

INVITED ARTICLE

## Legal Pluralism from History to Theory and Back: Otto von Gierke, Santi Romano, and Francesco Calasso on Medieval Institutions

Emanuele Conte

Roma Tre University, Roma, Italy

Email: [emanuele.conte@uniroma3.it](mailto:emanuele.conte@uniroma3.it)

### Abstract

This paper considers the historical contexts in which theories of legal pluralism grew and developed between the final third of the nineteenth century and the first half of the twentieth century. Theories of the state as a pluralistic system, as opposed to the absolute supremacy of state-made law, were the focus of German legal historical scholarship in the late nineteenth century, represented by the towering figure of Otto von Gierke. Gierke's image of a pluralist German Middle Ages largely influenced legal scholarship in Europe, even affecting the Italian scholar Santi Romano, whose book on the "legal order" has been considered a milestone in the construction of pluralist legal theories. Once passed from a legal historian like Gierke to a theorist like Romano, the model of a pluralist legal order returned to legal historiography, inspiring the innovative historical interpretation of medieval law proposed by Francesco Calasso. Gierke was a conservative, right-wing socialist, and Romano was a fascist and counselor of the fascist Italian government. Calasso, on the contrary, was a liberal opponent of the fascist regime. The three versions of legal pluralism, then, decline the same basic vision in three different ways, being influenced by the political contexts in which the three authors operated.

As we conceive it today, legal pluralism is a complex concept. As Tamar Herzog explains in her essay in this volume, scholars in a number of different fields use legal pluralism to approach a variety of issues.<sup>1</sup> The scope of this paper is limited: I want to show that the historiographic description of medieval law

---

<sup>1</sup> Bibliography on legal pluralism is very broad, and it would be impossible to offer here a survey, even if incomplete. A very recent and very useful collection of essays has been published in *Quaderni Fiorentini* 50 (2021) and is freely available online: <http://www.centropgm.unifi.it/quaderni/50/index.htm>.

suggested by nineteenth-century German scholarship contributed substantially to the creation of the category of legal pluralism, as opposed to the absolute supremacy of state-made law. This was the focus of German legal historical scholarship in the late nineteenth century, represented by the towering figure of Otto von Gierke. Gierke's image of a pluralist German Middle Ages profoundly influenced legal scholarship in Europe, even affecting the Italian scholar Santi Romano, whose book on the "legal order" has been considered a milestone in the construction of pluralist legal theories.

Gierke was a conservative, right-wing socialist. Romano became a counselor of the fascist Italian government in 1925, and in 1928 entered the Italian Fascist party. It may be surprising, then, that Gierke and Romano's model of a pluralist legal order also drove the innovative historical interpretation of medieval law proposed by the staunch antifascist Francesco Calasso. He drew inspiration from Romano to suggest a new, fascinating image of a pluralist medieval law, while freeing himself from the nationalist and corporatist ideas of Gierke and Romano. These three authors continue to influence legal theory and historiography to this day. This paper aims to show how the study of medieval law influenced the emergence of a pluralist view of law, how this view shifted from legal historiography to legal theory, and how it returned to legal history.<sup>2</sup>

### Three Lectures in 1909

I begin with three lectures delivered in 1909, all three in solemn circumstances, in three different languages, in three different countries, by two of the protagonists of this story. The third character of this paper, the Italian legal historian Francesco Calasso, was only 5 years old in 1909, and he could not deliver any speech that year. He will enter the stage later.

The first of these lectures was given on January 27 at the University of Berlin by Otto von Gierke, in celebration of the fiftieth birthday of William II, King of Prussia and Emperor of Germany.<sup>3</sup> Born in 1841, Gierke was acknowledged as the preeminent historian of the medieval corporations, and the portraitist of an allegedly German legal system, based on a network of communities united in creating a state radically different from the French model.<sup>4</sup> In 1909 he had already published three massive volumes of his most celebrated book, the *German Law of Corporations* (*Das deutsche Genossenschaftsrecht*), for a total of almost 3000 weighty pages. (A thick fourth volume was to be published, still unfinished, in 1913.) He influenced the drafting of the German civil code,

<sup>2</sup> Contra Ralf Seinecke, "Rechtsppluralismus in der Rechtsgeschichte," *Rechtsgeschichte* 25 (2017): 215–28.

<sup>3</sup> Otto von Gierke, *Die Steinische Städteordnung* (Berlin: Gustav Schade, 1909).

<sup>4</sup> I mention just a few recent essays on Gierke: Martin Peters, *Die Genossenschaftstheorie Otto v. Gierkes (1841–1921)* (Göttingen: Vandenhoeck und Ruprecht, 2001); Otto Gerhard Oexle, "Otto von Gierkes 'Rechtsgeschichte der deutschen Genossenschaft.' Ein Versuch wissenschaftsgeschichtlicher Rekapitulation," in *Deutsche Geschichtswissenschaft um 1900*, ed. Notker Hammerstein (Stuttgart: Franz Steiner, 1988), 193–217; Gerhard Dilcher, "Staatsbegriff und Korporationsbildung zwischen privatem und öffentlichem Recht im Spiegel der Genossenschaftstheorie Otto von Gierkes", in *Gli inizi del diritto pubblico. 3. Verso la costruzione del diritto pubblico tra Medioevo e Modernità*, eds. Gerhard Dilcher and Diego Quaglioni (Bologna: Il Mulino, 2011), 797–826.

the BGB, and he was influential enough to introduce into the new code some legal institutions that he claimed were the expression of a purely Germanic legal mentality.

In his lecture of January 1909, Gierke decided to focus on a particular administrative reform introduced in Prussia a century earlier: the reformation of the Prussian municipal administration, introduced in 1808 by Minister Karl Freiherr vom Stein. A nobleman and a statesman, vom Stein introduced two important reforms in Prussia: the abolition of peasants' serfdom, and the so-called *Städteordnung*, an ordinance on the administration of municipal cities in Prussia.

The first of the two reforms did not impress Gierke. The abolition of any personal status that affected the liberty of the individuals seemed to have no connection to the tradition of German law, being instead an effect of the renewal introduced by the enlightenment and positively affirmed by the French Revolution. Gierke was more interested in drawing the constitutional meaning of the second reform to the attention of the Emperor and his own academic colleagues in Berlin. With the *Städteordnung*, vom Stein had reawakened the deep conscience of the German people, drawing on history to build the future of the nation. The fundamental core of the reform was "the organization of the city in the sense of an autonomous community (*selbständige Gemeinwesen*)."<sup>5</sup> In Gierke's view, this reform reflected the most profound popular identity of the German nation, because the Germans had always established free cities and villages that did not aspire to be sovereign city-states (in contrast to the Italian communes), but instead considered themselves autonomous entities that organized and protected the rights of their citizens within the larger body of the German state. Issued just one year after Fichte's famous *Addresses to the German Nation*, the municipal reform drafted by Freiherr vom Stein realized one of their central proposals: restoring the traditional medieval communities that granted the rights of the German burghers, creating a large network of city communities whose legal status did not depend on the central state. In the view of Gierke, this was a shining example of what we now call "legal pluralism."

The second talk held in the same year was delivered in English by the same Otto von Gierke on October 6th, 1909.<sup>6</sup> Harvard University decided to award the old German professor an Honoris Causa Doctorate. His name was proposed by President Lawrence Lowell with a concise motivation: "Author of the best History of the Legal Theories of the Middle Ages; by far the greatest living authority on this subject; a man of extraordinary learning."<sup>7</sup> But if Harvard Law School was expecting a lecture on medieval legal theories, they were in for a surprise. Rather, in his talk to the University, Gierke offered a description of the constitution of the Second German Reich, seeking to stress the similarities between the American and the German Imperial constitutions—a difficult

<sup>5</sup> Gierke, *Die Steinische Städteordnung*, 11.

<sup>6</sup> Otto von Gierke, "German Constitutional Law in its Relation to the American Constitution," *Harvard Law Review* 23, no. 4 (1910): 273.

<sup>7</sup> Harvard University Archive, Papers of Abbott Lawrence Lowell. UAI 15.896 box 34, folder 8. Courtesy of Tamar Herzog.

task, one might think. Comparing the powers of the American president with those of the German Emperor was certainly a *vaste programme*, but the German guest underlined the fact that both constitutions were based on the acknowledgment of the legal existence of a plurality of bodies, whose union formed the nation. For the second time in 1909, and in a completely different context, Gierke insisted on the vital function of the legal autonomy of corporate bodies as an articulation of a pluralist state.

Santi Romano offered the third speech on the subject, on November 4th at the University of Pisa, almost exactly one month after Gierke's Harvard discourse. Romano was just 34 years old, and nevertheless had already held full professorship of public law for 10 years. Opening the academic year in Pisa, Romano presented his thoughts on "The Crisis of the Modern State."<sup>8</sup> A "marvelous creation of the law (*stupenda creazione del diritto*)," the state of the nineteenth century seemed to have overcome all the ambiguities that had marked the politics of the Middle Ages and the modern age, to reach at last an admirable perfection of legal forms. But, according to Romano, the opening of the new twentieth century revealed the signs of a crisis. Apparently, it no longer fit the complex society that had emerged from the deep economic changes that marked the nineteenth century. The new society of the early twentieth century seemed formed by different groups of individuals gathered in associations to obtain the protection of their rights—and sometimes of their privileges. This new society demanded for a new form of the state. In a one hour speech to the students and the professors at the ancient University of Pisa, the young Sicilian professor of public law drafted the basic principle of what he called a "Sistema corporativo (corporative system)," that is the constitutional definition of legal pluralism. Romano had read a substantial amount of Gierke's scholarship, and by drawing his picture of a corporatist constitution designed for the future, he referred often to the legacy medieval legal history in Italy.<sup>9</sup>

### From Legal History to Legal Theory

Santi Romano, one of the leading figures of the legal pluralism in the twentieth century, then, openly declared his debt to the Middle Ages, as it was presented in Gierke's reconstruction. As Gierke repeated in his two public speeches that year 1909, the Germanic legal tradition did not consider a public act of incorporation necessary to ascribe rights and duties to a legal entity formed by a plurality of individuals. It had been the medieval learned law, formed by the confluence of Roman and canon laws, which built the concept of legal personality as a fiction, meaning that a group of individuals could be considered in law as a single subject of rights. This meant that public power created the fictional personality of a collective, legally enacting the institution of a new

<sup>8</sup> Santi Romano, *Lo Stato moderno e la sua crisi. Discorso per l'inaugurazione dell'anno accademico nella R. Università di Pisa, letto il 4 novembre 1909* (Vannucchi: Pisa, 1909).

<sup>9</sup> Fuchs underlines what Romano owes to Gierke in Maximilian Fuchs, "La «Genossenschaftstheorie» di Otto von Gierke come fonte primaria della teoria generale del diritto," *Materiali per una storia della cultura giuridica* 9 (1979): 65–80.

subject. The new subject entered into legal existence only after this intervention of public power and, consequently, the newly formed subject was admitted to the market.

For Gierke this construction was artificial—perhaps it could satisfy the feelings of the medieval scholars, influenced by the learned law, but certainly could not be accepted by the Germans, a people who lived for centuries without the subtle inventions of Roman law. In his celebrated paper on “The Social Role of the Private Law,” Gierke clarified that when the Germans “stepped into history,” they still had “an unprepared state and unprepared law.”<sup>10</sup> “There was no sovereign state, and there was no sovereign individual. The state was tied to the individual and to countless community associations; it conceded the spiritual field to the church, and economic life to cooperatives. The individual remained dedicated to the community; in the family and community his thoughts and his aspirations flourished.”<sup>11</sup>

In particular, Germans had always gathered in communitarian entities, with no need for legitimation coming from above; every gathering of individuals was a political entity, regardless of state acknowledgment.<sup>12</sup> The confusion between public and private law made it possible for spontaneous communities to avoid the need for formal incorporation. Thus, the families of a village, the guild of those carrying out a trade, or a free association aimed at performing a public charity all gained their legal existence by the very fact of being in existence—an idea later deemed by legal historians and theorists “the theory of real entity.”<sup>13</sup>

Created in Germany, and certainly influenced by the German political discussion, Gierke’s vision of a pluralistic Middle Ages influenced Europe—and soon also arrived in the United States, as we have seen—affecting the understanding of history, particularly for legal historians.<sup>14</sup> However, as legal history still was seen as a fundamental part of every legal theory, jurisprudence and practice also adopted new perspectives in dealing with corporative bodies in

<sup>10</sup> Otto von Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin: Springer, 1889). This famous text was read by Gierke at the *Juristische Gesellschaft* of Wien on April 5, 1889. See the English translation: Ewan McGaughey, “The Social Role of Private Law, Translated, with an introduction,” *The German Law Journal* 19, no. 4 (2019), 1017–1116, at 1038.

<sup>11</sup> Michele Spanò offers a reading of Gierke’s “Soziale Aufgabe” in Spanò, “The ‘Social’ as the ‘Common’? An Inquiry into the ‘Soziale Aufgabe’ of Private Law,” *Quaderni Storici* 55, no. 3 (2021): 641–61.

<sup>12</sup> See the vast and complex essay on the long history of the concept of autonomy from medieval cities to modern legal theory: Pietro Costa, “Così lontano, così vicino. Il commune medievale e la sua autonomia,” *Quaderni Fiorentini* 43, no. 2 (2014): 698–782. On German constitutional theorists and on Gierke see particularly 733–43.

<sup>13</sup> Among many others: Boudewijn Bouckaert, “Corporate Personality: Myth, Fiction or Reality?,” *Israel Law Review* 25 (1991): 156–86, 170, and ff.; and Ron Harris, “The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business,” *Washington & Lee Law Review* 63 (2006): 1421, 1429.

<sup>14</sup> See Emanuele Conte, “The Order and the Volk. Romantic Roots and Enduring Fascination of the German Constitutional History,” in Harry Dondorp, Martin Schermaier, and Boudewijn Sirks (ed.), *De rebus divinis et humanis. Essays in Honour of Jan Hallebeek* (Göttingen: V&R Unipress, 2019), 37–53.

their relationships with national states. For the English-speaking world, Frederick Maitland's partial translation of book 3 of Gierke's *Genossenschaftsrecht* played an important role, partly because of the prestige enjoyed by the translator.<sup>15</sup> And, while Maitland was reading and translating Gierke in England, in France the sociologist Émile Durkheim did the same with no need for translations; soon enough, jurists like Raymond Saleilles and Maurice Hauriou followed suit.<sup>16</sup>

### Santi Romano, Institutionalism, and The Legal Order

In 1917 and 1918, Santi Romano published *The Legal Order*, a book that destined for slow but progressive international success.<sup>17</sup> Introducing the second edition in 1946, the author explained that the first edition had been out of stock for years, and a new edition was needed since “many speak of it without knowing it,” as often happens to books whose titles immediately recall a certain theory, or are quoted to evoke a specific conception. After the war, the book gained an international audience through translations into Spanish (1963), French and German (1975), Portuguese (2008), and finally English (2017).<sup>18</sup>

While Romano was writing his book, Europe and the world were shaken by the shocking experience of the World War I: a catastrophe that proved the complete failure of the nation-state myth, which had been regarded for a century as the most advanced and balanced achievement of western legal culture. The tragedy seemed to justify the intuition of Romano himself who, as we have seen, in 1909 believed that the “marvelous” state form of the nineteenth century was exhausted by his day.

*The Legal Order* expresses an unmistakable distrust in the myth of progress, which sees in the nation-state the historically inevitable realization of a perfect institutional form. Building on Hauriou's theory of institutions, Romano suggests abandoning the idea of the state as the only legitimate source of legal norms.<sup>19</sup> The first part of the book is devoted completely to the definition of a new concept of legal order, understood as a spontaneous institution. It was not “a rational requirement,” Romano writes, since it was in itself already a “real, effective entity.”<sup>20</sup> But even if its existence belonged to reality without

<sup>15</sup> James Kirby, “History, Law and Freedom: F.W. Maitland in Context,” *Modern Intellectual History* 16, no. 1 (2019): 127–54.

<sup>16</sup> Caroula Argyriadis-Kervégan, “Rapprochements entre la théorie de l'institution de M. Hauriou et la doctrine publiciste allemande de la fin du XIXe et début du XXe siècle,” in *L'institution. Passé et avenir d'une catégorie juridique*, ed. Jean-Philippe Basse (Paris: Editions L'Harmattan, 2008), 123–51. Recently, Céline Jouin has published a translation of Gierke's book on Althusius: see her introduction to Otto von Gierke, *Althusius et le développement des théories politiques du droit naturel*, ed. Céline Jouin (Paris: Garnier, 2021): 9–88.

<sup>17</sup> The book first came out as two long articles on the *Annali delle Università Toscane*, in 1917 and 1918. In the same year 1918 it was published as a book: Santi Romano, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Pisa: Spoerri, 1918).

<sup>18</sup> Santi Romano, *The Legal Order*, ed. and transl. by Mariano Croce (Abingdon: Routledge, 2017).

<sup>19</sup> Mariano Croce and Andrea Salvatore, “La forza trasformativa dell'impolitico. L'istituzionalismo di Maurice Hauriou e Santi Romano,” *Giornale di Storia Costituzionale* 41 (2021): 239–54.

<sup>20</sup> Romano, *The Legal Order*, 46.

any need for abstraction, the institution was not a purely social phenomenon: on the contrary, it was identical with the legal order and was therefore a legal concept. The institution existed because it produced a legal order, and the existence of a legal order justified the existence of an institution.<sup>21</sup> According to Romano, the state is also an institution and a legal order, but it is far from being the only one. This conclusion opens the second part of the book, which is devoted to legal pluralism. Romano begins with a critique of Kelsen's idea that the legal character of a norm is inevitably connected with the creative force of the state. This statement is relatively recent, observes Romano—before the modern era, and the rise of the nation-state as the most advanced form of institution, things were quite different: society was formed by many institutional fragments, many different communities independent from one another.<sup>22</sup> Here, Romano's main reference is Gierke, who "strenuously advocated" the theory that "every organic community is able to produce law."<sup>23</sup> Romano takes from Gierke the medieval coexistence of different corporations, whose legal personality is neither granted nor created by the state because they exist in law before and independently from the state. The concept plays the same role as in the writings of many Germanists of the late nineteenth century: the medieval order was the paradise of pluralism, and hence it was the hell of absolutism. For some scholars, these centuries represented a golden age of perfect harmony between the liberty and the autonomy of communities, and the safeguarding power of a superior authority.

In Santi Romano's work, both in *The Legal Order* and in his speech to the Faculty of Pisa in 1909 about the crisis of the modern state, this medieval order is invoked in opposition to the nineteenth century idea of the state. He grounds his argument in the first three volumes of Gierke's *Genossenschaftsrecht*, which Romano seems to have read in full. Already in 1909, and later in 1918, Romano outlined the reasons for the necessary demise of the idea of portraying the absolute state as the only holder of all legislative, regulatory, and jurisdictional powers, and he declared his admiration for Gierke's pluralistic ideas. By accepting the corporative structure of public law, however, Romano also suggested the need to reform political representation in parliament. If the two chambers were meant to represent interests, and if the interests of the national economy were held by trade and labor organizations, then at least one of the chambers should have been formed by representatives of those corporations.<sup>24</sup>

Shortly after fascists seized power in October 1922, Santi Romano became one of the regime's active advisers, providing counsel especially on constitutional reforms.<sup>25</sup> He was one of the five scholars who joined the commission

<sup>21</sup> Romano, *The Legal Order*, 12.

<sup>22</sup> Romano, *The Legal Order*, 51.

<sup>23</sup> Romano, *The Legal Order*, 63.

<sup>24</sup> Among many: Irene Stolzi, "Rappresentanza politica e rappresentanza degli interessi," *Giornale di Storia Costituzionale* 43, no. 1 (2022): 231–56.

<sup>25</sup> Italian legal historians are finally approaching the problem of the relationships between legal culture and the regime. See e.g., *Il diritto del duce. Giustizia e repressione nell'Italia fascista*, ed. Luigi Lacchè (Roma: Donzelli, 2015). On Santi Romano see Angela Musumeci, "Santi Romano,

of fifteen members named by Mussolini in January 1925 to draft the Fascist constitutional reforms. In 1928 he joined the Fascist party and was named president of the *Consiglio di Stato* (State Council). However, scholars are cautious in labeling him a fascist: in 1944 he was tried before the High Court of Justice in charge of purging public officials compromised with the regime, but resigned his offices in order to avoid being discharged for his Fascist associations. Marc De Wilde recently points out that “Although Romano may have recognized the corporatist state of Fascism as a return to an institutionalist jurisprudence, he did not call for an ideological reinterpretation of law, but instead emphasized the neutral and descriptive character of his institutionalist theory.”<sup>26</sup>

### Francesco Calasso: Bringing Medieval Legal Theories Back in History

Unlike Romano, Francesco Calasso was certainly not a fascist. Born in 1904, he became a professor of legal history in 1932, and from 1935 he taught at the University of Florence. In 1944, while still in Florence, he was known for his antifascist ideas. In his last autobiographical book issued in 2021, his son Roberto Calasso, a writer and publisher, remembers that his father had been arrested and sentenced to death by firing squad in retaliation for the assassination of the Italian philosopher Giovanni Gentile, a prominent fascist intellectual. He was released thanks to the intervention of the same family of Gentile.<sup>27</sup>

After the war, while Romano quit his chair to avoid being purged, Calasso joined the University of Rome, the first of a series of antifascist professors called in Rome to “defascistize” the Law Faculty in the capital city.<sup>28</sup> He quickly gained a leading position. Shortly after, in 1947, he published *The Legal Orders of the Medieval Renaissance*, with express reference to Santi Romano’s masterpiece.<sup>29</sup> One year earlier, when he was asked by a national publisher to direct a new book series of legal classics, the first title of the series was Romano’s *The Legal Order* (1946). Despite their different political views, the theory of legal order proposed by Santi Romano was a necessary base for the historical vision of Calasso.

---

un giurista fra due secoli,” in *I giuristi e il fascino del regime (1918–1925)*, eds. Italo Birocchi and Luca Loschiavo (Rome: Roma Tre, 2015), 325–49. An impressive general survey on the relationships of the Law Faculties with the Fascist regime is available in Italo Birocchi, “L’integrazione dell’Università nello Stato totalitario: la politica e il diritto nelle Facoltà di Giurisprudenza,” in *La costruzione della legalità fascista negli anni Trenta*, eds. Italo Birocchi, Giovanni Chiodi, and Mauro Grondona (Roma: Roma TrE-Press, 2020), 23–97. On p. 92 Birocchi observes: “The Regime [...] was born on the force, but became such through the law, which was re-invented by permeating institutions, legislation, and culture.”

<sup>26</sup> Marc De Wilde, “The Dark Side of Institutionalism: Carl Schmitt Reading Santi Romano,” *Ethics & Global Politics* 11, no. 2 (2018): 12–24.

<sup>27</sup> Roberto Calasso, *Memè Scianca* (Milan: Adelphi, 2021), 80–94.

<sup>28</sup> Italo Birocchi, “Sul crinale del 1944: Filippo Vassalli e la reinvenzione del ruolo della Facoltà di Giurisprudenza della Sapienza di Roma dopo la caduta del fascismo,” in *Giuristi al bivio. Le Facoltà di Giurisprudenza tra regime fascista ed età repubblicana*, ed. Marco Cavina (Bologna: Clueb, 2014), 259–72.

<sup>29</sup> Francesco Calasso, *Gli ordinamenti giuridici del rinascimento medievale* (Milan: Giuffrè, 1949), 23–24.



Calasso was extraordinarily critical toward the legal historiography of his time.<sup>30</sup> Following the German tradition, legal history in continental Europe was still based on the idea of a permanent challenge between Roman Law and German Law, seen through the fundamental opposition drawn by Georg Beseler, the mentor of Otto Gierke. In his famous book of 1843, Beseler had pit Roman Law, labeled “the law of the jurists,” against German Law, the actual and living “law of the people.”<sup>31</sup> The law of the jurist was abstract, dry, detached from the everyday experience, while the law of the people was constantly developing, even if strongly based on permanent and unchangeable popular values. In fact, the two schools of legal historians were not categorically opposed to each other, because the Romanists agreed that medieval Roman law scholarship was not particularly interested in practice. They were happy to leave the practical experience of law to the Germanists, as their aim was to secure the field of abstract scholarship for Roman Law alone.

Calasso mentions some statements by the founder of the historical school Savigny, who maintains that “the glossators did not aim to represent the practice of their day.”<sup>32</sup> Glosses, *summae*, and *lecturae* of Roman Law were taken as pure exegetical writings: solely struggling to understand the abstract significance of Roman legal institutions, not aiming at applying them directly to contemporary controversies. This left ample space for the research and writings of the Germanists, whose focus was exclusively on practice. As we have seen, these Germanists applied their practical focus to the legal forms of corporations: the fictional idea was typical of the law of the jurists, while the concrete institutional existence of the communities was the genuine feeling of the German legal tradition. For Calasso, this vision produced a misleading relegation of medieval doctrine “out of history.”<sup>33</sup> The idea that the glossators and the commentators had no interest in their present day hindered any attempt to understand their role in the development of society. On the other hand, it also hindered the use of intellectual writings as sources for the historical understanding of medieval law.

Calasso further argued against the historiographical commonplace that medieval jurists excluded public law from their thinking. Most legal historians believed that the German pandectists and their Italian followers were all focused on Roman private law; they assumed that public law was too connected with political developments to be described in terms of legal abstractions, and that the medieval public institutions were too different from the Roman ones. During the terrible years of the war, Calasso devoted himself to research on “the glossators and the theory of sovereignty” with the purpose of disproving

<sup>30</sup> Emanuele Conte, “Storia interna e storia esterna. Il diritto medievale da Francesco Calasso alla fine del XX secolo,” *Rivista Internazionale di Diritto Comune* 17 (2006): 299–322; Emanuele Conte, *Diritto comune. Storia e storiografia di un sistema dinamico* (Bologna: Il Mulino, 2009), 13–34.

<sup>31</sup> Georg Beseler, *Volksrecht und Juristenrecht* (Leipzig: Weidmann, 1843).

<sup>32</sup> Calasso, *Gli ordinamenti giuridici*, 204.

<sup>33</sup> Francesco Calasso, “Il problema storico del diritto comune e i suoi riflessi metodologici nella storiografia giuridica europea,” *Revue internationale des droits de l'antiquité* Ser. 2, vol. 2 (1953), 441–464. Reprint in Calasso, *Storicità del diritto* (Milano, 1966), 206. Cfr. Emanuele Conte, *Diritto comune. Storia e storiografia di un sistema dinamico* (Bologna: Il Mulino, 2009), 27–32.

this pretended indifference of the glossators to public law problems.<sup>34</sup> Already in his early book, Calasso used the concept of “legal order,” even though he does not explicitly refer to the famous book of Santi Romano, who at the time was still the president of the fascist State Council. Romano’s understanding of every legal order as an institution, which justified itself by the simple fact of its existence, is retraced by Calasso in the short and precise sentences of some glossators of the twelfth century, allowing each people (*populus*) the right and the duty to create its own legal order. In a passage of the *Fragmentum de Equitate* (written around 1160–70) and in a very short passage of a twelfth century collection of legal definition, he finds the exact statement of this vision: “Universitas: that is a people that must provide for each single man as one of its members. By consequence, it can enact laws, and interpret enacted laws, because through the law what everyone must do and what he must avoid is defined.”<sup>35</sup> “A people is the gathering of many, aimed at living by the law. If it does not live by the law, it is not a people.”<sup>36</sup>

Thus, jurists displayed a sharp and clear vision of the institutionalist idea of legal order since the mid-twelfth century, one close to Romano’s description, as evidenced in the sources quoted by Calasso. Two centuries later, in the mature definition of Baldus de Ubaldis (1327–1400), this circularity of institutions and law is admirably expressed in the theory of the self-justification of every local jurisdiction. “The peoples are recognized by the *ius gentium* (*populi sunt de iure gentium*),” writes Baldus: they exist, without any need for acknowledgment from a superior authority. “But no government can exist without laws and statutes (*sed regimen non potest esse sine legibus et statutis*)... Thus, the government and local legislation of each people is justified by the same *ius gentium* (*ergo regimen populi est de iure gentium*).”

In his famous *Medioevo del diritto* of 1954, Calasso called this “a sublime syllogism.”<sup>37</sup> It justified the autonomy of every local community by the force of the *ius commune* and allowed a perfect balance between universal reason and local autonomy. It was, in other words, the perfect description of a pluralistic legal system. In actuality, it was also the best demonstration of the deep involvement of medieval legal theory in the political intercourse of its age, and the best refutation of Savigny’s vision of medieval scholarship as “Professorenrecht,” but also of the Beselerian idea that doctrines did not create anything in medieval law.

<sup>34</sup> Francesco Calasso, *I glossatori e la teoria della sovranità. Studio di diritto comune pubblico* (Florence: Le Monnier, 1945), second edition (Milano: Giuffrè, 1951), 8–16.

<sup>35</sup> “Universitas: idest populus, hoc habet officium singulis scilicet omnibus quasi membris providere. Hinc descendit hoc, ut legem condant, conditam interpretetur et aperiat, quoniam lege prefinitur quod unusquisque sequi vel quid debeat declinare.” Calasso cites this passage as part of the *Quaestiones de iuris subtilitatibus*, but it is part of the *Fragmentum de Equitate*, which was usually appended to the *Quaestiones*, but was copied also on his own. Calasso, *I Glossatori*, 94; Calasso, *Gli ordinamenti giuridici*, 274.

<sup>36</sup> “Populus est collectio multorum ad iure vivendum, quae nisi iure vivat, non est populus,” in *Bibliotheca iuridica medii aevi*, vol. 2, *De verbis legalibus* ed. Patetta (Bologna: Angeli Gandolphi, 1892), 129–32, 131; Calasso, *I Glossatori*, 94; Calasso, *Gli ordinamenti giuridici*, 273.

<sup>37</sup> Francesco Calasso, *Medioevo del diritto* (Milan: Giuffrè, 1954), 501.

## From Gierke to Calasso via Romano

Beseler's and Gierke's idea of the corporation as a typically medieval legal idea landed in Italian legal scholarship thanks to the mediation of Santi Romano. In tune with the attitude displayed by Gierke in the two lectures delivered in 1909, Romano also drew on legal history to recommend constitutional reforms designed for the future. Influenced in turn by the vision of Romano, Calasso described the "legal orders of the medieval legal Renaissance" as a pluralist world.<sup>38</sup> But his powerful historiographical imagination transformed the original perception of the Germanists into a radically new concept, in which there was no opposition between the legal abstractions of Roman Law and the actual life of the local communities. Local legislation could be justified by general rules of the *ius commune*. For their part the jurists, far from being concentrated only on the text of the *corpus iuris*, were on the contrary very much involved in political discourse.

Bringing back legal abstractions from the heaven of pure concepts to the earth of concrete historical intercourses had consequences for traditional legal historical interpretation. Putting aside the idea of a clash between popular, German Law and the subtle abstractions of Roman Law, Calasso's idea of the historical presence of medieval legal doctrines opened the field to new interpretations of legal history. Some of them have actually been accepted, some have not. Calasso returned Romano's image of pluralism—now moved from history to theory—to the Middle Ages; he also reshaped this pluralism in a liberal, antinationalist, and tolerant form. Medieval legal scholarship had no national boundaries, and was fully aware of its own transformative power: legal theories did not just "reflect" the feelings of the people (*Volk*), but introduced innovative rules, taking an active part in the permanent fight for freedom and justice.

Take just one example: the concept of customs, considered by Gierke and the Germanists as the most evident expression of the spontaneous surfacing of the popular law from the collective conscience of a community. If we consider medieval legal scholarship as part of historical contingency, we cannot deal with custom separately from the doctrines built by contemporary jurists to define it in the framework of legal doctrine.<sup>39</sup>

For the medieval jurists, *consuetudo* was an abstract concept ruled by Roman and Canon Law. It was a form of legal norm that could coexist with the rest of the normative system, being acknowledged and limited by the same "constitutional" rules the glossators had identified for evaluating the legitimacy of every valid legal norm. The medieval jurists considered custom as a form of legislation: one that, like every legislation, needs both a subjective and an objective element. The object of legislation had to be fair and equitable, and the subject should be constitutionally qualified for enacting it: the Emperor for Roman Law, the Pope and the Council for Canon Law. Among the legitimate subjects of legislation, Roman and ecclesiastical sources also comprehend the people, whose legislation was called custom. Then *consuetudo*—custom in the sense

<sup>38</sup> Calasso, *Gli ordinamenti giuridici*, 19–39.

<sup>39</sup> Emanuele Conte, "Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction," *Rechtsgeschichte* 24 (2016): 234–43.

of medieval legal doctrines—was not necessarily an ancient tradition of an ethnic community, as the Germanists maintained and many scholars still think. It was a form of legislation issued by representatives of a community, very often not preserving ancient traditions, but rather *innovating* the existing balance of rights and duties.<sup>40</sup>

By reintroducing legal doctrine as one of the sources necessary to gain knowledge of the law as it was actually practiced and experienced during the Middle Ages, the liberal jurist Calasso suggested an image of medieval pluralism clearly removed from the original picture based on the identitarian Germanism by Gierke. His “Middle Ages of the Law” took shape while Italy was building its new republican form, balancing between the political ideas of democratic Christians, socialists, communists, and liberals. Reinterpreting theories of legal pluralism, Calasso’s vision reflects precisely this creative moment in Italian culture: the pluralism of institutions within the nation-state was not a token paid to authoritarian nationalism, but the recognition of a complex and intertwined society. Similarly, the “system” built in the late Middle Ages is presented by Calasso as an idyllic harmony of freedom, fairness, and rationality. But this image was as much a part of his own historical context as Gierke’s and Romano’s visions had been, before him.

**Acknowledgments.** This paper is one of the outcomes of my activity as the senior researcher of the ERC project CLCLCL, led by John Hudson and based at the St Andrews University, UK.

**Emanuele Conte** is ordinary professor of Legal History at Roma Tre University <[emanuele.conte@uniroma3.it](mailto:emanuele.conte@uniroma3.it)>.

---

<sup>40</sup> Tamar Herzog, “Germanic or Roman? Western European Narratives of Legal Origins,” *Rechtsgeschichte* 28 (2020): 18–30, 25.

**Cite this article:** Emanuele Conte, “Legal Pluralism from History to Theory and Back: Otto von Gierke, Santi Romano, and Francesco Calasso on Medieval Institutions,” *Law and History Review* (2023): 1–12. <https://doi.org/10.1017/S0738248023000159>