Santi Romano and L’ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations

Filippo Fontanelli

Abstract

This article has two main purposes. The first is to provide an introduction to Santi Romano’s seminal work L’ordinamento giuridico, first published in 1917, in which the author develops the main tenets of his thought, namely institutionalism and pluralism. The first part of this essay accordingly provides an outline of Romano’s theories; this account is intended to be sufficiently robust to benefit an English-speaking readership for which there is still no translated version of L’ordinamento giuridico available. Embedded within the overview of Romano’s theories is a discussion of the criticism they have attracted and the influence they had on Romano’s contemporaries, and to that extent this first part constitutes a contribution to the history of ideas. The second purpose is to assess the relevance of Romano’s theories for the current study of international, transnational and global law. It is argued that Romano’s particular conception of law as an institution can be helpful in the current debate on the unity and systematisation of international law, whereas his reflections on the plurality of legal orders contained early kernels of insight for present-day research on the fragmentation of international law and the rise of atypical global governance regimes.

Il y a la nécessité de protéger contre l’injure d’une connaissance hâtive, avec ses lacunes, ses malentendus, ses clichés expéditifs, certaines œuvres, en tout cas. Ce sont celles où les idées qui nourrissent le plus la réflexion des juristes, et que pour ainsi dire nous respirons sans bien savoir d’où elles nous viennent [sont exprimées] … L’ordinamento giuridico de Santi Romano est un de ces ouvrages à privilégier. Peu de juristes italiens en doutent; peu de juristes, hors d’Italie, le savent. Dans un pays où les travaux juridique sont assez systématiquement souvent tournés vers la théorie … il n’est sans doute pas exagéré de dire que cet auteur occupe la pensée des juristes plus

* PhD candidate, Sant’Anna School of Advanced Studies, Pisa, Italy; Hauser Global LLM. Scholar, NYU, 2010. Trainee Clerk, International Court of Justice, 2010/2011. f.fontanelli@sssup.it. Many thanks are due to R Howse, G Itzcovich, G Martinico, G Palombella, C Scott, W Streeck, and the participants at the Workshop on Courts and Judges’ session held in March 2011 at the European University Institute, Fiesole.
The very notion of legal order, which is the subject of both Santi Romano’s book *L’ordinamento giuridico* (*The Legal Order*) and this essay, may prove difficult to grasp for English minds, as has been justly noted. Lord Mackenzie Stuart, the first UK judge to sit on the bench of the European Court of Justice, maintained that the neologism ‘legal order’, applied to the European Community, could be confused with the English formula ‘law and order’, which can be translated approximately as ‘ordine pubblico’ or ‘ordre public’. French scholars in fact started to use the expressions ‘ordre juridique’ and ‘ordonnancement juridique’ earlier, though they did not refer to a full-fledged theoretical concept such as the Italian ‘ordinamento giuridico’ or the German ‘Rechtsordnung’.

---

1 See the preface to the French edition of *L’ordinamento giuridico, L’ordre juridique*, by Lucien François and Pierre Gothot (Dalloz, 1975). Our translation:

> It is absolutely necessary to protect certain works from the shortcomings of a perfunctory knowledge, that results inevitably in flaws, misunderstandings, expeditious stereotypes. In particular, these are the books [expounding] the ideas that most nourish lawyers’ thinking, and that we breathe—as it were—without knowing exactly where they come from. … *L’ordinamento giuridico* of Santi Romano is one of these books deserving protection. Few lawyers would disagree; few lawyers know it, outside Italy. In a country where legal scholarly works are often of a theoretical nature, it is fair to maintain that this author occupies a place in lawyers’ thinking and background that is larger than that of Duguit, Hauriou and Gény combined, in francophone countries. Nonetheless, it is not unusual to meet in France a lawyer, even a brilliant one, who does not even know Santi Romano’s name. But who would know the name of Kelsen, who only taught in Austria and wrote in German, if his works were not translated? At least, he would have benefited from the widespread curiosity towards German law; an Italian Kelsen would have probably faced an even more unfair destiny.


3 Lord Alexander J Mackenzie Stuart, *The European Communities and the Rule of Law* (Stevens and Sons, 1977) 2ff. Even more recently, the concept has betrayed its non-English roots: see Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Kluwer, 2001) 5 fn 1, where the ‘legal order’ formula is said to be ‘appropriate’, although maybe not commonly known in English.

4 See Charles Leben, ‘Ordre juridique’ in *Dictionnaire de la culture juridique* (PUF, 2003) 1113: ‘En France la notion mettra plus longtemps à s’acclimater.’ According to Dupuy (n 3), the use of this concept spread after
The monograph explored herein, *L’ordinamento giuridico*, was first published in 1917, when Romano (1875–1947) was a professor of administrative law at the University of Pisa. Although the book is almost a century old, in embarking on this analysis we will largely benefit from the legacy of the scholarship of the 1960s, which made the concept of *legal order* a familiar one; conversely, readers might run the risk of evaluating the past through the lens of the present (or the recent past). This is an inescapable problem when trying to highlight the prophetic value of a past statement: its virtues (a theoretical model is proven correct long after its formulation) are often overshadowed by the appreciation of its physiological flaws (it is easy now to point out where the model is not satisfactory in describing, or questioning, a modern reality).

This essay endeavours to provide a short, yet sufficiently robust, outline of Romano’s work for those who are not familiar with it. A very recent contribution by Aldo Sandulli provides a full description of the life and scholarly activities of the Sicilian jurist, and constitutes an excellent resource for English-speaking scholars. Recently, Massimo La Torre published an insightful monograph entitled *Law as Institution*, in which Romano’s

---

6 It was divided into two parts, which were published in separate issues (1917 and 1918) of the *Annali delle Università Toscane*, after Anzilotti’s *Rivista di Diritto Internazionale* rejected the submission. It then appeared in its entirety in 1918 (Pisa, Mariotti) and was subsequently published in 1946 (Firenze, Sansoni) in a re-edition prepared by Romano himself, who added a set of footnotes accounting for some of the criticism the work had attracted over time and for further scholarly works published since the first edition.


ideas are extensively discussed. The present analysis of Romano’s book will not attempt to assess whether or to what extent Romano himself subsequently retracted from the most ground-breaking statements expressed therein: it is less important—in this study—to point out the potential contradictions than to describe Romano’s intuitions and their enduring validity.

L’ordinamento giuridico is comprised of two parts. The first introduces the concept of legal orders as institutions (and vice versa), according to the Latin adages ubi societas ibi jus and ubi jus ibi societas. The second part investigates the issue of multiple legal orders and their reciprocal interplay. These two facets of Romano’s theory will be referred to as, respectively, institutionalism and pluralism.

Although Romano is commonly regarded as one of the fathers of modern Italian public law, mention of his work often amounts to little more than anecdotal reduction of his most influential theses. In particular, one of the most vivid and controversial examples provided by Romano to explain law as institution proved so successful that it became a commonplace for Italian jurists—that of criminal organisations as autonomous legal orders. This example represents the (simplified) quintessence of the concept of institutionalism: any organised body is a legal order. The strength of this intuition is reflected in the vast use that scholars make of it whenever they try to draw the legal framework of unusual fields of law. Besides representing a prototype of institutionalism in practice, the ‘gang of criminals’ rhetoric also implies that there can be a non-state legal order, thus contributing also to the pluralist doctrine.

Two factors barred the diffusion of Romano’s teaching beyond the boundaries of Italian academia, not to mention outside Europe. One was authors’ habit of producing

---


11 For a parallel treatment of this case study, which does not refer to Romano, see Peter Morton, *An Institutional Theory of Law* (Clarendon, 1998) 56.

12 Often Romano’s appraisal of the mafia order and his innovatory theory of pluralism are held to be the two highlights of his work; see eg Jacques Vanderlinden, ‘What Kind of Law Making in a Global World? The Case of Africa’ (2007) 67(4) *Louisiana Law Review* 1043, 1059.

13 A remarkable exception to the general ignorance of Romano’s thought in Anglo-Saxon scholarship is Julius Stone’s 1966 volume on jurisprudence, whose chapter 11 discusses institutionalism and Romano’s works extensively. In fact, as emerges in the credits to the book, this section was almost entirely prepared by an Italian professor of legal philosophy, Giovanni Tarello. See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966) 316–65. Since the views expressed therein are, as explained, fully embedded in Italian academia, we are not going to treat them as an example of the reception of Santi Romano’s theories abroad, although this work certainly was intended to represent a powerful means of disseminating his teachings (see the comment at 519, referring to Romano’s work as ‘little known outside his own country’). For this purpose, it is more interesting to observe how Stone treats the institutionalism theories in his *Legal System and Lawyers’ Reasonings* (Stanford University Press, 1964) 177ff. Stone endeavours to describe his contemporaries’ ‘[a]ttempts to integrate various conceptions into a definition of law’, and identifies seven cumulative steps that sum up classic and modern theories in a progressively sophisticated definition of law. They may be summarised as follows: 1: law is complex; 2: law includes norms whose function is to regulate behaviours; 3: behavioural instructions are valid within a society; 4: the whole complexity of which law is comprised forms an order; 5: the legal order is a coercive order; 6: coercion is institutionalised; 7: the
second-hand simplifications of his theories\(^\text{14}\) and the other, most importantly, was the lack of an English translation of his major work.\(^\text{15}\) This essay aims at addressing these two flaws, if necessarily to a limited extent, by providing a direct reading of some relevant passages of the book and an English translation thereof.

In addition, the second part of the present contribution assesses the relevance of Romano’s theories to the current study of international law. Specifically, the conception of law as an institution can be helpful in the current debate on the unity and systematisation of international law, whereas his reflections on the plurality of legal orders may help to frame and conceptualise the fragmentation of international law and the rise of atypical global governance regimes.\(^\text{16}\)

A brief description of Romano’s work precedes a sketch of his relationship with other major figures in legal philosophy in the last century and of his legacy across modern scholarship.

institutionalised coercive legal order of social norms should have a degree of effectiveness sufficient for the order to maintain itself.

---

14 Note that latest edition of the book was published in 1977.

15 Only four translations exist: French (L’ordre juridique (n 1), but see also the recent reprint (Dalloz, 2002) with an introduction by Pierre Mayer), German (Die Rechtsordnung, Übersetzung aus dem Italienischen von Werner Daum (Duncker & Humblov, 1975)), Spanish (El ordenamiento jurídico, translation of the 2nd edn by Sebastián Martín-Retortillo and Lorenzo Martín-Retortillo (Instituto de Estudios Políticos, Madrid, 1963)) and Portuguese (O ordenamento jurídico, Arno Dal Ri Júnior (trans) (Fundação Boiteux, Florianópolis, Brazil, 2008)). Professor Paulsson, president of both the London Court of International Arbitration and the World Bank Administrative Tribunal, recently commented, ‘It is a scandal of intellectual history that this seminal monograph has never been translated into English.’ See Paulsson (n 5). For similar praise of L’ordinamento giuridico in the wake of its publication in Spanish, see Sebastián Martín-Retortillo Baquer, ‘La Doctrina del Ordenamiento Jurídico de Santi Romano y Algunas de Sus Aplicaciones en el Campo del Derecho Administrativo’ (1962) 39(3) Revista de Administración Pública 39.

Romano’s theory, as mentioned above, is premised on the absolute equivalence of an organised social order and law, as two sides of the same phenomenon.17 This main tenet of his work places him among the fathers of legal institutionalism, a school founded in France by Maurice Hauriou and developed by his disciple Georges Renard.18

Hauriou and Romano’s thinking is not to be confused with the objective sociology of Durkheim, Gurvitch and Ehrlich, who explored the relationship between law and society within the framework of a sociology of law,19 and treated law as merely one aspect of the social structure’s organisation.20 Hauriou and Romano, on the contrary, aimed at formulating a rigorous legal theory that would not be content with reducing law to an emanation of society, but would see in a particular kind of society (the institution) the essential character of law.21

17 As rightly noted by Stone and Tarello (n 13) 516, German legal scholar Eugen Ehrlich had already used a similar conception of law in his *Fundamental Principles of the Sociology of Law* (1913), stating, ‘law does not consist of legal propositions, but of legal institutions. In order to be able to state the sources of the law one must be able to tell how the state, the Church, the commune, the family, the contract, the inheritance, came into being, how they change and develop.’
18 See *L’institution et le droit statutaire* (1906) and *Principes de droit public* (1910, 2nd edn 1916). Institutionalism was based on two conceptual innovations: the ‘objective reality’ of institutions, and the departure of institutions from the concept of legal personality. Hauriou’s definition of institution already presents some of the features of the model later used by Romano: institution is defined as the organisation of purposes into formal and procedural structures that are intended to persist in time. The purpose that shapes the social structure can be precisely the social nature of men, and this makes the identification of the purpose relatively irrelevant, by making it implicit in any society. Romano’s departure from Hauriou’s theory consists precisely in the rejection of this ‘naturalistic’ approach in favour of an empiricist approach, based on the observation of reality. Also, Hauriou is often criticised for incorporating ‘mystical’ elements into his theory: see eg Martín-Retortillo (n 15) 60: ‘El hálito sociológico e incluso metafísico que hay en toda concepción de Hauriou … la hace en cierto modo perder rigor jurídico.’
20 This approach is aptly summarised in David N Schiff, ‘Social Structure and Law’ (1977) 39(3) Modern Law Review 287, 298: ‘The foundations of a new jurisprudence which starts with the question “what is society?”’, rather than contrasting the law (as presumed) with the social reality, were laid by Max Weber, Emile Durkheim, Karl Marx and Eugene Ehrlich.’ Santi Romano later adopted an opposite starting point (a lawyer’s one), struggling to identify a concept of law that does not depend on, but is co-substantial to, the organisation of society. See Jan Paulsson, ‘Arbitration in Three Dimensions’ (2011) 60(2) International and Comparative Law Quarterly (2011) 291, 294: ‘Opponents of [Weber’s] vision insist that it may be of interest as a matter of sociology, but is deficient as a matter of legal analysis. Enter Romano. His was not the perspective of a sociologist; he was a lawyer through and through.’
21 The distinction between Santi Romano and Hauriou, in a nutshell, is that the latter conceives of law as a result of the self-organising institution, implying a sort of chronological succession according to which the institution comes before the law. Moreover, Hauriou is concerned with a re-definition of the State institution, but does not aim at founding a theory of pluralism. When Santi Romano sent a copy of *L’ordinamento giuridico* to Hauriou, the latter wrote a letter that included the following lines: ‘Il y a surtout entre nos deux travaux une différence de but et d’orientation. Vous avez visé à l’ordre juridique et j’ai visé une théorie de l’État’ [our translation: ‘Our theories differ in terms of purpose and direction. You focused on the legal order, I focused on a theory of the State’]. See Sabino Cassese, ‘Ipotesi sulla formazione de “L’ordinamento giuridico” di Santi Romano’ (1972) 1 Quaderni Fiorentini 243, 271.
This model is innovative compared with two preceding theories that identified law either with legal norms or with legal relationships between subjects.

According to the classic normativist or positivist theory, law is made up of the sum of norms\(^{22}\) whose objective application is totally independent from the individual conscience and the personal inclinations of members of society. Apart from a definitional divide (law is more than norms), Romano’s critique of positivism concerns two of its pillars: the objectivity of norms and the existence of sanctions. More precisely, the objectivity of norms and rules is nothing but a reflection of the objective reality of the overarching orders from which they flow. Norms cannot in and of themselves attain objectivity (better: objectification) in terms of generality, stability and regular application to persons. These features of objectivity are ensured by the institutions and the mechanisms that apply the norms, and depend on the effective functioning of the relevant authorities and entities entrusted with this task.\(^{23}\)

As for sanctions, legal positivism held that only rules providing for sanctions in case of violation (either directly, or through reference to a second-level rule) could be deemed legal norms.\(^{24}\) Romano maintains that this formal element cannot be mistaken for a substantial source of normativity: sanctions are provided by the system rather than by the single norm, this being another demonstration of how norms cannot exist without an all-encompassing system from which they derive their authority, as in the case of sanctions. Sanction, in other words, is a function of the non-norm part of the legal order.\(^{25}\)

Relational theories are not acceptable either, in Romano’s view. They generally equate law to the system of inter-subjective relationships among individuals in a given order (‘juristic voluntarism’).\(^{26}\) This model is incomplete, in that it postulates a plurality of

\(^{22}\) See Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1945) xv: ‘The legal order determines what the conduct of men ought to be. It is a system of norms, a normative order.’ See also Bobbio (n 7).


\(^{24}\) See Kelsen (n 22) 26: ‘[I]f we define law simply as order or organization and not as a coercive order (or organization), then we lose the possibility to distinguish law from other social phenomena, we identify law with society.’ This held true with respect to international law as well; see Dionisio Anzilotti, *Teoria Generale della Responsabilità dello Stato in Diritto Internazionale* (1902) 61.

\(^{25}\) See Giulio Itzcovich’s distinction between the institutionalist and normative approaches, where the former relies on the effectiveness of the system, and the latter on the notion of validity of the norms: ‘Potremmo dire, tagliando col coltello, che nel modello istituzionalista il diritto è valido e obbligatorio perché è efficace, nel modello normativista il diritto è obbligatorio, cioè deve essere efficace, perché è valido’ (Teorie e ideologie del diritto comunitario (Giappichelli, 2006) 64) [our translation: ‘One could simplify and say that in the institutionalist theory law is valid and compulsory because it is effective, whereas in the normativist model law is compulsory—that is, necessarily effective—because it is valid’]. See also Santi Romano, *Corso di Diritto Internazionale* (Cedam, 3rd edn 1933) 9–10, where he explains that, since sanction is not an absolute requisite of law, the international legal order is indeed a real legal order, even if it is based on a host of measures aimed at ensuring compliance with law that do not always fit the concept of sanction.

\(^{26}\) Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Mohr (Siebeck), 1892).
subjects whose self-sufficient and autonomous existence provides the source for the normative nature of their interrelational actions. In fact, interplay among the members of a society can assume a normative character only if we imply an organisational system in the background, that constitutes a basis for the existence of the individuals as members, and legitimises their acts as legally effective by framing them within a more sophisticated legal order. Moreover, a model centred on private law and individual actors is inherently incomplete because it appears to rely excessively on the importance of the application of rules, whereas the effects of law are the aggregate action of rule-making, interpretation, adjudication and enforcement, a series of phenomena that call into action a full range of bodies.27

Romano’s views on objectiveness and sanction entail the abandonment of one of the peculiar characters of legal positivism: the one-to-one and inescapable correspondence between State and sources of law. This opens the way for the study of a universe of non-State legal orders, which, in fact, were at that time hardly regarded as fully juridical.28

As seen above, Romano’s model does not ignore the importance of norms and legal relations, but it includes them in the wider framework of the legal order, still resisting the temptation to provide the concept of legal order with non-juridical connotations borrowed from sociology or politics. According to Romano:

Before being norm, and before relating to one or more social relationships, law is organization [and] structure, and it determines the position of the very society within which it operates, and which it establishes as a unit, an autonomous entity.29

The pillars of the legal order described in L’ordinamento giuridico are society, legal order and organisation.30

---

27 Interestingly, Romano’s doctrine is today applied also to contractual relationships, but this is more a reflection of its pluralist facet than a revival of relational theories. See Louise Rolland, ‘Les figures contemporaines du contrat et le Code Civil du Québec’ (2000) 44(4) McGill Law Journal 903, 905: ‘un contrat peut rester à la périphérie du droit étatique sans que sa nature juridique ne s’en trouve altérée. L’ordre contractuel est dans ce sens un ordre privé.’

28 The State-only origin of norms is translated in the concept of ‘statuality’, used in 1926 by Giorgio Del Vecchio in his essay ‘On the Statuality of Law’ (Society of Comparative Legislation, London (reprinted in 1937)). In this work, Del Vecchio is ill at ease when confronted with instances of non-State legal orders: for example, he stresses the ‘important’ case of the relation between the Catholic Church and the State, that is, ‘juridical orders interfering with each other, in force (at least partially) in the same territory and over the same subjects; hence they cannot have, both and at the same time, full State character’. In discussing the nature of international law, he acknowledges that ‘if [it] were to achieve a more precise unity, that is, a perfect organization, the complex of such rules would become a positive juridical order in the full sense of the term, or a State’.

29 See Romano (n 2) 27 (our translation). The original reads: ‘il diritto, prima di essere norma, prima di concernere un semplice rapporto o una serie di rapporti sociali, è organizzazione, struttura, posizione della stessa società in cui si svolge e che esso costituisce come unità, come ente per sé stante.’

30 For a useful overview of the main theses of the book, see Carmen Maria García Miranda, ‘La unidad en el concepto de ordenamiento jurídico de Santi Romano’ (1998) 2 Anuario da Faculdade de Direito da Universidade da Coruña 287, 289. See also the summary of Romano’s theory included in Norberto Bobbio’s Teoria della norma giuridica (n 7) 12ff.
There is a *society* whenever the members of a social body share a particular identity, or a purpose to achieve, which distinguishes them from subjects placed outside the body, and when such a body adopts effective rules that are not attributable to any of its members (or any multiplicity thereof) but rather to the body itself, as a separate entity. The distinction between the members and the entity is important, since the latter purports to achieve permanence despite the potential changes in its means, its interests, its composition and its rules.

Every society is governed by law, and arranged into a *legal order*, insofar as the law sets the societal values and objectives, and prevents recourse to force and arbitrariness.

This social order does not depend on norms only: it presupposes, and is based upon, an *organisation*, a structure. Law ensures the unity of the structure and its persistence, and is not limited to legal rules.31

Thus, there is absolute identity between the social institution and the legal order.32 Also, there is no chronological priority as between them: constitutional rules and social phenomena are co-original.33 This claim could give rise to a circular concept; indeed, by exploring the meaning of ‘institution’, one could hardly attain an additional meaning of what the law is.34 In fact, the tautology may prove frustrating only to those who ignore the pragmatic and empiric attitude of Romano; by using the word ‘institution’ to describe the whole of the legal experience35 (which is much wider than just a set of rules) Romano refers to something that is familiar to every jurist’s personal understanding.36 As Professor

---

31 The element of persistence is very important (and Romano repeatedly refers to it: see La Torre (n 10) 103), but it has been variously disregarded by the critics, who have insisted on maintaining that Romano’s definition of institution was so vague that any occasional and circumstantial gathering of people would qualify as a legal order.

32 This implies, for instance, that it would be wrong to say that the institution *has* a legal order, or that the institution *originates* from a legal order or a legal process. The origin of the institution is not a legal procedure, but a fact.


34 Indeed, this was the objection raised in 1926 by Vittorio Emanuele Orlando, who provocatively claimed that, according to Romano’s theory, a post-office queue would qualify as a legal order. Romano responded to this remark in one of the additional footnotes to the second edition of the book in 1946 (see fn 29ter). Moreover, Norberto Bobbio (Prologue to Andrea Greppi, *Teoria e ideologia en el pensamiento político de Norberto Bobbio* (Marcial Pons, 1998)) criticised the vagueness of the institution, while Massimo Saverio Giannini, in ‘Gli elementi degli ordinamenti giuridici’ (1958) 8(1) Rivista Trimestrale di Diritto Pubblico 219, hypothesised that the basic elements of institutions are: multiple membership, the normative element, and a permanent (or at least enduring) nature. See, more extensively, Itzcovich (n 25) 71. Schultz tries to break this circularity by means of fixing the ‘ubi societas, ibi jus’ adage, suggesting instead that ‘ubi societas, ibi regula’ (where the shift from law to rule implies that there can be orders that are not legal orders). See Thomas Schultz, ‘Secondary Rules of Recognition and Relative Legality in Transnational Regimes’ (2011) 56 American Journal of Jurisprudence, forthcoming. See online version available at ssrn.com (accessed 2 October 2011) 4.

35 Loosely, the capacious concept of legal order recalls the (even wider) notion of legal experience, minted by G Capograssi (see *Opere*, Studi sull’Esperienza Giuridica, 1959, vol II, 213–373, at 214–28) and discussed in depth in Umberto Santarelli, *Auctor iuris homo* (Part I) (Giappichelli, 1997).

36 In particular, it is easy for jurists belonging to Common Law jurisdictions to accept that positive norms are not the ultimate substance of a legal order and that the latter is the product of the joint activity of all the players involved, such as legislator, individuals, courts etc.
La Torre aptly puts it, Romano ‘conceives the notion of institution not as a merely systematic concept, but as a representation of a segment of reality’.37

Similarly, any investigation into the voluntarist commencement or foundation of the order would be, according to Romano, a non-juridical attempt.38 As it follows, Romano’s legal order is a static snapshot of the organisation, in which human voluntary action plays little role either in supporting or changing the system; the latter, in turn, evolves spontaneously. Human action and the norms regulating it are disregarded by Romano,39 whose equivalence between (static) order and law echoes Hegel’s equivalence between reality and rationality.40

Along these lines, Romano’s views have been interpreted as conservative and embodying an ideal of social pacification.41 A more careful analysis suggests that Romano’s efforts were aimed at setting up a framework that could account for the developments of his times: indeed, the rise of the administrative state at the turn of the century, as well as of the labour unions and political parties, urged him to elaborate a theory of legal orders that did not contemplate the State as the unique model (nor parliamentary law-making as the unique source of law).42 For these reasons, his model appeared to many as being somewhat a-problematic, inasmuch as the concept of law is evanescent and diffused

37 La Torre (n 10) 98.
38 See Santi Romano, Frammenti di un Dizionario Giuridico (Giuffrè, 1947) 69: ‘[A] legal order exists because it exists and whenever it exists, without this implying a confusion between fact and legal order, since the fact that represents the starting point of the jurist’s investigation is the legal order in that it exists, and there is no need to trace back searching for its foundation, the reason and the validity of its effectiveness.’
39 See Alfonso Catania, ‘Carl Schmitt and Santi Romano’ (1987) 64 Rivista Internazionale di Filosofia del Diritto 545, 567: ‘Since for Romano norms are essentially imperative instructions, they cannot account for customs and principles underlying the concept of organization.’ Note that norms for Romano are often little more than facts, as stressed by his insistence on the concept of jus involontarium and of necessity as a normative source.
40 For a famous critique of this equivalence (albeit not a totally impartial one) see Friedrich Engels, Ludwig Feuerbach and the End of Classical German Philosophy (Progress, 1946 [1886]) 10.
41 See Alfonso Catania, Manuale di Filosofia del Diritto (ESI, 1995), and Catania (n 39) 565. See also Sandulli (n 9) 40, referring to Romano’s theories prior to the publication of L’ordinamento giuridico: '[T]he 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.'
42 In this respect, see Sandulli (n 9) 39ff, describing Romano’s early intuitions about the crisis of the modern State: '[T]he original sin of the legal order, which followed the French Revolution [derived from] 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.' On the historical reasons that drove Romano to write L’ordinamento giuridico, see the extensive bibliography in Itzcovich (n 25) 71, who summarises them as follows (our translation): ‘Santi Romano starts to speculate about the existence of a law that is not the reflection of pre-existing norms, but the byproduct of the necessary self-organisation of the institutions, and of the exercise of governmental and regulatory powers. [Some of the elements of this new approach are the notion of] necessity as a normative source, the distinction between legality and legitimacy, the attribution of “special supremacy” powers to offices, factories, schools, private organizations, political parties.’ The fundamental study on the historical motives underlying the writing of L’ordinamento giuridico is certainly Cassese’s ‘Ipotesi sulla formazione de “L’ordinamento giuridico” di Santi Romano’ (n 21).
across all social institutions, and challenges most efforts aimed at figuring out what is actually law (and what is not). For instance, Sergio Panunzio, a contemporary of Romano’s, noted polemically that the definition of infra-State institutions as legal orders was less the outcome of a theoretical effort than a forced theorisation *a posteriori*, by which Santi Romano had simply attempted to find a place in legal theory for all the intermediate societal bodies proliferating in the first years of the twentieth century (‘theories of pluralism … do not flow from the brain of the authors who have formulated them … but directly from the reality of things’).43

Note that the theoretical value of the institutional equivalence (law = institution) is indeed of limited help.44 It is rather its descriptive and path-breaking inherent power that deserves to be acknowledged and credited, to the extent that—as I argue—it is still useful today.

**PLURALISM**

It follows from the above that every organised social force qualifies as a legal order.45 This maxim implies that there can be multiple legal orders, each corresponding to a different social force (variously embodied in, and represented by, an ideal, a common purpose or aspiration). Their full dignity and autonomy as legal orders do not postulate their isolation; however, the way in which orders relate to each other is defined internally: rules of interaction can be found in each legal order, governing its relationship with external ones:

The institution is a closed entity that can be conceived autonomously, because it has individuality on its own. This does not imply that it cannot relate with other entities, with other institutions, in a way that—under a different perspective—makes it to a certain extent a forming part of these latter. … Each institution’s autonomy must not be absolute, it can only be relative; its conception varies according to different perspectives. Certain institutions claim to be perfect, to be essentially self-sufficient, and to own enough resources to attain their exclusive purposes.46

---

45 See the Latin saw (mentioned in Santarelli (n 35)) ‘*populus est collectio multorum ad iure vivendum, quae nisi iure vivat non est populus*, which can be translated as: ‘a people [society] is a gathering of many to live according to the law, which is not a people unless it lives by law.’ Compare it with Schultz’s remark about the existence of international arbitration as an autonomous legal order: ‘Wherever there is a community, there is some sort of ordering, and ordering is inevitably achieved through norms.’ However, Schultz does not believe that such norms are necessarily of a legal nature: see Schultz (n 34) 3.
46 See Romano (n 2) 38 (our translation). The original reads: ‘*L’istituzione è un ente chiuso, che può venire in considerazione in sé e per sé, appunto perché ha una propria individualità. Il che non significa che essa non può...*
The aim of the first part of this essay is less to provide a detailed account of Romano’s pluralist model (apart from a short description in this section) than to test its application to the current nature and organisation of international law. This attempt is admittedly founded on an anachronism: what Romano had in mind was the existence of a more robust public administration, of sub-State legal entities (foundations, associations), of social organisations (the infamous gang of criminals, labour unions, political parties), of the Church, and of a multiplicity of States rigorously placed on the same level. However, he depicts the reciprocal relevance (and the potential conflict) between two legal orders using prescriptive and general wording that can easily be applied without linguistic effort to the interplay between any two legal orders, including those that were not in place in 1918.

Therefore, we will content ourselves with continuing in this mode in order to provide a sketch of Romano’s views on the plurality of legal orders (i) and of their reciprocal interaction (ii), with the purpose of re-thinking them within the current legal framework (see the next section). The closing part of this section (iii) briefly discusses Romano’s own view of the international law system, as a prelude to subsequent sections discussing the connections between Romano’s ideas and later theorists like Carl Schmitt and then contemporary international, transnational and global legal phenomena.
(i) Plurality of Legal Orders

Different kinds of human ideals (religion, ethics, business, arts) can bring about different legal orders. Their purpose and mission can differ, ‘but they are all legal orders insofar as they are institutions at all’. As we saw above, the legal order is not borne out of a legal process, but is the concretisation of a social fact, ie the effectiveness of its structure. This is very important because it rules out the necessity of tracing back a legal justification or legitimacy at the origin of the legal order, that is, to resort to metaphysics to explain the basis and binding force of law. This also makes pluralism a natural rather than conceptual feature of the legal order.

This approach has decisive consequences: since plurality of institutions is more a reality than the reflection of a harmonised whole, interplay among orders could even amount to absolute conflict, as is the case between a criminal organisation and the State order. Moreover, the State order is granted no sheer supremacy vis-à-vis other institutions, at least in the sense that orders which are regarded as unlawful by the State are not, for this reason alone, prevented from being real and actual legal orders. The State can deem them irrelevant as legal orders, or sometimes irrelevant even as mere facts, but this does not affect their own qualification:

A revolutionary society or a criminal association does not constitute law from the viewpoint of the State it tries to subvert, or whose laws it violates, just as a schismatic sect is considered anti-legal by the Church; but that does not imply that in the above case there is not an institution, an organization, and order which, taken singly in itself and intrinsically considered, is legal.50

Romano does not accept that the State is the only legal order, as this assumption would amount to an ethical position (echoing Hegel’s contention that the ethic idea and spirit are fully developed in the State form51). Therefore, it is more important to observe how legal orders interact reciprocally than to insist on the quest for the real legal order.

Another fundamental teaching resulting from the distinction between rules and legal order is the correspondent distinction between the aim of (single) provisions and the aim of the order as a whole. Since the legal order is a self-sufficient entity that does not depend (solely) on the rules that it produces, it is possible to extract a τέλος (telos) that necessarily characterises the order, and potentially informs the rules. With such backing, purposive/teleological and evolutionary interpretations become possible, without amounting to interpretationes extra legem.52

49 See Romano (n 2) 49.
50 Ibid, 43–44, 73.
51 See GWH Hegel, Lineamenti di filosofia del diritto (Laterza, 1965) 238.
52 See the following passage, quoted in Sandulli (n 9) 48, excerpted and translated from Santi Romano, ‘Osservazioni sulla completezza dell’ordinamento statale’ in Lo Stato moderno e la sua crisi. Saggi di diritto costituzionale (Giuffrè, 1969) 184: ‘[T]he problem of gaps in the legal order can be seen in different ways,
However, the scope of this interpretive expansion is narrowed by the finite nature of the system.\textsuperscript{53} The abandonment of the monolithic order of the State carries with it the abandonment of any illusion as to its completeness: no legal order can be deemed complete, as this would be at odds with the concept of a polycentric system of legal orders. Every order is closed, in that each is autonomous and often does not depend on another order, but the extension of the individual orders vary and can be limited; it would be misleading to expand its reach through speculation. The consciousness of the limited reach of legal orders dispels the risk of identifying a \textit{lacuna}, a gap to be filled: when a matter is not regulated in a given order it is likely that it lies just outside that order’s reach, and any attempt to envisage an implicit specific rule deriving it from general principles (a deductive technique premised on the completeness of the legal system) should not be encouraged.\textsuperscript{54}

(ii) Interaction Between Orders

\textit{Relevance} is the key element that matters with respect to the juxtaposition of legal orders. This concept inheres in three main aspects that can make one order \textit{relevant} to another: its existence, its content, and its effects.

The concept of legal relevance ‘should not be mistaken for factual importance of one legal order vis-à-vis another, nor for material uniformity of multiple orders that is either coincidential or based on political necessity, opportunistic considerations, or on grounds 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.’ See also Romano’s reading of evolutionary interpretation, in \textit{Frammenti} (n 38) 119–21: ‘[T]he 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’ (translation by Sandulli, 55). Importantly, Romano clarified that it is the institution that evolves, not the interpretation. On this, see Vincenzo Greco, ‘L’interpretazione evolutiva’, online paper (2006), www.dialettico.it/int%20evolutiva.doc (accessed 30 September 2011).

\textsuperscript{53} A current example of this limitedness of an autonomous legal order would be the status of the precautionary principle as described by the Appellate Body in the WTO \textit{Hormones} report: a general principle of the specific order (that affects the teleological interpretation of environmental obligations) that is not, at the same time, a general principle of public international law. See Appellate Body, report WT/DS26/AB/R and WT/DS48/AB/R of 16 January 1998, para 123. See also the International Tribunal on the Law of the Sea \textit{Southern Bluefin Tuna} arbitration (2000, 39 ILM 1359), namely the Order of Provisional Measures of 27 August 1999, at paras 77–79.

\textsuperscript{54} As Stone duly noted, in \textit{Legal System} (n 13) 189: ‘[Romano] observed that if we insist on seeing legal rights or liberties wherever we do not find negative or positive injunctions by the legal order, we naturally see them everywhere, for we have already put them there.’ See also John H Merryman, ‘The Italian Style III: Interpretation’ (1966) 18(3) \textit{Stanford Law Review} 583, 595, commenting on the impossibility of the existence of \textit{lacunae} in Romano’s orders.
of expediency’.55 Romano tries to exemplify the most common ways in which orders enter into relations (that is to say, are relevant for each other).56 Two legal orders can be in a relation of

(i) superiority/subordination (A is superior to B);
(ii) presupposition (A presupposes B);
(iii) mutual independence, but shared subordination with respect to a third legal order (A and B depend on C);
(iv) unilateral relevance granted spontaneously (A deliberately gives effect to B);
(v) relevance borne out of succession (A merges into B).

Only superiority and presupposition relationships—types (i) and (ii)—incorporate the very existence of a legal order into its relevance to another one. More commonly, a legal order is relevant to another in that the content of the former affects, or is incorporated in, the content of the latter.

The Content

The most obvious instance is when a superior order shapes or affects the content of a lower order (type (i) above). For instance, State law is directly relevant to the content of local entities’ legislation, in that it establishes the limits of their autonomy, and can even impose certain requirements as to the content of the norms they adopt. The case of international law (that is, how it interacts with State orders) is less clear-cut. International law can be deemed superior to, but without absolute supremacy over, State orders—at least, by the lights of many if not most State orders. Romano acknowledges that, generally, international law lacks direct effect in domestic systems, and is therefore unable to affect their content directly (in this, the effects-related scenario, described below, would be more appropriate).57 However, through the mechanism of State responsibility (that is generated from within international law itself), States are incentivised to make the content of

55 See Romano (n 2) 145 (our translation). The original text reads: ‘[Il concetto di rilevanza] non è da confondere con l’importanza di fatto, che un ordinamento può avere per un altro, e nemmeno con l’uniformità materiale di più ordinamenti, che non sia voluta oppure sia determinata da un’esigenza più giuridica, ma soltanto politica, di convenienza o di opportunità.’ See also Mayer (n 15) 12, noting that Romano’s analysis of relevance is the most accessible, convincing and original part of L’ordinamento giuridico.
56 Most of the following examples are either Romano’s own, or designed to fit Romano’s original doctrine, and therefore they may sound outdated.
domestic law conform to international directions; in addition, they can incorporate the content of international law by way of renvoi (that is, by including a cross-reference to the text of an international instrument in a domestic act), or by ratifying without reservation an international agreement.

Romano rightly recalls another similar example, that of the Church and the State agreeing to establish a legal order superior to both, by means of executing a concordat. The concordat is not a species of the category of international agreements, in that it is concluded between a State and the representatives of the Catholic Church acting as the executive officers of a religious (universal) community, rather than as public authorities of the (territorial) State order of Vatican City. This precision is not merely linguistic, as it clearly emerges from the contemporaneous adoption, in 1929, of an international agreement (between Italy and the Holy See) and a concordat (between Italy and the Catholic Church), the latter stipulating, amongst other things, the State-funded stipend and the waiver of compulsory military service for Catholic priests, and the attachment of civil effects to religious marriage.

In addition, two orders that are in principle independent of each other can reciprocally affect their content through a third legal order that establishes such relevance (type (iii) above). For instance, international law requires State legislators to satisfy various negative obligations that depend on the content of foreign legal orders. More pertinently, various international agreements can codify certain rules of conflict of laws (droit international privé), imposing on signatory States the obligation to give relevance to the substantive or procedural rules of foreign States.

The relevance of type (iv) depends on the unilateral opening up of a given legal order to the law of another institution. An obvious case is when States delegate governmental and legislative functions to local autonomies, which accordingly act on the behalf of the former; another instance is referral (renvoi) to foreign norms, typically encompassed in national conflict of laws rules.

Type (v) is perhaps the most intuitive: whenever a merger occurs, the content of the dissolving legal order is transferred, subject to the terms and conditions of the merger, into the legal order of the resulting body.

397; Niels Petersen, ‘The Reception of International Law by Constitutional Courts through the Prism of Legitimacy’, Max Planck Institute for Research on Collective Goods, paper 2009/39. For a synthetic but impeccable account of the tension between international obligations and domestic incorporation, see Committee on Economic, Social and Cultural Rights, General Comment No 9: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/C.12/1998/24, 3 December 1998. The Committee acknowledges that, although Member States have a duty to give effect to the Covenant, it is for them to choose how to implement it domestically.

58 Indeed, in 1929 Italy concluded with the Holy See the Lateran Pacts, which consisted of an international treaty that recognised the sovereignty of the Church over Vatican City, a financial convention, and a concordat governing the position of the Catholic religion within the then Kingdom of Italy.

59 Consider, for example, the general obligation not to adopt legislation governing the conduct of foreign citizens outside the territory of the State.
The Effects

It is sometimes the case that the law of a given legal order, besides having an ‘inward’ effect, entails some legal effects even outside the limit of the order, in other institutions. Extra-institutional effects represent the third category of inter-order relevance.\(^{60}\)

In type (i) cases (superiority and subordination), it is for the superior institution to decide which effect its law will have within the lower order. The situation is more complex when a legal order is only partly superior to another one, as the level of effectiveness will depend also on the scope of the superiority. In a federation, for instance, federal legislation can pre-empt state legislation; conversely, in complex systems where the principle of subsidiarity is used to allocate the exercise of concurrent competences, the law of the lower order can have the effect of preventing the superior order from regulating the same subject-matter.

In the case of presupposition (type (iii) above), there can be a mutual spillover of effects between the legal orders involved. For instance, international agreements requiring national implementation, execution or ratification will only be effective subject to a change in the State legal order. Likewise, European Community directives generally require State implementation to be effective, and international treaty obligations typically have an indirect impact on the domestic order, even when incorporation (that is, relevance as to its very content) is not granted.\(^{61}\)

Certain legal orders may unilaterally decide to give effect to external orders (type (iv) above). This is the case of domestic norm regulating the recognition of foreign judgments, or of foreign arbitral awards, or of private law issues relating to property, family, contract or tort law. A clear example of extra-order effectiveness is the recognition in a confessional State of the effectiveness of a religious marriage, a recognition that sometimes also goes so far as to amplify it by attaching thereto additional (civil) effects that were not foreseen by the Church institution.

(iii) The International Legal Order

The first postulation of Romano’s institutionalism with regard to international law is obvious: international law is indeed a legal autonomous order (or, in Romano’s jargon:}

---

\(^{60}\) This relevance is inherently different from the content-related relevance (see above). Therefore, trans-institutional effects will be taken into account regardless of their influence on the content of the ‘recipient’ legal order. See Romano (n 2) 183ff.

\(^{61}\) The international law–State law relationship presents a two-way relevance: the former has an indirect influence upon the latter’s content (see above), whereas State orders can determine international law’s effectiveness. Again, a reading of General Comment No 9 of the ICESCR Committee is helpful. Verbatim formal incorporation of treaty obligations in domestic sources is encouraged but not required, as this is deemed to make it more likely that implementation will be accomplished. On the mechanism side, the judiciary need not necessarily be a given a direct role, but must be given a role if other mechanisms are inadequate: its empowerment is not a consequence of the direct effect of the international norm, but a guarantee against its possible lack of effectiveness (thanks to Professor Craig Scott for this remark).
the international community is an organised institution). Those who deny this truth make a mistake based on the erroneous bias in favour of the State order. In Romano’s view:

The word ‘organization’ has many meanings. According to the narrowest one, it stands for an entity possessing a will of its own, and the necessary organs by which to implement this will. Under this definition, the international community would be organized only marginally. Nonetheless, under a broader definition, organization only indicates the stable and durable structure of an entity, which has a ‘body’, and which is a real entity as opposed to a mere aggregation of individuals or of other entities. In that sense, the international community is organized.62

The then-common understanding of international law as a mere emanation or projection of States was, in Romano’s view, a direct corollary of the ill-founded idea that States are the only legal orders on the scene. Consider how the following statement applies to the international legal order, and how the parenthetic clause ‘be they norms or not’ could refer to an order made of other orders:

We must acknowledge that a legal order is something different from the single material elements forming it, if it is true—as it certainly is—that a legal order ... is not the sum of various parts, be they mere norms or not, but a unit on its own. Please note that such a unit is material and effective, rather than artificial or achieved through a process of abstraction.63

International law, as noted above, is perhaps the area where the interaction between institutionalism and pluralism is at its most intense.64 The last quote clarifies that pluralism does not undermine unity, and Romano develops an argumentation per absurdum, in

---

62 Santi Romano, Corso di Diritto Internazionale (Cedam, 3rd edn 1933) 10. The original text reads: ‘La parola “organizzazione” ha parecchi significati. Nel significato più ristretto, accenna ad un ente che abbia una propria volontà ed organi per cui mezzo esplica questa volontà: in tal senso, la comunità internazionale non sarebbe organizzata se non molto parzialmente. Ma in un significato più largo, organizzazione vuol dire soltanto struttura stabile e permanente di un ente, in modo che questo abbia un “corpo”, sia veramente un ente e non un semplice aggregato di individui o di altri enti. In tal senso, la comunità internazionale è organizzata.’

63 See Romano (n 2) 12 (our translation). The original reads: ‘Se si ammette, come non è dubbio, che un ordinamento giuridico nel senso suddetto non è una somma di varie parti, siano o non siano queste delle semplici norme, ma un’unità a sé—e un’unità, si noti bene, non artificiale e non ottenuta con un procedimento di astrazione, ma concreta ed effettiva—si deve altresì riconoscere che esso è qualche cosa di diverso dai singoli elementi materiali che lo compongono.’ On the concept of international law as an ‘institution of institutions’, see Itzcovich (n 25) 72, referring to Romano (n 62) 18.

64 Nonetheless, the possibility that pluralism is used to support the unity of the fragmented scenario is not limited to the international system. Francisco Tomás y Valiente, former President of the Spanish Constitutional Court, recalled one of the first judgments of the Spanish Constitutional Tribunal, and used Romano’s institutionalism to bridge the gap between autonomy (of single local legal orders) and unity (of the State constitutional setting). See Francisco Tomás y Valiente, ‘Código Civil, Constitución y Jurisprudencia Constitucional en España (1978–1990)’ (2004) 39(1) Revista Jurídica Universidad Interamericana de Puerto Rico 101, 104, referring to judgment STC 4/1981.
response to those claiming that the normativity of international law is merely a consequence of States’ wills interacting:

[If this were true], each international law agreement would be self-sufficient, would derive its effectiveness from itself and stand as the primitive basis for the legal effects it produces. According to this view, it would be possible to argue, as some indeed did, at least in part, that there exists no international law, but as many international laws as there are agreements.\(^{65}\)

On the contrary, agreements are not generated and do not operate in isolation, but are backed and legitimised by a broader institution (the international legal order, which is distinct from single agreements):\(^{66}\)

International agreements themselves have not, as many believe, their own character that transcends the previous existence of an objective law, nor do they draw effectiveness from custom, as others argue. They are founded on a principle which was established together with the establishment of the international community, and developed inherently to its constitution and its current institutional features.\(^{67}\)

As noted by Dupuy,\(^{68}\) Romano manages to use treaty-making (the quintessential element of voluntarism) as evidence that international law is, in fact, something independent from States. First, the very possibility of concluding treaties is granted by principles of international law (not by rules of State law); secondly, if treaties are possible it is only because international law recognises the equality and sovereignty of States. In both cases, international law emerges as something autonomous, not merely as an emanation of States’ will.

Reading these quotations, it is possible to recognise Santi Romano’s aversion to reductionism (a legal order cannot be reduced to its formal legal sources). Just as the State is not a mere aggregate of positive sources, the international legal system is similarly more than an accumulation of inter-State agreements. Accordingly, State statutes are (a significant part of the) law only thanks to, and together with, the State system they are

\(^{65}\) See Romano (n 2) 57 (our translation). The original text reads: ‘Gli accordi internazionali starebbero ciascuno per sé, ciascuno trarrebbe da sé la sua efficacia e costituirebbe il primo principio del diritto di cui è fonte. In modo che, da questa premessa si può dedurre, come del resto si è, almeno in parte, dedotto, che non il diritto internazionale esiste, ma tanti diritti internazionali quanti sono questi accordi.’ As specified in Corso (n 62) 13: ‘[T]he corpus of specialized international law borne out of bilateral agreements between States is the result of their autonomy, which they derive from belonging to the general international community. This autonomy represents the necessary prerequisite of such body of law.’

\(^{66}\) Along the same lines, see Georges Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31(4) New York University Journal of International Law & Politics 919, 926.

\(^{67}\) See Romano (n 2) 62 (our translation). The original text reads: ‘Gli accordi medesimi non hanno, come molti credono, una virtù propria, indipendente dalla preesistenza del diritto oggettivo, e nemmeno, come credono altri, traggono la loro efficacia dalla consuetudine: essi invece poggiano su un principio che si è posto col porsi della comunità internazionale e si è connaturato con la sua costituzione, con i suoi attuali caratteri istituzionali.’

\(^{68}\) Dupuy 2007 (n 3) 72.
legitimised by and operating within; likewise, international legal instruments qualify as law only because they emerge and operate not in a *vacuum*, but within the organised institution of international law.

Romano’s analysis can only get this far, as the state of development of the international legal order as of 1918 had nothing to do with the current situation. However, his theoretical tools (institutionalism and pluralism) can be used to explain virtually every simple or complex legal order, and one claim of the present paper is precisely that these tools are not outdated for this purpose, and possibly have an added value with respect to alternative current methodologies. This claim will form the subject of the last section, where the main intuitions of Romano’s book will be re-examined against the contemporary system of international law and, finally, the global system of transnational regimes.

SANTI ROMANO, HANS KELSEN, CARL SCHMITT

Short of portraying the full network of the relationships between Romano and the scholars of his age, we will dedicate a few paragraphs to shedding light on the rapport between Romano and Kelsen, and between Romano and Schmitt.69 First of all, it must be noted that Kelsen was virtually unknown in Italy before the publication of *L’ordinamento giuridico*, in which Romano develops a harsh critique of Kelsen’s normativism, maintaining that it is a sort of reductionism.70 Indeed, Romano repeatedly refers to Kelsen’s *Hauptprobleme der Staatsrechtslehre* (1911) and *Ueber Staatsunrecht* (1913), aiming at rejecting those theories that equivocate what the State is with what the State does.71

The tension with Kelsen’s theories concerned not only the institutionalism side of Romano’s work but also the pluralism doctrine. Indeed, a conflict emerged regarding the conception of international law, where the monistic doctrine of the Austrian jurist is blatantly at odds with the pluralist description provided by Romano. Likewise, Romano mentions Kelsen’s *Allgemeine Staatslehre* (1926), claiming that the contention contained therein about the Church (Kelsen states that the Church, itself, is a State) is a terminological mistake that arbitrarily distorts the meaning of State.72

69 On this issue, see Vittorio Frosini, ‘Kelsen and Romano’ (1986) 63 Rivista Internazionale di Filosofia del Diritto 198. In that essay Frosini also presents a fascinating interpretation of the irremediable distance between the two thinkers, in light of the divide between Jewish monotheism and Greek–Roman polytheism. See eg 204: ‘Kelsen’s doctrine is the outcome of a migration of thoughts that, over the centuries, represented the ideal approach of the jurist: the man confronted with the book of the Law, be it the rule-book called Leviticus, the code of Justinian or the Code Napoléon.’

70 Before 1918, as reported in Frosini (n 69) 198, a review of Kelsen’s *Die Staatslehre des Dante Alighieri* (1905) appeared in 1907 in a literary journal, the *Bullettino della Società Dantesca Italiana*. Romano presumably knew Kelsen’s work through a doctrinal note (Eugenio Di Carlo, *Teoria pura e teoria empirica del diritto*) published in 1912 in a small journal edited in Palermo, his city of birth.

71 See Romano (n 2) 81–85.

Romano’s obstinate rejection of Kelsen’s ideas attracted Schmitt’s interest. In his 1934 work *Ueber die drei Arten des rechtswissenschaftlichen Denkens* (*On the Three Types of Juristic Thought*) Schmitt endeavours to discuss three doctrines, namely positivism, decisionism and a modern combination thereof. Without mentioning him explicitly, Schmitt’s critique of normativism is a direct attack on Kelsen’s doctrine.

Schmitt breaks down the Rechts-Ordnung compound concept into its two halves and notes that the then predominant normativism focused preeminently on the Recht half, reducing ‘every legal order to rules of law’. Schmitt contends that this interpretation is biased: a logical and linguistic grasp of the Rechts-Ordnung would require conceiving ‘Recht from the perspective of concrete order rather than of legal-rules’. This independent concept of ‘order’, then, would influence the legal half of the concept, and duly dispel its normativist seizure. Schmitt advocates ‘concrete-order thinking’ (*konkretes Ordnungsdanken*), as opposed to normativist thought, which deems itself inherently superior based on a misunderstood sense of impersonality and objectiveness (studying ‘the rule of law as opposed to the rule of men’). The misunderstanding arises from the misconception of law (Recht) as rule; instead, law stands for nomos, that is ‘norm, as well as decision and, above all, order’.

The concluding passage of the first chapter, on the distinction between normativism and concrete-order thinking, provides an extensive example of how the latter is comparatively better at describing legal reality by drawing on Romano:

In his book *L’ordinamento giuridico*, Santi Romano had justifiably stated it is inaccurate to speak of Italian law, French law and so on and thereby think only of a sum of rules, while in truth the complex and heterogeneous organization of the Italian of French state as a concrete order determines this law. There are numerous authorities and combinations of state authority or state power that produce, modify, apply, and guarantee the juristic norms, but do not identify themselves with these norms. Only that is Italian or French law.

After quoting Romano’s remark about rules being ‘the instrument of the legal order’ rather than an element of its structure, Schmitt praises him for correctly noting that ‘a
change in the norm is more the consequence than the source of a change in the order’.79

In the opening lines of the following chapter, introducing a discussion of decisionism, Schmitt reiterates his profound esteem for Romano’s innovatory contribution:80 ‘Among older authors one could hardly find an antithesis like the one in the previously cited position of Santi Romano. Early antitheses did not concern the opposition of norm and order, but mostly that of norm and decision, or norm and command.’81

Although the above discussion of Schmitt as well as the various citations in this first part of the essay have not provided anything near to a complete survey of Romano’s influence on his contemporaries,82 it is hoped that they suffice to convey the deference paid by continental European scholarship to his theory of institutionalism—and thereby help to establish a basis for scholars working in English to seek to become more familiar with Romano’s work and ideas.83

ROMANO’S HERITAGE

In this section, we will test the value of Romano’s theory for the modern debate about the nature of supra-national law. We argue that Romano’s conceptions of pluralism and institutionalism, as described above, are two useful doctrines that can be used efficiently to interpret the systems of European, international and transnational law.

The European Union Legal System

First of all, these models have already proved useful in conceptualising the European Union (EU), a legal system originating from several national systems, which lacked a clear normative hierarchical structure (supremacy and direct effect were a jurisprudential development, and had no legislative basis84). It should be recalled that the first recognition

---

79 See Schmitt (n 73) 57.

80 It should be noted that Schmitt’s use of Romano’s theory implies a certain distortion of the latter: by contrasting irremediably norms and (concrete) orders, and amplifying their differences, he aims at justifying his own irrational decisionism agenda, whereas Romano’s theory in fact accepts the importance of legal norms, as they are one half of the equation societas-jus.

81 See Schmitt (n 73) 59.

82 Also, it would be appropriate to highlight the deep divide that exists between Schmitt’s and Romano’s positions on legal pluralism. On this issue, see La Torre (n 10) 101.

83 It comes as no surprise that Armin Von Bogdandy, in his recent attempt to describe the rise and the actual status of Constitutional Law scholarship in Europe, acknowledges the importance of Santi Romano (along with Jennings and Schmitt) as being among those ‘purported antipositivist scholars [whose] significance … is in no way inferior to that of the founders of the positivist profile’. Armin von Bogdandy, ‘The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe’ (2009) 7(3) International Journal of Constitutional Law 364, 380.

84 For a classic overview of these doctrines see Bruno de Witte, ‘Direct Effect, Supremacy, and the Nature of Legal Order’ in Paul Craig and Gráinne de Búrca (eds), The Evolution of EU Law (Oxford University Press, 1999) 179, 209.
of the European Community as a distinct legal order of international law came from the European Court of Justice, in the early Van Gend en Loos case.\textsuperscript{85}

As Sánchez Barrilao noted, the predominant and most convenient normative model for describing (European) national legal orders is the Kelsenian one. Indeed, the Constitution (\textit{Grundnorm}) is the logical and legal source of authority and effectiveness of each lower legislative level, and through the principles of hierarchy and competence it governs and unifies the State order. In the European Community system, instead, no formal constitution was originally in place, at least of the kind known to the nation-State experience. The fundamental Treaties were, indeed, amenable to the category of inter-State agreements establishing an international organisation. However, the Community had since the beginning enjoyed various powers that were rarely entrusted to an international organisation, such as the power to issue regulations ‘binding in [their] entirety and directly applicable in all Member States’.\textsuperscript{86}

Although the Community did not easily fit into the category of international organisations, this alone did not prevent it from coming into existence and beginning to operate in connection with the Member States. Their coexistence could only be regulated through relational devices such as the doctrines of supremacy and direct effect. These principles secured a sufficient degree of autonomy, unity and systemic cohesion of the growing Community order, which was preserved by the establishment of the European Court of Justice’s monopoly on the final interpretation of Community law (its day-to-day application, in turn, is shared with all domestic judges). In the Community framework, the unity and identity of the order are not a by-product of normative hierarchy, but the normative structure is a reflection of the institutional setup, as historically developed through the relationship among the different orders and actors thereof.\textsuperscript{87} The line of successive treaty amendments, up until the creation of the EU and the adoption of the Treaty of Lisbon, clearly shows the intimate connection that exists between the institution and its laws: they change and adapt simultaneously and, in principle, there is no single answer to the question of whether the institution developed because of legislative reforms or whether, conversely, law shaped the system.

\textsuperscript{85} Case C-26/62, judgment of 5 February 1963, \textit{NW Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen} [1963] \textit{ECR} 1: ‘[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.’

\textsuperscript{86} See Art 189(2) of the Treaty Establishing the European Communities (Rome, 25 March 1957).

\textsuperscript{87} See Juan Francisco Sánchez Barrilao, ‘Relación entre el derecho de la unión europea y el derecho de los estados miembros: apuntes para una aproximación al principio de primacía a la luz de la constitución europea (declaración del tribunal constitucional de 13 de Diciembre de 2004)’ (2004) 1(2) \textit{Revista de derecho constitucional europeo} 127. Sánchez Barrilao expressly refers to the institutionalism and pluralism theories of Santi Romano (129–31). A similar observation can be found in Francisco Balaguer Callejón, ‘Los tribunales constitucionales en el proceso de integración europea’ (2007) 4(7) \textit{Revista de derecho constitucional europeo} 327, in 57, where he states that in the European scenario there is a subversion of the Kelsenian dyad consisting of \textit{implicit} Grundnorm (the ‘transcendental presupposition’) and \textit{effective} Constitution. In fact, in the Community there seems to be an \textit{implicit} Constitution and an \textit{effective} fundamental principle (the
In other words, Romano’s theory is more capable of grasping the difference between the State order and the EU order, or between the EU order and a classic body of public international law, than much of the very diverse literature on the issue. First of all, the EU order is an institution, and this alone should discourage any attempt to retrieve the deontological or normative nature of its structure: an ontological and empirical approach is far more accurate in describing its status, even if it fails to point at pre-established categories. Moreover, the concept of relevance (as articulated above) is very useful (much more so than that of hierarchy) in interpreting supremacy and direct effect and, more generally, the whole matter of the reciprocal relationship between the EU and the Member States.

Supremacy and direct effect are ‘negotiable’ concepts: what gets said (by the EU) is not what is heard (by the Member States). They are superimposed by the supranational authority to grant the uniform application of law across all Member States; but only over time, and by means of an interpretative effort, have national constitutions (and consti-

political will of Member States). In other words, the formal norm (the Constitution) is an implicit consequence of the real balance of power: law is a component and a consequence of the institutional setting.

For a detailed account of why the legal structure of the European Community/Union cannot aptly be described using the theories of either monism (either from the State or the Community’s point of view) or dualism (a typical starting point of international law theories) see Massimo La Torre, ‘Legal Pluralism as an Evolutionary Achievement of Community Law’ in Francis Snyder (ed), The Europeanisation of Law: The Legal Effects of European Integration (Hart Publishing, 2000) 125, 136. La Torre ends up claiming that the right theoretical framework is, in fact, pluralism, conceived as a ‘normative criterion’ and not simply as a ‘descriptive approach’. On the classic issue of whether Community law is, in fact, a species of international law, see eg Alain Pellet, Les fondements juridiques internationaux du droit communautaire, Collected Courses of the Academy of European Law (Martinus Nijhoff, 1994) 193–271; Martti Koskenniemi (ed), International Law Aspects of the European Union (Kluwer, 1998).

See Giacinto della Cananea, ‘The European Union’s Mixed Administrative Proceedings’ (2004) 68(1) Law & Contemporary Problems 197, 216, referring to Romano’s theory and stating that ‘although the study of these “mechanisms, workings, and connections” has been undertaken only recently, it has allowed a study of the European order to be put on a sounder footing’.

See Karen J Alter, ‘The European Court’s Political Power’ (1996) 19(3) West European Politics 458, 459: ‘[T]o put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it.’ For a comment on this two-sided interpretation of the supremacy concept, see Wojciech Sadurski, ‘Solange, chapter 3’: Constitutional Courts in Central Europe—Democracy—European Union’ (2008) 14(1) European Law Journal 1. Itzcovich (n 25) 79 provides an insightful account of how the concept of relative autonomy underpinning Romano’s pluralism leads to a new paradigm that discards sovereignty in favour of ‘perspectivism’, a model based on a shifting point of view (every institution can be variously relevant vis-à-vis each other, giving rise to a range of interaction devices that affect the degree of its ‘relational’ autonomy). On pluralism within the EU system, see in particular the works of Maduro, eg Miguel Poiares Pessoa Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in Neil Walker (ed), Sovereignty in Transition (Hart Publishing, 2003) 501–37; ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional. Pluralism’ (2007) 1(2) European Journal of Legal Studies 1. In the latter work, Maduro (at p 11) stresses that the interpretation and application of EU law is the by-product of this inter-systemic discursive process: ‘The rules, decisions, and interpretations given by courts are … taken over and used by a broader legal community with meanings that may not always be consistent with those originally intended by courts.’
tutional courts) gradually come to accept these principles.  

The gulf between EU law’s supremacy and the constitutional resistance (or tolerance) of Member States, however, does not imply a state of instability and conflict, but shows how the system is founded on complex devices that cannot be simplified, and its cohesion depends on the reciprocal views of relevance adopted (and adjusted) by the legal orders involved in this interplay. EU law, stemming from ‘an independent source of law, c[an] not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question’. For the EU order, an incompatible domestic norm is either a legally irrelevant fact or an illicit fact. Conversely, domestic constitutional law narratives typically profess the untouchable nature of the core values of their systems, and purport that the EU order is effective at the domestic level only so long as the latter deliberately opens itself up to the influence of the former.

Ultimately, it is not the legal setup that makes the EU what it is, but its peculiar (and historical) features as a society, an order that has managed to find an equilibrium among

---

91 This particular setup, resulting from two different systemic perspectives confronting each other (the European and the national one), is discussed extensively in Neil MacCormick, ‘Beyond the Sovereign State’ (1993) 56(1) Modern Law Review 1. Nico Krisch (in his ‘The Open Architecture of European Human Rights Law’ (2008) 71(2) Modern Law Review 183) borrows this interpretative model to examine the relationship between national constitutional courts and the legal order of the European Convention on Human Rights as expressed in the case law of the Court at Strasbourg, then expands his analysis to include the ECJ’s treatment of human rights. In his account of the interplay between norms, jurisdictions and judiciaries, Krisch repeatedly acknowledges that the formal and legal setting has played only a limited role, thus subscribing to the idea that the interaction (relevance) between orders is not prescribed in their rules, but is rather the result of how the systems regard each other. Franck Lecomte, in his ‘Embedding Employment Rights in Europe’ (2011) 17(1) Columbia Journal of European Law 1, 19, used Romano’s concept of inter-ordinamental relevance to describe Art 151 of the Treaty on the Functioning of the European Union, which expressly asks the Union and the Member States to ‘ha[v]e in mind fundamental social rights such as those set out in the European Social Charter … and in the 1989 Community Charter of the Fundamental Social Rights of Workers’.

92 See Joseph HH Weiler, ‘Federalism and Constitutionalism: Europe’s Sonderweg’, Harvard Jean Monnet Working Paper No 10/00, 2001. The concept of constitutional tolerance is described as follows in Damian Chalmers, European Union Law: Cases and Materials (Cambridge University Press, 2010) 194: ‘[W]hile the authority and reach of EU law is ultimately for national constitutional courts to decide, such courts commit themselves to recognize the special status of EU law. However, they do so on the condition that it does not violate certain constraints of national constitutional law.’

93 Case C-6/64, Costa v ENEL [1964] ECR 1141 (ECJ). See also Case C-11/70, Internationale Handelsgesellschaft [1970] ECR 1125, para 3: ‘[R]ecourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law.’

94 See Itzcovich (n 3): ‘Orders are an exclusive perspective on the legality of their own norms and elements (autonomy) and of their acts and decisions (authority).’ He also notes that this principle is codified in Art 27 of the Vienna Convention on the Law of Treaties.

95 To provide one instance relating to a single Member State, it is worth referring to the case law of the German Federal Constitutional Court in the so-called Solange line of judgments (Solange I, BVerfGE 37, 271 2 BvL.
its components which was impossible to define a priori. As Weiler said while describing the peculiar phenomenon of constitutional tolerance (in a paragraph eloquently titled ‘Neither Kelsen nor Schmitt: The Principle of European Constitutional Tolerance’):

The Principle of Constitutional Tolerance is not a one way concept: it applies to constitutional actors and constitutional transactions at the Member State level, at the Union level and among the Member States too. This dimension may be clarified by moving from concept to praxis, to an examination of Constitutional Tolerance as a political and social reality.96

That is to say, order is found not in the project (the norms), but in the process and the practice (the living society). It develops and defines itself over time, and has a legal quality that makes it different from the social bodies it operates on: to use the words of Raymond Radiguet, ‘l’ordre, à la longue, se met de lui-même autour des choses’.97

ROMANO’S THEORIES IN TODAY’S INTERNATIONAL AND SUPRANATIONAL SYSTEMS

Given the above with respect to EU law, can Romano’s theories be of any help in understanding the current status of international and global law? If so, what would be the advantage of using Romano’s institutional model for such a purpose?98 Finally, is there something in Romano’s pluralism that makes it appealing even today, notwithstanding the momentous development and sophistication that pluralism theories have experienced in the last century?

The previous paragraph, clarifying the added value of pluralism in the interpretation of the EU system, will serve as a case-study, an instance of how a non-formalistic focus...
on legal orders as institutions is the only possible way to understand how interacting legal systems behave in relation to each other, and how the complex structure that they integrate can qualify as an autonomous legal system in its own right.99

A word of caution is needed: the following analysis will develop along two prongs, each relating to a discrete subject matter. First, I will approach the classic debate on the unity of international law, as connected to the fragmentation rhetoric. Secondly, I will turn to those regulatory and normative transnational regimes that are not amenable to the category of international law, which arguably increase the pluralism of the global legal arena and challenge the very possibility of distinguishing between what is law and what is not. The distinction itself is sometimes thin and based on conventional categorisations that are capable of being challenged,100 but it is a reasonable one, and possibly the epistemological value of institutionalism and pluralism can further strengthen its legitimacy.

INTERNATIONAL LAW

Amongst modern international law scholars, the most enthusiastic promoter of Romano’s model has perhaps been Georges Abi-Saab.101 The opening line of the first part of his *Cours général de droit international public* is the Latin adage *ubi societas, ibi jus*,102 and the section titled ‘*La notion de système ou d’ordre juridique et son applicabilité au droit international*’ provides a lengthy discussion of the three schools of thought that made use of the notion of legal order, namely normativism (Kelsen), institutionalism (Romano), and Hart’s theory.103

99 See how Krisch himself (n 91) 214 contends that institutional pluralism, as observed in the EU system, could also represent an optimal model to explain the functioning and the structure of transnational law in general: ‘In situations where contestation is strong and authorities are not firmly settled, a pluralist order can contribute to the transformation of a regime over time and allow for responsiveness to different actors according to their changing political weight and public legitimacy. By leaving questions of fundamental norms and ultimate authority undecided, pluralism might give postnational law the flexibility it needs in order to deal with principled contestation—contestation might be easier to circumnavigate than in a constitutional order built on the idea that these questions are settled in one way or another.’

100 See eg Craig G Scott, ‘“Transnational Law” as Proto-Concept: Three Conceptions’ (2009) 10(7) German Law Journal 859, 867.

101 In addition, PM Dupuy deserves recognition for having explored Romano’s thought in his monograph on the unity of international law, and in several recent works regarding fragmentation.

102 See Abi-Saab (n 23) 45.

103 Abi-Saab adopts a neutral but meaningful interpretation of ‘legal order’: ‘*un ensemble juridique ou l’ensemble d’un droit…. il peut évoquer en plus dans les esprits le but ou l’impact social d’un tel ensemble, qui est l’établissement de l’ordre ou d’un certain ordre dans la société.*’ See also his ‘The Third World and the Future of the International Legal Order’ (1973) 29(1) Revue égyptienne de droit international 27–66. The same authors are discussed in Dupuy 2007 (n 3) 66ff and Charles Leben, ‘Quelques réflexions sur l’ordre juridique’ (2001) 34(1) Droits 19.
The particular qualities of Romano’s theory\textsuperscript{104} are used by Abi-Saab to describe the international order: the lack of a central sanctioning power fits it better than the Kelsenian model, as argued in the following quote from \textit{L’ordinamento giuridico}:

Many say that international law is a kind of society deprived of legal organization. The meaning of this argument is not really clear. … [T]hey want to stress the absence of an authority to which every State is subject. However, we do not agree that the concept of organization necessarily imports a similar concept of superiority and, as a consequence, of subordination. … [This view could depend on] the common shortsighted habit of mistaking for an essential aspect of a legal concept what, in fact, is just an accidental aspect that belongs only to a single legal order, in this case the domestic State order.\textsuperscript{105}

Furthermore, the appraisal of the collective identity as an element of unity of the institution is ‘far more clarifying’ than the process of self-identification based on the Grundnorm or the rules of recognition, which ‘mistakes the thing for its shadow’.\textsuperscript{106} Likewise, Dupuy praises Romano and bases his reconstruction of the unity of the system of public international law on a blend of Romano and Hart, in which the two theories complement each other and bring added value to the mix (Romano’s focus on social purposes, Hart’s doctrine on secondary rules).\textsuperscript{107}

Romano’s treatment of international law as an autonomous legal order is both technical and empirical in nature. His conclusion, seemingly poor in terms of abstraction and doctrinal categorisation, is nevertheless compelling:

Any definition of [international] law should encompass what is deemed to be law not merely out of scientific tradition. Otherwise, such definition would be arbitrary: jurists must not subordinate reality to concepts, but concepts to reality.\textsuperscript{108}

The unity of international law at large, however, does not imply that there cannot be autonomous institutions that are integral to the general system, such as epistemic communities relating to discrete fields of international law (human rights, international trade,\textsuperscript{94}

}\textsuperscript{104} See Abi-Saab (n 23) 113: ‘Bien que datant de 1918, l’oeuvre de Romano reste très moderne dans sa conception, son approche globalisante (qu’on appellerait aujourd’hui holistique), tout en étant très nuancée et attentive aux variations de structure, de fonction et de rythme du phénomène juridique.’

}\textsuperscript{105} See Romano (n 2) 54–55.

}\textsuperscript{106} See Abi-Saab (n 23) 120 (our translation). For a recent critique of Romano’s theory on this aspect (the lack of an explicit rule of recognition), see Carlo Focarelli, ‘On the Concept of “International Community as a Whole” in International Law’ (2007) 14(3) \textit{Journal of International Cooperation Studies} 51, 65.

}\textsuperscript{107} Dupuy 2007 (n 3) 74–75.

}\textsuperscript{108} See Romano (n 2) 53 (our translation). The original reads: ‘La definizione del diritto deve essere data in modo che vi si possa comprendere quel che, non soltanto per tradizione scientifica, viene considerato tale [il diritto internazionale]. Altrimenti essa è arbitraria: non la realtà si deve—dal giurista—subordinare al concetto, ma questo a quella.’ In this respect, Romano also submits a linguistic piece of evidence: States are commonly referred to as ‘members’ of the international community, therefore the latter must be thought of as a ‘body’, that is, an organisation.
environment protection, development cooperation etc). Romano could not foresee the process of diversification of international law that characterised the second half of the twentieth century, but it is not difficult to apply his doctrine of pluralism (as explained with respect to the intermediate social bodies within the State) to the current state of international law: there exist a variety of specialised systems that can be recognised not so much by looking at the formal legal instruments establishing or governing them (indeed, it cannot be said that there is a legal system of international law for each treaty; see above), but by running the institution test: it must be possible to isolate within the broader system various autonomous communities organised to pursue a discrete purpose or set of purposes. Also, the types of relevance explained above within Romano’s theory of pluralism come in handy to classify inter-ordinamental processes.

Indeed, these concurring field-specific systems of international law are relatively autonomous from each other, but they all presuppose the existence of the general system of international law (if only because their validity derives from the general principle of pacta sunt servanda). Not only does the latter represent a condition for their existence, it also has a bearing on their content, in that it can affect their normative content, either directly or by regulating the correlation (that is, respective relevance) between different orders. For example, the general system provides principles that can fill the gaps in the specialised ones, where necessary; it also lays down certain rules of conflict (such as the non-derogability of jus cogens) and hermeneutic principles shaping the content of the law of one system in light of the content of another one, when the applicable provisions are open to alternative interpretations (see the rule of systemic integration in Article 31(3)(c) of the Vienna Convention on the Law of Treaties).

The phenomenon of fragmentation of the current system of international law has been the subject of an investigation conducted by the International Law Commission (ILC) of the United Nations and of countless scholarly studies. Notably, the theories of

110 However, note that this new-corporatist blend of transnational pluralism is problematic, if only because it lacks democratic legitimacy, and is not capable of arranging itself in a constitutional set up. See Gunther Teubner, ‘Constitutionalizing Polycontexturality’, online paper, 2010, p 11, later included in Gunther Teubner, Hans Lindahl, Emilios Christodoulidis and Chris Thornhill, ‘Debate and Dialogue: Constitutionalizing Polycontexturality’ (2011) 20(2) Social & Legal Studies 209: ‘At the global level, neo-corporatist arrangements are bound to fail. The contradiction remains: the self-constitution of social subsystems takes a global course, and only nation-state institutions are available for their political-legal constitutionalisation.’
111 See above for a description of inter-order relevance in terms of existence and content.
113 See the ILC Report (n 48) and the bibliography listed therein, in particular Bruno Simma, ‘Self-Contained Regimes’ (1985) 16 Netherlands Yearbook of International Law 111; Pieter Jan Kuypers, ‘The Law of GATT as
Romano recalled above, as applied to the fragmentation issue (the autonomy of the multiple international law specialised systems, which does not undermine the unity of the system of international law that lies in the background; the non-reduction of orders to norms) yield the same results that the 2007 ILC Report on fragmentation incorporated in its first conclusive finding: ‘International law is a legal system. Its rules and principles (ie its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms.’

Admittedly, however, the ILC’s studies dealt with the substantive aspects of fragmentation (that is, with the issues relating to the conflict of norms belonging to different legal orders) rather than with the institutional aspect (how institutions can or are supposed to manage the interpretation and application of this intertwining of legal sources and orders). The narrow focus on norms, therefore, implies that these fundamental contributions by the ILC fare relatively poorly in describing how the global system and its antinomies work in reality. In fact, the apodictic sentence accounting for this self-restraint is, in and of itself, suggestive that perspectivism (that is, attention to
the internal point of view of each system as regards the relevance of other systems) is the right approach:

[F]ragmentation raises both institutional and substantive problems. The former have to do with the jurisdiction and competence of various institutions applying international legal rules and their hierarchical relations inter se. The Commission has decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. (emphasis added)

This precision is all the more important because it confirms that, when the general rules of conflict are insufficient—as they often are, it is within each order that one can find out how relations between different orders of international law do (and will) take place in the practice. Sometimes, the decisive elements will be codified into positive norms (the most important—and often overlooked—ones being the clauses on jurisdiction and applicable law, which define the powers of third party adjudicators117), whereas sometimes it is in the mind of the judges that the conflict is resolved: practices of comity or deference, or direct application of principles such as the correct administration of international justice, often intervene to determine the relevance of extra-systemic norms in individual cases.118

The study of norms (à la ILC Report, or à la Pauwelyn) must therefore be accompanied by the study of inter-judicial relationships: in the absence of clear rules on harmonisation or conflict resolution, judges superintending each specialised system are the autonomous


subjects in whose hands lies the actual determination of the reciprocal relevance of legal orders.

A last annotation might help us to appreciate how Romano’s portrayal of inter-order relationships is capable of providing the platform for, and even contributing to, the most advanced studies on the exchange between the branches of international law. Every order can decide whether and to what extent to open its system to other orders’ norms. Romano correctly does not specify which motivations should affect this decision, nor which legal process this opening should consist of (a deferential judgment, an open-ended rule of conflict of laws, a ministerial practice).

Freed from formalistic constraints, the concepts of content-relevance and effects-relevance (see above) can explain many of the most common instances of dialogue (or non-dialogue) between orders and judiciaries, with the advantage that the observer is not forced to lose sight of the big picture in the attempt to break them down into pre-established categories (consistent, evolutionary or deferent interpretation; jurisdictional issues; cases of judicial comity; application of, or reference to, an external set of norms; application of provisions or principles of conflict of laws; judicial review of decisions or acts of another order; accordance of a margin of appreciation or constitutional tolerance or regulatory freedom, etc). This pragmatic approach appears promising, and although it does not claim to be meticulous or exhaustive (after all, it does not provide a conclusive list of typical inter-order relationships) it might prove helpful, if only because it allows scholars to focus on a value-oriented analysis of the emerging inter-regime linkages.

See the notorious statement of the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v Dusko Tadi, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70: ‘In international law, every tribunal is a self-contained system (unless otherwise provided).’ As was rightly noted, far from evoking the phantom of self-contained regimes, this statement refers to the separate-ness and autonomy of international judiciaries, a corollary of pluralism; see Teitel and Howse (n 118) 976.


THE GLOBAL SCENARIO—PROLIFERATING TRANSNATIONAL NETWORKS

Outside the reassuring boundaries of international law as we knew it, the essence of law is notoriously more difficult to recognise, tucked into the folds of the countless transnational regulatory regimes that populate the global space. These systems of rules have challenged the classic concept of law, and have raised an inevitable theoretical dilemma: if these regimes are measured against the paradigms of State law and international law, they simply do not qualify as law. However, this conclusion is intuitively unsatisfactory: new regulatory regimes and networks condition and direct human behaviour, and they cannot be discarded as non-legal at once. On the other hand, an unconditional test of legality (everything goes), or one that cares only about efficiency (whatever works), is not desirable either, inasmuch as it has no edge: moral convictions, religious practices, the rules of video games, the prohibition on multiple submissions to scientific journals, all of this would be indistinguishable from law proper.

Not surprisingly, institutionalism (as well as its corollary, pluralism) is often resorted to in those eras in which legal categories blur and a whole body of legal dogmatics (Rechtswissenschaft) just seems to be so obsolete that it is not worth updating any longer. Just like State law alone could not explain the legal nature of political parties or trade unions in the first decades of the twentieth century, the classic notions of State and international law combined are not capable of accounting for the legal nature of several transnational regulatory regimes.

---

122 By ‘transnational regulation’ we refer here to the set of regulatory networks that have emerged in the last decades that do not correspond to the traditional categories of sources of law used in public international law or in the framework of transnational transactions governed by private international law. For a current and exhaustive analysis of these regimes and more generally of pluralism at the global level, see Peer Zumbansem, ‘Transnational Legal Pluralism’ (2010) 1(2) Transnational Legal Theory 141.


124 Interestingly, in Duncan Kennedy, ‘Two Globalizations of Law & Legal Thought: 1850–1968’ (2003) 36(3) Suffolk University Law Review 631, 651–2, Romano is listed among the most important Social Studies scholars of the ‘Second Globalization’, a phenomenon preceding the subsequent ‘Third Globalization’, the one GAL scholars focus on. See also Gunther Teubner and Peter Korth, ‘Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society’, working paper available on ssrn.com (accessed 30 September 2011), to appear in Margaret A Young (ed), Regime Interaction in International Law: Facing Fragmentation (Cambridge University Press, in press) 10: ‘Transnational communities’, or autonomous fragments of society, such as the globalized economy, science, technology, the mass media, medicine, education and transport, are developing an enormous demand for regulating norms, which cannot, however, be satisfied by national or inter-national institutions. Instead, such autonomous societal fragments satisfy their own demands through a direct recourse to law.’ On the cyclical re-emergence of institutionalist pluralistic models, see Roderick A Macdonald, ‘Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism’ (1998) 15(1) Arizona Journal of International and Comparative Law 69, 76, on the comeback of Romano’s theories: ‘[O]nly slowly is the historical pedigree of legal pluralism being rediscovered, only slowly is the age of the new being appreciated.’

125 This tendency is described (and criticised) in Teubner (n 110).
That is what Benedict Kingsbury refers to in his compelling contribution, ‘The Concept of “Law” in Global Administrative Law’. Although that article does not pretend to discuss in detail all the terms (and the boundaries) of the rising GAL field of study, it is fair to note that at the core of this theoretical effort lies the idea that the classic concepts of law (inherent to State law and international law) fail to comprehend the current situation, where proliferating regulatory regimes often lack some of the traditional features (binding nature, provision of sanctions, public nature and authority of the legislator, uniform and general application, public and democratic legitimacy).

Romano’s theory—which is echoed in Kingsbury’s article—is prophetic inasmuch as it rejects the proposition that law is merely a byproduct of States’ will, both at the national and supra (trans) national level. Also, Romano’s refusal to regard State law as the touchstone of legality avoids the common tendency to consider as law that which resembles State law, a tendency that clearly emerges in the literature on certain aspects of transnational regimes (discussing their democratic legitimacy, public origin, application by the judiciary, etc) that betrays the preconception that the attributes of State law are decisive in the binary test law/not law. By advocating the plurality of non-state legal orders and the importance of autonomy as opposed to (State-originated) authority, Romano’s theory is well placed to explain and interpret the nature and position of transnational regulation, of either binding or voluntary force.

Granted, a concept of law disconnected from the State is not a prerogative of postmodernism, it is also something typical of pre-State ages: an appraisal of the multi-centred legal system of the Middle Ages provides a neat example of pluralism of co-existing legal orders operating at the same time in the same social space, whose weight and effects depended very much on the effectiveness that they could achieve by virtue of their relative autonomy. However, Romano was among the first scholars (along with the exponents...
of sociology and sociological jurisprudence mentioned above) to free law from the State archetype after the latter presented itself as the inescapable model of reference.

In the current neo-medieval contingency, as it were, scholars still endeavour to emancipate the concept of law from the State law paradigm (from which the classical model of intergovernmental international law derives as well), and often try to do so by devising a new category of law (a very minimal one) that is capable of including new regulatory institutions. Even though his legacy is rarely acknowledged, such attempts are akin to the one that prompted Romano to write *L’ordinamento giuridico*; to some extent, Romano’s theory is still valuable, at least in that it combines rigorous pluralism (one that is on the verge of turning into sociology, but never does) and a technical analysis of the legal effects that legal institutions have on each other, based on the concept of relevance. Whereas the simplified maxim of Romano’s thinking would sound elliptical (every institution is law), its analysis of inter-order relevance is such that it not only accommodates many of the otherwise atypical episodes of interplay between legal orders, but also, *a contrario*, elucidates the concept of legal order itself, as it provides a picture thereof which is not only static but also relational.

To appreciate how the apparently underdeveloped theory of Romano might contribute to today’s study of law, consider for instance the following passage taken from Kingsbury’s article mentioned above, in which he praises Hart’s concept of law, and acknowledges it as a ‘promising starting point for a modern positivist approach to the concept of law in international law and in GAL’:

[Law is] a social practice consisting of primary norms of behavior and secondary rules for recognizing, adjudicating on, and changing the primary rules could be a legal system, provided that the key officials involved accepted the same rule of recognition and felt an internal sense of obligation to obey the rules quite separate from the threats or rewards they associated with compliance.

falling into a prejudicial misunderstanding: ‘We would like to emphasize … the impossibility of using concepts and schemes such as “State” and “sovereignty” and, conversely, the relative substantial concept of “autonomy” in order to understand the medieval legal order’ (at 168). Later, in describing the status of medieval law, he states: ‘[M]edieval law is not the reflection of any single political entity, but a basic reality held together by a very tight connection with the inherent constitution of the whole society, of which law represents the hidden organization.’ He also acknowledges the importance of Santi Romano’s theory in the development of medieval legal scholarship (at 175). For an accurate critique of this neo-medieval simile, often used by scholars as a ‘false-friend’, see Gianluigi Palombella, ‘The Rule of Law and Global Governance’, IIIJ International Legal Theory Colloquium paper, 2010, Appendix.

130 As Romano himself notes (n 2) 97: ‘[N]aturally, we had to come as far as the borderlands, the last where it is still possible to breathe a legal atmosphere, but we have never crossed the borders’ (our translation). The original reads: ‘ci siamo naturalmente dovuti spingere sino alle ultime regioni, in cui è dato respirare l’atmosfera giuridica, ma non le abbiamo mai oltrepassate.’

131 Compare with this Teubner and Korth’s remark (n 124) 5: ‘Legal unity within global law is redirected away from normative consistency towards operative “interlegality”.’

132 See Kingsbury (n 126) 29, referring to Hart’s *The Concept of Law* (n 7). Indeed, after setting this Hart/Romanian starting point, the article takes a Fullerian turn, in trying to provide rules with a sort of inner
We can recognise in these lines the equivalence between social practice and legal system, the requirement of internal cohesion, the non-essential role of sanctions, and a general trend of considering law as ‘unmoored’ from the State. However, there are also some elements that cannot be found in Romano, such as the express reliance on secondary rules (in primis, the rule of recognition) and the role of legal officers that, apparently, are a precondition of law’s existence. Significantly, these are precisely the elements that current transnational regimes are comparatively less likely to have or show: it appears that—in this case—less is indeed more, and Romano’s minimal notion of legal order, based on effectiveness and on the internal perception of each order as to its own legality (an internal point of view), is more helpful than sophisticated systems such as Hart’s one, premised on a rule of recognition that, in turn, is supposedly recognisable to the observer (an objective point of view).

In particular, the existence of legal officers and of sanctions is absorbed in Romano in the attribute of effectiveness, and so is the set of secondary rules. Romano does not exclude their existence (in fact, one could even say that the effectiveness and permanence morality that only ‘publicness’ (an aggregate of GAL principles) can ensure. The awareness of Romano’s theory (in which morality is not a necessary aspect of law) helps us highlight an ambiguity in GAL—‘the concept of law’ that Dyzenhaus had noticed as well (see ‘Accountability and the Concept of (Global) Administrative Law’, 2009, www.iilj.org/courses/documents/Dyzenhaus.TheConceptofGlobalAdministrative LawFinal.pdf (accessed 24 September 2011)): it is not clear whether, in the GAL perspective, atypical regulatory regimes are fully legal in themselves (and as such whether they might undergo the GAL treatment, for the sake of promoting the common good), or whether they merely amount to ‘putative law’, which can be transformed into real law only through the application of GAL principles.

Another indirect link between Romano and Hart can be found in one of the aspects of the 1958 debate with Fuller (HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) Harvard Law Review 593, and Lon L Fuller, ‘Positivism and Fidelity to Law—A Reply to Professor Hart’ (1958) 71(4) Harvard Law Review 630). Hart’s position on the laws of the Nazi regime cannot but recall Romano’s position on the gang of criminals as a proper legal order. However, whereas Hart intended to stress the formal validity of the laws, Romano’s institutional positivism is more interested in the existence and effectiveness of the social body as a whole. On these themes, see Emmanuelle Jouannet, ‘A Century of French International Law Scholarship’ (2009) 61(1) Maine Law Review 83, 129. Jouannet recognises the influence of Romano, Bobbio and Hart on the new French tendency to consider international law as a legal order, rather than a simple system of rules: ‘[T]he foundation of the legal order’s validity itself is not established with certainty, but the overall effectiveness of this order and the observation of its existence are sufficient to found the legal nature of the norms that this order comprises.’ More authoritatively, see the lengthy description of the ideas of Kelsen, Romano and Hart provided by Dupuy 2007 (n 3) 65–77, used by the author as the basis for the appraisal of international law as a coherent legal order.

See Kingsbury (n 126) 31: ‘[A]t present, any claims within GAL to be law do not rest on a rule of recognition, shared among relevant participants, that identifies and delimits a unified legal system of GAL.’ In turn, single institutions may have different internal rules of recognition. See also Teitel and Howse (n 118) 965: ‘One can have rapprochement without agreement on a grundnorm or general concept of justice underlying international legality as such.’

Paulsson (n 20) 308 refers to the Concept of Law (Clarendon, 2nd edn 1994) at 110 where Hart talks about the rule of recognition, noting that ‘[i]ts existence is a matter of fact’, to draw a parallel between the theories of Romano and Hart.
of the institution necessarily presupposes some internal cogs, such as the functioning of
the rule of recognition and the awareness thereof by officers). Nonetheless, Romano is
relatively uninterested in the specific normative features that make up the system: after
all, even rules of recognition are only relevant insofar as they are effective, or recognised
by the institution or the part thereof entrusted with their monitoring/enforcement.136 In
other words, and to use Hartian terminology, the ‘internal point of view’ by virtue of
which secondary rules are adhered to within the institution and made effective, is logically
anterior to them, and is the veritable conditio sine qua non of the existence of law:
‘Without supposing that officials take the attitude of norm-acceptance [the internal point
of view] to the rule of recognition, there could be no rule of recognition and hence law
could not exist as a conceptual matter.’137

In section (i) below, I will describe various contemporary doctrinal theories that share
some substantial similarities with Romano’s theory as described thus far. The purpose of
these sketchy remarks is not to provide a comprehensive picture of the modern views on
legal pluralism, but to find a place for Santi Romano’s theory in today’s studies of law.
Thereafter, in section (ii), I will briefly expound two case studies that might help put Santi
Romano’s ideas in context (the debate about the nature of lex mercatoria and the function
of international voluntary standards within international trade law). Finally, in section
(iii), I will try to wrap up these reflections and provide a workable definition of Santi
Romano’s pluralism that might be relevant for contemporary jurisprudence.

(i) The Global Space Without Order

As noted above, the approach of GAL studies shares the pragmatic and inclusive approach
of Romano’s reflections, an approach that runs the risk of ‘collaps[ing] into law every
kind of social constraint’.138 This haunting critique is not so different from the comments
that many scholars made about Santi Romano’s theories, among which Massimo Severo
Giannini’s sarcastic remarks stand out for their abrasiveness: ‘[L]egal orders would
proliferate at every corner. … [O]ne should even recognize a legal order in every … couple
of lovers, … [A]fter all] every loving connection is different from each other. All of this is

136 For a similar parallel, see Scott J Shapiro, ‘What is the Internal Point of View?’ (2006) 75(3) Fordham Law
Review 1157, 1169: ‘For Hart, a social rule just is a social practice and, hence, to say that the rule of
recognition exists is simply to state that a certain regularity of behavior is generally accepted as a standard
of conduct.’ On the social nature of the rule of recognition, see also Scott J Shapiro, ‘What is the Rule of
Recognition (and Does it Exist)?’ in Matthew Adler and Kenneth Einar Himma (eds), The Rule of Recognition
137 Shapiro, ibid, 1164. On the social feature of the rules of recognition, see Schultz (n 34) 5ff, in particular 6:
‘Secondary rules of recognition identify primary rules of conduct; thus, according to the social thesis, social
conventions take part in the determination of the contents of the applicable law.’ Further, he defines the rules
of recognition in the arbitration community as ‘non-positivized social conventions’.
138 Kingsbury (n 126) 62.
so extravagant that it is not even grotesque.'139 This caricature of institutionalism mis-understood some essential and functional—albeit minimal—features of the legal institution (its organised structure, its permanence over time, its yearning towards the realisation of a shared purpose) and it overlooked the fundamental criterion of effectiveness. But, most importantly, it missed the point because it assessed Romano’s theory’s ability to answer the question about what the law is (in the abstract) whereas, in fact, the real added value of institutionalism is that it teaches us how to recognise and treat law (in reality).

Therefore, Romano avoids entering the ‘vicious circle of empiricism’,140 and that is arguably where GAL studies should adopt his institutional yet perfectly legal approach. Indeed, the powerful intuition of the GAL school is less that it defines in advance what counts as law (an essentialist chimera), than that it promotes an ‘orthopedic’ intervention on the myriad of atypical systems of law that exist and operate in the transnational arena, an intervention aimed at making them amenable to certain general principles and characteristics that law should always present, but in fact often lacks.141 In this sense, GAL scholars should not worry too much if, in fact, it is not possible to isolate a universal and recognisable feature of law.142 Research into the essence of law (see below) should not be on their agenda, as it is sufficient to be able to recognise efficient regulatory (that is, legal) institutions, and try to customise the apposite ‘corrective’ policies around each of them.

Conversely, Teubner’s thoughts on the legal quality of transnational regimes are at once descriptive and prescriptive. In his view, the analysis of pluralism must be mindful of the shortcomings of essentialist and functionalist notions of law, and hinges on the capacity of the legal order to set up a discursive process based on the linguistic code legal/illegal: ‘It is the implicit or explicit invocation of the legal code which constitutes phenomena of legal pluralism, ranging from the official law of the State to the unofficial laws of world market.’143 However, the legal/illegal model presupposes a minimal quality of law, without which the alternative would be helpless, as law ‘would lose its ability to

---

139 Giannini (n 34) 221: ‘si rischia di giungere a trovare ordinamenti giuridici ad ogni angolo di strada. … dovrebbe fissarsi un ordinamento giuridico … in ogni coppia d’innamorati: [dopo tutto,] ogni corrispondenza amorosa è diversa dall’altra. Tutto ciò è talmente stravagante che non può neppur dirsi più grottesco.’ More on this critique above, at n 34.

140 This is an expression used in Giorgio Del Vecchio, ‘Diritto e Istituzione’, in Studi sul Diritto, Vol 1 (Giuffrè, 1958) 151, 163, to indicate the short-reaching effect of the elusive definitions provided by Romano: ‘It is the typical vicious circle of empiricism, that operates when one is under the illusion that it is possible to infer from certain empirical data a logical criterion that, in fact, has already performed its function, by making experience itself possible.’

141 As described in Karl-Heinz Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’, Osgoode CLPE Research Paper No 16/2011, 60, this intent is ‘a productive mode of managing the unavoidable indeterminacy of the permanent self-transformation of society by a shifting of institutional design more towards checks and balances’.

142 See Kingsbury (n 126) 29–30.

fulfill its societal function of providing a way to decide conflicts by transforming them into an answerable quaestio iuris’. This is why the binary code alone would not be sufficient: there must be institutionalized subjects capable of processing it, and meta-norms must be in place to govern this process.

Teubner’s theory of autopoietic (self-making) law, therefore, seems to improve Romano’s theory by adding a dynamic element. As Teubner himself states, his theory draws on the studies of institutionalism, but also updates them, notably because it envisages a diffused layer of interlegality that was supposedly lacking in the theories of pluralism contemplating only rigorously separated legal systems. In fact, I believe that Santi Romano’s pluralism is not wanting in this respect: the category of relevance between legal orders, as described in the previous section, is such that it can account for any kind of relationship, ranging from absolute separation to virtual interference/overlap, and the two parameters of content and effect would allow us to conceptualise endless manifestations of interlegality, including those ‘contextualising elements’ that Teubner invokes to prevent regimes from adopting ‘tunnel vision’ in the event of inter-ordinamental conflicts (these elements being, amongst other things, the use of comity and the idea of a transnational ordre public).

Apart from that, the idea that inter-ordinamental interplay is governed primarily by the internal perspective of each legal system is embraced by Teubner:

[Teubner and Korth (n 124) 7.]

Note also how Teubner phrases two of the three main claims of his fundamental essay on global law:

144 Teubner and Korth (n 124) 7.
145 Ibid, 10: ‘Autonomous law (with or without a state) only exists when institutions have been established which systematically assess all first order observations that use the code legal/illegal by means of second order observations on the basis of the code of law.’ See also the quote from Gralf-Peter Calliess, ‘Transnationales Verbrauchervertragsrecht’ (2004) 68(2) Rabels Zeitschrift für ausländisches und internationales Privatrecht 244, 254.
148 See Teubner and Korth (n 124) 5.
149 The institutionalist blend of Teubner’s idea is clearly visible, for instance in his Autopoietic Law (n 146) 218: ‘The historical relationship of “law and society” must, in my view, be defined as a co-evolution of structurally coupled autopoietic system.’
150 Teubner and Korth (n 124) 12.
151 Ibid, 6. See Teitel and Howse (n 118) 967: ‘Interpretation responds to and normalizes the proliferation of legal orders; since there is no original contextless “intended” meaning to the law.’
1. Global law can only be adequately explained by a theory of legal pluralism which turned from the law of colonial societies to the laws of diverse ethnic, cultural and religious communities in modern nation-states. …

2. The emerging global (not inter-national!) law is a legal order in its own right which should not be measured against the standards of national legal systems. It is not—as is usually understood—an underdeveloped body of law which has certain structural deficiencies in comparison to national law. Rather, its peculiar characteristics as fully fledged law distinguishes it from the traditional law of the nation states.152

It is easy to recognise in these lines the main tenets of, respectively, pluralism and institutionalism.153 In my opinion, this theory differs from Romano’s (as recontextualised) in two respects, both referable to the lesser degree of social embeddedness of Teubner’s self-making law: it refers to a set of secondary rules that makes the illegal/legal code operative (whereas Romano would see this element as somehow implicit in the requisite of effectiveness), and links the identification of discrete orders of law to an internal point of discourse that, precisely for its discursive nature, appears more problematic than the internal point of view that is implicit in the attributes of Romano’s institutions, such as social cohesion and permanence in time. Granted, in both respects Teubner’s theory is more fully elaborated than Romano’s, and possibly yields better normative and analytical results. However, sophistication at times results in unnecessary complications,154 and at least in this respect Romano’s focus on experience might represent a better starting point, especially when the subject matter of the analysis is the relationship between orders, rather than the discussion regarding the discrete legal existence of each of them.

Stone Sweet describes a different kind of legal order’s self-realisation, in which the shift from private regime to legal order occurs when a ‘dyadic contract’ between the parties evolves into a ‘triad’ institution including an impartial dispute resolver.155 Since its first enunciation, this theory has been used to account for the development and

---

152 Teubner (n 143) 5.
153 Teubner, ibid, mentions Santi Romano in passing, but focuses on the institutionalism aspect of his work and seems to ignore the essential tenets of his pluralism, which indeed resonates in his essay on non-state law. Consider for instance the following passage regarding the role of sanctions in the conception of law, and compare it with Romano’s treatment of sanctions (above): ‘Sanction is losing the place it once held as the central concept for the definition of law, for the delineation of the legal from the social and the global from the national … In contemporary debates, sanctions are only seen as one among many symbolic supports for normativity.’ On the interplay among legal orders (see the concept of relevance, above), consider the following lines, in ibid: ‘I hasten to add that the binary code legal/illegal is not peculiar to the law of the nation state. This is in no way a view of “legal centralism” … It creates instead the image of a heterarchy of diverse legal discourses.’

154 On the problems connected with Teubner’s use of the discursive criterion, see Tamanaha (n 123) 305ff.
155 Alec Stone Sweet, ‘Judicialization and the Construction of Governance’ (1999) 32(2) Comparative Political Studies 147. See the opening line (and underlying theme) of the article: ‘The triad—two contracting parties and a dispute resolver—constitutes a primal social institution, a microcosm of governance.’
mutation of certain governance regimes (like the international trade regime under the 1947 and, later on, the 1994 GATT) and for the consolidation into legal systems of phenomena like the *lex mercatoria* or the body of international arbitration, which originally constituted a series of rules and processes relevant only to the parties to a single bilateral relationship/dispute.\(^{156}\)

In a recent work Stone Sweet and Grisel refer explicitly to Romano, acknowledging the common core of their theories, but also specifying that their triadic model brings about a greater degree of precision and specificity, in that it clarifies the transforming effect that the impartial dispute settler has on the system.\(^{157}\) In my view, there is no dissonance between the triadic theory and Romano’s concept of institution; the triadic theory is innovative because it explains how a network of one-shot relationships between private parties can morph—naturally and not necessarily according to a pre-established plan—into a system of law. That is, it explains how certain non-State institutions emerge and how this transformation is due to a specific legal element of their structure (adjudication). It certainly represents a specification with respect to Romano’s model, not so much because of incompleteness of the latter, but because Romano is relatively uninterested in tracking down the origin of each legal order, let alone their internal legal structure. Dispute resolution is certainly a decisive aspect for the permanence, cohesion and effectiveness of the institution: this theory fits nicely with Romano’s model, in that it explains how and why certain legal orders (borne out of bilateral private practice) can achieve these attributes. In other words, whereas Romano developed a theory of the institution, Stone Sweet is at pains to go further and describe some patterns of *institutionalisation*, ie ‘the process through which … practices are consolidated as stable rules and procedures’.\(^{158}\)

However, adjudication is not a necessary element of a legal system: there are plenty of examples of transnational regimes (as loosely defined above) that do not come with a third party resolution system. They would still count as legal because—in spite of this deficiency—they meet the institutional requisites. In particular, it is worth recalling that one of the necessary attributes of the institution, according to Romano, is the organisation, that is, an articulated and permanent structure which is instrumental to the pursuit of its objectives. Even though adjudication is the archetypical process ensuring

---


\(^{157}\) Stone Sweet and Grisel, *ibid*, 8: ‘l’intervention d’un tiers neutre et impartial au cours d’un litige dyadique serait à la base de la création normative et de la construction d’un système juridique.’

\(^{158}\) Stone Sweet (n 156) 642. In Romano’s theory, simply, a contract can at most be an institutional fact, but cannot achieve the status of institution, because it lacks the organisational structure and the aspiration to social permanence.
and underpinning the organisation (and the evolution) of a legal system, it is only a species of the genus ‘organisation’.

(ii) Two Case Studies

The Autonomy of Lex Mercatoria

Throughout this article, reference has been made to the phenomenon known as lex mercatoria. Indeed, this is one field where Romano’s theory can be put to the test and arguably fare better than other doctrinal efforts. The classic question is whether the body of commercial transnational practices and rules currently in use between business actors, as variously codified, harmonised and adjudicated, has achieved the status of legal order or not.

From the beginning, the debate often turned to Romano’s theory, which provided a theoretical foundation for the emergence of a system removed from the State model. In the framework of this research it was noted that, ‘unlike the views of Maurice Hauriou, whose institution theory seemed somewhat dated in the second half of the twentieth century, Santi Romano’s work, was still … new and appealing’. In fact, Lagarde used Romano’s theory to dismiss the hypothesis of the autonomy of the lex mercatoria, but since then Romano’s theory has enjoyed increasing currency, most often to support the opposite conclusion (lex mercatoria is indeed an autonomous legal order).

159 On the importance of the organisation criterion, see La Torre (n 10) 104, referring to Neil MacCormick’s works (see eg ‘Institutions, Arrangements and Practical Information’ (1988) 1(1) Ratio Juris 73).


161 The discussion originated in the works of Berthold Goldman, ‘Frontières du droit et “lex mercatoria”’ (1964) 9 Archives de philosophie du droit 177 and were developed in the 1983 Festschrift for Goldman, in various chapters thereof. For a historical account of this debate, see Emmanuel Gaillard, Legal Theory of International Arbitration (Brill, 2010) 3ff. For an instance of the scrutiny of lex mercatoria according to Romano’s test, see Eric Loquin, La réalité des usages du commerce international (RID ECO, 1989) 163.

162 Gaillard, ibid, 4.

163 Paul Lagarde, ‘Approche critique de la lex mercatoria’ in Mélanges Goldman (LITEC, 1983) 125.

By now it should be clear why Romano’s theory on the legal order provides a helpful basis for the conceptualisation and systematisation of the lex mercatoria. I want therefore to dwell on the views of those who challenge the correctness of this association and point to the lack of an organised community, which would imply that either the lex mercatoria is not an order or that, if it is one, Santi Romano’s theory is outdated, because it does not envisage the possibility of an order deprived of a social body.

First, the relative cohesion of the body of rules, practices and pronouncements of which the lex mercatoria is comprised is a matter of fact; at least, it can be said that, in spite of any relative inconsistencies, they bring about a certain degree of predictability and stability in the world of transnational business transactions. In this sense, there is indeed a social body, a societas mercatorum that contributes to the formulation of, and benefits from, the substantive rules of the lex mercatoria and the secondary processes that ensure its operation. The fact that this society is de-territorialised, and that single members care more about the vindication of their economic interests than the building of a legal system, is not relevant: just as in Bernard Mandeville’s fable about the selfish bees, merchants’ vices can result in a public benefit, ie the emergence of a system of law that transcends single, private transactions.

Secondly, only at first glance is this society un-organised, or organised unintentionally. In fact, commercial actors are well aware of the lex mercatoria toolkit and make use of it all the time, and this shows that the real purpose/aspiration of the system is common


166 The same issue arises with the normative corpus of the so-called lex digitalis; see in particular Vaios Karavas and Gunther Teubner, ‘http://www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on “Private Parties” within Autonomous Internet Law’ (2005) 4(12) German Law Journal 1335. As for other orders with a thinner social body (such as lex sportiva and lex constructionis), see Michaels 2009 (n 165) 247 and bibliography therein; Emmanuel Gaillard and John Savage (eds), Fouchard, Gaillard, Goldmann on International Arbitration (Kluwer, 1999) 808–10, see bibliography referred to in fn 126, and Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25(4) Michigan Journal of International Law 999.

167 See eg Michaels (n 165); Ladeur (n 141).

168 Ladeur (n 141) 34.

169 Against this view, see eg Gralf-Peter Calliess and Moritz Renner, ‘Between Law and Social Norms: The Evolution of Global Governance’ (2009) 22(2) Ratio Juris 260, 271. This article, however, appears to rely significantly on the process of judicialisation, and the conclusion that lex mercatoria ‘is best categorised as a certain procedural setting in the context of ADR mechanisms and as the adjudication of conflicts according to general fairness-oriented principles’ seems a little reductive. As for the lack of territory, it is worth referring to Emmanuel Gaillard, who uses Santi Romano’s model to argue that international arbitration is an autonomous legal order, in spite of its de-localisation and its transnational character (see Gaillard (n 161)). For a cautious critique of this construction, see the book review of Veijo Heiskanen in (2009) 20(3) European Journal of International Law 942.
among all the members, not because they actually share the same interest, but because they want a stable framework where their competing or even conflicting interests can be implemented and composed.\textsuperscript{170} Even in the absence of a territorially defined and materially tangible social body or community (the hardware), the institution emerges as an actual organisation of practices, processes, routines and facilities (the software).\textsuperscript{171} It takes relatively little effort to update Romano’s idea of society to include the society of business people and firms active in the global \textit{mercâtus}, without requiring the presence of an underlying community.\textsuperscript{172}

For a pronouncement that confirms this view, and which also provides a fine example of the interplay and perceived relevance between orders (in this case, a State system and \textit{lex mercatoria}), see the judgment of the Italian Corte di Cassazione in \textit{Fratelli Damiano}:\textsuperscript{173}

\begin{quote}
[\textit{Lex mercatoria}] ‘arises when the belief about the existence of compelling values develops and manifests itself’ and when business actors conform ‘their practices to common rules, forming a society of merchants.’ In this society, that lacks ‘sovereignty’ and ‘coercive powers,’ law operates ‘diffusely’ and solidifies through the activity of the ‘organizational structures’ integral to the society of merchants, and in particular through the activity of the bodies that ‘pre-organize and provide arbitral adjudication.’\textsuperscript{174}
\end{quote}

\textbf{International Standards and WTO}

A second case study, pertaining more directly to the issue of interlegality, involves the function of international standards of a voluntary nature within the legal system of the World Trade Organization (WTO).

International standards are developed and adopted by transnational bodies like the International Organization for Standardization (ISO) and the Codex Alimentarius Commission. Such standards, which deal with safety specifics, sanitary requirements or any other property of goods and services that is capable of being measured and standard-
ised, are voluntary in nature, although various mechanisms and procedures exist to encourage their adoption domestically, through practices of incorporation or referral. The process of standard-setting is in principle as inclusive as possible in terms of the subjects involved, and should result in the adoption of standards shared not only by State governments, but also by the different stakeholders affected (producers, consumers, scientific community, NGOs).\textsuperscript{175}

This aspect makes international standards particularly interesting for the authorities monitoring the correct functioning of international trade. Indeed, it is often the case that a State will try to harm another State’s exports (and, indirectly, to favour its domestic producers of the competing goods) through the adoption of regulations requiring that certain technical, safety or sanitary requirements be met in order for goods to be marketed internally. Although this regulatory action might reflect a genuine interest in promoting an acceptable value, at times it has the purpose (or simply the \textit{de facto} effect) of raising a trade barrier in violation of WTO commitments, restricting the market’s access to foreign goods.\textsuperscript{176}

In order to monitor the regulatory autonomy of WTO members and prevent cases of arbitrary restrictions resulting from the adoption of unreasonable or bad-faith standards, two special agreements were concluded in 1994 in addition to the regime of the GATT, namely the Technical Barriers to Trade (TBT) Agreement\textsuperscript{177} and the Sanitary and Phyto-Sanitary (SPS) Agreement.\textsuperscript{178} In these instruments, the WTO legislator turned its attention to the international standard-setting regimes, and created a system of procedural presumptions that—to put it simply—grants to States that adapt their regulatory policies in order to meet international standards a presumption of WTO-compliance. Conversely,


\textsuperscript{176} For a short description of standards as non-tariff trade constraints, see Jürgen Kurtz, ‘A Look Behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements’ (2007) 30(2) \textit{University of New South Wales Law Journal} 504.

\textsuperscript{177} Agreement on Technical Barriers to Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

\textsuperscript{178} Agreement on Sanitary and Phyto-Sanitary Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.
state policies that are stricter than required by the relevant international standards (in particular ISO and Codex ones) are allowed, but impose on States a heavier burden to rebut allegations of violation of their WTO obligations.179

This linkage between the WTO system and standard-setting transnational regimes was expressly codified in the TBT and SPS Agreements, and led to talk of the ‘hardening’ of international standards, as though they were incorporated into the WTO rules and had accordingly turned into binding norms, despite being conceived and adopted as voluntary standards.180 This view, in my opinion, is flawed, because it overlooks the fact that standards play, in the two legal orders, two entirely different functions, quite apart from the issue of their binding force. In the regime from which they originate, they are designed to set a minimum standard of protection/harmonisation, reflecting the level agreed by all the stakeholders involved in the standardisation process. Each State, ideally, will not only abide by, but will also improve upon and increase domestically, this minimum level of protection. In the international trade regime, instead, these same standards are used as a benchmark of (preferable) maximum trade restrictions, and to the extent that increased protection implies an increase in trade restrictions, more protective policies are discouraged by means of the system of presumptions mentioned above.181

The misleading hardening rhetoric is probably a by-product of the difficult task of describing the instances of inter-order relevance using terminology that is drawn from State law, international law or conflict of laws. International standards are indeed acknow-

179 See TBT Art 2(4) and (5), SPS Art 3(1), (2) and (3). For an insightful overview and analysis of these provisions, see Joost Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO “Missing the Boat”? ’ in Christian Joerges and Ernst Ulrich Petersmann (eds), Constitutionalism, Multilevel Trade Governance and Social Regulation (Hart Publishing, 2006) 199; Robert L Howse, ‘A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and “International Standards”’ in ibid, 383; Harm Schepel, ‘The Empire’s Drains: Sources of Legal Recognition of Private Standardisation under the TBT Agreement’ in ibid, 397.


ledged to be of some relevance in the WTO regime, but they are not incorporated as such. They are treated as facts, as technical yardsticks, deprived of whatever (tenuous) compulsory attributes they originally had. The existence and content of international standards, in Romano’s jargon, has a bearing on the effect of WTO rules, but their very normative content does not become part of the WTO system.

Compare this reflection on the actual nature of the relationship between international standards and the WTO order with the following passage of L’ordinamento giuridico, in which Romano describes the possible ways in which one legal order (or a part thereof) can be relevant to another legal order:

[One order] can take another order into consideration, but providing it with a different nature than the one the latter would attribute to itself. Likewise, a legal order can equate to another legal order to a mere fact, ignoring his legal nature, or acknowledge it as a legal system, but only to a certain extent and to certain effects, perhaps subject to the conditions that it deems opportune to impose.182

In my opinion, this description of the possible relevance of one order’s elements within another order is particularly helpful in our attempt to grasp the exact nature of the interplay between international standards and the WTO, and far more accurate than alternative interpretations, such as those studies which focused on the inaccurate image of ‘hardening’, or on the political phenomenon of regulatory delegation between institutions.183 Romano’s description is also particularly far-sighted, as it anticipates the picture of indeterminacy and relativism that characterises the network of relationships between competing orders in the global pluralist system.184

182 Romano (n 2) fn 96bis of the 1946 edition. Note that the use of standards as facts (ie, as static units of measurement) has little to do with the well-known issue of the proof of foreign law (regarding the difficulties that arise when the law of one order has to be proved and applied before a court of another legal system), which is generally summarised in the maxim that the proof of foreign law is proof of fact (on this see eg Arthur R Miller, ‘Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for Die-Hard Doctrine’ (1967) 65(4) Michigan Law Review 613).


184 Compare Romano’s paragraph with the following passage on the possible relationship between private law and public system, taken from Brian Z Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30(3) Sydney Law Review 375, 404: ‘Official legal systems recognise or absorb other norms and systems for a variety of reasons. The private [normative element] may provide a useful function or service, legal officials may genuinely believe in the validity and legitimacy of the alternative norms and institutions, or political benefits may follow from embracing it, or it may simply be too powerful for the official legal system to supplant. Absorbing the competing system is also a way to control or neutralise or influence its activities—by paying the participants, providing them incentives to conform, or by situating the absorbed institution in a hierarchy that accords the official legal system final say.’
(iii) A Non-Essentialist Notion of Law, a Non-Essentialist Notion of Pluralism

Postmodernism typically contemplates complex phenomena that cannot be categorised or defined accurately, and pluralism is a very postmodern concept, as it cannot be simplified by giving a valid definition that fits all single elements of the plurality.185 In the legal framework, this simply means that there is no single definition that will suit every legal order (a non-essentialist concept of law).

The non-essentialist nature of law is brilliantly explained by Tamanaha, who cannot but derive from such a premise the following conclusion:

Formulating a concept of law … won’t work. Instead what is needed is a way to identify law that is not itself a concept of law, but rather … the specification of criteria for the identification and delimitation of law. Here it is: Law is whatever people identify and treat through their social practices as ‘law’ (or recht, or droit, and so on).186

Romano appears to anticipate this conclusion: in choosing effectiveness over authority as the foundational character of law, his institutionalism is ill at ease in defining what law is a priori, in abstract terms: he teaches us how to recognise law when it already exists, in the form of an institution. Law, rather than being in the eye of the beholder, is in the organisation of a society; there is an internal point of view that determines the legal nature of a system and its relationship with other systems.187

The principle of perspectivism, in fact, complicates things further. Indeed, the freedom of each order to decide on another order’s relevance188—except where such


186 Tamanaha (n 123) 313. On the non-essentialist conception of law of Romano (and his followers) see Schultz (n 34) 19, who argues that rules qualifying as law only according to a structural and effectiveness-driven conception thereof are unable to compete with State law, because they fare poorly in terms of ‘regulative quality’ (a decisive aspect of ‘absolute legality’). However, he embraces the idea of perspectivism and of relevance, conceding that ‘[t]he authority regarding relative legality[, as opposed to absolute legality,] lies with the officials of the legal system of reference’ (24).

187 The indeterminacy of what law is in abstract does not imply that there cannot be attempts at categorising how legal orders present themselves in reality: only, this is less of a deductive classification than an empirical grouping. See eg Tamanaha (n 184) 396ff.

freedom is constrained—is an essential starting point for an examination of how orders interact in reality, but defies any attempt at enumeration: there is no prescriptive theory of how orders must or should behave amongst themselves, hence there is no fixed picture of pluralism. In other words, I posit, Romano’s model points also to a non-essentialist concept of legal pluralism.

In this sense, the distinction between weak and strong (institutional and radical) pluralism\textsuperscript{189} is a misleading one, because it focuses on some inherent feature of pluralism that is alleged to be essential, and supposedly better at portraying plurality (and, arguably, at mapping the conflicts between its parts). Models of pluralism of this sort are doomed to be challenged by outliers; for example, radical pluralism is ill at ease in explaining the relative degree of cohesion traceable in certain compound systems, whereas weak pluralism (or, as MacCormick names it, ‘pluralism under international law’) would fail to apply to certain transnational regulatory regimes that appear to be—and often are—autonomous of the influence/control of general principles of international law, if only because of their private or hybrid origin.

This does not mean that weak and absolute pluralism cannot be useful stipulative models that apply to certain composite systems and describe their features with relative precision. Simply, neither of them can rise as the only model: a non-essentialist vision of law imports a non-essentialist vision of pluralism. Granted, it cannot be said a priori how conflicts would be resolved between legal orders, but this should not mean that pluralism is unacceptable: it just must not necessarily be based on a set of pre-established rules of conflict. In other words, often a set of systems arranges itself into a discrete order (or an original order develops into several coordinated sub-systems), but even when this is not the case the legal nature of these non-coordinated systems should not be called into doubt. Potential conflicts between institutions will then be managed and possibly resolved according to their internal rules of relevance,\textsuperscript{190} and their relative overall strength or capability to adapt/evolve.

This flexible version of pluralism has a meaningful consequence: pluralism does not imply any sort of order, nor does it inherently perpetuate itself (that is, preserve the plurality). There can be an ordered plurality (such as the system of field-specific orders of international law) and plurality with little or no pre-established order (like the multiplicity of transnational regulatory regimes). The global space is neutral—it cannot generate harmonisation or hierarchy for the simple fact that it hosts many orders; its

\textsuperscript{189} This formula is borrowed from Neil MacCormick, ‘Risking Constitutional Collision’ (1998) 18(3) Oxford Journal of Legal Studies 517, 528.

\textsuperscript{190} See how the concept of legal relevance, as an internal tool to manage plurality according to perspectivism, is akin to that of recognition advocated by Michaels 2009 (n 165) 256: ‘[I]t is an epistemic relativism in which law is constructed—not only by communities for themselves, but especially by legal systems for each other. Recognition, so despised by early legal pluralism, reenters the analysis but the focus is now on recognition as a practice of the recognizing law rather than as a universal criterion of validity for the recognized law.’
consistency is a variable of its evolving functional setup, is always determined in the making, and often coordination just does not come about. Legal orders routinely collapse, vanish, merge into each other, expand, mutate, are born, in accordance with the corresponding changes and needs of society.

Neil Walker used the suggestive formula of dis-order, a formula that Frosini used to describe the nature of the pluralistic order contemplated by Romano: ‘jus involontarium prevails over jus voluntarium, the great spider web of the normative system collapses, with the absurd consequence that legal disorder replaces legalized order.’

CONCLUSION

L’ordinamento giuridico—‘The Legal Order’ … remained an Italian secret for half a century, until Spanish, French, and German translations appeared. 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.

Hopefully, this article helps to remedy this very loss, or at least raises some awareness of Romano’s book. Romano’s theory has not been as influential as it should have been, due to the contingencies of his time. Nevertheless, this does not detract from its importance, in two respects: first, it was innovative and far-sighted, making Romano a veritable pioneer in the history of legal ideas; secondly, it is still helpful today, and this article has attempted to explain why Romano’s institutionalism and pluralism provide a sound and

---

191 This simple remark is suggestively encapsulated in the words of Erwin Panofsky, who struggled to define the relationship between the physical space and the space made homogeneous and ordered by the perception of the artist who aims to understand and depict it: ‘L’espace homogène n’est donc jamais un espace donné: c’est un espace engendré par une construction.’ See La Perspective comme Forme Symbolique (Les Éditions de Minuit, 1975) 42. Compare this quote with the following excerpt from the ILC Report (n 48) para 20: ‘In an important sense, “fragmentation” and “coherence” are not aspects of the world but lie in the eye of the beholder.’

192 The very limited role of law in bringing order to the system is acknowledged by Fischer Lescano and Teubner (n 166) 1046: ‘In the context of societal fragmentation, law will be forced to limit itself to its classical role; to furnishing compensation for and curb damage to human and natural environments.’

193 Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6(3–4) International Journal of Constitutional Law 373, 391: ‘[P]luralism proposes a kind of “nonorder” of orders, in which no general steering mechanism is available to frame the relations between orders … [I]t is important to conceptualize and understand the emerging configuration as a (candidate-neutral) disorder of orders rather than a (pluralism-favoring) nonorder.’ This quote is borrowed from Itzcovich (n 3), who has elaborated the very meaningful idea of dis-ordinamento, an untranslatable concept that endows the notion of disorder (disorde) with an additional sense of ongoing process, of unregulated re-organisation.

194 Frosini (n 69) 206.

195 Paulsson (n 20) 307.
flexible theoretical model for the study of the EU system and the fragmented corpus of international law. Moreover, it fares well when confronted with current and controversial phenomena such as the emergence of new orders (the *lex mercatoria*, the system of international arbitration) and, more generally, is virtually every bit as good as other contemporary theoretical models at making sense of the disordered global space and its array of transnational regulatory regimes.