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SANT'ANNA LEGAL STUDIES

STALS / PANOPTICA BOOK REVIEW

Alessandro Pizzorusso,  
**La produzione normativa in tempi di globalizzazione,**  
Giappichelli, Torino (2008)  
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*reviewed by G. Martinico*

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A. Pizzorusso, **La produzione normativa in tempi di globalizzazione**, Giappichelli, Torino (2008)\*

Reviewed by

**Giuseppe Martinico**

This book represents the intermediate version of a broader work that the author is going to complete in the next months. In order to write the second edition of his very famous (at least in Italy and Spain) *Commentario al Codice Civile. Le fonti del diritto* (art. 1-9),<sup>1</sup> Pizzorusso decided to write this short volume, giving lectures and receiving comments on this first collection of ideas.

Keeping in mind this essential feature of the volume, the reader can conceive this book as a sum of notes, rather than a final work.

Pizzorusso's starting point is that in the last twenty years the role of the State has changed a lot, and this has obviously influenced the law-making process' idea and dynamics. Against this background, the drafting of a second edition of his commentary implies the creation of a very different work from the original one.

The interplay between levels renders the idea of the non-simple distinction between the territorial actors' legislative domains. As a matter of fact, one of the difficulties in the multilevel legal system is represented by the existence of shared legal sources, which make the attempt of defining legal orders as self contained regimes very difficult.

This scenario does not permit scholars to overlook supranational and international forces, when writing about the national system of legal sources.

As Bobbio wrote in his work,<sup>2</sup> the history of law largely coincides with that of the State, especially after the birth of the modern State (soon after the end of the Middle Ages).

From a legal point of view, in fact, the birth of the modern State can be seen as a reaction to the legal pluralism prevailing in the Middle Ages, which was caused by the existence of several centres of power (traditionally, the classic notion of sovereignty is not deemed suitable to this era) and the existence of a variety of laws (local customs, privileges granted to the landlords).

In order to react to such pluralism, the modern State's Sovereign centralized the power by imposing his law on the State territory and progressively eliminating all the local privileges and customs (although the privileges were abolished completely only during the French revolution). The law

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<sup>1</sup> A. Pizzorusso, *Commentario al Codice civile. Le fonti del diritto* (artt. 1-9 del Cod. Civ.) [Commentary to the Civil Code. The Sources of Law (art. 1-9)] (1977).

<sup>2</sup> For example N. Bobbio, *Diritto*, in R. Guastini (Ed.), *Contributi ad un dizionario giuridico* 63 et seq. (1994).

thus became the voice of the Sovereign, his will made enforceable thanks to the monopoly of the strength later described by Max Weber<sup>3</sup>.

In this era, the Law-State binomial reaches its apogee as the only applicable law is the positive law of the State. There was no room for a real system of legal sources, because the Sovereign's acts or facts were not classifiable or distinguishable.

This would be partially overcome as a result of the French revolution, where the law *par excellence* would be found in the statute of the Parliament (the body expressing the general will): this implied a distinction between the statute of the Parliament and the other legal sources.

The final step of the current hierarchy of legal sources is represented by the advent of the Constitutional State, in which the almightiness of the legislator is limited by the Constitutions, understood as the highest laws in the national legal order. On account of the special procedure usually provided for their amendment, in fact, the Constitutions may not be touched by the ordinary laws of the Parliament.

This created a core of untouchable principles for the legislators – at least with regard to the rigid constitutions – guaranteed by the constitutional review of legislation (diffused, i.e. entrusted to the ordinary judges, or centralized, i.e. entrusted to a special Constitutional Court, depending on each legal order's decision).

After describing the evolution of the concept of law in the national legal orders (with exclusive regard to the European and for certain aspects American experiences), in the second part of the volume Pizzorusso investigates whether the traditional approach to the study of the legal sources is still valid.

The idea of globalization, in fact, placed the State domain of the legislative process under stress, by showing that State policy is inadequate to deal with the economic market's global dimension. Moreover, many Constitutions which were promulgated after the World War II have accepted to conceive their own as non-complete documents, requiring to be complemented by international legal sources (this is the case, for instance, of the Spanish Constitution in Art. 10).

This phenomenon of constitutional openness, as defined by Saiz Arnaiz<sup>4</sup>, put in doubt the previously described lucky binomial between law and state.

Hence, in the contemporary Constitutional State, the State legal sources are not exclusive, and the State itself no longer enjoys complete control on the genesis of the law which is applicable on its territory (the example of the EC law is also illustrative from this point of view).

Pizzorusso briefly describes the two possible approaches to this matter.

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<sup>3</sup> M. Weber, *Wirtschaft und Gesellschaft* (1922). Italian trans. *Economia e società* 53 (1980).

<sup>4</sup> A. Saiz Arnaiz, *La apertura constitucional al derecho internacional y europeo de los derechos humanos. El artículo 10.2 de la Constitución española* (1999).

The first one is founded on the principle of relativity of sources (every law has its own legal sources),<sup>5</sup> according to which the studies on these issues should be limited to the varieties of norm-producing acts or facts in the legal order, assumed as a reference mark.

The second approach is the comparative one and can be exemplified by David's work, contained in the International *Encyclopedia of Comparative Law*<sup>6</sup>.

Pizzorusso seems to accept a third way: only a systematic approach (which requires much attention to the comparison) can be of some help to capture the dynamics of the law-making process in the contemporary age but, at the same time, it is necessary to pay deference to the role still played by the State in such dynamics.

To put it in different words and quoting Beck, globalization is not the end of politics but just the projection of politics beyond the State nation<sup>7</sup>; something similar can be said with regard to law. Globalization does not mean the end of Law, just its projection beyond the State-Nation. Furthermore, this does not mean that the influence still exercised by States should be neglected: its role has changed, becoming one of the multi-layered constitutionalism's 'levels'<sup>8</sup>.

By adapting the Weberian metaphor, we could say that we moved from monopoly to oligopoly in the law-making power. According to Häberle,<sup>9</sup> in fact, the current era is characterized by the coexistence of two legal orders, characterized by partial sovereignty and partial constitution.

The scission between rules and political institutions that characterizes the contemporary era represents a new form of 'separation' in constitutional law, and it is well described by Alessandro Pizzorusso<sup>10</sup> by virtue of the distinction between cultural and political sources of law, which testifies the impact of these events on the ambit of the sources of law.

The political sources of law are the conclusive result of a debate where opposing political forces clashed in order to influence the State will's manifestation, represented by the law and its content; the cultural sources are inferred from the experience of the past (customs, judicial precedent) or from the rational analysis of legal phenomena (the role of the scholars for example). Cultural sources are not the result of an activity purposely aimed at the creation of law, and their acceptance

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<sup>5</sup> L. Paladin, *Le fonti del diritto italiano* 20-25 (1996); V. Crisafulli, Voce: "Fonti del diritto (dir. cost.)", in *Enc. del dir.* XVII 925 et seq (1968).

<sup>6</sup> R. David, *Sources of Law*, in *International Encyclopedia of Comparative Law* (1984).

<sup>7</sup> U. Beck, *What is Globalization?* (1999).

<sup>8</sup> I. Pernice, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution making-revisited?*, 36 *Common Market Law Review* 703 (1999).

<sup>9</sup> P. Häberle, *Dallo Stato nazionale all'Unione europea: evoluzioni dello Stato costituzionale. Il Grundgesetz come Costituzione parziale nel contesto della Unione europea: aspetti di un problema*, 2002 *Diritto pubblico comparato ed europeo* 455.

<sup>10</sup> A.Pizzorusso, *Fonti politiche e fonti culturali del diritto*, in *Studi in onore di T.Liebman*, I 32 et seq. (1979) and *Sistemi giuridici comparati* (1998), at 263-164.

is based on the idea that the law is not only the pursuance of the sovereign's will (the king, the people or the parliament) "but responds to the need for rationally determined justice."<sup>11</sup>

Globalization favoured the expansion of the cultural sources of law. This can be explained by the absence of a clear political power at supranational level, and it also involves problems of legitimacy in the supranational law-making process (partially connected to this issue is the very famous question of the democratic gap of the European Union).

These considerations allow us to understand Pizzorusso's proposed schematization of the legal sources in the age of legal pluralism. According to him one can classify the law-making processes as follows:

- 1) firstly, the law-making process carried out through the connection between domestic, and international and supranational legal orders (i.e. EC Law for example);
- 2) secondly, "the law-making process carried out through the connection between the State legal order and the legal orders of autonomous bodies or social groups" (i.e. regional law);
- 3) thirdly, "the law-making process carried out through other forms of connection between different states' legal orders" (the circulation of legal patterns, international private law; attempts of legislative unification);
- 4) finally, "the law-making process carried out through those legal orders not connected with the State" (i.e. transnational law), or through "illicit orders according to the domestic and international law" (Pizzorusso suggests the example of the rules of conduct internal to criminal organizations, such as the mafia).

It is clearly a schematization focused on the role still played by the State in the legal dynamics.

At a first glance this seems to be the weakest point of the book. However, paying attention to the proposed argumentation, one can see how it is the result of a clear and precise methodological choice: according to Pizzorusso, in fact, the so called 'Westphalia system'<sup>12</sup> is currently in decline, but still present.

Stepping back to the suggested schematization, the category of transnational law (by this formula Pizzorusso means the whole of the practises developed by the economic actors and characterized by a certain grade of effectiveness, irrespective of the fact that these norms may be accepted by the State) represents the most obvious proof of the "weakening" of the Westphalia system and the closest 'thing' to a real universal law.

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<sup>11</sup> Pizzorusso (1998), supra note 10, at 263-264. See also Pizzorusso (1979), supra note 10.

<sup>12</sup> The Peace of Westphalia (1648) concluded the end of 'Thirty Years War' and created a system where the States recognized each other's independence and sovereignty renouncing the idea of the unity of law beyond the Nation-State

It is interesting how Pizzorusso seems to see two possible routes for a future (albeit quite far away in the future) universal law: a universalization of law coming from the top and maybe fostered by the action of supra-states organization (but he does not currently believe in the UN Charter as a prospective UN Constitution) and a universalization from the bottom coming from the activity of these transnational actors.

Under the umbrella of transnational law – beside the *lex mercatoria* – Pizzorusso also includes the *lex sportiva* and *lex informatica* (Morand<sup>13</sup> would call these two ‘leges’ *droit anational*, to describe the lack of State control in their development).

According to the author it is impossible to describe such a transnational law as a real legal order, since it lacks a proper ‘organization’ (following the idea by Santi Romano<sup>14</sup> – as developed in Italy by Massimo Severo Giannini<sup>15</sup> – the author conceives a legal order as characterized by organization, pluri-subjectivity and norms).

In conclusion, the book by Pizzorusso- the purchase of which I recommend- presents many interesting points and offers several hints for a general reflection on the current state of the law-making process.

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<sup>13</sup> C. Morand, *Le droit saisi par la mondialisation: définitions, enjeux et transformations*, in C. Morand (Ed.), *Le droit saisi par la mondialisation* 81 et seq. and 97 et seq. (2001).

<sup>14</sup> S. Romano, *L’ordinamento giuridico* 25 et seq. (1946).

<sup>15</sup> M. S. Giannini, *Gli elementi degli ordinamenti giuridici*, 1958 *Riv. trim. dir. pubbl.* 219, at 226-239.