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## Book Reviews

Santi Romano. ***The Legal Order***. Ed. **Mariano Croce**. New York: Routledge, 2017 [1917–1918]. Pp. xxiii, 145. £84 (Hardback); £31.19 (Paperback). ISBN: 9781138280991

### 1 Introduction: Intimations of Global Legal Disorder

On 10 May 2020, the European Commission's President said: '[t]he final word on EU law is always spoken in Luxembourg. Nowhere else.'<sup>1</sup> She also foreshadowed punitive action<sup>2</sup> against Germany, after its Federal Constitutional Court (FCC) had doubted the legality of certain decisions of the European Central Bank (ECB).<sup>3</sup> A month later, the President of the United States declared a national emergency to deal with an 'unusual and extraordinary threat to the national security and foreign policy of the United States'.<sup>4</sup> The threat was the Prosecutor of the International Criminal Court (ICC) launching an investigation into the conduct of US military in Afghanistan. To counter it, the US President imposed financial and travel restrictions on ICC officials involved in the investigation. And, in September 2020, the UK Government announced plans to pass legislation (the UK Internal Market Bill)<sup>5</sup> that would expressly empower its Ministers to disregard the rules of an international agreement between the UK and the European Union (EU).<sup>6</sup>

The relationships between the United States and the ICC, between the Court of Justice of the European Union (CJEU) and the German FCC and between the United Kingdom and the European Union had clearly hit the rocks. These incidents prompted learned comments: legally speaking, how was such degradation even possible? A pandemic kept everyone homebound, and views on these episodes saturated the internet. Hot takes sold like hot cakes.

<sup>1</sup> European Commission, Statement by President Von der Leyen (10 May 2020), available at <https://bit.ly/379fpGS>.

<sup>2</sup> In the form of infringement proceedings, see Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01, Art. 258.

<sup>3</sup> German Federal Constitutional Court, Judgment (5 May 2020), 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

<sup>4</sup> Executive Order on Blocking Property of Certain Persons Associated with the International Criminal Court (11 June 2020), available at <https://bit.ly/3fHtJKL>.

<sup>5</sup> United Kingdom Internal Market Bill, 9 September 2020.

<sup>6</sup> Namely, the Northern Ireland protocol of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019 O.J. C 384 I/01.

Many commented on these episodes' fatal implications, ransacking thesauri for synonyms of 'crisis', 'rupture' and 'apocalypse'.<sup>7</sup> Most comments agreed that legal orders ought not to interact in such a way. Bloggers named better options: dialogue, rule of law, constitutional pluralism, proportionality, inter-legality. Almost invariably, the underlying normative assumption was that the FCC, the White House and Whitehall had not just breached the rules of an external order, but also disrespected a protocol of harmonious interaction *between* legal orders. The existence of this protocol remained a doctrinal truth – embraced by faith, rather than reason or experience. Clearly, the FCC and the US and the UK governments were aware of the risk of exposing their states to responsibility for international wrongdoing, and seemed indifferent.

In these episodes, two facts occurred, the former triggering the latter. First, legal orders collide, as they do, at least occasionally; second, when collisions happen, scholars lack a legal vocabulary to explain them, but assert that they should not happen just the same – taking a normative stance without a norm to stand on. Typically, the assertion points at the rules of the disrespected order (the EU, the ICC system and the Withdrawal Agreement between the United Kingdom and the EU) and/or at some elaborate version of one's preference for harmony over chaos. Most scholars, therefore, are in denial about the reality: inter-order coordination is just what each order makes, or fails to make, of it. Since these incidents are relatively sparse, it is easy to default on the reassuring idea that a spontaneous ordering of legal institutions (*κόσμος*) is in fact normatively organised (*τάξις*), which is the equivalent of believing that an intelligent design arranged clouds into the transient shape of a face or a cat. If one succumbs to this delusion, something as natural as a cloud dissolving is presented as animal cruelty.

Disappointment aside, there is no legal preclusion against inter-order clashes, and at least one scholar has never nurtured any such delusion. This author noted that whether two legal orders will coexist peacefully or even coordinate depends on the 'relevance'<sup>8</sup> that each affords the other at any time. Whether a legal order grants legal relevance to another one is a unilateral determination, sometimes made just out of habit or convenience. Such grant can be denied or withdrawn:

[Between two legal orders] there can be commonalities as well as antinomies. They can prop against each other, presuppose each other, recognize each other, as well as fight and disavow each other. . . . From a legal point of view, each order . . . should be considered in itself and for itself; and when we consider the one, we have to take the other into account only if, and insofar as, the former implies it for its own purposes and in the sense in which it does so, which might vary significantly. Each order operates on its own, for its own purposes, within its scope and with a force that originates from its organization and from its intrinsic characteristics (at 57–58, ¶ 29).

This means that clashes between legal orders are inevitable. The FCC and the CJEU, or the United States and the ICC, or the United Kingdom and EU, can scream accusations

<sup>7</sup> By way of example, see Dunt, 'Shock and Outrage as Parliament Votes to Put Government above the Law', Politics.co.uk (14 September 2020), available at <https://bit.ly/3q6tCNv>: 'Something fundamental in British constitutional life was disintegrating. One of the most basic of all the political principles that held the country together was coming unstuck.'

<sup>8</sup> Romano, *The Legal Order*, at 69, ¶ 34: 'My analysis of the relations between different legal orders necessarily dovetails with the analysis in which one of them can be relevant to the other.'

of illegality against each other, each projecting outwards their internal notion of legality. Not only is it possible, but it is even obvious that there will be cases in which 'one [institution] claims independence from the other, while the latter, on the contrary, claims the former is dependent on it' (at 69, ¶ 33.7).

The author who knew this is Santi Romano, and his remarks appear in the book *The Legal Order*, published in two instalments between 1917 and 1918. His views on legal pluralism are refreshingly accurate, but remain largely unknown outside Italy. A few translations exist, which have helped the book to reach a wider audience, but not the Anglophone world.<sup>9</sup> Mariano Croce, who in 2017 translated this short monograph into English and procured a brilliant introductory essay by Martin Loughlin, has created the conditions to make Romano great again.

## 2 The Most Important Legal Theorist You've Never Heard of

In the history of this journal, Santi Romano is cited a handful of times.<sup>10</sup> Koskenniemi and Humphreys cite him second-hand (respectively, reviewing Abi-Saab's 1987 *Cours général*<sup>11</sup> and Agamben's *State of Exception*<sup>12</sup>). Presumably, Kingsbury's mention of Romano is courtesy of the Romano connoisseur Sabino Cassese, a co-founder of Global Administrative Law, or of his student Lorenzo Casini.<sup>13</sup> In his reflections on Anzilotti, Roberto Ago ranks Santi Romano among the dearest '*grands savants*' who taught him law.<sup>14</sup> Francesco Francioni can be credited with the only genuine engagement with Santi Romano's idea in the pages of the *EJIL*. In an article on global public goods, he summarizes Romano's theory of legal pluralism, finding it 'incredibly modern in today's globalized world'.<sup>15</sup>

This is a rough survey, with many false negatives: many more scholars might know Romano and just have had no opportunity to refer to his name. (Pierre-Marie Dupuy, for one, is an attentive scholar of Romano, as the 2000 *Cours général* and the 2020 update demonstrate<sup>16</sup>). However, it gives a sense of the tiny footprint of Romano outside Italian, French and Spanish academia.

<sup>9</sup> Only four translations existed until recently: *L'ordre juridique* (L. François and P. Gothot trans., Dalloz 1975) (but see also the recent 2002 reprint with an introduction by P. Mayer); *Die Rechtsordnung* (W. Daum trans., Duncker & Humblot 1975); *El ordenamiento jurídico* (S. Martín-Retortillo and L. Martín-Retortillo trans., Instituto de Estudios Políticos 1963); and *O ordenamento juridico* (Arno Dal Ri Júnior trans., Fundação Boiteux, 2008).

<sup>10</sup> Not to be confused with Cesare Romano, whose (widely cited) pioneering work on judicial fragmentation in international law throws up a few false positives.

<sup>11</sup> Koskenniemi, 'Repetition as Reform: Georges Abi-Saab's *Cours général de droit international public*', 9(2) *European Journal of International Law (EJIL)* (1998) 405.

<sup>12</sup> Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception', 17 *EJIL* (2006) 677.

<sup>13</sup> Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23.

<sup>14</sup> Ago, 'Rencontres avec Anzilotti', 3 *EJIL* (1992) 92.

<sup>15</sup> Francioni, 'Public and Private in the International Protection of Global Cultural Goods', 23 *EJIL* (2012) 719.

<sup>16</sup> Dupuy, '2000–2020: Twenty Years Later, Where Are We in Terms of the Unity of International Law?', 9 *Cambridge International Law Journal* (2020) 6.

Even outside *EJIL*'s pages, Santi Romano's influence on international and transnational legal studies has been minuscule. To be sure, those in the know, however, have left crumbs to entice their readers: 'A worthy adversary of Kelsen, who ended up at Berkeley publishing lengthy works for many years in English, Romano never left Italy and wrote in his native language. It is a considerable loss for the Anglophone world.'<sup>17</sup>

In their works in English, Gaillard<sup>18</sup> and Paulsson have kept Romano's legacy alive, mostly in arguments on whether international arbitration qualifies as a legal order. However, for the most part, references to Romano are accompanied by the disclaimer that his name will not be familiar. Around 10 years ago, when I did a systematic survey, it was not altogether difficult to list virtually all references to Romano in English scholarship, however perfunctory.<sup>19</sup> The lack of an English translation of *The Legal Order* is likely to have been a serious barrier, which the recent translation might knock down at last. A century onwards, Santi Romano may finally make his entry on the anglophone stage.

### 3 A Non-Essentialist Notion of Law (Institutionalism), and Its Inevitable Corollary (Pluralism)

Santi Romano's central message is easily understood as a radical objection to legal positivism *à la* Kelsen. Alas, the message carries louder in those languages that have different words to distinguish a law (*lex, legge, loi, ley, Gesetz, закон*, etc.) from the law (*ius, diritto, droit, derecho, Recht, право*, etc.).<sup>20</sup> Legal positivism tended to flatten the distinction, reducing 'the law' to 'laws'. Santi Romano observed that statutes were only one component of the law; law is not just an act, the dignified result of a process. The institution does not create law: the institution and the law are like two sides of a coin.

As this is so, every society is a legal order, and the converse. *Ubi societas, ibi ius; ubi ius, ibi societas*. This is not correlation, but correspondence: tomato tomatto. Accordingly, all organized society with some unifying purpose and organization is a legal order. Law is not determined by its content or its process. Santi Romano endorsed a non-essentialist concept of law, 80 years before Brian Tamanaha dissuaded scholars of legal pluralism from contriving one.<sup>21</sup>

The quintessence of Santi Romano's legacy is therefore a crude version of legal institutionalism. He did not shy away from conceding that a gang of criminals can

<sup>17</sup> Paulsson, 'Arbitration in Three Dimensions', 60 *International and Comparative Law Quarterly* (2011) 291.

<sup>18</sup> E. Gaillard, *Legal Theory of International Arbitration* (2010).

<sup>19</sup> Fontanelli, 'Santi Romano and *L'ordinamento giuridico*: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations', 2 *Transnational Legal Theory* (2011) 67.

<sup>20</sup> Besides, the title of the work itself can be lost in translation. *The Legal Order* is the correct rendition of *L'Ordinamento Giuridico*, but it might not tell much to the anglophones, who might be more familiar with 'legal system' or 'legal regime'. See Itzcovich, 'Legal Order, Legal Pluralism, Fundamental Principles: Europe and Its Law in Three Concepts', 18 *European Law Journal* (2012) 358–384.

<sup>21</sup> Tamanaha, 'A Non-Essentialist Version of Legal Pluralism', 27 *Journal of Law and Society* (2000) 296. Tellingly, it was noted how Ehrlich featured in Tamanaha's pantheon, but not Romano: see Twining, 'Legal R/realism and Jurisprudence: Ten Theses', in E. Mertz, S. Macaulay and T. W. Mitchell (eds), *The New Legal Realism* (2016) 121, at 128 n.25.

be a legal order, even if the state considers them outlaws (at 21, ¶ 14). In fact, the corollary of institutionalism is that state law is not the only law, and that accordingly the state's legal order is not the only legal order (at 50, ¶ 25). Trite in hindsight, this was trinitrotoluene at the time: 'the state is nothing other than a species of the genus "law"' (at 53, ¶ 26). Legal pluralism is Romano's other legacy: he sketched his understanding of it in the second half of *The Legal Order*, and the remainder of this review focuses on it.

## 4 Radical Legal Pluralism

Romano was not the first scholar to consider law as a social phenomenon. His contemporary Eugen Ehrlich had already explored how legal rules play out in the life of citizens, and how they interact with non-legal rules. As such, Ehrlich was a pioneer of legal sociology, and carefully observed how various social regimes interact – some legal, others not. Therefore, Ehrlich can be credited for supporting a view of 'social pluralism' in which legal and non-legal are hard to distinguish, and their distinction would not matter ultimately because the object of study is social relations at large.<sup>22</sup>

Unlike Ehrlich's, Romano's thinking never turns into sociology. Romano is a lawyer through and through,<sup>23</sup> but observes law with the unsympathetic eye of the entomologist. Legal orders emerge, develop, disappear, inevitably interact, normally go along, sometimes clash with each other. Romano is indifferent to any metaphysical foundation of law: *natural law* plays no role in his theoretical framework. *The laws of nature*, instead, often explain how multiple legal orders come into contact.

Romano is unimpressed by natural law theories, which are dismissed as a parlour trick to justify the state's uniqueness. The trick is to use natural law to explain the centrality of positive law: appeals to a superior authority coalesce into an apology for the incumbent authority, i.e. the state. Positivists equate the state to the realisation of reason/God into the world, to support the notion that law is not just a human construct, but the by-product of a process driven by divine providence or rationality. Besides, metaphysical thinking invites hopeful (and delusional) parallels between 'the legal microcosm and the macrocosm of the order of the universe', supporting the conviction that a single will somehow informs a 'harmonic system' (at 52, ¶ 26). Santi Romano is ruthless with the state-centric theory and its metaphysical and philosophical elements. His uncompromising words could very well be deployed against the various schools that point at ordering tools as if they were connatural to law (constitutionalism, interlegality, systemic integration, dialogue, etc.):

Rescue attempts of this sort are destined not to be successful, and they look suspicious anyway. If a theory that came into life within the realm of philosophical speculation does not prove vital in that realm, it is just as unlikely to survive within the realm of the science of positive law (at 52, ¶ 27).

<sup>22</sup> On how Santi Romano breaks from Ehrlich's sociology of law, see M. Croce, *Self-Sufficiency of Law: A Critical-Institutional Theory of Social Order* (2012), at 77–79.

<sup>23</sup> His biography would deserve a separate monograph. Suffice it here to say that he served for 15 years as head of the Italian highest administrative jurisdiction, and that he authored university handbooks on constitutional law, international law, administrative law, colonial law and ecclesiastical law.

In Romano's pages, there is no patience for grand theories of natural law and legal positivism, but a keen interest in the laws of nature and positive law. Santi Romano had little evidence for his view that the state was just one order among many. At the time of his writing, the entire range of non-state legal orders that existed could be counted on one hand: international law, the church, local autonomies; a few intermediate social bodies were emerging, like political parties and trade unions. Yet, Romano did not need evidence to make principled remarks capable of generalisation: observation and rigour gave him the luxury of venturing into foretelling:

Should we rely on prophecies, however simplistic, we could stress that in a not too distant future the opposite process [i.e. the growth of non-state law] is likely to take place. For the so-called crisis of the modern state entails the tendency of an enormous series of social groups to constitute independent legal circles of their own (at 54, ¶ 28).

Romano's book describes the world of 1918, but his doctrine 'had then and has now a wider and universal horizon'.<sup>24</sup> As he predicted, the particularisation of social interests has, indeed, produced multiple particularised legal orders, and their interplay has become a matter of study. However, the apple does not fall far from the tree: if legal orders emerge spontaneously and have no pre-determined character, there is no script for their interaction either.

In short, Santi Romano's agnosticism on the essence of legal orders translates – all the more so – into disillusionment about their interaction. The opening of this review is gloomy for a reason: Santi Romano's ideas about legal pluralism are more incisive when inter-order crises occur, when the feel-good theories of law lose grasp of reality. Of course, orders can interact and coordinate; they do it constantly. When they do not, though, it is not really a glitch in the system, because there is no system. What matters is how any order accommodates each other's relevance.<sup>25</sup> Theories of pluralism, alas, do not provide 'a legal account of interconnectedness'.<sup>26</sup>

## 5 Inter-Order Legal Relevance

Orders interact in ways that 'vary indefinitely', rendering an attempt to classify them pointless (at 67, ¶ 33). Before sketching a gallery of typical interactions, Santi Romano, in a characteristic move of heuristic mastery, names the object of the inquiry: the *legal relevance* that one order affords to the other.

What should we mean by 'legal relevance'? It should not be confused with the *de facto* importance that an order could have to another; nor should it be confused with the material uniformity of more orders which is pursued or determined not by a legal need, but by political

<sup>24</sup> Salerno, 'L'influenza di Santi Romano sulla dottrina e la prassi italiana di diritto internazionale', 2 *Rivista di diritto internazionale* (2018) 357, 364 n.42.

<sup>25</sup> Takema, 'Between or Beyond Legal Orders – Questioning the Concept of Legal Order', in J. Klabbers and G. Palombella (eds), *The Challenge of Inter-Legality* (2019) 69, at 75 ('If conflicts do arise, these are resolved on an ad hoc basis or, similarly to systemic order, by an actor who decides what to do with the conflict').

<sup>26</sup> Palombella, 'Theories, Realities and Promises of Inter-Legality', in Klabbers and Palombella, *supra* note 25, at 363, 372.

convenience or opportunity. . . . To condense my thinking into a quick formula, I can say that in order for legal relevance to obtain, the existence or the content or the effectiveness of an order has to be conditional on another order on the grounds of a legal title (at 69, ¶ 34).

As Santi Romano promises, if one observes these basic aspects, ‘it will be easier to analyse how this relevance unfolds’ (at 71, ¶ 36). Of course, this is just a taxonomy of how orders *can* interact, not how they *ought* to. Santi Romano’s painstaking rendering is all the more endearing because in 1918 there were few legal orders on his palette. Reading Romano’s thoughts on inter-order interactions is as humbling as knowing that the paintings of Anders Zorn<sup>27</sup> were made without the colour blue (or green): it is incredible that so much was achieved with so little. Given the current explosion of legal orders since 1918, it is not difficult to demonstrate the currency of Santi Romano’s thinking.<sup>28</sup> *The Legal Order* is not just a milestone in the history of legal ideas: it is a work of visionary exactness. Its examples grow old but its ideas do not.

Since a picture is worth a thousand words, I will circumvent the word limit with a last *vignette* from mid-2020. The purpose is to show that inter-order incidents are better understood (and lived with) than obsessed over.

The 1997 bilateral investment treaty (BIT) between Austria and Croatia seems to promote inter-order interaction, expressly giving way to EU law: ‘[t]he Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union . . . in force at any given time’.<sup>29</sup> However, the EU has no concrete prospect to impose its construction of that coordination clause. In fact, on 12 June 2020, an international tribunal determined that the BIT was fully operational,<sup>30</sup> despite the objections of the respondent state (Croatia) and the strenuous arguments of the European Commission, which went as far as to claim that the BIT had been implicitly terminated.

In the words of the tribunal, the BIT safeguard clause uses EU law as a threshold *ratione materiae* but it ‘does not state that the BIT itself should be interpreted and applied under EU law’.<sup>31</sup> *ICSID locutus, causa finita*. This episode drew less attention than the ICC, FCC and UK Internal Market Bill incidents described at the outset. In the absence of mainstream commentary, readers will have to work out for themselves how legal relevance can help to make sense of the otherwise disturbing scenario of inter-order chaos (between EU law and the BIT).

In the discussion of legal relevance, Santi Romano addressed the scenario of an order that *determines its own content* by considering another order. Adapting for the contemporary scenario, his observation would read:

<sup>27</sup> A Swedish artist, born 18 February 1860.

<sup>28</sup> I have provided several other examples, and discussed them more adequately, in Fontanelli, ‘Let’s Disagree to Disagree: Relevance as the Rule of Inter-Order Recognition’, 4 *Italian Law Journal* (2018) 315.

<sup>29</sup> Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments (19 February 1997), BGBl No. III 180/1999, Art. 11(2).

<sup>30</sup> *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia – Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis*, 12 June 2020, ICSID Case No. ARB/17/37.

<sup>31</sup> *Ibid.*, ¶ 268.

The [BIT] takes into consideration the actual fact that a person, a thing, a relationship can at the same time fall within the scope of several orders. The [BIT] takes it upon itself, with the means at its disposal, to regulate this fact, which therefore in its eyes assumes the figure of a legal fact, and chooses one of those orders, which cannot be its own. Such a choice bears no importance for the law of [the EU], but is relevant to the [BIT] that makes it (at 84, ¶ 40(d)).

Crucially, in arbitral proceedings brought under a BIT, what is at stake is the content of the ‘receiving’ order (the BIT), not the effectiveness of the original one (EU law). In the award of 12 June 2020, the tribunal ignored the supposed *effectiveness* of EU law, which could not apply to the proceedings, but delimited the *content* of the BIT.

This reading of the episode is not comforting, but it is clearer than it would have been without Romano’s keywords. Many readers may have thought about the better-known *Achmea* judgment of the EU Court of Justice.<sup>32</sup> In that 2018 decision, the EU court had in fact ventured into the interpretation, application and overall assessment of another BIT between EU countries.<sup>33</sup> On that occasion, it simply considered that ‘Article 8 of the BIT has an adverse effect on the autonomy of EU law’,<sup>34</sup> and thus ordered its disapplication within the EU legal order. Commentaries on *Achmea* have filled libraries and *résumés*, but really all there is to say is that the EU had denied or withdrawn the concession of inter-order relevance to the BIT. *Lucilinburhuc locutus, causa finita*.

## 6 Conclusion: Beware of Narratives

Herein lies the beauty of legal pluralism as conceptualized in *The Legal Order*: it accepts that a thousand non-state orders can materialize, and a thousand natural shocks can rock their attempts to co-exist. International lawyers should take the hint from divorce lawyers, and accept that inter-order conflicts are part of what law is, not anathema to them.

Much like the red pill of *The Matrix*,<sup>35</sup> *The Legal Order* teaches us to let go of magical thinking and ‘receive with simplicity everything that happens’:<sup>36</sup> there is no pre-ordered *τάξις*, only spontaneous *κόσμος*. This book does not fill any gap in the literature, because it has been around for a century. This translation, instead, will fill a gap in many libraries, I am hopeful, and I am sure that new readers will be charmed.

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<sup>32</sup> Case C-284/16, *Slovak Republic v. Achmea*, Judgment, 6 March 2018, ECLI:EU:C:2018:158.

<sup>33</sup> Another one, the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (29 April 1991).

<sup>34</sup> Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, ¶ 59.

<sup>35</sup> *The Matrix* (L. Wachowski and L. Wachowski dir., 1999).

<sup>36</sup> This is the opening quote from *A Serious Man* (J. Coen and E. Coen dir., 2009). It is adapted from Rashi’s commentary on *Deuteronomy* 18:13, the relevant text being: ‘do not attempt to investigate the future, but whatever it may be that comes upon thee accept it whole-heartedly.’