

**The Institutional Theory of Law**  
**by Santi Romano: a Link between**  
**Law and Institutional Economics**  
**under an Historical Perspective**

# 0. Introduction

## 0.1. **Motivations of the Research**

Legal *institutionalism* and *Institutional Economics*: the same adjective means some links?

The recent english translation of the «L'ordinamento giuridico» (the Legal Order, 2017) by Santi Romano

## 0.2. **Foreword**

Romano was not an economist and the economists are not legal scholars; so the interest of Romano was the definition of the concept of law, while institutional economists are concerned, mainly, with the explanation of economic development

# 1. Key ideas in Romano's «The Legal Order»

- **1.1. The notion of institution**

- 1.1.1. Law is an institution

- The true concept of law is the concept of institution, so law is not only a system of norms, instead it «before being norm [...] is organization, structure, reality of the community itself». So «every legal order is an institution and every institution is a legal order»

- 1.1.2. The definition

- «Institution is every social entity», that is: a living and concrete entity which encompasses human beings but at the same time has its own existence.

- The essence of an institution (and so of a legal order) is in its organization

# 1. Key ideas in Romano's «The Legal Order»

- **1.2. The necessity of institution: *ubi societas ibi ius***

- Where there is an organized community here there is a legal order (and so an institution).
- A community entails the creation of an institution. No community without institution.

# 1. Key ideas in Romano's «The Legal Order»

- **1.3. The plurality of institutions**

- If every community has (or is) its own legal order, it means that in a territory we find many legal orders. So the State is only one, among many, legal orders
- An example: the legal order of an industrial plant or of a corporation

## 2. Two links with Institutional Economics

- **2.1. The necessity of institutions: *ubi transactio ibi institutio***

Institutions arise because of transactions costs. Their role «is to reduce uncertainty by establishing a stable structure to human interaction» (North, 1990)

So, when there is an exchange, given transaction costs, institutions are necessarily present.

This fundamental affirmation parallels Romano's intuition (when there is a community, here there is an institution)

## 2. Two links with Institutional Economics

- **2.2. Informal constraints**

«Institutions include any form of constraint [...] Are institutions formal or informal? They can be either» (North, 1990)

New Institutional Economics gives relevance both to formal and informal constraints, underlying that «formal rules make up a small part of the sum of constraints that shape choices» (North, 1990) and that «The difference between informal and formal constraints is one of degree»

This idea parallels Romano's theory, according to there is no difference between law created by a formal body (such as the State) and law created by unofficial bodies (even criminal ones) or spontaneously developed