

This article is published in a peer-reviewed section of the Utrecht Law Review

Does legal institutionalism rule out legal pluralism? Schmitt's institutional theory and the problem of the concrete order

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Introduction

The present paper explores the background of Carl Schmitt's legal theory and in particular his endorsement of the institutional theory of law developed in France by Maurice Hauriou and in Italy by Santi Romano. I will argue that although the encounter with the institutional paradigm allows the German author to overcome some serious weaknesses of his previous view on law, he at last sets forth a conservative and even reactionary view which is at odds with the basic tenets of legal institutionalism.

To this end, I will follow a twofold path. First, I will examine what we may label the 'institutional turn' of Schmitt by focusing on the essential features of his theoretical framework. Second, I will highlight the strengths of legal institutionalism by attending to the theoretical proposal of Romano – explicitly recalled (and at once highly misinterpreted) by Schmitt – who, unlike Hauriou, establishes a firm link between the theory of institution and legal pluralism.

While the German jurist draws on Romano's view (and the institutionalism paradigm in general) in order to prove the intrinsic incompatibility between the concrete order of a political community and social pluralism, Romano demonstrates that, once we accept that the institution is the core of legal phenomena, we must conclude that not only society but also the law is plural. In this framework, the comparison of Schmitt to Romano will shed some light on the pivotal relation between law and pluralism. Actually, *pace* Schmitt, the point of disagreement between them is whether the law is a means for preserving identity and excluding diversity, as the German author suggests, or a form of organisation which inevitably reflects the plurality of social life, as the Italian scholar contends.

In Section 1 I will explain concisely the way Schmitt's encounter with legal institutionalism affects his view on law and its relation to the question of political sovereignty. In Sections 2

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and 3 I will scrutinise both the theoretical and the socio-anthropological assumptions lying behind Schmitt's legal view and his identitarian understanding of politics and law. In Section 4 I will argue that, even in light of his renewed understanding of law, Schmitt does not abandon but only tempers the decisionist stance of his earlier works and that this leads him to postulate a continuing conflict between law and plurality. Thereby, in Section 5, I will outline the institutional proposal of Romano, so as to show the way in which he discloses the intrinsic link between law and plurality; at the same time, I will illustrate some flaws of Romano's position and, after suggesting some possible amendments, I will explain why his institutionalism may give us important insights into the nature of law and organisational dynamics in general.

1. Schmitt's legal turn: from decisionism to institutionalism

*Über die drei Arten des rechtswissenschaftlichen Denkens*¹ (*On the Three Types of Juristic Thought*), published in 1934, represents a decisive step in the development of Schmitt's theoretical framework. In this slim but dense volume, the German theorist makes an institutional turn, in that he draws on the institutional theory of Hauriou and Romano so as to provide a personal institutional perspective on law, which is generally known as '*konkretes Ordnungsdenken*' (concrete-order thinking). By virtue of this institutional turn, he manages to solve a persisting problem – which seriously affected his previous works – concerning the *grounds* and the *subject-matter* of the political decision that, in his view, is at the basis of every political order.

It is well known that in the works written in the 1920s, and in particular in *Politische Theologie* (firstly published in 1922), Schmitt contends that the existence and subsistence of a political community is essentially tied to the decision of a sovereign, who has to *decide* (i.e. to *cut out*, as the Latin *de-cidere* and the German *Ent-scheiden* well express) all the components of the society which are deemed to be heterogeneous with respect to the bulk of the community.² The homogeneity of the *demos*, preserved by the sovereign's decision, is the condition of possibility of any communitarian form of life, which otherwise would be inevitably destroyed by a growing and chaotic pluralism. In *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, first published in 1923, the German scholar forcefully argues that this polemic-identitarian dynamic is also at the basis of well-functioning democracies, in which equals are treated as equals whereas unequals are treated as unequals.

Nonetheless, this decisionistic viewpoint leaves a fundamental problem unsolved, i.e. on what can the sovereign found his decision? In the 1920s, Schmitt was convinced that that the political decision must be a pure one, i.e. 'not based on reason and discussion and not justifying itself, that is, (...) an absolute decision created out of nothingness'.³ A few years later, in *On the Three Types of Juristic Thought*, Schmitt unfolds a notion – the 'concrete order' – that seems able to solve this problem and thus to amend and enhance his political and legal theory. In this fertile writing he outlined a concept of social order which no longer depends on the *arbitrary* and *unquestionable* decision of a sovereign. Now, the sovereign is necessarily required to take into account the social fabric which is the genuine addressee of her/his indications.

1 C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, 1993.

2 See also C. Schmitt, *Constitutional Theory*, 2008 (originally published in 1928), in particular Sections 3, 8, 9 and 19 on the concept of a constitution as a 'total decision' and on the constitution-making power as the last decider on the social order.

3 C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, 1985, p. 66.

The institutionalist shape taken by Schmitt's legal view and his renewed interest in the normative dynamics of social life explain why many interpreters⁴ today assert that Schmitt's legal theory provides fruitful suggestions for capturing the variables and explaining the developments of the current legal and political scenario, at both a local and a global level. In particular, some of those interpreters⁵ contend that the concrete-order thinking is a dependable portrayal of the way the legal order works in social life and that the criticisms of Schmitt shed some light on what is able either to enhance or to reduce its good functioning.

Quite the opposite, it is my claim that the theoretical apparatus of Schmitt's institutional theory is firmly linked with certain conservative and reactionary assumptions which turn out to dismiss the value of most observations and proposals.

In the following pages, after showing some strengths of Schmitt's proposal, I will analyse the theoretical basis of his institutional turn so as to illustrate two points. First, the socio-anthropological grounds of his view on institutions – namely, his conclusions as to the relation between the nature of human sociality and the functions of the legal order – are fatally flawed. Second, the conceptual grid he draws may hardly help us understand our current legal and political problems at both the domestic and the global level. Actually, while, today, one of our major problems relates to the way we can create new arrangements for settling the growing conflicts due to the political, legal, religious and moral pluralism, Schmitt's theory endorses a view of politics and law which envisages discrete and sealed-off communities, built on a fabric of homogeneous and nested institutions. On Schmitt's reading, institutional theory appears to be in serious conflict with the theory of legal pluralism, i.e. the view which defends 'the *theoretical possibility* of more than one legal order or mechanism within one socio-political space, based on different sources of ultimate validity and maintained by forms of organization other than the state'.⁶

This sounds paradoxical if we think that one of the founding fathers of legal pluralism is precisely Romano, whom Schmitt quotes for corroborating his anti-pluralist institutional understanding of law. The Italian jurist names the two chapters composing his book: 'The concept of legal order' and 'The plurality of legal orders and their relations'. To solve this puzzle I will examine their respective theory of institution so as to verify whether or not the same signifier refers to the same signified.

2. The relevance and the critical force of Schmitt's institutionalism

Most of the critical remarks uttered by Schmitt throughout *On the Three Types of Juristic Thought* are directed at those positivist theories that claim to defend a strictly formal normativism but in reality consist of a spurious mixture of normativism and decisionism. Accordingly, the kind of normativism advocated by legal positivists is a *heteronomous, abstract and dangerous*

4 See e.g. A. Carrino 'Carl Schmitt and European Juridical Science', in C. Mouffe (ed.), *The Challenge of Carl Schmitt*, 1999, pp. 180-194; A. Carrino, *Oltre l'Occidente*, 2005; M. De Carolis, *Il paradosso antropologico*, 2008; M. Koskeniemi, *The Gentle Civilizer of Nations*, 2003; W.E. Scheuerman, *Carl Schmitt: The End of Law*, 1999. Also of particular interest, although not directly tied to Schmitt's legal theory, is the reconstruction of Schmitt's thought by A. Kalyvas, *Democracy and the Politics of the Extraordinary*, 2008, Chapter 2.

5 Especially Carrino, supra note 4.

6 F. Von Benda-Beckmann, 'Who's Afraid of Legal Pluralism', 2002 *Journal of Legal Pluralism and Unofficial Law* 47, pp. 37-83, p. 37. More in general, legal pluralism, no matter how it is conceived, is altogether incompatible with what John Griffiths calls 'the ideology of legal centralism', according to which 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions', while all other social orderings present in society 'ought to be and in fact are hierarchically subordinate to the law and institutions of the state' (J. Griffiths, 'What is Legal Pluralism?', 1986 *Journal of Legal Pluralism and Unofficial Law* 24, pp. 1-55).

legal thought. It is heteronomous as it necessarily presupposes a decisionistic element. It is abstract as it claims that legal norms have nothing to do with the concreteness of social reality. It is dangerous as the concept of law promoted by positivists jeopardises those social practices and models that are the core source of legal norms and that therefore a legal order must preserve. Let me concisely elucidate such criticisms.

Schmitt is intent on showing that ‘positivism is not an autonomous and hence not even an eternal type of legal thought’.⁷ Actually, positivism eventually fails to indicate an ultimate criterion of validity and thus is forced (whether knowingly or not) to adopt a decisionist stance. According to him, this stance lurks in the positivist decisive reference to some *social fact* as the source of law – and in effect the so-called ‘social thesis’, positing that the criteria of legal validity are ultimately a matter of social facts, is the cornerstone of many contemporary versions of legal positivism.⁸ According to Schmitt,⁹ this reference to social facts is a way of eschewing the challenging question of whether such a factual source is a norm or a decision or a concrete order. Actually, not only do positivist thinkers assert that this question extends outside the field of legal science, but in addition they maintain that those who take it up no longer act as legal scientists, but as philosophers, sociologists, or anthropologists. Schmitt replies that by ignoring the question concerning the grounds of legal validity, positivism conceals its intrinsic link with the legislative state of the 17th century, which absorbed all of the legal powers and imposed its superior will as the sole source of law. The social facts to which positivists usually refer are nothing but the *factual* will of the legislator.¹⁰ This is why Schmitt concludes that ‘only the decisionist component makes positivism capable of suspending in a determined place and time the question about the ultimate validity grounds of the norm in force, instead of leading it more and more toward the unforeseeable, the “meta-legal”’.¹¹

Furthermore, the German jurist reproaches to positivism an undue inversion between the ‘general norm’ (*allgemeine Norm*) and the ‘fact-type’ (*Tatbestand*). He maintains that within the positivist framework the legal order is understood as the fact that ‘a concrete situation corresponds to general norms with which it is gauged’.¹² General norms are conceived as criteria that officials may employ for assessing the concrete situation, and such criteria are inscribed in the abstract fact-types that norms embody. On this reading, the norm precedes (both ontologically and conceptually) the factual situation, which is to be measured with the gauge provided by the norm. Thus norms represent an abstract, intellectual, discursive product, which may never be identified with the concrete situations it allows to assess. Schmitt depicts this idea as a legal aberration that misconceives the relation between the norm and the concrete situation. Every legal regulation, Schmitt contends, requires a ‘*normal* situation’ and a ‘*normal* type’.¹³

What is at stake here is the *relation between norms and normality*. I can reconstruct Schmitt’s point of view as follows. Positivists defend two basic tenets. First, norms and normality *have no ontogenetic relationship*, as they belong to different ontological dimensions: norms are in the field of normativity, in that they express what ‘*ought to be*’ and remain valid even though

7 Schmitt, *supra* note 1, p. 29. All translations from German are mine.

8 See, for instance, J.L. Coleman, *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory*, 2001; K.E. Himma, ‘Inclusive Legal Positivism’, in J.L. Coleman et al. (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, 2001, pp. 125-165; J. Raz, *The Authority of Law*, 1979.

9 Schmitt, *supra* note 1, p. 30.

10 See *ibid.*, pp. 29-30.

11 *Ibid.*, p. 31.

12 *Ibid.*, p. 15.

13 *Ibid.*, p. 20.

no individuals comply with them.¹⁴ Second – and this in my reading is the feature that connects positivism to the democratic and progressive tradition –, norms can be employed for criticising normality, as they allow people to bring into question and thus to revise the concrete conditions in which they are situated; in this view, not only are norms independent of normality, but they can serve as a means for transforming those situations in which the widespread normality is felt as oppressive or unjust.

Schmitt argues that this portrayal of the link between normativity and normality is both erroneous and (as I will explain below) dangerous. According to him, a norm cannot be expected to regulate the concrete situation if it becomes ‘*abnorm*’, that is to say ‘abnormal’.¹⁵ Actually, a norm which overcomes the concrete type becomes unusable, since it distances itself too much from the reality that it is expected to govern. The fact-type described in the general norm cannot be seen as an intellectual product of legislators. The fact-type derives from a previously widespread *social practice* that the concrete order is aimed at preserving and promoting so as to guarantee the stable reproduction of the collectivity. This is why every norm must be anchored to the ‘normality of the concrete situation’, which is an ‘inner, legal feature of normative validity’.¹⁶ In doing so, Schmitt overturns completely the two basic tenets of positivist thought mentioned above. First, norms and normality *have a close ontogenetic relationship*, in that norms derive from that normality which they are designed to rule and preserve. Actually, norms must contain certain ‘concrete figures’ which may be ‘assumed as *typical* in the legal life and in the legal thought’.¹⁷ They are not an intellectual product of law-makers, but ‘concrete *conjectures*’ that ‘arise directly from the concrete requirements of a situation deemed as normal and a human type deemed as normal’.¹⁸ Second, this ontogenetic dependence of norms on the concrete situation confutes the positivist contraposition between legal normativity and societal normality, as the former should not erode but preserve the latter. The norm, therefore, can never trigger social change but only follow it: ‘The rule *follows* the changing situation’.¹⁹ For reinforcing his conclusions, Schmitt quotes the passage of *L’ordinamento giuridico* where Romano writes that ‘the order moves the norms as if they were pawns on a chessboard’, norms being ‘the object and even the means of its activity rather than an element of its structure’.²⁰

In these criticisms we may capture what Schmitt considers to be the mortal danger that, in his view, the positivist tenets involve. He attacks violently the utopian attitude of positivists, who, at least in his reconstruction, by considering legal concepts and their underlying fact-types as separate from concrete conditions, believe that jurists can preserve the certainty, precision, generality, calculability and predictability of law. According to him, such an image of law ends up promoting ‘an artificial and meaningless abstraction that rifts the natural and real vital nexus’.²¹ The most perilous outcomes of positivist thinking are not theoretical but political: a positivist view of law harms the homogeneity and the compactness of the social fabric, since it favours some individuals and groups to the detriment of others. In fact, formal fact-types are

14 See for instance H. Kelsen, *Introduction to the Problems of Legal Theory*, 2002, Chapter 3.

15 Schmitt, *supra* note 1, p. 20.

16 *Ibid.*, p. 20.

17 *Ibid.*, p. 9.

18 *Ibid.*, p. 9.

19 *Ibid.*, p. 20.

20 S. Romano, *L’ordinamento giuridico*, 2nd revised and enlarged edition, 1977, p. 17 (all translations from Italian are mine). The mentioned edition contains considerable revisions made by Romano in the second edition of 1946, when he endeavoured to summarise and counter the main criticisms which his widely debated book had received in almost two decades. Romano’s book has been translated into French (*L’ordre juridique*, 1975), into German (*Die Rechtsordnung*, 1975), and into Spanish (*El ordenamiento jurídico*, 1963).

21 Schmitt, *supra* note 1, p. 50.

instruments that meet the requirements of a society made up of selfish individuals who oppose their particular interest to the general interest of the state.²² Thereby, Schmitt claims, the positivist formulas turn out to exacerbate the conflict between the public and the private sphere and to promote the dissolution of the state under pressure from the most powerful non-public formations and organisations of civil society.

This is the *pars destruens* of Schmitt's argumentation, i.e. the criticisms that today are generally valued because of their evocative and provocative capability of showing the inner flaws of the liberal *Rechtsstaat* and that may surely be addressed to the current practices of the *rule of law* at the domestic and international level.²³ In effect, no one may question the topicality of Schmitt's analysis when, in *State, Movement, People* (published in 1933), which anticipates many of the arguments summarised above, he writes that 'collective formations and organizations' which 'occupy the non-statal and apolitical sphere of freedom (...) challenge the State under various legal titles. (...) They enjoy all the advantages of the State power without relinquishing the advantages of the sphere of freedom, politically irresponsible and uncontrolled, because ostensibly apolitical'.²⁴ Such private groups pretend that they are apolitical and in doing so manage to acquire political power at the expenses of the public sector. Many theoreticians²⁵ today similarly question the rhetoric of the rule of law that often masks those powerful self-interested groups which 'dominate both the will of the State (by way of legislation) and also (through societal constraint and the force of the "purely private law") the individual person whom they mediate. These become the true and the real vehicles of the political decisions, and wielders of the statal instruments of power, but they will master it from the non-"public" individual sphere, free of State and constitution, and in this way evade any political risk and responsibility'.²⁶ In this passage we can easily find vivid anticipations of the current criticisms against the emerging private and functional normative regimes whose move toward deregulation, co-regulation and self-regulation is aimed at absorbing the traditional competencies of the national legal systems.²⁷ It seems that in his analysis Schmitt foresees the risks connected to the feeble and often ineffective formality of the legal instruments of current national governments and international organisations, which are less effective than the efficient goal-oriented procedures of the rising 'informal justice'. And, actually, such an informal justice more often than not is ruled by non-public social networks whose influence grows since they are able to affect public decisions and at the same time to 'evade any political risk and responsibility'.

3. The three pillars of Schmitt's institutional theory

Although the spirit of the critical remarks mentioned above may be shared and supported, I contend that the critical force of Schmitt's conclusions is radically undermined by his reactionary premises and that, for this reason, his theory is unable to offer viable solutions to the current problems of national or international politics.

22 See C. Schmitt, *The Concept of the Political*, 1985, pp. 37-45.

23 See, for instance, Mouffe, supra note 4; L. Odysseos & F. Petito (eds.), *The International Political Thought of Carl Schmitt. Terror, Liberal War and the Crisis of Global Order*, 2007.

24 C. Schmitt, *State, Movement, People. The Triadic Structure of the Political Unity*, 2001, pp. 26-27.

25 See, for instance, U. Mattei & L. Nader, *Plunder. When the Rule of Law is Illegal*, 2008.

26 Schmitt, supra note 24, pp. 26-27.

27 See for instance W. Heydebrand, 'Globalisation and the Rise of Procedural Informalism in Europe and America', in V. Gessner & D. Nelken (eds.), *European Ways of Law*, 1997, pp. 93-139.

Actually, in my view, the final outcome of his theory – on whose pillars I will focus below – is in no way due to the transient circumstances of the German Reich. On the contrary, the institutional turn offered Schmitt a perfect solution to a persisting theoretical problem which, in his view, occurred both in the normativist and in the decisionist legal thought and also affected his own previous works, as he admitted in the preface to the second edition (1933) of *Political Theology*: ‘I would like to supplement my remarks on Hobbes concerning the two types of juristic thinking (...). I now distinguish not two but *three* types’.²⁸ My claim is that, although Schmitt was right when he stressed that there was a persisting problem affecting many different legal perspectives, he eventually failed both to grasp it correctly and to provide a feasible solution.

Consequently, I will analyse the three main pillars of Schmitt’s institutional theory – that is, the notions of *institution*, *normality* and *general clause* – in order to achieve two different goals. On the one side, I will show that the fatal flaws of Schmitt’s notion of institution stem from certain socio-anthropological assumptions which compel him to support a reactionary perspective. On the other side, I will argue that both his notion of institution and his concept of legal order are instrumental to the defence of a decisionist and identitarian view of politics.

a. The notion of institution

The criticisms of Schmitt against a purely intellectual understanding of the legal fact-types invite readers to acknowledge that norms arise from previous social practices which the concrete order must preserve and promote. Legal fact-types are nothing but ‘typical figures’ that the order lays down so as to reflect – as precisely as it can – certain concrete patterns of behaviour and life models. Schmitt offers various examples, such as the *bonus pater familias*, the brave soldier, the dutiful official, the dependable fellow.²⁹ Norms reflect and incorporate such typical figures in order that these may serve as common standards for the generality of the population, as they are the vital nourishment of certain key social institutions, such as, respectively, the family, the army, the state, the party.

Now it is well known that ‘institution’ is an essentially contested notion that today is returning compellingly to the fore. As I argued in my last work, devoted to analysing this concept,³⁰ scholars tend either to narrow or to overextend its meaning. In fact, some authors, such as, for example, Neil MacCormick, conceive of the institution as a particular legal device – contract, property, matrimony and the like – which serve ‘as a co-ordination scheme, a matter of reciprocal expectations and adjustments to conduct’.³¹ Conversely, other scholars give institution a broader meaning, closer to the definition of Émile Durkheim, who designates ‘as “institutions” all the beliefs and all the modes of conduct instituted by the collectivity’, which have ‘a reality outside the individuals who, at every moment of time, conform to it’.³² On the one hand, institutions are conceived as specialised instruments belonging to a specialised field of society; on the other, they are deemed to be the basic structure of society independent of its particular members. My contention is that Schmitt’s understanding of institutions is closer to the second less specialised and more sociological meaning, as they are represented as pre-legal social practices that are at the core of a specific cultural world. Let me explain this point better.

28 Schmitt, *supra* note 3, pp. 2-3.

29 Schmitt, *supra* note 1, p. 18.

30 M. Croce, *Cos’è un’istituzione*, 2010.

31 M. La Torre, ‘Institutional Theories and Institutions of Law. On Neil MacCormick’s Savoury Blend of Legal Institutionalism’, in M. Del Mar et al., *Law as Institutional Normative Order*, 2009, pp. 67-82, p. 76.

32 É. Durkheim, *The Rules of Sociological Method*, 1984, pp. 14-15.

Anthropology, Schmitt points out in *The Concept of the Political*, has relevant political bearings.³³ The notions of human being and human sociality represent fundamental points of departure for all kinds of theoretical conceptualisations. The German jurist thinks of human beings as ‘dangerous’ and ‘risky’ beings who need stable guidelines. This image recalls patently the idea of human beings that emerges progressively in the German anthropological environment of the early 20th century.

Arnold Gehlen may be mentioned as the most resolute supporter of this idea. He is among the founders (along with other prominent scholars, such as Johannes J. von Uexküll and Helmuth Plessner) of the German tradition of philosophical anthropology. By drawing on Johann G. Herder’s reflections on human nature,³⁴ Gehlen depicts the human being as ‘deficient’ (*Mängelwesen*)³⁵ and ‘world-open’ (*weltoffen*).³⁶ In fact, animals can count on an instinctual structure which responds in a pre-programmed manner to the multiple stimuli of their surrounding environment (*Umwelt*), understood as a set of basic conditions that allow them to survive. This advantage, however, is outweighed by the fact that animals depend heavily on their specific environment, out of which their instinctual structure is ineffective. On the contrary, human beings have no specific environment, but a ‘world’ (*Welt*), which they are called upon to transform by means of their unique capacities to project and plan. But while humans’ lack of ties to a specific environment offers them a vast set of possibilities that are not conceded to other beings, human instinctual deficiency is full of risks. Human beings are open to a plethora of stimuli which they are naturally incapable of managing. This is what Gehlen calls ‘burden’ (*Belastung*).³⁷ As a consequence, human beings must inevitably seek a ‘relief’ (*Entlastung*) from the burden of overwhelming stimulation which is tied to their being world-open. This is what Gehlen calls ‘relief principle’ (*Entlastungsprinzip*).³⁸

This concise sketch of Gehlen’s view on human nature allows us to understand the importance of culture in human life. Culture is a ‘second nature’.³⁹ Culture allows humans to close their world and to neutralise all the uncertainties affecting their relation to the natural environment. Gehlen’s theorising is based on a very instructive theory of knowledge as performance⁴⁰ that explains the way human beings manage to accumulate a cognitive background, which is handed down generation by generation by means of language. This background, i.e. the cultural world – able to complement the instinctual deficiency of human nature – is concretised and embodied by social institutions, which operate as external props. In their serving as a guidance for conduct, institutions allow human beings to undertake shared activities and to pursue common ends. Thus, in Gehlen’s view, institutions are super-personal models, in light of which a community of human beings may follow common guidelines and develop a shared project of life.

On this reading, institutions are not only complementary to human nature, but also constitutive for there being a social community. In fact, they provide the condition of possibility

33 Schmitt, supra note 22, pp. 58-60. This topic has been extensively discussed by H. Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, 2006. Of course, Meier leaves out the implications for an institutional theory of law, but the anthropological view of Schmitt is very profoundly addressed.

34 See A. Gehlen, *Der Mensch. Seine Natur und seine Stellung in der Welt*, 1940, Section 9.

35 *Ibid.*, p. 16.

36 *Ibid.*, p. 34.

37 *Ibid.*, p. 35.

38 *Ibid.*, p. 35.

39 *Ibid.*, p. 37.

40 See A. Gehlen, *Anthropologische Forschung. Zur Selbstbegegnung und Selbstentdeckung des Menschen*, 1961, Chapter II. I explore this relevant aspect of Gehlen’s theory of knowledge in Croce, supra note 30, pp. 55-67.

for a stable social order, in that they issue behavioural patterns of conduct that orient and direct human drives. By rendering drives into needs and urges into interests, institutions allow human beings to distance themselves from the here and the now of contingent psycho-physiological states so as that they may become aware of these states and may transform and discipline themselves consciously.⁴¹ Hence, not only do institutions govern human conduct, but they shape the will and perception of human beings, so far as that the cultural world comes to appear to them as natural and obvious. Although the cultural world, comprised of sedimented institutions, is a human creation, during their primary socialisation the members of a community progressively interiorise it to the extent that they tend to see it as a necessary and permanent feature of their surroundings.⁴²

In sum, according to Gehlen, the key function that institutions carry out is to provide public, stable, durable behavioural patterns which are meant to guide human conduct and to mould the social environment. If this is so, in order to work efficiently institutions must be perceived by social subjects as superior, indisputable, beyond the here and the now. They must work as stable and binding 'inhibitory forms', produced over long periods of time, that manage to lead human beings out of their state of nature. There are thus two mortal enemies of institutions: the human fascination for an idealised uncorrupted state of nature and the opposite tendency toward an erosive self-criticism.⁴³ Human beings need a '*bienfaisante certitude*' that they can only find in their cultural tradition.

Gehlen's conceptualisation is very close to the basic idea of human beings which underpins the political and legal thought of Schmitt. In this reading – and this is a key factor – institutions are *social* products emerging from the stable reiteration of specific behaviours so that they become part of a common cultural background. They are sedimented customs which deserve to be protected since they are the *ethical and ethnical matrix* of a collectivity. As typical instances of institutions, both Gehlen and Schmitt mention matrimony, the family, guilds, the church and the army. Schmitt argues that these social formations come before the legal order: the concrete *legal* order is meant to reflect and preserve the concrete *social* order, the latter representing the very grounds of the former.⁴⁴

b. The notion of normality

Normality is key to the idea of the concrete order. In many passages of *On the Three Types of Juristic Thought* Schmitt speaks of a 'normal situation', a 'normal man', 'normal concepts'. Nonetheless 'normal' is a highly ambiguous term. It may designate what the members of a collectivity consider as corresponding to their basic theoretical and practical intuitions (for instance, normal may appear to us to be the aspiration of Italian same-sex couples to acquire the same rights as heterosexual couples); whereas, on the contrary, 'normal' may mean 'widespread' or 'more widespread than' (and in this reading at present in Italy heterosexual marriages are more normal than homosexual ones). While the first meaning contemplates the coexistence of alternative practices, the second envisages a conflict between *widespread* and *alternative* practices and considers the latter as detrimental to the former. Correspondingly, the first meaning is perfectly compatible with, say, an Aristotelian-Thomist view, according to which social

41 See Gehlen, *supra* note 34, pp. 59-65.

42 See Gehlen, *supra* note 40, Chapter 5.

43 See *ibid.*, Chapter 4.

44 Let me anticipate that the rejection of this derivative and conservative role of the legal order is the crucial difference between Schmitt and Romano.

practices produce their own inner standards, whose plurality is a native consequence of the multifaceted plurality of human potentials. But such a view collides with the image of a dangerous, risky and deficient human being, who needs stable and uniform models of conduct. Indeed, it is not matter of controversy that the notion of normality which underlies the Schmittian concept of institution is closer to the second meaning. In the Schmittian framework, the qualifying adjective 'normal' can only be attributed to those practices and models that are shared by the ample majority of a collectivity, since only they are able to assure the communitarian order. Every practice and model is to be integrated in a homogeneous institutional fabric, which alternative practices and models expose to a danger. In sum, 'normal' institutions are 'typical', 'mainstream', 'traditional' practices in which the ethical and ethnical matrix of a collectivity is rooted.

Accordingly, an individual who wants to be a good father of a family must show specific qualities and values, pursue certain objectives and adhere to precise principles. These qualities, values, objectives and principles are determined by the cultural horizon in which this individual is situated. But it may erroneously seem that, at the end of the day, the basic virtue of these practices and models rests on their proven ability to assure the stable reproduction of the collectivity. On this reading, time would seem the rightful guarantor of their inner validity. Yet, according to Schmitt, institutions alone are incapable of assuring the reproduction of a collectivity and this very same collectivity is incapable of preserving its normal institutions without some stable prop. Thus a *legal* order is required in order that normality may be constantly confirmed and reaffirmed and a collectivity may maintain its own identity. As a consequence, to understand the way Schmitt conceives of the relation between social reality and its institutions we have to understand the way, according to him, the legal order works.

c. The notion of general clauses

Legal concepts, such as 'good faith' and 'good manners'⁴⁵ or 'blame, aid, proof',⁴⁶ are often vague and indefinite. Schmitt rejects forcefully the normativist conviction that formal norms already contain all what judges need in order to interpret and enforce them. But he himself recognises that norms require a certain degree of formality since they are to be used for gauging a considerable set of different situations. Often this formal core collapses into the penumbral zones so that the legal order turns out to be the terrain of different and contradictory interpretations. The risk of plurality and divergences is always incumbent.⁴⁷

To minimise such a risk, Schmitt sets forth the concept of 'general clauses' (*Generalklausen*), which are expected to assure a general framework of values and principles able to indicate the way norms are to be interpreted and enforced. 'Good morals, good faith, reasonableness, unreasonableness, cogent reasons'⁴⁸ are by no means abstract concepts envisaged by legislators with no regard to social reality, but instruments for promoting the normality with which the concrete order is imbued. Morals, faith, public reason are the direct expression of society and must be employed as guidelines by those who have to apply general norms to concrete cases.

45 Schmitt, *supra* note 1, p. 49.

46 *Ibid.*, p. 50.

47 Schmitt was concerned with such a problem to such an extent that it was already at the core of his first work after his PhD thesis, C. Schmitt, *Gesetz und Urteil. Eine Untersuchung zum Problem der Rechtspraxis*, 1912. More specifically, here he argued that the complete judicial decision can hardly be deducted from pre-existing legal norms by means of interpretation and subsumption and thus there must be more substantial criteria of judgment.

48 Schmitt, *supra* note 1, p. 49.

However, in a pluralistic society such as that of the early 20th century, where moralities, faiths and reasons diverge to such an extent that some prominent author speaks of a ‘polytheism’ of values,⁴⁹ how can such general clauses provide dependable guidelines? Who can say what counts as good or bad, sacred and profane, reasonable and unreasonable in a situation where the conceptions of good, faith and reason are multiple and sometimes conflicting? Schmitt is rather clear: the *Führer* (leader).⁵⁰ General clauses can serve the function of directive guidelines only if there is a sole legitimate interpreter. This is the final conclusion of *On the Three Types of Juristic Thought*. If the concrete order is supposed to reduce pluralism and promote a common criterion of normality, there must not be any room for different interpretations.

This is the reason why Schmitt concludes that the state, its legal order and, above all, its leader are not institutions among others and therefore must finally encompass every social institution. By quoting Fichte and Hegel, Schmitt explains what he deems to be the guardian of the concrete order. He points out that Fichte has the merit of leaving the individualist abstractions of Jacobinism aside and conceiving the state as ‘a concrete-historical unit, distinguishing by itself friend and enemy’.⁵¹ Furthermore, in defining Hegel as the ‘*summa*’ of the ‘trends and tendencies of German resistance (to the individual-rationalistic bents of positive codified law)’, Schmitt defines the state as ‘the concrete order of orders, the institution of institutions’,⁵² and thus as undoubtedly superior to any other societal component. But there is no state, Schmitt alerts, without the other two fundamental components, i.e. the *movement* and the *people*. Only the new political form based on the union among state, movement, people enables the German Reich to surpass the principle of the separation of powers and to leave its political destiny to the leader’s care.

4. The political function of law: the reactionary outcomes of Schmitt’s institutionalism

Now, it could be argued that the final conclusion mentioned above is not theoretically relevant because it stems from contingent political circumstances, as is proven by the fact that the initial parts of *On the Three Types of Juristic Thought* – devoted to a legal-scientific analysis – are solid and well argued, while the final parts – containing various references to the ongoing modifications of German law – are hasty, vague, imprecise. But this objection falls short. As I wrote above,⁵³ the institutional turn solves a theoretical problem which troubles Schmitt persistently, i.e. *what the sovereign has to decide on*. While in *Political Theology* Schmitt seems to believe that the decision of the sovereign may come *ex nihilo* and provide by itself its own subject-matter; the institutional turn induces Schmitt to revise his own view. The idea of institutions as widespread models of conduct inherently requires someone who *decides* which models are normal and which are not: the subject-matter of the decision is a set of previously given institutions which have to be integrated into a stable order according to the basic criterion of normality that the leader lays down and implements by way of legal devices.

But this institutional integration does not rule out the decisionist stance. In fact, the concept of general clauses helps us understand how the leader is called upon to offer specific guidelines

49 See M. Weber, ‘Science as a Vocation’, in H.H. Gerth & B.S. Turner (eds.), *From Max Weber: essays in sociology*, 1991, pp. 129-157, p. 147. See C. Schmitt, *Die Tyrannei der Werte*, 1967, where the author argues against Scheler and Weber, charged with introducing in the political ambit a concept that pertains strictly to economic theory.

50 Schmitt, *supra* note 1, p. 53.

51 *Ibid.*, p. 37.

52 *Ibid.*, p. 39.

53 See Section 1, *supra*.

that may avoid any conflict of interpretations. General clauses are an efficient link between the legal order and institutions, whose employment allows the leader to gain control over the theoretical and practical background of the collectivity. In fact, although this background is a sort of substratum made up of general beliefs and convictions lying behind a collectivity, and although the leader must always take its specific contents into careful consideration while making his decisions, its employment permits the leader to control the activities of officials. The leader remains the *authentic interpreter* of such a background and consequently his interpretation of the general clauses is the only gauge for *distinguishing the normal from the abnormal*, that is to say *the friend from the enemy*.

In this way, Schmitt dismisses completely the critical force of his attacks on the abstractions of positivism and turns out to provide an image of the concrete order as something which is intrinsically dependent on political circumstances. On the one hand, the legal order presupposes the criterion of normality which only the leader can lay down; but, on the other hand, in a sort of vicious circle, the very same legal order is meant mainly to satisfy political requirements, and in particular the need that the mentioned criterion of normality may be backed by legal force so as to increase the homogeneity of the collectivity and to discourage alternative practices that may be at odds therewith. But in this way the criticisms that Schmitt addresses to positivists – i.e. the fact that their view of law ends up favouring minority but well-organised parties of society⁵⁴ – turns out to backfire on him. In fact, the homogeneity of the collectivity, as Schmitt himself acknowledges, is the outcome of an intense activity meant to promote specific practices and models so as to bridle the instinctive pluralism of human sociality.

In conclusion, as Andrea Salvatore, a brilliant interpreter of Schmitt's thoughts, concludes in an article we wrote together: '(B)y including the decisionist aspect also in institutional juristic thought, the foundation of the whole logic of the concrete legal order is rooted, in the final instance, in the friend-enemy contradistinction which characterises and defines the concept of the "political"'.⁵⁵ By defining what is abnormal, that is to say, the practices and models of the (internal) enemy of a collectivity, the leader assures the stability of a normal social order – made up of social institutions – which is to be embodied and safeguarded by the concrete legal order – made up of fact-types, norms and general clauses. But this normality persists by virtue of a perpetual struggle against the objects that the leader defines, on a case by case basis, as the enemy. This is the basic polemical social psychology that is at the core of every politico-philosophical writing by Schmitt.⁵⁶

The assumption that a stable social order may only be based on widespread and homogeneous institutions which may be harmed by the rise of pluralism is the tacit foundation of Schmitt's legal institutionalism. But this conclusion, which deems social and legal institutionalism to be in striking contrast to social and legal pluralism, is radically flawed. Let me again quote Salvatore: '[E]very identitarian and ethical version of the institutional paradigm is

54 See Section 1, *supra*.

55 M. Croce & A. Salvatore, 'Ethical Substance and the Coexistence of Normative Orders. Carl Schmitt, Santi Romano, and Critical Institutionalism', 2007 *Journal of Legal Pluralism and Unofficial Law* 56, pp. 1-32, p. 5.

56 In M. Croce, *La conquista dello spazio giuridico. Potere statale e amministrazione della giustizia*, 2009, I dwell on this problem under a historical-reconstructive viewpoint. In particular, I advance the hypothesis that the modern state could become the predominant form of political organisation mainly because the emerging central governments promoted meticulously a pervasive conquest of the legal field, both by reducing the traditional autonomies of jurists and judges and by proposing themselves as the ultimate makers of valid decisions. It is my claim that although positivism, as Schmitt rightly asserts, inherits this vision and in addition tries to conceal it behind the 'scientific' veil of social facts, Schmitt himself is the most patent representative of this statist conception, especially when he emphasises the need for a leader who is able to guarantee the ethical and ethnical identity of a collectivity by indicating the borders of normality. This statist infatuation helps to understand why Schmitt's institutionalism is a tough opponent of every kind of pluralism (whether social or legal).

characterised by a monistic logic. Only this logic assures the political unity which is the condition of possibility for and, at the same time, the real aim of the communitarian identification with *one* concrete legal order. This identification compels a reduction of the manifold and complex practices, as well as of the various normative models socially diffused, to a monistic juridical recognition of one, well-defined, all-inclusive form of life'.⁵⁷ As I will indicate in the following pages, the concept of law defended by other institutional perspectives describes the legal field as the cradle of diverse and plural forms of regulated interactions, whose plurality is the major resource of both law and society.

5. The tie between institutionalism and pluralism: institutions as legal orders

Along with Maurice Hauriou, Santi Romano is one of the founding fathers of European classic institutionalism and the most significant reviser of the theoretical grounds of Italian public law. Though today most interpreters consider his institutional proposal to be either a less refined version of new institutional theories⁵⁸ or nothing but a rudimentary forerunner of Herbert L.A. Hart's perspective,⁵⁹ I contend that Romano's institutionalism offers original and too often neglected means for interpreting the nature of law and legal practices. My basic aim here is to show that not only is Romano well aware of the harmful outcomes of normativism and positivism, but in addition his institutional theory offers helpful guidelines for facing contemporary legal and political issues connected to the emergence of multiple sources of law beyond the state.

In *L'ordinamento giuridico* at first Romano rebuts the idea that 'law is a rule of conduct'. His criticisms seem very close to those addressed by Schmitt to normativism and positivism. But – unlike Schmitt, who thinks that we cannot speak of law in general but only of particular orders – Romano's primary concern is with the *differentia specifica* of law, i.e. the feature which allows us to say that something is law. While normativism is 'inadequate and insufficient' (but not totally incorrect, as also Schmitt retains), Romano wants to discover a 'more fundamental and, above all, antecedent' feature of law, 'both as to the logical requirements of the concept of law and to the correct evaluation of the reality in which law operates'.⁶⁰ I believe this quotation to be relevant insofar as it demonstrates that Romano's enquiry is guided by theoretical concerns.

Actually, many critics⁶¹ have charged his theory, and more in general classic institutionalism, with being a sociology of law, owing to the fact that institutional scholars are intent on understanding the way the legal machinery works in concrete reality and hence are mainly focused on contingent circumstances. A theorist of law, these critics continue, should always bear in mind the difference between what is logically necessary to the concept of law and what is present in the standard or normal case. But, as also Schmitt vividly notices, the advocates of institutionalism claim that concreteness is by no means a transient feature, but a necessary condition of law. Schmitt does not clarify whether such an element is conceptually or factually necessary. He seems only to assert that a concrete order would not exist without its material components, which it has to embody and preserve. But Romano, as it is clear by reading the initial parts of *L'ordinamento giuridico*, avoids any ambiguity: his primary concern is with what is logically necessary to the concept of law.

57 Croce & Salvatore, *supra* note 55, p. 5.

58 See La Torre, *supra* note 31.

59 See N. Bobbio, *Dalla struttura alla funzione*, 2007, p. 146.

60 Romano, *supra* note 20, p. 5.

61 See for instance Bobbio, *supra* note 59. Romano himself discusses such a criticism in *L'ordinamento giuridico* (p. 41, note 30^{ter}).

This conceptual departure of Romano marks the first key difference with Schmitt: while the latter maintains that some previous extra-legal elements (i.e. social institutions) are factually required in order that the legal order may emerge and work, the former argues that any social manifestation is already-and-always legal and consequently there is nothing social which is not already-and-always legal. In a nutshell, while Schmitt believes there is only one legal order which is called upon to preserve certain previous social institutions, Romano thinks ‘there are as many legal orders as institutions’,⁶² since any institution is an autonomous legal order. To clarify this point I need to explain Romano’s notion of institution and to compare it with that of Schmitt.

As I sustained before, Schmitt defends a socio-anthropological view of institutions deemed as a social ‘shell’ which complements the instinctual deficiencies of human beings and provides them with dependable guidelines for organising their social existence. Hence, the more stable and homogeneous such guidelines are, the more stable and homogeneous the collectivity is. Romano endorses a more sophisticated notion of institution. To understand it better, I have suggested⁶³ that we should distinguish between two basic aspects of an institution, namely its *origin* and its *function*. Whereas any institution has a *factual* origin, which is essentially related to the concrete practices of those who have built it up, its function does not depend on them. Actually, institutions serve what I call a ‘*quasi-transcendental* function’ of outlining and typifying the rules which underpin such concrete practices. Institutions are devices that allow the rules of a practice to survive those who have firstly introduced them. In this reading, an institution is a structural framework (a ‘superstructure’, Romano says) which establishes the rules and roles which are typical of a practice and enables those who are involved therein to adopt a reflexive attitude toward their own activities. To put it differently, an institution permits a distinction to be made between transient and contingent relationships, on the one hand, and, on the other, those in which the activity of the actors is governed by describable rules and which therefore involve certain obligations and responsibilities on the part of the actors. This is emphasized by Romano when he rejects the notion of an ‘organic community’ (employed by Otto von Guericke⁶⁴) in favour of the ‘larger’ and ‘more complete’ concept of an institution.⁶⁵ In sum, an institution is any social entity with its own ‘discipline, which includes a complex order of authorities, powers, norms, sanctions’ and is governed by ‘internal regulations (...) endowed with disciplinary powers’.⁶⁶

In this more sophisticated view, institutions are not mere traditional habits, but normative structures in which obligations and responsibilities are at work, namely in which any relationship is a ‘legal relationship’ – to use a term much employed in the early 20th century Italian legal debate. Let me provide an example. If Tom and Kate meet each other by chance and then decide to have a coffee, no rule governs their interaction until the moment they agree to have a coffee; but if Tom and Kate have an appointment, their practice is governed by the institution of ‘making an appointment’, which commits them to a set of pertinent actions.⁶⁷ In saying that fixing appointments is a well-established social practice meant to organise interactions in certain specific circumstances we are also saying that appointments are normative structures governed

62 Ibid., 106.

63 Croce, supra note 56, pp. 206-219.

64 Also Schmitt levels criticisms against Guericke’s ‘*allgemeine Assoziationstheorie*’, but for different reasons and from a different point of view. See Schmitt, supra note 1, pp. 40-41.

65 Romano, supra note 20, pp. 132-133.

66 Ibid., p. 126.

67 Although I think that the new institutional paradigm developed by Neil MacCormick and other prominent scholars, such as Dick Ruiters, Massimo La Torre, and Ota Weinberger, has little in common with classic intuitionism, such an argumentation may be shared by both perspectives.

by specific rules (though informal and non-coercive). However, ‘making appointments’ is only an *in nuce* institution, what I call ‘normative social practice’, where rules and roles are highly flexible and changeable.⁶⁸ An institution is a social practice whose typified rules and roles do not depend on the will of the affected actors. For instance, if Tom and Kate decide to cancel their appointment, the rules related to the practice of making appointments no longer govern their activities. On the contrary, an institution is a normative structure which exists and persists with no regard to what the actors decide (or rather, a situation where rules are no longer voluntary). For instance, the rules and roles of a professor and a student remain the same regardless of their actions or decisions. In a word, an institution is a device which prevents the actors from altering the rules of the practice in which they are involved and typifies the pertinent roles in order that other actors may take part in it.

Notwithstanding the different terminology between his explanation and mine, this conceptual definition of an institution is the theoretical grounds of Romano’s exposition when he writes that an institution ‘which in the legal world has a concrete, effective, objective existence’, ‘entails relationships but is not constituted by them; on the contrary, it comes before, in that it represents an organisation or structure which is necessary in order that the very same relationships – if and when they develop into its orbit – may be qualified as legal’.⁶⁹ Such an understanding of the function of institutions, meant to outline and establish the rules of the relationships which develop into their orbit, is reinforced when the Italian jurist analyses the difference between bare and legal relationships: ‘For an institution to emerge the existence of persons connected to each other by bare relationships does not suffice; there must be a closer and organic link’.⁷⁰ In other words, Romano argues that a bare relationship between two individuals is incapable of creating, say, the institution of matrimony, which on the contrary emerges when the typified rules and roles of this kind of relationship are established.

But the establishment of rules and roles – and this denotes a second key difference with Schmitt – requires neither a leader nor a criterion of normality. Institutions are nothing but the outcome of the reflexive activity of the affected actors in their trying to make explicit and stabilise the informal and intuitive rules which underlie their interactions. This understanding portrays as native the link between institutionalism and pluralism. In fact, the rise of institutions may depend on several factors, such as the actual needs of the affected actors, the physical environment that surrounds them, the progress of their cultural and scientific knowledge, their modes of production and so on. Institutions are by nature contingent and plural. They are the outcome of the activities of human beings who, within their natural and social environment, create stable contexts of interaction with their own inner rules. Hence, this Romanian understanding leads to a de-substantialised idea of social collectivities: entities with quite unclear boundaries, whose subjects observe the rules of different institutions to varying degrees for different purposes. On this reading, larger institutions (such as the state) are deemed to be composed of individuals and groups that to some extent belong to various other institutions for various purposes some of the time.

But here three main problems arise. First, since any social entity can potentially represent a complete institution with its personal legal order, a collectivity may well end up in a chaotic situation in which innumerable institutions overlap. Second, among such overlapping institutions,

68 See Croce, *supra* note 30.

69 Romano, *supra* note 20, p. 67.

70 *Ibid.*

there can be some whose activities are in overt conflict with the activities of the others.⁷¹ Third, the idea of institutions as rule-governed contexts with an equal dignity leaves unexplained the fact that in every society certain institutions are preserved and promoted by way of legal and political means while others are just tolerated and others are even combated; it also leaves unexplained the existence of the ‘institution of institutions’, i.e. the modern state.

In a Schmittian framework there would be no room for such problems. Institutions are only those widespread and majority practices – handed down by the national communitarian tradition – which embody a criterion of normality that the leader is entitled to lay down and promote; conflicting institutions represent the enemy. However, Romano, who is called upon to face these problems, underrates or eschews them. First, he affirms, with no further justification, that although we may adopt large criteria ‘for finding the features of institution in certain very simple and scarcely developed forms of society, we do not believe that we can come to recognise the legal phenomenon in every “state of coexistence”’. But Romano offers no indication as to the dividing line between states of coexistence which could be recognised as institutions and others which could not. Instead, he has clearer ideas as to the second problem. In considering whether or not illegal organisations should be considered institutions with their personal orders he openly asserts – in a hardly positivist vein – that we could deny they are institutions only from a moral point of view, i.e. by claiming that an order is not legal if it contravenes morality. But, he continues, this link between law and morality is ‘inexistent’. For these organisations are complete institutions with their personal legal regulations, because they ‘have an inner organisation and an order which, considered *in se* and *per se*, we have to qualify as legal’.⁷² Nonetheless, this conclusion clashes with what Romano asserts as the third problem. In fact, all things considered, the various institutions should be deemed as equal and thus the power of the one over the others can hardly be justified at a conceptual level: such a power can only be *factual*. Obviously, this problem concerns, in particular, state power. On the one side, Romano rejects the idea that state power is a factual, pre-legal power. On the other side, he does not recognise to the state any right to impose its own legal order, because it is an institution among others. Here we can easily notice that Romano and Schmitt have rather different ideas on the power of the law-maker: while the latter thinks of a supreme decision-maker, which is able to decide on the state of exception and thus both to create and nullify legal orders,⁷³ the former grants few powers to the law-maker, which neither creates nor nullifies any law: ‘The legislator is not, therefore, the maker of the law (...), i.e. its original creator; thus he lacks the power to nullify it’.⁷⁴ But then Romano still has to justify the primacy of the state over the other institutions. He continually oscillates between two extremes. On the one hand, at a conceptual level, he seems to argue that the statal institution has some superior features which other institutions do not (a sort of Aristotelian *Polis*: within subgroups, such as families or villages, members may fulfil specific needs, but only within the *Polis* can citizens achieve a fully autarchic and good life). However, Romano does not indicate what renders the state a thoroughly complete and superior institution. On the other hand – and with a slight flavour of contradiction – Romano seems more inclined to understand the primacy of some institutions over the others as a matter of fact, as something that legal theorists cannot

71 This problem recalls the well-known objection about the Mafia, which is a perfect example of a well-functioning institution whose activities are clearly incompatible with those of the others.

72 Romano, *supra* note 20, pp. 123-124.

73 We should bear in mind that, as I have already noted (Section 3, *supra*), in light of his institutional turn, Schmitt admits that the decision cannot come *ex nihilo*, but must always take into consideration the previous *social* order composed of concrete institutions, that is the basic matter of the decision.

74 Romano, *supra* note 20, p. 83.

understand theoretically but only *explain* empirically. But this mostly appears as a way of evading the problem by saying that concrete cases of dominance have no ‘legal significance’, as they rest on ‘factual circumstances, extrinsic happenings, which do not relate to our current enquiry’. All in all, Romano does not solve the problem. Sometimes he tends to consider state supremacy as a necessary condition for the other institutions to flourish; sometimes he is inclined to consider it as a factual (and thus theoretically unjustifiable) dominance. Perhaps we may posit – at a more psycho-biographical level – that Romano, a prominent state official, does not want to reach openly the conclusion – more consistent with its theoretical premises – that the state is an institution among others which manages to exercise a despotic power over equally valid institutions and often claims despotically that *non-state* legal orders are *non-legal* orders.

Conclusions

One may now ask which is the pay-off of this comparison between Romano and Schmitt? Some critics might even doubt that we could really obtain more dependable indications from the former, whose biography shows some similarities to the latter, in that he was President of the Italian Council of State under the Fascist regime of Benito Mussolini (even though he was not one of its keen supports). Yet, in my view, we can have a substantial pay-off only if we take Romano’s institutionalism to its extreme ends and then amend it in some respects. I can only sketch this theoretical proposal here.

Institutions are the foundations of social life, i.e. the context within which human beings shape their theoretical and practical categories and construct their social reality.⁷⁵ Human subjects obtain stable guidelines from institutions which help them to organise their existence. Hence, the influence over such a crucial background and the rules that govern it assures a corresponding influence over the general dynamics of social organisation. The legal order is the institution which in any stable collectivity turns out to be considered as the legitimate field where the rules of any other institution can be modified or changed, while those who operate in this special field are deemed as entitled – by virtue of a special knowledge that they only master – to select the *normative facts* of this collectivity. Such normative facts become *general standards* which are proclaimed as binding for the entire collectivity by the publicly recognised legal experts, whose peremptory judgments can only be revised by peers. This is why the control over the legal field always implies a potential control over the other institutions.⁷⁶

Such a conclusion should induce us to acknowledge two basic points. First, every type of normative structure possesses an equal dignity and has to be assessed according to its capability to fulfil the requirements of the affected subjects. Second, the rise within a population or a territory of a set of legal standards to the detriment of rivals must always be understood as the outcome of a *symbolic struggle*, in which the involved actors strive to hold the reins of the dynamics of social organisation. Therefore there is no unvarying answer to the question why an institution manages to obtain primacy over the others within a collectivity: the answer depends on how such a collectivity is structured and, in particular, the distribution of social, economic, political, religious, cultural and symbolic power among them. Legal scholars must therefore

75 See P.L. Berger & T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, 1966, Chapter 3.

76 In my view, this interpretation helps to explain the different configurations of political organisations in the different epochs: the conquest of the legal field was vital both to the edification of the Roman Empire and to the establishment of national territorial states. In fact, a strong central political power always needs the loyalty of judges and jurists, whereas their autonomy often obstructs a centralisation of power.

contaminate the pureness of the theory with the impurities of socio-anthropological empirical observation, which is indispensable for a critical reconstruction of the many social and symbolic struggles that have taken the observed collectivity to the existing social arrangement. Only in this way, i.e. by integrating conceptual analysis and empirical reconstruction, can legal theory be permanently critical.