

ETHICAL SUBSTANCE AND THE COEXISTENCE OF NORMATIVE ORDERS

CARL SCHMITT, SANTI ROMANO, AND
CRITICAL INSTITUTIONALISM¹

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The present article aims to introduce an *interactional conception of law*, based on four main tenets. Law is made up of a set of rules which are the conditions of possibility for durable forms of interaction. A rule is a condition for the successful accomplishment of an interaction, that is to say, a condition without which the interaction would not achieve the aim that it is expected to achieve. An institution is a typified set of reiterated practices. Positive law is the reflexive outlining of the effective and institutionalised rules.

In the following pages we seek to show, on the one hand, that such an interactional conception of law, which we label ‘weak’ or ‘critical’ institutionalism, allows us to describe the institutionalisation process not as an unreflective sedimentation of consuetudinary practices, but as a way of selecting those interactions that have previously proved to be efficient in solving problems which characterise a certain social context; on the other hand, that the paradigm of legal pluralism, strictly

¹ We are very grateful to Prof. Gordon Woodman for his critical reading of our article. We received valuable comments that have certainly improved the original version of our work. Although this article is the fruit of a unitary and jointly discussed project, Mariano Croce wrote sections 2, 4 and 5, while Andrea Salvatore sections 1 and 3.

related to our perspective, enables us to differentiate between several normative levels by following two specific and distinct kinds of rules, namely organisational/constitutive rules of different concrete ordering systems, and procedural rules for the settlement of potential disputes among them.

By making a comparison between Carl Schmitt's and Santi Romano's concepts of law, we will outline a form of weak institutionalism, linked to a particular concept of interaction and thus free of any particular connection with the concrete specificities of the discrete forms of life. Then we will clarify the main conceptual tools we need in order to develop our interactional conception of law. To test further such tools, we will examine the main theses of what is generally called 'new institutionalism', so as to capture the proper meaning of the term 'institution' and to verify the relation between this new institutionalism and the old one. Finally, we will show that an institution as conceptualised in this article requires structurally and promotes suitable processes for revising the existing rules, which are to be considered as workable (and always fallible) solutions for solving problems within a specific environmental context and at their best satisfying the requirements of the social actors involved.

1. Strong Institutionalism as Identitarian Institutionalism

Carl Schmitt in the preface to the second edition of *Political Theology* (Schmitt 1985, first written in 1933) abandons the former distinction between two types of juristic science, the normativist and the decisionist, which he had previously presented as the core distinction of jurisprudence, and adopts a tripartite division that he considers to be more complete. In addition to the normativist and decisionist types, Schmitt includes institutional juristic science. In *On the Three Types of Juristic Thought* (Schmitt 2004, first published in 1934), he develops the new categorisation and labels the object of institutional juristic science 'concrete orders'.

According to this new perspective, law is not based on a concept of a legal order which is dependent on some normative rule; on the contrary, legal order itself is the condition of possibility of rules. The concepts of 'legal order' and 'set of rules' do not coincide at all, since the latter is only a partial and derivative aspect of the former: the legal order is at once the foundational ground and the basic aim of the whole normative system. In this scheme it is not the generalised rule which defines the normal condition, that is to say the order, but vice versa. The rule as such is unable to provide a criterion of normality, which indeed is to be presupposed by

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referring to the factual form of life within the community. Hence law is the whole set of social relationships and communal practices which durably characterise, and in so doing institutionalise a certain form of life, and without which the political community would implode.

Let us clarify the contradistinction between the normativist and the institutionalist juristic science. The remarks addressed by Schmitt from an institutionalist point of view to the normativist approach are only partially focused on the process of abstraction from the real substance of social relationships; in fact, the fundamental assertion aims to underscore that the normativist approach is in the end structurally incomplete in its description of social relationships, as it is unable to give an account of the ethical substance which, in its turn, ends up being the authentic yardstick for the normal social condition and then, ultimately, for law. Therefore the contradistinction is not essentially between the abstract deontology of normative juristic thought and the concrete essentialism of institutionalism. It derives from the more fundamental contrast between two irreducible categorisations of reality: on the one hand, the normativist categorisation, able to give an account only of the spheres of human existence ruled by relationships of mutual, equal, and cooperative exchange; on the other hand, the institutionalist categorisation, able to shed light even on background legal concepts, which are not eventually ruled by a functionalist logic and which in their concrete inner order are the source of the different criteria of normality, the sum of which is the main structure of life.

According to Schmitt's example, no set of norms could cover the case of the *bonus pater familias* ('the good father of a family') by defining it systematically through the prescription of certain acts. Yet, the social characteristics of this conceptual person are relevant for an effective formulation of the norm of judgment in a particular case, and for the justification of the judgment. The shared notion of the *bonus pater familias*, socially diffused, is the substantive making good of what otherwise would be a legal vacuum. Such an ideal is composed of all the characteristics and behaviours which are commonly judged to belong to a 'normal' *bonus pater familias*, to which even the normativist has to refer insofar as s/he wants to account for the logic of a judgment applying the law. Thus the normativist conception of law turns out to be not only incomplete, derivative, and abstract as regards the social relationships shared within a community. It is also, and more fundamentally, parasitic on the institutional conception of law, in that it has always to refer to situations which are juridically relevant to the establishment

of the normal condition, that only a juristic science based on concrete legal order is able to produce.

Yet, in spite of the explicit reference to institutionalism, Schmitt's position, as it has been sketched here, amounts to a communitarian and essentialist version of the institutional model: for these reasons, we maintain it is radically incompatible with the nature and core tenets of institutionalism. The basic difference, as we will see in more detail below, resides in the spectrum of social relationships which are judged to be relevant in juridical analysis. In fact, from an institutionalist point of view, *every durable interaction is a juridical relationship*; in Schmitt's opinion, on the contrary, we should consider as juridical practices only the social practices contemplated by a preceding communitarian identity which has been taken for granted and presupposed in some way since the birth of a community. In Schmitt's reconstruction, the fluidity of the horizontal relationships –which institutionalism takes into account – is completely replaced by the firmness of a vertical relationship with an unquestionable ethical substance: in this perspective, the whole set of single interactions does not shape but is shaped by a previous social identity, which gives it sense and social relevance.

In our opinion, the communitarian shift of Schmitt's institutionalism can be proved from two specific aspects of his work: on the one hand, his identification of the features of the institutional reality to which law must refer, and on the other hand the overall logic characterising *On the Three Types of Juristic Thought*.

As to the first aspect, in the above mentioned preface to the second edition of *Political Theology*, Schmitt speaks of “institutions and organisations that *transcend the personal sphere* [emphasis added]” (Schmitt 1985: 3), and in *On the Three Types of Juristic Thought* he defines the characteristics of the order as “highest, unalterable, but also concrete” (Schmitt 2004: 50). In the first quotation there is a clear purpose to remove the study of institutionalisation from interactions between social actors and to reserve it to a superior, unquestionable political order. In the second quotation we can see, if we focus on the adversarial turn of the phraseology, that Schmitt aimed to rethink the contradistinction drawn between a superior, immutable, and abstract order and a subordinate, contingent and concrete order. Schmitt's purpose is to invalidate this opposition by denying (as institutionalism basically does) not only that the former may be defined as a juristic order, but also and primarily that a concrete legal order can change (which is a key corollary of the first institutionalist argument). Hence, the only way to reconcile the concreteness of the legal system, *i.e.* the link to the form of life actually shared within a community, with its immutability is to consider social interactions –

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which structurally vary and change – as inner articulations of an ethical and identitarian substance already-and-always formed. Such social interactions turn out to be different and potential versions of the same communitarian identity. Thus they are neither alternative to nor in conflict with the unchanging substantial core, which is never affected by the possible variations, that Schmitt's institutionalism does not seek to deny.

In relation to the second aspect, that is, the overall logic characterising *On the Three Types of Juristic Thought*, it is necessary to specify that Schmitt's tripartite division is not reciprocally exclusive, but mutually inclusive. *Every* juristic system (and, *a fortiori*, every juristic thought) is composed of norms, a decision, and a specific legal order: the hierarchical, logical order between them is structurally decisive to such an extent that whichever is considered to be the leading element comes to determine the type of juristic system. Therefore, as Schmitt points out, if we focus on institutional juristic thought we may easily notice that it provides both norms and decision. If the contribution of the normativist approach is evident, in that it endorses the binding value of an interactional constant which is sociologically attestable, only the decisionist contribution reflects the genuine particularity of Schmittian institutionalism: by means of it we can identify the social subject who is called upon to uncover among the whole set of interactions those which are juridically relevant, so as to leave aside the interactions which are to be considered to be inessential or dangerous owing to the fact that they are extraneous to the customs of a specific community. Here, this subject is the sovereign to whom is definitively reserved the faculty of deciding, namely of restricting social reality in such a way that normality is defined by excluding those social interactions which are at odds with the aimed homogenisation. Such a normal situation is the condition of possibility for any juristic regulation. It is this which Schmitt defines as the 'political truth'.

Moreover, by including the decisionist aspect also in institutional juristic thought, the foundation of the whole logic of the concrete legal order is rooted, in the final instance, in the friend-enemy contradistinction which characterises and defines the concept of the 'political', as we can clearly see in another text published by Schmitt in the same year, *State, Movement, People* (Schmitt 2001, originally published in 1933). But, even apart from the Schmittian theorisation, we argue that every identitarian and ethical version of the institutional paradigm is characterised by a monistic logic. Only this logic assures the political unity which is the condition of possibility for and, at the same time, the real aim of the communitarian identification with *one* concrete legal order. This identification

compels a reduction of the manifold and complex practices, as well as of the various normative models socially diffused, to a monistic juridical recognition of one, well-defined, all-inclusive form of life. Surely, this reduction does not necessarily affect juridical entities which are external to the concrete legal order, such as, for instance, the Schmittian categorisation friend/enemy. However, the repressive logic, intrinsic to the activity of selecting specific features and practices which are considered as core ethical elements of a certain community, shows itself as structurally indispensable in contrast to all the other social interactions, which are judged inessential, if not dangerous to the shared ethical substance.

Nevertheless, from an institutional point of view the interactions which an essentialist or ethical institutionalism systematically leaves aside are to be considered equally relevant by the jurist, since every interaction has an inherent relation with law, as we will argue in the next pages.

2. Weak Institutionalism as an Interactional Institutionalism

It is often claimed that legal institutionalism, as a way to explain the phenomenon of 'law' in its social setting, belongs to the *sociology of law*. It is said that it seeks to explain the workings of mechanisms of social integration, especially those which, within a delimited space and time, can be considered to be 'juridical'. In so doing, institutionalism, setting aside the differences between its various versions, may shed light on the factual conduct of social actors, reciprocally bound, by and large, to prescriptions governing their behaviour. Yet, according to this criticism, although such an analysis might provide revealing insights about the functioning of legal machinery, institutionalism is unable to explain *why* such substantive prescriptions should be considered as valid (or *invalid*), since the sociologically-oriented analysis lacks normative criteria which would allow a distinction to be drawn between 'is' (the factual enactment of prescriptions) and 'ought' (their justifiable validity). Therefore, institutionalism turns out to ascribe juridical value to the material behaviours which *de facto* actors display within a social community. In this scheme, forms of socially diffused behaviour, along with convictions, beliefs, practices and values, constitute an inescapable *ethical substance*, in which law is and will continue to be rooted. From this perspective, the concrete order is expected to embody and reproduce this substance, as a deep and indelible genome of community.

Albeit this criticism may strike home at some forms of institutionalism, we shall show in the following pages, through instances of the main tenets of the thought of

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Santi Romano, that the reading mentioned above, if applied to Italian legal institutionalism, is largely misleading. Indeed, Italian legal institutionalism, especially in the Romanian perspective, provides a sound basis for the justification of a notion of legal pluralism free from ethical or ontological implications.

It is highly significant that *L'ordinamento giuridico* (Romano 1977, first published in 1918) and considered to be one of the founding books of Italian legal institutionalism, starts from a strictly conceptual analysis of the notion of 'legal order'. Romano seeks to offer a definition of law as an autonomous and constitutive phenomenon which creates space for interactions, and hence as the condition that allows social actors to establish stable interactions. He aims to account neither for the way law factually works nor for the concrete behaviour of social actors, but to provide a well-founded, strictly juridical conceptualisation of law as the basic framework of every form of sociality.

In Romano's view, law is the crystallised ensemble of the rules which constitute an ordered society within which subjects may engage in stable and durable forms of interaction. Although no page of Romano's book provides this definition, we will endeavour to clarify and specify every term of it, since we believe that it represents one of the best possible syntheses of Romanian institutionalism.

The relation between the 'social' and the 'juridical' is expressed by the principle '*ubi ius ibi societas*' (where there is law, there is society) as well as by its converse '*ubi societas ibi ius*' (where there is society, there is law). Law constitutes an interactional phenomenon, which transcends the immediate subjective dimension and considers subjectivity to be derived from the primary intersubjectivity of social relationships. In fact, law is formed by a network of rules created by the dynamic triggered by the interactional exchanges among subjects, who in their daily routine practices, are inclined to repeat the most successful and efficient actions. These actions then undergo a process of typification, to such an extent that they become *general models*, or, we could say, *typical cases*, on the basis of which social actors shape and reproduce their particular form of sociality. Nonetheless, Romano radicalises his position by claiming that where there are stable forms of interaction (*societas*), there are already-and-always law (*ius*). Actually, those rules which relationships must presuppose, if they are truly relationships and not just chance encounters between independent agents, are already-and-always law. In this manner, law turns out to mean "organisation, structure, position of the society itself in which it grows", *i.e.* *an orderly framework* (Romano 1977: 17), within which interactional forms are

crystallised, offering social actors reproducible, functional models. Therefore, law is the indispensable condition for pursuing two basic social aims: on the one hand, it overwhelms the fragility and transience of subjective wills; on the other hand, it helps reproduce the fundamental organisation in which subjective wills may enjoy the dimension of sociality, namely of a stable and durable interaction, which makes subjects socially situated agents.

In other words, law is the complex of the organising and constitutive norms stemming from the establishment of *institutions*, which themselves are the cradle and covering of *visible social bodies*, namely groups of subjects of law. Those groups are to be distinguished from clusters of randomly assembled persons by virtue of their exhibiting particular characteristics:

- common forms of interaction, including relations such as kinship, hierarchies and economic structures, and juridical models such as robbery, homicide and divorce;
- the shared recognition, at least implicit and generally diffused, of the indisputable value of this structure;
- the mutual attempt to make this structure thrive.

We might in passing notice the remarkable resemblance between this concept of law and that of Cicero, who conceived of the '*res publica*' as an ensemble of subjects not "*quoquo modo congregatus*" ("congregated in any sort of way"), but "*iuris consensu et utilitatis comunione sociatus*" ("bound together by agreement on justice and common utility", Cicero 1995: 53). Here the *iuris consensus* is presupposed as a basis for institutions to function, as a framework which performs a twofold social role: on the one hand, it is the cradle of and the condition for stable social relationships; on the other hand, it is the safe space in which agents constitute their identities, their epistemic and moral categories, their personal and collective aims. As a counterpoint, there is the common awareness that every action depends on interaction, and consequently on the structure that assures the stability of interaction, which is considered a common utility.

In the formulation provided above, the concept of *institution* coincides with the legal order itself. Institution consists of any model of interaction which is genuinely social, or rather, capable of self-organising on the basis of an inner mechanism of regulation, made up by those practices concretely performed by the members of a social group. The typification of these norms yields a system of rules, without which the group would be a mere ensemble of subjects however

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congregated. Thus law is the material ground where the juridical association is rooted and where its meaning is enacted in daily activity.

In the previous section we have, by addressing Schmitt's conception of institutionalism, highlighted the ontogenetic dependence of norm on the concrete order. Schmitt quotes the words of Romano when the Italian jurist argues that positive norms should be conceived of as a production of a previous legal entity, a "complex and heterogeneous organization", within which the relation of norms to each other takes form and acquires a specific social meaning (Schmitt 2004: 57). In this view, positive norms not only have no significant influence on the forms of life they are supposed to be regulating, but they are basically aimed at guaranteeing the stable reproduction of this form of life, namely of the institutions which produce every single norm: institutions are thought of as the image of the legal order's material body, tied to the consolidation of praxes, customs, values.

Yet, in our view, Romanian institutionalism leads to very different conclusions. In order to make it clearer, we will draw two possible interpretations of institutionalism, that we will name 'strong' and 'weak'.

In the 'strong' interpretation, law creates and promotes a previous, homogeneous social unity, which shapes and stabilises the relationships of social actors to one another. In this scheme, the term 'concrete order' means a complex of forces, values, beliefs, and knowledge which underpin a homogeneous stream of social interactions within a stable and organic *social community*. For this and in it, law is the substantive core of the material self-organisation: outside this context individuals could not achieve the status of fully social subjects. Society is a substantive unity, settled in and through its substantive law. The ratification of norms aims to protect the genetic code of the material community, the members of which find in law an indispensable unifying element. Law, and the values inextricably embedded in it, controls subjects by promoting a series of models as an articulate and pervasive mechanism for producing and reproducing a communitarian form of life.

Nevertheless, in the 'weak' interpretation, the main points of the institutionalist paradigm are the *principle of the plurality of institutions* and *the dissolution of the concept of monistic legal order*. This reading seems to grasp Romano's theoretical purposes, in particular when he openly rejects the notion of 'organic community' (used by Otto von Guericke) in favour of the "larger" and "more complete" concept of 'institution' (Romano 1977: 132-133). As the author often stresses, in any social

organism that relies on typified and repeated models of interaction we find “a discipline, which includes a complex order of authorities, powers, norms, sanctions”, *i.e.* ‘internal regulations’ “endowed with disciplinary powers” (Romano 1977: 126). For we can deduce the principle that we have as many institutions (*i.e.*, social segments in which typified models of interaction are at work) as there are internal regulations, or, rather, juridically relevant orders (even though single norms within them may lack either a codified form or a coercive force).

In this ‘weak’ perspective, the inner homogeneity of the single legal order does not configure the institution as a *comprehensive and exclusive unity*, but as a *solid intersection of practices and institutions* aimed at regulating the associate life of a group of individuals within a differentiated situational context. For this reason it appears to be *totally compatible with the possibility that other institutions* may regulate other differentiated situational contexts. Although the order requires an internal hierarchy – namely, an efficient mechanism of superior and inferior grades and functions – it does not claim to affect the whole social existence of its members, but only the features which are related to the specific context in which and for which the institution was born.

The definition which opened our discussion of Romano’s concept of law seems to become clearer. Law affirms those institutional rules that are constitutive for the relations among the subjects affected by the order, within the social segments which encompass their actions. This viewpoint leads to a revision of the traditional concept of positive law, to such an extent that, in the end, state law turns out to be *an order among* others, intertwined with others more or less comprehensive: it means that state law may no longer be considered as having a full sovereignty (*i.e.* the coincidence of *auctoritas* and *potestas*). As a consequence, for example, the rules of the World Trade Organisation or those of the *Fédération Internationale de Football Association*, or those of the Canon Law of the Catholic Church are legal orders as valid as those of the states in which those institutions are physically located. However, their norms claim to be *compulsory only for the associate members, and only when they are engaged in activities regulated by those institutions*. Outside of their defined sphere of control, these institutions do not provide their members any particular status.

3. Interaction, Rule, Legal Effectiveness

After outlining Carl Schmitt's and Santi Romano's concepts of law, it is worth shedding light on the consequences of adopting the weak institutionalism perspective; in this way, we will pave the way to frame our concept of law, which we will take up in the last section.

First of all, the concept of interaction replaces the concept of ethical substance and turns out to be at once the pivot and the basic unit of the whole reconstruction. As we showed above, strong institutionalism treats the law as if it were an ethical substance, by hypostatizing a set of relationships of force, identitarian models, and communitarian practices, shared within a certain social sphere, and by recognising it as *the* legal substance *sub specie aeternitatis*. According to our interpretation, Schmitt's remarks on normative juristic science can be reformulated against Schmittian institutionalism itself with the same effectiveness: if normativism is ultimately partial because it is unable to give an account of the multifaceted rule-governed social realities, likewise strong institutionalism ultimately abstracts from the irreducible plurality of socially diffused interactional forms because it hypostatizes a specific description of them; in doing so, it abandons the intrinsically multifaceted reality that the law has to rationalise – which is exactly the same error Schmitt ascribes to normativism.

But the communitarian shift which affects strong institutionalism is much more radical than it has hitherto been argued to be. For this shift consists not only in wrongly assuming as immutable a specific and contingent version of certain social relationships, rooted in a given community within a given time, but also and more fundamentally in giving a social account which links values, practices, and knowledge to a single identifying moment which it considers to be authentically demiurgic. On the contrary, these values, practices, and knowledge have been formed in different historical periods and irreducibly related to social requirements. In addition, and more generally, we should remember that, like the hypostatisation of a specific communitarian interpretation, the selection from among the ongoing social interactions which structure the presupposed concept of community, also itself risks being arbitrary.

In summary, strong institutionalism is misleading with regard to four aspects: *a)* as an *arbitrary selection* of particular spheres and social interactions within the whole set of social relationships, socially diffused, according to the monistic and reductive logic explained in the first paragraph; *b)* as an *arbitrary interpretation* of

particular spheres and social relationships within the whole set of multifaceted and irreducible forms of interaction characterising the social relationships themselves, socially diffused; *c*) as an *atemporal hypostatisation* of both social relationships and their potential forms, which are really unpredictable in the abstract, since they depend on the changes of the interactional forms, which result in turn in their being linked to social actors; *d*) as an *abstract reconstruction* of a social and historical process, influenced by irreducible functional factors, which, on the contrary, is treated as if it were an organic and plain manifestation of an original ethical identity.

Let us clarify what we mean by considering again Schmitt's example, that is, the *bonus pater familias*, and by adapting it to the main differences between strong and weak institutionalism. On the one hand, owing to the fact that they are both forms of institutionalism, strong and weak institutionalism establish a link between the norm and the social reality which precedes, founds and substantiates it; but, on the other hand, their definitions of reality are radically different. For instance, even if we concede either that the paternal institution is a central element of a given community or that the definition of the legal subject is in some way automatic (and actually both statements are far from being invariably correct), many elements may vary: on the one hand, the spheres juridically relevant for the definition of the legal subject (thus: should the *bonus pater familias* influence his daughter's choice of profession?); on the other hand, the determination and the interpretation of them (thus: when, if ever, does such a determination translate itself into the choice of the subject of study for his daughter until she comes of age or even further, or does it take other forms of influence?). Such variants, in their turn, may change over time, up to the point of total disappearance, or at least of the loss of their original forms, having then to be replaced by other interactional forms. In these circumstances, only a historically abstractive or ideological reconstruction of the development of a given community could wrongly reduce such a history to the social accomplishment of a specific and unchangeable identity.

To put it differently, the fallacy of strong institutionalism consists in assuming both a sustained interaction in an idealtypical form and an enduring social relationship as if it were predetermined without any link to functionality. On the contrary, by leaving aside the concept of ethical substance and adopting an interactional point of view, we can give a complete and systematic account of social change, insofar as it is juridically relevant. In this way, we ensure that juridical analysis is able to account for the constitutional fluency of social reality. Hence weak institutionalism, by identifying law with a set of interactions, aims to illuminate the

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real spectrum of social relationships, multifaceted and magmatic as it is, and to make it the starting point of an analysis free of any assumptions about identity.

In weak institutionalism's perspective, the identity criterion is replaced by the social actor's rationality criterion: law becomes a set of interactions not only coordinated and sustainably implemented, but also performed according to the benchmark of rationality – in the thin meaning of relationships which produce intelligent and efficient regulations, able to be put into effect in order to resolve the dysfunctions arising within the social network. At this point, let us define more clearly some of the main concepts we have just addressed.

In weak institutionalism terms, a norm is the typification, namely the constant observance (from the social actor's point of view) and the systematic discovery (from a possible observer's point of view) of the rules of an interaction: therefore the norm is ontogenetically dependent on the legal order. Such a constancy can be identified with the reiterated choice of an interactional practice once it has been originally performed. The observance can be said to be constant if social actors in context C₂ adopt the same interactional regulation that has proved to be effective in the former context C₁. Consequently, the more times the regulation characterising interactional practices is reiterated, the more it emerges as structurally inherent to similar interactions; that is to say, the reiterated regulation becomes a *typical case*. No doubt, the whole juridical interaction can actually be performed in a spontaneous, immediate, and irreflexive way, without invalidating either the functioning of interactional relationships or the reconstructive task of the jurist: for our purposes it is sufficient that such nonreflective social behaviour can be reflexively explained.

Interactional rules shape the set of the conditions of possibility for interactions to be successful, namely the conditions without which the interaction itself would not have the outcome that it was expected to have while deciding to perform such an interaction; in other words, without these conditions the social effectiveness of interactions, as it is intended by the social actors, would disappear. The interaction is an activity in which no actor involved or affected by its outcomes is only passive (or, conversely, only active): interaction is an activity in which social actors, in as much as they want to act rationally, have to presuppose a mutual cooperative (whether direct or indirect) relationship, namely a relationship in which A's action influences B's action, and *vice versa*, by each conditioning the other.

Before explaining our concept of law in a more systematic way, it is useful to offer an example concerning our basic tenet, *i.e.* that the norm is the typification of the conditions of possibility for an action in which social actors presuppose a mutual (even if indirect and/or unreflecting) conditioning relationship.

Let us imagine that a member of a given society needs the aid of someone to get a certain goal that could not be obtained only through the aid of friends and relatives. So, in order to get it, s/he makes an agreement – reciprocally profitable and thus mutually accepted – with an outsider, through which s/he gains a benefit equivalent to that which the outsider gains from the same transaction. If the members of such a society use the previously accepted model of the contract in similar cases, this model acquires legal validity. Such rules, or rather the conditions which make the agreement a contract and serve the function of interactional relationship, consist in the fact that parties to a contract mutually accept a responsibility which inheres in their own performative assertions to be bound. Without such a postulate, the model of the contract would be neither available nor even thinkable. Hence in our example, in the perspective of weak institutionalism, the acts in which the binding mutual responsibility of the members emerges are legal acts, in that they are the typification of constitutive rules of an interaction persistently diffused within the society we are imagining.

Our example allows us to pinpoint three important aspects of weak institutionalism and so to specify further the concept of law we intend to introduce.

Firstly, the failure to comply with the normative requirements of interactional practices does not invalidate the norm – whereas this could be claimed within a perspective which aimed mainly to consider normativity as rooted in the reiterated adoption of a certain practice. On the contrary, this failure confirms the binding validity of normativity, since it is a necessary condition of possibility for the free rider's prudential strategy to be designed and implemented. Actually, in our previous example, the action of a free rider who signs the contract with the tacit intention of taking advantage from the agreement without honouring his/her own obligations is possible (in the twofold meaning of 'thinkable' and 'practicable') *if and only if* the free rider him/herself presupposes that the other contractor honours his/her own obligations. If that is so, the free rider implicitly attributes validity to the contract (or, more precisely, presupposes the contract as a typical model). Since both parties *equally recognise* the general validity of the rules, we may conclude that the strategic act itself is constitutively entailed in the category of interactions (at least by way of a process of reflexive elucidation).

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If what we are saying is correct, law consists of a set of interactions, namely, activities that require a mutual (though not necessarily equal) cooperation, among which prudential strategies are included. If so, then the only social realities external to the legal system – although law is able to regulate them – are the non-interactive relationships, namely the relations in which one of the parties turns out to be only passive with regard to the outcome of the relationship. The actions/interactions distinction coincides with the distinction between facts and acts (especially in civil law), that is, between legally relevant acts/omissions and legally irrelevant acts/omissions which have legal consequences (or rather, effects that make the context different from the way it was before they happened). Yet the classic criterion of ‘explicit will’, which is traditionally connected to the origins of the Roman concept of *negotium juridicum*, is replaced by a criterion which focuses on the absolute passivity of one or more subjects involved in the interaction. Obviously, actions, albeit they are not acts but facts, may have relevant legal outcomes; yet, that does not make them relevant *as such*, but insofar as their effects (say, legal effects) affect/imply a legal act, and thus come to constitute a typical case. In our example, a redefinition of the typical case of the contract – by virtue of which contractors could bind a third party external to the agreement – should be considered in every respect as a non-interactive relationship and thus, as such, devoid of any legal validity.

Secondly, the conception of the norms as reiterations of rules induces us to focus the juridical analysis not upon an irreflexive and factual *status quo*, but upon the interactive conditions which are presupposed by the following of a given social practice. Hence, the validity is significantly more than the hypostatization of a certain social practice, since it covers a set of possible practices, connected to each other by the shared reference to the same regulation. Therefore, the practice actually adopted in a given time lag and space segment will never fill the regulation itself. In our example, from the juridical recognition of the contractors’ responsibility we cannot deduce a paradigmatic and unique regulation of the specific norms that rule all of the clauses of the contract or all of the characteristics relevant to the legal definition of the contractor.

Thirdly and consequently, if law refers to norms, namely rules constituting and shaping a given interactive practice, it is easily noticeable that such rules cannot be identified with the actual practice, because they are, more originally, its condition of possibility. To sum up, weak institutionalism, unlike the strong version, denies that *is* and *ought* can juridically coincide. Such a conclusion is inspired not by mere wishful thinking or normative prescription, but by the

concept of institution we advocate, since it implies a different frame of social reality. Actually, as we will try to show in the next pages, we should think of social reality as a structurally multifaceted and magmatic space, in which an intrinsic critical self-reflexivity represents the condition for a progressive improvement in rationality.

4. New Institutionalism and the Nature of Institutions

Before trying to corroborate our notion of weak institutionalism, it is worth addressing the paradigm which is generally called “new institutionalism” and is deemed to be an important revival and development of the old version of which we spoke above. The comparison between our way of defending a new form of institutionalism and the so-called new institutionalism is decisive so as to evidence that the latter is not a true form of institutionalism, but a bright and viable way of reconciling the positivist approach with the theory of institutional facts (originally developed, in the Anglophone debate, by G.E.M. Anscombe and J.R. Searle).

In one of the leading works in the field of new institutionalism, *An Institutional Theory of Law*, Neil MacCormick and Ota Weinberger explain to us that when persons reach an agreement, when they take part in a ceremony, when they watch a football match, they all are experiencing institutional facts (MacCormick and Weinberger 1986). Those are particular facts, which are true not because of some inner quality but in virtue of the practices and the norms that every participant shares and (at least implicitly) knows: such facts are “not true simply because of the condition of the material world and the causal relationships obtaining among its parts”; on the contrary, they are “true in virtue of an interpretation of what happens in the world, an interpretation of events in the light of human practices and normative rules” (MacCormick and Weinberger 1986: 10). In this light, institutional facts are considered as *occurrences mediated by concepts* which social actors use and apply when they act in the various ambits of social life. The idea of MacCormick and Weinberger is that, in order to exist and persist, institutions (which the authors tend to identify with the ensemble of legal paradigms, such as contracts, marriages, football championships, and so on) acquire their meaning by the relative concepts, which take shape within social practices and which function as instances of institutions. Nonetheless, these concepts, as well as *a fortiori* the relative institutions, do not exist outside the normative activities of social actors. Therefore, institutions are not sheer facts, but are seen as facts inasmuch as they constitute the cement of social practices.

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For these reasons, according to the authors, the *being true* of those institutional facts can be only tested hermeneutically: these facts exist as long as the participants believe them to exist. This is a clear inheritance of H.L.A. Hart's 'practice theory' (and actually MacCormick often mentions it), in which the English legal philosopher introduces "the internal point of view" (Hart 1961, especially chapters V and VI). By assuming such a point of view, the members of a community are inclined to look at the legal rules not as compulsory menaces, but as practices which are shared and are followed *just* (even if *not only*) because they are shared. These practices organise the social life of the citizenry by providing criteria for assessing and (when necessary) criticising the conduct of each other. The Hartian legal portrayal was a first step toward the revival of the institutionalist paradigm. In fact, legal rules are depicted not only as coercive rules of conduct, which should be valid (*i.e.* should belong to the legal system) insofar as they are laid down by a legitimate authority; Hart shows that, besides penal rules (primary rules, rules of conduct), there is a series of rules (secondary rules) which confer power and create public (norm-creating and norm-applying apparatuses) and private (contractors, brides and grooms, testators) legislators. On this reading, it is thoroughly perspicuous what MacCormick means when he writes: "Our judgement of the state of the world is not simply in terms of pure physical facts and relationships, but in terms of an understanding of such facts and relationships as humanly meaningful because imputable to shared human norms of conduct. We know why this is so. Observance of norms leads people into patterns of behaviour" (MacCormick 1998: 322-323). Rules are deemed to constitute a specific language which confers on social reality a whole of meanings: only by enjoying this language we may understand what happens around us (in terms of social actions) and distinguish, for example, the movement of the autumn leaves in the wind from that of two dancers.

Thus, institutions are systems of norms which create spheres of meaning. Such norms have the form of constitutive norms (*à la* Searle, for instance Searle 1969), which establish "what counts as an *x*", where the variable stands for a contract, a marriage, a testament, a championship, a parliamentary procedure, and so on. More specifically, MacCormick singles out three kinds of rule which are designed to *manage* institutions: 1. *institutive* rules, which yield the specific instance of the institution (*e.g.* "when two persons find themselves able to reach an agreement about something they are making a contract"); 2. *consequential* rules, which determine the series of consequences stemming from the institution (*e.g.* "if a contract exists, then..."); 3. *terminative* rules, which establish when and in which way an institution stops existing.

In this view, institutive rules fix an instance according to a pre-existing concept. If so, the institutive normativity is composed of three elements, *i.e.* the concept, the instance, and the institution. The rule makes the concept come into existence by creating an instance and by defining the procedure which the instance requires in order to be realised in the actual social world. The general formula of institutive rules is the following: “If a person having qualifications *q* performs act *a* by a procedure *p* and if the circumstances are *c*, then a valid instance of the institution *I* exists” (MacCormick and Weinberger 1986: 65). But by examining this explanation of institutional facts and institutive norms a question arises: which is the kind of concept that exists before the rule fixes its instance and what its nature?

By facing this question we may capture the real difference between old and new institutionalism. But before undertaking such a comparison, it is useful to grasp the real intentions of the latter.² By rejecting the assumptions of Kelsen’s “pure theory of law” – according to which legal theory has always to maintain its *purity*, *i.e.* to justify a concept of law as an *ought-to-be* which continues to be valid even if no person complies with its norms – MacCormick and Weinberger points out: “Human law is a feature of human society (in at least some of its forms), and it has to be understood as such” (MacCormick and Weinberger 1986: 1). The explicit purpose of this kind of institutionalism is to provide the positivist analysis of law a socio-ontological background. And, in this regard, such an institutionalist theory conceives of itself as a socio-ontological development of legal positivism. This is perfectly consistent with Hartian positivism, where Hart himself had reproached some versions of positivism and realism with misinterpreting the relation between law and social reality, between rules and social practices. On this reading, new institutionalism may be interpreted as a sound account for that kind

² Notice that when MacCormick and Weinberger come to make a brief comparison between their institutionalism and the old one, they only mention the founder of French institutionalism, Maurice Hauriou, and his notion of *idée directrice* as a basic social engine. But in our opinion, the theory of the French author is not as robust and sophisticated as the theory of Romano, in that it sounds more like a sociological theory applied to the field of legal studies than a genuine theory of law. Thus, the theory of Hauriou – notwithstanding his merit of being a pioneer in the area of institutionalist studies – does not represent the best point of departure for a fresh institutionalist theory, and MacCormick and Weinberger are right in concluding that Hauriou’s writings often reveal some mysterious or even mystic traits.

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of rule (secondary rules) which is intended to make citizens private and public legislators. Secondary rules (power-conferring rules) are those rules through which human beings recognise, create, modify, and apply primary rules (rules of conduct). Thereby, secondary rules are instruments for creating meaningful entities for social reality which do not exist outside social practices, such as ownership, marriage, divorce, adoption, testament. Those are the institutions which new institutionalism concentrates on. Thus, in this framework, there is a strict identity between institutions and institutional facts; but, in doing so, institutions end up being assimilated to legal paradigms – and actually MacCormick often refers to contracts and marriages as graspable examples of institutions.³ Surely, this kind of institution is an important part of the social life and legal organisation of a historic community. Institutions (in this connotation) represent an ensemble of social tools which enable social actors to arrange their co-existence and any legal institution belongs to a system or context from which it acquires its specific meaning. As the context changes, the meanings do as well, even though the label of some institutions stays the same: for example, *obligatio*, *pater familias*, *iurisprudentia* present many family resemblances with obligation, father of family, jurisprudence, but in their original context they had quite different meanings (see Hespanha 1999, chapter V). New institutionalism is completely right in inviting us to understand norms not as means for coercive regulation but as sense-attributing instruments, aimed at capturing those basic organisational concepts that are fluidly diffused among the practices of a community and at fixing them into instances (namely, those instances which provide the basis for issuing rules of conduct).

Yet, we believe that, although fully compatible with what we have named ‘weak institutionalism’, this understanding of rules (whether social or legal) risks of misunderstanding the nature of institutions. In fact, in the framework sketched

³ In Italian such an identification would sound like a sort of confusion, since ‘institution’ in MacCormick’s sense is rendered by the term ‘*istituto*’, while ‘institution’ in Romano’s and old institutionalism’s sense is expressed with the term ‘*istituzione*’. In this view, the marriage, as regulated by the Italian Civil Code is an ‘*istituto giuridico*’, while the family, as a social form of organisation or as a general and diffused social practice, is an ‘*istituzione*’. This confusion is also pointed out by Massimo La Torre, Italian translator of *An Institutional Theory of Law*, in his appendix to the Italian version of MacCormick’s and Weinberger’s book.

above, institutions are a sort of by-product: they rely on previous organisational practices in which previous concepts were at work. Let us recall the question asked above: which is the kind of concept that exists before the rule fixes its instance and what is its nature? By using Hart's subtle conceptual instruments – inherited and largely exploited by the new institutionalism – we may only say: there must previously exist a practice which may yield the concept and in which such a concept may be used as a standard for conduct and criticism. Still, this seems to be a rather factual observation meant to ascertain the existence of a shared practice; but it is unable to explain *why* such a practice exists. And this is precisely what a brilliant legal theorist belonging to the old Italian institutionalist school, Widar Cesarini Sforza, had already noted more than fifty years ago: such a descriptive approach only asserts that there is a convergence of behaviours – which is deemed able to yield institutions – but, in the end, seems unable to explain the way in which this convergence comes into being and produces institutions.

Sociologists associate the custom-formation process with the action of two psychological forces: imitation and habituation; but it is clear that both of them are facts that sociologists observe and describe insofar as such facts disclose the existence of a custom, which sociologists still have to explain. And the explanation – namely the reason why there are imitated behaviours and habits – may be found only in the abstractive process which creates the practical types, by depersonalising volitions and putting them into the objectivity of social practices. (Cesarini Sforza 1954: 54-55)

This criticism could be levelled against the new institutionalism inasmuch as it points out that our social world is made up of things or events that are intelligible only “in the light of a norm or norms, that may range from the most informal implicit norm or convention to the most highly formalized and articulated rule” (MacCormick 1998: 333). Thus, in the end, the deepest conclusion reached by this legal theory is the factual observation according to which, in order to understand certain social practices, the legal theorist has to observe them as an internal observer, by assuming the point of view of the participants. Such a theory ends up being a descriptive paradigm, that is, what Hart himself, in the preface to *The Concept of Law*, had already referred to as a “descriptive sociology” (Hart 1961: vi). But such a conclusion may never satisfy the advocates of the old institutionalism. Old institutionalists would probably not consider new institutionalists to be authentic institutionalists.

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It is evident that ultimately the two paradigms of institutionalism disagree over the meaning of “institution”. In a nutshell, according to the old institutionalism, institutions are a structural part of the general process of social organisation, while the new one deems institutions to be only outcomes of such a process. To make it clearer, let us take the example provided by Romano in *L'ordinamento giuridico*. In a passage which accounts for the relation between human practices (and, in particular, the elemental cell of human practices, the relationship between two persons) and the institution, Romano stresses that the institution, which has always a concrete existence,

entails relationships, but cannot be identified with them; in contrast, the institution comes before relationships, in that it represents that organisation or structure which is indispensable in order that relationships themselves – when inscribed in its area – may be defined as juridical (Romano 1918: 67).

No doubt in this passage the institution represents the *possibility condition for relationships* and not the outcome of them. The practice may be defined as juridical, and its consequences may be deemed as legally relevant, only insofar as they belong to a previous institution. If compared to the new institutionalism, according to which the institution is an instance deriving from a concept which, in its turn, derives from a practice, the old institutionalism overturns the ontogenetic process: the practice is an activity which is intelligible in the light of a concept which is produced by a previous institution. Arguably, such an overturning may seem to entail a *petitio principii*, since the institution is not an *a priori* entity, but always stems from a human activity. However, the resolution of this apparent double-bind is the more robust theoretical core of the old institutionalism.

Romano himself perceives the risk of a *petitio principii* and tries to rule it out; however his arguments about it do not seem entirely clear. As we have seen, he speaks of a general structure capable of transforming the interactions among subjects into relations having legal effect: “The existence of persons related to one another and involved in simple relationships is not sufficient to yield an institution; for that there is a need for a closer and more organic link among them” (Romano 1918: 67). Romano is trying to explain that it is not any sort of relationship or practice which is able to yield an institution. Unfortunately, his prose here is rather blurred (“there is a need for a social superstructure on which not only the discrete relationships, but mainly their generic position may depend and which may rule them” – Romano 1918: 67). But what he really means could be rendered as

follows. The institution is the basic bedrock of sense which allows people to interact by following *a common interactional scheme* (this is what is meant by ‘generic position’). This scheme can never follow the interaction; the scheme is presupposed by the interaction, if the latter is to be intelligible as such: the interaction becomes a specific interaction *only in light of* the institution. Romano goes on: “Hence we can hardly imagine an institution made up of two physical persons: they will remain two individuals, who will not be able to form a single entity” (Romano 1918: 67). The example given by Romano is the following. A family does not form an institution only on account of the couple being a married couple, but on account of there being a relationships between two individuals who play two typified roles and who interact in compliance with a scheme which may be performed by all those who want to get married so as to constitute a family. At the very least, the old institutionalism’s core point is that an institutionalist theory cannot limit itself to observing the existence of normative systems of interaction which precede the issuing of positive norms. What counts for more is the ability to distinguish those kinds of interactions which are normative (and which are the source of positive law) from those which are not and to explain *why* they are normative.

In the end, and with a certain flavour of paradox, the principal flaw in the new institutionalism is rather similar to that of strong institutionalism: each takes for granted the existence of orderly behaviour and habits, and each considers orderly behaviour and habits to be the real source of positive law. But neither of them explains which, among the multiple series of orderly behaviour and habits, are the sources of institutions, or why. Surely the intentions of Schmitt and MacCormick are divergent. In fact, the former stands for a decisionist approach and the latter for a descriptive positivism aimed at grasping social reality. And likewise the Schmittian comprehension of positive norms is less rich and useful than that of the new institutionalism, with its many Hartian nuances. But both of them ultimately misinterpret institutions and their role in social organisation. What we shall try to sustain below is the viability of a different institutionalism, able to exploit Romano’s understanding of institutions and, at the same time, to show the relation between institutions, social practices, and rules, without incurring in any *petitio principii*.

5. Foundations for Critical Institutionalism

The justification of an ‘interactional’ conception of law meets both theoretical and practical requirements. We stated above that normative praxes may be shaped in

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and by spontaneous, unmediated, and irreflexive interactional exchanges. We wanted to clarify our claim that juridical institutions come from the reiteration and then the typification of interactional modalities: the routine praxis transcends the here and now of the situational context, detaches itself from the material actors and becomes a *typical case*, thereby fitting into the complex mechanism of control and stabilisation of reality which gradually takes form and grows in the situational context.

Nonetheless, the ordering system is able to regulate interactions precisely because it is at once their cradle and their condition of possibility: indeed, it is the shared reference to the same regulation (*i.e.* to the typified praxis) that qualifies and defines the single action. In a mechanism of mutual reinforcement, the subsumption of the action under the general model plays a pivotal role in the process of consolidation of legal practices.

This is the reason why we posited that normative orders are institutions, namely typification of customary interactional practices. Such an institution serves four basic functions:

- *action generalisation*: it makes actions accessible to actors who did not participate in the original definition of the practices at issue;
- *interactional form abstraction*: it abstracts interactional forms from the particular context of production and thus makes interchangeable the actors who are involved in similar institutional practices;
- *typical case production*: it adopts the action as a general model so that it is assumed as a criterion for judging comparable interactions;
- *typical case stabilisation*: it enables general models to shape the practical reasoning of actors, so that their behaviours become predictable and valuable.

These are the qualities of generality, abstractness, typicality, and predictability, which characterise social actions endowed with legal effectiveness: positivisation, or rather the ascription of a coercive force to these actions, is the mindful recognition of these qualities in reiterated and durable interactions.⁴

⁴ That is the core assumption which lies behind the criterion of ‘normative facts’ advanced by Costantino Mortati, according to which the jurist is called upon to “understand and correctly interpret” not “the transient and unrepeated happenings, which express mere existentiality”, but those of “which we have to

Yet, here we may find a first insidious fault affecting weak institutionalism, inherited by and shared with many other forms of institutionalism: as we anticipated above, it fails to distinguish the criteria for judging the conduct of actors (*ought*) from the actual conduct of them (*is*). In fact, even as institutionalism definitively eliminates ethical substance, it dissolves the prescriptive-normative force of regulations by reducing them to the mere typification of previously diffused and stabilised interactions.

In the following paragraphs we shall argue that this criticism is ineffective and fundamentally misleading.

Interactional practices meet the demand for solutions to problems related to the particular environmental conditions in which actors are involved. They are not only socially stabilised praxes, but above all strategies satisfying specific criteria of efficiency and rationality. Their becoming unreflective is a by-product of reiteration: the routine reifies a theoretical-practical knowledge produced in the attempt to make stable and unproblematic the environment in which individuals and groups find themselves to be living.⁵

This concept concerning the origin of legal order preserves the normative force of legal rules, conceived as an extra-factual criterion for judging the praxes governed by the rules. Hence, the process of institutionalisation is a *posterius* that ensues from the *prius* of the intelligent and cooperative accomplishment of solutions, which come to be institutionalised insofar as they have first proved to be efficient (*i.e.* to have solved problems) and intelligent (as to both their possibility of being performed in the cheapest and most successful way and their ability to meet affected people's requirements, within the limits of socially diffused knowledge). Therefore, positive law is the conscious and reflexive outcome of a process of recovering the sedimented normative framework. Unordered and unreflective practical knowledge converts itself into theoretical knowledge, becomes aware of itself, and fixes its regulative instances by way of coercion, which in its turn comes to be linked to specific criteria (the size of the harm, the range of affected people, etc.).

search for their regularity, that makes them suitable to become criteria for evaluating social relationships" (Mortati 1967: 9).

⁵ On this view, the concept of institution which fits best with weak institutionalism is that offered by Berger and Luckmann (1967).

If this is true, the ordering system, regardless of the ties with its social segment (whether anchored or not to a bounded territory), plays the role of a yardstick, due to its proper origin, *i.e.* its institutionalisation by reference to the criteria of effectiveness and intelligence of solutions. Basically, insofar as law emerges as a specific mode (general, abstract, typified, and predictable) of problem solving it is always considered liable to amendment in relation to just the same criteria as those which induced the actors to judge as efficient and intelligent the original interactional practices. On this view, the modification of some problematic circumstances (*e.g.* the problems, the resources, the socio-environmental conditions, or the requirements of affected people) inescapably modifies the normative framework, so that a mindful revision of the positive norms is inherently required.

We can now pinpoint a specific and essential feature of law. We argued at the beginning that strong institutionalism claims that the effectiveness of laws is linked to certain concrete models, a claim which a rigorous analysis shows to be arbitrary and abstract. In addition, strong institutionalism connects the validity of these models to a specific, unquestionable mode of life, to such an extent that law ends up being an instrument for promoting a peculiar worldview. Our weak institutionalism enables us to say not only that discrete and segmented orders, always inextricably intertwined, rule discrete and segmented sectors of human activities, but also that the tendency of norms to undergo revision belongs intrinsically both to the concept and to the function of law.

In short, weak institutionalism claims, on the one hand, to be able to paint a reliable picture of what law concretely is; and, on the other, to determine something about what law ought to be, by illuminating the formal criteria on the basis of which it is possible to revise existing norms. Thus weak institutionalism comes to integrate with, and, also in part to correct some instances of so-called 'legal pluralism'. This is worth some clarification. Legal pluralism can be understood in two different manners, each to some degree flawed. On the one hand, legal pluralism may be conceived as a descriptive-sociological theory aimed at detecting the coexistence of and potential competition between various legal orders (whether coercively enforceable or not) within the same bounded area.⁶ On the other hand, legal pluralism may be seen as a sociological-realistic theory,

⁶ See, for instance, Griffiths (1986), Merry (1988), Moore (1969), Moore (1973).

aiming to single out criteria for describing the object of law beyond the sterile antagonism of legal orders to one another and making reference to those elements which induce social agents to ascribe legal force to particular phenomena (elements which are undiscoverable at the level of the pure theory and which necessarily require empirical investigation).⁷

The first approach, tending to isolate and analyse different normative levels, seems to be anchored to circumscribed territorial spaces, within which different objects and social situations are ruled by different normative systems. Various orders seek to be recognised by the central normative system. Examples are folk laws, regional autonomies and sport regulations, which may be recognised by the State. The second approach, in contrast, refers to concrete social dynamics, showing that law is plural just because the ways in which people organise social life are plural. In doing this it does not refer to an ultimate legal system endowed with a special force, but runs the risk of failing to question the possibility of conflict between different orders. Examples of problems here are issues which exceed the capacity of single legal orders and require a common decisional framework, such as environmental and international security issues; or the need to settle competition between soft law and hard law, where the former, notwithstanding the fact that people seldom consider it to have legal force, tends to autonomously solve problems which are officially subject to the latter.

On the one hand, the first legal pluralism, although it manages to show the inconsistency of the monistic-centralistic paradigm, runs the risk of being a mere description of a state of things which characterises every society from the beginning. In fact, as regards the events which shaped Western societies, the history of the modern territorial State developed according to a plot unfolded by the competition between the resilient durability of *iura propria* and the authoritative claim of administrative law enforced by central governments.⁸

On the other hand, the second legal pluralism, although it manages to be programmatically ‘non-essentialist’, that is to say, free from a given idea about the ‘substance’ of the phenomenon ‘law’ (considering as law only what people

⁷ See, for instance, Dupret (2007), Kleinhans and MacDonald (1997), MacDonald (1998), Tamanaha (1993), Tamanaha (2000).

⁸ See the instructive analysis offered by Mannori and Sordi 2001. Also see the first chapters of Tilly (1990).

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consider to be law), it leaves everything “open to empirical investigation” (Tamanaha 2000: 318). As a result legal science ends up incapable either of finding measures for the coexistence of the different orders or of providing criteria for the revision of the existing rules.

Weak institutionalism inherits and integrates instances of both. On the one hand, it conceives of legal science as capable both of providing general measures for settling disputes among ordering systems and of individuating reliable criteria for revising single orders, whether positive or not. On the other hand, it frees itself from the reference to a particular field or territory, since it links the stabilisation of organising practices to segmented interactional frameworks which are reiterated and durable.

What follows will be but a general programme, as each of the elements of our weak institutionalism needs to be integrated and clarified. But, we will endeavour to show that our interactional concept of law (which is present, at least in essence, in the thought of Romano) can be compatible with a notion of processes of revision as praxes of mutual emancipation among social actors, directed towards an improvement of currently adopted solutions in terms of their efficacy, intelligence and, as we shall see, fairness.

Weak institutionalism becomes a *critical* institutionalism insofar as it is integrated with a *critical-deliberative conception* of the *formation of the will* and *decision-making process*. It enables the theory to keep its analytical-descriptive validity without renouncing its use as a tool of social critique.

To accomplish this task, critical institutionalism has to pursue a triple strategy: a. it has to chart those legal characteristics which give the ordering system a legitimate coercive force, or, it might be said, which justify coercive enforcement; b. it has to promote a non-essentialist understanding of legal pluralism, without losing the distinction between ordering levels; c. it has to explain why the above mentioned criteria of efficacy and intelligence ought to be integrated with the criterion of fairness, so as to prove that the distinction itself between ordering levels presupposes such an integration.

(a) The radically interactional concept we advocate here has to face a possible accusation of ‘panjuridicism’ as long as it tends to provide the multiple forms of ordering diffused within societies with an indistinct legal force; basically, it seems not to be able to answer the question that Sally Merry has put thus: “Where do we

stop speaking of law and find ourselves describing social life? It is useful to call all these forms of ordering law?” (Merry 1988: 878). Actually, in our opinion, we can hardly answer that question from the point of view of the pure theory, since a search reveals only two possible solutions. First, the essentialist option, exactly like strong institutionalism, views law as a protection mechanism for a particular form of life, so that each non-legal ordering system comes to depend on an ultimate central legal system whose norms are legitimately enforceable. Secondly, the formal-positivistic option refers to a “*Grundnorm*” or a “rule of recognition”, which alone allows norms to be recognised as legally binding, with the consequence of limiting law to the norms enacted by the state centre. As a feasible *tertium quid*, the *praxiological approach* advocated by Baudouin Dupret (2007) is of some interest. He invites us to consider as law only that law involved in the daily practice of law, that is to say the law which individuals socially situated recognise as law. This perspective focuses on concrete interactional practices, so as to evaluate the characteristics of permanence and stability, the values which social actors assign to them, and the role which they perform within the organisation of the social segment at issue. On this view we need not only to understand the value which social actors assign to the norms, but also to provide an account of the way they establish their relations and bind their behaviour to stable rules, which is understandable empirically by an observer/interpreter and reflexively by a social individual in action.

(b) However, critical institutionalism is expected to achieve more satisfying results than the mere individuation of criteria for distinguishing between ‘legal’ and ‘non-legal’. Its underpinning legal pluralism gives rise to a normative claim. It seeks to outline workable proposals for reforming legal frameworks as they actually are, so as to contribute to the process of revision of the sub- and supra-state legal architecture which current processes of globalisation produce and require. Thus, the proposal which merits exploration is that we differentiate between *material* legal orders and *formal* legal orders. By drawing on the distinction between “rules of conduct” and “rules for decision” advanced by Eugene Ehrlich, we can devise an integration mechanism between two normative levels. The first level consists of various institutional-segmental ordering systems. These include: those connected to territory in the form of: communitarian, state, sub-state or other regulations; those connected to specialised spheres, such as the *lex mercatoria*, gentlemen’s agreements, and indications of the WTO appellate body; and those connected to

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specific objects, such as factory regulations and sports regulations.⁹ Within these a given individual can enjoy different statuses, and should retain a high degree of autonomy as systems composed of particular rules are effective inside the segmental sector. These institutional-segmental ordering systems are subject secondly to the procedural rules of a formal-decisional meta-order, which is aimed at settling potential disputes between different segmental orders according to specific criteria.¹⁰

(c) Finally, let us clarify the term '*critique*', noticeably diffused in the epistemological and philosophical fields as well as in that of political philosophy (to which the present writers belong), but fairly uncommon in the theory of law.¹¹ We associate '*critique*' with the concept of interactional law: weak institutionalism and part of legal pluralism run the risk of reifying a substantive object and of considering it as the sole foundation for a historical community¹² – in this view, the opposition between folk law (or customary law) and state law tends towards the replacement of law enacted by the central authority by the private law of discrete groups or communities.¹³ On the contrary, law should be deemed a specific way of

⁹ Consider the present list not as a precise taxonomy for the different ordering forms, but as an attempt to exemplify the variety of them.

¹⁰ The outlining of such criteria exceeds the target of this paper; we only say that they should be able to establish '*critical-deliberative*' contexts (see below, point c.), so as to apply and make workable what David Held describes as a triple test for filtering and guiding public decision implementation. Basically, regardless of the territorial configuration of the different legal communities, the intelligent and fair resolution of public issues seeks to detect case-by-case the proper range of affected people, according to the criteria of '*extensiveness*,' '*intensity*,' and '*comparative efficiency*' (see Held 1995: 236).

¹¹ For an interesting and fruitful use of the adjective '*critical*' see Kleinhans and MacDonald (1997).

¹² About the concept of 'reification' we recall again the analysis given by Berger and Luckmann: "Reification is the apprehension of human phenomena as if they were things, that is, in non-human or possibly superhuman terms" (Berger and Luckmann 1967: 89).

¹³ "Legal pluralists tend to reify 'norm generating communities' as surrogates for the State" (Kleinhans and MacDonald 1997: 35).

ordering interactions, tied to the peculiar configuration of interactions within the segmental space. Hence, law is the product of a problem-solving strategy that social actors adopt in different environmental conditions.¹⁴ Subjects of law are called upon to conduct an ongoing revision of interactions and of their underpinning rules, precisely because those rules, as we showed above, were originally elaborated in order to efficiently and intelligently satisfy the interests of affected people. They should have the possibility to discursively¹⁵ and reasonably *criticise* all the rules which they consider not to satisfy their requirements, that is, which prevent them from pursuing their aims or which produce unsatisfactory results. This is why critical institutionalism invites us to “consider the problem from the standpoint of the individual” (Vanderlinden 1989), in other words, to take social actors as the basic yardstick for both recognising and evaluating legal norms. It has to search for and make usable those means which enable subjects of law to become *the source of legitimacy of every legal regulation*. Therefore, insofar as the norm-revising process is aimed at improving the efficacy and intelligence of norms, it inherently requires the mindful participation of every affected person, who should at once autonomously and cooperatively make compatible the different interests at stake: this proves that the criterion of fairness is both complementary and necessary for an efficient and intelligent revision of common rules. These *deliberative* processes should be guaranteed by common procedures enforced by the formal meta-order. Only the possibility of an ongoing revision of norms guarantees that norms remain anchored to their peculiar *ratio*, *i.e.* the efficient, intelligent, and fair ordering of interactions between subjects.

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¹⁴ As Kleinhans and Macdonald point out, “[l]egal subjects are ‘law inventing’ and not merely ‘law abiding’” (Kleinhans and MacDonald 1997: 39).

¹⁵ We take this term in the sense that Karl-Otto Apel and Jürgen Habermas give it, when they discuss the redeeming of validity claims within a cooperative and inclusive discussion among equal speakers.

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