

Abstract.

Every time there is the chance to examine society, it is fundamental to bear in mind the concept of law: the juridical phenomenon is a cornerstone of every social and economic relationship; it takes part of the training and survival of society. Everything that surrounds us is composed by law: the social institutions, the habits, the culture. That element is so deeply rooted it becomes difficult to come forward with a precise and universal definition of it.

Law can be defined as a complex of legal norms and customs that give an organization to a collectivity in a determined historical moment. Naturally, according to its historical-philosophical framing, several researchers have focused their efforts in researching new definitions and forms of law, in order to enforce or deny previous conceptions.

Where do norms originate from? How was right born? In order to try to give an universal answer to these complex questions, it is essential to begin from a structured starting point, otherwise there is the risk of getting stuck in a vicious circle.

The theoretical approach used in this paper has taken as points of departure the two principal theories of the general right: the normativistic theory (which the main exponent is the philosopher Hans Kelsen) and institutionalism (mainly represented by Santi Romano). If the former states that the law comes from legal norms, the later attributes the ability to

constitute the law to the social organizations. These two theories, with two different methods of analysis of the society, have opposite perspectives.

The first chapter deals with the explanation of the two philosophical schools of thought. The first theory corresponds to the normativism, whose exponent is considered to be the philosopher and jurist Hans Kelsen. The main feature of it is the faculty and the role that norms have in order to legislate: thanks to it the law purchases validity and effectiveness. For the purpose of being considered effective, the norms must be respected and followed by the majority of the partners. But their *opinio iuris ac necessitatis* is already present in the same norms. Besides Kelsen contests any theory that he defines "law maker", the only source of law is the norm. The same juridical theories are founded upon legal norms.

But where do norms originate from? Every norm, according to the normativism, has a legal basis constituted by the norm of superior rank that precedes it, by reaching the mandatory norms, which cannot be repealed in some way. Therefore the State (legal system *par excellence*) is just one of the possible representations or projections of the legal norms into society: when you join a specific organization, you automatically get involved into the normativistic structure that regulates that specific institution.

The second general theory on the legal system that we took in consideration is the so-called institutionalism, strongly supported by Santi Romano, who focused his attention on the institution as legal system. The idea of the Sicilian jurist is broadly expressed in its famous work of general theory of the law entitled "The legal system", published for the first time in

Pisa, 1917. The work, well known in the field of the legal culture among European countries, is the most representative and valiant writing that proposes "anti-normativistic" theories of law.

The second chapter furnishes a deeper analysis of the institutionalistic theory, particularly arising from the writings of Romano. He supports the idea that the law cannot be simplistically reduced to legal norms. This implicates that every organization, that includes a system of norms and shares a collection of laws and regulations, can be effectively considered a social institution.

Starting from the consolidation of the essential relationship among the two concepts of "legal order" and "institution", the automatic consequence is observing the fact that also those apparently "subversive" organizations, with a system in opposition to the dominant government (State), can be considered institutions. In particular Romano refers to the concept of institution in the strict sense, whereas they include a defined, ineluctable, shared and approved system of rules among all the members of a specific organization.

Moreover, as Romano supports, the so-called "statual" orders do not finish the category of institutions: there are also the "extra-statual" orders that can be placed at the same level of the first ones, although at the same time they differ for carrying different objects and purposes.

By the analysis of the two theories, it is evident that what diverges between them is the different point of view. There is a continuous contradistinction

among law as pure abstraction and law as organization; straight "from the tall one" and right "from the lower part." The positive law is accused of being too abstract, since it sets the bases of a representative juridical phenomenon of society, reminding that theoretically the norms give themselves the "right" to be law. There is a dramatic increase of the distance between norms, or imposed rules, and the social organization, which refers to the relationships that are created inside the society. Can the law be reduced only to this relation? Is it possible not to take in consideration all the other variables that participate in an evident way in the formation of institutions?

From the contrariety of the two principal legal theories, in particular focusing on the institutionalism of Romano, it is possible to give a first definition: every order endowed with an organization, a normative system and a coercive working apparatus can be practically defined as an Institution. This statement is a logic consequence of the analyzed institutionalistic thought, nevertheless it is easily disputable.

The extra-government orders are qualified as "Institutions" in a proper sense, both from the formal point of view and from the structural point of view. Santi Romano has identified and listed the principal characteristics qualifying an institution:

- The pluri- subjectivity, or rather the presence of identities, belonging to the same social group;
- A specific "set of norms", or the existence of a specific system of norms accepted by the society, directed to discipline the action of the subjects;

- An organization, which is a structure that has the faculty to create norms and to guarantee their respect and effectiveness.

Thanks to these tools of analysis, it can be easily recognized the presence of such characteristics inside the "extra-governmental" institutions: each one includes a group of subjects that adhere to a common normative system, creating a structured and complex organization.

There is another issue concerning the definition of Institution: is it possible to associate the concept of "Institution" with "legal"? In this case the characters of the investigation inevitably change. The theory of the legal system of Santi Romano allows to recognize and to establish an institution in a proper sense, but in a certain way it justifies the existence of a lot of valid and effective, but nevertheless illegitimate organizations.

An organization is illegitimate when its actions involve some negative consequences from another juridical subject. The "deviant" organizations, which do not present themselves before the State, decide to constitute a reality in opposition to the first one for object and purposes. They are directly considered subject to sanctions from the same State, through the use or the threat of use of the strength or through the coercive apparatus.

Although these extra-government organizations can be qualified as illegitimate, nothing can be deduced around their legitimacy. Every extra-government organization includes all the characteristics of an institution, therefore they can be considered and analyzed at the same level of the State.

In particular, in the third chapter we considered the “borderline” case of one of the most influential “mafia” associations, Cosa Nostra.

It is evident the fact that an extra-government system could be born inside the State and then develop in an autonomous way. Cosa Nostra has reached high levels of maturity and expansion, that only an institution with a complex and working apparatus would have been able to conquer: it is remarkable to mention that this organization has been properly called “a State in the State”.

From a deeper examination, Cosa Nostra contains all the fundamental characteristics of an institution: a well working coercive apparatus, a refined normative system, a hierarchical organizational structure, the control of a territory among the bosses of the main important families, methods of “cooptazione” for the entrance of new members in the organization. Even more extraordinary is the fact that Cosa Nostra has been able to create an articulated net of commercial, economic, and respectable relationships with public and private agencies and entities, increasing in an exponential way its influence.

However it is compulsory to take into account that every criminal association has a destructive disposition, particularly in contrast with the affairs of the State, damaging its structure in different ways. Are there any real impediments in order to consider these “extra-statal” as "legal Institutions?"

The istitutionalistic theory is the point of departure for an exact definition of the concept of Institution, but it is not enough: there are many other variables which cooperate in the determination of a legal system.

Surely a structural organization is the point of departure for a working institution considering, above all, its functional role in the satisfaction of the specific affairs of its partners. Nevertheless it is not possible to speak of "legal Institution" in a proper sense:

-from the "giuspositivista" point of view, institutions as "Cosa Nostra" inevitably miss the requisite of the legality. That is why the mafia is defined as a "parasitical organization", because it comes into force wherever the State presents some structural gaps, and it exploits them pursuing her own (often economic) affairs against the same State. These types of organizations are devoted to the destruction: if there is a conflict of affairs, the favored method of resolution is the use of violence, threat and coercion.

-From the institutional (or realist) point of view, "Cosa Nostra" misses all the requisites coming from the moral legitimacy, which means that it misses a basic principle that confers to each organization the capacity to be recognized as equal by their partners and the sovereign orders.

First of all, the legitimacy designates the moral justification of the power of an organization, because it is founded upon ethical-juridical and ethical-social nature principles and values. As we mentioned before, the only means of communication of the mafia with the "external world" is violence in all of its shapes: which form of ethics could it spread, if it only stimulates homicide, to the respect of the rules up to the death? Mafia is as unexceptionally well-structured as sick. Can a legal legitimacy exist without a moral legitimacy?

It is certainly impossible to give an affirmative and universal answer to these important questions and in trying to do so, an even ampler and more articulated debate is open, which would include and overpass the simple definition of order as "legal Institution."

The thesis supported until now, following the school of thought of the institutionalistic theory (alongside the jurist Santi Romano), accompanies us up to a certain point in the definition of "Institution" in its proper sense, but it does not have all the necessary instruments to conclude it.

Nevertheless, it is necessary to remember (as Santi Romano used to answer to the accusations from some philosophers) that the above-mentioned theory does not have a philosophical matrix. In other words the tools that it furnishes, during the analysis, are not completed, in fact it adopts a predominant juridical point of view, recognizing the power but also the limits of a "univocal" social analysis as part of a good analysis.