

FRANCESCA ASTA\* – CARLO CAPRIOGLIO\*\*

SANTI ROMANO (1917-1918), *L'ORDINAMENTO  
GIURIDICO*, ENG. TRANS., THE LEGAL ORDER,  
EDITED AND TRANSLATED  
BY MARIANO CROCE,  
ABINGDON-NEW YORK, 2017

One hundred years after the first appearance of *L'ordinamento giuridico*, Routledge finally fills a gap in the Anglo-Saxon legal culture, by publishing the English translation of a seminal work of the European legal theory of the twentieth century. The book has been translated and edited by Mariano Croce, Associate Professor at La Sapienza University, Roma, who also wrote the afterword. The book is enriched by an introduction by Martin Loughlin, Professor of Public Law at London School of Economics.

***About the book:***

*The Legal Order (L'ordinamento giuridico)* was first published between 1917 (Part I) and 1918 (Part II). The second edition, appeared in 1946, was translated in Spanish (1963), French (1975), German (1975) and Portuguese (2008), becoming a “classic” of continental legal thought in the twentieth century. Despite this, it has never been translated in English until now. In *The Legal Order* Santi Romano illustrates the core arguments of his “institutional theory.” The book is organized in two chapters. In Chapter I, Romano critically discusses three dominant conceptions of normative legal positivism.

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\* PhD candidate in Philosophy of Law, Roma Tre University.

\*\* PhD candidate in Philosophy of Law, Roma Tre University.

The first is the reduction of the very “essence” of the law to the notion of norm. According to Romano, the norm cannot be the grounds for the definition of law, instead it is just a “derivative or secondary aspect” (Chap. I, par. 16). Romano also criticizes the idea that coercion is a sort of accessory of the norm, instead arguing that it constitutes the distinctive feature of the law as “[a] complete and unified order, that is, an institution” (Chap. I, par. 10). Finally, Romano contends that “the law is the vital principle of any institution” and, therefore, any “institution is a legal regime.” By arguing as such, the author claims that many “old” problems are “straightforwardly incongruous” (Chap. I, par. 15), first and foremost, the chronological relationship between the state and the law. “All the definitions of law that have been advanced so far have, without exception, a common element, that is to say, the genus proximum to which that concept is reduced. Specifically, they agree that the law is a rule of conduct, although they to a greater or lesser extent disagree when it comes to defining the *differentia specifica* by which the legal norm should be distinguished from the others. The first and most important goal of the present work is to demonstrate that this way of defining law, if not mistaken in a certain sense and for certain purposes, is inadequate and insufficient if considered in itself and for itself. Consequently, it is to be integrated with other elements that are usually overlooked and that, instead, appear more essential and characterizing.” (Chap. I, par. 1) . In Chapter II Romano deals with a series of issues that emerge from his theory mainly related to the matter of pluralism. Romano “decidedly” rejects the dominant conception that the “state system has become the only system in the legal world” (Chap. II, par. 27). According to the author, multiple autonomous “institutions” and legal orders, other than the State, coexist, such as the Church and even criminal organisations. The latter is one of the most controversial and debated aspects of Romano’s theory, but it clearly expresses the main argument of his “institutionalism”: namely, that any group that shares rules within a bounded context is a legal order, or rather that any organised social body is a “legal institution.” “As long as these institutions live, it means that they are constituted, have an internal organization and an order, which, considered in itself and for itself, certainly qualifies as legal. The effectiveness of this order is what it is, and will depend on its constitution, its ends, its means, its norms and the sanctions of which it can avail itself. (...) They have legislative and executive authorities, courts that settle disputes and punish, statutes as elaborate and precise as state laws. In this way they develop an order of their own, like the state and the institutions recognized as lawful by the state. Denying the legal character of this order cannot be but the outcome of an ethical appraisal, in that entities of this type are often criminal or immoral.” (Chap. II, par. 30)

***About the author:***

Santi Romano was born in Palermo in 1875. He graduated in Administrative Law at the University of Palermo in 1896, under the supervision of Professor Vittorio Emanuele Orlando. The encounter with Orlando, “founder” of Italian Administrative law studies, had a strong influence on Romano’s thought. After the degree, Romano contributed to the First Complete Treatise on Italian Administrative Law (*Primo trattato completo di diritto amministrativo italiano*), a series of volumes edited by Orlando and dedicated to Italian Administrative law. Between 1897 and 1928, Santi Romano taught Constitutional and Administrative Law in several Italian Universities (Camerino, Modena, Pisa, Milano). After joining the Fascist Party, he was appointed President of the Council of State (the Italian Administrative High Court). Despite his institutional activities, he did not give up teaching and became Professor of Administrative Law and, later on, of Constitutional Law at La Sapienza, University of Rome. After the liberation of the city by the Allies, in October 1944, Romano resigned from the Council of State. He died in Rome on 3 November 1947.

INTERVIEW WITH MARIANO CROCE  
EDITOR AND TRANSLATOR  
OF SANTI ROMANO'S  
*THE LEGAL ORDER*

To coincide with the publication of the English translation of Santi Romano's *The Legal Order*, we interviewed Mariano Croce, Assistant Professor of Political Philosophy at the University La Sapienza - Roma, who translated and edited the volume.

**I: In the afterword to the English edition of *The Legal Order*, you affirm that, when it comes to Santi Romano, reference to the socio-legal settings is inevitable. How did the Italian socio-historical context influence the legal culture during the first decades of the 20th Century and how did Santi Romano's work have an impact upon the approach to public law in Italy?**

C: While I myself think that a theory's innovative force should be severed from the historical circumstances that contributed to its development, the Italian context of the time is certainly enlightening. For the contradictions of the project of the modern state were emerging with disquieting force. The rise of mass democracy was too great a challenge to Italian oligarchic liberal parliamentary politics which had emerged out of the unification in 1870. Political participation was scarce, and the electoral system reflected the liberal nationalist minority comprising the educated and propertied middle class and the liberal aristocracy.

Unrepresented constituencies were significantly aggravated by the impact of unification carried out by the Piedmontese political elites. If in the South banditry and crime mushroomed as a response to such disappointing political developments, the

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\*PhD candidate in Philosophy of Law, Roma Tre University.

\*\*PhD candidate in Philosophy of Law, Roma Tre University.

Papacy and the Catholic Church were hostile to the new nation-state. In sum, parliamentary politics reflected the interests of a narrow class and was hampered by different forms of aversion and resentment. Meanwhile, two *prima facie* opposite ideologies were blending together to give life to the Fascist ideology: nationalism and the kind of socialism that led to revolutionary syndicalism, influenced by French thinker Georges Sorel. But, as historian David Roberts insists, Italy was particular in its own way, as Italians were developing a radical alternative to the liberal mainstream by combining post-Marxism with radical populism – a combination that would soon culminate in Mussolini’s conservative revolution. It is crucial to bear this in mind while making sense of Romano’s distinctive contribution to fathoming and taming the heap of ferments that were drawing the 19th-century model of state to a close.

Romano had an enormous impact on public law in Italy. Famously, the young Romano contributed to a seminal collection of volumes, edited by his master, Vittorio Emanuele Orlando, devoted to Italian administrative law, *Primo trattato completo di diritto amministrativo italiano* (First Complete Treatise on Italian Administrative Law), published between 1900 and 1915.

The importance Orlando and his many collaborators attached to such a monumental scholarly enterprise shouldn’t go unnoticed: in his preface to the first volume, Orlando emphasized his and the other contributors’ conscious, and eventually successful, attempt at constructing an Italian school of public law. This collection of writings, he claimed, was the necessary counterpoint to the growing expansion of the state’s competences in the public realm.

While in the past Italian scholars had been heavily influenced by the French lawyers who had been working and mulling over the *Code Napoléon* and, subsequently, by the German pandectists, Orlando insisted that the specialization and evolution of the Italian state called for a full-fledged “home-grown” scholarly apparatus. After obtaining his degree at the University of Palermo, Romano wholeheartedly adhered to this ambitious project. However, he would soon part ways with his master (though they remained good friends, with the inevitable ebb and flow of pre- and post-war times) and developed a new, seminal approach to the legal phenomenon – one that was destined to refound the status of public and administrative law.

**I: *To what extent does The Legal Order reassert a conventional idea of the state or does it represent a new way of conceiving its tasks and organization?***

C: It is my contention that debates revolving around Romano’s being torn

between a pluralist theory of institutions and a conventional understanding of the state as a meta-institution lessens the imaginative potential of his proposal. I don't mean to ignore blatant traces of ambiguity in both his theorizing and his conduct as a foremost administrative official. At first sight, an oscillation characterised his pluralist theory that inhibits his theoretical account of an irreducible normative multiplicity and sacrifices it to the unifying power of state law. Likewise, one can hardly neglect the frictions between two aspects of his analysis. On the one hand, the idea that law is institution, organization, position of an entity, that is, the allocation of the necessary conditions for a normative entity to work based on a complex technological machinery. On the other hand, all the various examples of conflict between orders, provided by Romano, where the main question is how to reconcile a given institution with the legal order of the state.

Despite this, I think there's much more than meets the eye. I would argue that Romano's view is that law isn't so much the outcome of a process, but the process itself. If it is true that – as many of his detractors remarked – it's not easy to pin down the notion of institution in Romano's book, this is because he often oscillated between focusing on the characteristics of institutions and focusing on the process that turns a collective into an institution. Without a doubt, when he spoke of "things and energies" and "permanent and general ends" along with "guarantees, powers, subjections, liberties, checks," he seemed to be thinking of the observable traits of organizations. An approach of this sort rests on an empirical survey of the steps that are necessary to deploy a specific structure that, as Romano himself underlined, "consecrate the principle of the coexistence of individuals, but above all takes it upon itself to overcome the weakness and limitedness of their forces, to exceed their feebleness, to perpetuate particular goals beyond their natural life, by creating social entities that are more powerful and durable than individuals."<sup>1</sup> Yet, this was not Romano's main concern, as these are recurring features of all institutions, not that which brings them about.

I think it's helpful to distinguish the institution's formal structure – that is to say, the process whereby it comes to life – from its substantive characteristics. My view

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1 S. ROMANO, *The Legal Order*, Abingdon: Routledge, 2017, p. 21.

is that, while the latter are obviously central to there being institutional phenomena, Romano concerned himself with their formal structure in the first place. His main argument was that an institution is a normative structure that allows a particular ensemble of individuals to conceive themselves, and to be conceived by others, as the members of a stable and durable collective. In § 10, he went so far as to say that “society” simply stands for “institution.” While expanding on this, he singled out three main features of institutions that are not substantive characteristics but elements of a formal structure. First, within institutions the connections that tie people together must be objective, stable and permanent, in the sense that they are sheltered from the potentially variable will of individual members: “[A] class or a group of people that is not organized as such, but is only determined by mere affinities between people themselves, is not society proper.”<sup>2</sup> Second, these connections are ordered in a way that powers and competences are internally allocated among members, whether formally or informally. In other words, “social order” simply stands for “institution.” Third, the order (or the “internal law of the institution,” as Romano often called it) is not a collection of norms – which may well be essential parts of the institution –, but “an organization, a structure, a position of the very society in which it develops and that this very law constitutes as a unity, as an entity in its own right.”<sup>3</sup> In doing so, Romano coalesced the notions of institution, law, legal order, internal ordering, organizational structure: these terms are nothing but different words denoting the same phenomenon.

This is a key aspect of Romano’s unique blend of institutionalism and pluralism. For if it is its formal structure that establishes whether or not an ensemble of people forms an institution, then all ensembles of people can in principle qualify as legal orders. In other words, it doesn’t matter whether the purpose of an institution (one of its key substantive characteristics) has to do with religion, politics, morality, economics, or other areas of social life: “The celebrated contention that the law represents the ethical minimum is partly true and partly seriously mistaken. The law not only represents an amount of morality, but also of economy, customs, technique, etc. And this amount,

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2 S. ROMANO, *The Legal Order*, Abingdon: Routledge, 2017, p. 12.

3 S. ROMANO, *The Legal Order*, Abingdon: Routledge, 2017, p. 13.

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which cannot be circumscribed and measured a priori, might not be a minimum.<sup>4</sup>” Put otherwise, the law can be the internal normative structure of a collective regardless of its religious, moral, political or other types of nature. All institutions that stably tie people together and are ordered in a way that powers and competences are internally allocated are legal orders.

Interestingly, Romano’s conclusion that all institutions are legal orders regardless of the purpose of association serves as a conclusive rejection of the idea that there is an essential connection between law and morality.

So, when I say that in Romano’s view the law is a process, I mean the particular set of operations by which a formal structure emerges that might comprise this or that substantive characteristic (the latter being circumstantial and contingent vis-à-vis the process, which is what qualifies the law as the law).

**I: *In what sense was Romano’s analysis on the distinctive nature of law and legal theory able to account for a society in transition?***

C: I think Romano’s analysis is key to the understanding of what pluralism means today. In “*Lo Stato moderno e la sua crisi*” (The Modern State and its Crisis), Romano took issue with the multiplication of social movements and associations (mainly labour-based organizations, such as workers’ federations and various kinds of trade unions) that were struggling to draw liberal constitutionalism and parliamentary politics to a close. Obviously, Romano wasn’t the first to grapple with this phenomenon. Before him, French jurist Léon Duguit gnawed at French and German theories that presented the state as the only source of law. He thought that the origin of law is human beings’ wilful actions and the social rules that are required for these actions to be performed and regulated. This meant that state agencies should serve as jurisdictional – rather than legislative – bodies. The state had to be reformed thoroughly. Duguit came up with the notion of functional representation, in which representation is not based on territorial distribution but mirrors the occupational composition of society

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4 S. ROMANO, *The Legal Order*, Abingdon: Routledge, 2017, p. 22.

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and the groups of social functions to be performed. According to him, only this type of representation could make sure that the state system always acts in the interest of the groups it encompassed. Just as influential at the time was Eugen Ehrlich's sociological jurisprudence that famously distinguished between *Rechtssatz* (legal proposition) and *Rechtslebe* (life of the law). Ehrlich claimed that the core of life of the law did not reside in codified state rules but consisted of the everyday rules produced and applied by the various associations of human beings that comprise complex societies. He censured mainstream legal theories in that they were blind to the non-official sub-state orderings that governed people's conduct on a daily basis, while state law rules only came into play in specific circumstances of dispute within state courts. Duguit and Ehrlich are particularly relevant in so far as they championed versions of pluralism that were largely incompatible with the state-form. In this sense, their theories help pin down a substantial difference between what today we call "multiculturalism" and a situation of genuine legal pluralism. Multicultural conflicts can by and large be resolved within the frame of constitutionalism, as all social parties agree that the meta-normativity of state law should never be jettisoned. On the contrary, legal pluralism is a condition where social groups and associations contend state law should not be granted primacy over their inner normative orders. In a legal-pluralist scenario, the state is but one order among many, so much so that it can no longer play the role of neutral arbiter among contending social parties. Juxtaposing Duguit and Ehrlich with Romano evidences that the latter moved some distance away from the two sociologists for two reasons that provide the main thread for my discussion. First, although Romano's pluralist theory was arguably more radical than those of the other two scholars, he maintained that pluralism was not necessarily at odds with state law. Second, his main argument was that only from a "juristic point of view" – one that leaves aside sociological and philosophical considerations – can one make sense of the compatibility between pluralism and state law. In "*Lo Stato moderno e la sua crisi*" Romano made this point by arguing that sociologists' hasty dismissal of state law neglected the state's functioning as a common structure for a healthy confrontation of sub-state groups and associations within the frame of the constitution. On the one hand, he recognized that the state sprung from the French revolution had long ignored the host of societal groups that had a normative life of their own and found no representation in the state structure. On the other hand,

he averred that doing away with the state was no solution, as it would create the conditions for an overt conflict of those rival groups in a circumstance where pre-modern supra-state normative frame were no longer available. In the last pages of this short text, he adumbrated a solution that he would clarify later on in *The Legal Order*. The law should not be conceived as a set of norms issued by a body within a given group and backed by threat of sanction. Rather, it is a point of view – a purely juristic one – from which the social world can be described as an arena of smaller and bigger legal orders that can engage in a normative exchange by using the technical language of the law. While neglecting this role of state law, as sociologists tended to do, necessarily implied the end of the state, the latter should rather be viewed as one legal entity that is able to interact with other legal entities within a strictly legal-linguistic frame.

**I: *What influence has Romano had outside Italy (in particular on the work of Carl Schmitt)?***

C: Certainly, Romano had a tremendous impact on Carl Schmitt. But the latter's use of the former hardly allows measuring the impact with any accuracy. For Schmitt made an astute and manipulative use of Romano's theory, which he defines as "very significant". At the end of the first chapter of *On the Three Types of Juristic Thought*, Schmitt quoted Romano when the latter writes that "the legal order, taken as a whole, is an entity that partly moves according to the norms, but most of all moves the norms like pawns on a chessboard – norms that therefore represent the object as well as the means of its activity, more than an element of its structure."<sup>5</sup> It shouldn't go unnoticed that Schmitt translated Romano's locution "taken as a whole" (*comprendivamente inteso*) into "is a unitary essence" (*ist ein einheitliches Wesen*). Such a questionable amendment to the original text lays bare Schmitt's cunning and idiosyncratic misuse of Romano's institutionalism: he aimed to integrate Romano's theory of institution into his concrete-order thinking and, at the same time, to expunge its most detestable consequence, that concrete is, legal pluralism. But, as I noted above, Romano's theory of institution

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5 S. ROMANO, *The Legal Order*, Abingdon: Routledge, 2017, p. 7.

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was at one with his pluralistic view of legal reality. Romano conceived of institutions as self-standing normative contexts where agents develop rules which attach to roles. Institutions are complex and multilayered patterns of interaction where subjects are not only rule-abiders but also, if not primarily, role-players. On this account, for instance, the word “mother” is by no means the carrier of a broader ethos of the family (at least from the vantage point of the legal theorist), but an element of a normative web whereby the term “mother” signifies a set of rules that the role-player is required to follow and her relation to the other role-players. The family is an institution for itself and in itself, whether or not it is positioned in a broader social context where it is endowed with special relevance.

On Romano’s account, there is no genuine difference between the highly complex practice called “law” and the smaller normative context of, say, a sports club. Both are instances of the legal phenomenon. In substance, from a legal-theoretical viewpoint, there is no difference whatsoever between the rules laid down by the national parliament and the rules issued by a bunch of people who want to organize their coexistence by way of rules and roles. Such an understanding of institutions inevitably eventuates in a pluralistic view of the legal phenomenon. For any context where people issue rules and determine roles is an institution and, as such, Romano insisted, develops its own law. No view could be further apart from Schmitt’s. When he spoke of the church or the good father of family he wanted to make the point that these are pieces of a wider fabric that stands as long as all its pieces hold together. While Romano was obviously concerned with the coexistence among institutions (and a fortiori among laws), but regarded this as a matter of composition through law, Schmitt was first and foremost preoccupied with the homogeneity of the social realm, which he viewed as law’s chief end. It is important to emphasize this divergence, as it reveals two crucial features of Schmitt’s legal thought. First, it rests on a pluralistic understanding of social life, not that far from Romano’s and other pluralists’ social ontology. Secondly, precisely because of this, Schmitt viewed pluralism as the most insidious jeopardy a political community can incur.

In 1930, while Schmitt is revising his view of law in institutional terms, he produced a revealing essay, *Ethic of State and Pluralistic State*, where he attended to the diffusion of a pluralistic understanding of politics and its compatibility with the

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existence of the state. Schmitt treated as a truism the idea that all modern states to a greater or lesser degree rely on various societal parties, if only because states are not able to fulfil some basic social tasks. In other words, social pluralism is a widespread and possibly inescapable phenomenon. Yet, Schmitt identified a major threat posed by social pluralism when it becomes widespread and untamed: social groups tend to perceive themselves as autonomous normative entities and claim to have a right to enforce their own indigenous regulations. What Romano regarded as an innate aspect of legal life, Schmitt saw as a detrimental anomaly to be fended off.

***I: What is the legacy of Romano's work and why translate "The Legal Order" into English in 2018?***

C: Again, the nature of pluralism today looks like a central theme to me. Contemporary legal pluralists have set the record straight by unveiling the historical and context-specific connection between the law and the state, as Marc Galanter nicely summarized when he claimed that Western state legal systems are nothing other than institutional-intellectual complexes claiming to encompass and control all the other institutions in the society and to subject them to a regime of general rules. These complexes, he said, consolidated and displaced the earlier diverse array of normative orderings in society, reducing them to a subordinate and interstitial status. Nonetheless, Romano's reading of this historical fact turns the table of legal analysis. For he never claimed that the state should prevail over other institutions; nor did he ever claim that other institutions should prevail over the state. As I strove to demonstrate in my various analyses of his writings, he was concerned with a perspectival matter: what is the point of view from where the "matter-of-factness" of the conflict between institutions can be reframed in legal terms? Can practical conflicts be transformed and tamed as they are turned into legal ones? If this is the question Romano was trying to answer, then he never pitted the law of the state against the law of other institutions. Instead, he intended to task jurists with providing an account of social reality that might find a route to make the various legal orders compatible with each other. Therefore, in the end the dilemma of the conflict between state and non-state institutions is destined not to be solved, as it isn't a genuine dilemma. Instead, it is a space, or a lexical circuit,

that jurists have to inhabit as they perform their jurisprudential practice. Doing away with fictitious portrayals positing an alleged natural superiority of the state legal order is only one of the premises to fulfil this task – it is but a step to a better understanding of the state as a legal order that is able to accommodate (and be accommodated by) other non-state orders.

Therefore, the gist of Romano's analysis is the jurists' awareness and the precise conceptualization of the juristic point of view. Certainly, he was conscious of the political outcomes of this activity, which is supposed to produce effects on reality. And yet jurists should not so much be concerned with these political outcomes as such, as they should pay heed to the purity of legal analysis. The question, highlighted by many critics of pluralism, of a connection between justice and state law doesn't fall within the scope of legal analysis (as far as Romano conceived of it), because it is a pragmatic effect that the separation between law and justice prevents approaching as a conceptual issue. And I think Romano is correct, if many scholars have shown how the state and the rule of law have played as instruments to foster the neoliberal agenda and to promote greater inequality. At the same time, the methodological pureness advocated in *The Legal Order* was not instrumental in furthering the project of a specific conformation of law, as some positivist theories might have been. Romano's theorizing of the juristic point of view delineated an image of the law as a virtual place from where the state can be reimagined: a space where the state appears as a concept rather than a thing and thus can be reframed in many different ways. In the end, dissolving the dilemma of pluralism is something that can't be done theoretically. For it is a conceptual line itself, more than a riddle to solve. Instead, approaching social phenomena through pluralism as a conceptual line should be the jurist's main objective, as the language and categories he applies are intended to produce a revision of the state in the sense of its compatibility with other orders and the conceptual frameworks these orders are rooted into. This doesn't imply that peaceful coexistence will always be the natural upshot or that justice will never be harmed. Nobody can predict where the juristic activity will lead to and, as Romano's historical circumstances convincingly illustrate, actual politics can always spoil the result of juristic inquiry. Yet, as long as law offers a categorial space for rethinking the state, it doesn't produce or construct it, but opens up further spaces for lay people to produce or construct it under the aegis of new legal imaginings.