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ROMANO AND THE MEANING OF INSTITUTION[1]

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Abstract

This paper objective is to discuss Romano's concept of institution and the identity proposed with the idea of legal order. Firstly, I will examine the definition of institution, the critique that Romano (1857-1947) addresses to the conception that establishes the primacy of the normative field. Then, I will try to identify the logical structure that, in *The Legal Order*, concerns the arrangement of the order as unity. This article therefore has two main purposes: the first one is to trace a profile of Romano's institutional thought by taking advantage of some Hegelian principles that seem to be coherent with the definition of legal order suggested by Romano. The second aim is to show that Romano achieves his point about identity between legal order and institution by means of a logic of self-foundation. In this sense, it is possible to point out a stable tension in the theoretical framework of *The Legal Order* between the pluralism of institutional process and the plurality of several institutions.

Keywords

Santi Romano, legal system institution, Pluralism.

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Resumen

Mi objetivo, en este artículo, es investigar el concepto de institución de Romano (1857-1947) y la identidad propuesta con la idea de ordenamiento jurídico. En primer lugar, examinaré la definición de institución, la crítica que Romano dirige a las teorías normativas que sitúan la sanción como único elemento formal verdadero a la hora de determinar si una norma tiene o no carácter jurídico. Luego, trataré de identificar la estructura lógica que, en *El Ordinamiento jurídico*, se refiere a la disposición del ordenamiento como unidad. Por lo tanto, este artículo tiene dos propósitos principales: el primero es trazar un perfil del pensamiento institucional de Romano aprovechando algunos principios hegelianos que parecen ser coherentes con la definición de ordinamiento jurídico sugerida por Romano; y el segundo es mostrar que Romano logra su punto de identidad entre el orden legal y la institución mediante una lógica de auto-fundación. En este sentido, es posible señalar una tensión estable en el marco teórico de *El Ordinamiento jurídico* entre el pluralismo del proceso institucional y la pluralidad de diferentes instituciones.

Palabras clave

Santi Romano, ordenamiento jurídico, institución, pluralismo.

Introduction

The conflict between norm and nature is the deepest and most difficult issue to reconcile that modern thought has faced. This is the authoritative opinion of John Mcdowell (1996), who also traced it to the origin of the main crux of western philosophical thought, namely the dualism between 'mind' and 'world', to which, for example, both Hegel and Heidegger gave a central position (p. 95).

Mcdowell does not fail to add that modern philosophy, reduced to its focal point, is nothing but the attempt to bridge dualistic gulfs between the normative plan of "Ought" and the natural one of "Being", albeit with little success. The problem, at least according to the American philosopher, would lie not so much in the dualistic trend of modern philosophy, but rather in its constructive ambition; this has led to a shift in perspective between the normative and the natural viewpoints without ever really questioning the epistemological constitution of either of them.

This thesis concerns not only the field of philosophy. For example, by gazing even to the regulatory crisis affecting the contemporary State, it can be noted that the focal point lies precisely in the law's ability to embrace actions and facts of the social world.[2] In this sense, according to Kelsen (1960), legal qualification has an intrinsic power to ascribe the legal quality to certain acts; normative proposition is the tool through which it is possible to fill the gaps between rule and the social world of action[3]. Nevertheless, it is possible to find different perspectives along the fundamental divide between normativism and institutionalism. The point of the debate stands on a different nature for norms. For the former, norms embody the constitutive principles of social reality, for the latter they are nothing but a legal expression of the institutional field from which they are informed. By demonstrating a deep understanding of this problem, Santi Romano (1983), in his 'Fragment of a legal dictionary', in order to describe the legal system, uses the image of a building which, although having foundations, walls and roofs to ensure its stability, has doors, windows and pipes that keep it open to the world

2. For a detailed analysis of the crisis of law which primarily invests the state in «that field of transit» which is the twentieth century, see Grossi (2012).

3. For the issue of "legal qualification", Kelsen is an inescapable reference; in the *Reine Rechtslehre* in fact his main focus is about the legal propositions as hypothetical judgments: if it is A, it must be B. This relationship of imputation, as Kelsen defined it distinguishing it from causality, indicates that the terms of the legal proposition are terms of qualification. This means that the illegal act does not exist in itself, but is qualified as such, at the moment in which the legislator imputes certain consequences to the occurrence of certain events, which in turn are classified as sanctions. A. Catania (1987) summed up this connection by writing that "the terms of a legal proposition are [...] terms of qualification [...]. There is no crime in itself, but only acts qualified as illegal by the legislator exist" Catania (p. 86). In this regard, see also Paulson (2014, p. 26 ff.)

(p. 86). The law is not a finite system, but instead an order where unity does not conflict with the possibility of changes and social life's dynamism. Such a dimension declares Romano's intent to build a legal point of view able to explain the potential of social complexity (Croce, 2017, p. 845). Behind the thesis of the institution as unity —according to the terms of S. Romano— there lies a speculative principle that reveals itself to be essential for thematizing the form of law. Furthermore, this principle is entirely involved in that course of contemporary thought which, according to Mcdowell, does not restrict itself to receiving dualism between norm and nature from tradition, but it is also able to renovate its terms.

This article therefore has two main purposes: the first one is to trace a profile of Romano's institutional thought by taking advantage of some Hegelian principles that seem to be coherent with the definition of legal order suggested by Romano. The other aim is to show that Romano achieves his point about identity between legal order and institution by means of a logic of self-foundation. This operation has a dual effect: to weaken the dualistic separation between "Ought" and "Being" by turning it into a simple distinction within the same concrete dimension of institutional order. And, secondly, to attribute a potential character to Romano's view of pluralism between effective legal orders.

Institution as unity

The theoretical profile of Romano's *The Legal Order* continues to be the subject of an intense debate, frequently approached from themes and categories specific to the general theory of law, between exponents of legal normativism, constructivism and evolutionism.[4] It is possible to attend such a discussion, even with an eclectic intent between different theoretical perspectives.[5] This article has more limited ambitions, for it intends to orient itself on the theoretical profile of Romano's notion of institution as autonomous unity; the basic mark of this characteristic – according to the Italian jurist – can be portrayed differently, more thoroughly and more precisely than from the viewpoint of Maurice Hauriou who maintains that institution approximates an ensemble of things. In so doing, Hauriou primarily wanted to underline the objective profile of institution;

4. Concerning the composition of Romano's main work, see Cassese (1972, pp. 244-283) and also Fioravanti (1981, pp. 169-219).
5. A great discussion about the issues typical of institutionalism by comparison with social sciences is Barberis (2011, pp. 349-360; 2018, pp. 130-142).

but, according to Romano, it does not imply that both institution and legal order are to be considered as given "objects" at all (Romano, 1977, p. 33).

A relevant footnote contained in *The Legal Order* helps to clarify what exactly are the aims and the horizon of Romano's (1977) point of view. He argues that contemporary jurists consider that law has a positive nature and that its essence can be found in norm. In this way they have not paid attention to certain antecedent features of law, with consequences for a clear concept of legal order. To these criticisms that have rejected his inquiry as not jurisprudential, but pre-juridical and thus sociological, Romano explains: "On my part, I would like to add that it was my aim to include in the legal world a fact of social order that was generally believed to be anterior to the law; to this end, I tried to demonstrate that this mistake is the source of most faults and incongruities of conventional definitions of law" (p. 41, note 30ter). Romano addresses these words to the critics and his primary target is to restore institutional meaning to the fact. Inserting itself into a horizon already outlined by Gierke's *Genossenschaftstheorie*, Romano defines law through a principle that is not exclusively normative. Legal order cannot be considered as a simple set of norms that govern the coexistence of individuals, but law takes it upon itself to organize constant communities in order to perpetuate particular purposes beyond their natural life (p. 43). In short, the aim is to extend the boundaries of law beyond the normative principle of coexistence, based on a conception of freedom as simple negative principle. This principle, formulated by Kant, maintains that everyone finds the limit of his own free will where the sphere of other's freedom begins. The strongly anti-Kantian gesture by which Romano extends the concept of law should now be clear.

He attributes twofold meanings to the expression 'law'; on the one hand, which refers to "a complete and unified order, that is, an institution"; while on the other hand, it indicates a precept or a complex of precepts, gathered and variously assorted, that can be labelled 'institutional' in order to distinguish them from the non-legal ones. Thus, it enables the connection they have with the institution of which they are elements to be highlighted (Romano, 1977, p. 27)[6]. This connection in fact points to the legal character to be attributed to them.

It should be clear from this that the formal scheme of Kantian freedom is not enough to bring forth the juridical phenomenon within society. According to Romano (1977),

6. It is worth to mention that, according to Tarello (1988), Romano, by underlining the dynamism of the legal order (in particular with regard to the state), anticipates Kelsen's distinction between the static and the dynamic system of norms (pp. 186-88).

before it is a norm, in fact, even before it concerns a particular social relationship, the law is "an organization, a structure, a position of the very society in which it develops and that this very law constitutes a unity, as an entity in its own right" (p. 27). The legal order is constituted as a unity of elements such as organization, social context and, at the end, norm. Therefore, mere coexistence of individuals, that is also an institutional product, if considered alone, represents an elementary fact not powerful enough to justify law as an institutional fact.

At this point in Romano, an idea comes to light that was also shared by Hegel and which puts forward a third way with respect to both the voluntarism of the *pactum societatis* and the rationalistic solution of natural law. At the beginning of *Elements of the Philosophy of Right*, Hegel (1991) writes that the system of right is "the world of spirit» produced from within itself as a second nature" (als eine zweite Natur) (p. 35). By using the Aristotelian idea of second nature, Hegel describes a mutual constitution of subjects and the ethical world. On one hand, the "ethical objective element" is the social and political world that has an absolute authority and power over individuals and their representations; on the other hand, these powers "are not something alien to the subject", for they guarantee a subject's right to their individuality. Hegel's aim is to show "the institutional rootedness" of social practices, which law and morality reduce to abstract operations as the acquisition, transferral and restitution of rights and only limit their individual dimension (Kervegan, 2018, p. 336). From this perspective, institutions like marriage, corporations and representative assemblies are the anchorages on the ground from where the law extends its conceptual boundaries beyond the idea of society as mere coexistence.

This point does not mean to reduce the distance between Hegel and Romano, which is moreover clearly highlighted by the Italian jurist discussing the fundamental theme of the role of the State. And there again, for Hegel, the ethical element (*Sittlichkeit*) cannot be reduced to the objective institutions and regulations, for it indicates a subjective disposition of law. While the differences remain valid, however, it cannot be overlooked that even for Romano the identity of the legal order and institution is an articulated relationship, that is, the result of a mutual reference. From this point of view, all social bodies endowed with goals are institutions, even if their autonomy is relative.

It is not surprising then that, according to Romano (1977), "the concept of institution and the concept of a legal order, considered as a unity and as a whole, are absolutely identical" (p. 34). It is worth insisting on this articulation that forms such an identity. The legal order, in fact, exists as a society actually constituted; for that reason, Romano

insists on the social nature of institution, shared by its members, as something that organizes a community and makes it different from a simple group of people. But, at the same time, it should be specified that the order is the position and the result of that collective which the very same order constitutes as a unit and as an entity by itself. It seems that we are facing not only a simple external link between institution and order, but also a real mutual and circular constitution, concerning which the element of common mediation is the unity of both. This unity is simultaneously both what the order constitutes and what the order is made up of. How these terms should be understood, in order to avoid the situation where their relationship does not simply represent a vicious circle, is the crucial question that Romano's legal theory raised. It has been conveniently highlighted that for Romano "there is a link between law and fact that goes beyond the terms of the mere priority of one over the other" (Palombella, 1990, p. 374). The same can be said again about the connection between institution and order: the unity of institution, that is what that guarantees its very individuality (different thus from another institution), is not something that only comes first, as if it were a cause/effect relationship. According to Romano, the main characteristic of legal order is its self-reflective character, starting from which the phenomenon of legal normativity becomes understandable and justifiable. For every institution that is insisting on its unity - State, church or band of brigands it does not matter - it is necessary that this unity does not come from the outside or from anything other than its own purposes, habits and practices. The social fact originates the legal order, but it is not the only source of its constitution. In fact, once the legal form has been adopted, it is the order that recognizes that fact as its origin. The legal point of view allows, retroactively, to recognize as a legal act what in the first instance had to be considered as a fact extraneous to the legal sphere. Thus, the unity of the order, as a legal unit, is a product of law, and not a datum received from a pre-legal dimension.

Institution and the grounding's logic

The issue involving the relationship between fact and order is a constant in the work of Santi Romano; it can be tracked down, for example, both in the essay titled *L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione* (1901) ("*The de facto establishment of a constitutional order and its legitimacy*") and in the section dedicated to legal reality in the other impressive work *Frammenti di un dizionario giuridico*

("*Fragments of a legal dictionary*"). Here, as is obvious in *The Legal Order*, the main way of reasoning is built from two theoretical elements. Both, however, show clearly that it would certainly be much too shallow to accuse Romano's perspective of equating, as such, the social sphere and the juridical one.[7]

The first step is given by a principle that we could summarize as follows: it is not the legal order that depends on the norm, but the norm that depends on the legal order. For Romano, it is a matter of extending the law's horizon beyond the limit conferred on it by normativism, without bringing into question that the legal order creates a set of norms. In this sense, his main commitment is to demonstrate that the reduction of the (legal) phenomenon of normativity in a *régle de droit* (L. Duguit) is a mistake; therefore, integration with other institutional elements becomes fundamental. What governs institutions is not the system of rules, but the mutual acceptance of their normative bind; on this basis it is possible to organize a social collective union. From this point of view, stability and organization are two fundamental indices of the institutional entities, which together also represent a resource and a barrier to reject the thesis (so called *pangiuridicismo*) in accordance to which every social group constitutes a legal order.[8]

From these elements then derives the second point to which we already referred, namely the foundation of the juridical nature of the system. If a legal order were simply depending on a previous fact, within a mechanical causality relationship, and thus lacking any possible legal qualification, the order would be bound to that fact and nothing more. In this case, the whole institutional theory would be likely to become a doctrine of law as fact. However, Romano's (1977) main purpose is to avoid the equivalence between law and effectiveness. Otherwise, how can we explain Romano's statement that: "the process whereby a state is formed is pre-legal. But when the state becomes alive, it is already an order comprising the agencies that are granted legislative power. From this moment onward, these agencies possess legal life and all legal directives they issue are legally effective" (p. 60)? This passage leads to the exclusion of the law's reduction to a natural force, instead pushing towards the logical articulation of the way in which law is interpreted as "first and foremost an arrangement, an organisation of a social entity" (p. 51).

In this sense, the argument used by Romano (1977) regarding international law is meaningful. Everything stands in considering the legal horizon and its logic. As Romano pointed out, the formation of an international community's structure was something

7. In this regard, see Pietropaoli (2012, p. 63).

8. As everyone knows, this question is articulated and even ambivalent for Romano himself; however, at least in our opinion, his theory is able to preserve the difference between the legal sphere and what is regarding the social regulation; for a different interpretation, oriented towards Romano's pangiuridicism, see La Torre (1999, p. 132).

that took a long time and was not governed by preceding law. Therefore, it is true that, without the existence of individual states, the international community could not even have arisen; in this sense, international law, like state law, is a clear example of an institutional entity, for it affirms itself "as a necessary product of the interstate organization" (p. 60). However, one thing is a naturalistic connection, the other is a logical relationship: the first follows the temporal succession, the second a different sort of circularity. In fact, Romano claims that the condition of mutual independence between states "from a legal point of view […] does not pre-exist international law, as it is established by it" (p. 58). The principle by which states cannot be bound except by norms that they themselves have contributed to produce is not a natural condition of fact. It is a condition laid down by a specific legal principle of international law, which therefore, to be effective, must presume it as already established and in force. In short, in order that the order's social birth has legal relevance, it is not sufficient that it is only what it is, that is to say, a given fact, but it has to be seen, within Hegelian terms, as a presupposed point of legal order and at the same time something posited by the very same order as well. In our opinion, this framework is what represents the fundamental point of Romano's recommendation. There is no legal order which can exist only as a matter of fact or as a mere product of the agreement between independent natural wills, and therefore only as a mere force without any juridical qualification pertinent to it. The birth of a legal order is not what gives to the very same order its unity. It is the legal order that constitutes itself as an entity and in so doing it is always going to recognize social fact as the element that comes first.[9] Already in *L'instaurazione di fatto di un ordinamento costituzionale*, the attention of Romano (1969) was directed to the "supreme moment in which a positive law assimilates and absorbs with its power of attraction what is alien or even hostile" (p. 31). The novelty of this point of view means a significant change regarding the legitimation of the state: central to this problem it becomes no longer how a constitutional order is compliant with law, but when it de facto exists. It is concerning the question of the state, namely when it turns into a problem of legitimization rather than legitimacy, that Romano introduces a significant shift of paradigm. However, it is worth saying that in the early decades of the twentieth century the historical reach of this change became increasingly evident in the whole of Europe, albeit in different and sometimes opposite forms. [10]

9. In this regard, see Olivari (2016, pp. 74 ff).

10. It seems to us that this historical junction includes a paradigmatic change of point of view with respect to the problem of the State. As far as Romano is concerned, it can be understood as the transition from a perspective oriented only to the State as a lawmaker to one instead oriented to the society. But it is equally relevant to note that primarily the theoretical

There is an expression that is fully demonstrative of this logic: "it exists because it exists, and it is a legal order because it exists and from the very moment it comes about" (Romano, 1977, p. 50). This means that the relationship between fact and legal order, between ground and grounded, is a sort of reflective relation of ground. Below the tautological, or rather pseudo-tautological, surface of this expression stands something more; in fact, the second "it exists" contains, in addition to the factual existence, the reason for that fact. It is worth expanding on this point.

This way of presenting "institutional entity" seems to me to be quite close to a conception of ground, as "complete ground", that Hegel (2010) in the *Science of Logic* introduced as relation of relations (p. 407). Hegel's point is that the essential determination (called "real ground") does not suffice to ground its own unity with that for which it is essential. The main example, for Hegel, is the natural field; no deductive procedure, in fact, makes it possible to progress from the laws of nature to the empirical determinations of natural entities. But it is not so different if we consider the juridical field, so much so that, with regard to the logical way to consider the concept of punishment, Hegel said that the one determinant which is assumed as punishment's ground (as retribution, as deterring threat or as a contribution to the self-awareness of the culprit) does not amount to the whole punishment. Hegel takes into account that no essential determination grounds the relationship. Rather, the relation in which the totality of the determination of a thing is thought is what grounds the essential determination and its relations to inessential determinations. In fact, if it is only the essential determination that exercises the grounding action, this activity is incomplete. In this case, it would remain detached from the real constitution of the thing and it will collapse in an inevitable *regressum in infinitum* between all the determinations that can assume the role of ground. For this reason, according to Hegel, the unity must be thought of before the respective roles of the determinations can be considered (p. 531).[11]

In Romano (1977), the legal system, as well as the ground in Hegel, is a self-production, for its unity characterizes the reciprocal efficacy of each real determination (social fact, organization and norms) as defined not only in itself but by virtue of the relation-

framework of these issues is transformed. Furthermore, Romano is not the only author who observes this paradigm shift. In the same period, between 1912 (*Gesetz und Urteil*) and 1921 (when he published the essay about the Dictatorship), Carl Schmitt also came to pose at the constitutional level the problem of the law's implementation when the law no longer guarantees certainty and stability. Also in this case, what was previously a question related to the legal sources gets changed, becoming an issue about the relationship between a material constitution and a constitution formally in force, but that no longer guarantees an order for the rules that the legislator has established; in this regard see Fioravanti (2011, pp. 88 ff.) and Lanchester (2011, pp. 5 ff.).

11. Béatrice Longuenesse (2007) provided an original interpretation of the Hegelian concept of foundation with reference also to twentieth-century philosophy, specifically to the notion of over-determination introduced by Althusser (p. 105).

ship with the others. The result is a set of conditions performing the legal order, which is finally constituted as an entity in its own right (p. 27).[12]

From this point of view, we can now understand why Romano highlights so intensively the relevance of unity as an index of a legal entity; the reason lies in the fact that institution primarily means the process of institutionalization of the juridical. It is this evolving unity, which the Italian jurist calls an entity, that distinguishes a multitude of people, perhaps even united by a shared but still external element (for example, a queue at the post office), from a collective which is a process of organization formed from the mutual aims and practices of the members.[13]

In this sense, stability as a main characteristic of the institution is not merely synonymous with permanence over time; rather, it should be understood as regulated behaviour, that is to say a *form* of life informed by an internal normativity recognizable from the practices in which it is inscribed. It is useful to observe that in a similar way H.L.A. Hart insisted that law is a set of primary rules and secondary rules, the latter which establish how the primary rules should be issued, applied and amended. From this perspective, the rule of recognition is a sort of rule already woven by the social fact of observing it.

On the ground of the thread followed in these pages, it is useful to observe a difference between the Romanian institution and the concrete order of Carl Schmitt. In the essay titled *On the Three Types of Juristic Thought* (1934), Schmitt (2004) underlines a *trait d'union* with Romano: both the jurists agree in connecting the phenomenon of legal normativity to the order as a concrete entity (pp. 57). Without prejudice to this shared intention, however, the reading of the institutional process changes in a significant way. For Schmitt, it maintains both historical and theoretical centrality in the role assumed by the concrete figures of the order, starting from the Guardian of the constitution, they represent in fact the elements that give effective substance and legitimacy to the institution, by making it an autonomous entity. In the case of the constitution's guardianship, according to Schmitt, it is a concrete political act that originates from a disconnect between law and politics and therefore requires an interpretation oriented to its removal. In this sense, Carlo Galli (2015) has noted that in

12. Recently T. Gazzolo (2018) proposed a reading of these passages of *The Legal Order* in continuity with the Hegelian logic (pp. 118 ff).

13. With the purpose to clarify the notion of organization, which according to him remained much too vague in *The Legal Order*, Bobbio used Hart's concept of "secondary rules", namely those kinds of rules governing the recognition, modification and conservation of primary rules (Bobbio 1977, p. 27). The main aim of this interpretation is clear: to make free the focal point of normativism present in Romano from the reduction of the norm to a simple imperative order.

the late nineteen twenties and early thirties, Schmitt uses all his historical and juridical analyses to declare the death of the liberal form of the Weimar Republic in order to keep alive the notion of a substantial and democratic legitimacy (pp. 18-19). On the contrary, according to Romano, the main character of the institution is represented by the dynamic process of the order's constitution; it is in that process that an institution achieves independence of its singular elements. Interpreting Romano's concept of legal order, the Italian scholar, Alfonso Catania (1987) highlights that the fundamental junction must be identified "in the inseparable connection between *ius involontarium* and organization" where it becomes clear "the distance from an author such as Carl Schmitt who builds his political-juridical thought on the gulf between order and decision" (p. 152-153). This point seems to us very relevant, because for Romano the institutional process does not rely on any substance separated from norms; rather, it can be said that the normative framework is the ground to know social practices within the collective and that mutually social practices are the ground of existence for the normative structure. Also, for this reason, once the reference to a previous substance has ceased, the grounding activity of the institution becomes a process of self- grounding.

Pluralism and plurality: a tension in the concept of order

According to consolidated opinion, Santi Romano represents a basic reference point of modern legal pluralism.[14] The reasons for this lineage now deserves specific attention. According to Barberis, three ideas make Romano the pioneer of any following kind of legal pluralism (Barberis, 2011, p. 357). The first is undoubtedly the thesis concerning the plurality of legal systems. On the base of the equation between legal order and institution, Romano undermines the thesis of the statehood of law and recognizes forms of infra-, over-, inter- and even anti-state law.

The second idea, in consequence of the first one, deserves more space, because it refers to the Romano's rejection of the principle of exclusivity of the legal system. The question is based on the complex relationship, which is made up of similarities, analogies but also differences impossible to avoid, between the concept of sovereignty and that of autonomy concerning the legal systems. What the latter, in particular, represents, before being a key notion for the debate on the European Community law's issues, is

14. For an updated analysis of contemporary legal pluralism, see the issue entirely dedicated to it by *Jura Gentium, 11,* edited by M. Croce, A. Vassalle and V. Venditti (2014).

a way to enter the folds of Romano's institutionalism. Autonomy and sovereignty have different and not mutually adaptable traits; as Merkel and Gierke have already noted, legal autonomy points to a kind of normative power different from that of the state). By explaining the features of this concept, Romano in *The Legal Order* affirms that autonomy must not be absolute, but can only be relative; its conception results only from certain points of view, which are intended to change. The attention paid to it by Romano stems from his desire to highlight the factual instances of institutional autonomy, emphasizing what makes them similar to the sovereignty of the State, although conceptually distinct and unmistakable (Iztcovich, 2006, p. 74). All of that topic is about autonomous orders, phenomena of social and administrative auto-organization, and special laws. Autonomy and sovereignty should not be confused with each other, but Romano puts them in contact. Furthermore, the identification between order and institution involves another step in this direction. If sovereign power, as much as autonomy, has limitations, for it involves only what is part of a certain institution, then the boundary between autonomy and state sovereignty is inevitably destined to be thinned out. From this point of view, it is possible to define as autonomous not only a secondary order, but also a sovereign one in so far as it is considered from the outside, namely from the perspective of a different sovereign order.

This concept of autonomy is the basis for giving a new profile to the exclusive character of the legal order. In a footnote from *The legal system*, in fact, we read: "the principle that every original order is always exclusive, is to be understood in the sense that it can, not that it necessarily has to, reject the legal value of other orders" (Romano, 1977, p. 146, note 95bis). The keystone of this definition stands in the non-exclusive nature of the relationship between legal orders. At this point the concept of *legal relevance* plays a decisive role. It should not be confused with the importance that an order could have with regard to another, but it means the necessity that "the *existence* or the *content* or the *effectiveness* of an order has to be conditional on another order on the ground of a legal title" (p. 145). On this pivot revolves the concept of autonomy in as much as the state order recognizes a secondary order as an institutional entity. This order should not be confused with the original one (state order): it remains different by virtue of its own relevance and at the same time its norms are not simply assumed, integrated or nationalized by the norms of the original legal order; also for the point of view proper to the state, it is possible to outline an order as a "foreign" law deriving from an independent source, while it remains applicable and relevant for the regulation of specific political conflicts.

The third and final idea, through which the influence of Romano on legal pluralism can be evaluated, concerns the hierarchy of legal sources. Here, according to Barberis, the most appropriate interpretative framework for a legal theory is a network, where the relationships between the legal sources are determined not by formal hierarchies, but, in case of conflicts of interpretation, through the prevalence of one or the other source. In this view, that is a sort of theoretical *realism*, it is not then the superior norm that prevails over the inferior one, but it results that the superior norm is the one which the Courts consider prevailing in the case of conflict between several norms.

This short, but incisive sketch has the objective of illustrating why institutional theory has been such an issue in the last three decades concerning the debate about what it is that founds the supremacy of the state.[15] These reasons are included in the inclination of legal pluralism to coordinate autonomous institutions and to ensure a fair balance between exclusive validity claims and potentially conflicting principles.

As for Romano, however, there is something more, which concerns one of the most significant part of his thought. In particular, this is the fact that the institution has no reality except through the process of institutionalization. This is a process essentially devoid of a sovereign-subject to whom it must be assigned, but it is constituted by a set of practices and mechanisms through which positions, status and relationships are defined. Therefore, this open and plural regulation does not hinge upon a further meta-order, nor does it require a legitimization by a *de facto* power. What matters instead *it* is that this social fact is realized as an arrangement of the law, and not as an external source. And so, the organization shows itself to be an internal element of the order. For this reason, the idea, suggested by Bobbio, to clarify its concept with the notion of "secondary rule" does not seem to be an exaggeration. After all, even for Romano the problem was to refer what regulates, modifies and delimits the order to the field of the same order (as an inner rule). This *reflective* kind of question is what allows us to eliminate the distance between norm and social practice and, thus, to build a unitary plexus between social collective, organization and norm. From all this there is an immediate consequence concerning the legal order and the theme of pluralism. In fact, if the institutional process is a production of the order as a unity, it is this formal structure

15. The issue of the *institution* has a relevance that goes beyond the disciplinary boundaries of the juridical field. In these pages we have tried to offer some reasons for philosophical reasoning should be interested in this sort of issue; but it is evident that it is a theme that deserves a much more detailed treatment. It is a political, anthropological and ontological perspective that has recently had a fruitful rediscovery in the Italian debate, in particular see R. Esposito, *Pensiero istituente. Tre paradigmi di ontologia politica* (Einaudi, 2020); and E. Lisciani Petrini & M. Adinolfi (Eds.) *Discipline filosofiche - Il problema dell'istituzione. Prospettive ontologiche, antropologiche e giuridico-politiche*, *29*(2), Italy: Quodlibet.

that opens a place of interaction, integration and therefore of shared communication, with no possibility of exhausting its capacity. No legal order can claim for itself the monopoly of legitimacy over other orders. Therefore, the law ends up drawing a field of communication between a potentially infinite number of orders. From a similar perspective some scholars had spoken of the *operationalization* of pluralism (Croce 2018, p. 22); according to this point of view, Romano's concept of "relevance" intends to be a legal way "to depoliticize*s* inter-institutional conflicts" and to give attention to the effects produced by the institutional entities on each other, rather than to look for the traits defining the nature of an institution. But this way to consider the legal order's theory cannot cloud the intrinsic contradiction that belongs to it and that really represents its very productive element.

From Romano's point of view, in fact, the form and the language of law does not result in the exclusive availability of a specific order, not even the state one, because they are instead the horizon into which each institution enters by producing its own legal unity. Therefore, in the page of the *Frammenti*, mentioned at the beginning of this article, the legal order is described as a building closed by foundations and walls, but equipped with doors and windows through which it is open to the influences, especially of other orders. In this sense, the order, as the subject of the process, does not own its unity at the beginning and for that reason its identity is going to correspond only with the immanent activity of the very same process. In other words, it is not possible that any legal order exists without an institutional process producing its unity. But on the other side, when Romano proposes a set of relations between different kinds of legal orders, he is concerned about the order as a unity already constituted, and not during the activity of constitution. The same concept of relevance, in fact, is possible on the base of legal orders already completely formed. In this case, their unity is not considered as an effect of the institutional activity, but as a given property belonging to the legal entity. What does it mean for the structure of the legal order? The problematic question is that these twofold aspects cannot be mutually corresponding but quite the opposite: they risk being alternative. From one perspective, the law is conceived through a processual kind of logic and, by speaking in strict terms, it will not be possible to consider the law as a (defined) legal order. The alternative viewpoint is that in which the unity belongs to the order and the law is a matter of relations between different legal entities. This is a sort of tension that probably cannot be resolved with only the tools made available in *The Legal Order*. The *plural* coexistence of the orders is not assimilable at all to the *pluralism* that the order's grounding involves. However, this is the dilemma Santi

Romano left as an inheritance to the philosophical and juridical debate. It is true that starting from the 1930s, an attenuation of Romano's pluralistic theses can be glimpsed in the interest of a greater centrality given to the nation state's role. In any case, to testify that that choice was not dependent only on internal affairs, lies the fact that, as soon as the experience of fascism ended, Romano decided to republish, without any consistent variation, *The Legal Order*. In this choice we can probably identify his awareness that the problem of pluralism, disclosed years earlier at its highest conceptual level, was far from being resolved.

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