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edited by Camilla Crea

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TABLE OF CONTENTS

VOL. 11 – NO. 1 (2025)

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PREFACE

INTRODUCTION

ESSAYS

TABLE OF CONTENTS

DECISIONISM OR SCHMITTIAN INSTITUTIONALISM: SCHMITT AS A READER OF MAURICE HAURIOU AND SANTI ROMANO

Ronaldo Porto Macedo Jr.*

Carl Schmitt is known for being a representative of decisionist legal thought. I consider that Schmitt's decisionist thinking of the 1920s was transformed, without becoming contradictory, when it received, during the end of that decade, the influence of institutionalist legal thought, mainly through the works of Maurice Hauriou and Santi Romano. In other words, one can speak of institutionalism in Schmitt's thought from the 1930s onwards. To present this argument, it is necessary to demonstrate the coherence of Schmittian legal thought, particularly how it reconciles the institutionalist pluralism of the 1930s with the decisionist monism of the 1920s. To this end, it is necessary to systematically reconstruct Schmitt's thought from the perspective of his legal theory. Carl Schmitt recognises the great importance of the works of Hauriou and Santi Romano for the development of his trichotomy regarding legal thought. For him, 'the distinction suggested here between thinking based on norms and thinking based on order emerged and became fully conscious only in the last few decades. In the preceding authors, it is not possible to trace an antithesis like that contained in the passage from Santi Romano'. The article first presents an overview of institutionalism and its pluralist implications. Then, I analyse Schmitt's Concrete-Order Thinking and examine its internal coherence.

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Carl Schmitt is widely recognized for his decisionist legal thought. However, in the late 1920s, his ideas evolved under the influence of institutionalist legal theory, particularly through Maurice Hauriou and Santi Romano. From the 1930s onward, Schmitt incorporated institutionalism into his legal thought without contradicting his earlier decisionism. This article explores the coherence of Schmitt's legal theory, showing how he reconciles the institutionalist pluralism of the 1930s with the decisionist monism of the 1920s. A systematic reconstruction of his legal theory reveals this transformation. Schmitt himself acknowledged Hauriou and Romano's impact on his legal framework, particularly in shaping his trichotomy of legal thought. He emphasized the shift from norm-based to order-based thinking, a distinction he traced to Romano. This article first outlines institutionalism and its pluralist implications before analyzing Schmitt's Concrete-Order Thinking and its internal coherence.

I. INTRODUCTION

Carl Schmitt is known for being a representative of decisionist legal thought.[1] I consider that Schmitt's decisionist thinking of the 1920s was transformed, without becoming contradictory, when it received, during the end of that decade, the influence of institutionalist legal thought, mainly through the works of Maurice Hauriou and Santi Romano. In other words, one can speak of *institutionalism* in Schmitt's thought from the 1930s onwards. To present this argument, it is necessary

[1] Text translated and revised by Daniel Murata, to whom I am immensely grateful. This article revisits and expands the content of chapters III and IV of my book *Carl Schmitt and the Foundations of Law* (São Paulo: Saraiva, 2nd ed, 2011), also published in Spanish in 2013 by Fontamara. For this reason, I have not been able to fully incorporate several contributions made on the subject, particularly the relationship between Santi Romano and Carl Schmitt, published in recent years. The book originally resulted from a thesis defended in 1993 and subsequently published in 2001. Among them, special mention should be made of the following excellent works on this field: M. Croce and M. Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford: Stanford University Press, 2020); M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt* (London: Routledge, 2013); Ead, 'After Exception: Carl Schmitt's Legal Institutionalism and the Repudiation of Exceptionalism' 29 *Ratio Juris*, 410-426 (2016); Ead, *Carl Schmitt's Institutional Theory: The Political Power of Normality* (Cambridge: Cambridge University Press, 2022); M. de Wilder, 'The Dark Side of Institutionalism: Carl Schmitt Reading Santi Romano' 11 *Ethics & Global Politics,* 12-24 (2018); A. Salvatore, 'A Counter-Mine that Explodes Silently: Romano and Schmitt on the Unity of the Legal Order' 11 *Ethics & Global Politics*, 50-59 (2018); L. Vinx, 'Santi Romano against the State?' 11 *Ethics & Global Politics*, 35-36 (2018); M. Croce, 'Does Legal Institutionalism Rule Out Legal Pluralism? Schmitt's Institutional Theory and the Problem of the Concrete Order' 7 *Utrecht Law Review*, 42-59 (2001);Id, 'The Enemy as the Unthinkable: A Concretist Reading of Carl Schmitt's Conception of the Political' 43 *History of European Ideas*, 1016-1028 (2017); J. Meierhenrich, 'Fearing the Disorder of Things' in Id and O. Simons eds, *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2016); M. Loughlin, 'Politonomy', in Ead eds, *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016); M. Loughlin, *Political Jurisprudence* (Oxford: Oxford University Press, 2017).

to demonstrate the coherence of Schmittian legal thought, particularly how it reconciles the *institutionalist pluralism* of the 1930s with the *decisionist monism* of the 1920s. To this end, it is necessary to systematically reconstruct Schmitt's thought from the perspective of his legal theory.

Carl Schmitt recognises the great importance of the works of Hauriou and Santi Romano for the development of his trichotomy regarding legal thought. For him,

> 'the distinction suggested here between thinking based on norms and thinking based on order emerged and became fully conscious only in the last few decades. In the preceding authors, it is not possible to trace an antithesis like that contained in the passage from Santi Romano'.[2]

The article first presents an overview of institutionalism and its pluralist implications. Then, I analyse Schmitt's Concrete-Order Thinking and examine its internal coherence.

II. INSTITUTIONAL THEORY

1. Basic outline of institutionalism

> 'Institutions represent in law, as in history, the category of duration, continuity and reality; the operation of their foundation constitutes the legal basis of society and the State'.
>
> MAURICE HAURIOU[3]

> 'The institution is the seat of an authority'.
>
> RENARD[4]

The French jurist Maurice Hauriou (1856 - 1929) was the great precursor of the so-called legal institutionalism. His work directly and greatly influenced the work of Carl Schmitt, a fact explicitly admitted by this author and evident in the

[2] C. Schmitt, *Über die Drei Arten des rechts-wissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934). Italian edition: Id, '*I tre tipi di pensiero giuridico*', in *Le categorie del "Politico"*, translated by G. Miglio and P. Schiera (Bologna: Società Editrice il Mulino, 1972) 260.

[3] M. Hauriou, *Teoria dell'Istituzione e della fondazione*, translated by C. Sforza (Milano: Giuffré, 1967). See also the excellent works (in Portuguese) by José Fernando de Castro Farias, *A origem do Direito de Solidariedade* (Rio de Janeiro: Renovar, 1998), and Id, *A Teoria do Estado no fim do século XIX e no início do século XX. Os enunciados de Léon Duguit e de Maurice Hauriou* (Rio de Janeiro: Lumen Juris, 1999).

[4] R.G. Renard, *Théorie de l'Institution* (Paris: Librairie du Recueil Sirey, 1939), 122.

works of the German jurist from 1933 onwards. What is institutionalism? Is there an institutionalism in Schmitt? Those are the two basic questions underlying this article.

Schmitt himself, in his text *On the Three Types of Legal Thought*, observes that there are three basic types of legal thought: we have first, legal thought based on the idea of *norm*; secondly, legal thought based on the idea of *decision*, and finally, legal thought based on the idea of a system, here understood as an *institution*.

For Hauriou, institutions represent the category of duration and continuity of reality in law. The foundation would be the legal basis of society and the State.[5] Institutions are founded on a specific type of power, which presupposes a type of consensus. If political pressure for power is not exerted through violence, the consent given by the subject is legally valid.

Legal institutionalism, for Hauriou, refers to two basic questions, namely: (1) what is necessary to establish the degree of consensus that subsists in institutions and, thus, the basis of their power and, in particular, of sovereign power; and (2) the degree of the objectivity of institutions, that is, the measure of their existence, a question that, in turn, refers to the relationship between legal objectivism and subjectivism. Institutionalism is an attempt to overcome the confrontation between *objectivism* and *subjectivism*. This overcoming has important implications for the theory of sovereignty and its relationship with the foundations of Law.

Hauriou defines *subjective right* as 'everything that in law is based on the conscious will of certain subjects, such as, for example, contractual situations, testamentary provisions known as last will'.[6] On the other hand, *objective right* is understood as 'everything that in law is constituted independently of the conscious will of specific subjects and that therefore appears to be based on itself, such as, for example, a rule of customary law.'[7] To put this same point in different phrasing, subjective right is grounded on conscious wills, while objective right on subconscious wills, ie, 'that live in the frames of our memory without being present at the moment.' Those latter are ideas that we perceive and imagine and then lose sight of, but which live within us and influence our actions without us knowing their workings.

Traditionally, until the mid-19th century, law was conceived as a hybrid set of subjective elements (eg legal personality, subjective rights, legal acts, etc) and objective elements (eg legal systems, regulations, laws and customs). From 1850 onwards, the phase of ultra-subjectivism began in Europe with authors such as Gerber, Jellinek and Laband, culminating with authors such as Kelsen and Schmitt's own decisionism, as expressed in his *Theory of the Constitution*.

Jellinek and others conceived of the rules of law as subjective volitions of the State considered as a person. In doing so, they took up classical conceptions strongly inspired by Hobbes and Rousseau. For them, law was conceived as an

[5] M. Hauriou, *Teoria dell'Istituzione* n 3 above, 6.
[6] ibid
[7] ibid

expression of the general will, that is, of the will of the state as the incarnation of sovereign power. Hobbes and Rousseau's conception of sovereignty[8] was typical of political philosophy, and its transposition to law and generalisation would have been, according to Hauriou, 'imprudent' on the part of those hypersubjectivist authors. The State's rules and regulations were easily absorbable in the subjectivist conception to the extent that it understood the law as a product of State volition. Difficulties would arise, however, when one tried to account for the so-called customary law (often older than the State) as a product of the will of the State.

Hypersubjectivism was followed by a hyperobjectivist reaction, one of whose greatest exponents was Léon Duguit. For Duguit, the legal rule, conceived as a thing existing in itself, becomes the basis of all legal existence. Legal personality becomes a valueless concept. Human actions can only create legal effects if they conform to legal rules. This legal conception bears great similarity to Durkheim's objectivism, for whom the legal rule was a product of the environment of the 'mass of consciousnesses.'

Hauriou summarises his institutional thinking in the following formulation:

> 'An institution is an idea of a work or enterprise that is carried out and legally lasts in a social environment; for the realisation of such an idea, a power is organised that provides it with the necessary organs; on the other hand, among the members of the social group who are interested in the realisation of the idea, community manifestations are produced, direct from the organs of power and regulated by procedures'.[9]

For Hauriou, there are two basic types of institutions. The first type would be the *institution-person* or constituted body, ie, State, associations, unions, etc, in which organised power and communitarian manifestations among the group members are internalised within the scope of the idea of work. After being the object of the corporate institution, the idea becomes the subject of the physical person that develops into the constituted body.

On the other hand, there are institutions-thing in which organised power and the community manifestations of members are no longer internalised within the scope of the idea of work. They exist in the social environment but remain external to the idea.[10] A typical example of this type of institution would be precisely the customary rule, which is an institution because, as an idea, it propagates and lives in the social environment but does not generate a corporation of its own. This type of institution lives both within the social body and within the State, using its power to sanction and take advantage of the community manifestations that occur within it.

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[8] I admit that both Rousseau's and Hobbes's thoughts are part of the same 'family' of theories regarding the conception of sovereignty and its relationship with law. Regarding this, see C.A. Moura, 'Hobbes, Locke e a Medida do Direito' 6 *Filosofia Política* (Porto Alegre: L&PM, 1991) 141-154.

[9] M. Hauriou, *Teoria dell'Istituzione* n 3 above,12-13.

[10] ibid 13.

One of the best examples of how this theory of institution works is offered to us by Hauriou in his essay on 'The unpredictability in the contractual relations of social institutions'.[11] In this remarkable essay, the French jurist seeks to demonstrate how the changes that were taking place in the law, particularly in the area of French administrative law, could not be adequately explained by traditional theories about the abuse of rights and the *rebus sic stantibus* clause.

For Hauriou, the fundamental element that would have provoked the incorporation of the Theory of Unpredictability (*Théorie de l´imprévision*) and the 'socialisation of risks', in particular in accident and administrative law, would have been the *institution of public service*.[12] To understand the extent of these changes, it is necessary to start from a first observation, namely, that applying the theory of unpredictability introduces a principle of distributive justice into a commutative contract. As remarked by Hauriou:

> 'Unpredictable risk is distinguished from foreseeable risk and while the latter remains subject to a principle of commutative justice, which attributes 'to each his own risk', the unpredictable risk is common to both parties and distributed between them'.[13]

This way of thinking was exemplarily expressed in the war decision of the Council of State of 30/03/1916, the Gaz Bordeaux case, which concluded that

> 'the gas company, during the transitional period, must bear only that part of the onerous consequences of the *force majeure* situation which a reasonable interpretation of the contract allows it to bear'.[14]

Several decisions followed along the same lines of thought. The Faillot Law of 21 January 1918 established that it is up to the judge to establish the extent of the damage to the interest due to the party that requested the dissolution, which is a way of sharing risks. One could even speak of a 'risk distribution coefficient' since the sharing of risks is not merely a division into two halves. 'Where does this communion of risk to be shared come from, and how can a risk common to the contracting parties arise?' asks Hauriou. It is true that in a pure contract, there are no elements to understand and justify this 'socialisation of risk'. The answer lies in the institution in which there are interests and the so-called common risk. The foundation of the aforementioned socialisation can be found in the communion of ideas and community of interests.

> 'A community spirit is created which in the State will be called public

[11] M. Hauriou, 'L'imprevisione nei rapporti contrattuali della istituzioni sociali' *Teoria dell'Istituzione e della fondazione*, translated by C. Sforza (Milano: Giuffré, 1967), 47-67.
[12] ibid 50.
[13] ibid
[14] ibid

> spirit, in associations corporate spirit, in private law relations family spirit and so on.'[15]

In this way, in contracts dominated by an institution, the community spirit penetrates, creating the feeling of shared risk and distributive justice.

Such penetration of interests generates an equation in which every contract involving an institution is influenced by itself and by its interests and spirit, imposing a distributive justice pattern that establishes common risks.[16]

The history of administrative law demonstrates several transformations that have occurred within the scope of law and its interpenetration with the history of institutions. Since the second half of the 19th century, contracts established between the Public Administration and companies, such as public service concessionaires, followed classic parameters according to strict clauses, the non-compliance of which implied draconian sanctions such as seizure and bankruptcy.

Around 1886, this logic began to change with the growing importance of the concept of *Public Service*. People began to reflect on the *principle of continuity*, which states that public service should not be interrupted and cause harm to social life. Therefore, Contracts involving providing services to the public began incorporating community interests. The form of competition, agreements on tariffs between companies and users, etc, are signs of these transformations.

As Hauriou emphasises,

> 'whether the public service institution is incorporated into the contract or is merely the final objective, it is always within the contractual situation that the institution dominates and that it is verified, and it is under its influence that the distributive sharing of the consequences of the unpredictable risk takes place'.[17]

Still, what are the grounds for the obligation of sharing risks? Would they derive from the contract itself? The law and the contract were silent on these aspects. In fact, for Hauriou, the acceptance of the institution of the public service in the

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[15] M. Hauriou, 'L'imprevisione' n 11 above, 51.

[16] It is interesting to note that, while Renard (another important institutionalist, neo-Thomist and disciple of Hauriou) distinguishes the contract from the institution as original forms of law, on the other hand, he admits that there is only one *institutional conception of law*. For Renard, in the contract there is no integration of an idea, there is only a meeting of two wills that each follow their own idea and this phenomenon produces an equilibrium; the effects of the contract are entirely included and definitively closed in this equilibrium: 'The contract is merely the "tête a tête" between the creditor and the debtor, the seller and the buyer.' R.G. Renard, n 5 above; A.J. Delos, 'Théorie de l'institution' *Archives de Philosophie du Droit et de Sociologie Juridique*, Cahier Double nos 1-2 (Paris: Recueil Sirey, 1931), 133. As Delos emphasizes, for Renard and Hauriou there is only one institutional conception of law, that is, even at the level of the contract there is an 'embodied idea' that is expressed in the balance that must exist between the contracting parties. There is, therefore, an institutional nature and the contract revolves around an 'organizing idea.' ibid 136.

[17] M. Hauriou, 'L'imprevisione' n 11 above, 56.

contract is the basis for this obligation.

> 'Through the implicit acceptance of the institution incorporated in the contract and which had its natural requirements, it can be said that the unpredictable also becomes predictable and regulated by the contract'.[18]

In the theory of unpredictability, there is, therefore, a combination of social data and legal techniques. We are here to understand social data as the public service institution linked to the contract with the 'socialisation of risks'. In turn, the idea of distributive justice and the technique reveal the acceptance of the institutional element within the contract.

The transformations within the scope of the theory of unpredictability in administrative law are not the only examples of the intertwining of institutions *in* law. Other examples related to the institutions of family, succession and private property could be mentioned. Thus, in several private law contracts, dominated by institutions such as the public service, the *element of solidarity* arises between the parties that will significantly influence the judge's judgment regarding the use of his power to share common risks, according to the principles of distributive justice, already defined in function of the institution.

Other examples of the presence of institutions in commercial law are assets created as collateral for creditors since bankruptcy puts all commercial relationships at risk. In the field of labour law, several situations could be analysed in the same way. The existence of collective labour contracts began to show, as early as the early 1920s, a feeling of solidarity between workers and employers in the same field of activity. It is notable that risks were shared among workers in the same field of production to avoid the simple and prevailing law of supply and demand in setting jobs and wages. In this case, once again, there is a socialisation of risks negotiated between unions, employers, and employees.[19]

In the context of family law, Hauriou analyses an interesting example. Imagine, in the context of French civil law before the First World War of 1914, that a woman-owned income securities that her husband, the administrator of the woman's assets, had sold for a high price without reinvesting the money obtained. Before the First World War, the husband purchased new real estate securities without complying with the formalities required for the investment. The marriage was dissolved after the First World War, and those securities were devalued by 50%. However, the husband had to reimburse the woman the full amount with which the first sale had enriched the joint property. This result, contrary to the family spirit, led the legislator in 1919 to modify, due to the war, the system of dowry restitution and establish that the securities sold would be valued on the day of liquidation. In this case, case law merely interpreted the nature of family acts that

[18] M. Hauriou, 'L'imprevisione' n 11 above, 57.
[19] ibid 62.

required sharing unforeseeable risks, considering a reasonable interpretation of the institution of marriage.[20] The institution allows the introduction of the calculation and distribution of risks in social relations established in a new sociability pattern regulated by *solidarity*. The institution will allow the change of the 'rules of judgment' of the Social Law that was then being formed.[21] Exemplary of this change is the adoption of more flexible regulatory criteria based on normality *patterns*, such as legal standards.

In one of his essays on Common Law, Hauriou observes that in French administrative law, a type of normative regulation is gaining more and more ground that is not based on the 'rule of law' but rather on what Anglo-Saxon law calls a *standard* or directive. According to Hauriou,

> 'a legal rule consists of a precise provision, relating to specific hypotheses, which strongly and closely binds the judge to a power superior to his own (the same would occur for a legal rule binding an administrative body)'.[22]

On the other hand, a *standard*,

> 'it is intended to guide the judge or administrator in the application of the law, leaving him a certain discretionary power; very often the judge or administrator, with his discretionary power, creates his own *standards* and directives (parameters). The *standard*, in effect, is not a precise rule relative to a hypothesis. Still, it is a general power to decide as an arbitrator a category of controversy by adopting certain freely established methods'.[23]

The *standard* is empirical, constructed from particular cases, and therefore changeable and flexible.

Anglo-Saxon law presents one of the most important *standards* in the experience of Social Law, the standard of rationality, that is, a consistent method in the search for a *balance* between two opposing interests in a contract. In doing so, it is inspired by a third interest, that is, the *continuity* of a socially useful company that is constituted (for example, a commercial company that would not need to go bankrupt)[24] and

[20] M. Hauriou, 'L'imprevisione' n 11 above, 64. Several other examples of transformations that have occurred in the field of Social Law and in particular the concept of responsibility can be found in F. Ewald, *L'État Providence* (Paris: Grasset, 1986) and in L. Husson, *Les transformations de la responsabilité* (Paris: PUF, 1947).

[21] I am here using François Ewald's terminology. See the essay F. Ewald, 'A Concept of Social Law', in *Dilemmas of Law in the Welfare State* (Berlin: European University Institute, 1985) 40-75; Id, *L'État Providence* n 20 above. See G. Gurvitch, *L'Idée de Droit Social. Notion e système du Droit Social. Histoire depuis le 17e siècle jusqu'à la fin du 19e siècle* (Darmstadt : Scientia Verlag AAlen, 1972). I have dealt with the subject more comprehensively in the book R. P. Macedo, *Contratos Relacionais e Defesa do Consumidor* (São Paulo: Max Limonad, 1st ed, 1997) notably on the first three chapters.

[22] M. Hauriou, 'L'imprevisione' n 11 above,123.

[23] ibid 124.

[24] At this point, institutionalism questions the very logic of liberal thought based on the idea

thus seeks to establish a balance between the three elements.[25]

The *standard* would be a more appropriate way to establish the rule of a kind of 'balancing reason' within the exercise of power by the Administration, allowing the conciliation between the interests of private parties and those of institutions. In this sense, the *standard*, being a form of self-limitation of the discretionary power of the Administration, would be a type (or type, as Schmitt would say) of *law*.[26]

When analysing the work of Al Sanhoury (*Contractual Limitations on Freedom of Labor in English Jurisprudence*, Paris, 1925) on Common Law, Hauriou observes that he distinguishes four periods in the history of standards in English law, particularly in restraints of trade (1) Until the end of the 18th century there were no contractual restrictions on freedom of labour and strict application of Common Law; (2) After the beginning of the 18th century (Mitchel C. Reynold case) there began to be partial restrictions on freedom of trade; (3) From 1893 (Nordenfelt case), the *standard* changed and the rationality directive became the rationality *standard*. The balance between the economic interests of the contracting parties and the interests of *policymaking gained fundamental importance, to the point where the interests of policymaking* began to be confused with the protection of existing companies. One way to do this would be to avoid monopolies that were harmful to the community, thus ensuring free competition; (4) In the years 1913 and 1916 (Mason and Saxelby cases), the last period began, when the interests of companies were recognised in a restricted manner about the Administration's concessions. Regarding employment contracts, the company's interest gave way to the workers' right to ensure their own subsistence and the community's interest in opposing employer abuse in the bargaining of work conditions. At this point, the judge needs to reconcile two types of directives. On the one hand, there is an interest in maintaining the 'market logic' of free competition (within a classical liberal logic à la Hayek).[27] On the other hand, it is imperative to reconcile it with the need to protect workers from employer abuse (the logic of the 'Welfare State', so well analysed by Ewald).[28]

In the final part of his essay 'Legal Policy and Subject Matter of Law', Hauriou presents some conclusions about his legal theory and its relationship with the *abovementioned standards*. For the French jurist, the architecture of the legal system would be as follows:

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of the market and free competition. As Hirschman analyzes in his book: A. Hirschman, *Saída, Voz e Lealdade* (São Paulo: Perspectiva, 1973), the bankruptcy of a company does not always appear as a rational option from an economic point of view, as it implies the dissolution of investments in training, resources, 'Know How', etc, which are lost with the bankruptcy of the company.

[25] M. Hauriou, 'L'imprevisione' n 11 above,125.

[26] ibid 127.

[27] See F. Hayek, *Direito, Legislação e Liberdade. Uma nova formulação dos princípios liberais de justiça e economia politica* (São Paulo: Visão, 1985).

[28] F. Ewald, 'A Concept of Social Law' n 21 above. See M. Hauriou, 'L'imprevisione' n 11 above, 131-132.

> '1)- At the base are the *standards* and directives, primary creations of the self-limitation of the power of the various social authorities that administer the law in the operations of practical life and the composition of controversies; 2)- Above these, there are written rules of law or laws that serve to control and contain the discretionary power that jurisprudence exercises through standards and directives and, furthermore, to provide society with more general, better known and more stable rules; since the laws themselves need jurisprudence to be applied, a practical balance is established between the latter and the former that leaves a part of the discretion to jurisprudence; 3)- A little above these two essential planes of law, and to regulate their balance, is the dual magisterium of legal principles and doctrine. Up to the level where principles dominate, the various elements of the legal system are based on power, since laws are the work of a discretionary power, and so is jurisprudence. In the higher zone of principles, on the contrary, we find only pure ideas which seek to realise themselves in legal institutions through the persuasive work of doctrine and the organisation of jurisprudential customs. This is how social things progress, moving from the pole of power to the pole of institutions, through the combined action of feelings of self-limitation and the persuasive force of ideas'.[29]

The *standard does* not say what should be done. It does not state any rule of conduct; it does not follow the logic of what is permitted and what is forbidden. It addresses the judge and tells him how he should judge without explicitly stating the norm that will be specifically sanctioned. For these reasons, it constitutes what François Ewald would call a 'rule of judgment.' The *standard* provides an average measure of social conduct that can be adapted to the peculiarities of each given hypothesis.[30]

General principles of law perform a function analogous to standards. In the context of Social Law, general principles of law play a homogenising role. General principles establish the ground for consensus regarding the measures and limits of the legal and non-legal. As a result, the legal system would be based on the principle of a balancing reason, which would seek, with moderation, to reconcile the various principles, powers and institutional interests existing within society. Thus, acting justly would imply acting normally in the sense of integrating and harmonising the general interests in society and institutions in particular.[31]

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[29] M. Hauriou, 'Politica giuridica e materia del diritto' *Teoria della istituzione e della fondazione* (Milano: Giuffrè, 1967), 168.

[30] F. Ewald, *L'État Providence* (Paris: Grasset, 1986), 492-493., 492-493.

[31] See F. Ewald, 'A Concept of Social Law' n 21 above, 68; F. Ewald, 'Una experiência foucauldiana: os princípios gerais do direito', in *Foucault. A norma e o direito* (Veja: Lisboa, 1993) 67-76. As Ewald claims: 'The judgement of balance, in the social law sense, is a *normative* judgement. Judging in terms of balance means judging the value of an action or a practice in its relationship to social normality, in terms of the customs and habits which at a certain moment are those of a given group. In therefore means judging relatively: the same act may at one lace be punished, at another not.

One should note that the very concept of normality is a reflective, changing and mutable one. It establishes a form of rationality and criteria for dividing what is fair and unfair, legal and non-legal.[32]

2. Implications of Hauriou's Theory

Interestingly, the conception of justice presupposed in institutionalist thought is radically opposed to the classical liberal conception of justice, as formulated, for example, by Friedrich Hayek. In this dimension of criticism of liberal legal thought, institutionalism presents a strong element of affinity with Carl Schmitt's thought.

For institutionalist thinking, the justice presupposed in the contractual relationship is no other than the fairness of the equilibrium achieved by the exact balancing of the exchanged values. Thus, for example, as Delos points out, when exchanging a given apartment for a certain amount of money, it must be done at a specific ('normal') price to balance the two sides of the bargain.

> 'There is a "fair price" for the apartment and the fairness of the contract consists of the balance of the exchanged considerations'.[33]

For an institutionalist conception of law, the equilibrium between the objects exchanged, and their exact balancing constitutes the fair price in the contractual relationship. The fair price, therefore, can only be determined by balancing and estimating on the part of agents.

Such a conception would provoke indignation in a liberal like Hayek, for whom the concept of a fair price is eminently metaphysical and without any rational foundation.[34] The institutionalist conception of law represents a strong blow to voluntarist legal conceptions based on the *autonomy of the will*.[35] For Hauriou and Renard, there is no autonomous will, only wills that are subject to an object. Even in a contractual relationship freely established between two individuals, the wills only adhere to an object recognised as fair by reason. For the institutionalist conception, one would be far removed from the liberal conception, according to

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What furnishes the principle of the sanction is not the intrinsic quality of the act, but its relationship to others: it is the abnormal, the abuse, the excess - what goes beyond a certain limit, a certain threshold, which in themselves are not natural but social, and therefore variable with time and place. Not that the abnormal is amoral or wrong. Quite the contrary; it may be useful and necessary, like industrial development with its accompanying nuisances. But it introduces a social imbalance which it seems just to compensate for, in terms of a certain idea of equality in the collective distribution of burdens'.

[32] Regarding this, see my R.P. Macedo, n 22 above. .

[33] J. Delos, 'Théorie de l'Institution' *Archives de Philosophie du Droit et de Sociologie Juridique*, Cahier double nos 1-2 (Paris: Recueil Sirey, 1931), 139.

[34] F. Hayek, *Direito, Legislação e Liberdade. Uma nova formulação dos princípios liberais de justiça e economia politica* (São Paulo: Visão, 1985), 92.

[35] Regarding this question, see M. Villey, 'Essor e décadence du voluntarisme juridique' *Archives de philosophie du Droit. Nouvelle Série - Le rôle de la volonté dans le droit* (Paris: Sirey, 1957), 87-98.

which the object of the contract would be fair because it would mark the meeting point of two wills. Institutionalism recognises the existence of an institutional nature in the contract itself to the extent that the presence of an organising idea is identified in it.

This aspect is even more evident in Delos' thought, another representative of institutionalist thought:

> 'A legal act is therefore never a pure manifestation of the will. Neither is the law a pure expression of the will of the rulers, nor is the foundation the meeting point of the wills of the members of the group, the effect of a social contract à la Rousseau, nor does the contract mark the conjunction of two freedoms that establish their point of equilibrium: there is no will in law that does not bow before an object, that does not adhere to it, that does not submit to its rules. It is, therefore, the analysis of realities themselves; it is the study of the internal structure of the legal act that definitively places subjectivism and voluntarism outside the domain of the philosophy of law'.[36]

Once any voluntarist and subjectivist conception of law is rejected, any type of voluntarist decisionism (law as the exclusive will of the sovereign) is automatically dismissed, which will mean a significant change in the direction of Carl Schmitt's theory, in line with his adherence to institutionalism. After all, for institutionalism, the legal rules themselves, the administrative or regulatory decisions, connect rulers to those they govern. Still, the point of contact and the core of this relationship is formed around an idea of Law and, thus, a representation of the *common good*. Within the institution and the foundation, all internal legal connections revolve around an end, the achievement of which it seeks. In the case of a contract, everything revolves around the balance assumed in the 'fair price'.

3. Institutionalism and the Sociology of Law

> 'The connection between law and sociology is inscribed at the heart of the very notion of justice.'
>
> DELOS[37]

> 'A little sociology takes the jurist away from the law, and a lot of sociology brings him back.'
>
> HAURIOU

[36] J. Delos, n 34 above, 143.
[37] ibid 147.

Legal sociology has a significant influence on the institutionalist conception of law. As pointed out, for this legal conception, fair, positive law is the expression of a balanced social order. Modern law thus achieves the justice of a Social State.[38] Therefore, the order of justice is a social order, which is why sociology has much to contribute to the jurist in this effort to identify what is fair, what is balanced, and the *normal social order*.

Institutionalism introduces an important change in the approach to the legal phenomenon. Law from an institutionalist perspective ceases to be studied independently of its 'social subject matter'. It is as if the 'legal form' exhausted the rule of law in its essence to use the Thomistic language of Delos and Renard.[39] In this way, the law ceases to be understood as a mere formal reality. It becomes what it is: a social form, a social behaviour that, according to specific reasons and processes, assumes a positive legal form.

For theorists of Social Law, among whom Hauriou is one of its most notable precursors, the law is conceived from the 'legal experience' surrounding it. This concept was developed within the scope of French legal sociology[40] and is very close to institutionalism and Schmittian concretism. For Romano and Schmitt, the question of the foundation of law (or grounds of law) is no longer to *determine a priori* what law should be in society, but rather to analyse how the concrete and positively realised legal experience constitutes parameters for the 'demarcation' of the legal and the non-legal.

By assimilating Hauriou's influence, Carl Schmitt absorbed the critique of social law that is paradigmatically expressed in institutionalism and in Saleilles's 'natural law of variable content'. For the theorists of Social Law, the problem of law becomes the problem of law's government, of legal prudence, more than its metaphysical foundation. For this reason, Hauriou, Romano and, in a certain sense, the Schmitt of the 1930s present a reflection closer to the sociology of law than philosophy. Nevertheless, as will be seen later, Schmitt will defend a formal conception of law that is not identified with the so-called legal sociologism.[41]

It is important to note that despite the general characterisation of institutionalism now presented having taken Hauriou's thought as its main point of reference, several of his central ideas also appear in the thought of other important jurists such as Georges Renard, Delos and even Georges Gurvitch.

Renard, adopting the same basic definition as Hauriou, develops some of his ideas by giving institutionalism a notably theological and neo-Thomist character. For him, the institution is basically 'an idea endowed with appropriate paths and means that allow it to establish itself and be realised, to perpetuate itself by taking

[38] ibid 149.

[39] ibid 150.

[40] See the works by F. Ewald and L. Husson already mentioned. See also L. Husson, *Nouvelles Études sur la pensée juridique* (Paris: Dalloz, 1974) 57-172 and G. Gurvitch, *L'Idée de Droit Social* n 22 above, and Id, *Éléments de sociologie juridique* (Paris: Éditions Aubier-Montaigne, 1960).

[41] G. Gurvitch, *Éléments* n 40 above.

shape and objective existence'.[42] According to Renard:

> 'For its members, an institution is a means, a place (foyer), a bond of trust – fides –tha t is established between them; this varies according to the nature of the institutions but which a somewhat attentive psychology finds everywhere. This intimacy results from the effect that the idea exerts on the members of the institution. It is the idea – or the end, the Common Good that it represents – that makes the institution, insofar as it takes root within a given human environment that it "informs" and organises and differentiates, and in which it gives rise to a power.'[43]

Based on Hauriou's reflection, it is possible to summarise the following fundamental characteristics of Social Law. What has changed from traditional civil law to social law is the social rule of judgment. This means a change in the type of political rationality through which social relations are thought of. Furthermore, the criteria that distinguish law from non-law and the rules according to which judges will judge conflicts also change. Social Law is law directed less at individuals taken in isolation but instead at them insofar as they belong to a group, a class, a socio-professional category or an institution. The subjects of Social Law are qualified according to their position in society. Social Law is a law of privileges and inequalities; it is a discriminatory law, a law of preferences. For this reason, the categories of the underprivileged, the worker, the injured, etc. can emerge within it. Social Law is a law of material equity and not of formality, where what is fair becomes what is *normal*. This intertwining of the concept of normality with reality itself means that in the conception of Social Law, the dualism of *is* and *ought* is overcome to the extent that obligations begin to be defined in relation to reality itself, which it regulates to a certain extent. Finally, to the extent that the various institutions are sources of authority,

[42] R.G. Renard, *La philosophie de l'Institution* (Paris: Librairie du Recueil Sirey, 1939), 95-97, quoted by J. Delos, 'Théorie de l'Institution' *Archives de Philosophie du Droit et de Sociologie Juridique*, Cahier double n. 1-2, 1931, Recueil Sirey, Paris, 101.

[43] ibid 104. According to Renard, the institution is a source of power and authority. 'Every institution is the seat of a legal system; there is at least one potential legal system in it; the institution has its inner life constituted by relations between its organisms; it is organized and when we say organism we mean differentiation: the institution is the *seat of an authority*'. Id, *Théorie de l'Institution* (Paris: Librairie du Recueil Sirey, 1939), 120-122, J. Delos, 'Théorie de l'Institution' *Archives de Philosophie du Droit et de Sociologie Juridique*, Cahier double nos 1-2 (Paris: Recueil Sirey, 1931) 104, 106. Delos, in his commentary on the theory of institutions, observes that the legal relevance of institutions depends to a large extent on their success as institutions. Thus, unlike sociologists, the jurist is more interested in established institutions than in embryonic institutions. These embryonic institutional movements are always of interest to sociologists, but not necessarily to jurists, since the latter is practically too busy protecting the rights of clearly constituted institutions and groups, and the imperfection of the technical means at his disposal greatly limits his action, so that he can usefully seek to guarantee certain social activities, certain very tenuous solidarities. He should not ignore them, but he cannot be paralyzed by them; bound by the 'law of success', he goes further.

institutionalism leads to legal pluralism, where there is room for the coexistence of multiple sources and origins for law.

Hauriou's insights regarding institutionalism led to Carl Schmitt's thought towards Social Law and the critique of its theoretical foundations. It is worth analysing in further detail, however, to what extent such thoughts can be rendered a coherent whole, in particular the concepts of sovereignty and legal pluralism.

4. Sovereignty and Pluralism

To the extent that Hauriou insisted greatly on the idea that each institution could create its own law, another fundamental question emerged: the limits and inter-relations between the different institutions and state sovereignty.

Hauriou, in his early works, makes clear his criticism of the absolute conception of sovereignty: 'We believe (in sovereignty) to be more relative and subject to law; we do not see why sovereignty would not be as relative as freedom.'[44] (...) Furthermore, he adds, 'It is a dogma of modern political theory that the sovereignty of the State excludes all other sovereignty and is not, over the same territory, shared with any other power.'[45] Therefore, according to Hauriou, this dogma of absolute sovereignty is false and is contradicted by historical experience and the reality of facts.

As highlighted by Gurvitch,[46] Hauriou's conception of sovereignty, particularly relative sovereignty, varied throughout his works. In *Précis de Droit Public*,[47] he observed that the great error of authors such as Esmein and Duguit, who deny the sovereignty of the State, is to recognise only one form of sovereignty. For Hauriou, there are three types of sovereignty: (1) sovereignty of established law, which is the principle of order; (2) sovereignty of government, which is the principle of authority, which he calls political sovereignty; and (3) sovereignty of subjection, which is the principle of freedom, which he calls national sovereignty.[48] The first and the last form the juridical sovereignty which is opposed to political sovereignty. Political sovereignty belongs to state power and is manifested in the commander's will, while juridical sovereignty belongs to society.

According to Hauriou, the republican constitutional regime already separates political and legal sovereignty. With the help of judges, the latter subjects political power and rulers to positive law.[49] Therefore, the power of jurisdiction is a legal power that relativises political power (political sovereignty). As the embodiment

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[44] M. Hauriou, *La science sociale traditionelle* (Paris: Larose, 1895) 375-386.

[45] ibid 385-386.

[46] G. Gurvitch, 'Les Idées-maîtresses de Maurice Hauriou' *Archives de Philosophie du Droit et de Sociologie Juridique*, Cahier double nos 1-2 (Paris: Recueil Sirey, 1931), 160. See too G. Gurvitch, *L'idée du Droit Social* n 41 above, 647-710.

[47] M. Hauriou, *Précis de droit administratif et de droit public* (Paris: Librairie de la Société du recueil Sirey, 2nd Edition, 1919), 620.

[48] ibid 38, 625.

[49] ibid 664.

of legal power, the judge is 'the living organ of society.' Political sovereignty is balanced by jurisdictional power. Popular sovereignty and 'social power'[50] influence and participate in judges' decisions.

The 'pulverisation' of the notion of sovereignty harmonises perfectly with legal pluralism, typical of institutionalism, insofar as it recognises the possibility of various orders equivalent to or superior to the State, which collaborate with it on an equal footing.[51] Political sovereignty would be absolute only within its previously determined limit of action. Hauriou emphasises that

> 'The State is sovereign... The nation, on the other hand, is sovereign; it is sovereign because it can draw from within its own organisation the bloc that can form autonomous institutions' (...) 'The nation is also capable of being present outside the government of the State, thanks to the frames that are its own. These frames are those of the autonomous institutions.'[52]

Hauriou thus refuses any identification between the State and the nation and attributes to the latter, to society, an active and important legal role.

Sovereignty, at the internal level of a country, would follow the same paradigm as sovereignty at the international level, in which the international balance expresses an external limitation of independent and equivalent States.[53] Trade unions, confederations, workers' organisations, etc, are examples of autonomous institutions existing within a society that would limit State sovereignty.

Hauriou's legal pluralism leads to a conception of freedom of a Tocquevillian nature insofar as the balance of the social powers in dispute guarantees the individual about each of these powers taken in isolation.[54] Thus, as Georges Gurvitch observes, 'the external limitation of dissociated sovereignties is, at the same time, the triumph of freedom.'[55]

Gurvitch greatly laments the change, influenced by Aristotelian-Thomistic thought,[56] in Hauriou's thinking towards the end of his career. In the last editions of his *Principes de Droit Public*,[57] he observes that legal sovereignty, political

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[50] François Ewald develops a Foucauldian approach to the idea of social power, emphasizing the increasing role of public opinion in the formation of the changing and controversial (in the etymological sense of 'polemos') concept of Social Justice. See F. Ewald, n 32 above.

[51] G. Gurvitch, n 46 above, 185.

[52] M. Hauriou, n 50 above, 447, 244.

[53] Regarding this point, see R.P. Macedo Jr., 'Foucault, o Poder e o Direito' *Revista de Sociologia da Universidade de São Paulo*, 2, I, 151-176 (1990). In this paper the ideas of Ewald and Foucault about the paradigm of international law for the definition of sovereignty within the scope of the Welfare State and Social Law are analyzed.

[54] M. Hauriou, n 46 above, 370.

[55] G. Gurvitch, n 52 above, 189.

[56] See ibid 189-194; G. Gurvitch, n 41 above, 123. Hauriu defines himself in his *Précis de droit administrative et de droit public* as 'a Comtean positivist who becomes a Catholic positivist, ie, a positivist who will utilize the social and moral content of Catholic dogma.' M. Hauriou, n 53 above.

[57] M. Hauriou, ibid 618.

sovereignty and popular sovereignty are all united in the sovereignty of the State.[58] In this way, Hauriou returns to the old theory of the self-limitation of the State to explain the relativity of State sovereignty. The State, in this new formulation, retains legal supremacy. The supremacy of the institution gives way to the State; the announced 'age of the institution' retreats to the 'age of sovereignty.'

For Gurvitch, 'to reattach the sovereignty of law to the sovereignty of the State and reduce it to its self-limitation is to deny it completely.'[59] This statement is exaggerated. While it is true that Hauriou reconsiders the radicalism of some of his initial positions, it is also true that such a change does not imply a general denial of the essential features of institutionalism. An example of this can be found in Hauriou's own position, in the sense that the trade union movement represents an external limitation of the sovereignty of the State by the legal sovereignty of society.[60] Hauriou, in yet another manifestation of his great sensitivity to the study of the social reality in which he lived, recognises the increasingly complex and profound intertwining between institutions, the State and Public Administration, even going so far as to desire the introduction of professional unions into the 'mechanism of public powers.'[61] In this same line of thought, Hauriou distinguishes *public administration from the administration of public interest, which is* closer to private life. By elaborating on such distinctions, Hauriou presents a third way of understanding the phenomenon of sovereignty and the opposition between the State and Society that is not limited to a bipolar, dichotomous consideration. Public Administration would not be limited to always being a State body but could be more or less intertwined with and dependent on autonomous social institutions, such as trade unions.

It is interesting to note that the recognition of the legal supremacy of the State and the integration of unions into the State itself does not remove Hauriou's perception of the danger and risk that the mere nationalisation of unions and the annihilation of their autonomy would represent. For this reason, Hauriou advocates decentralising public services to combat statism and guarantee the effectiveness of the Tocquevillian motto, according to which only power controls power.[62]

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[58] Hauriou in his Preface to his *Droit Administratif*, p IX, prior to 1910 already stated that 'Thus, the time has come to regard the State no longer as a sovereignty, no longer as a law, but as an institution or a set of institutions, or, more exactly, as the institution of institutions.' M. Hauriou Apud G. Zarone, *Crisi e Critica dello Stato. Scienza giuridica e trasformazione sociale ta Kelsen e Schmitt* (Napoli: Edizione Scientifiche Italiane, 1982) 117.

[59] G. Gurvitch, '*Les Idées-maîtresses* n 57 above, 190.

[60] M. Hauriou, n 57 above, 735-736.

[61] ibid 208.

[62] Even in this second phase of his thinking, Hauriou, in his defense of institutions – and in particular freedom of the press – ends up designing a social-democratic political ideal, which is distinct from the radical and dictatorial position assumed by Carl Schmitt in the 1930s. For him, the institutions that guarantee the so-called fundamental rights have their foundation not in the State, but in society itself. See, in this sense, R. Schnur, 'L'influence du Doyen Hauriou dans les pays germaniques', in G. Marty and A. Brimo eds, *La pensée du Doyen Maurice Hauriou et son influence* (Paris: Pédone, 1969), 265, 267. Despite such distinctions, several authors such as E.

Despite these considerations, the change in Hauriou's thinking is not without importance. It is worth to emphasise that in this second phase of his thinking, the State begins to be recognised as the most perfect of institutions, the most eminent, an institution that is called to embody the common interest.[63] On the other hand, interests related to the economic sphere will appear to him as merely individual and particularistic interests.[64]

Before concluding the presentation of institutionalism, it is worth analysing the ideas of another institutionalist author who also had a direct influence on Schmitt: Santi Romano.

5. Santi Romano's Influence

According to Norberto Bobbio, Carl Schmitt is perhaps the only great jurist contemporary to Santi Romano who understood and recognised the importance and originality of the Italian jurist's work. The laudatory statements he presents in *On the Three Types of Legal Thought* represent the first international recognition by a renowned jurist of the originality of a work such as The Legal Order (*Santi Romano*).

Santi Romano's theoretical debt to Hauriou's thought is obvious and has been acknowledged by him on several occasions. His work has, however, the great merit of conferring systematicity on some of Hauriou's ideas on pluralism and institutionalism. One of the main points of identity of the works of Hauriou, Romano and Schmitt is their strong aversion to Kelsenian normativism, which had a strong presence in the European legal debate of the first half of the century.

For Romano (as well as for Hauriou), law, before being a norm or referring to a social relationship, is an organisation, a structure, an institution: 'Each legal system is an institution and vice versa, each institution is a legal system: the equation between the two concepts is necessary and absolute.'[65] For him, the institution precedes law, which derives from it.

The difficulties and ambivalences that arise in Hauriou's definition of the State reappear in Romano's thought. His greatest difficulty lies, on the one hand, in the fact that his pluralist institutionalism prevents him from conceiving of the State as a synthetic totality. On the other hand, he is unable to develop the thesis of legal pluralism without a strong and unitary concept of the State since each plurality of legal systems does not subsist from the point of view of a theory of law as

Bodenheimer and Friedman have directly associated institutionalism with a totalitarian and Nazi conception of law. Perhaps this identification is due precisely to the development, given by Schmitt, of institutionalism in texts such as *Über die drei Arten des Rechts-wissenschaftlichen Denken*. See R. Schnur, ibid 275.

[63] M. Hauriou, n 62 above, 65, 78.

[64] ibid 383.

[65] S. Romano, *L'Ordinamento Giuridico (1919)* (Firenze: Sansoni, 1946). For the purposes of this essay, the spanish edition was used. Id, *El Ordenamiento Jurídico* (Madrid: Instituto de Estudios Políticos, 1963), 2.

an organisation. For this reason, Bobbio correctly describes it as 'theoretically pluralist, but ideologically monist.'[66] For Romano, the State, insofar as it is a complex system resulting from a series of institutions that include a people, a territory, and a bureaucratic organisation, constitutes a 'maximum institution.'[67] This maximum institution would organise, coordinate, and harmonise the powers and rights generated within the various social institutions.

Santi Romano, unlike Hauriou, who inquires about the founding will of the institution, does not see the legal possibility of this inquiry. For him,

> 'an order is because it is when it is, without this meaning confusing fact and order, since the fact that constitutes the starting point of the jurist's inquiry is exactly the order as it exists and it is not possible to go back further, to research the basis, the reason and the value of its effectiveness.'[68]

In this sense, Romano is the theorist of the involuntary law of organisation (*ius involuntarium*),[69] contrary to Schmitt's theory of concrete order, which gives the voluntary actions of men (*Führer*) a determining character.[70]

Another important aspect common to the institutionalist theses of Hauriou and Romano on the one hand and Schmitt's 'concrete order thinking' on the other is the opposition to the Kantian dichotomy between *Sein* and *Sollen* that appears in Kelsen's theory. As is known, Kelsen separates the spheres of *is* and *ought* and defines his understanding of legal science by this distinction. For him, what is in the descriptive realm (*is*) is not of interest to the jurist but only to the sociologist. For an institutionalist approach, the descriptive (*is*) is the social reality already mediated

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[66] N. Bobbio, 'Teoria e Ideologia nella dottrina di Santi Romano', in Id, *Dalla Struttura alla Funzione. Nuovi Studi di teoria del diritto* (Milano: Edizioni di Comunità, 1976).

[67] Zarone understands that the State as a 'maximum institution' represents a step forward in relation to the vagueness of Hauriou's idea of 'institution of institutions.' This is because, for Romano, there would be no indecision between state complexity and social multiplicity in view of the separation that exists in Hauriou between the analysis of the transformations of the State and the legal theory of institutions. Romano's analysis would be more dynamic, to the extent that it recognizes the increasingly absorbing character of the state order in relation to institutions. See G. Zarone, *Crisi e Critica dello Stato* n 58 above, 130.

[68] S. Romano, *Frammenti di un dizionario giuridico* (Milano: Giuffrè, 1951), 69; Id, n 66 above, 50-51; A. Catania, 'Carl Schmitt e Santi Romano' IV *Rivista Internazionale di Filosofia del Diritto*, Ottobre/Dicembre, LXIV (1987) 556.

[69] See A. Catania, ibid 557.

[70] Goldoni and Croce rightly highlight that 'In substance, to overcome the limits of Hauriou's dominant theory, Romano advanced a notion of institution that identifies its distinguishing mark with its formal structure. Yet, the latter is not something objectively and ostensibly visible, as it is a perspective on institutions, one that allows grasping their legal nature. This is what we dub "the juristic point of view". §15 nicely summarizes it: "If law only can materialize and take shape within the institution, and if, conversely, all that is socially organized and is subsumed under the institution as one of its elements takes on a legal character, we obtain the following corollary: the law is the vital principle of any institution, that which animates and holds together the various elements that compose it, which determines, fixes and preserves the structure of immaterial entities. In its turn, the institution is always a legal regime".' M. Croce and M. Goldoni, n 1 above, 72, references omitted.

and legally constituted. For institutionalism, law is thought of within social reality, within the institutions that influence and determine its own functioning and reproduction.[71]

By admitting that one cannot renounce the principle of a 'superior organisation that unites, moderates and harmonises the smaller organisations in which the first is specified', Romano can be understood, in a certain sense, as a 'moderate pluralist'. Romano's pluralism is moderate in relation to Gurvitch's pluralism, which excludes any possibility of hierarchy between institutions and rejects their subordination to a super institution called the State. Romano believes in the benefits of the emergence of social groups that can improve the articulation of individual relations and the State. Still, he always considers the State to be the final moment of an organised society. For this reason, Bobbio states that Romano is 'theoretically pluralist and ideologically monist.'[72] According to Romano,

> 'every institution is by definition (...) a legal system; given that, in our case, there are several institutions that stem from others, it will also result that the legal systems that constitute the former will be parts of the legal system of that broader institution that comprises them; those will therefore

[71] In this regard, the following excerpts from Romano and Schmitt prove the above statements. From S. Romano, n 69 above; A. Catania, n 69 above, 561: 'The concept of law, which must be sought beyond the so-called sphere of practical activity with regard to objective law, postulates two fundamental points. The first concerns the need to refer this concept not to that of a norm, or a complex of norms, but rather to that of an institution. That is, not to the form of duty, but to that of being. The second point, closely linked to the first, requires that the voluntarist character of law be dispensed with in consideration of the ius involuntarium which must be taken into account. Vice versa, the category of duty, the element of will, and therefore the form of practical activity reappear in the manifestations of subjective law. However, it must be borne in mind that the latter is not a primary moment, but a secondary or dependent one of objective law. It is precisely in objective law that one must seek the essence of law, which is deduced from its specific function.' C. Schmitt, *Über die Drei Arten des rechts-wissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934); Italian edition: Id, '*I tre tipi di pensiero giuridico*', in Id, *Le categorie del "Politico"* n 2 above, 254, states that: 'One can speak of a real *nomos* as a real king only when *nomos* embraces the total concept of law, comprising a concrete ordering of the community. Exactly as in the compound term-concept "legal order", the two separate concepts of law and ordering are defined against each other. Thus, in the connection established between *nomos* and king, the *nomos* is already thought of as a concrete ordering of associated life, if one wants to give meaning to the term "king". And likewise, "king" implies a legal concept inherent in the legal system and, therefore, must be of the same nature as the *nomos*, if the terminological approximation between *nomos* and king is not to be a purely external approximation of names, but is to respond to a precise orientation. As the nomos is king, so the king is nomos and, in this way, here we already find ourselves in the context of concrete decisions and institutions, rather than abstract norms and general rules.'. In the opposite sense, 'normatist thought, the purer it is, the more it leads to an increasingly drastic fracture between norm and reality, between duty and being, between rule and concrete behavior.' ibid 256. Still in this same sense, A. Catania, n 69 above, 560 states that 'while in the Kelsenian dichotomy the *Sein* is at the same time a logical condition and the immanent tendency of the normative *Sollen*, in Schmitt and Romano the being is consistently individuated, materialized in a corporate-type structuring. The *Sein* is not, as in Kelsen, indifferently the social reality, but rather a social reality already mediated and legally constructed.'.

[72] N. Bobbio, n 67 above, 183.

be internal legal systems of the latter.'[73]

For radical pluralism such as Gurvitch's, the State is an institution like any other. For moderate pluralism, the State is always an institution different from the others, irreducible to the others and, in a certain sense, the institution that makes them possible.[74] It is the 'institution of institutions' as Romano calls it, following the example of Hauriou.[75]

On the other hand, Romano's monism was also relative because it differed from Kelsenian monism, expressed in the formula: 'the State can be legally understood as being the Law itself — nothing more, nothing less.'[76] For Romano, the State tends to absorb the various legal systems, but new institutions and systems always emerge, which prevents the identification between the State and law. According to him, 'between the concept of institution and that of the legal system, considered unitarily and globally, there is a perfect identity.'[77] However, it is worth emphasising that such a lack of differentiation only occurs when the State completely encompasses all institutions, a fact that empirically never occurs. It is the understanding of the nature of the State and its relationship with institutions that will allow us to identify the nature of Romano's 'relative monism.'[78]

Based on the theoretical framework outlined by Bobbio to understand Romano's thought, we can also understand Schmitt as a pluralist theorist (in the phase of *konkretes Ordnungsdenken*) and as a relativist monist ideologue insofar as he defends the subordination and hierarchisation of institutions in relation to the State

[73] S. Romano, *El Ordenamiento Jurídico* n 65 above, 330.

[74] Once again in the history of political philosophy we are faced with the famous reproach made by Aristotle to Plato. See Plato, *Statesman*, 258E-259D. About the specificity of the authority of a king when compared to that of a chief of a house, see Aristotle, *Politics*, Book I, 1252a-1252b. The nature of the State institution and the power inherent to it are different from other institutions and powers. At this point Romano and Schmitt are Aristotelians in relation to the Platonic Gurvitch.

[75] S. Romano, n 73 above, 125.

[76] See H. Kelsen, *Teoria Pura do Direito* (Reine Rechtslehre) (Coimbra: Armênio Amado Editor, 1974) 424. Such an ideology of ideological monism is equally well expressed in Mussolini's formula 'tutto nello stato, nulla al di fuori dello stato, nulla contro lo stato.' Apud N. Bobbio, 'Teoria e ideologia nella dottrina di Santi Romano' *Dalla Struttura alla Funzione. Nuovi studi di teoria del diritto* (Milano: Edizioni di Comunità, 1977), 185.

[77] S. Romano, n 73 above, 120, 135.

[78] M. Croce and M. Goldoni, n 71 above, 121-122, correctly highlight that: 'it is worth noting that his (Schmitt's) adhesion to institutionalism was mainly inspired by Hauriou and Romano, whom he regarded as his predecessors: 'Hauriou, like Santi Romano, are my masters…Perhaps, rather than masters, it is more appropriate to say predecessors." However, it is easy to realize that Schmitt's peculiar understanding of Romano reduced the latter's nuanced theory to a minor variation of Hauriou's institutionalism. Whether consciously or not, Schmitt neglected the decisive differences between these scholars and especially failed to grasp Romano's point on the innate plurality of the legal world.' Furthermore, "This means that in both Hauriou's and Schmitt's institutional conceptions institutions have not a legal but a protolegal character. Contrary to Romano, Hauriou thought that the institution is the fountainhead of law, in that it is a social project that is meant to achieve a particular objective in light of the organized structure that the directing idea imposes. In this sense, while institution is not law, law never produces institution: "Institutions make juridical rules; juridical rules do not make institutions".

(or Movement, or People) embodied in the figure of the *Führer*. Schmitt's version of ideological monism is distinguished from Kelsen's monism, which recognises the absolute identity between State and law in the Pure Theory of Law (*Reine Rechtslehre*).[79]

To understand the meaning given to Schmitt's monism, it is necessary to recall some aspects of his political thought. One of the central points of tension between Schmitt's concepts lies in the fact that, for the German jurist, parliamentarism is incapable of making decisions. Parliamentarism leads to political Hamletism. On the other hand, concentrating the balance of social conflicts and institutions on the *Führer* can lead to dictatorial personalism (as will happen with Nazism, according to the diagnosis of its *Kronjurist*). Schmitt criticises parliamentarism, the 'discussing class' (Donoso Cortès), but does not realise that institutionalism leads to pluralism and the negotiation of conflicts.[80] Nevertheless, in order to preserve the *Führer*'s decision-making power, Schmitt will defend the need for social homogeneity and a hierarchy among institutions. In this precise sense, he will be a pluralist theorist and a monist ideologue.

Finally, it is also important to consider that institutionalism establishes its own unique relationship between the decision, the institution and legal rules. The origin of the institution lies in a decision, in a subjective initiative that, as we have seen, does not necessarily have a conventionalist character. The founding communion in the beginning is the work of a few. As Giuseppe Zarone rightly observes, 'at the origin of the institution there is no social contract but only a 'decision'.'[81] Later, as the institution acquires structure, one can speak of an 'institutional will.' At a later stage, the institution begins to compose the consensus that legitimises the government. The rules of law do not pre-exist in the institution because they arise from the institution.

Hauriou's theory of institutions, unlike Romano's, did not aim to provide a definition of law. Its objective was to show that a legal system does not arise from will but from a social fact, such as the organisation of power around an idea. Hauriou had in mind that it would not be possible to understand what an institution is without debating the pre-legal, social or political phenomenon of 'power.'

One of the points of tension in Schmitt's thinking lies in the fact that he does not admit that Social Law and institutionalism can establish a *new legal rationality*. For Hauriou, there is a new universalisable Aristotelian-Thomist rationality. The French jurist believes in the catholicity of reason; that is, he believes in an immutable universal reason. For him, there is a *lumen rationalis naturalis* and the moral law is situated outside of society and outside of the individual.[82] For François Ewald, Social Law forms a new standard of reflective rationality in society.[83] For

[79] H. Kelsen, *Teoria Pura do Direito* (Coimbra: Armênio Amado Editor, 1974), 377-426.
[80] As well observed by F. Ewald, n 51 above.
[81] G. Zarone, n 68 above, 116. See M. Hauriou, n 30 above, 40-42.
[82] G. Gurvitch, n 60 above, 66.
[83] Regarding this, see F. Ewald, n 81 above, and R.P. Macedo, n 33 above,

Schmitt, however, the only element that can maintain the unity of law and the State is the occasionalist decision, which is irrational by definition.

However, it is important to note that the decision establishes an order that obeys political rationality based on equilibrium and normality. The original, irrational decision establishes an order that follows its own logic and, in this sense, contains its own rationality. In this sense, Georg Lúkacs is somewhat correct in including Schmitt in the list of irrationalist thinkers.[84] For Schmitt, the decision that finds normality and the institution itself arises from nothing. It arises from a political decision that arises from a normative nothingness.

III. NORMALITY AND '*KONKRETES ORDNUNGSDENKEN*'

In the text *Political Theology*, from 1922, Schmitt still does not distinguish the three types of legal thought, which is why he states that

'in effect, each order rests on a decision and also the concept of the legal system, which is uncritically used as something that explains itself, contains within itself the opposition of the two different elements of the legal data. *Also, like any other system, the legal system rests on a decision and not on a norm*.'[85]

The text *On the Three Types of Legal Thought*, when seeking a foundation for law in social institutions or in the 'concrete order', as Schmitt prefers, brings an enormous novelty to the definition of the concept of sovereignty. In it, the German jurist states that

> 'The State itself is, for the institutionalist way of thinking, no longer a norm or a system of norms, nor a mere sovereign decision, but rather the institution of Institutions, in whose order countless other Institutions (in themselves autonomous) find their defence and order.'[86]

It is clear that in this 1933 text, Schmitt recognises that the foundation of law and sovereignty is no longer the sovereign decision of a superior political power, but rather is based on institutions, which, in turn, refer to an institution of institutions that, as will be seen, is no longer necessarily the State, but can be the State, the Movement and the People.

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[84] G. Lukács, *El Assalto de la Razón. La trayectoria del irracionalismo desde Schelling hasta Hitler* (Barcelona: Grijalbo, 1967) 519-537.

[85] C. Schmitt, 'Teologia Politica', Id, *Le Categorie del "politico"* (Bologna: il Mulino, Bologna, 1972), 37. My emphasis. In this work, Schmitt distinguishes only two possible foundations for law: the decision and the norm, considering the system itself, here understood in its normative sense, as something derived from the decision. This position would be modified in 1934, when the system began to be understood as the foundation of law and an instance capable of providing elements for the sovereign decision.

[86] ibid 57, my emphasis.

> 'Presently, the State is no longer subdivided into the two members of State and society but is structured into three sets of orders according to State, Movement and People. As a special set of orders, the State no longer holds the monopoly of the political (*des Politischen*). Still, it is merely an organ of the Führer (*leader-commander*) of the movement.'[87]

It is crucial, however, not to exaggerate the differences. Schmitt does not entirely abandon his decisionism when dealing with the issue of sovereignty. One could perhaps speak of a 'mitigated decisionism' of the German thinker from 1933 onwards. For Schmitt, the Social State, the Administrative State (or the Welfare State, as François Ewald would say) still adopts a Hobbesian conception of sovereignty and of the measure of law. The will of the sovereign has been replaced, it is true, by the social will, the sovereign was 'democratised', but there is no measure of its extension. Society has no external measure, a *Physis*, an outside. Thus, one can see that Schmitt's self-criticism in the 1933 text is still committed to a Hobbesian conception of sovereignty. Schmitt remains faithful to the Hobbesian motto: *Auctoritas non veritas facit legem*. However, now institutions are also sources of *Auctoritas*.

The shift in Schmitt's thought from 1922 to 1933 lies precisely in the abandonment of a *narrower* voluntarist conception of sovereignty (Hobbesian), in which sovereignty is the decision of the prince or dictator in a situation of chaos, to a still Hobbesian conception, but now broader, of sovereignty, in which the social will is expressed through institutions. In extreme situations of exceptionality, such institutions refer to the Institution of Institutions, that is, the 'status of a people and of political unity.'[88] In a situation of normality, institutions maintain their existence with apparent independence from each other. The sovereign power of the Institution of Institutions goes back to sleep to wake up in the period of exception.

It is important to note that Schmitt's Hobbesian conception of sovereignty distances him from the legal pluralism of Hauriou or Santi Romano. For Schmitt, institutions and the law based on them refer to a sovereign power. Sovereign power is still an essential concept in the definition of law. For Romano and Hauriou, on the contrary, the law is based on, it originates from, various autonomous sources that coexist in a given society. This observation, however, should not be exaggerated about Romano. Bobbio[89] observes in his essay on Romano that he was a 'moderate pluralist' in the sense that the emergence of social groups can produce a better articulation of relations between individuals and the State. However, Romano always considers the State as the necessary final moment of organised society.[90]

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[87] C. Schmitt, *Über die Drei Arten des rechts-wissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), 66-67.

[88] C. Schmitt, *Teoria da la Constitución* (Madrid: Alianza Editorial, 1982) 205. This i show Schmitt defines state in 1922.

[89] N. Bobbio, n 76 above, 183-185.

[90] ibid 183-184.

The State is, as for Schmitt, the 'Institution of Institutions.'[91] Romano did not consider the State as an exclusive institution or order (in the sense he attributed to the term in the *Teoria dell'Ordinamento Giuridico*).

1. Normality and Exception

The concept of normality used by Schmitt and its relationship with its symmetrical concept, that is, the exception, constitute an absolutely central point for understanding the *Kronjurist*'s thought. It has already been said that Schmitt is known as the philosopher of the exception of romantic exceptional occasionalism. This is, for example, the interpretation of him by Karl Löwith.[92] For Schmitt, 'normality explains nothing, the exception explains everything' (*Teologia Política*).[93] Accordingly:

> 'Each type of legal consideration of compound terms such as "legal order", "sovereignty of the law", and "validity of norms" makes possible two different types of legal thought: the abstract type, based on rules and norms, and the concrete type, based on the order. For the jurist of the first type, who individualises the law into general, pre-established rules and laws, independent of the concrete situation, each manifestation of legal life - each command, each measure, each contract, each decision - becomes a norm, each concrete system and community is resolved into a series of norms endowed with validity, whose "unity" or whose "system" is, in turn, only normative. For him, the order consists substantially in the fact that a concrete situation corresponds to general norms, by which it is compared. On the other hand, precisely this "correspondence" constitutes a difficult and insoluble logical problem, since normativist thought, the purer it is, the more it leads to an increasingly drastic fracture between norm and reality, between *ought* and *is*, between rule and concrete behavior. All valid norms are "in order", as long as they are naturally valid; the "disorder" of the concrete situation does not interest the normativist, who is only interested in the norm. However, concrete behavior can never be, from the normativist point of view, disorder as opposed to order.'[94]

This consideration explains why, for the Kelsenian normativist, a crime is not a violation of the law nor an unlawful act. On the contrary, for Kelsen, crime is the legal act par excellence, it is the conduct that corresponds to the criminal law, and there is therefore no reason to speak of a violation.[95]

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[91] ibid 185.

[92] K. Löwith, 'Il "concetto della politica di Carlo Schmitt" e il problema della decisione' *Nuovi Studi di Diritto Economia e Politica*, VIII, 58-83 (1935). Originally published in *Internationale Zeitschrift für Theorie des Rechts*, IX, no 2, 1935.

[93] C. Schmitt, n 88 above.

[94] ibid 256-257.

[95] See H. Kelsen, n 79 above, 166, 169. See, for instance, what Kelsen says in page 169: 'The

As observed by Schmitt,

> 'The violation that legitimises the State's claim to distribute punishment is reduced, from a normativist point of view, to the factual presupposition of a possible application of norms. (...) The violator therefore does not violate the peace or the order, he does not violate the general norm as a rule at all, and from a "strictly legal" point of view he does not violate anything.'[96]

The very idea of violation, therefore, presupposes a *de facto* order, a normality that can effectively be denied and contested. Only concrete peace and a concrete order can be violated: only by starting from a thought oriented in this direction can a concept of violation be grasped. On the contrary, the norm and the abstract rule continue to apply calmly and immutably despite the 'violation'; this is above every situation and concrete action.

Following Weber's analysis of law, Carl Schmitt admits that the ideal functioning of a legal thought based on norms and rules is imaginable. This is so in its functioning in a context where the regulatory and functional order concept makes sense, such as in a society of individualistic-bourgeois exchange.[97] An example of this type of society, or rather, of this paradigmatic type of relationship between norms and conduct, can be found in the functioning of a railway station. In a railway station, the timetables, standards, expectations, etc., are absolutely ordered, and the commands themselves can be replaced by perfectly functional automatic traffic lights and signalling devices.

However, for Schmitt,

> 'there are, however, other spheres of human existence to which the transposition of such a functionalism of mere regularity would mean the destruction of the specifically legal essence of the concrete order. This is the

designation of "non-law" (illicit), "contradiction-with-the-Law", "violation-of-the-Law" expresses the idea of a denial of the Law, the representation of something that is outside the Law and against it, that threatens, interrupts, or even suppresses the existence of the Law. This representation is misleading. It arises from the fact that we interpret as a logical contradiction the relationship between a norm that prescribes a certain conduct and a factual conduct that is the opposite of that prescribed. A logical contradiction, however, can only exist between two propositions of which one states that A is and the other that A is not, or of which one states that A should be and the other that A should not be. The two propositions cannot subsist, one in the face of the other, because only one of them can be true. Between the descriptive proposition of a norm that says that an individual should behave in a certain way, and the proposition that says that he does not in fact behave in that way, but carries out the opposite conduct, there is no logical contradiction. Both propositions can subsist, one in the face of the other, both can be simultaneously true. The existence or validity (validity) of a norm that prescribes a certain conduct is not "broken" by the opposite conduct as a chain that binds an individual is broken; for the chain of law is not "damaged" in the way that an individual can be damaged, that is, in the way that his existence can be harmed by an act of coercion directed against him.' See C. Schmitt, n 85 above, 18.

[96] ibid 256-257.

[97] ibid 257. See too, M. Weber, *Economia y Sociedade* (Mexico City: Fondo de cultura Economica, 1981) 639-648. According to Habermas, Schmitt is Weber's "spiritual heir".

> case of all sectors of life that are formed in a non-purely technical way, with the emphasis placed on exchange, in an institutional way. These have within themselves the concepts relating to what is normal, to the normal type, to the normal situation, and their concept of normality does not consist, as in a society of technicalized exchange, in the fact of being a predictable function of normative regulation. These have their legal substance, which certainly also knows general norms and regularity, only with the concrete basis of the internal order, which is not the sum of those rules and those functions.'[98]

An example of this type of change can be found in the common life of spouses in a marriage, members of a professional association, employees of the State, etc. In these cases, the customs, regularity and predictability existing within a system do not exhaust the life of these institutions. The concrete internal order, discipline and rigour of each institution oppose, while the institution itself endures each attempt at standardisation and comprehensive regulation. One example of this changing institution can be the very concept of *bonus pater familias,* which, as Schmitt observes, once again citing Maurice Hauriou, is a concept with changing content and only definable and explicable in a given concrete situation. Other examples can be found in François Ewald's intelligent analyses of the transformations that occurred in insurance law from the end of the 18th century to the 20th century in France[99] and in Hauriou's works on administrative decisions at the beginning of the century.

Like Ewald, Schmitt observes that the concept of concrete order (or concrete order) refers directly to the concept of normality since each concrete order presupposes an underlying normality.

> 'We know that each order — including the "legal order" — is linked to *concepts of normality* that are not derived from general norms but, on the contrary, produce such norms themselves, solely based on their own order and in function of it.'[100]

Every norm presupposes a situation of normality.

> 'A legislative regulation presupposes a concept of normality completely different from itself: to the point that, in its absence, the regulation itself becomes completely incomprehensible and one can no longer even speak of a norm.'[101]

In this sense, Georges Canguilhem's considerations regarding the concept of norm, which is only comprehensible in the context of normativity or normality, are valid

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[98] C. Schmitt, n 85 above, 18-19.

[99] See, for instance, the discussion in F. Ewald, n 40 above, and in L. Husson, *Les transformations de la responsabilité* (Paris: PUF, 1947).

[100] C. Schmitt, n 85 above, 19, my emphasis.

[101] ibid

in this case.[102] The norm is a concept that only gains meaning within a situation of normality. Analogously, a 'chess rule' only gains meaning within a system that forms the game of chess, including all the normative elements, practices and institutional and lifeworld assumptions that constitute the game. For this reason, Schmitt states,

> 'The rule (in the concrete legal order) follows the changing situation for which it was intended. A norm can present itself as inviolable as it wants. Still, it dominates a situation only to the extent that it has not become completely abnormal (*abnorme*) and as long as the concrete type presupposed as normal has not disappeared. The normality of the concrete situation, regulated by the norm, and of the concrete type presupposed by it is therefore not just an external presupposition to be disregarded by legal science but a distinctive legal trait, internal to the essence of the validity of the norm and a normative determination of the norm itself. A pure norm, without a type, would be a legal contradiction.'[103]

Thus, the concept of normality implicit in the very idea of exception, rhetorically privileged by Schmitt (since they are related concepts), occupies a central role in the legal and political conception of the German jurist.

It is now time to analyse the type of 'institutionalist decisionism', or thinking about the concrete order, established from the 1930s onwards and its internal coherence.

2. *Schmittian Institutionalism*

Carl Schmitt affirms that

> 'There is no rule applicable to chaos. First, an order must be established. Only then does a legal system make sense. It is necessary to create a normal situation and the sovereign is the one who decides definitively whether this state of normality really reigns.'[104]

The sovereign is, therefore, the one who establishes order in chaos, even though the decision, in a normative sense, arises from nothing.

Would we once again be faced with a voluntarist decisionism of the Hobbesian mould? No, the Schmittian sovereign, when he makes the sovereign decision, places himself as a point of reference and measure for the qualification and individuation of the legal. The decision derived from nothing serves as a parameter for the behaviour of institutions and society. However, the sovereign decision does not

[102] G. Canguilhem, *O Normal e o Patológico* (Rio de Janeiro: Forense, 2nd ed, 1982) 113, 205-269.

[103] C. Schmitt, n 85 above, 20.

[104] ibid 39.

exhaust and does not entirely determine the legal contents. The sovereign decision merely initiates the institutionalist legal game and acts itself as the first reference for this same game. For Hobbes, on the contrary, corporations or partial societies are totally dependent on sovereign power and are not autonomous sources of law. After all, only *Auctoritas facit legem*.

For Schmitt, a sovereign decision arises from a necessarily arbitrary decision establishing an order in which institutions operate. A sovereign decision establishes a normality to replace chaos. Schmitt's thinking about concrete order combines institution and decision syncretically, coherently, and systematically. Institutions arise from an arbitrary decision but gain autonomy, forming an 'institutional will'. Institutions, to the extent that they are the seats of authorities, create values and contents, which, in turn, will influence the formation of the sovereign power that ultimately decides on what normality will be put in place to replace chaos. Finally, as the 'Institution of Institutions', the State unites and subordinates the other institutions, establishing a hierarchical relationship between them. Schmittian institutionalist decisionism consists of this system of overlap and dependence, which combines the occasional element of the original decision (of sovereignty or the institution) with the dynamics of creating values and contents of the institutional game.[105] For these reasons, Ewald's words regarding the Welfare State are valid for Schmitt:

> 'Normalization consists of determining a reference or a model for an object or an activity. The operation has two notable characteristics. *The choice of the norm, firstly, proceeds from a necessarily arbitrary decision in relation to what the object of normalisation does*. If there is a need for a norm, it is because there is no natural reference for this object. The normative decision is then addressed to a group of joint and competing activities. The norm will establish their objectivity, which will allow them to articulate with each other.'[106]

IV. CONCLUSIONS: SCHMITT'S INSTITUTIONALIST DECISIONISM

Although it is beyond the scope of this article to analyse Schmitt's post-1940 thinking, it is worth noting that the theory of institutions, of the thinking of concrete

[105] In similar vein, M. Croce and M. Goldoni, n 79 above, 133: 'The law is the product of a selection of institutional standards from practice-based normative sources that devoted officials handle with recourse to general clauses and in compliance with the leader's view of the community. The leader is the interpreter of the common ethnic identity, which, as a concept, owns a "systematic force…that pervades all the judicial deliberations." This makes Schmitt's institutionalism an "institutionalist decisionism," as the conjunction of an anti-pluralist state monism with an amended decisionism'.

[106] F. Ewald, n 40 above, 592, my emphasis.

order, finds its full realisation or, better yet, its most radical and expanded expression, in the theory of Nomos developed mainly in his great mature work, *Der Nomos der Erde* (*The Nomos of the Earth*), from 1950.[107] In this work, Schmitt analyses the crisis of European public law, characterised by the loss of a measure for the articulation of a theory of European law. From the perspective of the 'Nomos of the Earth', law is conceived as a set of social and economic relations, in short, as a global social order.[108]

In his works after 1940, Nomos is the structure resulting from the synthetic unity of appropriation, distribution and production processes in which men are collectively involved.[109] For Schmitt, European Public Law consisted of a particular relationship between spatial order and solid ground and spatial order of the open sea.[110] Based on a certain equilibrium, this political-legal order began to enter into crisis with the formation of the two great world powers, the USA and the USSR, and with the development of aviation, which resulted in a new interplanetary order. The new international legal order then began to be based on *a new principle of political equilibrium* based on the hegemonic power of the new great powers.[111] The political world was increasingly conceived as a federation of independent states coexisting in a new global equilibrium. The new world order was formed by the 'equilibrium of hegemony and hegemonic federalism.'[112] Thus, Europe and soon the entire Western world become Hamlet and live in the dilemma of indecision; any decision can alter the world's political balance. Every political decision in the sphere of international law involves a rearrangement of the world political-legal balance. These last observations point to a new investigation that needs to be carried out.

[107] I am here using the spanish edition, C. Schmitt, *El Nomos de la Tierra en el Derecho de Gentes de jus publicum europaeum* (Madrid: Centro de Estudios Constitucionales, 1979).

[108] Regarding this, see P. Portinaro, *La crisi dello jus publicum europaeum. Saggio su Carl Schmitt* (Milano: Edizioni di Comunità, Milano, 1982), 93-105. See also P. Schneider, *Ausnahmezustand und Norm. Eine Studie zur Rechtslehre von Carl Schmitt* (Stuttgart: Deutsche Verlags-Anstalt, 1957), 259-277.

[109] Regarding this issue, see the essay C. Schmitt, 'Nehmen/Teilen/Weiden. Ein Versuch, die Grund-fragen jeder Sozial-und Wirtschaftordnung vom NOMOS herrichtig zu stellen' *Gemeinschaft und Politik. Zeitschrift für soziale und politische Gestaltung*, I, 18-27 (1953). Italian translation: Id, 'Appropriazione/divisione/produzione. Un tentativo di fissare correttamente i fondamenti di ogni ordinamento economico-sociale, a partire dal 'nomos', in Id, *Le categorie del "Politico"* n 2 above, 295-312. See too: Id, n 108 above, 47, 53, 225-226.

[110] C. Schmitt, *El Nomos* n 110 above, 24.

[111] ibid 25.

[112] ibid 227.