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Whither the state? On Santi Romano's *The legal order*

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ABSTRACT

This essay foregrounds the relevance of Italian jurist Santi Romano's theorizing to today's political and legal debates on the relation between state and non-state laws. As Romano's classic book *L'ordinamento giuridico* (1917–1918) has finally been translated into English, the Anglophone readership can take stock of one of the most enlightening contributions to institutional thinking in the last centuries. Romano put forward a theory of legal institutionalism that has legal pluralism as a basic corollary and contended that the legal order is naturally equipped to temper and overcome conflicts between bodies of law. The present contribution argues that this approach unravels the riddles of recent multiculturalist paradigms and provides invaluable insights on the way the state could and should manage the conflicts between competing normative orders that lay claims to legislative and jurisdictional autonomy.

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In a seminal article on the rise of national states in Europe, Charles Tilly (1989) defined the triumph of the state-form over alternative political structures as the 'major unanswered question in European history'. Before the end of the eighteenth century, there were so many forms of organized power that nobody, not even a 'European Sybil', might have predicted the consolidation of just one form as the political structure par excellence. While for a variety of reasons anthropologists and historical sociologists have always remained sensitive to alternative forms of organization, in the eyes of most political and legal theorists the state became the archetypal form, to the extent that it came to be regarded as a necessary condition for social order. 'State', 'law' and 'order' became synonymous with each other, while 'stateless' was associated with 'disorderly' and 'chaotic', if not 'uncivil'. Nearly all projects of constitutionalization and democratization in the last century, whether in the Global North or the Global South, revolved around the state as the natural venue of politics, while the waning of the state was variously interpreted as a serious symptom of de-democratization. Even cosmopolitan and federalist proposals were basically modelled after the matrix of the state, as they envisaged parliaments, administrative bodies, courts and the separation of powers at a global scale.

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Leading Italian jurist Santi Romano (1875–1947) never yielded to the idea of an indissoluble link between state and law, and was among the few scholars in Europe that at the beginning of the twentieth century realized that the state legal order needed serious amending. At the end of the nineteenth century, the state was buckling under the weight of non-state political and social actors deeply dissatisfied with liberal constitutionalism. Anti-parliamentarism, socialism, insurrectionary anarchism, irredentism, revolutionary syndicalism and many other anti-systemic movements brought into question the authority of the state and the pre-eminence of state law over alternative forms of regulation and government. Romano stood out over his contemporaries as a scholar who struggled to reconcile the state-form with those bellicose ferments in a way that could have changed the history of contemporary state if totalitarian regimes had not implemented their disastrous recipe.

In 2017, one hundred years after its first publication in Italy, Romano's masterpiece *L'ordinamento giuridico* (*The Legal Order*) was finally translated into English.¹ According to Jan Paulsson (2011), who drew on *The Legal Order* for the elaboration of his influential theory of arbitration, it was 'a major scandal of intellectual history that this seminal monograph has never been translated into English' (Paulsson, 2008, 217). Analogously, Loughlin (2017, xi) praises Romano's book as a work that 'remains unsurpassed to this day as a study of the essential elements of institutional jurisprudence'. It is the relevance of this classic book to contemporary thinking that the present book symposium wishes to highlight, casting light on the rich seam that Romano's theory has to mine in today's political and legal setting. More or less sympathetic to this Italian jurist's theory, the contributions appearing in this symposium nicely foreground the potential his institutional conception of law has to change our view of the relation between politics and law in the global world.

Marc de Wilde's article juxtaposes Romano's and Carl Schmitt's theoretical paradigms and accounts for the Schmitt's use of the Italian jurist's theory while unfolding the notion of 'concrete order thinking'. De Wilde contends that, while the two authors' critiques of legal positivism were strikingly similar, Schmitt's institutional thinking served as a theoretical justification for the Nazi state. On the contrary, although he was a major legal figure under the Fascist regime, Romano pluralist inclination made him highly suspicious of all attempts at incorporating non-state institutions into the state body. For whether or not the state acknowledges them, non-state institutions continue to exist and to develop in the shadow of the state. More importantly, de Wilde goes on to say, Romano's view was that the state itself is, and cannot be but, a heterogeneous organization, comprising various more or less autonomous institutions. In this sense, de Wilde's article makes a compelling case for Romano's peculiar conception of the state and its relation to non-state institutions, and demonstrates that his institutional theory should be regarded as a refined contribution to contemporary theories of legal pluralism.

¹While I translated the book from Italian into English, Martin Loughlin and Marco Goldoni provided precious help in checking and revising the translation. The exchange with them was key to making a complex early twentieth-century Italian text easily accessible to an Anglophone readership. Loughlin remarkably increased the cultural value of this enterprise by producing an erudite and perceptive 'Foreword', while I put forward an interpretive line of Romano's overall theory in the 'Afterword'.

Lars Vinx is more dubious of Romano's overall proposal. His argument reads that the notion of law emerging out of *The Legal Order* is eventually a state-centred one. Based on this reading, Romano's true objective is not to dispute the state's supremacy over other forms of law but to vindicate a particular idea of the good state. Unlike de Wilde, Vinx believes that Romano held a view of the state as an institution of institutions that feeds off sub-state institutions which it integrates into its all-encompassing order. Consequently, when Romano rejects the claim that all law is the law of the state, the polemical target is states that fail to accept the autonomy of sub-state institutions and only recognize the existence of individual citizens. On Vinx's account, the real payoff of Romano's institutional theory is his conception of 'legal relevance' that allows constructing a sound institution of institutions, within a state system where all institutions as well as their justifiable internal normative claims are paid equal moral respect.

Werner Menski enriches the sceptical strand with an analysis that covers non-Western types of law to show that a Western and eventually positivist bias narrowed down Romano's pluralist focus. Menski reasons that Romano was genuinely committed to debunking the myth of the state as the creator and custodian of the law. And yet, he did fail to appreciate many sources of law and thus reduced the legal phenomenon to that of institution. In doing so, however enlightened and open-minded he was as a jurist, Romano remained a modern scholar of the Global North who strove to impose theoretical simplicity on a phenomenon, such as law, that is inherently and irretrievably chaotic. In Menski's view, this explains why Romano was so adamant that the boundaries of legal science should be preserved and that law is a special field of social reality. Menski's conclusion is that we all should take stock of Romano's full-hearted invitation to transcend the limits of state-based theorizing, while we all should transcend Romano's failure to transcend the limits of Western, and eventually positivist theory.

Much more sympathetic to Romano's project is Andrea Salvatore's contribution. The crux of his argument is that the merits of Romano's work exceed by far any comparison with other authors. Romano's institutional theory lends itself as a lens to approach the current transformations of the relation between law and politics in contemporary societies. In particular, he offered compelling arguments against the reduction of non-state normative entities to non-laws. Romano's theory, then, is better definable as a forms of 'critical institutionalism' because of its anti-reductionist approach that granted proper legal dignity to non-state social phenomena. At the same time, the picture of the legal world Romano provided is that of a complex and ideally all-embracing network of institutions – a picture that does justice to the legal continuum where the lines separating different normative entities are inevitably blurred. Finally, and contrary to most critics, Salvatore places emphasis on Romano's sensitivity to power relationships, albeit from a purely juristic standpoint. Indeed, while the issue of power is framed in purely jurisprudential terms, it is described as a competition of material forces that has to be handled with the legal toolkit, without any presupposition of a natural hierarchy of normative formations.

While fully aware of the weaknesses identified by Vinx and Menski, on the wavelength of de Wilde and Salvatore my introductory essay aims to bring Romano's key legacy to an international readership of political and legal theorists who are concerned with the uncertain destiny of the state and the wide-ranging transformations of the international order. In particular, the subsequent pages will emphasize the import of

Romano's book for the theorization of the state, as well as the relation between law and politics in an epoch that bears stunning resemblances to the beginning of the twentieth century. My main argument will be that Romano's conception of how the state should cope with pluralism offers invaluable insights for understanding today's rethinking of the state and its relation to sub- and supra-state bodies.

The frailty of liberal constitutionalism

In an essay tellingly titled 'Lo Stato moderno e la sua crisi' (The Modern State and its Crisis), Romano (1909) took issue with the multiplication of social movements and associations (mainly labour-based organizations, such as workers' federations and various kinds of trade unions) that were struggling to draw liberal constitutionalism and parliamentary politics to a close. Obviously, Romano was not the first to grapple with this phenomenon. Before him, French jurist Léon Duguit gnawed at French and German theories that presented the state as the only source of law. He thought that the origin of law is human beings' wilful actions and the social rules that are required for these actions to be performed and regulated. This meant that state agencies should serve as jurisdictional – rather than legislative – bodies. The state had to be reformed thoroughly. Duguit came up with the notion of *functional representation*, in which representation is not based on territorial distribution but mirrors the occupational composition of society and the groups of social functions to be performed.² According to him, only this type of representation could make sure that the state system always acts in the interest of the groups it encompassed. Just as influential at the time was Eugen Ehrlich's sociological jurisprudence that famously distinguished between 'Rechtssatz' (legal proposition) and 'Rechtslebe' (life of the law). Ehrlich claimed that the core of life of the law did not reside in codified state rules but consisted of the everyday rules produced and applied by the various associations of human beings that comprise complex societies. He censured mainstream legal theories in that they were blind to the non-official sub-state orderings that governed people's conduct on a daily basis, while state law rules only came into play in specific circumstances of dispute within state courts.

Duguit and Ehrlich are particularly relevant in so far as they championed versions of pluralism that were largely incompatible with the state-form. In this sense, their theories help pin down a substantial difference between what today we call 'multiculturalism' and a situation of genuine legal pluralism. Multicultural conflicts can by and large be resolved within the frame of constitutionalism, as all social parties agree that the meta-normativity of state law should never be jettisoned.³ On the contrary, legal pluralism is a condition where social groups and associations contend state law should not be granted primacy over their inner normative orders. In a legal-pluralist scenario, the state is but one order among many, so much so that it can no longer play the role of neutral arbiter among contending social parties. Juxtaposing Duguit and Ehrlich with Romano evidences that the latter moved some distance away from the two

²See Laborde (1996). More generally on how functional representation was conceived at the time, see Laborde (2000).

³For example, Jan Pakulski (2014) warns against radicalized versions of multiculturalism promoting elements relative to political organization and 'elements of legal code'. He argues that this type of diversity should 'be blamed for ethno-religious fragmentation, particularism and even separatism'.

sociologists for two reasons that provide the main thread for my discussion. First, although Romano's pluralist theory was arguably more radical than the other two scholars', he maintained that pluralism was not necessarily at odds with state law. Second, his main argument was that only from a 'juristic point of view' – one that leaves aside sociological and philosophical considerations – can one make sense of the compatibility between pluralism and state law.

In 'Lo Stato moderno e la sua crisi', Romano made this point by arguing that sociologists' hasty dismissal of state law neglected the state's functioning as a common structure for a healthy confrontation of sub-state groups and associations within the frame of the constitution. On the one hand, he recognized that the state sprung from the French revolution had long ignored the host of societal groups that had a normative life of their own and found no representation in the state structure. On the other hand, he averred that doing away with the state was no solution, as it would create the conditions for an overt conflict of those rival groups in a circumstance where pre-modern supra-state normative frame were no longer available. In the last pages of this short text, he adumbrated a solution that he would clarify later on in *The Legal Order*. The law should not be conceived as a set of norms issued by a body within a given group and backed by threat of sanction. Rather, it is a point of view – a purely *juristic* one – from which the social world can be described as an arena of smaller and bigger legal orders that can engage in a normative exchange by using the technical language of the law. While neglecting this role of state law, as sociologists tended to do, necessarily implied the end of the state, the latter should rather be viewed as one legal entity that is able to interact with other legal entities within a strictly legal-linguistic frame.

Pluralist institutionalism

The Legal Order deploys a robust theory of law that glues together legal institutionalism and legal pluralism. Yet, its importance exceeds by far the boundaries of legal theory as it puts forward a full-fledged theory of how social order comes about and works. Accordingly, both in terms of theoretical depth and aspirations, Romano's book is on a par with ground-breaking contributions, such as Carl Schmitt's, Hans Kelsen's and HLA Hart's. The book is divided into two parts. 'Part I. The Concept of a Legal Order' makes the case for a concept of law that does justice to law's institutional character, beyond law's being a set of rules and procedures. 'Part II. The Plurality of Legal Orders' explores the relation between state law and non-state laws. However, as I noted above, my discussion here touches on jurisprudential issues concerning the nature of law only tangentially, that is, in as much as they help pinpoint the notion of the pluralist state advocated in *The Legal Order*.

Romano's critical analysis of available jurisprudential paradigms pointed at the narrow conception of law they provided. In this sense, he anticipated HLA Hart's seminal deconstruction of rule-based and sanction-based theories of law in *The Concept of Law*.⁴ Hart insisted that law is a set of primary rules mandating conducts and secondary rules establishing how primary rules should be issued, applied and

⁴Scholars such as Norberto Bobbio and Jan Paulsson have already underlined the commonalities between these two authors.

amended. This is a social practice based on a social rule whereby a particular population (those who abide by secondary rules) are involved in a mutually binding normative practice. If this is so, though Hart was reluctant to admit it, then law proves to be a social practice like many others, characterized by its members' acceptance of its normative framework.⁵ In a certainly more intricate and old-fashioned language, Romano laid out a similar argument. To determine what law is, one should not look at its substantive characteristics, such as laws comprising a set of rules or the sanction that backs them up; let alone the connection between law and morality, as most of the time law works effectively even if it clashes with the widespread morality of law-abiders. Instead, one 'needs to pinpoint the characterizing feature, the nature of this collection or this whole' (Romano, 2017, 5). In other words, like Hart, Romano gestured to the practice nature of the institutions as something that *organizes* a collective and makes it different from a transitory sum of individuals. It is worth expanding on this point.

Romano maintained that there is no difference whatsoever between the phenomenon of institutionalization and that of organization, as both make sure that the existence of the normative entity individuals give life to is not conditional upon the existence of these individuals. The structure whereby the institution becomes autonomous from 'the weakness and limitedness of [the] forces' of individuals, according to him, is the law of that collective. In my reading, Romano was trying to isolate a *juristic point of view* from which one could account for the phenomenon of (legal) normativity. In a lexicon that is closer to today's philosophical parlance, one could put it as follows: while the institution is nothing other than the order that makes it autonomous from its transitory composition, it is also that which allows accounting for that composition as forming an institution. In this sense, one could speak of *intelligibility condition* and *existence condition*. The normative structure provides the *intelligibility condition* for one to describe the practical activities of a collective as falling within the scope of an institution. The practical activities that are carried out by the members of that institution provide the *existence condition* for the normative structure. If that is the case, then there is no substantive separation between these two types of conditions, as they call for the adoption of a point of view from which people's activities can be accounted for in terms of a supra-individual shared practice.

This leads to Romano's most controversial conclusion. If law can be traced back to this basic normative dynamic, then there are as many legal orders as institutions. The state legal order is the particular order of one institution among other institutions with a law of their own. In this frame, the qualifier 'legal' is by no means the exclusive property of the state order, as it more comprehensively indicates all institutional entities which cannot be reduced to a sum of individuals. Some of these institutions are inseparable from the state (e.g. its administrative and judicial bodies or other sub-state entities whose authority depends on the state), while others are fully autonomous, to the extent that their legal order might conflict with the state's. In other words, as the law is brought back into the realm of social practices, legal monism appears as an unjustified identification of the legal phenomenon in general with the state legal order. The idea that the state is the only source of valid law is an ahistorical abstraction that

⁵Other scholars have pointed to Hart's unintended espousal of legal pluralism. Menski (2006, 98). I tackle this question in Croce (2014).

has served specific political purposes. All legal orders, from this juristic point of view isolated by Romano (2017, 59), are on an equal footing, even illegal ones that are criminalized by the state:

It is well known that, under the threat of state law, many associations live in the shadows, whose organization can be said to be almost analogous to that of the state, though on a smaller scale. They have legislative and executive authorities, courts that settle disputes and punish, statutes as elaborate and precise as state laws. In this way they develop an order of their own, like the state and the institutions recognized as lawful by the state. Denying the legal character of this order cannot be but the outcome of an ethical appraisal, in that entities of this type are often criminal or immoral. This could be admissible if one demonstrated the necessary and absolute dependence of positive law on morality – what, in this sense (which I believe to be quite ingenuous), does not hold true.

This conclusion is particularly interesting not only because it marks off a morally neutral point of view that permits describing what a legal order is whether or not it conforms to moral standards. More than that, Romano's concern was with doing away with limited views of state law that make all types of law depend on the history-specific law-type embodied by the state. Therefore, moral neutrality in this case plays out as an epistemological decolonization of legal thinking whereby normative phenomena are not weighed against the background of just one model of political organization. While this conclusion will become an anthropological commonplace long after Romano's death, it was a major purchase of *The Legal Order* well before that time. But what are the consequences of this? And how did Romano deal with them?

Turning political conflicts into legal relations

Romano was fully aware of the potential risks attached to his pluralist theory of institution and espoused them thoroughly. According to him, the unlawfulness of institutions that the state considers as illegal

exists, and can only exist, in the eyes of the state order. The state can persecute them with all its means, and therefore can bring them to an end, as well as produce the consequences, also penal, that fall within its power. But as long as these institutions live, it means that they are constituted, have an internal organization and an order, which, considered in itself and for itself, certainly qualifies as legal. (Romano, 2017, 58–9)

Yet, as I wrote at the outset, albeit radically pluralist, Romano's theory leaves much room for state public law as a *meta-language* where the various legal orders can interact and coexist. At first sight, this might come across as a contradiction. If all legal orders, even those immoral and criminal, are perfectly equal from a theoretical vantage point, then only bare power establishes what is legal and what is not in a given geo-historical context. If it is not power that decides, there must be a meta-order that determines what orders are admitted and what are not. In the first scenario, power is the only way out of chaos and conflict; in the second, there must be some sort of axiological hierarchy defining the position and legality of orders. According to various critics, Romano was eventually caught in this double-bind. He was charged with being 'a pluralist from a theoretical standpoint, but a monist from an ideological one' (Bobbio, 2007, 154). To put it otherwise, he paid lip

service to pluralism, but acted as a steadfast monist when he was the President of the Italian Council of State under Benito Mussolini's regime. In the end, critics maintain, *The Legal Order* was not able to reconcile pluralism with the institutional pre-eminence of the state. Even such a staunch advocate of pluralism as Romano had to recognize that doing away with the state opens the door to dangerous processes of fragmentation and re-feudalization, as well as the emergence of factions claiming political and judicial autonomy from the state.

In the last two decades, this problem of what it is that founds the supremacy of the state has regained centre-stage in legal and political theorizing. The question of how to accommodate the plurality of religious and cultural groups has turned into the question of whether or not the state can hold onto its liberal constitutionalism in a 'post-secular' age. Is there any chance of reconciling the plurality of normative vocabularies with(in) the monist structure of constitutional states? How can incompatible normative regimes that embrace conflicting moral principles on, say, individual freedom, gender relations and/or education, agree on the feeble frame of a few principles enshrined in constitutional law? This problem at a sub-state level has been heightened by the growing prominence of a variety of supra-state political agencies (such as regional bodies, international courts and intergovernmental organizations) and financial institutions that erode states' legal authority and political autonomy. Today more than ever, states are the addressees of legislative and administrative inputs that often reduce the autonomy of national policymaking or make them the instruments of global agencies. In sum, as was the case at the end of the nineteenth century, the end of the twentieth century was marked by the fragility of the state-form and the re-emergence of non-state organizations that, both from below and from above, foster modes of organizing power that relocate the state into a long chain of partially overlapping sub-state and supra-state institutions.

Contrary to what critics believe, I think Romano's invaluable contribution to escaping this predicament has to do with the role he attributed to law in coping with conflicts between orders. If observed through the lens of *The Legal Order*, the recent crisis of the state calls for a revision of state public law in such a way that it might cease to be the law of one institution (the state) to become a field of ongoing exchanges in accordance with a technical language. Put otherwise, Romano's epistemological decolonization of legal thinking turns out to be an invitation to view state law not as the particular legal order of one institution, but as a legal-linguistic venue – one in which a variety of institutions can interact and negotiate by adopting a common medium. As I hinted above, this requires making two major amendments to the traditional conception of the state vis-à-vis other legal entities. First, the legal character of institutions is not conditional on state recognition (at least no less than the law character of the state is conditional on the recognition of other normative entities). Second, the intercourse between legal entities has always to be treated legally, that is to say, by embracing the juristic point of view for them not to morph into political conflicts. Evidently, the 'purity' of Romano's jurisprudential method does not satisfy theoretical requirements (as was the case with Kelsen's 'pure' theory of law), as it rather accommodates the actual need to carve out and protect a point of view from which the interactions between potentially competing entities are described and administrated *legally*.

In Part II of *The Legal Order* Romano explored how the relations between orders could be handled legally by introducing the notion of ‘relevance’, which is to say, a legal technique for assessing and governing the effects of one order on another. *Legal relevance*

should not be confused with the *de facto* importance that an order could have to another; nor should it be confused with the material uniformity of more orders which is pursued or determined not by a legal need, but by political convenience or opportunity. [...] To condense my thinking into a quick formula, I can say that in order for legal relevance to obtain, the *existence* or the *content* or the *effectiveness* of an order has to be conditional on another order on the grounds of a legal *title*. (Romano, 2017, 69)

In this short essay, I can hardly summarize Romano’s nuanced account of legal relevance. For various sections of Part II are dedicated to a meticulous inspection of the various aspects of relevance, he hinted at in the formulation quoted above. My quick mention only intends to emphasize how alert he was to the necessity to translate the juristic point of view into a concrete legal technique to handle legally the interactions between legal entities. Relevance is a technique that depoliticizes inter-institutional conflicts and transforms them into relations between legal orders that are to be regulated by measuring and governing the legal effects of these orders on each other.

There are three main advantages to this approach. First, all institutional entities are recognized as possessing a legal order of their own that does not presuppose recognition on the part of any other legal order (unless the former’s existence depends on the latter’s, as is the case with the state agencies or sub-state territorial administrations that are state bodies in the first place). Second, the conflictual potential inhering in relations between organizations is mitigated as these are transformed into legal relations – in other words, political conflicts are rendered into legal matters that can be administrated with recourse to a specialized set of rules and principles. Third, the law that is supposed to solve this legal conflict is not the law of one particular order, but the outcome of the efforts of legal experts who, by adopting the juristic point of view, analyze the conflict at hand to find a legal solution to it.

To provide an example, while dealing with an issue that at the time was particularly critical, to wit, the relation between the law of the state and the law of the Church, Romano (2017, 105) averred:

The state recognition of ecclesiastical law as a law is conditional upon the civil effects that can derive from it; the parts that, on the contrary, do not produce those effects are irrelevant to it unless special dispositions that establish otherwise are issued (ones that can be said exceptional). It should be noted that this principle applies not only to religious matters, but to any matters.

Romano’s ‘transposition’ of the clearly political question of the frictions between religious beliefs and precepts into the question of the civil effects of religious practice is a fine example of how the legal technique can tame divisive political conflicts. The existential issue of what the order is that has precedence over the other is turned into the issue of what the legal effects are of orders on one another.

Concluding remarks

As I pointed out above, Romano's sophisticated elaboration bears no resemblance to the solution adopted by the political regimes that followed the post-WWI political-constitutional crisis. Quite the contrary, state public laws were given a radically nationalist twist with states being almost exclusively preoccupied with cultural, social and linguistic homogeneity. Correspondingly, the corporatist system became the spearhead of a state-centred organization of labour, while class struggle was largely marginalized as dangerous to peaceful coexistence. In sum, the reform of the state apparatus between the two world wars departed significantly from the pluralist scenario envisioned by Romano and became much more akin to the state-sponsored blend of decisionism and traditionalism of Carl Schmitt's post-exceptionalist institutionalism of the 1930s.⁶ This eventuated in an unfathomable tragedy that was then ensued by a new wave of democratic constitutionalism in post-WWII. Interestingly, at that time Romano was outspokenly sceptical of the new legal theory that inspired post-WWII constitutional charts, because it represented a further step to a rigid, and rigidly monist, state.

Whether or not Romano was right on this latter issue, or whether (as some believe) he simply could not bring himself to acknowledge the advances of a new generation of constitutionalists, it is undeniable that the second half of the twentieth century celebrated the union of statehood and democracy, especially under the guise of the welfare state. It was a glorious story, but it has largely come to an end. Now that new recipes are being evoked and produced, I believe Romano's lesson is a rich seam to mine. *The Legal Order* is a refined book that casts light on the pragmatic effects of conceptualizing law. Most legal and political theories of the last centuries were consciously or unconsciously pivoted on the (allegedly essential) connection between the law and the state. As early as the beginning of the twentieth century, he was so perceptive to take to heart two seemingly irreconcilable issues: the fictitious nature of that connection and the need to preserve the state. As I strove to illustrate, the solution Romano's book proposed was a correct assessment of the legal phenomenon that might do justice to all institutional entities and at the same time might establish a platform for interaction and negotiation among them.

It is evident that Romano counted too much on the virtues of law – even in the noblest form he had in mind. He was convinced that the legal technique on its own is able to produce effects of pacification, as law is 'a field where there are no trenches to destroy but shelters to erect'. (Romano, 1909, 20). In reality, his idea of a legal theory as a purely juristic inquiry into the nature of law, capable of identifying the legal character of all institutions, attaches an unprecedented weight to jurists and legal scholars, and eventually makes them the custodians of social order. He thought legal scholars and jurists should steer clear of political concerns to commit themselves to the pureness of the legal method. While this possibly makes sense of his activity as the President of the Italian Council of State, this is a view that, though insightful, turns a blind eye to the political stake of judicial activities. As present-day legal pluralists remark, the interchange between orders can hardly be reduced to a purely legal matter. Various processes of recognition and misrecognition are at play that always entail political

⁶For a thorough analysis of Schmitt's revision of decisionism and his final adhesion to legal institutionalism, see Croce and Salvatore (2013).

struggles. More importantly, Romano's conception tended to give priority to institutional entities and thus to underrate the position of individual members within those entities. In this way, power imbalances and inequalities are likely to be confirmed or even reinforced by his strategy to cope with pluralist conflicts.

Be this as it may, even the weaknesses of Romano's institutional theory testify to its centrality to today's debate on the destiny of the state and the development of alternative organizational structures. We should then accept his invitation to historicize the adventure of statehood not to do away with the state in any easy manner but to give it a new life. Despite his irenic view of peacefully interacting legal orders within the frame of a technical-legal lexicon, *The Legal Order* remains a shining example of a theory genuinely attuned to its performative effects on reality and of a theorist who was fully prepared to take responsibility for them.

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