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The dark side of institutionalism: Carl Schmitt reading Santi Romano

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ABSTRACT

This article analyzes and compares the institutionalist theories of law developed by Santi Romano and Carl Schmitt. In the early 1930s, Schmitt referred to Romano to explain his own conversion to an institutionalist jurisprudence, which he preferred to call ‘concrete order thinking’. Both Romano and Schmitt criticized the normativist approach to law characteristic of legal positivism. Instead, they developed an institutionalist approach that regarded legal norms as secondary phenomena, pointing at the importance of the underlying institutional order, which shaped and informed these norms. More particularly, both Romano and Schmitt believed that the crisis of the modern state could only be overcome by recognizing the juristic character of non-state institutions and their legal orders. However, unlike Romano, Schmitt used ‘concrete order thinking’ to advocate an ideological reinterpretation of law: he thus presented the National-Socialist Führerprinzip as a ‘great example’ of ‘concrete order thinking’ and called upon German judges to reinterpret the so-called ‘general clauses’ in statutes in line with the National-Socialist ideology. While Schmitt developed ‘concrete order thinking’ into a theoretical justification of the totalitarian state, Romano emphasized the neutral and descriptive character of his institutionalist theory. Unlike Schmitt, he concluded that non-state institutions and their legal orders could never be completely incorporated into the state, but continued to exist and develop in its shadows.

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Introduction

The appearance of the English translation of Santi Romano’s *L’Ordinamento giuridico* (Romano, [1918] 2017) is an important event for legal and political theory. Romano’s book, which had already been translated in French, German, Spanish and Portuguese, is one of the most original and influential contributions to an institutionalist jurisprudence. As Mariano Croce, who took the initiative for this exemplary translation, has rightly pointed out, the renewed interest in Romano’s institutionalist theory may be explained by its topicality: as states are increasingly confronted with sub- and supra-national legal orders, Romano’s emphasis on the inevitable plurality of legal orders has gained a new relevance and urgency. However, Romano’s theory is also important for historical reasons: it was part of a general movement in early twentieth-century jurisprudence which sought to

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overcome the limitations of legal positivism and its focus on a state-centered concept of law. More particularly, these jurists criticized legal positivism for its failure to recognize new social forces, which contested the state's legitimacy and monopoly on lawmaking. Their theoretical contributions were not always politically neutral: rather, whether intentionally or not, they contributed to paving the way for more radical movements that rejected the liberal state and its normativist conceptions of constitutionalism and the rule of law.

Perhaps, the most prominent among these critics of legal positivism was Carl Schmitt. While in the 1920s Schmitt had advocated a decisionist approach, emphasizing the ways in which law depended on sovereign decisions, in the early 1930s, he converted to an institutionalist theory. In his *Über die drei Arten des rechtswissenschaftlichen Denkens* [On the Three Types of Juristic Thought, 1934], Schmitt expressly invoked Romano's book to explain his own conversion to institutionalist jurisprudence, which he preferred to call 'concrete order thinking [*konkretes Ordnungsdenken*]' (Schmitt, [1934a] 2006, 20/57).¹ Like Romano, Schmitt rejected the normativist approach characteristic of legal positivism. By reducing law to a 'set of norms', positivists had ignored the problem of the 'realization of law', that is, the interpretation of legal rules in concrete social contexts and their application to real-life cases. On Schmitt's view, to conceive of law as a set of norms, which could be valid and meaningful independently of the social context, was an absurdity. Instead, law should be understood as a 'concrete order', on which the validity and meaning of legal rules depended: 'For concrete order thinking, "order" is also juristically not primarily "rule" or summation of rules, but conversely, rule is only a component and a medium of order' (Schmitt, [1934a] 2006, 11/48). In other words: according to Schmitt, rules were but secondary phenomena of law: it was not rules that constituted the legal order, but the order that determined the rules.

However, as Croce and Salvatore (2013, 110) have pointed out, Schmitt used Romano's theory in a selective way. He thus tended to downplay what Romano considered the inevitable outcome of his institutionalist theory: the notion that multiple legal orders existed in society, which competed, and could even come into open conflict, with the legal order of the state. Schmitt sought to reduce the pluralist dimension of Romano's institutionalist theory by subjecting the plurality of non-state legal orders to the superior authority of the state as an 'institution of institutions' (Loughlin, 2017, xxiv). He argued that,

[f]or the institutional mode of thinking, the state itself is no longer a norm or a system of norms, nor a pure sovereign decision, but the institution of institutions, in whose order numerous other, in themselves autonomous, institutions find their protection and their order. (Schmitt, [1934a] 2006, 47/88)

Contrary to Romano, Schmitt thus presented the state as a superior organization, on which non-state institutions and their legal orders depended. Moreover, as Croce and Salvatore (2013, 116) have pointed out, by translating Romano's reference to the state legal order 'comprehensively understood [*così comprensivamente inteso*]' as a 'unitary

¹For this text, page references will be given to both the German original and the English translation, with the page number of the original preceding the translation. On the relation between Romano and Schmitt, see, in particular, Croce and Salvatore (2013), 109–123; Pietropaoli (2002), 1–22; Montedoro (2002), 105–141; Catania (1987), 546–575; La Torre (2010), 97–109.

essence [*einheitliches Wesen*]', Schmitt suggested that it should be regarded as a *homogeneous* entity, while Romano, in the second part of his book, had emphasized the *heterogeneity* of the legal order, which he believed consisted of multiple, more or less autonomous institutions.

In this article, I will revisit the relation between Romano and Schmitt. My aim is to analyse and compare their institutionalist theories, and, more particularly, to explain how Schmitt reinterpreted Romano's theory. Although I agree with Croce and Salvatore that Schmitt sought to downplay the pluralist implications of Romano's theory, my impression is that there were also significant affinities between their approaches. Most importantly, both Romano and Schmitt believed that the crisis of the modern state could only be overcome by recognizing the juristic character of non-state institutions and their legal orders. Moreover, their professional careers showed striking parallels: while Romano joined the Fascist Party in 1928 shortly before being appointed as President of the Italian Council of State, Schmitt joined the National-Socialist Party in 1933 before becoming a member of the Prussian Council of State.² Apparently, they did not see any contradiction between their theoretical commitment to an institutionalist jurisprudence and their professional collaboration with dictatorial regimes. However, unlike Romano, who emphasized the neutral and descriptive character of his institutionalist theory, Schmitt used 'concrete order thinking' to advocate the ideological reinterpretation of law. He thus recognized National Socialism as the embodiment of 'concrete order thinking', rejecting liberal constitutionalism as a 'normativist way of thinking' that belonged to the past (Schmitt, [1934a] 2006, 43/82).

The crisis of the modern state

Romano's attempt to develop an institutionalist theory of law was related to concerns about the crisis of the modern state. As early as 1909, Romano had held an inaugural lecture at the University of Pisa on 'Lo stato moderno e la sua crisi [the Modern State and its Crisis]', in which he drew attention to the fact that social movements were increasingly turning against the state (Romano, [1909] 1950, 311–325). What characterized these social movements, which included workers' federations and trade unions, was their attempt to collectively organize particular groups according to their shared socio-economic interests. Romano considered the resurgence of these 'corporatist tendencies' the 'major fact of the present age' (Romano [1909] 1950, 316). They had led to new political doctrines that considered the abstract formalism of the liberal state a 'useless legal fiction', and sought to re-establish the political community on the basis of labour or class interest (314). As an early example, Romano referred to Proudhon, who had proposed to replace the 'abstract sovereignty' of the state with the 'effective sovereignty of the working classes' (319). He also mentioned the more recent example of Léon Duguit, who had advocated a form of 'functionalist representation' based on corporatist self-organization to replace the 'fiction' of individual representation (313). According to Romano, such doctrines were symptomatic of the crisis in which the

²For an analysis of Schmitt's involvement with National Socialism: Mehring (2014), 275–406 and Blasius (2001). On Romano's activities as President of the Italian Council of State under Fascism, see, *inter alia*, Melis (2004), 39–58 and Musumeci (2015), 325–349.

modern state found itself, as it had failed to come to terms with these new movements which testified to levels of social cohesion, which the state could not itself provide.

More particularly, Romano argued that the new corporatist doctrines had affected the core principle of public law, which he defined as the ‘impersonality of public power or, more precisely, the personification of power by the state considered as a person’ (Romano, [1909] 1950, 313). This principle had allowed for a conception of the state as an entity capable of unifying the diverse elements of which it was composed, without being identified with them. As Romano argued, the principle of the state’s personality had first been developed by medieval jurists, who had distinguished between the body of the state and the individuals of which it was composed. More particularly, they had maintained a sort of dualism between the state and the prince, who was but a ‘patron or servant of the state’ (313). The principle of the state’s personality had thereby stimulated rulers and officials to exercise public power, not as holders of a personal entitlement, but as organs of the state, which was believed to express the supreme will of the community. According to Romano, this had allowed the state to

surpass the ephemeral existence of individuals, while being composed of men; to rise above their non-general interests, while mitigating and harmonizing [these interests]; to concern itself not only with present generations, but also with future ones, connecting diverse moments and energies in an uninterrupted continuum of time, actions and objectives. (313)

Crucially, as an institution, the state could retain its identity and perpetuate its goals, even if its membership changed over time. This allowed it to overcome the limited and transitory nature of human life itself.³

It was this principle of the personality of the state, and the dualism between office and office holder which it implied, that the new ‘corporatist’ doctrines rejected as a ‘useless fiction’. Rather than considering the state as being endowed with a personality and will of its own, they considered it the organ of a particular group or class. According to Romano, the fact that these doctrines had developed into antagonistic discourses could be explained by the inadequacy of the modern state itself (Romano, [1909] 1950, 318). For Romano, the root cause was the French Revolution: it had given birth to a new understanding of the political community that had left little room for recognition of social forces outside the state, which were regarded as illegitimate survivals of the past. Thus, from 1791 on, corporations of artisans and guilds were dissolved, while their re-established in whatever form was prohibited. Henceforth, the state recognized only the individual citizen, an ‘individual seemingly armed with an infinite number of rights which were emphatically and generously proclaimed, but whose legitimate interests were in fact not always protected’ (Romano, [1909] 1950, 317). However, social forces outside the state continued to demonstrate an indelible vitality. The modern state proved utterly incapable of regulating these social forces, the existence of which it did not even recognize. On Romano’s view, the failure to recognize and effectively represent the legitimate social interests of citizens explained why

³Romano’s characterization of the institutional continuity of the state clearly resonates with Ernst Kantorowicz’s definition of institutional time as a ‘continuity despite change’: ‘the most significant feature of the personified collectives and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal’. Kantorowicz ([1957] 1985), 311.

associations and collectives were increasingly inclined to side with those who strived for more radical and revolutionary transformations of public power (323).

However, Romano also believed that the core principle of public law, the personification of the state, should not be dismissed under the pressure of these new social movements. Instead, he argued that the state's personality, and the distinction between office and office holder, was the only guarantee that potential conflicts between rival groups in society could be resolved in peaceful ways. He believed that the institution of the state remained indispensable, as it was the only superior organization capable of mitigating and harmonizing social conflict. But to achieve this, the state should not become the mere instrument of particular groups or classes, but maintain a personality and will of its own. Indeed, only the state, Romano argued, could assert itself as an entity capable of rising above particular interests, thus transforming the conflicting wills in society into a shared or general will (Romano, [1909] 1950, 324). It could do so by adopting the impersonal language of law and the institutional functions and roles associated with public office, i.e. the notion that the general will could not be identified with that of the individual ruler or office holder. More particularly, according to Romano, only the state and its core principle of public law, i.e. the notion that the state had a will and personality of its own, could give birth to a new political system based on the effective representation of social interests without amounting to a simple return to a pre-revolutionary past. As Romano concluded, the state was the 'only institution known to humanity, capable of giving birth to a political system in which the future of a corporative society would not amount to a simple return to a constitution very similar to a feudal one' (Romano ([1909] 1950, 324/14).

The legal order

Less than a decade after the 'The Modern State and its Crisis', Romano published *The Legal Order* (Romano, [1918] 2017), in which he revisited the question as to how the state and its laws related to non-state institutions and their laws. In the first part of the book, entitled 'The Concept of a Legal Order', Romano presented his institutionalist theory of law, building on the insight that law was not merely a set of norms, but an institution, that is, a form of collective self-organization. In the second part, 'The Plurality of Legal Orders', Romano addressed the relation between state law and non-state law, observing that a plurality of legal orders had emerged outside the state. The two parts of the book were interrelated: Romano's institutionalist theory of law implied that every social institution, those outside the state as well, constituted a legal order on its own. As Romano observed,

[i]t is well known that, under the threat of state law, many associations live in the shadows, whose organization can be said to be almost analogous to that of the state, though on a smaller scale. They have legislative and executive authorities, courts that settle disputes and punish, statutes as elaborate and precise as state laws. (Romano, [1918] 2017, 59)

The main question was therefore what role the state played among this plurality of legal orders, and, more particularly, whether it could still be considered as a superior organization capable of mitigating and harmonizing social conflict.

As Romano observed in the first part of his book, legal theorists tended to present the legal order as a *normative* order, consisting of a set of norms. However, as he explained, this normativist approach had failed to solve several problems in legal theory, which were related to the realization of law. For instance, it had proved incapable of explaining the concept of the legal sanction: although an integral part of any legal system, sanctions for violating legal norms could not themselves be regarded as norms. Hence, as Romano observed, ‘if one only concentrates on norms, one ends up denying sanction being a feature of law’ (Romano, [1918] 2017, 11). Instead, Romano argued that law could not be defined as a set of norms, but as the entity that informed and shaped those norms: ‘the legal order, taken as a whole, is an entity that partly moves according to the norms, but most of all moves the norms like pawns on a chessboard’ (7). More particularly, Romano maintained that the legal order was a ‘concrete and effective unity’, from which norms derived their meaning and validity. Revisiting his notion of the impersonal character of public power, he explained that the force of law consisted of the ‘impersonality of the power that elaborates and establishes the rule’ (9). As Romano suggested, this allowed it to transcend individual and personal interest, and to serve as a technique for resolving conflicts in society.

According to Romano, law and institutions were co-constitutive: law could become meaningful and effective only as an institution, and in their turn, institutions could only exist inasmuch as they were governed and preserved by law. This had important implications for Romano’s understanding of the state. It implied that the state, as an institution, was always already constituted and ‘animated’ by law. As Romano observed, for the state to exist, there had to be a legal order at the same time (Romano, [1918] 2017, 23). Consequently, state power could not be a ‘de facto power, a pre-legal attribute of the state itself’, but, instead, emerged with law, which ‘disciplined and regulated’ it (39). In this context, Romano criticized Georg Jellinek’s theory of the self-limiting character of the state: although it was true that the state could limit itself through law, it was impossible for the state not to be legally limited, since no state could exist without law. This implied, first of all, that statutes [*legge*] could not be the beginning of law [*diritto*]: instead, they were but an addition to, or modification of, pre-existing laws that were constitutive of the state. Secondly, it meant that the legislator lacked the power to annul the law completely, for ‘in order to annul it, the legislator should declare the end of the state itself’ (40). Romano thereby uncovered an important principle of the rule of law, i.e. that state officials, including the legislator, were always already bound by pre-existing laws which were constitutive of their authority and vital to the functioning (and effectiveness) of the state itself.

In the second part of *The Legal Order*, Romano focused on another important implication of his institutionalist theory: that there were as many legal orders as there were institutions (Romano, [1918] 2017, 50). For instance, he regarded the international community as an institution with its own, more or less autonomous legal order, which could be distinguished from those of individual states. Likewise, within each state, there were multiple legal orders: not only did the state itself consist of various institutions – e.g. public bodies, provinces and municipalities – which operated more or less autonomously. Also outside the state, there were multiple institutions, including, for instance, firms, factories, trade unions, schools and churches. According to Romano, each of these institutions constituted a ‘legal world in its own right’, with its own officials,

norms, procedures and sanctions (Romano, [1918] 2017, 36). As Romano observed, with the emergence of the modern state, many of these institutions had come under the scope of state law: in some cases, their legal orders had been incorporated almost completely into the legal order of the state. However, this did not mean that there were no legal orders left outside the state. Instead, Romano gave the example of the law of the church, which could not be reduced to that of the state without seriously misrecognizing it: the church could thus count on ‘spiritual and internal sanctions, which are genuine legal sanctions on account of the nature and their institutional character, whether or not they are backed by civil sanctions’ (58).

This led back to the question of how the state related to non-state institutions and their legal orders and, more particularly, whether the state had some special characteristics that allowed it to mitigate or resolve potential conflicts between institutions. Addressing this question, Romano provided a complex and nuanced typology of institutions, distinguishing, for instance, between original, derivative and intermediate institutions, between institutions that pursued general and particular ends, between simple and complex institutions, and between institutions with and without legal personality (Romano, [1918] 2017, 67–69). These distinctions enabled Romano to specify the various relations between institutions and, more particularly, to determine to what extent institutions depended on each other for being effective. In doing so, Romano suggested that state and non-state institutions were, in effect, mutually dependent: thus, non-state institutions depended on state law for attaining complete effectiveness. For instance, the church depended on state law for church marriage to have ‘civil effect’. On the other hand, if state law ignored non-state legal orders, which had emerged in its shadows, it, too, would lose its effectiveness (Romano, [1918] 2017, 98). For instance, while the state had abolished the obligation to give tithe, the church had continued to impose it on its members. This implied that ultimately, the state was an inherently limited institution: although it could declare non-state institutions legal or illegal, it could not prevent them from developing legal orders of their own, on which the effectiveness of state law depended.

In *The Legal Order* Romano moved beyond the position he had defended in ‘The Modern State and its Crisis’ by proposing a theory of legal pluralism. What others have criticized as the ‘double bind’ of Romano’s theory – i.e. his failure to reconcile his theoretical commitment to pluralism with his belief in the pre-eminence of the state⁴ – can instead be explained by a new insight: the discovery of how state and non-state institutions were in fact mutually dependent forced Romano to give up one of the main assumptions of his inaugural lecture, namely that the state was the only institution capable of rising above particular interest and resolving societal conflicts. More particularly, Romano revised his earlier view that all law ultimately emanated from the state and that non-state institutions could be legal only to the extent that they were recognized by the state. Thus, the legal character of institutions was not conditional on state recognition, and, indeed, state law itself could be effective only to the extent that it did not deny the reality of these non-state legal orders which had emerged in its shadows. What Romano had previously identified as the defining characteristic of the

⁴Compare Norberto Bobbio’s assessment that Romano was ‘a pluralist from a theoretical standpoint, but a monist from an ideological one’ (Bobbio, 2007, 154). Cf. Croce (2018), 5 [page number should be checked].

state, i.e. the impersonal character of public power and the distinction between office and office holder, was no longer perceived as a unique trait of the state, but as something that characterized *every* institution (whether state or non-state). Thus, although Romano no longer defended the pre-eminence of the state vis-à-vis non-state institutions, he remained convinced that law – and, more particularly, the impersonal functions and roles associated with legal institutions – could serve as the ‘common medium’ by which social conflicts could be resolved (Croce, 2018).

On the three types of juristic thought

In his writings of the 1920s, Schmitt, like Romano, had sharply criticized the normativist approach to law, which considered the legal order as a ‘set of norms’. Instead, he had defended a decisionist approach, arguing that law originated from a ‘sovereign decision’ (Schmitt, [1922] 1996, 37–38). However, shortly after the Nazis had taken to power, Schmitt shifted his focus away from decisionism to an institutionalist approach, a reorientation for which he explicitly acknowledged the influences of Maurice Hauriou and Romano (Loughlin, 2017, xxiv). Thus, in *On the Three Types of Juristic Thought*, he referred to Romano’s ‘very significant theory’ (Schmitt, [1934a] 2006, 45/86), arguing that law should be regarded as a ‘concrete order’:

In his book *L'ordinamento giuridico*, Santi Romano had justifiably stated it is inaccurate to speak of Italian law, French law and so on and thereby think only of a sum of rules, while in truth the complex and heterogeneous organization of the Italian or French state as a concrete order determines this law. There are numerous authorities and combinations of state authority or state power that produce, modify, apply, and guarantee the juristic norms, but do not identify themselves with these norms. Only that is Italian or French law. (20/57)

Quoting from Romano’s *The Legal Order*, Schmitt explained that norms were the ‘consequence’, rather than the ‘source’, of the legal order. In other words: norms were but a secondary phenomenon of law. Instead, law was primarily to be regarded as a ‘concrete order’, which determined the validity and meaning of norms.

In *On the Three Types of Juristic Thought*, Schmitt began by observing that every jurist, whether consciously or not, was inclined to define law either as a rule, or a decision, or a concrete order. Schmitt explained that, although rules, decisions and concrete orders were all indispensable elements of juristic thought, jurists tended to emphasize one of these elements at the expense of the other, assuming, for instance, that all law emanated from a sovereign decision (Schmitt, [1934a] 2006, 7/43). Adopting a historical perspective, Schmitt observed that ‘concrete order thinking’ had traditionally been characteristic of German jurisprudence. However, under the influence of the reception of Roman law, it had gradually been replaced by a normativist approach, which conceived of the legal order as a set of norms. In the nineteenth century, with the emergence of the legislative state, legal positivism had become the predominant theory of law. As Schmitt explained, legal positivism was characterized by a combination of normativist and decisionist approaches (Schmitt, [1934a] 2006, 27/65). As positivists were unable to understand the ‘realization of law’ (e.g. its application to real-life cases), they took recourse to decisionist approaches, which traced positive norms back to

sovereign decisions. However, in doing so, they tended to ignore social realities; they applied abstract and general norms, while ignoring the concrete realities of social and economic struggles. Hence, according to Schmitt, at the turn of the century, ‘concrete order thinking’ had revived in response to the failures of legal positivism.

Characterizing the condition of German jurisprudence in his own day, Schmitt recognized the ‘forceful advance toward concrete order and formation thinking’ (Schmitt, [1934a] 2006, 48/89–90). In all domains of law, he observed, the abstract and general norms of legal positivism were gradually being replaced by more concrete norms that related directly to social and economic realities. Crucially, according to Schmitt, these norms reflected ‘standards of normality’ that had been developed by various non-state institutions. Schmitt gave the example of the ‘concrete institution of the family’, which was governed by standards regarding the normal type of behaviour that could be expected of family members. As Schmitt suggested, judges did not ignore these standards of normality, but used them to interpret legal rules: for instance, they interpreted the rules of family law by referring to the *bonus pater familias*, i.e. socially accepted standards regarding what counted as a ‘good family father’. Every legal rule presupposed such ‘standards of normality’, which could not be derived from the codified norms themselves, but which were nonetheless crucial for their interpretation and application (Schmitt, [1934a] 2006, 19/56). According to Schmitt, these standards of normality were not external, extra-legal concepts, but rather an inherent aspect of law itself: they were essential for the effectiveness and normative determination of legal rules (20/56–57).

Schmitt considered the state as an ‘institution of institutions’: it was the state which protected and regulated other institutions (such as the family), determining their effectiveness and recognizing their standards of normality (such as the *bonus pater familias*) (Schmitt, [1934a] 2006, 47/88). As Croce and Salvatore (2013, 116–117) have pointed out, by presenting the state as ‘institution of institutions’, Schmitt seemed to strategically reinterpret Romano’s conception of institutionalism, downplaying its pluralist implications.⁵ Although Schmitt did indeed seek to tame legal pluralism by subjecting non-state institutions and their legal orders to the superior order of the state, my impression is that Croce and Salvatore exaggerate the differences between Romano’s and Schmitt’s approaches: thus, Schmitt did acknowledge the autonomy and legal nature of non-state institutions, which were regulated and protected by the state, arguing that state law could only be meaningfully interpreted in accordance with their ‘standards of normality’.⁶ This was not very different from Romano’s conception that the state could determine the ‘relevance’ and ‘effectiveness’ of non-state institutions, while their legal orders ‘informed and shaped’ state law. More particularly, Croce and Salvatore (2013, 117) claim that Schmitt considered non-state institutions as ‘extra-legal elements’ (unlike Romano, who emphasized their legal character), is not entirely convincing: instead, as we have seen, Schmitt considered the ‘concrete order’ and its standards of normality not as ‘external, jurisprudentially disregarded presupposition of

⁵Compare also La Torre (2010), 101: ‘The most striking difference between Romano and Schmitt lies, however, in the latter’s fierce anti-pluralism’.

⁶For this reason, Joseph Kaiser (1986) concludes that Schmitt defended a ‘type of pluralism’.

the norm’, but as ‘inherent, characteristic juristic feature’ of the norm itself (Schmitt, [1934a] 2006, 20/56–57).

However, Schmitt also warned against misunderstanding concrete order thinking as merely seeking to preserve or restore traditional institutions and their standards of normality. Instead, by using the expression ‘concrete order and *formation* thinking [*konkretes Ordnungs- und Gestaltungsdenken*]’, he wanted to emphasize that it was a dynamic type of thought, which reflected changing ideas about what constituted normal behaviour. It was this dynamic aspect of concrete order thinking, which allowed Schmitt to turn it into a justification for the ideological reinterpretation of law. He thus recognized National Socialism as the embodiment of ‘concrete order thinking’, which had pierced through ‘the cover of a superficial positivism’ (Schmitt, [1934a] 2006, 42/81). More particularly, he considered the National-Socialist ‘leadership principle [*Führerprinzip*]’ as one of the ‘great examples’ of concrete order thinking. He claimed that the *Führerprinzip*, which originated from the concrete order of the Prussian army, had to remain incomprehensible from the perspective of legal positivism and its normativist conceptions of constitutionalism and the rule of law. Legal positivism thus demanded ‘an oath to the constitution, to a *norm*, instead of to a leader [*Führer*]’ (Schmitt, [1934a] 2006, 43/82). By contrast, Schmitt maintained that leadership was inseparable from notions of fidelity, discipline and honour, which related to the *person* of the *Führer*, rather than to a norm. On Schmitt’s view, the *Führerprinzip* served to overcome legal positivism and the ‘liberal-constitutional, power-separating, normativistic way of thinking of a bygone individualism’ (Schmitt, [1934a] 2006, 43/82). He even suggested that the state had lost its political monopoly and had become a mere ‘organ of the *Führer*’: ‘The state, as a special part of the order within the political unit, no longer has a monopoly on the political, but is only one organ of the *Führer* of the movement’ (55/98).

From the perspective of legal practice, it was most problematic that Schmitt used his theory of ‘concrete order thinking’ to advocate the ideological reinterpretation of existing law. As Rütthers (1968, 301) explains, Schmitt’s ‘concrete order thinking’ became an ‘instrument for changing the content of positive law’. To achieve this, Schmitt developed a theory regarding the interpretation of so-called ‘general clauses [*Generalklauseln*]’, such as ‘good faith’ and ‘common decency’. As Schmitt pointed out, by reinterpreting these general clauses, the meaning of law could be changed, without it being necessary to amend the statutes themselves:

As soon as concepts such as “good faith” and “common decency”, and so on are no longer linked to the individualistic, bourgeois, commercial society, but to the interests of the whole nation, the entire *Recht* changes in reality without it being necessary to change a single “positive” law. (Schmitt, [1934a] 2006, 49/91)

More particularly, Schmitt called upon judges to reinterpret existing statutes, such as the German civil code of 1900, in line with the National-Socialist ideology. As he put it in an article on ‘Nationalsozialismus und Rechtsstaat’ (National Socialism and Rule of Law, 1934), ‘all unspecified concepts, all so-called general clauses, are to be applied unconditionally and without restrictions in a National-Socialist sense’ (Schmitt, 1934b, 717). Schmitt’s guideline was soon followed in legal practice. For instance, German courts rejected appeals by (former) Jewish employees against the reduction in their pensions as being ‘contrary to good faith’ or regarded the refusal to bring the Nazi salute as a ‘significant cause’ justifying an employee’s dishonourable discharge (Rütthers, 1968, 226). Although it is difficult to prove any direct

influence of Schmitt's 'concrete order thinking' on these judicial decisions, it was important for justifying the National-Socialist reinterpretation of law on theoretical grounds (Rütthers, 1968, 302). Especially in the early phase of Hitler's dictatorship, between 1933 and 1936, it was crucial for providing a theoretical justification for the transition to the 'legal order' of National Socialism (Rütthers, 1968, 100).⁷

Conclusion

In this article, I have analyzed and compared Romano's and Schmitt's institutionalist theories of law. More particularly, I have tried to explain how Schmitt used Romano's theory to develop his own notion of 'concrete order thinking' and to advocate the ideological reinterpretation of German law. As we have seen, both Romano and Schmitt criticized legal positivism and its normativist conception of law, and they did so in strikingly similar ways, emphasizing its failure to come to terms with the 'realization of law'. Moreover, both advocated an institutionalist approach to law that regarded legal norms as secondary phenomena, pointing at the importance of the underlying (non-state) institutional order which informed and shaped these norms. And finally, both developed their institutionalist theories in an attempt to remedy the crisis of the modern state, and, more particularly, its failure to come to terms with new social movements that questioned the state's legitimacy and monopoly on lawmaking. In this context, they both suggested that an institutionalist jurisprudence could contribute to mitigating and resolving social conflicts by focusing on the impersonal roles – or 'standards of normality' – associated with legal institutions. Although Croce and Salvatore are right to point out that Schmitt sought to downplay the pluralist implications of Romano's theory by subjecting non-state institutions and their legal orders to the superior authority of the state, Schmitt did acknowledge that the state, in order to remain legitimate and effective, depended on these non-state institutions and their standards of normality.

However, contrary to Romano, Schmitt expressly used 'concrete order thinking' to justify the new 'legal order' of National Socialism. He thus presented the National-Socialist *Führerprinzip* as a 'great example' of the revival of concrete order thinking and rejected the liberal conception of the rule of law as a foreign import. For Schmitt, it was ultimately not the state, but the *person* of the *Führer*, as organ of an emerging order, that demanded unconditional fidelity. More particularly, as we have seen, Schmitt called upon judges to reinterpret the 'general clauses' in existing statutes in line with National-Socialist ideology. He thereby succeeded in turning law into an ideological instrument of Hitler's dictatorship. In doing so, he moved well beyond Romano's institutionalist theory and its focus on legal pluralism. Although Romano may have recognized the corporatist state of Fascism as a return to an institutionalist jurisprudence, he did not call for an ideological reinterpretation of law, but instead emphasized the neutral and descriptive character of his institutionalist theory. More importantly, while Schmitt developed 'concrete order thinking'

⁷On the reception of Schmitt's 'concrete order thinking' under National Socialism: Kaiser (1986), 233 and Stolleis (2002), 323–324. Stolleis observes that the popularization of Schmitt's concrete order thinking in National-Socialist legal doctrine led to 'disenfranchising [entrechtende] consequences for the individual' (quoted in Quaritsch, 1986, 339).

into a theoretical justification of the totalitarian state, Romano argued that non-state institutions and their legal orders could never be completely incorporated into the state, but continued to exist and develop in its shadows. Indeed, Romano emphasized that the state was itself a heterogeneous institution, consisting of numerous, more or less autonomously operating institutions, which were constituted by law. He thereby uncovered an important principle of the rule of law, i.e. that state officials, including the legislator, were always already bound by pre-existing laws, which they could not determine or fully control.

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References

- Blasius, D. 2001. *Carl Schmitt: Preussischer Staatsrat in Hitlers Reich*. Göttingen: Vandenhoeck & Ruprecht.
- Bobbio, N. 2007. *Dalla struttura alla funzione: Nuovi studi di teoria del diritto*. Laterza: Roma-Bari.
- Catania, A. 1987. "Carl Schmitt e Santi Romano." *Rivista internazionale di filosofia del diritto* 64: 546–575.
- Croce, M., and A. Salvatore. 2013. *The Legal Theory of Carl Schmitt*. Abingdon: Routledge.
- Croce, M. 2018. "Wither the State? On Santi Romano's *The Legal Order*." In Croce, M. (Ed.). *Ethics & Global Politics*. London: Taylor & Francis.
- Kaiser, J. 1986. "Konkretes Ordnungsdenken." In *Complexio oppositorum: Über Carl Schmitt*, edited by H. Quaritsch, 319–340. Berlin: Duncker und Humblot.
- Kantorowicz, E. [1957] 1985. *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton, NJ: Princeton University Press.
- La Torre, M. 2010. *Law as Institution*. Dordrecht: Springer.
- Loughlin, M. 2017. "Santi Romano and the Institutional Theory of Law." In *The Legal Order*, ed. S. Romano, edited and translated by M. Croce, with a foreword by M. Loughlin and an afterword by M. Croce, xi–xxix. Abingdon: Routledge.
- Mehring, R. 2014. *Carl Schmitt: A Biography*. Cambridge: Polity.
- Melis, G. 2004. "Il Consiglio di Stato ai tempi di Santi Romano." In *La giustizia amministrativa ai tempi di Santi Romano presidente del Consiglio di Stato*, edited by A. Romano, 39–58. Torino: Giappichelli.
- Montedoro, G. 2002. "La crisi dello stato in Santi Romano e Carl Schmitt." *Diritto amministrativo: Rivista trimestrale* 1-2: 105–141.
- Musumeci, A. 2015. "Santi Romano: Un guirista tra due secoli." In *I giuristi e il fascino del regime*, edited by I. Biocchi and L. Loschiavo, 325–349. Roma: Tre Press.
- Pietropaoli, S. 2002. "Ordinamento guiridico e konkrete Ordnung: Per un confronto tra le teorie istituzionalistiche di Santi Romano e Carl Schmitt." *Iura gentium: Rivista di filosofia del diritto internazionale e della politica globale* 2: 1–22.
- Quaritsch, H., ed. 1986. *Complexio oppositorum: Über Carl Schmitt*. Berlin: Duncker und Humblot.

- Romano, S. [1909] 1950. "Lo stato moderno e la sua crisi." In *Scritti minori: Diritto costituzionale*, edited by G. Zanobi, Vol. 1, 311–325. Milan: Guiffrè. Translated as S. Romano, S. 2015. "L'état moderne et sa crise." Translation D. Soldini. *Jus Politicum* 14: 1-15.
- Romano, S. [1918] 2017. *The Legal Order*, edited and translated by M. Croce, with a foreword by M. Loughlin and an afterword by M. Croce. Abingdon: Routledge.
- Rütthers, B. 1968. *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. Tübingen: Mohr.
- Schmitt, C. 1934b. "Nazionalsozialismus und Rechtsstaat." *Juristische Wochenschrift* 63 (24): 713–718.
- Schmitt, C. [1922] 1996. *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*. Berlin: Duncker und Humblot. Translated as C. Schmitt. 2005. *Political Theology: Four Chapters on the Concept of Sovereignty*, translated and introduced by G. Schwab, with a foreword by T. Strong. Chicago: The University of Chicago Press.
- Schmitt, C. [1934a] 2006. *Über die drei Arten des rechtswissenschaftlichen Denkens*. Berlin: Duncker und Humblot. Translated as C. Schmitt. 2004. *On the Three Types of Juristic Thought*, translated by J. Bendersky. Westport: Praeger.
- Stolleis, M. 2002. *Geschichte des öffentlichen Rechts in Deutschland: Weimarer Republik und Nationalsozialismus*. Munich: Beck.