Brief reflections on legal pluralism as a key paradigm of contemporary law in highly differentiated Western societies

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Abstract

Many scholars, from different disciplines, use the category of “legal pluralism” to explain the legal dimension of Western societies’ increasing cultural, religious and social differentiation. As a particularly complex concept, the notion of “legal pluralism” requires to be deeply investigated in order to better understand its many implications and increase its explanatory potential as a paradigm for understanding the legal complexity of highly diversified societies. In this regard, the contribution of Italian legal scholarship offers precious inspiration. On the one hand, Santi Romano – a legal thinker active in the first half of the 20th century –can be considered one of the founding fathers of legal pluralism: with his masterpiece *L’ordinamento giuridico* (1918), he delved into the issue of legal pluralism from an anti-formalist perspective, in opposition to legal positivism. On the other hand, the works of Paolo Grossi – a distinguished historian of law who addressed legal pluralism as a characteristic of law in the Middle Ages – are also very important for the study of law in contemporary Europe, since he criticizes the dominant legal reductionism and promotes the objective dimension of law as a social institution.
Keywords: Legal pluralism. Social complexity. Institutionalism. Legal positivism.

1 Introduction

The paradigm of “legal pluralism”, although composite and quite controversial, has proved to be one of the most fortunate interpretive category of the relationship between law and society and has recently gained a new centrality thanks to the increased complexity of contemporary legal orders, both at the national and the global level. In particular, legal pluralism seems to be a useful conceptual tool in framing some of the many articulations of this complexity, such as Western societies’ increasing cultural, religious and social differentiation. As is well known, this diversification and fragmentation of contemporary Western societies is due to different phenomena, such as immigration-related cultural and religious pluralism[1], increasing social complexity in terms of lifestyles options and spaces for self-determination (e.g. in the framework of personal relationships and family law), multiple belonging to overlapping legal systems at local, national and transnational level.

1 See VERTOVEC, Steven. Super-diversity and its implications. Ethnic and Racial Studies, Vol. 30 n. 6, p. 1024-1054, Nov. 2007, who, in his seminal article, framed the increasing complexity of contemporary societies due to migrations and human mobility as “super-diversity”. Far from being attributable to the sole British society, the process of “diversification of diversity” – which “complicates” diversity beyond the ethnic dimension – is a key feature of social and legal complexity of Western immigration countries, with the resulting “multiplication of significant variables that affect where, how and with whom people live” (1025). These additional variables to be considered include “differential immigration statuses and their concomitant entitlements and restrictions of rights, divergent labour market experiences, discrete gender and age profiles, patterns of spatial distribution, and mixed local area responses by service providers and residents”, so that […] “super-diversity” “points to the necessity of considering multi-dimensional conditions and processes” and has to be understood as the interplay of different factors concerning immigrants in contemporary societies (1049).

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Nevertheless, the notion of "legal pluralism" itself is marked by a high degree of complexity: far from identifying a specific discipline or a unitary perspective, it can be rather considered as a "broad area of discussion and exchange, where legal philosophers, anthropologists and sociologists, along with practitioners and activists, have held and continue to hold heated debates on many key legal issues"[2]. A distinction which proves to be particularly significant in the current debate on the legal fragmentation of contemporary societies is that between an "objective" and a "subjective" legal pluralism. While the first one deals with the plurality of legal systems within a given territory with a systemic or institutional approach, the second one focuses on individuals and the choices that subjects make between norms from different sources and of different contents[3], with an "actor perspective" that enhances the active role of individuals in producing their own law. In particular, this "subjective" dimension has been conceptualized as a critique of the traditional legal pluralism (for example, that elaborated by John Griffiths[4]), which was regarded as undermining the rule of law, being limited by an institutional perspective of law and presenting an essentialist image of normative orders and communities[5].

As a particularly complex concept, and given its heterogeneity, the notion of "legal pluralism" requires to be deeply investigated in order to better understand its many implications and increase its explanatory potential as a paradigm for understanding contemporary social complexity. In fact, the extraordinary changes of Western societies' social and legal configuration question legal scholars, among the other social scientists, with regard to the reformulation of heuristic categories, theoretical frameworks and methodologies. This effort of refining interpretive legal tools hinges on a deeper knowledge of their historical and conceptual implications, in order to better face the multifaceted challenges both a methodological and substantial level. To this purpose, this article aims to highlight the precious contribution of two prominent Italian legal scholars – Santi Romano and Paolo Grossi – whose works are unfortunately marginal in some contexts (as the Anglophone legal scholarship), or at least too marginal compared to their objective value, mainly because of the language barrier.

2 Santi Romano: law as institution

Santi Romano was a legal scholar active in Italy in the first half of the 20th century[6]; he can be considered as one of the most important Italian jurists, if not the major Italian jurist, of all time. He had a peculiar education and research path that certainly contributed to his complex, with particular reference to the role of the State and its law in the framework of a legal pluralist conception[7].

Santi Romano was one of the leading exponent of the institutional theory of law – whose foundations had been laid by the French Maurice Hauriou only some years before Romano's 1918 masterpiece[8] – and is considered to be one of the

2 See CROCE, Mariano. Self-sufficiency of Law. A Critical-Institutional Theory of Social Order. Ed. London: Springer, 2012, p. 67. Among the many authors who variously deepened the issue of legal pluralism with regard to contemporary societies: Griffiths, Petersen and Zahle, Vanderlinden, Chiba, Engle Merry, Falk Moore, Menski, Shah, Sousa Santos, Teubner, Macdonald, Wolkmer.

3 See, for example, KLEINHANS, Martha-Marie, MACDONALD, Roderick A. What is a *Critical* Legal Pluralism? Canadian Journal of Law and Society, v. 12, p. 25-46, Fall 1997; VANDERLINDEN, Jacques. Return to Legal Pluralism: Twenty Years Later. Journal of Legal Pluralism, n. 28, p. 149-157, 1989.

4 See GRIFFITHS, John. What is Legal Pluralism? Journal of Legal Pluralism. v. 24, 1986, p. 1-55.

5 KLEINHANS Martha-Marie, MACDONALD Roderick A. What is a *Critical* Legal Pluralism?, cit., p. 32 and s. The subjective perspective seems more suitable to conceptualize the legal diversification of Western immigration societies, in which individuals follow rules deriving from different legal systems: "not only the positive laws of their country of origin, but also religious, customary, transnational and infranational rules that often have a personal or ethnic, rather than territorial, validity", see FACCHI, Alessandra. Customary and Religious Law: Current Perspectives in Legal Pluralism, 2007, <www.juragentium.it>.

6 He was born in Palermo (Sicily) on the 31st of January 1875 and he died in Rome in 1947. On the Romano's theorization of legal institutionalism and legal pluralism as deeply rooted in the Italian legal and political culture, see ZANETTI, Gianfrancesco. Italian Normative Pluralism: What is Unique about the Future of Italy. California Italian Studies, 2(1), 2011.

7 For an excellent analysis of Romano's prismatic figure and scientific production, as articulated in four activity periods, see SANDULLI, Aldo. Santi Romano and the Perception of the Public Law Complexity. Italian Journal of Public Law, 1(1), p. 1-38, 2009.

8 See HAURIOU, Maurice. L'institution et le droit statutaire. Récueil de Législation de Toulouse, 2e série, T. 11, p. 134-182, 1906, and HAURIOU, Maurice. Principes de droit public. Ed. Paris: Librairie de la Société du recueil J.-B. Sirey & du journal du palais, p. xi-734, 1910. Romano is often associated also

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founding fathers of legal pluralism, which he delved into from an anti-formalist perspective, in opposition to legal positivism.

He published his masterpiece *L'ordinamento giuridico* in 1918 and since then this small book has quickly become an essential point of reference for legal scholars; in fact, virtually all the major Italian legal scholars, both in the first and in the second half of the 20th century, have felt the need to take their own position with respect to the arguments put forward by Santi Romano.

The fortune of the book outside Italy is an interesting issue to highlight, starting from the existence of foreign translations. In fact, while Romano's work has been translated in Spanish (*El ordenamiento jurídico*, 1963), French (*L'ordre juridique*, 1975), German (*Die Rechtsordnung*, 1975) and Portuguese (*O ordenamento jurídico*, 2008), shockingly there is no English translation. According to Norberto Bobbio, this would confirm the traditional Anglo-American ignorance of the Italian legal culture[9]. The lack of an English version had a crucial role in the (inadequate) dissemination of Romano's works, which undoubtedly is a "considerable loss for the Anglophone world"[10]. Fortunately, some articles and essays on Romano's thought have been written in recent years to fill this knowledge gap and partially remedy that very loss[11].

The book is composed of two chapters – "The concept of legal order" and "The plurality of legal orders and their relations".

2.1 The concept of legal order

In the first chapter the author develops his anti-formalist perspective on law, in opposition to the legal positivist paradigm based on the assumption that "law" is equivalent to "norms" or to "legal order" as made by norms.

Right from the start Romano focuses on the concept of "legal order", which should not be understood as a sum of various parts but as an effective "unit" in itself, resulting in something different from its components. But if law is not reducible to legal norms[12], what are its essential elements and what is that "*quid*" which identifies the legal order as a unit in itself?

According to Romano, the concept of law is identified by the concepts of *society*, *social order* and *institution*.

The intimate connection between law and society has two, interpenetrating, senses: *ubi ius ibi societas* (what does not come out from the purely individual sphere – what does not exceed the life of the individual as such – is not "law") and *ubi societas ibi ius* (there is no "society" without the manifestation of "law"). This last statement requires the notion of "society" to be clarified: Romano intends "society" as an entity that is, formally and extrinsically, a concrete unit, distinct from the individuals who are part of it.

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to the reflections on law and society by some outstanding legal sociologists as Durkheim, Gurvitch and Ehrlich, but he himself pointed out he considered the "institution" from a legal (and not sociological) point of view, as a "system of objective law", see ROMANO, Santi. L'ordinamento giuridico. Ed. Firenze: Sansoni, 1967, (or. ed. 1918), p. 96-97.

9 See BOBBIO, Norberto. Teoria e ideologia nella dottrina di Santi Romano. In: BOBBIO, Norberto. Dalla struttura alla funzione. Nuovi studi di teoria del diritto. Ed. Roma-Bari: Laterza, 2007 (or. ed. 1975). The concept of "legal order", although it is fundamental in European public law, is less "general theoretical" than we are used to believe today. For a long time it was almost untranslatable into English: according to the first British judge at the Court of Justice, Lord Alexander J. Mackenzie Stuart, in English the neologism "legal order" could be confused with the expression of "law and order", see ITZCOVITCH, Giulio. Ordinamento giuridico, pluralismo giuridico, principi fondamentali. L'Europa e il suo diritto in tre concetti. Diritto pubblico comparato e europeo. n. 1, 2009, p. 36.

10 See PAULSSON, Jan. The Idea of Arbitration. Ed. Oxford: Oxford University Press. 2013, p. 307, n. 20.

11 See, for example, SANDULLI, Aldo. Santi Romano, cit.; LA TORRE, Massimo. Law as Institution. Ed. London: Springer, 2010, p. 98-115; FONTANELLI, Filippo. Santi Romano and *L'ordinamento giuridico*: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations. Transnational Legal Theory, 2(1), 2011, p. 67-117; CROCE, Mariano. Self-sufficiency of Law, cit., p. 76-80, 113-119. Fontanelli (p. 70) observes that "a remarkable exception to the general ignorance of Romano's thought in Anglo-Saxon scholarship is Julius Stone's 1966 volume on jurisprudence, which chapter 11 discusses institutionalism and Romano's works extensively" (see STONE, Julius. Social Dimensions of Law and Justice. Ed. Stanford: Stanford University Press, 1966, p. 516-555).

12 Romano challenges the traditional, positivist, conception of legal norms as differentiating from other kind of "norms" for their formal characters: objectivity and legal sanction. With regard to the former, the Author thinks that the legal order's objectivity certainly refers to – and reflects on – norms, but it always originates from a time that is (logically and chronologically) prior to norms. As for the latter, the sanction may not be contained in – and imposed by – any specific norm, and it can rather be immanent and latent in the "gear", the apparatus, of the legal order; in this case the sanction functions as a force, a "practical guarantee", that operates indirectly and does not result in any subjective right or legal norm, see ROMANO, Santi. L'ordinamento giuridico, cit., p. 18-24.

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The idea of social order is also a crucial element insofar it allows to exclude all the phenomena marked by "pure arbitrariness" and "material force": every social manifestation – simply because it is "social" – is governed by an "order", at least with regards to its members.

The third and last essential element – that of "institution" – is undoubtedly the most distinguishing feature of Romano's theory (that, in fact, is also known as "institutionalist" theory). According to Romano every social entity, or social body, is an institution, provided it has an objective and concrete existence. "Organization" is a key concept to understand the essence of institutions, since it is able to transpose social facts into the legal domain by linking the notions of "institution" to that of "legal order": in fact, according to Romano, law is first of all "position" (in the sense of "the act or process of positing"), that is the organization of a social entity. In this way law continues to be defined from a formal perspective, its material content being uninfluential to its concept. "Law as institution" means that non-law is only what is irrevocably anti-social, namely individual by nature. Institutions can be classified according to their scope (i.e. religious, ethical, economic, artistic, educational, etc.) but each of them, as an institution, is also a legal order.

The adoption of such a theoretical framework obviously implies identifying law (and legal orders) also beyond State law and Romano tests his definition of law by exploring some relevant examples and case studies (in the first chapter but especially in the second one, dedicated to the plurality of legal orders).

As for the international legal order, the debated issues traditionally concern the definition and the autonomy of international law, that some theories consider a mere manifestation or projection of States (internal) law. Romano asserts the international legal order is an "institution" and international law "posits itself" in the same way as State law: international law is the immanent order of states community and it is inseparable from it; it must be sought in the institution in which that same community materializes, before focusing on the single legal rules sanctioned by specific treaties[13].

The Catholic Church is also a legal order that does not derive its legal character from State law. The Church and the State are two "legal worlds"; two different and distinct orders each one with its own sphere, legal sources, organization, sanctions.

13 *Ivi*, p. 64.

Romano also formulates very interesting arguments concerning those "small institutions", such as families or households, that are also labelled as "legal microcosms". The "conjugal society" – although it is based on the (bilateral) marriage relationship[14] – is usually shaped as "family", namely an institution that is a "continuing unity", a "social body" organized on the basis of state regulations, common goals to be pursued or the relationship between its current and future members. In the same way, a household can be considered a "small legal order" that is ruled by one (or more) individual(s) and is legally binding on family members, employees, guests, items, etc. This "household law" must not be confused with those State norms dedicated to some house related aspects (such as the constitutional protection of personal domicile) since the former constitutes an internal, autonomous, order that unifies different elements (persons and things) under a unique government and direction.

Maybe one of the best known example provided by Romano to explain law as institution, the idea of criminal organisations (i.e. *mafia*) as autonomous legal orders is articulated on the assumption that their "illicitness" is only relevant to the State, while those organizations are legal orders insofar they "live" in terms of having their effective internal organization.

2.2 The plurality of legal orders and their relations

The second chapter, as already mentioned, is dedicated to the plurality of legal orders and their reciprocal interplay, as a consequence of the institutionalist perspective developed in the first part: in fact, while every institution is a legal order, the equal dignity and autonomy of legal orders does not entail their isolation, and every legal order shall have its own rules of interaction with external ones. According to Romano, the conception of legal pluralism aims to overcome that "state-centred reductionism" based on the link between

14 Romano differentiates between one (or more) determined legal relationship(s) and the institution: in fact, the latter implies relationships but it never dissolves into them. On the contrary, the institution is that organization or structure that is necessary to relationships to be qualified as "legal", whether and when they take place within its sphere of influence, p. *ivi*, 67.

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legal positivism and natural law. If the state-centred approach can be historically explained as an overstatement of an event that surely was of great significance (the rising of modern States), the idea of a "necessary" connection between law and State has to be called into question, together with its underlying "mental need" that is similar to the idea of God[15].

The description of the different forms of interactions between legal orders is centred on the concept of "relevance". The ways in which two legal orders can be relevant to each other are: I) superiority/subordination (A is superior to B); II) presupposition (A presupposes B); III) reciprocal independence but common dependence with respect to a third legal order (A and B depend on C); IV) relevance unilaterally granted (A gives effect to B); V) succession of legal orders (A is absorbed by B).

A legal order can be relevant to another with regard to different "moments" – that are one order's "existence" (types I and II)[16], "content" (types I, III, IV, and V)[17] and "effects" (types I, II, IV, V)[18].

15 *Ivi*, p. 111: "[…] the analogy between the legal microcosm and the macrocosm of the universe order would require this personification, which makes possible the conception of a single will in a harmonious system".

16 Some of the examples given by Romano are related to the relationship between local entities and the State (type I) and between member states' law and federal State law, or State law and international law (type II).

17 A superior legal order can shape or affects the content of a lower order (type I): see, for example, the relationship between local entities and State law or between international law and state law (even if, in this last case, the effective superiority of international law is more controversial). Two State legal orders can be relevant to each other also according to type III, for instance when international law (a third legal order) tries to coordinate State legal orders by requiring State legislators to satisfy some obligations that depend on the content of foreign law. Cases of unilateral determination of a legal order by another one (type IV) are those of State delegation of administrative and legislative functions to local entities and that of private international law (with referral to foreign norms). The incorporation of one legal order into another (type V) implies that the content of the dissolving order is transferred to the new one, which will result in the union of the two previous orders.

18 One legal order can have "external effects" on another one according to type I, with regard to both "complete" subordination (i.e. the effect of State law for a local entity depending on that same State law) and "partial" subordination (i.e. the effects of a Federal State law on member States). Presupposition (type II) can be referred to the requirement, by an international agreement, of a change in the State legal order for national implementation, execution or ratification to be effective. Type IV (unilateral decision of a legal order to give effect to another, independent, order) can be identified when a State recognizes effects to foreign law or to some aspects of the Church law (i.e. the recognition of a religious marriage as well as of additional, "civil", effects). The legal order resulting by the incorporation of one order into another (type V) can also recognize some effects to legal acts of the already extinct order.

3 Paolo Grossi: law and complexity

Paolo Grossi is an Italian distinguished legal scholar and historian of law. He left his position as a full-time professor at the University of Florence in 2008 (at the age of 75) and was appointed as one of the 15 Italian constitutional judges in 2009. He is author of many books and articles, in which he has mainly focused on the complex link between law and society by both a historical perspective and an acute observation of contemporary law. Grossi places emphasis on the role of legal history for an authentic understanding of the law: in fact, as a legal historian, he believes that (positive) lawyers must grasp the meaning of legal rules beyond the wording of the text, overcoming the sterile legal formalism by verifying the effectiveness of those rules.

Grossi has been profoundly influenced by Santi Romano. Firstly, with regard to the concept of (legal) "order"[19], he writes that – as referred to "harmony in diversity, where harmony wants to be respect for and preservation of diversity" – the notion of "order" is a precious key to understanding legal transformations from Medieval legal complexity to the legal absolutism of the Enlightenment, through the Twentieth Century Law up to the informality and factuality of contemporary global law. Secondly, Romano's legacy is also appreciable relating to the idea of the "eclipse" of the State, due to its inability to impose order on the increasingly complex socio-political and legal systems[20]. In fact, the crisis of the State undoubtedly resonates trough Grossi's work, with particular reference to his analysis of contemporary legal sources.

Grossi's focus on diversity and legal pluralism – as both distinguishing features of law in the Middle Ages and paradigms that need to be

19 See GROSSI, Paolo. Ordinamento. Jus. Vol. LIII, n. 1, 2006, p. 1-12.

20 See GROSSI, Paolo. "Lo Stato moderno e la sua crisi" (a cento anni dalla prolusione pisana di Santi Romano). Rivista trimestrale di diritto pubblico. Vol. LXI, n. 1, 2011a, p. 1-22.

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recovered in contemporary law[21] – must be comprehended in his broader perspective on legal phenomena, which is shaped by some keywords (legal absolutism, particularism, pluralism, mythologies, modernity, globalization) and pairs of opposite concepts (law/State, statute/customs, high/low, historicity/fixity, subjectivity/objectivity, abstractness/concreteness, legality (as conformity to a legal statute)/rule of law (as conformity to a higher law), exegesis/interpretation, local/global, uniformity/fantasy, norm/application, private law/public law)[22].

Far from being a point of reference only for legal historians, Grossi's work is also very important for the study of law in contemporary Europe, since he criticizes the dominant legal reductionism (of "law" to "statute") and promotes the objective dimension of law as a social institution, considering legal pluralism as the peculiarity of an order more consistent with the social body.

Much of the Tuscan scholar's attention has been dedicated to both legal reality and legal thought in the Middle Ages. According to Grossi, during that controversial period we witnessed the dissolution of the "State" (the Roman Empire's political structure and the culture that existed within that structure) and the emergence of a new order built on three factors: earth, blood and time:

> The Earth, despite its mysterious vastness, is a maternal figure because it is productive and provides subsistence. Blood links human subjects together indivisibly and spreads amongst them their inheritance of virtue and wealth via means that cannot be communicated outwardly. Time is duration but is also the hammering of months and of years that creates, extinguishes and alters[23].

The centrality of these three "primordial facts" resulted in both the *factuality* of law and the protagonism of *groups* at the expense of individuals. "Reicentrism", "communitarianism" and the conception of "law as a factual entity" led to a view of the legal world as one of *custom*, which is suggestively described by Grossi as a "path beaten through a forest:

> The path does not come into existence until an enterprising subject takes the first steps in a certain direction; he is then followed by a crowd of imitators, all convinced that his is the most rapid way to cross the forest. The path is therefore nothing more than a series of steps, repeated consistently over time[24].

As a result of the incompleteness of medieval political system, law was therefore conceived as a "totality of values underlying social and economic relationships", rather than a politically generated commandment. This conception of law as an order was characterized by both a bottom-up "organizing" dimension and legal pluralism, as "the possibility of the coexistence of diverse legal orders emanating from diverse social groups, even whilst the sovereignty of one political authority over the territory those groups inhabit remains unquestioned"[25]. In fact, in every historical civilization where the presence of the State weakens or even vanishes, "society" – as a relational, global, wide open reality – becomes the protagonist, with thousands of bottom-up plural articulations such as families, supra-family groups, religious bodies, class-based *corpora*, professional bodies, political and social entities of increasing dimension (from small rural communities right up to the Holy Roman Empire or the Church).

Although the 11th and 12th centuries undoubtedly represented a turning point in history – with the "mature" Middle Age being characterized by a number of political, social, cultural as well as legal innovations – Grossi stresses that the fundamental choices of medieval legal thought remained substantially constant in terms of continuing dominance of customary lawmaking and the persistence of an emphasis on factuality in the law. This remains true even if the increasing social, political and economic complexity of the late Middle Age asked for more general organizing categories and more rigorous and refined legal approaches than custom's universe of facts to be provided: legal scholarship, as is well-known, had a crucial role in designing those laws which medieval societies so greatly needed.

A distinguishing aspect of Grossi's investigations concerns the demystification of some

21 Grossi has been sometimes accused of a "new medievalism" but this seems to be a banalization of his thought. As a historian he is fully aware that the Middle Ages represents an original, historically specific experience, which is irremediably gone and cannot be recovered, not even as a model.

22 See ALPA, Guido. Paolo Grossi: alla ricerca dell'ordine giuridico. In ALPA, Guido (coor.). Paolo Grossi. Ed. Roma-Bari: Laterza, 2011, p. XIV.

23 See GROSSI, Paolo. A History of European Law. Ed. Oxford: Wiley-Blackwell, 2010 (or. ed. 2007), p. 7.

24 *Ivi*, 10.

25 *Ivi*, 4.

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"modern" conceptual and legal solutions (those developed from 16th to 19th century and consecrated with the Enlightenment and the French Revolution), which are often presented as unquestionable achievements of a definitive progress, while they should be more properly conceived as relative outcomes to be deconstructed[26].

According to Grossi the legal and political Enlightenment needed "myths"[27] to be created, since the destruction of ancient convictions and institutions had left a void to be filled with alternative "absolutes". The new "theorem" of modernity was based on some fundamental assumptions: a democratic socio-political order, which expresses the nation's general will; political representation as the sole instrument for representing one's will; the parliament as the sole institution enabled to normatively express the general will (and the consequent identification of the general will with statute law); the principle of legality as the main rule of modern democracies.

The State as the sole legitimate lawmaker (legal monism), the absolute primacy of statute law within the hierarchy of legal sources (legal absolutism)[28], the "state of nature" as a world of lonely, absolutely free and equal individuals: these essential features of modern law are ordinarily presented as "mythological beliefs". A critical approach, as the one promoted by the Author, does not entail that the unquestionable conquers of 18th constitutionalism, such as liberal declarations of rights, should be underestimated. Nevertheless, they were "insufficient", insofar they were based on a purely artificial and intellectual construction (the "state of nature") and implied a cruel reduction of social and legal complexity.

If the concrete economic and political interests of the rising bourgeoisie underlying the theorem of modernity remained in the shadows, the top-down perspective on legal phenomena has proved to be pervasive. In fact, since the end of the 18th century, at least in continental Europe, the term "law" has identified the authoritative command; furthermore, the success of the conception of law as a norm has meant the loss of law's "sapiential dimension", in terms of both the exclusion of legal scholars from lawmaking and the decline of the "ordering" character of law. Law is no longer considered as a "social physiology", an entity to be discovered and apprehended in the social reality and then translated into rules, but rather a mechanism to deal with the pathologic dimension of social life: the man in the street, in the words of Grossi, sees law as something totally alien to him, that falls on his head from above "like a roof tile".

At the dawn of the 20th century, this scenario began to change, with the irremediable crisis of the Nation State and the rediscovery of (social, economic, legal) complexity. This rediscovery was marked by social and economic transformations, epitomized by Grossi as "the emergence of a collective *I* among the citizenry"[29]. In opposition to the individualist stance of post-Revolutionary 19th century law, the rise of different "social formations" (workers' organizations, political parties, spontaneously born associations) had a disruptive effect on the two pillars of that legal system (that also corresponded to a specific "legal culture"). On the one hand, "the stark separation between public law and private law", which had been recuperated by modern legal thought from the ancient Roman law, was undermined by the presence of a "non-state collective" which was difficult to place. On the other hand, "the equally stark division between the world of law and the world of facts" also began to crack in terms of State monopoly of legal sources, since the new economic demands and social practices (which were qualified as mere "facts" by State law) resulted in the need for new forms of law:

> Two levels of legality thus developed: that of the written law, and that of everyday experience – formal law and living law. […] The facts that had emerged and been established trough social practices were thus enshrined in legislation. At the same time, there was now a non-legislative means of generating law, leading to two levels of law-making – factual and legislative – that were not always in harmony[30].

26 See GROSSI, Paolo. Mitologie giuridiche della modernità. Ed. Milano: Giuffré, 2007.

27 On the concept of "legal myth" see, again, ROMANO, Santi. Frammenti di un dizionario giuridico. Ed. Milano: Giuffrè, 1983 (or. ed. 1947), p. 126.

28 As has been previously said, Romano's idea of the "eclipse" of the State certainly affected Grossi's overview of 19th century's "bourgeois law": "As Romano puts it in his extremely lucid summary, the tableau had been reduced to two players: the macro-individual of the state, and the micro-individual of the single citizen. The sources of law had also been reduced: to the written laws of the state in the public sphere and to the contract in the private sphere. Society itself had been reduced to an anonymous mass of citizens, all formally equal, who submitted inertly and passively to the commands of the centre of power", see GROSSI, Paolo. A History of European Law, cit., p. 138.

29 *Ivi*, p. 139.

30 *Ivi*, 140.

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The movement "State *towards* society" has been deeply marked by two extraordinary events occurred in the 20th century.

The first one is the adoption of democratic Constitutions after the Second World War[31]. While liberal constitutions (in particular, the part dedicated to the Bill of Rights) were inspired by an individualistic conception, with an abstract individual as the unitary subject in the state of nature, the new constitutions reflect the (economic, social, cultural, religious) pluralism of states in the second half of the 20th century. Therefore, in addition to the protection of citizens against arbitrary power, democratic constitutions now deal with both persons and "intermediate communities" and recognize principles and rules on education, religion, economics, health, environment, work and property. For this reason, according to Grossi, democratic constitutions are inspired by (and cannot help but be inspired by) a "genuine legal pluralism", which identifies and enhances social and cultural forces beyond the "positive and irreplaceable reality of the State"[32].

The second, epochal, event for contemporary law to dismiss those state-centred "distorting filters" and bring to light law's social roots was the creation of a united Europe as a legal laboratory. In fact, on the one hand, the European Union originates from a single market, which testifies the primacy of economics as a concrete and factual dimension: "the legal Europe, shaped on the basis of the economic Europe, […] is a blatant denial of the modern option for pureness and abstractness. European law trickles factuality from each of its pores"[33]. On the other hand, Europe can also be considered an innovative forum thanks to the osmotic dynamic between common law[34] and civil law, which resulted in the primacy of unwritten law (i.e. the "common constitutional traditions") and judicial decisions (see the crucial role of both the ECJ and the ECtHR in European law-making).

4 Conclusive remarks

The reflections developed by Santi Romano and Paolo Grossi represent a precious contribution to the studies on legal pluralism as a key category for understanding the relation between law and social complexity.

The importance of Romano's thought has been expressly acknowledged by many scholars working in different fields of law studies. Jaques Vanderlinden, among others, mentions several times Santi Romano as an essential point of reference in the theorization of legal pluralism: that "magic little book" (*L'ordinamento giuridico*) was decisive for Vanderlinden to approach the topic of legal pluralism for the first time and sustain his adhesion to the conceptualization of law beyond the State[35]. As for the area of contemporary international, transnational and global relations, Filippo Fontanelli identifies several issues for which the reference to Romano's theories can be a useful interpretive tool to "frame and conceptualise the fragmentation of international law and the rise of atypical global governance regimes"[36], in addition to exploring some interesting applications in European, international and transnational law.

In dealing with the relevance of Santi Romano to modern times, it must be obviously considered that his thought has been marked by the contingencies of his time (the beginning of the 20th century), as it can be easily argued by the

31 Grossi stresses the peculiarity of the "constitutional turn" in Germany and Italy, two countries tragically marked by totalitarianism and in search for a "refoundation" of the State.

32 See GROSSI, Paolo. Introduzione al Novecento giuridico. Ed. Roma-Bari: Laterza, 2012, p. 28. Let us consider, with Grossi, the first three articles of the 1948 Italian Constitution: "The people [*under the Article 1*] is not an anonymous mass where the individual is not very different from ants in an anthill. Two dimensions are recognized to the individual citizen, who is caught and identified as both an individual and as a social agent. […] He is regarded within social formations aimed at […] providing him with a congenial environment to integrate and develop his potentiality […] This is demonstrated by the equality [*principle*] under Article 3, that is so deeply distant from the French Revolution *egalité*: in fact, [*the Italian Constitution's framers*] neither stopped at the first stage (that of legal equality) nor opted for a levelling collectivism, but put equality well below a floating abstractness, following the Republic's duty to "remove those obstacles of an economic or social nature" […]", *ivi*, p. 29.

33 *Ivi*, p. 36.

34 According to Grossi, the precious Common Law's lesson is that of law as a "radical reality", that is to say law belongs to one people's roots and identifies with that people's history without changeable political events being able to affect the law's deep layer, see GROSSI, Paolo. Un impegno per il giurista di oggi: ripensare le fonti del diritto, in ALPA, Guido (coor.). Paolo Grossi. Ed. Roma-Bari: Laterza, 2011b, p. 30.

35 See VANDERLINDEN, Jacques. Les pluralismes juridiques. Ed. Bruxelles: Bruylant, 2013, p. 12.

36 For example with regard to the *lex mercatoria*, the cyber-law, the international sport system. See FONTANELLI, Filippo. Santi Romano and *L'ordinamento giuridico*, cit., p. 88-113.

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"institutions" exemplified in the book – such as a still solid Nation State (with its public administration), proliferating "intermediate social bodies" (foundations, associations, labor unions, political parties, criminal organizations), the Catholic Church and an international legal order founded on the relations between different States placed on the same level.

Nevertheless, this does not put into question the significance of Romano's works for the research on social and cultural diversity as a source of legal pluralism. In fact, his theories still represent a remarkable contribution to a pragmatic and empiric attitude towards the legal phenomenon, thanks to the conception of the "institution" "not as a merely systematic concept, but as a representation of a segment of reality"[37]. He promoted an idea of law (and of legal order) as strictly connected to social facts and to the "real" dimension of "effectiveness", irrespectively of how State law qualifies those (non-State) legal expressions from its viewpoint. In rejecting essentialist and abstracts concepts of law, he supported an "inner" perspective on legal phenomena. While some Romano's insights still prove to be enlightening with regard to the interaction of different legal orders[38], his theory is less suited to conceptualize the "subjective" dimension of legal pluralism, that focuses on the active role of individuals within the different normative communities (such as families, cultural and religious groups, etc.) in which they are involved and under which they recognize and produce their own legal subjectivity[39].

A further lesson to keep in mind is related to Romano's aversion to absolutizing legal categories and institutions – such State centralism –, which are, at the end of the day, quite recent, if comprehended with a historical and comparative perspective. This critical attitude is shared by Paolo Grossi, whose relevance to the conception of social diversity as legal pluralism is clearly related to his critique of modern individualism (as a theoretical premise of the conception of law as a general and abstract norm), in favour of a complex understanding of law as a physiology of pluralistic societies.

By drawing a parallel between the Middle Ages' social and legal fragmentation and the complex articulation of contemporary Western societies, Grossi shows that legal pluralism is a key category to both recognize and promote law as connected "to a plurality of social institutions, beyond monism of modern legal positivism"[40]. Paolo Grossi's attitude about the relationship between law and society seems to be particularly coherent with the valorization of individuals' diversified legal belongings, due to his belief in the centrality of multiple social (as well as cultural and religious) groups within which individuals are situated and, more generally, the necessary correspondence between legal regulations and "effective" social reality.

On the other hand, Grossi is fully aware that legal pluralism and legal particularism do not entail a short-sighted critique of State law: in fact, one of the major challenges that contemporary legal scholars have to face is precisely to acknowledge the role of the State as crucial in creating the conditions for the enhancement of the "particular" in the framework of "universal" rights and guarantees.

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37 See LA TORRE, Massimo. Law as Institution, cit., 2010, p. 98 n. 10.

38 See KISLOWICZ, Howard. Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation. Queen's Law Journal. v. 39, n. 1, 2013, p. 208 and 220, for example, mentions Romano's theories in connection with the relationship between state and religious legal norms. GARRÉ, Roy. Non di solo diritto. Spunti di riflessione, ad uso della storia giuridica, sul rapporto fra diritto ed altri ordinamenti normativi. Forum Historiae Iuris. 14 Feb. 2003, stresses the importance of the theoretical framework developed by Romano for the studies on folk law and subaltern legal cultures. The Canadian sociologist ROCHER, Guy. Pour une sociologie des ordres juridiques. Cahiers de droit. N. 1, 1988, p. 99, has been one of the early re-discoverers of Romano's legal institutionalism and of its usefulness in the theorizations of contemporary pluralism.

39 See FARALLI, Carla, FACCHI, Alessandra. Pluralità delle fonti e modelli teorici: dalle premesse storiche agli sviluppi attuali. In: PATTARO, Enrico. Problemi della produzione e dell'attuazione normativa. Ricerca Murst ex 40%, 1997, <http://www.cirsfid.unibo.it>. For the concepts of "code switching" and "cultural navigation" see R. Ballard (1994).

40 See. ROSATI, Massimo. Post-secular society, transnational religious civilizations and legal pluralism. Philosophy & Social Criticism. Vol. 36, n. 3-4, 2010, p. 417-418.

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Breves reflexões sobre o pluralismo jurídico como paradigma fundamental do direito contemporâneo nas sociedades ocidentais altamente diferenciadas

Resumo

Muitos estudiosos, de diferentes disciplinas, utilizam a categoria do "pluralismo jurídico" para explicar a dimensão jurídica da crescente diversificação cultural, religiosa e social das sociedades ocidentais. Sendo um conceito particularmente complexo, a noção de "pluralismo jurídico" obriga a uma sua profundisação a fim de compreender melhor as suas muitas implicações e para aumentar o seu potencial explicativo como paradigma de compreensão da complexidade jurídica das sociedades altamente diferenciadas. Neste assunto, o contributo da doutrina jurídica italiana oferece uma valiosa inspiração. Por um lado, Santi Romano - teórico do direito em atividade na primeira metade do século XX - pode ser considerado um dos fundadores do pluralismo jurídico: com a sua obra prima "O ordenamento jurídico" (1918) ele tratou o pluralismo jurídico desde uma perspectiva antiformalista, em oposição ao positivismo jurídico. Por outro lado, os trabalhos de Paolo Grossi - um historiador do direito que tratou o pluralismo jurídico em quanto caraterística do direito na Idade Media - são assim mesmo muito importantes para o estudo do direito da Idade contemporânea, em quanto ele critica o dominante reducionismo jurídico e promove a dimensão objetiva do direito como instituição social.

Palavras-chave: Pluralismo jurídico; complexidade social; institucionalismo; positivismo jurídico.

Enviado em 04/08/2014.
Aprovado em 22/01/2015.

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