented.[42] In the case of Vermeule, the Schmittian influence is explicitly admitted and easily recognizable.[43] As for the "British" side, in the words of Thomas Poole it similarly "treats established constitutional forms and norms as fungible, even disposable, and presses exceptional moments in the direction of a central authority delivering the 'will of the people'". This more familiar genealogy follows naturally from the conservative Catholic premises as Schmitt himself was Catholic. Many of his ideas are explicitly or implicitly recalled in the current stream of authoritarian constitutionalism.[44] In fact, Schmitt's exaltation of the role of the executive is well-known. Politics is the reign of societal irreconcilable divisions, in which each group fights for survival against the existential enemy: Catholics cannot tolerate the existence of Protestantism, whites cannot coexist equally with blacks, capitalists cannot accept the communist menace. Only the chief of the executive, the modern monarch, can rise above societal divisions and restore unity and social homogeneity once and for all by suppressing inimical social groups (the *hostis*)[45]. He will be supported by the people, yet not through the liberal ritual of elections (a

[41] <https://www.commonwealmagazine.org/church-within-church> ; <https://mosaicmagazine.com/response/uncategorized/2018/03/some-catholics-are-anti-liberal-but-the-church-is-not/>.

[42] See <https://verfassungsblog.de/schmitten-in-the-usa/>; <https://aeon.co/essays/carl-schmitts-legal-theory-legitimises-the-rule-of-the-strongman>; <https://www.lrb.co.uk/blog/2019/april/the-executive-power-project>. See also the more general analysis by P. Blokker 'Populism as a constitutional project' 17 (2) *International Journal of Constitutional Law* (2019).

[43] Note, however, that Vermeule's current claims are different from others he made in other writings on the intrinsically "Schmittian" character of the executive in the USA. E.g., see A. Vermeule 'Our Schmittian Administrative Law' 122 *Harvard Law Review* (2009). While he previously argued that de facto American administrative law is filled with black and gray holes and that these simply cannot be fully supervised by the judiciary (the classic pivotal institution in rule-of-law based legal constitutionalism), in the contributions I have just referred to the argument is normative: the existence of a deferent judiciary, opening black and gray holes, is explicitly favored.

[44] See again M. Schwartzman - J. Wilson 'The Unreasonableness of Catholic Integralism' 1043-1056.

[45] C. Schmitt *The Concept of the Political* (The University of Chicago Press 2007 [1932]).

distortion of real democracy in which voters pursue private aims in the ballots).[46] It is through direct acclamation or even silent approval that support will emerge.[47] He who performs this task is the sovereign,[48] able to impose order in the state of exception. Schmitt's head of the executive is a sorcerer and a messiah performing a miracle, a not rationally predictable nor legally constrainable ultimate decision in the wake of legality's suspension.[49] The modern picture of an executive taking decisions of high-politics to ensure the common good on behalf of the people and backed by a powerful hierarchical bureaucracy is to a certain extent beholden to Schmitt's views.

The intellectual roots quickly identified so far to explain recent authoritarian constitutionalism, both conservative Catholic and Schmittian, are useful heuristics. Here is also, however, where this paper departs from the current literature. Indeed, I would like to introduce another possibility, another "ghost from the past" that current authoritarian constitutionalism evokes. The call for executive preeminence in Western liberal democracies, I argue, is considerably close to the theory of public law proposed in the early Thirties by the Italian constitutional lawyer Costantino Mortati in his attempt to explain the changing legal system of the (at that time) Kingdom of Italy after the first decade of Fascist regime.

Clarification is immediately needed here: what I am suggesting is *not* a causal relation between current arguments on the need to concentrate power in the hands of the executive shifting the balance of powers and Mortati's ideas. Although his figure and views are particularly well-known, it is unlikely that his works are largely read and influential beyond the Alps (if only, because of linguistic barriers). I am suggesting, though, that there are similarities (or "family resemblances",[50] so to speak) between some of his ideas as expressed in the early Thirties and current authoritarian constitutionalism: by looking at the former we can perhaps better understand the latter.

[46] C. Schmitt *Constitutional Theory* (Duke University Press 2008 [1928]).
[47] *Ivi.*
[48] C. Schmitt *Political Theology* (University of Chicago Press 1985 [1934]).
[49] D. Dyzenhaus *Legality and Legitimacy* (OUP 1997) 174.
[50] Famously, see L. Wittgenstein *Philosophical Investigations* (Blackwell 1953) §§ 65-67.

There are two reasons why this connection is natural as well. First, despite a few distinctions, Mortati was deeply influenced by Schmitt.[51] Thus, a common Schmittian root unites contemporary calls for executive dominance and Mortati's views. Second, Mortati was a constitutional lawyer living the transition of the Italian constitution from the classic liberal phase to the Fascist era. This transformation did not happen in a sudden, momentous constituent phase. On the contrary, it was a process which lasted for years and slowly but steadily changed the domestic constitution. It took advantage of the weakness of the liberal-democratic institutions and of the flexible nature of the 1848 Constitution (the so-called Albertine Statute).

To briefly recapitulate, after the rise to power in 1922, Mussolini's premiership started a process of slow but steady change of the previous liberal State. In 1922, a new electoral law granted a two-thirds majority to the first party, which secured to the Fascist Party full control over the Chamber of Deputies after the manipulated elections of 1924. Two crucial Acts significantly enhanced the powers of the previous Prime Minister, now Head of Government (n. 2263/1925), and of the government (n. 100/1926), conferring wide legislative and regulatory powers to the executive and depriving the Parliament of the main check over the executive in parliamentary systems, the motion of non-confidence. In 1926, the remaining opposition deputies lost their seats as the Government declared their decadence: what remained of political pluralism was suppressed for good. A special Tribunal to adjudicate over political crimes was constituted in 1926 too. By 1929 the Fascist Party had decisively entered the Italian constitution: two Acts (n. 2693/1928 and 2099/1929) made the main organ of the Party, the Grand Council of Fascism, a state institution. It enjoyed

[51] M. Nigro 'C. Schmitt tra diritto e politica' 15 *Quaderni fiorentini per la storia del pensiero giuridico moderno* (1986) 715-719; M. Fioravanti 'Dottrina dello Stato-persona e dottrina della Costituzione. C. Mortati e la tradizione della giuspubblicistica italiana' in M. Galizia - P. Grossi (eds) *Il pensiero giuridico di Costantino Mortati* (Giuffrè 1990) 120-145; A. Catania '*Mortati e Schmitt*' in A. Catelani and S. Labriola, *La costituzione materiale* (Giuffrè 2001)109-128. See also C. Mortati 'Costituzione' (entry) in XI *Enciclopedia del diritto* (1962) and Id., 'Brevi note sul rapporto fra costituzione e politica nel pensiero di Carl Schmitt' 2 *Quaderni fiorentini per la storia del pensiero giuridico moderno* (1973). The following footnotes, as the present, will often rely on materials in Italian. This is inevitable as most of the works on and by Mortati are not translated in English, the *lingua franca* of modern scholarship. However, where possible I will try to refer to works in English to facilitate foreign readers. On the relation between Mortati and Schmitt, one can look at M. Croce - A. Salvatore *The Legal Theory of Carl Schmitt* (Routledge 2012) 131-139.

several advisory powers, especially in constitutional areas: all legislation changing the constitutional structure of the country (composition and powers of the Parliament and of the executive, unions and corporations, relations with the Catholic Church) had to be discussed in the supreme assembly of the Party before being reformed. Moreover, according to the new electoral law (1928) minor organs of the Party were to propose lists of candidates to be then reexamined by the Grand Council and later exposed to a plebiscite (only a yes-or-no to the unitary list of candidates was allowed). Many candidates came from "corporations" (bodies associating workers and employers by profession), the main link between the Party and the civil society and a powerful tool to break unions.[52] Finally, in 1939 came the repeal of the Chamber of Deputies, substituted by the unelected Chamber of Fasces and Corporations.

At the end of the process the Italian form of government had changed, yet it also involved partial preservation of the previous institutions (the Crown, administrative bodies like Ministries, ordinary and administrative courts). Lawyers like Mortati tried to make sense of the ambiguity: deep transformation through concentration of powers in the hands of the executive and of the Party, together with a certain persistence of previous institutions. They were experiencing, in other words, the kind of transformation that authoritarian constitutionalism purports to reach in contemporary legal orders: bending the institutions of a liberal order to their aims while not suppressing them (or at least not all of them). This makes of Mortati's thoughts a particularly interesting perspective to explain current transformations too.

A last caveat is necessary: what will follow is not a comprehensive view of Mortati's ideas. He was a long-lived and very influential lawyer,[53] with a large impact on Italian constitutional scholarship.[54] His tripartition of territory, people, and sovereignty, for instance, is still today the standard way for Italian lawyers to understand the

[52] For a wide exposition on the Fascist constitutional transformation, see C. Ghisalberti *Storia costituzionale d'Italia* (Laterza 2002) 336-382.
[53] Biographic notes on Mortati can be found in English in L. Rubinelli 'Costantino Mortati and the Idea of Material Constitution' 40(3) *History of Political Thought* (2019).
[54] A broad, introductory view on Mortati's ideas can be found in G. Bognetti 'Costantino Mortati e la Scienza del diritto' 4 *Quaderni costituzionali* (2011).

constitutive elements of the State.[55] Apart from being a scholar, he was a deputy for the Christian-Democrats at the Constituent Assembly in 1946. There he was member of the inner Commission that prepared the draft of the Constitution on which the plenary could then work.[56] From 1960 to 1972 he served as a judge in the Constitutional Court, where he is believed to have influenced the first cases in which the ICC elaborated the notion of the "supreme principles" of the Constitution.[57] This idea, in turn, will plant the seeds for the later counter-limits doctrine on the relations between Italian and supranational and international law, one of the most characteristic and still today influential doctrines developed by the Court.[58] His works and ideas, in other words, are numerous and various, and partly changed throughout the years.

One can realize why it is worth considering his ideas in detail: Mortati was not only a jurist of the regime, trying to explain the authoritarian turn of the country, he was also a "father of the constitution". He participated in the drafting of the new constitution, largely contributed to interpreting it as a judge, exercised (and still exercises) a vast influence on generations of scholars and lawyers at large. He cannot be dismissed as a parenthesis in the history of constitutional thought of the country. On the contrary, his persisting influence must be understood by taking into account both his thinking during the regime and his later views under the Republic.

It is on the first phase of his thinking that I will focus here. Later works are less interesting in a paper devoted to showing the kind of connections between

[55] See Mortati's handbook of public law, C. Mortati *Istituzioni di diritto pubblico* (Cedam 1962, 6th edition) 109-140.
[56] Mortati's militance as a Christian-Democrat (a Catholic party) may rise the doubt that his Catholicism must be close to the "integralist" variant examined in the last paragraph. This would be a misleading characterization: Mortati was close to the left-wing of the party. On Mortati's impact on the Constituent Assembly, see G. Amato 'Costantino Mortati e la Costituzione italiana. Dalla Costituente all'aspettativa mai appagata dell'attuazione costituzionale' in M. Galizia - P. Grossi (eds) *Il pensiero giuridico di Costantino Mortati* (Giuffrè 1990) 131-145 and F. Bruno 'Costantino Mortati e la Costituente' in F. Lanchester (ed) *Costantino Mortati costituzionalista calabrese* (ESI 1989).
[57] G. Itzcovich *Teorie e ideologie del diritto comunitario* (Giappichelli 2006) 214-220.
[58] Among many, see M. Cartabia 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' 173 *Michigan Journal of International Law* (1990).

authoritarian and non-authoritarian institutions that can characterize liberal democratic legal orders.

In particular, I will focus on *L'ordinamento del governo nel nuovo diritto pubblico italiano* ('The government in the new system of Italian public law', 1931),[59] his first book and a major attempt to conceptualize the transition from the liberal to the authoritarian state, and on a later but strictly consequential essay, *Esecutivo e legislativo nell'attuale fase del diritto costituzionale italiano* ('The executive and the legislative in the current phase of Italian constitutional law', 1940).[60]

This marks a significant departure from the current literature on Mortati: a series of recently published essays and book chapters in English, by both Italian and foreign scholars, has mostly focused on another of Mortati's major contributions, namely his theory of the "material" constitution and on the 1940 book *La costituzione in senso materiale* ('The constitution in a material sense').[61]

This body of commentaries in English is part of a wider renaissance in studies on early XX century institutionalism. Institutionalism was an attempt to conceptualize the rapidly growing pluralism of new social organizations (mass-political parties, trade unions, churches) which participated in the political life of late XIX-early XX

[59] C. Mortati *L'ordinamento del governo nel nuovo diritto pubblico italiano* (Studi dell'Istituto di diritto pubblico e legislazione sociale della R. Università di Roma 1931), later republished (Giuffrè 2000). Citations will refer to the most recent edition.

[60] C. Mortati, 'Esecutivo e legislativo nell'attuale fase del diritto costituzionale italiano' 14 *Annali della Università di Macerata* (1941), republished in C. Mortati *Raccolta di scritti, Problemi di politica costituzionale* (vol. 4) (Giuffrè 1972). Citations will refer to the most recent edition.

[61] See again L. Rubinelli 'Costantino Mortati and The Idea of Material Constitution'. See also M. La Torre 'The German Impact on Fascist Public Law Doctrine - Costantino Mortati's Material Constitution' and G. Della Cananea 'Mortati and the Science of Public Law: A Comment on La Torre' both in C. Joerges - N. Singh Ghaleigh (eds) *Darker Legacies of Law in Europe – The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003); M. Loughlin *Political Jurisprudence* (OUP 2017) 19-21; M. Goldoni - M. Wilkinson 'The Material Constitution' 81(4) *Modern Law Review* (2018) 574-578; J. Colón-Ríos *Constituent Power and the Law* (OUP 2020) 216-223; M. Croce - M. Goldoni *The Legacy of Pluralism - The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford University Press 2021) 136-183.

century European States.[62] According to this theory, law is not a set of norms,[63] but a series of organizations or "institutions", which pursue their goals through norms. Public bodies like States and their constituent elements, such as administrative agencies, are institutions themselves, but so are private actors like trusts, corporations, or unions. Institutionalism was an attempt to conceptualize the irresistible rise of mass movements (especially parties and unions) that between the end of the XIX and the beginning of the XX century changed Europe's political landscape. Consider, for instance, the advent of the Labour Party (the political voice of the unions) as the main left-wing political organization in the UK at the expense of the Liberals.[64] Similarly, think about the birth of the People's Party (1919) in Italy as a Christian-democrat (Catholic) party. Organized mass movements were gaining de facto influence in several countries. Institutionalism attempted at realistically accounting for the role of these movements from a legal point of view: they are, in Romano's vocabulary, genuine legal orders.[65] This theory had in the French scholar Maurice Hauriou[66] and in the just mentioned Santi Romano[67] its first and most prominent contributors. Schmitt himself was influenced by institutionalists in the Thirties,[68] and of course so was Mortati.

The idea of the material constitution is, in a sense, a development of this theory. Mortati focuses on the role of one specific institution, the dominating legal party (or coalition of parties), which unifies the various and conflicting forces (societal

[62] On institutionalism, see again M. Croce - M. Goldoni *The Legacy of Pluralism*. On Romano's institutionalism see also M. La Torre *Law as Institution* (Springer 2010) 97-134; Id. 'Institutionalism as alternative constitutional theory: on Santi Romano's concept of law and his epigones' 11(1) *Jurisprudence* (2020); M. Loughlin *Political Juriusprudence* (OUP 2017) chapters 6 and 7.

[63] Of course, this entails sheer opposition to Kelsen's "normativism", namely the idea that a legal order is a system of hierarchically ordered norms. E.g. see H. Kelsen *General Theory of Law and State* (Harvard University Press 1945) 123-136. This also excludes the later redefinition of institutions by Neil MacCormick. Indeed, by relying on the Hartian idea of secondary rules, MacCormick ultimately turns the argument around and explains institutions as complex groups of secondary norms. See N. MacCormick *Institutions of Law* (OUP 2007).

[64] P. Leyland *The Constitution of the United Kingdom* 108-109.

[65] S. Romano *The Legal Order* (Routledge 2017 [1946]) 50-63.

[66] M. Hauriou 'La théorie de l'institution et de la fondation. Essai de vitalisme social' 4 *Cahiers de la Nouvelle Journée* (1925).

[67] S. Romano *The Legal Order*. See also Id. *Lo Stato moderno e la sua crisi* (Vannucchi 1909).

[68] C. Schmitt *On the Three Types of Juristic Thought* (2006 [1934]). On the relations between Schmitt and Romano, see M. De Wilde 'The dark side of institutionalism: Carl Schmitt reading Santi Romano' 11(2) *Ethics & Global Politics* (2018) and M. Croce - A. Salvatore *The Legal Theory of Carl Schmitt* 109-123.

pluralism). The dominating party establishes a system of constitutional rules that is *not* neutral: it privileges some interests and social forces over others. In Mortati's view, the dominating party draws a line between winners and losers in the constitution. If we think about the arrangement of constitutional mechanisms under the general etiquette of "militant democracy",[69] we can envisage what Mortati has in his mind. However, while this friend-foe understanding of constitutional law reflects once more Schmitt's influence on Mortati, he does not accept Schmitt's faith in a messianic figure interpreting the will of the nation, taking the ultimate "sovereign" decision, and restoring homogeneity beyond potentially disrupting social pluralism. Mortati deems notions like "nation" or "people" as irrational. He is instead influenced by Romano's focus on emerging and self-organizing social forces, and (dominating) political parties have a special role in his view. This less messianic and more rationalistic view, allows to describe his institutionalism as "realist".[70]

Given the currently unfolding growth of works on institutionalism in these years, it is therefore natural that *La costituzione in senso materiale*, the most mature institutionalist moment in Mortati's thinking, also was the most discussed.

The phase I would like to focus on, however, partly predates the institutionalist turn and the idea of the material constitution. For foreign lawyers it is a still relatively unexplored period in Mortati's thinking, as most of the recent works on Mortati published in English discuss this phase only cursorily. Yet, it also is a crucial one: it was the phase in which Mortati, as already mentioned, tried to conceptualize the shift from the liberal to the authoritarian State and the coexistence of elements from the former and from the latter. The transformative power of unions and mass parties, movements and corporations, which self-organize in institutions beyond the State and yet have materially an impact on law beyond the formal structure of the constitution (an appealing idea for those who wish to reform the status quo) is less relevant here. *Rectius*, the political party in this phase of Mortati's thinking is a

[69] A. Sajó - R. Uitz *The Constitution of Freedom* 433-440. In fact, the Constituent Assembly in which Mortati served ultimately adopted "militant" measures by outlawing the Fascist Party by constitutional provision (XII Transitional and Final Provision). In this sense, the dominant parties founded a new constitutional order *against* the defeated fascists.
[70] M. Croce - M. Goldoni *The Legacy of Pluralism* 141-154.

pivotal social institution that restores unity, but this happens "from above", by taking over State's powers and weaponizing its coercive apparatus.[71]

The problem Mortati faces in these works is twofold. On the one hand, how to tame societal pluralism: this almost obsessive *leitmotif* is present in Mortati as it was in all other institutionalists. On the other hand, how to conceptualize the changes in Italian public law since the advent of the Fascist regime: was it an evolution of the previous liberal regime or was it better to think about it as an entirely different form of government? The two issues are not disconnected: Fascism had "infiltrated" the previous liberal State at a time (post-World War I) when it seemed unable to handle social unrest. The Fascist state had tamed social pluralism by drawing a strict line between recognized social formations (the Party, labor corporations, the Catholic Church, Fascist cultural or sportive associations) and outlawed ones (other political parties, trade unions, as well as religious, cultural, sportive associations, etc.). Thus, the deep change in the structure of the State and its grip on society at large was a specific (and authoritarian) answer to the issue of pluralism.

Given these remarks, in the next paragraph we will move to an analysis of Mortati's first works and how he understood the shifting balance in the equilibrium of powers in Fascist Italy as well as the taming of social pluralism. It is the first theme though, the slow but steady bending of a liberal constitution towards authoritarian terms, that is crucial to the aims of this paper: it shows how a theory of an originally liberal but increasingly authoritarian State may look like.

[71] M. La Torre 'Institutionalism as alternative constitutional theory' 96-97.

4. Executive Dominance: Governing Function and Political Direction in Mortati's Early Writings

We can now examine the just mentioned early writings by Mortati, 'The government in the new system of Italian public law' (1931) and 'The executive and the legislative in the current phase of Italian constitutional law' (1940).

'The government in the new system of Italian public law' is conceptualization of the various changes that the Italian form of government had experienced since 1922 (year of Mussolini's rise to power). As previously mentioned, the various steps entailed a significant reduction of the role of the elective Chamber of Deputies (finally transformed into the unelected Chamber of Fasces and Corporations in 1939) and a strengthened position for the executive. Italian public lawyers were at that point struggling to understand whether this series of changes entailed a legal revolution and the birth of a completely new constitution or mere transformation of the former liberal State.[72]

The book is structured in two parts. In the first, the main concepts to analyze the changes in Italian public law are introduced: this exposition of Mortati's constitutional theory is particularly interesting to our aims and I will return to it in more detail in a moment. The second and longer part is instead devoted to an in-depth analysis of the transition from the liberal to the fascist State. Various aspects of governmental action are considered: the Head of Government, his relations to the Crown and other governmental institutions (Ministers and Grand Council of Fascism in particular), governmental powers in peace and wartime, internal security, diplomatic relations, special powers in the state of exception, auxiliary organs. Some general concluding remarks are added as a final chapter.

Coming back to the first part of the book, Mortati immediately starts with an analysis of the *governing function*. He draws a line dividing the government from the

[72] On the broader debate among public lawyers on the nature of the new system of government, see M. Fioravanti 'Dottrina dello Stato-persona e dottrina della Costituzione' 49-114.

executive: apart from the classic tripartite division coming from Montesquieu, modern States are characterized by a *fourth* function. It is the governing function, aimed at identifying the common political goals that the three powers, despite their differentiation, must pursuit together. In other words, while the separation of powers differentiates State bodies, the governing function ensures unity. This function of the State identifies the main (political) directives to be followed by all the bodies: one institution will oversee choosing the aims that the State will pursue.

The governing function does not coincide in his view with legislation: although general directives in State's action are sometimes identified through statutes, in other cases, like in the sphere of international relations, the identification happens through other instruments, like treaties or unilateral decisions.[73] Mortati is clearly influenced by Rudolf Smend and his theory of the fourth branch.[74] According to Smend, the main function of the State is integrating individuals in a community of shared authorities, procedures, values and even symbols.[75] Integration escapes the lens of XIX century separation of powers centered on parliamentarism: a classification of the functions of the State between bodies that create (legislative), apply (executive), or adjudicate (judiciary) is unable to single out the power of identifying the values which will drive integration. Or, to use Mortati's wording, Montesquieu's separation of powers does not single out the institution in charge of choosing the "political direction" (*indirizzo politico*)[76] of the state. He who oversees the political direction holds the governing function, a power of identification of aims and values that must be understood as a fourth function of the State.

[73] C. Mortati *L'ordinamento del governo* 7-10.
[74] R. Smend *Verfassung und Verfassungsrecht* (Duncker & Humbolt 1928). Significantly, Smand's major work is entirely translated into Italian, *Costituzione e diritto costituzionale* (Giuffrè 1988). Excerpts in English can be found in A. Jacobson - B. Schlink (eds) *Weimar: A Jurisprudence of Crisis* (University of California Press 2002) 213-247. On Smend and the governing function see M. La Torre *La crisi del Novecento* (Dedalo 2006) 161-181. More generally for a commentary on Smend in English, see S. Korioth 'Rudolf Smend' in A. Jacobson – B. Schlink (eds) *Weimar: A Jurisprudence of Crisis* (University of California Press 2002) 207-212. On Smend's impact on Mortati's first book, see M. La Torre 'The German Impact on Fascist Public Law Doctrine' 315-316.
[75] R. Smend, *Weimar: A Jurisprudence of Crisis* 217-235.
[76] On this notion in the Thirties also beyond Mortati's views, see C. Tripodina 'L'"indirizzo politico" nella dottrina costituzionale al tempo del fascismo' 1 *Rivista AIC* (2018).

While the concept of the governing function may recall Schmitt's idea of the fundamental political decision, a crucial difference must be noted: in Schmitt's decisionism, the ultimate choice is made once and for all at some point in extra-legal circumstances to define the constitutional identity of a legal order.[77] Mortati's (and Smend's) governing function performs its role in ordinary circumstances: it governs everyday life of the people, not merely extreme cases. The power to act in the state of exception does not have a foundational role from this perspective, but only a remedial one (it will preserve the political direction of the State in case of danger).[78] Moreover, the political direction can change: "integration", "political direction", and "governing function" are dynamic concepts, conceived to conceptualize changes in society the time.[79] Schmitt's constitutional identity would require an act of constituent power to be changed.

However, this power is not a merely *political* power of direction, of identification of general goals with no binding effects. It is a *legal* power, and it performs its role through legal acts: here "act" is meant as a (usually written) binding expression of will by a public body. Therefore, it must not be conceived in the strict sense of statutory legislation by the Parliament, but rather in a broader sense. Mortati has in mind a series of acts by public bodies which include primary legislation and secondary regulation, but also interpretive statements, appointments and dismissals of key figures, budgetary powers, committees' evaluations and opinions, annulments and overruling of administrative acts by superior offices.[80] Altogether, these "acts" instantiate the governing function.

Mortati is careful in characterizing the acts of government: he echoes a distinction between acts of government (*actes de gouvernement*) and acts of mere administration drawn by the French *Conseil d'État* in the XIX century.[81] The two

[77] C. Schmitt, *Constitutional Theory* 75-89 and 125-136.
[78] Mortati is adamant on this point: emergency powers are but one of the typical manifestations of the governing function, the others being ordinary activities of government in domestic and foreign affairs. See C. Mortati, *L'ordinamento del governo* 14-15.
[79] Quoting S. Korioth 'Rudolf Smend' 211: "For him, the stability of constitutional law, which ensures predictability, took second place to the elasticity of a constantly changing constitutional system".
[80] C. Mortati *L'ordinamento del governo* 25-27.
[81] On the French notion, see P. Duez *Actes de Gouvernement* (Librairie du Recueil Sirey, societe anonyme 1935) 17-26.

groups are not different in form, but in scope and motives: the former are political in nature.[82] One cannot predetermine what will count as an act of government: the same act may or may not qualify as acts of government depending on whether it is enacted by a governing body or not.[83] In some cases, the political nature of an act will be more evident: the decision by the Head of State to dissolve the Parliament is a classic example of an act of government. In other circumstances, the line will be harder to draw. Take, as an example, a recent judgment by the Italian Constitutional Court: according to the Court, the power enjoyed by the executive under article 8(3) of the current Constitution to reach an agreement with representatives of religious groups, is an act of government (*atto politico*).[84] This includes the power to even refuse starting talks with the association representing atheists and agnostics in the country (UAAR).[85] Decisions to start talks with religious minorities is way less clearly a political act than the dissolution of the Chambers.

Political acts are not administrative acts, in which the enacting authority performs a merely executive function, applying an already determined content: Mortati maintains that governing means more than merely executing (the content of statutory norms).[86] The acts through which the governing function is performed are intrinsically political in content. Mortati tries to give specific content to this notion: what does it mean for an act to be political? His answer is that acts of government identify the common aims that all public bodies, separated as they usually are in modern States, must pursue. This also allows him distinguishing the discretionary character of acts of government from that of mere administrative acts: the former regard the free identification of the aims of the State, while the latter only concern

[82] P. Duez *Actes de Gouvernement* 23-24.
[83] C. Mortati *L'ordinamento del governo* 26-27.
[84] The specific Italian version of this concept was discussed in a series of books and articles published in the last decades. E.g. see V. Crisafulli *La Costituzione e le sue disposizioni di principio* (Giuffrè 1952); P. Barile 'Atto di governo (e atto politico)' in *Enciclopedia del Diritto* (Giuffrè 1959); E. Cheli *Atto politico e funzione di indirizzo politico* (Giuffrè 1961). For a recent historical and comparative analysis, see G. Tropea 'Genealogia, comparazione e decostruzione di un problema ancora aperto: l'atto politico' 3 *Diritto amministrativo* (2012). See also A. Lollo *Atto politico e costituzione* (Jovene 2020).
[85] Italian Constitutional Court, judgment 52/2016, §§ 5.2-5.3.
[86] M. Fioravanti 'Dottrina dello Stato-persona e dottrina della Costituzione' 131-132.

the means to reach already determined aims.[87] Moreover, these acts are completely exempt from review by other public bodies: if they were object of review, the governing function would move to the reviewing body. For instance, in the already mentioned judgment on atheists' association, the Constitutional Court remarked that the decision by the government not to start talks was not subject to judicial review of any kind but may trigger parliamentary debate and possibly even a no confidence motion against the government. It is the Parliament, then, that performs the governing function from the point of view of the Court, not the executive nor the judiciary.[88] That acts of government would be exempt from judicial review, in a manner somewhat similar to the political question doctrine in the USA,[89] was at the core of the concept of *actes de gouvernement* since its inception. However, by inserting the governing function in the picture, Mortati generalizes the lack of review to all other powers: the conceptual impossibility of mechanisms of review is not a feature of administrative acts adopted by bureaucracies alone; it rather belongs to acts of the governing body, be it a parliament, the executive, the head of State, or anyone else. Also, Mortati orders the branches hierarchically, with the governing body on top and the others following this lead, in a manner unknown to the classic separation of powers.[90]

Now, in Mortati's view in every State a *single* institution will necessarily hold the function of government and determine the political direction of the country. This entails that no State has ever had pure equilibrium between powers. Even the classic parliamentary systems born in the XVIII and XIX centuries were inevitably dominated by an institution performing the governing function, the parliament itself in his view. In parliamentary systems, the monarch was progressively deprived of his

[87] C. Mortati *L'ordinamento del governo* 15-17.
[88] Italian Constitutional Court, judgment 52/2016, § 5.2.
[89] Among many, see M. Tushnet *The Constitution of the United States of America – A Contextual Analysis* (Hart Publishing 2015) 144-149.
[90] C. Mortati *L'ordinamento del governo* 19-20.

governing function, and this shifted to the assembly.[91] This was, in turn, the *longa manus* of the emerging bourgeoisie of the industrial age.

However, Mortati also points out that this age of parliamentary dominance is well over in 1931. The emerging of new social groups and of massive political movements had irremediably disrupted the ideological homogeneity of the assemblies elected in the XIX century. Here Mortati is clearly a disciple of Romano and Schmitt. He agrees with the former on the irresistible growth of new social organizations, especially parties and unions. He also agrees with the latter on the crisis of parliamentarism, unable to understand and take care of the new interest that these movements represent. The expansion of State's function follows inevitably in his view, giving birth to the modern administrative state, the institutional structure to concretely realize the XX century welfare state.[92]

What follows in Mortati's view is the rise of the executive as the holder of the governing function: we move from parliamentary to executive dominance. Only the executive, from his point of view, is able to effectively take into account the various demands coming from a plural society.

To exemplify this shift, Mortati briefly considers the evolution of the British form of government between late XIX and the beginning of XX century, arguing that the rise of mass-parties in Britain entailed a direct link between the prime minister and the electors. The lower House lost the governing function in favor of the Cabinet: the latter now receives a strong mandate directly from the voters based on unitary and coherent political program of action (political direction). The majority in the House, in turn, receives from the Cabinet directives on how to implement it: unitary political direction comes from the latter and is simply applied by the former. The royal opposition only has mere functions of control. This is a huge shift from the XIX purely parliamentary form of government, in which political direction and even appointment and dismissal of Cabinet's members was up to the House. The Cabinet

[91] C. Mortati *L'ordinamento del governo* 29-36. Similar remarks on the historical origin and significance of the separation of powers can be also found in 'Esecutivo e legislativo nell'attuale fase del diritto costituzionale italiano' 434-437.
[92] C. Mortati *L'ordinamento del governo* 37-38.

was in that era a mere *executive* body of the Parliament; today it is a proper *government*. In Mortati's view, the UK constitution solves the issue of unity in political direction by strengthening the role of the Cabinet and of its leader.[93]

In contrast, Mortati also refers to the French III Republic, in which the governing function remains in the hands of the Parliament (and of its extremely fragmented and weak majorities).[94] Weimar's Germany too is considered by Mortati as an example of parliamentary governing function, despite the emergency powers of the President.[95]

The first part of the book ends with some additional comparative remarks. The rest of the work is a detailed analysis of the Italian government after the already mentioned reforms of 1925-1926. This meticulous scrutiny is beyond the scope of this paper, and I will not summarize it here. We are more interested in the last chapter of the book, in which a few general conclusions on the new system of Italian public law are drawn. After the deep transformation of the '20s, in Mortati's view the governing function has moved away from the institutions of the liberal era and concentrated into the figure of the Head of Government. As in Britain, the executive is now the core of the State: it identifies the political direction and has a direct link with the people. Differently from the UK, however, this link is not represented by the election of the supporting majority in the House, but rather by the ability of the Head of Government to understand, interpret, and harmonize the needs and will of social forces. This is a function of integration of people in the State not too far from Smend's. Elections are now plebiscites approving the list of the only remaining party, the Fascist party, to the lower House. Through plebiscites and through a variety of organizations connected to the party (corporations in particular), the new system of government links the head to the body, the *Duce* to the people. Of course, the titanic task of being Head of Government could only be performed by someone endowed with "superior political abilities": only an extraordinary, miraculous leader can be Head of Government. Mortati, who had carefully tried to avoid political irrationalism in his analysis of legal change in Fascist Italy, is ultimately forced to end his book by

[93] Ivi 38-44.
[94] Ivi 44-45.
[95] Ivi 48-54.

depicting a Schmittian figure, a political sorcerer performing the miracle of restoring unity by reconciling conflicting social interests.[96]

Most of these views are iterated almost ten years later, in the article 'The executive and the legislative in the current phase of Italian constitutional law'. In 1940, the legal context had changed again, in particular because of the dissolution of the Chamber of Deputies, substituted by the unelected Chamber of Fasces and Corporations. In fact, the essay starts with Mortati wondering about the consequences of this reform for his usual target, the separation of powers: did it entail the repeal of the separation in Italy? Not quite. In his view, there is room for a differentiation of functions between constitutional bodies in Fascist Italy and even the need for a certain degree of independence: a certain degree of separation is functional to the guarantee of rights. The very "essence of the Fascist State" (*verbatim*) lies in Mortati's view in the attempt to reconcile some degree of recognition of individual rights with the general interest as determined by the supreme bodies of the State.[97] Thus, the total collapse of separation of powers would be incompatible with the goals and essence of the Fascist regime. The reform of the Chamber and the new power of the Head of Government to indirectly appoint and dismiss its members is not enough to consider the independent legislative as definitively erased from the system: it still participates in the elaboration of legislation in the country and its decisions are not directly conditioned by the executive (an unusually formalistic reading for a realist like Mortati).[98] The problem of reconciling separation and unity is solved ambiguously in the essay: the Head of Government holds the governing function and is beyond any doubt the dominating figure, but other constitutional bodies exist and cooperate with him. Common ideological adherence to the Fascist Party and the power of the Head of Government to identify the political direction allow to blend the activity of other constitutional bodies (especially the Chamber of Fasces and Corporation and the

[96] Ivi 217-226.
[97] C. Mortati 'Esecutivo e legislativo' 444-446. In his view, this minimal area of safeguard for individual prerogatives would distinguish the Fascist State from the Soviet system.
[98] Ivi 454-457.

Grand Council of Fascism).[99] Mortati ends the essay by firmly reasserting that some version of the separation of powers is therefore still preserved in the new system:

> Of all modern one-party regimes, the Italian is the only which also preserved in its organization the essential elements of the modern State, the only able to reconcile the need for quick and unitary state action and the variety of mechanisms through which this is put into practice, and so to realize a transformation that has been called a conservative revolution, in which the genuinely Roman political wisdom of its creator is reflected.[100]

This is, in the end, the result of Mortati's reflection in the early writings we examined. States need to integrate individuals in a community and overcome societal pluralism. Identifying the common values of a community around which individuals must pool is the task of the institution holding the governing function. Previously this power belonged to the bourgeois parliament, while pure "separation" of powers has always been a myth in Mortati's view. This era is now over because of the rise of new social groups, their interests and organizations. Concentration of powers in the hand of the executive (*rectius*, the government) is the way successful modern States embraced to tame social pluralism and the threat this represent for the unity of the community. The shift towards the executive can happen in the form of executive dominance over parliamentary majority as in the Westminster model or in the form of Fascist authoritarianism and corporativism. However, according to Mortati what happens is a simple rearrangement or reinterpretation of the separation of powers, now shifting towards the executive, not a total erasure of it. The two regimes, the British parliamentary system and the Fascist authoritarian state, are closer in his mind than one could imagine.

In a sense, Mortati's interpretation of Fascist Italy's constitution is opposite to Fraenkel's characterization of Nazi Germany as a dual state in which a "normative" state broadly based on the rule of law and a "prerogative" state exposed to the

[99] Ivi 462-465.
[100] Ivi 471. Translation is my own.

arbitrariness of the ruling party coexisted separately.[101] In Mortati, the Fascist State and the pre-1922 liberal State are merged in one and the fusion of the normative and the prerogative is such that the prerogative is limited by a bare minimum of legal constraints inherited by the normative. So much so that in his 1940 essay he even figures the possible intervention of the Crown, the most important remaining institution of the previous liberal State, to substitute the Head of Government in exceptional cases and after duly considering the views of the other bodies of the Fascist Party.[102] Something close to this will in fact happen in July 1943, with the fall of the regime. Fraenkel's prerogative state, on the other hand, is completely unbound and allows the normative state only as much space as it wishes. Tellingly, Fraenkel explicitly denies that the Third Reich theory of the State is simply a variation on previous views like Smend's and stresses the specificity of the National-Socialist view of public law: the prerogative state can at any time claim for itself jurisdiction over new areas previously deemed as not-political, this way arbitrarily restricting the normative.[103] Mortati, as we have seen largely influenced by pre-Fascist and pre-Nazi theories like Romano's and Smend's, conceptualizes Fascist Italy in a much different way, as the new form assumed by the modern State to meet needs and challenges of the XX century.

As a result, Mortati is picturing a State that is at the same time "authoritarian" and "constitutionalist": diversification of powers among public bodies and even guarantee of rights are ensured through a strong concentration of powers in the executive, which will interpret and realize the will of the people.

[101] E. Fraenkel *The Dual State: A Contribution to the Theory of Dictatorship* (OUP 2017 [1941]) 3-103.
[102] C. Mortati 'Esecutivo e legislativo' 468-470.
[103] E. Fraenkel *The Dual State* 69-70.

5. Conclusion: Lessons from the Past?

We now come to the end of this paper. We have considered the idea that the notion of "authoritarian constitutionalism" may actually be a mere oxymoron but discarded it to embrace the view that even the core of tradition of Western constitutionalism has in its history and in its current life a series of practices and institutions authoritarian in character: from prerogative and emergency powers to militant democracies and the assertive character of the constituent power itself. Among these, a special role belongs to those theories of the constitution which tend to shift the balance between the branches towards the executive. The cases of Vermeule and Finnis have been briefly recalled exemplifying contemporary calls for reinforcement of the latter. Lastly, I have briefly summarized the first works by Costantino Mortati to show a detailed exposition by a prominent public lawyer from the Thirties trying to reconcile (some of the) the institutions of the modern State born from XIX century liberalism with authoritarianism.

What can we learn from this exposition of a doctrine from the (dark) past of Western constitutionalism? I am pointing out that Mortati's early works show a precedent of how calls for executive dominance in a system broadly based on the separation of powers and even, in his view, on a certain degree of guarantee of rights. No matter how much Mortati was actually describing the specificities of the public law of his time and how much he was just superimposing a purely theoretical model on a very much authoritarian system. Mortati may well have been deluded in describing the law of his time, but what matters is that he tried to accomplish a theoretical reconciliation between authoritarianism and modern constitutionalism. From his perspective this just was the most natural evolution of the modern State, more and more at pain handling a bundle of irreconcilable social interests in a pluralist society. Letting the executive or "government" determine and pursue the general interest, while guaranteeing to a certain extent some rights and maintaining a bare minimum of separation of powers was for him the form of the modern State in XX century, exactly like the dominance of bourgeois elective assemblies had been in the XIX.

History would eventually prove him wrong. Mortati himself abandoned calls for executive dominance. The reconciliation of conflicting social interests in a pluralist society was handled in the second half of the XX century in the West through welfare states largely implemented by the so much despised parliaments.[104] A certain amount of centralization in the hands of the executive happened, but this surely did not become the only subject able to identify political objectives and reconcile competing interests. Parliaments had an equally active role.

However, the mere existence of these works is of great intellectual interest in our time: it shows that authoritarian constitutionalism is no oxymoron, but a possible variation within the large family of modern constitutionalism. It is an ever-lasting temptation from within constitutionalism which cannot simply be overlooked but must be understood.

[104] In the Italian Republic, the function of political direction has been firmly in the hands of the Parliament for several decades. Developments in the last decades, including a new wave of recentralization on the executive, the ever-growing role of direction played by supranational institutions like the EU, and the calls for new forms of direct democracy through the Web, partly resized the role of the Chambers in choosing the political direction. On this evolution, see S. Filippi – R. Ibrido 'La funzione di indirizzo (e il rapporto con il tempo)' in XVIII(1) *Rassegna di diritto pubblico europeo* (2019) 55-64.