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A Politicized, Legal Pluralist Analysis of the Commons' Resilience: The Case of the Regole d'Ampezzo

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ABSTRACT. How does law affect the resilience of common-pool resources? To answer this question this paper adopts an institutionalist perspective on law, arguing that this shares many similarities with the approach of some legal pluralist scholars, i.e., the recognition that a social-ecological system is influenced by a plurality of legal orders having—to borrow Santos terminology—porous qualities. Studying the production and types of relationships between these legal orders can help us in determining whether a system is or is not likely to be resilient. More precisely, if the legal orders interact in a harmonious and dynamic way thanks to bottom-up as well as top-down forces, the system is likely to be resilient. This theoretical hypothesis is tested in a case study, i.e., an alpine common property in northern Italy called Regole d'Ampezzo. It becomes clear that its resilience to various shocks is due to the harmonic integration and adjustments of customary, property, and environmental laws. However, the completeness of this type of analysis is put under discussion when we move from the macro-institutional level to the micro-political one, i.e., to an analysis of intra-community power relations. Drawing on the work of Foucault on the power–subject nexus, the paper attempts to show that in the specific context of the Regole, the harmonic legal pluralist orders operate as a technique of government, perpetuating certain relationships of power between the actors of the common pool resource. At the same time, the relationships of power also contain the possibility of their reversal since, following Foucault, exercising power means acting on the actions of free subjects. The general conclusion is that a legal study of the resilience of common pool resources can benefit from a politicized version of legal pluralism.

Key Words: *common pool resources; Foucault; legal pluralism; power; Regole d'Ampezzo; resilience*

INTRODUCTION

In this paper I explore the links between law and social-ecological resilience in relation to the governance of common pool resources (also referred to in this text more generally as “commons”). Common pool resources are systems characterized by subtractability (i.e., that the use of the resource by one individual can reduce benefits available to other users) and difficulty in limiting the appropriation rights of existing users and/or in excluding potential users (Ostrom et al. 2006). Various approaches can be followed to assess the role of law in attaining socially-ecologically resilient common pool resources. One is a doctrinal analysis assessing the substantive provisions of specific legal texts for their capacity to secure the social-ecological resilience of a common pool resource. Another is a legal pluralist enquiry into processes of formation and development of the legal structure, focusing on the interactions between legal orders and underlined by an attempt to decentralize law by emphasizing the importance of multiple, nonstate sources of law. (For a theoretical review of different legal pluralist strands, see Mellissaris 2004.) Although these approaches are complementary, here the focus is on the second approach by critically investigating the relationships between different legal orders applicable to a common pool resource and considering how the social-ecological resilience of commons may be dependent on the types of interactions between these orders and how these are produced. I argue that this legal pluralist approach is also supported by an institutional perspective on law and

regulation, which is rooted in the writing of common pool resources scholars who are influenced by new-institutional economics (see, for example, Ostrom 1990, Schlager and Ostrom 1992, Ostrom 2005), and this is the reason why I refer to this as the “macro-institutional view”. For common pool resources writers, institutions are “the rules of the game in society” (North 1990:3). Since both customary norms and (state) legal rules are comprised within the definition of “rules of the game”, it can be argued that the institutional writings of common pool resources scholars are attentive to legal pluralist structures, although many of these texts do not explicitly employ the term “legal pluralism”, apart from the work of Meinzen Dick and Pradhan (2001, 2002) which discusses the concept of legal pluralism in relation to water rights.

Common pool resources scholarship can also be linked to another body of literature, that of resilience. These literatures share many analytical preoccupations and have many points of contact: from the emphasis on multilevel governance and cross-scale interactions, to the attention to context and dynamism of social-ecological systems, and, finally, to a search for variables (design principles) that are likely to foster systemic resilience (see Ostrom 1990, Berkes et al. 2003, Lebel et al. 2006, and Cox et al. 2010) This paper offers a contribution to the growing body of literature that explicitly links the resilience approach to common pool resources—i.e., Anderies et al. 2004, Berkes 2006, Schlüter and Pahl-Wostl

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2007, Armitage 2008, and the special feature on resilience and adaptation of the *International Journal of the Commons* edited by Janssen in 2011—by arguing that attention must be paid to the production and types of connections between legal orders when assessing the social-ecological resilience of common pool resources. My hypothesis is that legal pluralist orders can contribute to the social-ecological resilience of the commons if they are harmonic and dynamic due to their mutual adjustments being produced by both bottom-up and top-down forces. This is due to the fact that they confer to the common pool resources the ability to adapt to different challenges and shocks without losing their fundamental identity. Conversely, disjunctures and contradictions between legal orders have the potential to put at risk the resilience of the commons.

However, drawing on Foucault's analysis of power relations and subject formation (Foucault 1982), I also aim to show that concentrating solely on the macro-institutional level to understand the impact of legal pluralist structures on the resilience of common pool resources risks overlooking their role as a technique of power in the Foucaultian sense, thus (re) producing particular knowledges and relations between individuals or groups of the common pool resources. The exercise of power is a question of government for Foucault, where to govern is to “structure the possible field of action of others” (Foucault 1982:221). This implies that the freedom to act is an essential ingredient of each power relation so that the subjugated individuals/groups have latent opportunities for reversing the relation of inequality within the field of power they are part of. Consequently, an analysis of power relations must also include an analysis of the “strategies of struggle”. By linking the macro-institutional analysis with a micro-political one, the legal pluralist assessment of the resilience of common pool resources is politicized.

A case study in the second section of the paper tests the discussion. The case study is an upland common property in the northeastern Italian Alps, known by the name of the Regole d'Ampezzo (translation “Rules of Ampezzo”). The territory of the Regole, lying at the heart of the Dolomites World Heritage Site, is considered one of the most successful community conserved areas in Italy (see Lorenzi and Borrini-Feyerabend 2009). I argue that this success is due to the existence of a harmonic and dynamic pluralist legal structure, where customary, property, and environmental legal orders at local, national, and European levels are well integrated and facilitate each other's development. However, this conclusion obscures the existence of gender inequalities that can be observed if the focus of the analysis switches from the macro-institutional to the micro-political level, i.e., from the interconnections between legal orders to the way these interconnections may affect the relationships between the actors of the social-ecological system. This is not intended as a generalization because harmonious legal pluralism does not always facilitate the perpetuation of unequal power relations.

The effects of harmonious legal pluralism on power relations are in fact always context specific and may serve to empower marginalized groups but this does not erase their political value. The key point is that the relationship between resilience and legal structures must be politically grounded.

THEORETICAL FRAMEWORK

Introducing social-ecological resilience

Resilience has different meanings depending on the disciplinary and temporal context in which it is employed. To avoid conceptual ambiguity, it is important to define what is meant by resilience in the context of this article. Following the conceptual division in Brand and Jax (2007), this paper focuses on resilience as a boundary object rather than as a descriptive ecological concept in that it looks at resilience as an interdisciplinary perspective to understand complex social-ecological systems, as elaborated by Folke (2006). Adopting a social-ecological resilience perspective serves to erase the dichotomy between society and nature by focusing on the mutual constitution of people and their environments in the face of change and uncertainty and on the importance of understanding human systems in studying the functioning of ecosystems. A system is resilient when it is capable of absorbing shocks and adapting to new circumstances, while retaining key traits of its original identity. This includes not only its social but also ecological identity as there are certain ecological boundaries that cannot be passed without causing detrimental and final crashes in the ecosystem. Therefore, resilience does not mean opposition to change; rather adaptivity, both in terms of governance and ecology, is considered to be a strong component of a resilient social-ecological system (Folke et al. 2005). Folke et al. (2010) distinguish between adaptability as the capacity of actors to accommodate change while maintaining the social-ecological system in the stability domain, and transformability as the capacity to cross thresholds and move to new domains. As recognized by Walker et al. (2004), resilience can constitute a powerful basis for sustainability, emphasizing adaptive resource management.

In the last decade both empirical and theoretical studies on the resilience of social-ecological systems have flourished, yet in the field of legal studies social-ecological resilience scholarship is still in its infancy. However, as Ebbesson (2010) notes, the resilience perspective should be taken into account by lawyers because it can help in the critical assessment and reconsideration of laws and legal concepts. Also, specific laws can be tested using the lens of resilience so that recommendations can be made to integrate resilient legal components into their texts. For example, in the field of nature conservation law, this type of analysis has been carried out by Trouwborst (2009, 2011) who has assessed key international and European legal conservation instruments from the perspective of resilience and adaptation to climate change. My

purpose, however, is not to follow this line of inquiry, but to explore the link between law and resilience by looking at the way in which the types of interactions between legal orders and the way they are produced influence the resilience of a social-ecological system, as the next session discusses.

Institutionalist perspective on resilience and its link with legal pluralism

Common pool resources scholars are well known for overcoming the “tragedy of the commons” argument by pointing out that neo-Malthusian theories and the classic formulation of game theory underplayed the role of institutions in shaping actors’ behaviors in the context of common pool resources. Since the early 1990s, common pool resources scholars have revalorized the commons’ spaces, drawing attention to a myriad of empirical cases on institutional management of shared resources. A leading figure of this scholarly enterprise has been and continues to be Ostrom (Ostrom 1990, Schlager and Ostrom 1992, Becker and Ostrom 1995, Ostrom 1999, Ostrom 2005). Against the orthodox recommendation to solve the commons problem through an exogenous policy (either through private property or state centralization), Ostrom’s early research demonstrated that certain of the commons’ users are capable of organizing small-scale collective institutions to manage the common pool resources in question (Ostrom 1990). In *Governing the Commons*, Ostrom gathered examples of successful management of small-scale commons in different geographical contexts and extracted eight design principles that characterize enduring and robust common pool resources (Ostrom 1990:80). The design principles are: 1) clearly defined boundaries and clearly defined membership of use-rights holders, 2) congruence between appropriation and provision rules and local conditions, 3) collective choice arrangements, 4) monitoring by appropriators or by monitors accountable to the appropriators; 5) graduated sanctions; 6) low-cost conflict-resolution mechanisms; 7) external recognition of self-organization, and 8) multiple layers of nested enterprises if the common pool resource is part of a larger system (Ostrom 1990:90).

Although *Governing the Commons* is a key contribution to academic research on the governance of commons, its focus on the determination of a set of design principles for successful governance of isolated local systems has potentially dangerous effects if translated into practice without further consideration, which would result in management approaches that are too prescriptive and that ignore the wider political, economic, and legal contexts. Moreover, understanding institutions in terms of robustness may conflict with resilience thinking because it can push towards a rigid understanding of sustainability as stability and endurance, rather than as resilience. These dangers have been recognized over the years by common pool resources’ scholars, who now point to the limitations of one-size fits all solutions, arguing that there is no singular panacea

for resolving the social-ecological systems’ problems and stressing the importance of acknowledging polycentric dynamic systems and cross-scalar institutional links in the management of common pool resources (Ostrom 2007, Ostrom 2009 and Heikkila et al. 2011). Similar critiques of the early institutional approach of common pool resources scholars have also been raised by legal scholars (Rose 2011). The recent work of common pool resources scholars calls for contextualization, flexible governance, nested institutions, and diagnostic approaches.

The institutionalists’ shift of emphasis from bounded, small-scale governance systems to multilevel governance systems brings out the dynamism and multifaceted nature of this renewed analytical framework, which perfectly fits with the resilience literature. In the words of Berkes (2006:46), the commons’ management is now understood as “the management of complex systems, with emphasis on scale, self-organization, uncertainty and emergent properties such as resilience”. By understanding institutions as the rules of the game and focusing the attention on polycentric governance systems, the current institutional approach to common pool resources has many points of contact with legal pluralist analyses. Significantly, the law that gains prominence in institutional analyses of the commons’ resilience is not only the law of the state, because institutions comprise rules at different levels of decision making and are dynamic places where legal learning can unfold. Clearly, this perspective shares many attributes with some legal pluralist analyses as developed in the field of the sociology of law, where the types of interactions between different legal orders help to explain how governance emerges and to assess how it develops in a given context. It should be noted in passing that not all legal pluralist perspectives would fit with the institutional perspective on the commons’ governance. For example, Teubner’s system analysis places too much emphasis on the self-referentiality of systems and on the processes of translation that are the distorting filters disabling direct communication and responsiveness between systems (Teubner 1997).

It is worth recalling the concepts of interlegality and porosity coined by de Sousa Santos to understand the connections between the institutional perspective on law as highlighted above and the legal pluralist literature. Employing a legal pluralist perspective, de Sousa Santos urges scholars to recognize that “we live in a time of porous legality or of legal porosity Our legal life is constituted by an intersection of different legal orders, that is, by interlegality Interlegality is a highly dynamic process” (de Sousa Santos 2002:437). The concepts of interlegality and legal porosity point to the fallacy of understanding legal orders as self-enclosed, autonomous units and invite reflection on the ways in which they become mutually constitutive, or as de Sousa Santos himself puts it, how each can be defined “in relation

to the legal constellation of which it is a part” (de Sousa Santos 2006:46). This analysis is not far from the institutionalists’ emphasis on nested institutions and polycentrism since it also places emphasis on the dynamic relationships between different legal spheres, thus decentering law and regulation.

Politicizing the institutionalist/legal pluralist perspective

One key challenge in approaching and assessing the resilience of common pool resources posed by a theory focused on depicting the interactions between legal orders is to what extent this theory leaves scope for considerations of power relations among the actors of the social-ecological system under analysis. The work of institutional scholars is primarily policy oriented and consequently issues of power and resistance at the micro-level have not been explored very often in the literature. This limitation has been recognized by scholars such as Zwartveen and Meinzen-Dick (2001) and Agrawal (2003) who have criticized the institutional literature on common pool resources for not examining micro-articulations of power relations and unequal distribution of resources. In Agrawal’s (2003:257) words: “Perhaps the most striking question for theorists of commons lies in arguments about the extent to which they attend to intra-group politics and issues of power and resistance. In their preoccupation with sustainable management and successful institutions, they may have ignored the possibility that all successful enforcement institutions are also coercive, and the burden of coercion tends to fall unequally on those who are less powerful.” A similar criticism can be raised against legal pluralist scholars. The main interest of legal pluralists has been to identify and discuss the types of interrelations among legal spheres without asking how these interrelations at the macro-level can affect power relations at the micro-level, although there are few exceptions (Walby 2007, Shariff 2008). To avoid such analytical omissions, a legal assessment of the resilience of a social-ecological system at a macro-institutional level (i.e., the interactions between various legal orders) should be complemented by an analysis of the micro-political, i.e., the power relations among actors within the social-ecological system.

This type of analysis finds its theoretical inspiration in the work of Foucault, especially his essay entitled “The Subject and Power” (1982), where Foucault reconciles his interest in understanding how power is exercised, which permeated his earlier writings (see, for example, Foucault 1975 and Foucault 1976), with his recent interest on the formation of subjects (see Foucault 1984a and Foucault 1984b) by arguing that throughout his career he has attempted to “create a history of the different modes by which, in our culture, human beings are made subjects” (Foucault 1982:777). According to Foucault, studies of the power-subject nexus have drawn too narrowly on models concerned with legally legitimate power and with the institution of the state as the sole source of authority. His intellectual task therefore has been to go beyond

this understanding of power as state command searching for modes and technologies of power permeating the body of society and reconceptualizing power as a “total structure of actions brought to bear upon possible actions” (Foucault 1982:789). Playing on the equivocal meaning of the reflexive verb “to conduct” in French, Foucault argues that to exercise power is therefore to (se) conduire. “For to ‘conduct’ is at the same time to “lead” others and a way of behaving within a more or less open field of possibilities” (Foucault 1982:789). Consequently, power does not stem from a single source (the state) directly commanding subjects but it is exercised by various means and technologies, internalized within the body of the society producing a particular relationship of inequality between people. Moreover, these relations of power can, at any time, be subverted because power “is a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action” (Foucault 1982:789). Each relation of power contains the seeds of resistance because the modes and technologies by which power is exercised can be strategically appropriated by the subjugated actors to attain their freedom.

Applying the Foucaultian perspective on power relations to the present study of the resilience of common pool resources means erasing the assumption of a-political legal pluralist structures. The first step in this process of politicization is to ask whether harmonic legal pluralist structures are a technique of power, holding an instrumental role in reproducing power relations among the actors of the social-ecological system. However, interrupting the analysis at this stage would mean picturing subjects as passive objects of legal structures, disregarding their agency. Therefore the second step in the politicization of legal pluralism is to look at the “strategies of struggle” used by actors as a means of empowerment. This theoretical framework is tested below to discuss the resilience of an alpine common in northern Italy.

CASE STUDY

Regole d’Ampezzo

Although private property is the dominant form of land tenure in contemporary Italy, some common properties persist, especially in the Alpine territories. The Regole d’Ampezzo, located in the municipality of Cortina in the Veneto region, is one example of the resilient common properties that have been able to absorb different shocks without radically changing their identity. First of all, the customary governance system of the Regole will be outlined, followed by a discussion of the shocks suffered by the system. Although these shocks could have seriously undermined the resilience of the Regole, this has not happened. The reason seems to lie in the harmonious dynamic interactions between different legal orders affecting the social-ecological system in question and the way they have been produced. However, it will also be evident that the apparent resilience of the Regole comes at a social cost, namely

Table 1. Organs and functions of the Regole's customary governance system.

Organs	Membership	Functions
General Assembly	All <i>Regolieri</i> registered in the Community Land Registry.	Adopting Orders concerning the regulation of the <i>Regole</i> . Orders are adopted by two-thirds majority vote.
Assembly of Deputies	22 members, of which 11 are elected by General Assembly with a 3-year mandate and 11 are <i>Marighi</i> (heads of individual <i>Regole</i>) with a 1-year mandate.	Administrative powers. Decisions are taken by absolute majority vote and a quorum is constituted by 15 deputies.
Executive Committee	President and 6 deputies.	Taking decisions on emergency matters and proposing programmes for the activities of the Assembly of Deputies as well as executing Orders of the General Assembly.
College of Majors	3 permanent and 2 temporary majors, elected by the General Assembly among the <i>Regolieri</i> .	Monitoring and accounting powers.
Judging Commission	3 <i>Regolieri</i> (with one presiding), nominated by two parties in dispute. The <i>Regolieri</i> have no legal training but are chosen because of their local experience and "ancient" knowledge of the environment, although they are assisted by legal officers.	Resolving disputes arising between <i>Regolieri</i> . If a dispute cannot be resolved internally the parties may decide to settle the dispute through the ordinary Court.

the permanence of gender inequalities within the system. This observation serves to highlight the limitations of a legal assessment of resilience that focuses only on the macro-institutional level, as the permanence of gender inequalities can only be accounted for if we switch to the micro-political level.

Customary governance system of the Regole

The common property of the Regole d'Ampezzo has a rich institutional history, much of which is inscribed in local codes called *Laudi* (sing. *Laudo*), dating back to the thirteenth century. At present there exist eleven *Regole*, each with its own *Laudo* and all sharing an overarching *Laudo*, called the Community *Laudo* 2007. The *Laudi* contain administrative, constitutional, and property customary rules and therefore are the key sources to understanding the internal governance system of the *Regole*. The common property rights holders are known by the name of *Regolieri* (sing. *Regoliere*). In accordance with "ancient" custom, the title of *Regoliere* (plur. *Regolieri*, name by which property right holder is known) is hereditary. As an alternative to inheritance, there is also the possibility to "acquire" the title of *Regoliere* by lapse of time or by demonstrating financial or labor contributions to the commons. However, this needs to be decided on a case-by-case basis and requires complex administrative procedures to be approved (Community *Laudo* article 5(b)) (Community *Laudo* 2007). Article 5 of the Community *Laudo* entitles male children of the *Regolieri* to assume the title of *Regolieri* at the age of 25 and to have their names registered in the Community Land Registry. By contrast, women are registered only if there are no male descendants in the family. Moreover, if they marry, they can maintain and pass their rights to their offspring only

if their husbands are themselves *Regolieri*, otherwise they will lose their rights (article 7 of the Community *Laudo*). Only the *Regolieri* who are registered in the Community Land Registry are granted common rights (article 8 of the Community *Laudo*). The rights guarantee access to resources (the right to graze animals on the common and the right to cut timber) and participation in decision making (the right to vote and participate in decisions affecting the community). Regulations annexed to the Community *Laudo* outline the functions of the main organs of the common property and specify the conditions for exercising common rights, thus providing for a rigorous democratic system of decision making, monitoring, and sanctions for misconduct (Table 1).

Legal, economic, and environmental shocks

It can readily be observed that this is a sophisticated local governance system with well defined social boundaries and a high level of surveillance and monitoring, thus satisfying Ostrom's design principles for successful common pool resources. However, this system has been challenged by legal, economic, and environmental shocks. The legal shock refers to the detrimental effects of the 1927 national law on the commons (Law n. 1766 of the 16 June 1927). The 1927 law, powered by ideals of agrarian capitalist development, divided the commons under two categories: a) fell lands suitable for pasture and forest use (such as the *Regole* d'Ampezzo), and b) lands suitable for cultivation (article 11). The latter were destined to privatization through a subdivision in quotas, while the former were still subject to the exercising of rights of common but the ownership of the lands passed to the municipality or to agrarian unions. The way the law dealt with the first category took its inspiration from the governance

model of Southern Italian commons where rights of common existed over manorial lands, yet this was a model that the common properties of northern Italy never shared.

As for the economic shock, for many decades, the selling of timber constituted the principal revenue for the Regole. However, recently the demand for local timber has declined dramatically, principally due to the competitive prices of eastern European timber as well as of the timber of other Italian valleys. This has led many Regolieri to abandon their exercising of the common right to cut timber. Finally, the Regole has also been challenged by an environmental shock since extensive areas of the Regole's territory have been legally designated to protect important and vulnerable species and habitats, from migratory birds such as hazel grouse to plants such as the lady's slipper orchid. The territory of the Regole now hosts the Regional Park of the Dolomites as well as Special Protection Areas (SPAs) and Sites of Community Importance (SCIs), all falling within the Alpine biogeographical region and designated under the 79/409/EEC Wild Birds Directive and the 92/43/EEC Habitats Directive. The Sites of Community Importance designated in the Regole territory are: Gruppo Monte Pelmo-Mondeval-Formin Site of Community Importance (SIC IT3230017), the Gruppo Antelao-Marmarol-Sorapis Site of Community Importance (SIC/ZPSIT 3230081), and the Dolomiti d'Ampezzo (SIC/ZPS IT3230071). Case law and statutes have taught us that the boundaries of protected areas of European sites are to be designated on scientific grounds alone. As socioeconomic considerations cannot be taken into account at the designation stage, this could have triggered a conflict between the demands of environmental law and those of common property rights holders. However, as clarified below, this has not happened and the resilience of the Regole has not been jeopardized.

From a macro-institutional perspective, the Regole's ability to absorb these shocks can be explained as the product of the harmonic integration and responsiveness of different legal spheres due to bottom-up as well as top-down forces, as discussed in the following section.

A legal pluralist explanation of the Regole's resilience

To overcome the legal shock, the Regole began a process of resistance, reclaiming ownership and statutory autonomy. The matter was first heard by the commons commissioner for the provinces of Trento, Bolzano, and Belluno. Commons commissioners were a statutory body established in 1927 to determine the ownership of the commons and settled related disputes. With the order (sentenza) 24.10/27.12.1947 the commons commissioner declared that the ownership of the Regole's lands was to pass to the municipality and this implied that they become subject to the uses of the whole municipality of Cortina, rather than only of the traditional holders of rights of common. After losing in the Court of Appeal, the Regole referred the matter to the Supreme Court of Cassation but the

appeal was abandoned when the municipality of Cortina and the Regole achieved a compromise in 1957 approved by the city council whereby around 1500 ha of lands were assigned to the municipality and almost 17,000 ha to the Regole (Romagnoli 1986). Therefore, the key variable that transformed the relationship from a difficult to a harmonious one was the Regole's bottom-up legal resistance to the juridical wall created by the 1927 law. The statutory autonomy of common properties was then recognized by different national property laws, such as the law n. 1102 of 3 December 1971 and the law n. 97 of 31 January 1994 that I discuss below.

As for the economic shock, agricultural diversification has become essential in challenging the crisis of the timber market. The geophysical characteristics of the Ampezzo valley make it attractive for the development of skiing infrastructures, so that national and regional property laws have enabled the Regole to exploit part of the collective property for tourism developments whilst employing the language of the *Laudi* by stressing the "ancient" connections of the Regole and other mountain common property institutions to their lands. Indeed, under the 1971 property law the Regole can use part of their land for tourism developments, provided compensatory remediation measures are taken (article 11 of the Law n.1102 of 3 December 1971). This has been reiterated by the law n. 97 of 31 January 1994 property law setting provisions for mountain areas. Article 3 of the 1994 law confers to the Regole and other mountain common property institutions legal personality under private law, it affirms their statutory autonomy while assigning to the regional bodies the role of guaranteeing the participation in the management of the commons of all representatives "freely chosen" by the common property rights holders, as well as the power to authorize some forms of development of the land. In line with the 1971 law, the 1994 law stresses that land can be developed for tourism projects as long as it is not detrimental for the conservation of "the ancient" agro-sylvan-pastoral goods. The language of the *Laudi* has permeated property law, as is apparent from the recurrent use of the loaded term "ancient" in property laws. Moreover, not only property laws have recognized the value of the *Laudi*, but also the reverse process has occurred. Article 3 of the Regulations annexed to the Community *Laudos* now allows change of use of land in favor of tourism development. Following these changes many Regolieri have become active participants in the tourist industry.

To respond to the environmental shock, diversification has also involved an environmental re-orientation of the Regole's activities, again enabled by responsive and dynamic institutions. The environmental designations on the Regole's territory in fact have not triggered conflicts between the (private) interests of the Regolieri and the (public) interests of nature conservation bodies. On the contrary effective community-based natural resource management has thrived.

The environmental law (law n. 21 of 22 March 1990) establishing the regional Park of the Ampezzo Dolomites has entrusted the Regole with the direct and autonomous management of the Park, pursuant to the provision of article 7(1) of the law n. 40 of 16 August 1984 on parks. The Convention specifying the Park's management criteria states that this managerial power has been granted to the Regole due to the "specificity of the ancient forms of management of the Ampezzo natural heritage, by them [the Regole] preserved and protected for hundreds of years" (Convenzione del 30 Ottobre 1990). This is an exceptional innovation for the history of park management in Italy, which has seen parks always managed by public bodies. Also visible is once again the use of the adjective "ancient" this time in environmental law texts as a proof of the sustainability of the Regole.

In relation to European conservation sites, it appeared that the same degree of managerial power could not be enjoyed by the Regole since the 1997 Decree implementing the Habitats Directive into Italian law conferred on the regions and the autonomous provinces normative and managerial powers and responsibilities in relation to Natura 2000 sites (Decree of the President of the Republic n. 357 of 8 Sept 1997). However, the Decree n. 3 of 24 September 2002, outlining the guidelines for the management of Natura 2000 sites, empowers the regions and autonomous provinces to choose, where possible and appropriate, another management body, including mountain communities and park authorities. This option has been taken on board by the Veneto region. Under a Decision of the regional council (n. 4572 of 28 December 2007), mountain communities and park authorities can submit a request to the Region for drafting management plans of European sites in their territories. It is worth recalling that article 6(1) of the 1992 Habitats Directive states that the management of European sites can include "if needed be, appropriate management plans". The decision states that this prerogative is granted to mountain communities and park authorities in recognition of their thorough and "ancient" knowledge of the local environment. The Regole submitted a request and they are listed in Annex I of the 2007 Decision as the body responsible for the drafting of the management plan for the Special Protection Area falling within their territory.

From this analysis it becomes obvious that the resilience of the Regole owes much to the responsiveness and discursive interconnections of legal domains at different scales, from local statutes to the regional implementation of European Directives, and the way they have been produced. Employing an institutional perspective to understand the commons' resilience serves to acknowledge that a social-ecological system is governed by an array of interacting legal domains. It could be concluded that in cases like those of the Regole where this interaction is harmonic and permits mutual adjustments and developments thanks to bottom-up as well as top-down forces, the system is likely to be resilient.

Conversely, a system's resilience is jeopardized in situations where there are disjunctures between different legal spheres. Nevertheless, this legal pluralist analysis does not consider relations of power between actors at the micro-level and therefore it can only offer a partial assessment of the system's resilience.

Politicizing the Regole's resilience

The harmonic dynamism between legal spheres recognized above as a fundamental determinant for ensuring the resilience of the Regole is also a means by which power, in the Foucaultian sense, is exercised. This is mostly evident in relation to the discursive reproduction of power by environmental and property laws. Absorbing the language and discourses of the Laudi environmental and property laws emphasizes the importance of the "ancient" ties the Regolieri have with the land and their "ancient" knowledge, and guarantees that commons representatives are "freely chosen" in conformity with the Laudi, thereby contributing to the idealistic/simplistic representation of the Regole as a bounded homogenous community and failing to question the gender inequality at its heart.

At the same time, as power is always exercised on free subjects, "there is no relationship of power without the means of escape or possible flight" (Foucault 1982:794). Indeed, the Regolieri are not passive subjects of the power of legal discourses and orders but some of them critically engage with them in order to resist power. Indeed, when conducting semistructured interviews with a sample of Regolieri in 2008, many openly discussed the gendered social structure of the Regole embodied by article 7 of the Laudo and its effects on unequal access to resources and participation in decision making. The question of the unconstitutionality of article 7 of the Laudo was even put before the Constitutional Court in 1988 but it was declared inadmissible by the Court as it related to customary rules not having the force of law. At present, a group of Regolieri is re-opening the question of the rights of women within the Regole system. This group has proposed amending article 7 of the Laudo so that all women can inherit rights in the same way as men and be registered in the Community Land Registry. Under article 8 of the Regulations annexed to the Community Laudo, amendments to the Laudi are to be proposed by the Assembly of Deputies and approved by the General Assembly. However, article 8 also enables a group of 40 Regolieri to present proposals for amending the Laudo to the General Assembly as long as they notify the Assembly of Deputies 30 days before the General Assembly meeting. Interestingly, in an article on this topic by Ghea published in the Regole's bulletin, the need to harmonize different legal spheres is actually used as a justification for proposing the registration of all women in the Community Land Registry (Ghea 2011). It is stated that the amendment of the Laudo for ensuring gender equality would bring the Regole in line with the Italian constitution and other national laws (Ghea 2011).

Therefore, although the Constitutional Court of Italy dismissed the question of the unconstitutionality of the Laudo, the relationship between the constitution and the Laudo has been re-examined in the context of the gender debate and the discourse of harmonious legal pluralism is actually strategically employed by some Regolieri to voice the gender struggle, thereby exemplifying the “locking together of power relations with relations of strategy” (Foucault 1982:795).

CONCLUSION

The relationship between law and resilience has so far not received much attention in the literature on resilience of social-ecological systems. In this article I have attempted to shed light on this relationship concentrating on common pool resources. I have explicitly linked the institutional literature on commons with legal pluralism, showing that both academic strands point the analytical cursor on polycentric governance and cross-scalar institutional interactions between legal orders. Although the focus has been on European, national, and sub-national law, future work could consider the role played by international law (for example the World Heritage Convention 1972 (UNESCO 1972)) within this pluralist legal framework and its effects on the production of the Regole's identity. Looking at the types of interrelationships between legal orders and how these are produced may help scholars in assessing the resilience of a common, provided they are backed up by substantive legal provisions that facilitate its resilience. If the legal orders are harmoniously interacting and dynamically adjusting to one another thanks to bottom-up as well as top-down forces, then it is likely that the common in question will be resilient. However, drawing on Foucault's theory of power and the subject, I have also pointed out that a macro-institutional focus on the interactions of legal orders to assess the social-ecological resilience of a system must be complemented with an analysis of the power relations at the micro-level.

The theoretical discussion has been grounded in an empirical reality, using a case study of a common property situated in the Italian Alps, whose resilience to external shocks has been rendered possible by the harmonic integration and mutual development of different legal orders. At the same time, the switch from the macro- to the micro-level of analysis revealed the way in which harmonic legal pluralism in this setting actually leave gender inequalities unaltered. Indeed, by respecting and recognizing customary rules, property and environmental laws do not question the gender discrimination at the heart of the Regole system, thus perpetuating the narrative of the Regole as a bounded community. However, harmonic legal pluralism as a discourse can actually be strategically appropriated by subjugated actors as a means of empowerment, and therefore the analysis of power relations at the micro-level also needs to highlight “strategies of struggle”. Politicizing the legal analysis by integrating an analysis of micro-issues of power into the assessment is

therefore essential in developing a certain caution before asserting whether a social-ecological system is resilient or not. Needless to say the analytical framework proposed in this paper is tentative and its value can be tested only by applying it to the study of resilience in other case studies.

Responses to this article can be read online at:

<http://www.ecologyandsociety.org/issues/responses.php/5138>

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