

# Santi Romano and the Perception of the Public Law Complexity

Aldo Sandulli

*Abstract:* Santi Romano, the major Italian scholar of Public Law, was protagonist of the «most extraordinary intellectual adventure that any twentieth-century Italian jurist ever lived»: he was the architecture of the complexity of Public Law. In the Italian legal field, he first and most clearly perceived the crisis of the State and the surfacing of social and corporate forces with interests that conflicted with those of the municipal legal order. In 1917, after a gestation period lasting almost a decade, he developed, adopting a realist perspective, his theory of the institutions in an essay entitled *L'ordinamento giuridico*. The article shows Romano's contradictory personality and analyses the four periods of this complex and prismatic figure: the first, a five-year period of intense scientific activity - from 1897 to the beginning of the 20<sup>th</sup> Century - is mostly dedicated to the production of monographs, consistent with legal method approach; in the second stage - up to the coming of Fascism - Santi Romano gradually distanced from this ideas, by writing fundamental essays on institutionalism; the third period - ending with the Second World War - is mainly dedicated to a system reconstruction, by means of publishing mostly manuals; at the end of his life, there is the last stage, during which he drew up his scientific will, the "*Fragments*".

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# Santi Romano and the Perception of the Public Law Complexity \*

Aldo Sandulli \*\*

## I. *Orlando's Legacy*

The construction of the Italian Administrative Law was achieved in the late 19<sup>th</sup> and early 20<sup>th</sup> Century by a group of young scholars, led by Vittorio Emanuele Orlando<sup>1</sup>, the Sicilian academic, who had already founded the so-called Italian school of Public Law.

Before Orlando, Administrative Law studies were typically characterized by a strong eclecticism and poor theoretical strictness, which followed the French blueprint (on the contrary, his legal method involved a split between law and other social sciences, as well as a systematic and dogmatic elaboration of legal analysis, based on the pandectist and Private Law paradigms)<sup>2</sup>. Previous studies were usually carried out by attempting legal systematization, but there were only few monographs and no specialized reviews or treatise writings. Therefore, before Orlando the science of Administrative Law was lacking in solid construction and methodological foundation.

Orlando distanced himself from the French tradition and drew his inspiration from Savigny's Historical School and the German science of Public Law: he was especially interested in the State doctrines of Gerber and Laband. The legal approach developed by Orlando aimed at two main purposes, both related to a specific time in Italian history. The first was a social policy objective, regarding the preservation of State unity and the leading role of the upper

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\* English Translation by Maria Luce Mariniello.

\*\* Professor of Administrative law, Law School, Università Suor Orsola Benincasa di Napoli. I wish to thank the University of Michigan, which has enabled me to carry out research as a Jean Monnet Research Fellow at both the European Union Center and the Center for International & Comparative Studies within its Law School.

<sup>1</sup> V.E. Orlando (1860-1952) was a Professor in Modena, Messina, Palermo and, above all, in Rome. Also, he was a deputy for more than a quarter of a Century, as well as the Premier, the Minister of Justice (Grace and Religion), the Minister of the Interior, the President of the Chamber of Deputies and a senator of the Italian Parliament.

<sup>2</sup> V.E. Orlando, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico*, in *Arch. giur.*, 1889, See also Id., *Diritto pubblico generale: scritti vari (1881-1940), coordinati in sistema*, Giuffrè, Milan, 1940, 17 ss.

middle class; the second looked at the policy of law, regarding the development of an independent branch in legal science, by means of an increasing definition and simplification in related studies, so that a new awareness of its specialty could be achieved. Indeed, the definition of the field of studies was the foundation of the entire construction to be built by the Sicilian jurist. Consequently, Orlando's theories were a "political tool" of reaction and fulfilment of a specific project for the preservation of national unity. The so-called "legal method" allowed the jurist to rapidly develop a legal knowledge on public administration, but inevitably isolated it from the other social sciences. This implied the greatness of legal studies in the late 19<sup>th</sup> and early 20<sup>th</sup> Century, but was also the main reason of the decline of the Italian legal science in the following part of the Twentieth Century.

Unlike his predecessors in Administrative Law studies, Orlando had a clear purpose: to claim the primary role of both the jurist and the Public Law science in building and safeguarding the unity of the Liberal State. Orlando also had a clear idea of the course of action to achieve the goal of a central position for Public Law science in safeguarding the unity of the Liberal State: that is elaborating a five-phase program for cultural change, to be completed in the space of a decade (the elaboration of a methodological manifesto; the foundation of a school; the provision of groundwork for developing a manual-writing system; the publication of a new specialized review; to start a widespread treatise writing). In other words, Orlando was a great organizer of juridical culture.

In the field of Public Law, the most relevant contribution from Orlando came from two different manuals: the "*The Principles of Constitutional Law*"<sup>3</sup> and "*The Principles of Administrative Law*"<sup>4</sup>, a caesura with the past. The volume was characterized by three underlying criteria: a systematic approach, the unity and system-wide coherence of the scheme, an exclusively legal analysis.

Since 1897, he directed the publication of the *First Complete Treatise of Administrative Law*, which pursued the ambitious objective of meticulously cultivating the whole field of Administrative Law for the first time. All the main representatives of the late 19<sup>th</sup> and early 20<sup>th</sup> Century scholars generation, who had joined the legal method, were called upon for collaboration in drafting the monographs by which this impressive (yet still unfinished) work is made up of. Moreover, Orlando founded and directed many major Public Law reviews.

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<sup>3</sup> V.E. Orlando, *Principii di diritto costituzionale*, Barbera, Florence, 1889.

<sup>4</sup> V.E. Orlando, *Principii di diritto amministrativo*, Barbera, Florence, 1891.

In conclusion, when in 1987 Orlando became a newly elected member of the Parliament, at the age of only thirty-seven (from then on, devoting himself entirely to politics), he had already completely changed the Italian studies of Public Law.

The Italian jurist's footsteps were followed by a group of young scholars: standing out among them were Oreste Ranelletti, Federico Cammeo and Santi Romano, who burdened themselves with building up the Italian Administrative Law.

Oreste Ranelletti <sup>5</sup> came from the study of Roman Law and was the pupil of a renowned Romanist, Vittorio Scialoja. Just as he did for Scialoja's teaching (he was a follower of the Historical School, even if bereft of any sociological influence), he accurately implemented the legal method and faithfully worshipped the State as a legal entity <sup>6</sup>. Ranelletti (who published relevant studies on the administrative act and the public goods) was the greatest representative of the "*contenutistica*" tendency, aiming at emphasizing content, rather than form, in Administrative Law studies. His approach consisted in the analysis of administrative matters by following their inherent and natural content, and going back from statute laws up to systematized general principles. Although he had only few direct "disciples", Ranelletti had many followers and his approach was the most followed in the first half of the 19<sup>th</sup> Century.

Federico Cammeo <sup>7</sup> came from the study of civil procedure and was one of the pupils of the expert on Civil Law Lodovico Mortara. Although he came from the German tradition, as most of his contemporary scholars, he was very cultivated in English and had a deep knowledge of the public sector in the Common Law systems. Cammeo (who was the author of a famous publication,

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<sup>5</sup> Oreste Ranelletti (1868-1956) was a Professor in Camerino, Macerata, Pavia, Naples and, above all, in Milan.

<sup>6</sup> To Ranelletti "the starting point is not liberty, but the State", which is the only "creator of the right to liberty" and "the guardian of all liberties". Without the State there was no law nor liberty: as a consequence, any exposure of risks to the liberal State's stability had to be necessarily prevented. From the methodological point of view, Ranelletti transferred the pandectist approach and method to the Public Law: he used a rigorous juridical approach (without even considering the possibility that there might be others), consisting of: examining the norms of positive law regarding those matters: drawing inferences from them by means of abstraction and a generalization of those "legal principles" pervading the norms; reconstructing the "legal institutions" by means of relating those principles and systematizing the "institutions" (O. Ranelletti, *Oreste Ranelletti nell'opera sua*, 31 dicembre 1955, in Id., *Scritti giuridici scelti*, vol. I, supra, 630)

<sup>7</sup> Federico Cammeo (1872-1939) was a Professor in Cagliari, Padua and, above all, in Bologna and Florence.

the “*Administrative Law Course*”<sup>8</sup>) used and introduced typical pandectist concepts into the Italian Administrative Law, at times just by means of a transplant, but more often by turning Private Law concepts into Public Law patterns. The use of Pandects was instrumental and directed towards the discovery of the Public Law features of the institutions, following quasi-deductive method, in search of the limits on public power, relating to individual liberties and rights.

Orlando, Ranelletti and Cammeo produced their best works during this first stage of development, between the end of the 19<sup>th</sup> Century and the beginning of the 20<sup>th</sup>. Although their following scientific work was successful, and eventually brought them honours in the entire space of the first half the 20<sup>th</sup> Century), their contribution is mainly related to those years of foundation of the Italian Public Law.

## II. *Santi Romano: a Complex Scholar*

The scientific path and fortune of Santi Romano<sup>9</sup>, a complex and prismatic figure, were very different.

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<sup>8</sup> F. Cammeo, *Corso di diritto amministrativo*, Milani, Padua, 1914.

<sup>9</sup> In this brief bibliographical note, I am particularly grateful to G. Melis, *Romano, Santi*, in G. Melis (editor), *Il Consiglio di Stato nella Storia d'Italia. Le biografie dei magistrati (1861-1948)*, vol. II, Giuffrè, Milan, 2006, 1518 ss. Santi Romano was born in Palermo on the 31<sup>st</sup> January of 1875, by Salvatore and Carmela Perez. His course of studies was initially undertaken in Palermo, where he started a collaboration when he was still a student with the law firm of Vittorio Emanuele Orlando, and the *Public Law Archive* review, in which he published his first writing in 1894. He graduated in Administrative Law in 1896, supervised by Orlando (with Orlando as supervisor), and the following year published his dissertation as a monographic work on public rights, in the first volume of Orlando's treatise.

In 1898, he qualified as a university teacher in Administrative Law. The following year, after honorably losing an open competition at the University of Macerata (in this competition, won by Ranelletti, Cammeo, Brondi, Armani and Pacinotti also participated) Santi Romano obtained a full-time temporary position in Constitutional Law at the private University of Camerino. In the next year he was placed equal second with Cammeo in an open competition at the University of Cagliari.

In 1900, his two monographs on administrative justice came out (appeared /were issued/ were published), still within Orlando's treatise; the following year, besides his celebrated book on “*The Principles of Administrative Law*”, his fundamental essay on the “*De Facto Institution of a Constitutional Legal Order and its Legitimization*” saw the light of day.

At the beginning of the new Century he married Silvia Faraone, by whom he had two children, Salvatore (born in 1904, who became a full professor in private law) and Silvio (1907). In 1902 Santi Romano moved to the University of Modena as a temporary professor of International Law, and of Constitutional Law in 1905. There he gave the well-known opening lecture on “*The Constitutional Law and the other Legal Sciences*”. In 1906, still in Modena, he

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became a full professor. In 1908, his monograph on *"The Commune"* was published in the treatise of Orlando.

In the same year, he moved to the University of Pisa, holding the chair of Constitutional Law and delivering the famous inaugural speech for the academic year on *the Modern State and its crisis*. He stayed there for about fifteen years, also filling the position of Law Faculty Dean in the period 1923-24 (he also was appointed to the teaching of comparative colonial law at the Cesare Alfieri Institute of Florence). In 1914, he wrote *"The Italian Public Law"* (*Italienisches Staatsrechts*), for the German-speaking readers, which was published posthumously in 1988, due to war events. In 1917 he published on the *"Annals of the Tuscany Universities"* review and, the following year, his most famous and significant monographic contribution, *"The Legal Order"*.

From 1917 to 1921 he was a member of the High Council for Education. In 1924, he was appointed to the first 15-member commission established by the fascist Government for the constitutional reform. In 1926 he was appointed member of the council for diplomatic legal affairs. In 1924 he had also moved to the State University of Milan, still in the chair of Constitutional Law, where he was appointed both member of the University academic board (1925-1928) and Dean of the Law Faculty (1927-28). Between 1918 and 1926 he had a fervid production of manuals (handbooks): *"Colonial Law Course"* in 1918, *"Lectures in Ecclesiastical Law"* in 1918, *"Constitutional Law Course"* in 1926 and *"International Law Course"* in the same year.

In 1928, he joined the Fascist Party. In the same year, Mussolini appointed him President of the Italian Administrative High Court (*Consiglio di Stato*): this is the only case of nomination of a total outsider in the whole Court's history. His influential presence contributed to keeping the Court's independent view. Moreover, he did not drop University, keeping his academic teaching at the University of Rome "La Sapienza", where he gave courses of Administrative Law and Organization from 1929 to 1931, as well as Constitutional Law from 1932 to 1942. In 1931 he published the first volume of an *"Administrative Law Course"*, concerning the *General Principles*.

In those years Santi Romano also occupied two important positions: he was appointed member of the Senate (1934-1944) and president of the central commission for local finance (in the same year). He was a member of many ministerial commissions, such as the commission for the national historic and artistic heritage reform bill.

In 1935, (and up to 1946, when the casting vote of Benedetto Croce drove him out) he was a member in the legal section of the *Accademia dei Lincei* (besides being an associate agent of other Academies in the field of sciences, literature and arts, operating in the cities of Turin, Palermo and Modena). Santi Romano was decorated with many honors during his lifetime: The Grand Cross of the Italian Crown Order in 1930, the Grand Cross of the Mauriziano Order in 1933, the designation as a knight of the Savoia's Crown Civil Order. In 1938 he wrote a famous and controversial opinion on *"The Marshall of the Empire"*, in which he declared himself in favor of simultaneously conferring this rank both to the King and Mussolini by statute law. He asserted the legitimacy of this act by assuming that such a designation would not have derogated from the current Constitution (the *"Statuto Albertino"*), by which the King is the Commander-in-chief of the Army.

After the political turnover of September 8, 1943 in Italy, Santi Romano adopted provisions for transferring the personnel of the *Consiglio di Stato* to the North (After the armistice, Italy was divided in two parts: the South was on the side of the Allies and in the North there was a fascist puppet-state named Repubblica di Salò created by Hitler and Mussolini). Nevertheless, when he was asked to move to the city of Cremona, the new seat of the Administrative High Court, he preferred to retire. After the liberation of Italy he re-entered the chair, but in September 1944 he was remitted to the High Court of Justice and was subjected to a purge trial at the *Consiglio di Stato* "purge commission" of primary jurisdiction. Stubbornly defending himself and denying all the accusations against him, Santi Romano asked for and obtained retirement in October 1944. In the last few years of his life, he lived a life of sadness

During the foundation period, he was of the same importance as the other three scholars, but he was also the one who paved the way for a new concept of the law: on the methodological side, this (concept) was defined by Giannini as “post-pandectist”, because it was aimed at mitigating the legal purism by opening it to facts and social reality (therefore, the use of dogmatics was not an end in itself, but a means for understanding the surrounding reality: as observed by Miele: « *his sharp comprehension of reality is always present in his mind when he expounds the Law: he does not let the schemes and theories grasp him, nor the “turbid mixture” of reality drive him while expounding and describing legal institutions*»<sup>10</sup>); as for legal reconstruction, it aimed at overcoming the simplifying pattern of the relationship between the State and individuals, by means of a rediscovery of the civil society based on the institutional theory.

Compared to the other founding fathers, his different path is also probably due to his peculiar legal education and the different perspective from which he approached legal issues and the study of Law. Romano, the first and most famous of Vittorio Emanuele Orlando’s pupils, “was born” as a Public Law scholar and did not arrive there from Private Law studies (as Ranelletti and Cammeo).

Moreover, he mainly concentrated in that field of study which nowadays would be defined as legal theory - while Orlando used to define it as “general public law” - with a strong interest in the International Law. Not by chance Santi Romano has been the most famous and translated Italian scholar of Public Law outside the national boundaries.<sup>11</sup> It should be also noted that, even if

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and loneliness, he devoted himself to his last and celebrated work: the “*Fragments of a legal dictionary*”. He died in Rome, on the 3<sup>rd</sup> of November 1947.

<sup>10</sup> G. Miele, *Stile e metodo nell’opera di Santi Romano*, in *Arch. studi corp.*, 1941, anche in Id., *Scritti giuridici*, vol. I, Giuffrè, Milan, 1987, 340. Miele goes on, “There is in him the awareness of the social substance hiding behind them, but this is counterbalanced by the knowledge of law: harmony between them, not the one absorbing the other, least of all the separation, which could be equivalent to the reciprocal ignorance between each other. This is the same quality which I found in another great public law scholar, Orlando, who was not even causally his Master. All that allows him to be always acquainted with new legal phenomena, to study them without prejudice and with a “realistic” mind (the latter being a very fashionable adjective at the time), to constantly revising and testing his ideas, ready to modify them if they turned out to be insufficient or inadequate in respect to new legal entities” (pp. 340-341)

<sup>11</sup> The most celebrated work by Santi Romano (*L’ordinamento giuridico*, Mariotti, Pisa, 1918) is translated in German, French, Spanish and Portuguese: S. Romano, *Die Rechtsordnung*, Duncker & Humblot, Berlin, 1975; Id., *L’ordre juridique*, Dalloz, Paris, 1975; Id., *El ordenamento juridico*, Instituto de Estudios Politicos, Madrid, 1963; Id., *O ordenamento juridico*, Boiteux, Florianopolis, 2008.

Romano had an eminently “German education”, his main points of reference were Gierke and, most of all, Georg Jellinek, instead of Laband and Gerber.<sup>12</sup>

Contrary to his master, Romano was reserved and taciturn: he didn’t talk much, letting his written works speak on his behalf, in a direct and sharp manner<sup>13</sup>; « the style is as moderate, clear, straightforward as the man. There is a very good combination of accuracy and simplicity »<sup>14</sup>.

Orlando held the scholar in a very high esteem, as can be inferred from a private letter of the 1<sup>st</sup> February 1933 to Carlo Alberto Biggini, where it is stated that: «Romano would be excellent, but his lack of demonstrativeness makes him fail in one of the most important qualities to be a master».<sup>15</sup> Such a fault was nevertheless compensated by an outstanding capacity for concentration in the study, as is demonstrated by the high quality and degree of accuracy in his work, and also by the exceptional number of monographs published during the first years of his scientific activity: ten long and original monographic studies

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<sup>12</sup> On this point, see A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”* (A proposito di: *Santi Romano, Il diritto pubblico italiano*, Milan, Giuffrè, 1988, pp. LXIV-447 (with an introduction by Alberto Romano), *Quaderni Fiorentini*, 1989, 623.

<sup>13</sup> From this point of view, it should be pointed out that Santi Romano was not only wonderful with the pen but, if necessary, also very harsh and biting. A sound example of this can be found in the letter written to the Minister of Justice, Pietro De Francisci, on the 12<sup>th</sup> January 1934 (now edited by G. Melis, *La giurisdizione sui rapporti di impiego negli enti pubblici. Nuovi documenti e quattro lettere inedite di Santi Romano (1933-34)*, to be published on the *Rivista Trimestrale di Diritto Pubblico*, 2008) as well as in some of the headings edited by di S. Romano in his “Fragments of a legal dictionary” (*Frammenti di un dizionario giuridico*, Giuffrè, Milan, 1947, see for example the headings “Giurisprudenza scolastica” (Case law in the field of education); *Giuristi* (Jurists); *Glissez, mortels, n’appuyez pas* (Sartre’s expression “Gently, mortals, be discrete”); *Mitologia giuridica* (Legal Mythology); *Uomo della strada, uomo qualunque* (the “John Hancock”, the “commonplace kind of man”).

<sup>14</sup> According to G. Miele ( *Stile e metodo nell’opera di Santi Romano*, supra, 340): «In his works his hand is so light that all efforts are hidden by the writing: and also, there is no sign of frills, superfluous words, but always a search for the essential, for what can be the necessary minimum to achieve the purpose of making it understandable (...) his reasoning is straightforward, consistent, effective in its concise expression, from which comes the sense of strictness which impresses the reader.

A. Amorth (*Il diritto amministrativo*, in P. Biscaretti di Ruffia (a cura di), *Le dottrine giuridiche e l’insegnamento di Santi Romano*, Giuffrè, Milan, 1977, 2070) also defines the scientific works of Santi Romano as « a model of style for exposing concepts in a clear and simple manner, even if pregnant: in other words, limpid, yet still deep water. »

<sup>15</sup> The full text of the letter is available in L. Garibaldi, *Mussolini e il professore. Vita e diari di Carlo Alberto Biggini*, Milan, Mursia, 1983, 391. As for Romano as a teacher, see also the records from A.E. Cammarata, in his booklet on “The Modern State and its crisis. Essays in Constitutional Law” (*Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale*, Giuffrè, Milan, 1969): «While the first sentences of his lectures were apparently cold and distant (in comparison with, I daresay, the volcanic incandescence of the lecture given by Giovanni Gentile which I attended in the morning), as the lectures went by he gradually warmed up, even if still in total decorum, up to make us (the students) “feel” his scrupulousness and passion in elaborating the expounded theory».

were published in the first four years following his graduation (besides the three writings within Orlando's treatise, the solid essays on administrative decentralization, State's constitutional bodies, disciplinary powers, administrative decisions on state-ownership, approval laws, *de facto* establishment of a constitutional system, to finish with an handbook publication, the "Administrative Law Principles"), full of new ideas<sup>16</sup> and insights, which reveal a unique and almost foreseeing capacity to read between the lines of the present and forestall the events.<sup>17</sup>

The complexity of Romano's figure calls for a subdivision of the analysis to split up his scientific bequest into related stages: the first, a five-year period of intense scientific activity - from 1897 to the beginning of the 20<sup>th</sup> Century - is mostly dedicated to the production of monographs, consistent with Orlando's approach; in the second stage - up to the coming of Fascism - Santi Romano gradually distanced from Orlando's ideas, by writing fundamental essays on institutionalism; the third period - ending with the Second World War - is mainly dedicated to a system re-construction, by means of publishing mostly manuals; at the end of his life, there is the last stage, during which he drew up his scientific will, the "*Fragments*".

### III. *The Early Works and the "Principles"*

Romano was as a precocious talent as Orlando. He was only seventeen when he started practicing law in his master's office<sup>18</sup>, and only eighteen when

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<sup>16</sup> G. Miele, *Stile e metodo nell'opera di Santi Romano*, supra, 339, «Romano has a taste for discovery and innovation: when he deals with a new topic, no side is left unexplored: his written works are remarkable for the number of inferences, comparisons, explanations, which reveal an uncommon ability for observation and insight. The reader is impressed by his wealth of ideas, definitions, opinions, inferences, found spread here and there with a certain elegant carelessness, which often contain the starting point for new researches, and always offered the opportunity for reflection on apparently warned-out topics. From this point of view, it should be probably stated that Romano writes for a range of experts, rather than for the reading public. He loves the shades of meaning, the hints, and we can imagine him sometimes suggesting new solutions to long standing challenges in a few, but set, words: and all this without emphasis or care, just as if it was a natural thing.

<sup>17</sup> G. Miele, *Stile e metodo nell'opera di Santi Romano*, supra, 341, «as well as he argued the necessity for a second level interpretation of public law provisions, he can immediately become aware of the identifiable legal developments underlying the complex and blurred social reality. He has the gift of second sight, the best gift of a jurist, which makes the latter as the augur who omens by observing the flight of birds or by examining the victim's entrails.

<sup>18</sup> It is Orlando himself who remembers this period (the last decade of the 19<sup>th</sup> Century) on two occasions. The first occasion arose from the publication of the "*Scritti in onore di Santi*

he first published, still as an undergraduate, his first work on “The Concept of Public Charitable Institution”, dedicated to the legal character of prisoners’ aid societies.<sup>19</sup>

What is impressive about this brief work, halfway between a comment on a court decision and an article, is the determined way and the influential personality with which he deals with the subject matter. Indeed, he dismisses both arguments upheld by the Italian Administrative High Court (*Consiglio di Stato*), which had been drawn in the form of an advisory opinion and a judicial decision, respectively, by stating that: « ...I became convinced that right and

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*Romano*” (Writings in honour of Santi Romano) in 1940. See V.E. Orlando, *Ancora del metodo in diritto pubblico con particolare riguardo all’opera di Santi Romano*, in *Scritti giuridici in onore di Santi Romano*, Cedam, Padua, 1939, and also *Id.*, *Diritto pubblico generale. Scritti vari (1881-1940) coordinati in sistema*, Giuffrè, Milan, 1940, 41: « ... around the turn of the last Century, Santi Romano had been apprenticed to one of those “legal craftsman’s workshops” (as to say very little, quite amateurish, law firms) in Palermo, which was held by the author of these pages, and he rapidly became a Master, together with Salvatore di Marzo and other capable young fellows. A workshop where we used to do a bit of everything: from the heated debates on the most difficult legal matters *in apicibus juris*, to the most simple investigations on the best way to commence a garnishee proceeding brought in a magistrate’s court».

The second occasion was the commemoration of Santi Romano in 1948. On that occasion V.E. Orlando (*Santi Romano e la scuola italiana di diritto pubblico*, in S. Romano, *Scritti minori*, vol. I, Giuffrè, Milan, 1950, VII-VIII) dwells longer upon the memory of the “conventual life” in his Sicilian (lawyer’s) office. « We all know what kind of mutual aid is established between a “Master” university teacher and his student. You give and receive at the same time, as this is the usual relationship between any speaker and any listener, but it is incomparably more intense when it happens in such an idea-provoking school as the University. Now, if we consider the cosy little room of an homelike office rather than a lecture hall, then this relationship will certainly lose its splendour and extent, but will gain in deepness and intensity.

Collaboration here is developed not only within theoretical discussions, but also in practising research; it is a complete and total kind of collaboration, determined in a sort of “conventual life”. So, in that office of mine, which was completely unpretentious, its size included, I gathered six or seven young fellows to work together. Besides Santi Romano, there was another future jurist who would become a member of our Law Faculty in Rome, Salvatore di Marzo; and others, even if in a limited manner, also contributed to “pure” science, although their core business would turn out to be the legal profession or magistrature.

In that community life of work, we used to, sometimes, do a bit of everything. So, for example, after a debate on the highest matters of law, as a “pure theory” arising from some lecture I gave or had to give, we suddenly had to undertake difficult investigations on a more or less complex case to be brought before the Supreme Court from a lower court of appeal, with the consequent need for a search of legal materials (i.e. authorities and case law). Nevertheless, we modestly turned into typists when, in the absence of a minor collaborator, it was necessary to promptly serve a summons, the terms of which were to expire. » Orlando also remembered that it was just Santi Romano who catalogued the public law volumes in his legal office and, in conclusion, recalled his collaboration in the making of the *Public Law Archive (Archivio di Diritto Pubblico)*.

<sup>19</sup> S. Romano, *Il concetto di istituzione di pubblica beneficenza. A proposito delle società di patronato pei liberati dal carcere*, in *Arch. dir. pubbl.*, 1894, anche in S. Romano, *Scritti minori*, vol. II, *Diritto amministrativo*, ristampa dell’edizione del 1950, Giuffrè, Milan, 1990, 1 ss.

wrong are on both sides, and it couldn't be otherwise given that, as I will demonstrate in a moment, (the Court) gave a an over-simplified answer to a very complex question, while this problem has many facets.»<sup>20</sup>). In this way he also afforded himself the luxury of criticizing such a renowned leading figure, although in his early forties, as the Romanist scholar Carlo Fadda.

His graduation thesis on public rights (a revised version of which was included in the first volume of the Orlando's Treatise and published in 1897) also has some characteristics which often recur in subsequent publications by Romano. This work shows, in fact, that Romano possessed three fundamental capacities. First of all, the gift of the greatest jurists that is to say a very well-structured, mature legal mind from a young age. Secondly, the capacity of keeping an independent view and the inclination to debate different opinions, by confronting the most renewed scholars' views (even the foreign ones, such as Gerber and, obviously, Georg Jellinek), without compromises but always keeping a critical attitude. The third is the disposition to investigate public law from a legal theory point of view, especially by a systematic approach, with accuracy and exceptional capacity for dogmatic analysis. («Our analysis shall be limited to general theories aiming at an exclusively scientific and systematic approach; a work with the aim of conducting mostly technical legal analysis, and addressed to provide simple systematic definitions»<sup>21</sup>).

Along with these "invariant" characteristics, there are some "temporary" features following Romano's works especially during the first ten years of his career, which thereafter fade. Firstly, there is a strict use of the legal method, in a faithful compliance with his Master's dictates. Nevertheless, the use of systematic and legal theory analysis contributed from the beginning to some openings which can be defined as gaps in the organization of his scientific criteria. Secondly, within legal relationship analysis, he used to narrow the focus on the "State-individual" dualism, which was a typical approach used by Orlando, and more generally by legal science in the liberal State, even if with embryonic signs of diversity <sup>22</sup>.

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<sup>20</sup> *Op. e loc. ult. Supra Supra note 32.*

<sup>21</sup> S. Romano, *La teoria dei diritti pubblici subbiettivi*, in V.E. Orlando (a cura di), *Primo Trattato completo di diritto amministrativo italiano*, vol. I, *supra*. See also S. Romano, *Gli scritti nel Trattato Orlando*, Giuffrè, Milan, 2003, 4.

<sup>22</sup> A. Romano, *Santi Romano nel Trattato Orlando*, in S. Romano, *Gli scritti nel Trattato Orlando*, *supra*, X, noted that ever since this first work there is an implied distinction between the « "the State as an artificial person", that is a subject of the legal order defined as the State's legal order; and "the state legal order" of which the State-artificial person is a legal entity: only one of the existing legal entities, even if the most important, the major, the dominant one; but

The long essay on administrative decentralization published in 1897 is also a monograph, although it was edited as a heading of the “Italian Legal Encyclopedia” (*Encyclopedia giuridica italiana*). Here Romano, after having purified the subject-matter from non-legal approaches, as required by the legal method, identifies the focal point of the analysis in the decentralization as « the most effective tool for a suitable implementation of that “State of Rights” (*Rechtsstaat*), which should be the ultimate goal for lawmakers and scholars. »<sup>23</sup>.

From this work some elements emerge as the pieces of a mosaic to be eventually completed. In a brief passage the author prefigures the arguments he was to develop further: in spite of municipal corporations being political subdivision of a State (which perform certain state functions on a local level, and possess such powers as are conferred upon them by the State) «non-territorial self-governing bodies (...) can be conceived as separated by the State - even if only limited to some events including, above all, their rise and lapse - and, consequently, as regards these bodies, the theory of decentralization results in a relation to the doctrine of restrictions on individual freedom»<sup>24</sup>.

As for the “bureaucratic decentralization”, the author stigmatizes the institution of Provinces in Italy as sly and unnatural, defining « the Region as the only local government district of a general scope which, as well as the Commune, has a very solid legal basis»<sup>25</sup>. Nevertheless, he likes to make it clear that « administrative (local) districts of the national government (“directly” deriving their powers from the State/ central state administration) are never to be considered as legal right-holders (“subjects of law”) neither as public nor private legal persons. »<sup>26</sup>.

Then, the author analyzes the concept of self-government and the operation of self-governing bodies, by debating against the German jurists and recalling some of the arguments of Vacchelli (self-government « is something more than a liberty right, is a State’s activity set against other state activities,

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not completely, since these are self-limitations imposed by the State itself. ». Thus, an early hint can be found about the fundamental matter of the relationship between the legal order and the State, along with all the contradictions implied by Romano’s approach to this issue, between innovation and tradition.

<sup>23</sup> S. Romano, *Scritti minori*, vol. II, *Diritto amministrativo*, supra, 24. And in fact Romano mainly questions about the need for decentralization, as well as the suitable public functions to be decentralized, so that the different types of decentralization could be consequently examined: bureaucratic, self-governing, territorial, institutional.

<sup>24</sup> S. Romano, *op. ult. supra*, 26.

<sup>25</sup> S. Romano, *op. ult. supra*, 41.

<sup>26</sup> S. Romano, *op. ult. supra*, 43.

which is not purely individual »), so as to come to the appeasing conclusion of the distinction between “direct” and “indirect” State’s administration<sup>27</sup>.

He finally closes with some remarks on the « institutional decentralization», which include bashful premises, at an embryonic stage, of future theoretical developments.

Here he cited the regular religious orders of the Catholic Church («these, which make up autonomous institutions, responsible for their own administration, goals, distinct ancient traditions, demonstrate how desirable it would be if also the State could rely on the contribution of such institutions, not necessarily the same, but similar in its substantial organization»<sup>28</sup>) in order to auspicate the rise of public institutions, even if in the framework of the State’s indirect administration paradigm, and with the remark that: «in the entire topic of institutional decentralization every change should be initiated by individuals, so that it could be eventually recognized by the State, while the reverse would never be effective.»<sup>29</sup>.

The strict application of the legal method – following a merely systematic approach («so, there is only one another way : to suppose that any possible analytical study has already been completed and therefore make a systematic synthesis out of the resulting outcomes in order to draw up a general theory »<sup>30</sup> - is a constant factor in these works by Romano: furthermore, on the essay on disciplinary power of 1898, this is present in the two monographs on the topic of administrative justice, within which he demonstrated a rare speculative ability, by structuring the thesis of the administrative character of the decision issued by the Fourth Division of the *Consiglio di Stato*.<sup>31</sup>.

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<sup>27</sup> S. Romano, *op. ult. supra*, 57, «we can thus conclude: self-government means indirect administration of the State, conducted by a legal person by virtue of *subjective rights*\* and in its own interest, as well as in the interest of the State. ». \* This expression is used by the author although, among the majority of the European Continental writers, the description of rights as being “subjective” appears not to extend to such rights as those of a government agency which, in the given example, seems to be operating under “delegated powers” rather than “subjective rights”.

<sup>28</sup> S. Romano, *op. ult. supra*, 74.

<sup>29</sup> S. Romano, *op. ult. supra*, 81.

<sup>30</sup> S. Romano, *Le giurisdizioni speciali amministrative*, in V.E. Orlando (a cura di), *Primo Trattato completo di diritto amministrativo italiano*, vol. III, Società editrice libraria, Milan, , anche in S. Romano, *Gli scritti nel Trattato Orlando*, 139.

<sup>31</sup> S. Romano, *Le giurisdizioni speciali amministrative*, *supra*, 139 ss.; Id., *I giudizi sui conflitti delle competenze amministrative*, in V.E. Orlando (edited by), *Primo Trattato completo di diritto amministrativo italiano*, vol. III, *supra*, see also S. Romano, *Gli scritti nel Trattato Orlando*, *supra*, 293 ss.

By the end of this first, but very work-intensive, period of his scientific activity, Romano was now ready to undertake the difficult task of writing his first manual, the “Administrative Law Principles” (*Principi di diritto amministrativo*)<sup>32</sup>.

This work has been correctly considered as one of the most significant works by the Sicilian jurist, a volume symbolizing the “dogmatic” tendency of which, according to Giannini, Romano himself was the major representative: this tendency «divided the matter of administrative law into general theories to which all the legal institutions (concepts, categories) related to the same principles and were traced back, without consideration to which branch of administrative activity was practically involved by the application of those principles»<sup>33</sup>.

The “Principles” by Romano were «the most significant attempt of our science to construct an independent conceptual framework»<sup>34</sup>, by dividing Administrative Law into nine legal theories. He dedicated the introduction to the definition of “Administrative Law” (mostly based on the distinction between Constitutional Law and Science of Administration) and “sources of law” (laws, regulations, customs, indirect norms), while the theories regarded:

1. *Administrative-Law relationships*

*the subjects:* public and private legal persons;

*the relationships:* supremacy, liberty, civil and patrimonial rights; the distinction between rights and interests as well as between different species of interests; the creation, modification and extinction of legal relationships.

2. *Administrative acts*

definition, classification, validity and forms.

3. *Administrative liability*

liability of administrative bodies and against administrative bodies.

4. *The organization*

hierarchy; the joint nature of decisions functionaries and officers; the State’s direct administration at the national and local level; self-government or, rather, institutional bodies; the exercise of administrative duties by private institutions.

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<sup>32</sup> S. Romano, *Principi di diritto amministrativo italiano*, Società editrice libraria, Milan, 1901.

<sup>33</sup> M.S. Giannini, *Profili storici della scienza del diritto amministrativo*, in *Studi sassaresi*, 1940, anche in *Quaderni fiorentini*, 1973 (ed ora in Id., *Scritti*, vol. II, Giuffrè, Milan, 2002), 151-152.

<sup>34</sup> M.S. Giannini, *Profili storici*, supra, 160.

5. *Legal protection against public authorities*

general and special jurisdiction, special administrative jurisdictions, administrative justice, dispute resolution regarding conflicts of competence between administrative authorities.

6. *Administrative restrictions to individual rights*

police, monopolies.

7. *The provision of services to the public sector*

public works contracts, duties, special taxes and taxes.

8. *The supply of administrative benefits and public services*

common principles, public welfare and charity, state education, public transport services, railway service, administration of the healthcare system.

9. *Public property*

public ownership, public roads, State maritime property, public water, state military property

*regulation of public property:* Public-Law restrictions, Public-Law servitudes, other public real rights, expropriation for public utilities, communal use rights;

*Private-Law relationships of public bodies:* public ownership of goods taken for private use, Private-Law obligations of public bodies.

The general outline of this book was destined to leave a mark on the manuals to be published in the following half Century, although the work was also severely criticized for its excessively dogmatic and theoretical approach. Nevertheless, the project was of undeniable strength and wide-comprehension: it entirely covered the yet unexplored territory of Administrative Law, without dwelling upon descriptive analysis.

The system's view, on the other hand, was stated by the author himself in the preface to the second edition, in 1905: «I only wanted to demonstrate that our branch of law has now overcome its early stages, when it could only be itemized by describing every single activity undertaken by administrative bodies. On the contrary, now it is possible, rather, necessary to organize the textbooks by theoretical categories, regarding the fragile, but fundamental, connections gradually discovered through legal research, which allow a classification of the different legal relationships arising from the public administration. After all, this is the ultimate purpose of every (branch of) legal science »<sup>35</sup>.

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<sup>35</sup> S. Romano, *Principi di diritto amministrativo italiano*, supra

Thanks to this work the Italian Administrative Law and its science took a huge step forward.

#### IV. *The Crisis of the Modern State and the Two Souls of Santi Romano*

This first period of very intense scientific production alone would have been enough to make the Sicilian jurist one of the most influential scholars on Public Law of his age.

Moreover, it was the following period, dedicated to the elaboration of his institutional argument, which allowed him to be listed among the greatest theorists of the 20<sup>th</sup> Century <sup>36</sup>.

Romano drew up the theory of the plurality of legal orders in the space of a twenty year period <sup>37</sup>, during which he carried out a step-by-step systematic study (which, from the stylistic point of view, it has been correctly noted « the extreme constancy of his writing and how his work proceeded by subsequent additions rather than changes»: this remark can be considered as appropriate also from the methodological point of view.

It was a stream of research that started at the end of the 19<sup>th</sup> Century with his essay on the approval laws in 1897 (*Saggio di una teoria delle leggi di approvazione*), and another on the construction of public law statutes in 1899

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<sup>36</sup> M. Fioravanti (*Stato di diritto e Stato amministrativo nell'opera giuridica di Santi Romano*, in Id., *La scienza del diritto pubblico*, supra, 405 ss.) also underlined how central the administrative matter was to Santi Romano, even within those scientific works regarded in a more proper sense, as "legal theory". Moreover, it should be recalled that one of his most important works, the complex monograph on the Commune (S. Romano, *Il Comune*, Società editrice libraria, Milan, 1908), dates back to that period « a work that could be defined as "perfect" for: the completeness of its subject-matter and especially for the in-depth identification of the Commune within the category of "political communities"; the research and focus on its distinctive characteristics in comparison with the State; the (definition of) the Commune's legal status within an entirely-structural notion of self-government; the analysis of the Commune's constituent elements, namely the territory and the communal people; the creation, modification and the growth of Communes. Still now, this is the only high-level scientific work on the subject matter, and has been widely plagiarized, not so much for the expounded theories - always following a strict legal method - as for the numerous general definitions given by Santi Romano, such as: the political community; the clear distinction between self-government and the definitions of autonomy and freedom of government; the territory, territorial powers and so on» (A. Amorth, *Il diritto amministrativo*, supra note 25, 2076-2077).

<sup>37</sup> As for the relevance of Santi Romano's juvenile works for the publication of his *L'ordinamento giuridico*, see above all M. Fioravanti, *Per l'interpretazione dell'opera giuridica di Santi Romano: nuove prospettive della ricerca*, in *Quad. fior.*, 1981, 169 ss., recently re-edited with the title "*Stato giuridico*" e diritto costituzionale negli scritti giovanili di Santi Romano (1897-1909), in Id., *Scienza del diritto pubblico*, supra, 277 ss.

(*L'interpretazione delle leggi di diritto pubblico*), then continued with the speeches and lectures published in the first ten years of the XX<sup>th</sup> Century: in 1901, the essay on the *de facto* institution of a constitutional legal order and its legitimization (*L'instaurazione di fatto di un ordinamento costituzionale e la sua legittimazione*), and then, in 1902, the preliminary remarks for a theory on the limitations upon the legislative function in the Italian Law (*Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano*), followed by the essays on the first constitutional charters in 1907 (*Le prime carte costituzionali*), as well as the Law and the constitutional correctness in 1909 (*Diritto e correttezza costituzionale*)<sup>38</sup>.

But it is only with the famous essay of 1909 on the “Modern State and its Crisis” (*Lo Stato moderno e la sua crisi*) that he achieved a first significant step towards a new understanding of the legal systems. From this essay one may find some of the main contents of his following analysis, even if, at times, mingled with an apologetic vision of the State. The resulting effect, as has been very well described, « was of an extraordinary resonance and as if it were a big stone launched into the calm waters pond of the legal science »<sup>39</sup>. And, considering his acumen, it should be also noted that Santi Romano was still very young at only thirty-four years old<sup>40</sup>.

It seems therefore useful, in dealing with Romano's institutionalism, to start from the inaugural speech for the 1909-10 academic year at the Royal University of Pisa.

As in the best tradition of the Italian school of Public Law, the essay opens with a profession of faith in the legal status of the State, « wonderful creation by the law »<sup>41</sup>.

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<sup>38</sup> All the quoted essays are now available in S. Romano, *Scritti minori*, vol. I, Giuffrè, Milan, 1950 (edited by G. Zanobini, and reprinted in 1990, in a new edition by A. Romano).

<sup>39</sup> P. GROSSI, *Santi Romano: un messaggio da ripensare nell'odierna crisi delle fonti*, in Id., *Società, Diritto, Stato. Un recupero per il diritto*, Giuffrè, Milan, 2006, 148. Grossi points out that his message also « was basically suppressed by a silent majority, lazily sleeping in the shade of a “comfortable” statism ».

<sup>40</sup> As it is emphasized by P. Grossi, *Il diritto tra potere e ordinamento*, in Id., *Società, Diritto, Stato*, supra note 69, 180, « the sharp glance of this young Constitutional Law scholar, armed with youthful courage, has the same cold-heartedness as a doctor towards a very serious patient. And from this, it clearly emerges that there were truths, impotences, deafnesses, which the official propaganda of the regime managed to hyde thanks to the Italian Risorgimento fireworks and the jingoist rhetoric »

<sup>41</sup> S. Romano, *Lo Stato moderno e la sua crisi*, in Id., *Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale*, supra, 8:

«The impersonal nature of public power or, rather, the personification of the power by means of the State, conceived as a person itself: here is the basic principle of modern Public

However, the author very soon moved on from this subject to notice the first signs of crisis in the modern State: «But this luminous concept of the State - the developments and applications of which cannot be described in detail here - for the time being appears to be more and more eclipsed, so that taking it as a bad omen would not be completely superstitious »<sup>42</sup>.

A key factor of the crisis was produced by the circumstance that, within the modern State «and often (...), even against it, there is a series of organizations and societies, thriving and flourishing with an actual power, which tend, in their turn, to join and associate amongst themselves.

They may pursue the most diverse objectives, but share a common feature: that is to group the individuals based on the criteria of their occupation or, rather, their economic interest. (...)

As a matter of fact, within this emerging trend towards new corporative systems based on professional specialization, which were once so flourished and then almost disappeared due to the rise of the modern State, we assisted in the greatest occurrence in contemporary history»<sup>43</sup>.

This has laid bare the original sin of the legal order, which followed the French revolution: an oversimplified conceptualization of the relationship between the State and individuals, conceived as if it were exclusive. So, society developed on its own line, independently, or even against, the influence of the legal rules.

It can thus be inferred that the crisis « of the contemporary State can be considered as the result of the convergence of these two trends, which reciprocally worsen each other: the gradual build-up of society based on specific social interests is ever more in the process of losing its atomistic character, and the lack of legal or institutional tools, which can be found in society itself , as a means of manifesting and imposing its organization within

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Law: an immaterial person, even if real; a non - fictitious nor imaginary entity which, even if it has no body, nevertheless can manage to develop, express and impose its will, through delicate and marvellous devices.; it is not shade nor spectre, but a true life principle, operating, if not by an actual organism, with the support of a set of institutions displayed and coordinated for this purpose.

A wonderful creation by the law which, according to easy criticism, appeared to be not more substantial than a poetic fantasy; instead, as the result of a long and steady historical process, it gave life to such a social eagerness which, so at least to express ourselves, is bigger than an thing else as well as more active and powerful. We owe to this fact that individuals and boards, de facto exercising sovereignty, don't act as right-holders but as the State's agents or bodies, the supreme will of which they implement, as do impersonal offices ».

<sup>42</sup> S. Romano, *supra* note 68, 9.

<sup>43</sup> S. Romano, *supra*, 12.

the State's one. This lack can explain the reason why there is sometimes a sharing of causes and purposes between those societies and groups of individuals which, by their nature and interests, are not supposed to rally in opposition to the State and those which pursue a radical and revolutionary change in public powers»<sup>44</sup>. Moreover, once the situation has been analyzed and the reasons for the crisis have been identified, « it seems to us that an action principle is more and more required and necessary: that is to establish an upper organization which can comprise, reconcile and harmonize minor organizations into which the first organization is subdivided. This upper organization can and will be the modern State which, for a long time, can keep its present features almost intact. (...) It has the potential to assert itself as an organization overcoming partial and contingent interests and enforce its will, which can be definitely defined as general. However, the State is the only known institution that, until now, has been able to produce such a political system so as to prevent the future corporative society from coming back to a feudal-like structure. (...) The State will not be only the symbol, but also the actual body within which this principle will be increasingly applied. It will become even more powerful and active, a real personification of that large and comprehensive community which can be shaded by a passing crisis, yet is destined to gain more and more consistency and coherence »<sup>45</sup>.

This essay sets out some of the premises for the institutional theory, even if only to a certain extent. Santi Romani is perfectly capable of catching the signs of the change in progress, that is to say the mismatch between the legal construction and the economic and social developments, the antinomy between the so-called Age of Giolitti<sup>46</sup> and the former period, as well as the footprints of the irrepressible social complexity which corresponds to the legal universe complexity and which is going to wear away, from the inside, the State as a legal entity : he completely understands that the political sphere is going to prevail over the legal one. Nevertheless, because of his legal education and political inclination, he couldn't do anything but stay linked to that «wonderful creature of the Law » that is the modern State.

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<sup>44</sup> S. Romano, *op. ult. supra*, 23.

<sup>45</sup> S. Romano, *supra*, 24-25.

<sup>46</sup> Giovanni Giolitti was five times premier in Italy. The period 1901-14 is often called the Age of Giolitti, characterized by a significant change in the organization of labor, social and agrarian reforms, the introduction (1912) of universal male suffrage and Italy's first colonialism through the conquest of Libya in 1911.

It follows that the essential problem for him was how the State could reabsorb the corporative tendencies, rather than the possible role for intermediate bodies within the legal order. The same problem had to be faced, at the beginning of the Fascist twenty-year period, by Alfredo Rocco, the architect of the new State<sup>47</sup>, who then solved it in 1926 by establishing the corporative system (this was the statist face – prevailing in the Fascist regime – of Santi Romano's arguments, compared to the pluralist one expressed by Sergio Panunzio)<sup>48</sup>.

« The corporative system, as it is regarded in its ordinary course, rather than degeneration, (...) can serve (...) not to overwhelm the State, as it has developed under the modern Law, but in filling in its gaps and make up for its lacks»: these could have certainly been the words of a famous essay by Rocco of 1920<sup>49</sup>, but instead it was Santi Romano in 1910<sup>50</sup>.

So, it can be inferred that the organicistic and anti-individualistic vision emerging from this essay (edited in Pisa) aimed at reassembling minor organizations into the State and «was the opposite of pluralism»; that « to unify, to reconcile and harmonize (this is the magic formula of Romano's writing) eventually implies an elimination of the pluralism (which the fascist corporativism attempted to put into practice some years later);«that there is an alternative, made of competition and conflict, regulated by the legal order»<sup>51</sup>. According to Roberto Ruffilli, Romano succeeded at the attempt to apply Hegel's «Ethical State» pattern as «unification of society as an organic whole based on classes»<sup>52</sup>. Nevertheless, Ruffilli points out that it is exactly «the identification of more and more “abstract” solutions by Romano», as to say «the statist version of political, social and legal pluralism», that shall contribute to determining «his following support in favour of the dictatorial Fascist State»<sup>53</sup>.

The idea that the increasing complexity of society implies legal fragmentation is registered by Romano also in his essay on the State's interests

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<sup>47</sup> Referring to the title of Chapter V in the volume by E. GENTILE, *Il mito dello Stato nuovo*, Roma-Bari, Laterza, 1999.

<sup>48</sup> Although there are numerous writings on this topic, it is sufficient to recall the very clear passages by P. Grossi, *Scienza giuridica italiana*, supra, 171 ss.

<sup>49</sup> A. Rocco, *Crisi dello Stato e sindacati*, in Id., *Scritti e discorsi politici*, vol. II, *La lotta contro la reazione antinazionale (1919-1924)*, Milan, Giuffrè, 1938, 631 ss.

<sup>50</sup> S. Romano, supra note, 26.

<sup>51</sup> S. Cassese, *Lo Stato*, «stupenda creazione del diritto» e «vero principio e vita», nei primi anni della *Rivista di diritto pubblico (1909-1911)*, in *Quad. fior.*, 1987, 507.

<sup>52</sup> R. Ruffilli, *Santi Romano e la «crisi dello Stato» agli inizi dell'età contemporanea*, supra, 319.

<sup>53</sup> R. Ruffilli, supra note, 314.

and those of self-governmental entities (“*Gli interessi dello Stato e gli interessi degli enti autarchici*”)<sup>54</sup>, another crucial example of his foresight. In this work, through the auxiliary bodies formula, Romano points out the institutional clash of public interests, thus undermines, from its foundations, the construction of the administration as a unitary and monolithic body. Still, even here, the contradictions of Romano’s institutionalism emerge, since it is incapable to come out « of the compromise according to which the creative power of the legal order is recognized as well as the State’s supremacy is accepted »<sup>55</sup>.

On the other hand, Paolo Grossi wonderfully described the two souls of Santi Romano in a meaningful passage of his book on the “Italian Legal Science” (*La scienza giuridica italiana*), which is appropriate to quote in full: « this Romano, who examines the State thoroughly, going deeply into the subject, but also scanning its horizons and even beyond the State, is not in contrast with the constructor of a state system, the State as a legal entity. Simply, he sits alongside, with a completely different subject-matter, on a completely different level.

In Romano recurs the same beneficial splitting which already occurred in his first master, Orlando, between the structure-analyst of a given legal entity (that is to say, historically defined, this State or that one which, in the case of Orlando and Romano, was the Unitary Kingdom of Italy arising from the national independence wars) and the expert of “General Public Law” (as Orlando used to call it), in whose observatory the specific State’s figure is complicated and rarefies in an extraordinarily wide and various landscape»<sup>56</sup>.

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<sup>54</sup> S. Romano, *Gli interessi dei soggetti autarchici e gli interessi dello Stato*, in *Studi di diritto pubblico in onore di Oreste Ranelletti*, Cedam, Padua, 1930, see also Id., *Scritti minori*, vol. II, supra, 351 ss.

<sup>55</sup> S. Cassese, *Cultura e politica del diritto amministrativo*, Il Mulino, Bologna, 1971, 44.

<sup>56</sup> P. Grossi, *Scienza giuridica italiana*, supra, 110. It is to be reminded also the definition by N. Bobbio, *Teoria e ideologia nella dottrina di Santi Romano*, in P. Biscaretti di Ruffia (a cura di), *Le dottrine giuridiche di oggi e l’insegnamento di Santi Romano*, Giuffrè, Milan, 1977, 41, according to whom the Sicilian jurist is to be considered as « a pluralist from the theoretical point of view, and a monist from the ideological point of view ». In the same volume, moreover, Uberto Scarpelli underlined the conflict between conservatism and progressivism in Santi Romano. And A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”*, supra, 631, noted that the « the different attitude of the Sicilian jurist, now as the Author of the “legal-institutional discontinuity”, and then as the Author of the “legal-constructural continuity” ». P. Costa, *Lo Stato immaginario*, Giuffrè, Milan, 1986, finally, registered the paradox of pluralism in Romano, which is achieved through a State-centred model. Moreover, A. Massera, *op. ult. supra*, 632, in Romano’s mind there is not only this, but also the consideration that the present powers in the legal order, and their relationships, have an intrinsic legal significance. Most of all, there is the firm belief that it is necessary to equate the State and the public power and that a new

### V. *Romano's Institutionalism*

So, since the first decade of the 20<sup>th</sup> Century, Santi Romano perfectly understood the complexity of the legal universe and the crisis of a fragile and vacillating State.

But there is certainly a gap, a caesura, as Sabino Cassese noted, between the Romano in the first decade of the 20<sup>th</sup> Century, and the one who published, in the immediate post-war period, the booklet on the "Legal Order" (*L'ordinamento giuridico*).<sup>57</sup> In this work the institutional theory is completely accomplished (and it should also be pointed out, as Giannini did<sup>58</sup>, that especially during his period of teaching in Pisa, Romano had the possibility of deepening his knowledge of both Canon and International Law, which probably provided Romano's theory with crucial elements and points).

In this work the Sicilian jurist goes beyond the recording of the modern State's crisis, since he prefigures its overcoming. The structure of *L'ordinamento giuridico* is quite simple. The work is divided in two parts: the first is dedicated to the concept of legal order, the second to the plurality of legal orders and their relationships. According to Romano, the legal order as a set of norms is a restricted interpretation, because « the process of objectification, which gives rise to the legal phenomenon, doesn't start from the issuing of rules, but from a previous time; norms are merely a display of the legal order, one of various displays»<sup>59</sup>. Rather than a set of norms, Law is first of all «organization, structure, position in society itself»<sup>60</sup>. On the contrary, the legal order should be identified, within an objective law system, with the institution, which indicates every kind of entities or social bodies. An institution is «not a need of the reason, an abstract principle, an ideal-something, but it is rather an actual and effective entity»<sup>61</sup>. Such a conception of the legal order is very important for Administrative Law, where « before regulating the relationships arising from

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pluralism of public and administrative powers is emerging, which is the foundation of that *État au pluriel* we have to face nowadays».

<sup>57</sup>The following quotations are made from the reprint, S. Romano, *L'ordinamento giuridico*, Sansoni, Florence, 1946. The work was first published in 1917, in two issues, on the *Annali delle Università toscane* and came out in a single volume in Pisa, in 1918.

<sup>58</sup> M.S. Giannini, *Prime osservazioni sugli ordinamenti giuridici sportivi*, in *Riv. dir. sport.*, 1949, 10 ss.

<sup>59</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 19.

<sup>60</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 27.

<sup>61</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 96.

administrative functions, there is the Law which establishes the organization of those entities called upon their implementation»<sup>62</sup>.

Institutions and norms are considered as two distinct elements in law, both are necessary , «but those who can't understand why there is such a necessity, and thus assume only the norms to be the real essentials of law, are driven to a state of uneasiness by their belief. Therefore, they tend to leave out of their works, or nearly always limit, the treatment of other subjects. So, especially among the German scholars, Administrative Law experts often skip the theory of administrative organization and, in the field of Procedure Law, also the Italian jurists overlook the so-called "judicature" (the system of courts) and reduce it to a small number of preliminary concepts. These are intrinsic, indirect and often unobserved consequences, yet indicative of a one-sided conception of law»<sup>63</sup>.

From the conception of the legal order as the equivalent to an institution derives the corollary that there are as many legal orders as there are institutions. So, there is a plurality of legal orders, not at all referable to the State's law only , because otherwise «there would be no other actual legal orders but the State and the Interstate ones» and «law would be nothing but power or will, irradiating from the State (and, within the International Community, from many different States). There is no necessary connection between law and State. The first does not exclusively result from the second, and the State is also a species of the genus "law". One legal order can be significant for another and there are different degrees of significance implied in them, but also could be completely insignificant, just as there are many fields of human activities which are irrelevant for the State's law. Some legal orders can be "inner" to others, for example several legal orders are included within the State's one: they are inside the State, but separated by it. These are, in short, the main contents of the volume.

First of all, an observation has to be made. What is impressive regarding his approach to the topic is Romano's ability to deal with what he considered to be an extremely "border" topic for legal studies (on the conflict between politics and juridical systems). As for the logical path, his method never diverges from the dogmatic framework, which always distinguished his works. The terminology, legal techniques and reasoning used are all typical of the dogmatic approach: his style but for the substance completely recalls the legal method. In

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<sup>62</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 98.

<sup>63</sup> S. Romano, *L'ordinamento giuridico*, supra note 102, 98-99.

this specific case, in fact, he uses the sophisticated techniques of legal dogmatics in order to draw on one of its fundamentals: the role of the State as a legal entity in the law universe.

Further, on the methodological issue, the breakdown with the past is still disruptive and open to radical changes, especially in the field of Administrative Law. If there is a logical *prius* with respect to the *juris* role, here is where a jurist has to look at the social reality in order to seize it. The world of (legal) facts falls within (or returns to) the law studies through the attention paid to society, rejecting that abstruse formalism. Social complexity removes the simplifying and reductionist construction arising from the French Revolution and shows the plurality and fragmentariness of the legal universe.

Before giving an opinion on the significance of the social dimension in *L'ordinamento giuridico*, some attention has to be paid to the author's educational and ideological background. He was certainly still a Conservative from the political point of view (so, we cannot expect him to see the contingent social circumstances in a contemporary sight, nor that he could go too far in the way of drawing up the State legal order <sup>64</sup>). As for his philosophical references, he was an anti-individualist and an opponent to the Enlightenment.<sup>65</sup> On the social side, he was a representative (and supporter) of that upper agrarian bourgeoisie typical of Southern Italy (and, therefore, his social position can be associated with those of Orlando, Salandra, as well as of Ranelletti himself <sup>66</sup>). Nevertheless, in the conclusions of this work we can't find the same reconciling return to the State's comforting embrace, as it happened in the case of *Lo Stato moderno e la sua crisi*.

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<sup>64</sup> From this perspective, it can be argued that the "realistic" reading of *L'ordinamento giuridico* by D'albergo is overdone. See S. D'Albergo, *Riflessioni sulla storicità degli ordinamenti giuridici*, in *Riv. trim. dir. pubbl.*, 1974, 451 ss. On the other hand, it seems that the merely ideological interpretation given by Tarello also remains ungenerous. See G. Tarello, *La dottrina dell'ordinamento e la figura pubblica di Santi Romano*, in P. Biscaretti di Ruffia (a cura di), *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano*, supra, 245 ss.; Id., *Prospetto per la voce "Ordinamento giuridico" di una enciclopedia*, in *Pol. dir.*, 1975, 73 ss.

<sup>65</sup> On this point, see the very sharp analysis by G. Falcon, *Gli "scritti minori" di Santi Romano*, supra, 667 ss. As for Romano's opposition to the Enlightenment ideas, Falcon points out that «it is not just a purely aristocratic attitude, which was also present in Romano, but rather a defensive necessity which, as well as leads to statement of a necessary unattainability for the sources of the law, is at the same time functional to the stability of the State».

<sup>66</sup> Not by chance, all the above mentioned scholars were attracted by the fascist ideology, especially in its first stages. The rise and success of Fascism was indeed considered as instrumental to the restoration of the social order, and to the appeasement of social class conflicts by means of corporatism. Therefore, it was seen as the only possible remedy against the social and political adversities in the first post-World War. See also, G. Falcon, *Gli "scritti minori" di Santi Romano*, supra, 673.

The State as a legal person is by this time like a king without his crown, it is « only one of the various forms of human societies, even if the most developed, and there is no reason to acknowledge its divinity»<sup>67</sup>.

In other words, one agrees with the opinion expressed by Sabino Cassese in his article on “*A theory on the formation of L’ordinamento giuridico by Santi Romano*” ( “*Ipotesi sulla formazione de L’ordinamento giuridico di Romano*”<sup>68</sup>. According to Cassese, this work is an attempt to reconstruct, based on a legal ground, the liberal-democratic State, in a partly different way from the previous writings by Romano (and also from the following ones, as it will be demonstrated further on): « this was the first and most consistent - if not the only - response to the needs of the new institutions».

The reported elements of innovation in legal theory could have resulted in a radical change in the fundamental concepts of Administrative Law studies. And it is yet common knowledge that this did not happen, since the implications of the institutional theory were fully understood only several decades later: what are the reasons for this sort of “soundproofing” of the Sicilian jurist’s message, which instead should have made a lot of noise?

One first reason could be traced back to the eternal mingling of innovation and tradition, so it is always easier for science to settle into tradition, rather than to attempt catching the change. Conservatism usually acts as strong counterbalance to the innovation forces. Time only rewards reforming insights which, at that point, become new mythologies to remove, following to new changes have been metabolized. In this specific case, there two other factors to be taken into account.

On the one hand, as it has been pointed out, according to Orlando, Ranelletti, and other liberal scholars in Public Law of that time, the dogma of the State as a legal person was related to the defense of the state unity, but also to a sort of political and social *status quo*. Consequently, not only the recognition of the legal existence of such “social coagulators” as the so-called intermediate bodies, but also the very possibility of their independent organization as legal orders separated by the State, even if included in it, was considered as an attack on the social order, against to which they offered a fierce resistance.

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<sup>67</sup> S. Romano, *L’ordinamento giuridico*, supra, 111.

<sup>68</sup> S. Cassese, *Ipotesi sulla formazione de L’ordinamento giuridico di Romano*, in *Quad. fior.*, 1972, 243 ss. (the quotation can be found in p. 246). See also S. Cassese, *L’amministrazione dello Stato liberale-democratico*, in *Quad. storici*, 1972, anche in Id., *La formazione dello Stato amministrativo*, Giuffrè, Milan, 1974, 11 ss.

On the other hand, the historical factor should also be taken into account, namely that Romano published his work in 1917-18, only five years earlier than the rise of fascism. The gradual concentration of power in the state government and in the Fascist National Party ended by hiding any trace of the changes reported by Romano, through a sort of forced subsumption of the social complexity into the totalitarian State.

The point is that the Italian science of Public Law (and especially that of Administrative Law) remained guiltily unreceptive to Romano's theories and only in the period after the Second World War was it able to reap the fruits (particularly in the specific field of Administrative Law it was above all with Giannini, and also with Miele, Bachelet Ottaviano, Bassi, Silvestri). Romano, besides, continued on his way, basically a lonely path towards institutionalism.

Another step forward in this direction was the short, but sharp, essay on the completeness of the state order, recalling an idea just mentioned in "*The legal order*", which inflicted hard blow on the theory of the gaps in the law shown by Donato Donati (furthermore, it should be noticed that Romano presented his argument in Modena, which was the town he had just left to move to Pisa and which was also Donati's hometown, with whom he was however on very good terms).

In this essay, the reasoning is as convincing and almost mathematical as in the typical style of Donati's writings. Here Romano argues that the absence of a norm is not to be considered as a gap in the legal order, but just the sign of its indifference with respect to the subject matter to rule; also, that the presence of a legal norm does not excludes all possibilities of institutional gaps. On these premises, he infers that « the problem of gaps in the legal order can be seen in different ways, depending on whether the law is considered as a set of rules or rather an institutional system: these two points of view are not mutually exclusive, in fact they are combined, even if they are different and thus request different solutions. At the same time, there remains further evidence of the impossibility of reducing the whole legal order to its normative aspect »<sup>69</sup>.

The analysis of the institutional period can be closed with a mention of the lecture given at the Istituto di Scienze Sociali in Florence, bearing the title of "Beyond the State" (*Oltre lo Stato*<sup>70</sup>), where, in fact, there seems to be a halt in the development of very eye-opening and innovative reflections.

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<sup>69</sup> S. Romano, *Osservazioni sulla completezza dell'ordinamento statale*, in Id., *Lo Stato moderno e la sua crisi*, supra, 184.

<sup>70</sup> S. Romano, *Oltre lo Stato*, in Id., *Scritti minori*, vol. I, supra, 419 ss.

Starting from the recurring remark that «God or devil, true reality or false idol, salvation or perdition, the State has become the first, if not the only, actor in world science » Romano assumes that it cannot be simply « excluded that States, or even only some of them, under certain conditions, shall eventually remain, rather than develop, included and perhaps absorbed in wider organizations, which are not state-like in the strict sense »<sup>71</sup>.

But, at this point, before making any ultimate conclusions, the Sicilian jurist comes to a halt, going backwards to the *dominus*-State, which abandons its bellicose expansionism and colonizing imperialism in order to become a *primus inter pares*. A conclusion which leaves us so perplexed that we are led to raise doubts, even on how to interpret his arguments in L'ordinamento giuridico.

In this regard, it has been asserted that « the theory of the legal order is to some extent an overcoming of the arguments for the state nature of law, but in the author's perspective its position is nevertheless prior to the State, both on the structural (because the relationship between the system and the State is of the genus-species type) and historical side (because the state organization is a different progress from the pluralistic one, in the sense of particularism, as it actually was in the Middle Age); it doesn't seem accidental that in the same year of 1919, looking for horizons to his "Beyond the State", Romano found them in the hegemonic expansion of the State»<sup>72</sup>.

## VI. *Santi Romano and the Fascist regime*

The third stage of Romano's scientific path, at the end of his teaching period in Pisa and during the one in Milan, is almost completely filled with handbook arrangements. Romano even worked on seven handbooks and, what's more, regarding seven different branches of law, in the space of fifteen years, from 1914 to 1930. It should be also recognized that most of them had a didactic purpose, except the "Italian Public Law" (*Il diritto pubblico italiano*) and the "Constitutional Law Course" (which were more ambitious, complex and inspired works<sup>73</sup>). Apart from the book on "The Italian Public Law", which is

<sup>71</sup> S. Romano, *Oltre lo Stato*, supra, 421

<sup>72</sup> G. Falcon, *Gli "scritti minori" di Santi Romano*, supra, 674.

<sup>73</sup> The writing by G. Miele, *Stile e metodo nell'opera di Santi Romano*, supra, 341, was edited just on the occasion of the publication of the fifth edition of S. Romano, *Corso di diritto costituzionale*, Cedam, Padua, 1928 (1 ed.), defined as « one of the most significant works by Santi Romano, among those which better represent a scholar personality. The topic itself

worth analyzing in more details, these works are listed below, in order of their publication date: the “Colonial Law Course” in 1918 (*Corso di diritto coloniale*<sup>74</sup>), the “Lectures in Ecclesiastical Law” firstly edited in 1912 and secondly in 1923 (*Lezioni di diritto ecclesiastico*<sup>75</sup>), the “Constitutional Law Course” in 1926 (*Corso di diritto costituzionale*, which was even reprinted eight times), the “International Law Course” in 1926 (*Corso di diritto internazionale*<sup>76</sup>) and the first, practical and essential handbook on the general principles for an “Administrative Law Course”, which was published in 1930 and reprinted for the third time, in a revised and increased version, in 1937, when Romano had just become the President of the Supreme Administrative Court (*Corso di diritto amministrativo*<sup>77</sup>).

A special mention is to be given to “*The Italian Public Law*”, which was finished in 1914 and intended for the German audience, but remained unpublished until 1988.<sup>78</sup> At first, it was the outbreak of the first World War that kept the author from delivering the work to the publisher. Successively, the

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requests various attitudes, not always present in the same author: the jurist skills, historical education, political sense, a deep knowledge of positive law, system capacity to organize and arrange the numerous subject matters, a solid background in legal theory; but those attitudes are submitted to a creative and well estimated effort, which makes the book a living organism, that is to say eurythmic, original, full of sharp remarks, where topics are often seen under a new and unexpected light».

<sup>74</sup> S. Romano, *Corso di diritto coloniale*, Athenaeum, Roma, 1918.

<sup>75</sup> S. Romano, *Lezioni di diritto ecclesiastico*, 2 ed. adjusted and increased, Pisa-Palermo, Juventus, 1923.

<sup>76</sup> S. Romano, *Corso di diritto internazionale*, Cedam, Padua, 1926.

<sup>77</sup> S. Romano, *Corso di diritto amministrativo. Principi generali*, Cedam, Padua, 1930 (3 ed. revised, Cedam, Padua, 1937). There are differing opinions on this work. Some authors emphasized its merely didactic purpose and the absence of a deep reconstructive reflection, although they recognize his usual clearness of mind. However, there is also someone (Amorth, *Il diritto amministrativo*, supra, 2077) who considered it as «the “*summa*” of Romano’s Administrative Law, referring back to his renowned *Principles*, of which it represents the transcription of some “partitions” of his theories in more refined terms, the development of their foresights. Therefore, just as general theory work, this book makes only few references to positive law, so it is probably not by chance that it includes only a brief description of the administrative organization, since this topic necessarily implies reference to the positive law in force at the time of the “*Course*” edition and revision».

For sure, Romano decided not to edit further volumes of this work. For one thing, it seems that he was also very pleased with the first volumes of the *Administrative Law Course* edited by Zanobini, to whom he left the task of drawing up abstract legal arguments by means of a systematic and constructive approach, while he preferred to devote himself almost entirely to Constitutional Law .

<sup>78</sup> S. Romano, *Il diritto pubblico italiano*, 1914, Giuffrè, Milan, 1988. Besides Alberto Romano and Sabino Cassese (also mentioned in the following footnotes), an in depth study of this work was made by A. Massera, *Santi Romano tra “diritto pubblico” e “ordinamento giuridico”*, supra, 617 ss., who carefully compared this book with the rest of Romano’s manuals/handbooks editions.

institutional changes determined by the coming of fascism most likely made the book's framework outdated and led Romano to give up its publication: as regards this event, there is no need to dwell upon it further, since it was already described in details by Sabino Cassese<sup>79</sup> and Alberto Romano<sup>80</sup>. What is to be pointed out here is that, in all likelihood, the draft of this work - an actual treatise on the *Staatsrecht* - proceeded at the same rate as the one of *L'ordinamento giuridico*. Since this was probably the last work edited by Romano before "*The Italian Public Law*", it was therefore also its theoretical and systematic basis<sup>81</sup>.

This is the only period of time during which Romano, as already mentioned, held very high positions in government.

Differently from Orlando, Romano devoted himself exclusively to research and never practiced law. He avoided political contests and refused full-time positions outside academia until that morning of December 8<sup>th</sup> 1928, when a university porter rushed into the lecture hall of the University of Milan and, interrupting his lecture on Constitutional Law, announced a phone call from the Premier. Here Mussolini offered him the appointment as the President of the *Consiglio di Stato*, in a manner that was a breach of the usual procedure for appointments followed by the Italian Supreme Administrative Court till then (and thereafter)<sup>82</sup>.

Hence it follows the controversial issue of Romano's relationship with Fascism, (a subject ) on which many wrote. But we won't dwell upon this subject too much, also because, oddly, there are extreme opinions which do not properly consider that the reality of facts is often more shaded than its sharp interpretations (and this remark is especially appropriate in the case of the Sicilian jurist, because of his contradictory personality). In the previous paragraphs we already emphasized Santi Romano's conservative ideological positions, and we also noticed that, most likely, he didn't look at Fascism with a hostile attitude. In fact, it is probable that Romano (as the majority of the jurists

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<sup>79</sup> S. Cassese, *Ipotesi sulla formazione de L'ordinamento giuridico di Romano*, supra, 260.

<sup>80</sup> A. Romano, *Presentazione*, in S. Romano, *Il diritto pubblico italiano*, 1914, supra, XVII ss.; see also A. Massera, *Santi Romano tra "diritto pubblico" e "ordinamento giuridico"*, supra, 628 ss.

<sup>81</sup>In this perspective, see the very interesting remarks in the above mentioned writings by Sabino Cassese and Alberto Romano.

<sup>82</sup> On this point see G. Melis, *Il Consiglio di Stato ai tempi di Santi Romano*, in *La giustizia amministrativa ai tempi di Santi Romano Presidente del Consiglio di Stato*, Giappichelli, Turin, 2004, 39 ss. The author also reminds an episode regarding Carlo Schanzer who was the favourite to be appointed after former president Raffaele Perla and was firstly appointed, but then all of a sudden removed.

of the liberal age) cherished the hope, at least initially, that the Fascist State would have developed by integrating the traditional principles of liberalism and, in the meantime, by accomplishing the renewed needs of that complex society, so that remedies could be found for the State's crisis as well as for the ongoing strikes, assaults, ravages of private property.

There is abundant evidence that Romano, on the occasion of formal celebrations and annual reports, bestowed great honours upon Mussolini in compliance with the typical language and style of the fascist speeches and it is also unquestionable that his opinion "Marshall of the Empire" favoured, in the end, Mussolini's plans <sup>83</sup>.

However, Santi Romano asked for and obtained the Fascist Party membership card only in October 1928 (so quite late and, anyhow, in order to be appointed at the *Consiglio di Stato*). Recent studies by Guido Melis demonstrate that Romano played his role as the President of the *Consiglio di Stato* with a great dignity, and his appointment did not imply at all a "fascistization" of the Court <sup>84</sup>. There are certainly traces, in Romano's works of the late Twenties and the beginning of Thirties, of a reversal from his previous positions of the immediate post-First World War years. Above all, it can be seen in his review of the book on *La trasformazione dello Stato* edited by Alfredo Rocco, which was besides published just before his appointment as the President of the *Consiglio di Stato* <sup>85</sup>. According to Romano, there is a profound antithesis between the Liberal State and the Fascist one, since the first «is opened to all kinds of ideals and plans; this is the reason why it is incapable of controlling the existing forces in the Country, but is controlled by them». Romano agrees with Rocco that the Fascist State, in contrast, accepted and implemented «until the extreme consequences » the teaching of the modern school of Public Law, according to which «sovereignty does not lie in the people, but in the State, (...) provided with its own legal status, which is different from that of individuals and asserted its authority over them as a superior entity ».

After only ten years from the publication of *L'ordinamento giuridico*, it seems as if we are dealing with a completely different Romano who, from one

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<sup>83</sup> On this matter, see also the very interesting the historical reconstruction by A. Romano, *Santi Romano, la giuspubblicistica italiana: temi e tendenze*, in *I giuristi nella crisi dello Stato liberale*, Venice, 2000.

<sup>84</sup> G. Melis, *Il Consiglio di Stato ai tempi di Santi Romano*, in *La giustizia amministrativa ai tempi di Santi Romano Presidente del Consiglio di Stato*, Giappichelli, Turin, 2004, 42 ss.

<sup>85</sup> S. Romano, *Recensione ad Alfredo Rocco, Le trasformazioni dello Stato. Dallo Stato liberale allo Stato fascista*, in *Arch. giur.*, 1928, pag. 3 dell'estratto.

side, steps back from his opening to pluralism, so that the stress is on the State rather than on institutions. On the other side, he prefigures a continuity between the conception of State derived from the legal school of Public Law and the totalitarian drifts of the Fascist regime. Just as if these theorizations on the sovereign and authoritarian power of the State as a legal person were, in a latent way, the premises for achieving a full “consubstantiality” between fascism and the State.

#### VII. *The late Romano: the “Fragments”*

The last period of the Sicilian jurist’s life – after he was subjected to a purge trial and retired – was marked by sadness and resentment. Nevertheless, even during these tormented years, Santi Romano found the strength to enrich science with such important works as the “Principles of General Constitutional Law” (*Principi di diritto costituzionale generale*<sup>86</sup>) and, most of all, the “Fragments of a legal dictionary” (*Frammenti di un dizionario giuridico*). The latter is a sort of scientific testament which is worth dwelling upon.

Apart from the entry on “Clipperton” (written in 1930, with only few additions in March 1944), which is however unconnected with the rest of the work,<sup>87</sup> the other items listed in the “Fragments” were written in the space of three years, from the beginning of 1944 (the entry “Law and Ethics” was completed in March 1944) and the end of 1946 (the entry “Legal Mithology” is dated December 1946).

On the whole, the writings in the book can be divided in three different groups.

The first, consisting of quite long and articulate entries, aims at critically re-interpreting legal relationships and, in doing so, Romano returns to one of the key issues of his dogmatics. Such a re-reading of legal relationships is carried out by the author both on the “organizational” side and on the side of the subjective legal situation. An example of the first category can be found in the entry “Organ”, a meticulous reading of the public organs theory, which aimed at excluding all possibility of legal personality for administrative bodies. As for the second, one might look at “Absolute Rights” and “Duties, Obligations”,

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<sup>86</sup> S. Romano, *Principi di diritto costituzionale generale*, Giuffrè, Milan, 1945.

<sup>87</sup> Considering the dating, which was probably the author’s starting point for drafting the booklet: this could also explain the placing of such an item within the work.

which are closely related to one another from the writing viewpoint (although the basic argument in both entries is really that there is an asymmetry between rights and duties), but also at the entry "*Power, Authority*". The outline is the same: the settling of an issue, a description of the arguments expressed by other legal scientists, the identification of the main critical problems arising from those arguments, their classification in different categories, a proposal for a new theory, the analysis of possible consequences arising from the implementation of the proposed theory into the system.

The Santi Romano emerging from these pages of the "*Fragments*" is somehow a quite familiar one. The same is the author emerging from the second group of entries, mostly medium-sized writings, in which he returns to the institutional theory. He feels that this is probably his last chance to embark on the unexplored, or yet unclear, territory of the *L'ordinamento giuridico*<sup>88</sup>. The Sicilian jurist does it through his typical reasoning, a strict legal logic, just as if it were mathematics; although with a different tone of voice, compared to the entries of the first category, because what is different is in fact the subject-matter<sup>89</sup>.

As an example of this group of entries we can refer to "*Autonomy*" (actually, this is a sort of "halfway-house" between the first and the second group), "*Custom*", "*Law and Ethics*", "*Law (the function of)*", "*Evolutionary Interpretation*", "*Legal Norms (addressees of)*", "*Legal Reality*", "*Revolution and the Law*". Hence, he returns to deal with the primary question for a jurist, that is "what is the law", which is examined from different angles, through the institutional approach, by demonstrating the explanatory capacity of the legal order argument.

First of all, as for the borders of law (it should be pointed out that the meaning used here is that of « positive » law, therefore a different concept from justice and natural law), Romano explains that « if the conflict with moral principles is not sufficient to deprive the whole institutions (or single parts of them) of their legal nature, there is decisive evidence of the groundlessness of those arguments that, in one sense or another, equate law and ethics, rather than distinguish between them. This does not necessarily imply (...) that the

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<sup>88</sup> From that time, it was considered as a sort of key work within the Italian legal writing of the first half of the 20<sup>th</sup> Century, although for this very reason often misunderstood and, anyhow, fiercely opposed, controversial and widely criticized, both in the philosophical and legal field, ever since the publication of the "*Fragments*".

<sup>89</sup> It is quite similar to *L'ordinamento giuridico*, where we can find the typical style of Romano, although more direct, or less pompous, compared to other works by the same author.

law shall not, as far as possible, comply with ethics or, at least, deviate from it »<sup>90</sup>.

Secondly, with regard to the function of law, the author asserts that (based on the assumption that law is different from ethics and economics) such a function can be fully understood only from the institutional viewpoint, rather than from the normativist one (because norms are only one of the possible means): the function of law is to order and stabilize institutions, by means of a specific relationship between such a function and the structure of the body which performs it<sup>91</sup>.

Thirdly, as for how to interpret the law, he insists on the point that « the so-called evolution of interpretation, which is nothing but the evolution of the legal order itself, as it is interpreted, is only possible as far as the interpretation focuses on the close relationship between norms and institutional developments, rather than on the legal norms by themselves. Indeed, if we look at the essence of an institution, we can see that institutional development has a strong impact on the norms and, therefore, on the whole legal order on which such norms depend. »<sup>92</sup>. Finally, Romano deals with the way in which facts influence legal phenomena and, with specific regard to such traumatic events as political disturbances, he examines the relations between a revolutionary organization and the surviving State's institution, leaving out the relationship established between the previous and new legal orders, a subject-matter which was instead discussed in *L'ordinamento giuridico*. On the first matter, Romano reveals that « revolution is an unlawful fact in the light of the positive law of the State against which it occurs, but it does not mean that, from a different perspective, where it qualifies by itself, revolution is a well-structured movement governed by its own law » consequently, it is an independent legal order, in so far as it is a legally organized power<sup>93</sup>.

However in the "Fragments" there is an unexpected and unusual Romano who indulges in considerations involving his personal situation or, even, in polemical remarks on what he can see around him and lets us read his heart much more than usual. In short, here appears a more deeply human Romano, compared to the dogmatic scholar who enunciated theories and "built cathedrals", even if more exposed and less protected by the veil of formality. As

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<sup>90</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 73-74.

<sup>91</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 82-83.

<sup>92</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 121.

<sup>93</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 224.

it was stated before, the evidence of this can be especially found in the third group of entries, the short ones, as well as in some parts of the longer items.

As an example of the first feature identified in this kind of entries, we may refer to the last paragraph of "*Revolution and the Law*" (*Rivoluzione e diritto*): legal orders arising from revolutions in progress are technically inferior, makeshift, lacking in competence and experience. Nevertheless «they distrust collaboration from all those involved with the regime they are trying to abolish, even when they are dealing with people who are outside politics, impartial and expert.(...) Until the new construction is completed, it may, however, be necessary to make use of the remaining parts of the previous legal order. The progressive adaptation of the new legal system by integrating to the previous order, while the latter is gradually dying out, is a very hard task which can seldom be successfully completed if those who are undertaking it are not sufficiently aware that this is a difficult and delicate question»<sup>94</sup>. How could we not infer from these words, a reference to his personal condition?

As for the second feature, we may consider the last sentence in "*The John Doe, the ordinary man*" : « one should wish that a man "of the people" shall not become "vulgar"; that the "ordinary" man shall not behave as if he was a skilled, a learned one, and expect to command when he should obey; that, in short, the good-natured and quiet "*John Doe*" shall not take on the attitude of a "man of the crowds" and, in doing so, cause a deterioration of democracy into "holocracy"»<sup>95</sup>.

If we look at the heading "*Education Case-Law*", this feature can also be found in the severe criticism of the courts («heavy, pedantic and abstruse logomachies, useless quibbles, show exhibitions of learning and virtuosity, aimless analysis resulting in an end in themselves, complicated arguments which keep the reader from understanding or getting in the way of a correct perception of the reality. In other words, an exaggeration of that "concept jurisprudence", which had already been criticized, not always fairly, but is now more and more evidently going to extremes»<sup>96</sup>).

Similarly, Romano criticizes the scholars in the entry on "*Jurists*" (it is not always easy to make a distinction between the actual jurists and (...) those to whom such a quality is attributed, sometimes even officially. As there are Chinese or Roman pearls which appear authentic, and even more beautiful than

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<sup>94</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 232.

<sup>95</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 235.

<sup>96</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 112.

the authentic ones, to those who are not connoisseurs, so there are false jurists, who have only a (superficial and) faint semblance of the authentic jurists. (...)

But, more than the completely and shamelessly false “jurists”, we should worry about those half-jurists who (...) can be compared to cultivated pearls. (...) Their lack of legal mind is hidden by veneers of politics, sociology, philosophy or pseudo-philosophy, limited and obscured historical learning, often in such a good disguise that it is difficult to notice»<sup>97</sup>). The result is an idea of legal science which is closed to any exchange with other human sciences.

Above all, this last entry – together with the following (*Glissez, mortels, n'appuyez pas*), is also important for its methodological implications. What are, according to Romano, the qualities of the real jurist?

The capacity to dominate and carefully scan the horizon of the whole social phenomena, managing to identify what is legally significant; to have complete mastery of analytical tools and the ability to be concise, that is to have a legal mind which is an innate faculty rather than a learned behavior, although it can be improved with practice and experience; the use of such a strict reasoning as, at least potentially, the one used by mathematicians, even if is aimed at solving practical problems<sup>98</sup>; accuracy and precision but without becoming entrenched; the ability to comprehensively analyze events, so that they might be understood as a whole and appear in their real essence, without being smashed into smithereens<sup>99</sup>.

Furthermore, what is the role of a real jurist in the society? He « usually ends up outstanding and win the elevated place he deserves, so that he can accomplish his noble task, and which should be granted to him in the name of the public good. A society which denies such a place to him is either primitive or degenerate or, as it often happened during certain revolutions, is going through a more or less serious crisis which, if still latent, could lead to great upheavals»<sup>100</sup>.

In these sentences we can probably see, besides the aristocratic approach referring to the leading role of jurists in society, also the need for justifying his appointments during the Fascist period as the natural result of a process by which the technical authoritativeness of a real jurist is recognized within a

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<sup>97</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 113.

<sup>98</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 115.

<sup>99</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 117.

<sup>100</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 116.

given legal order. With respect to such a process, it seems inferable that he considered himself bound not to draw back.

On the whole, the "*Fragments*" is a work on the border between the juridical and non-juridical, seeking for what can be defined as juridical or outside the legal phenomena, in search of how a jurist might deal with such topics: in this perspective, as stated above, the volume might be considered as a sort of appendix, or late continuation of *L'ordinamento giuridico*. This kind of works (dedicated to the study of « the last territory where we can find a legal atmosphere») is particularly congenial to the Sicilian jurist. Although he reveals an enviable cultural background in several fields of human sciences, Romano succeeds in convincing the reader that he remains within the borders of his adopted territory, the legal studies, while the basic problem is that social complexity, by penetrating the legal system, makes the jurist's task much more hybrid with respect to his attempt at maintaining "purity" of legal knowledge. The question to ask should be: assuming this complexity, could it really be possible for a jurist, even with the strongest cultural tools for a wide comprehensive approach, to split substances as if he was a chemist, so that he can distinguish between juridical and non-juridical? In regard to this question, the answer given by Romano, although advanced for those times, doesn't seem convincing.

Moreover, in the "*Fragments*" we perceive a contradictory feature in the work of Romano, which recurs also in other writings, previous or subsequent to *L'ordinamento giuridico*, and which eventually contributed to the criticism to the institutional theory.

We intentionally kept last the entry "*Legal Mythology*" which, besides being among the most relevant of the volume, was also written last in chronological order, and was finished less than a year before the author's death

In about ten limpid pages, Romano highlights how real legal myths had been invented in every age and often caused many harms. However, the Sicilian jurist argues that there are also beneficial myths, because they meet practical needs of which there is no clear awareness, arising from « vague intuitions which also have hints of truth, obscure instincts even if deep-rooted». In these cases, it is the myth which contributes to gradually creating reality, «not only by discovering, but also by making it». «Law owes much to these myths and (...) and many of the contemporary legal realities originated just from them: like this, the assertions of human and citizen's fundamental rights,

the concept of State legal personality, the provision of a structure by which it is capable of will and actions, no longer through some representative other than its own organs, etc. It does not mean that other myths, in contrast, still are « useless shades, apart from their appearance» and, in the misleading beliefs of philosophers or jurists, they can cause serious mistakes and dangerous utopias<sup>101</sup>.

By describing the “State-legal person” as a mythology, Romano expressly recognizes, for the first time after scoffing it on many occasions, the reasons for the “realist” arguments - mainly those with their origins in the French legal theory - which, half a Century before, had already defined the State anthropomorphism as a superfluous legal fiction.

### VIII. *The «most extraordinary intellectual adventure»*

We are dealing with the umpteenth element of contradiction in the very impressive and prismatic scientific production of Santi Romano<sup>102</sup>. In these terms, it seems that here we find the foundation for those remarks according to which the Italian institutionalism was « more apparent than real, insofar as from the asserted plurality of legal orders often drifts onto the more or less explicit argument that there is an order which is more “legal” (and organized) than others, which is precisely the State »<sup>103</sup>. Therefore, it remained on the grounds of an incomplete pluralism, which «recognizes the presence of organized interests and their “juridical character”, but puts them in the framework of the general system of the State, which dominates them »<sup>104</sup>. It can consequently be argued that there are two possible readings of *L'ordinamento giuridico*: the first, out of the context of (the rest of) Romano's scientific production, the second in connection with it. If the first allows to cover a wide range of insights, the other partially close on them, reminding the idea of

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<sup>101</sup> S. Romano, *Frammenti di un dizionario giuridico*, supra, 134.

<sup>102</sup> M. Galizia (*Profili storico-comparativi della scienza del diritto costituzionale*, in *Arch. giur.*, 1963, 100 ss.) and S. Cassese (*Cultura e politica del diritto amministrativo*, supra, 184) present quite similar readings of the contradictions and second thoughts of Santi Romano as an example of his attempt at compromise between the authoritarian ideology, inspiring the Italian Public Law school, and those pluralist drives existing in the society, but also in the scientific production within the field of human sciences .

<sup>103</sup> N. Matteucci, *Positivismo giuridico e costituzionalismo*, in *Riv. trim. dir. proc. civ.*, 1963, 1030.

<sup>104</sup> S. Cassese-B. Dente, *Una discussione del primo ventennio del secolo: lo Stato sindacale*, in *Quad. stor.*, 1971, 961.

compromise, aimed at harmonizing Hauriou's institutionalist theory with the dogmatic tradition.

The point is that the institutionalist theory, even in its "purely" legal version as it was developed by Romano, was basically rejected or translated into normativistic terms by the contemporary and subsequent science of Public Law. So, those incredibly sharp intuitions, resulting from « the most extraordinary adventure ever lived by an Italian jurist in the 20<sup>th</sup> Century »<sup>105</sup>, had to wait for several decades before being gathered, developed and converted in a significant progress in legal science, during the second half of the 20<sup>th</sup> Century. Legal science, and particularly the science of Administrative Law, adjusted its path, as it is common knowledge, according to Giannini's angle of complexity. A complexity which had been perfectly understood by Romano, for one thing it was congenital to the controversial spirit of the Sicilian scholar, as a jurist and man, moved by an imperative need to reach « a complete view and, one would say, almost panoptical of the legal life»<sup>106</sup>.

Notwithstanding these contradictions, Santi Romano is to be considered as the major Italian scholar of Public Law and, maybe, the major jurist our country has ever produced.

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<sup>105</sup> P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950*, Giuffrè, Milan, 2000, 109.

<sup>106</sup> G. Capograssi, *L'ultimo libro di Santi Romano*, 1951, in Id., *Opere*, vol. V, Giuffrè, Milan, 1959, 226.