WHAT TO MAKE OF THE EXCEPTION?

A THREE-STAGE ROUTE TO SCHMITT'S INSTITUTIONALISM

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ABSTRACT
This article traces a developmental trajectory in Schmitt's conception of law that brings out alternative conceptualizations of the exception. "Transcendence", "immanence" and "integration" signify three different models to represent the relation between what I call "nomic force" (the particular phenomenon of bringing order) and "materiality" (the matter-of-factness of a particular entity or phenomenon). I contend that while *Political Theology* feeds off a transcendent model, where a sovereign decider makes materiality speakable, *The Concept of the Political* shows important differences as Schmitt's argument implies a novel conception of materiality, much indebted to an immanent model. Finally, in the years in which Schmitt embraces an institutional theory of law, between 1928 and 1934, he elaborated on a theory of law pivoted on integration. The chief claim of this article is that Schmitt's conceptualization of exception and decision is conditional upon the relation between nomic power and materiality that underlies his reflection in these three phases.

KEYWORDS
Concrete order, decision, exception, materiality, nomic power, political theology

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1. *Introduction: transcendence, immanence, integration*

In his analysis of Carl Schmitt's contribution to "politonomy", Martin Loughlin (2016) points out that Schmitt's overall oeuvre should be read as an exercise in political jurisprudence, that is, a type of juristic inquiry that aims to capture the character of the basic laws of the political. Loughlin contends that one fails to capture Schmitt's key concerns unless due heed is paid to the texts in which he came to endorse an institutional conception of law which he called «konkretes Ordnungs- und Gestaltungsdenken» («concrete order and formation thinking»). I believe this interpretation does justice both to Schmitt's self-understanding and to the efforts he put into solving the puzzles his previous decisionism had generated. Yet, Schmitt's espousal of institutionalism, as well as the theoretical path that led him to it, have been abundantly debated in the last few years (see e.g. ARVIDSSON, BRÄNNSTRÖM, MINKKINEN 2016; CROCE, SALVATORE 2013; CROCE, SALVATORE 2016a; LOUGHLIN 2016; MEIERHENRICH 2016). Therefore, it would be of little use to rehearse those analyses. Instead, what I set out to do in this article is ferret out a few key differences in Schmitt's understanding of exceptionalism and decisionism that I believe depend on the conceptual framework he was building on.

In effect according to some scholars (see e.g. BRÄNNSTRÖM 2016; MEIERHENRICH 2016), manifest signs of an institutional thinking were already evident in the works of the 1920s, such as *Political Theology* (hereinafter *PT*) and *Roman Catholicism and Political Form* (SCHMITT 1996). While I agree that what is known as "decisionism", developed by Schmitt early in the 1920s, is more transitory and occasional than most interpreters tend to believe, I think it is important to foreground the different background against which Schmitt gradually embraced institutionalism. My main argument for such a more accentuated sensitivity to progressive theoretical changes is that they help explain what role exception and decision really played in the early 1920s and why Schmitt's somewhat held onto decisionism but jettisoned exceptionalism. More in particular, and for my purposes, this approach singles out three phases in which Schmitt championed three different ways in which social entities or phenomena develop and organize their inner normativity. As I will

discuss, if in *PT* normality – that is, people's everyday life within their practical frameworks – is entirely conditional upon someone who instantiates it through a miraculous irruption, in *The Concept of the Political* (hereinafter *CoP*) the conception of normality is certainly subtler, whereas in *On the Three Types of Juristic Thought* (hereinafter *TTJT*) normality hovers over norm and decision.

To commence, I would like to introduce a terminology that is likely to help avoid confusion. For it is imperative to differentiate the concept of *nomic power* from that of *normativity*. Nomic power denotes the particular phenomenon of bringing order, the capacity to order. While the broader notion of normativity can be related to the general circumstances where customs or rules arise and are followed by social actors within practical spheres of varying dimensions, "nomic" qualifies the ordering character of a particular entity or phenomenon. The counterpoint to nomic power is "materiality", as the matter-of-factness of a particular entity or phenomenon. My claim is that the gradual turn in Schmitt's conception of law sheds light on various relations between nomic power and materiality. With reference to a terminology of his own, in *Insurgencies* Antonio Negri singles out three illustrative, prototypical ways of conceiving this relation: transcendence, immanence and integration.

Transcendence evokes an ontological chasm between the nomic and the material. They are believed to dwell in altogether diverse spheres of social reality. While the material has no normative tinge, the nomic is that which bestows normative value on an otherwise normatively indifferent entity. Unsurprisingly, Negri mentions Hans Kelsen as the champion of transcendence. Although I will return to his theory below, it is worth recalling that Kelsen's (1992, 23) theory of imputation creates a connection between a legal condition (a particular conduct) and a legal consequence (a sanction). The sanction that imputation attaches to a specific conduct within a legal order makes that conduct unlawful (and thus legally relevant). Accordingly, in *Reine Rechtslehre*, Kelsen (1992, 10) claims that «external circumstances» are events «perceptible to the senses» and «governed by causal laws», what happens in the social world is a chain of natural events governed by the laws of mechanics. This means that behaviours become legally relevant if and only if they are associated to a sanction by imputation. Such a separation between the material (one's behaviour) and the nomic (the legal sanction), traditionally framed in terms of "ought" vs. "is", maintains an ontological chasm between such two domains[1]. As I will discuss later, the consequences on the conception of law are relevant.

[1] I would like to thank one of the reviewers who emphasized the need to justify a transcendental interpretation of Kelsen's legal thinking. As I will only be concerned with this topic in so far as it illustrates Schmitt's legal theory, I will limit myself to pointing to the literature that problematizes my interpretation, such as BULYGIN 1982; BULYGIN 1990; CELANO 1999; GUASTINI 1992; NINO 1985.

Immanence implies that materiality is intrinsically endowed with nomic force. In this case, Negri conjures Schmitt's view of decision, as it is the nomic device that spawns an order and irradiates it with normative force. For Schmitt, there is no separation between the materiality of the order and its nomic source, as the sovereign decision is internal to the order. In effect, as I will illustrate in more detail, Schmitt's claim that the decision is an integral element of the legal order is meant to bridge the gap between ought and is, in the sense that the norm is a by-product of an original moment of creation. This is why, as Lars Vinx (2016, 45) points out, in Schmitt's view «the founding decision taken by a people acting as constituent power enjoys a higher degree of democratic legitimacy than any possible outcome of constituted politics». We will see that this position was destined to change in Schmitt's theoretical development, but as far as *Verfassungslehre* is concerned, it is true that the sovereign decision is "pure event as voluntary occurrence of power" (NEGRI 1999, 8). This is a power that validates the decision as the fountainhead of the constitutional order, because it draws the boundaries of the political community. This is why, says Vinx, Schmitt's rejection of constitutional review on the part of a judicial body is coherent with his broader jurisprudential view. Since it is the fundamental decision, the inextinguishable source of nomic power, that has to be protected, rather than the text of the constitution as the by-product of the decision, the executive is better equipped to capture, read and nurture the form of life that that decision was meant to mark off.

Integration gestures towards an oscillatory movement between the nomic and the material. There is no ontological gap between the two; nor is there an intrinsic identity. Nomic and material interpenetrate in the sense of a mutual necessitation. The position that best represents this approach is Costantino Mortati's understanding of the material constitution (MORTATI 1998). In the context of the present article I cannot address such a seminal account of the relation between the nomic and the material. All that I can say is that Mortati makes room for two interlaced phases of the establishment of a constitutional order. First, the production of a particular model of political unity and social order, which is imposed by the convergence of the most powerful social forces and groups. This order has to be strong enough to mould and govern individual conducts and social interactions. Second, the production of a constitutional apparatus that is meant to fully achieve the ordering goals undergirding that particular model of political unity and social order. In this framework, government and legislation are devoted to the direct enforcement of the "material constitution" that that order incarnates; while administration and jurisdiction carry out complementary tasks to achieve the order's goals. As any constitutional order is based on the concordant advancement of the material (the concrete model of social order) and the nomic (the constitutional machinery it gives life to), Negri (1999, 9) is right to emphasize

that what lies behind the constitution is an «ceaseless movement» which «determines its dynamic apparatus».

As I noted, it is my conviction that Schmitt's legal theory cannot be brought under one model, as the sequence itself of the three models makes sense of the gradual rethinking of his own conception of law and its relation to social normality. In what follows, I will cross more or less in depth *PT*, *CoP* and *TTJT* to sketch the diverse relation between nomic power and materiality envisaged by Schmitt in these works. I will conclude by discussing how the exception turns out to be affected by Schmitt's changing orientation.

2. *Transcendence*

Famously the first line of *PT* puts together two keystones in Schmitt's influential lexicon: *decision* and *state of exception*. In short, the incipit «[s]overeign is he who decides on the state of exception» (SCHMITT 2005, 5) implies that the sovereign is the one who manages to make a decision that has so huge an impact on a political community as to determine a state of exception. This is why, in his reappraisal of the central role of political theology in the life of contemporary political communities, Paul Kahn (2011, 45) comments that «the exception depends upon a perception of threat». He insists on two main characteristics of the sovereign decision. First, it has to exert effects; second, it is not amenable to further normative scrutiny. Indeed, something is not a decision on account of the status of those who made it; nor is it because of the procedures that led to it. Rather, it is its effects that establish if something is a decision. This is the "situational" nature of the decision: it is the situation that determines if a decision is truly one of its kind. And it is such when its effects are decisive. While I will return to the character of decisiveness later on, it is of preliminary importance to underline, as does Kahn, the unjustifiable nature of a true decision.

According to Leila Brännström, the a- or extra-legality of the decision is only apparent. It seems as such only from the point of view of constitutional liberalism, as the latter is unable to account for such a momentous *genuinely legal* phase. She then claims that in *PT* «the decision on the state of exception is a legal decision if made by the authorized subject» (BRÄNNSTRÖM 2016, 19). Brännström concludes that a decision is an authentic decision «only when [...] "actual power" and "the legally highest power" come together» (BRÄNNSTRÖM 2016, 21). Based on this reading, the decider – an authorized one – can be identified before she makes her decision. As the «precise details of an emergency cannot be anticipated» (SCHMITT 2005, 6), they cannot be codified and are destined to be left out of written law. But this only means that they cannot be put on paper despite constitutional liberalism's tantalizing dream of codifying all that is legal. In

reality, according to Brännström's reading, just as much as in his later institutional phase, Schmitt understands the exception as a suspension of the order intended to protect and reinstate (when threatened) the concrete order that the legal order crystallizes and stabilizes. Schmitt's case for bringing the exception back into the realm of the legal is thus claimed to amount to justifying the genuine legality of the exception as a circumstance of utmost peril in which an authorized person or body is called upon to take extreme measures to protect the communal form of life.

Although this interpretation is intriguing because it traces Schmitt's concern with the concrete order back to *PT*, it misses out on a central aspect of his understanding of the exception. As I hinted, Kahn (2011, 40) emphasizes that the decision on the state of exception has to be assessed against the effects it produces: «A decision with no effect is not a decision. [...] The sovereign power is not that of recognizing or identifying the exception; it is the power to decide on the exception». If the author of the decision were to be previously authorized, she would not be the decider because of the decision's effects, but on account of the authorization that qualifies her as the decider. Therefore, while Schmitt was at pains to bring the notion of exception within the borders of legal theory, as a paramount legal concept, he was not thinking of an authorization prior to the decision. For it is the series of effects on the social world that determines who the sovereign decider is[2]. I would like to describe these effects with reference to *performativity*, that is, an utterance's power to make the world correspond to what is uttered. On this account, deciding on the state of exception means saying that the community is in a state of exception and that legal normality is *ipso facto* suspended. Performativity does not make room for anything prior or posterior: it is a timeless event that either occurs or does not occur. As the words uttered "this is a state of exception" succeed in creating the state of exception, legal normality is suspended. This is the reason why most interpreters envision a link between *PT* and *CoP*: the state of exception is the circumstance in which the decider declares, decides on who the enemy is and by doing so, performatively, brings the friend into existence.

What is at stake here is the degree of materiality vis-à-vis the jurisgenerative activity of nomic power. If Brännström were right, the decision would be meant to protect a pre-existing normality, a concrete order, and the state of exception would amount to the series of measures taken by the authorized guardian of the

[2] Brännström has a point when she remarks that the meanings Schmitt associates to the word "Ausnahme" (exception) are at least four. So, while in one sense – i.e. exception as "extreme emergency" – the decider could in principle be legally identified (depending on the jurisdiction in question), in the sense of "state of exception" the decider cannot be previously authorized. Indeed, while «[t]he sovereign produces and guarantees the situation in its totality», it is the exception that «reveals most clearly the essence of the state's authority», so much so that authority «to produce law it need not be based on law» (SCHMITT 2005, 13).

community. If this were the case, the decision and the exception would play a restorative role with a view to preserving the concrete order. On this account, materiality and nomic power seem to be in a relation of integration that justifies and authorizes the deciding (protective) power of the sovereign. I do not think this is the case, though. However tenable, this interpretation plays down Schmitt's dismissive attitude to normality. In *PT* the normal is identified with the regularity of everyday life which is governed by the normal provision of the legal order. Truly enough, Schmitt insisted that the normal situation has to be in full swing for the legal order to work properly: «For a legal order to make sense, a normal situation must exist» (SCHMITT 2005, 13). Still he adds that it is the sovereign that «decides whether this normal situation actually exists» (SCHMITT 2005, 13). In other words, the normal situation is not the bearer of a nomic power residing in the materiality of a form of life. Quite the reverse, the source of nomic power that infuses the materiality of the normal situation is the sovereign. Her performative act of determining what counts as a threat marks the boundaries of the community and brings its material content into life.

Despite this, the creative nature of the act of deciding should not be overstated. I think that a more tenable interpretation of *PT* lies midway between the exceptionalist reading and Brännström's more concretist reading. While the exceptionalist reading pins on the sovereign a miraculous creative power, the concretist reading overestimates the role of the concrete order. It is my contention that Schmitt, *contra* Kelsen, was trying to tease out the jurisprudential import of the exception. The positivist conception of law as coordination mechanism playing out as a timetable downright dismisses the connection between norm and normality. In the terminology I am using here, Schmitt denied the source of nomic power being the norm. He thought Kelsen made a mistake in conceiving the norm (or better, the sanction) as that which confers normative value on the conduct it brings into the legal domain. At the same time, though, Schmitt did not believe that materiality intrinsically possesses nomic power. Rather, «[w]hat matters for the reality of legal life is who decides» (SCHMITT 2005, 34). Accordingly, the relation is such that the legal norm depends on a situation of normality, while the latter depends on the deciding power of a sovereign.

This chain of dependence, so to say, explains the elusive passage that closes the first chapter of *PT*, where Schmitt quotes from Kierkegaard's *Repetition*[3]. In the juncture in question, Kierkegaard (2009, 77 f.) contends that the exception is key to understanding the universal and that, therefore, those who aim to study the latter should first and foremost concentrate on the former. Most of those who have examined Schmitt's use of Kierkegaard's words[4] claim that they are based on

[3] On the relationship between the two authors see RYAN 2011.

[4] See e.g. CONRAD 2008; GOULD 2013.

a fundamental misreading – and in effect most often Schmitt was quite an unfaithful and mischievous reader[5]. Based on a conventional understanding of the exception, some say that «Kierkegaard, unlike Schmitt, wanted to preserve the antinomy between exception and norm. In order for exception to be oppositional and to function as a critique of the norm, it must be aberrant» (GOULD 2013, 5). In truth, Kierkegaard (2009, 78) writes that «[t]he vigorous and determined exception which, despite its struggle with the universal, is an offshoot of it, preserves itself. The relationship is this: the exception grasps the universal to the extent that it thoroughly grasps itself». Shortly thereafter, Kierkegaard specifies that only some exceptions qualify as exceptions:

> «The legitimate exception is reconciled with the universal; the universal is at its basis polemically opposed to the exception. It will not reveal its infatuation with the exception until the exception forces it to do so. If the exception does not have the strength to do this, then it is not legitimate».

In light of these junctures, and in line with the interpretation I am advancing, I believe Schmitt did not misread Kierkegaard, as the latter's words articulate the relationship between the exception and the general that Schmitt had in mind. If one regards the exception as the miraculous and foundational moment in which a decision is made and society is brought to order, then one fails to appreciate the productive relationship between the exception and the general as two poles of an unceasing dialectic. Kierkegaard's words capture at best this relationship as a polemical opposition whereby the exception is meant to *reveal something important about the general*. If it is undeniable that Schmitt mistranslated the word "legitimate" (see RYAN 2011, 185), this does not impinge on the role that Schmitt attributed to the exception. In fact, when he claimed that, in order for an exception to be what it is, it has to be "wirklichen" ("true" or "authentic"), he meant to stress its role as a disclosure more than a purely creative moment. To be an actual, genuine exception, it has to reveal something of its opposite, that is, the general. By thoroughly grasping itself, the genuine exception grasps the universal and thus makes it visible. In other words, *PT* sets in motion a relation whereby the exception makes normality speakable: it performatively articulates something that would not speak for itself and needs to be uttered by someone who does not create it but brings it to light. This is why the paradigm that emerges out of *PT* falls within the scope of what Andrea Salvatore and I (CROCE, SALVATORE 2016a) call "social semantics": reality is "spoken" by someone who pronounces the words

[5] On Schmitt's partial manipulation of the original text see RYAN 2011, 185.

that make it visible. The normal is not speakable unless someone – in Schmitt's case, the sovereign who makes the effective decision – speaks it in the first place.

This is why, all in all, the relation between nomic power and materiality Schmitt's envisaged in the early 1920s is still describable in terms of *transcendence*: for normality to be what it is, it needs a powerful utterer who brings it into the domain of the speakable. Materiality does not possess any nomic force of its own, as it is vested with normative power by the disclosing utterance of the decider. It is still too early for the concrete order to make its appearance, especially if it is conceived, as Schmitt did a few years later, as the repository of an uncreated nomic power.

3. *Immanence*

However counterintuitive, *CoP* offers a first telling pointer to Schmitt's gradual revision of his own theory of social order[6]. In effect, at face value *CoP* lends itself to an exceptionalist reading. The content of the decision made by the miraculous sovereign Schmitt spoke of in *PT* is the enemy. This foundational decision instantiates the friend, to the extent that the latter is entirely conditional upon the expulsion of the perilous element that poses so serious a threat to the community – which is itself created in this decision-making process. In other words, the political community is generated by the performative power of "uttering the enemy".

While *CoP* teems with evidence supporting this interpretation, I think an alternative reading is likely to shed some more light on a few junctures of this work that would otherwise make little sense. Although enigmatic at first, the opening line of this book – «The concept of the state presupposes the concept of the political» (SCHMITT 2007, 19) – is a gesture to the contingent experience of Western statehood. Schmitt intended to criticize theories that regarded the connection between the state and the political as necessary and trans-historical. He thought that as the state acquired a stable monopoly on the *jus belli*, it could lose such a monopoly just as easily. In short, Schmitt's argument reads that the state could cease to be the linchpin of the political at the moment in which it is no longer able to prevent conflicts between social parties. To put it otherwise, Schmitt's idea of politics is a pacified state of coexistence where the political conflict is unthinkable. The role of normality is much more prominent here; for normal life is what has to be protected. At the same time, within the socio-semantic framework that animated *PT*, the widespread view of the community members cannot accommodate any idea of conflict with other members that might bring into question their fundamental allegiance to the community. The

[6] I discuss this topic at length in CROCE 2017. This is why my discussion here will be more cursory.

state ceases to undertake the task it was born to carry out when it allows the idea of a conflict to materialize.

As Schmitt's troubled relationship with the advocates of the pluralist state demonstrates (see SCHMITT 2007, 40-45 and SCHMITT 2000), he reckoned with human beings' natural tendency to overproduce normative contexts and to differentiate themselves from the others. In the face of it, he thought the only way to secure the community's stability is to create a space where people's basic allegiance and loyalty to the state could make a political conflict unthinkable. In effect, a conflict is political where it reaches the «utmost degree of intensity» (SCHMITT 2007, 26) so much so that it aggregates and disaggregates: the very idea of there being a political conflict *performatively* sets in motion a potentially fatal opposition between friend and enemy. The community would end up irreparably riven and fragmented into non-state sub-divisions. For the state to ward off this eventuality, it must make sure that the community members' allegiance and loyalty to the state might surpass any other allegiance and loyalty to non-state groups. This explains Schmitt's aversion to the theory of pluralist state: its supporters made a point as to the pluralist nature of human sociality, but precisely because of this, the state should keep the idea of a political conflict at bay and make sure that its citizens could not construct more intense sub- or supra-state forms of belonging and membership.

Although the socio-semantic idea of a basic symbolic worldview that makes the community speakable is still in place, *CoP* sets forth a different relation of the nomic to the material than the one underlying *PT*. While in the latter writing the decision is presented as that which discloses the normal, in *CoP* the community is thought to be imbued with a foundational distinction between the friend and the enemy: the enemy is what lies outside the boundaries of the community (or the internal menace that has be expunged from the community). The basic, constitutive (and most often unaware) intuition of the community as a form of life where conflicts cannot arise saturates the members' political imagery. With no such intuitive allegiance, the state would be unable to prevent the materialization of intersectional conflicts, both as an imagined and a concrete possibility. In this regard, the social order Schmitt envisaged in *CoP* bears a striking resemblance to the concrete order he would speak of a few years later in *TTJT*. Despite this, the relation between the nomic and the material is closer to the model of immanence. Indeed, Schmitt toyed with the idea of something that saturates the political view of citizens and tames their potential differentiation into threatening sub-groups. This something – what in *Constitutional Theory* represents the people's fundamental decision – is immanent to the order. The latter vanishes as this something is brought into question. Between state-sponsored friendship – the nomic – and the community life – the material – there is a relationship of intrinsic correspondence.

4. *Integration*

To recap, *PT* puts forward the image of a mighty social utterer whose decision makes normality speakable and sets the stage for the legal order to work effectively. *CoP* emphasizes the importance of a stable normality where the idea of a conflict never arises. While in 1922 the conception of a decision as a possibility condition for normal life inclines to transcendence, Schmitt's preoccupation with warding off the rift between friend and enemy convey the sense of an immanent relation between the nomic and the material. Nevertheless, in 1928 Schmitt stated to focus on what is to be done for the state to keep the monopoly on the political. He never cared to explain what it is that puts the friends together. As Negri notes, like in *Constitutional Theory*, it is as if an original, fundamental decision on what the community should be like were able to permeate any future decisions of the community.

As I noted earlier, while the literature on Schmitt's institutionalism is burgeoning, it would be pointless to trace the steps he took to overhaul his previous decisionism[7]. Suffice it to say that his encounter with the institutional theory of Maurice Hauriou and Santi Romano brought him to reflect on the role of materiality, namely, the set of social practices and normative networks developed by social actors in everyday life. As a matter of fact, Schmitt found what he always had right under his nose, that is, the nomic force of the material inscribed in the daily activity of the community members. He came to recognize that those micro-practices which over time give life to macro-practices – to wit, broader, time-tested social institutions – can hardly emerge out of a decision. To stick to my terminology, the social grammarian that in *PT* towers over normal life and the law can neither create social normativity nor make it speakable. This is more or less what Schmitt wrote in the preface to the second edition of *PT* (November 1933): «I now distinguish not two but three types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one», which «unfolds in institutions and organizations that transcend the personal sphere» (SCHMITT 2005, 2-3). Now the previous union of decisionism and normativism is dismissed as a «formless mixture, unsuitable for any structure» (SCHMITT 2005, 3). If it is true that he hastened to underline the risks of an institutionalism deprived of the props of decisionism and normativism – «an isolated institutional thinking leads to the pluralism characteristic of a feudal-corporate growth that is devoid of sovereignty» (SCHMITT 2005, 3) – it is just as true that in these years Schmitt provided the most compelling arguments against what in the present article I refer to as "transcendence".

[7] For a more detailed analysis see CROCE, SALVATORE 2013.

In *TTJT*, the transcendent element of the triad normativism, decisionism and institutionalism is obviously represented by the first. Schmitt excoriates the normativist conception of law as a mere set of norms, or even worse, a set of norms joined together by a fundamental norm. He argues that legal scholars who understand the legal order as an "impersonal" technique of description, whereby some conducts are brought into the legal domain and in this way are made legal, neglect the essential connection between social and legal normativity. For they see legal prohibitions as intellectually fabricated norms that turn a normatively indifferent conduct into a crime. As they are put together, legal norms form a system, which serves to assess reality from the special vantage point of the law. The relation between social reality and the law is purely descriptive: there is no substantive, let alone ontological link between the two domains. The law is an instrument in the hands of officials to determine what ought to follow when a particular fact occurs. All that is legal can be reduced to norms, which in their systematic conjunction saturate the legal panorama. Such «an increasingly sharper separation of norm and reality» (SCHMITT 2004, 52) takes social reality out of the picture.

It has to be noted that Schmitt's preoccupation with the normality of social conducts and practices exhibits decidedly novel nuances. Unlike in *PT*, he does not insist on the jurisgenerative force of the decision, which in 1922 was presented as the possibility condition for normality. Instead, he criticizes normativist jurisprudence's myopia to social normativity. As discussed by Lars Vinx, a first telling symptom of his interest in the normal, quotidian activity of institutional practices can be found in *Constitutional Theory*, as Schmitt gave a particular twist to the topic of constitutional rights: «In the later Weimar years [...] Schmitt put forward a theory of "institutional guarantees", according to which many constitutional provisions that appear to protect individual rights merely protect the existence of certain social institutions» (VINX 2016, 42)[8]. While this obviously entails demeaning individual rights or even putting them in danger, it also gives a sense of what, in Schmitt's view, deserved constitutional protection. Vinx (2016, 43) goes on to say:

> [T]he protection of the constitution does not primarily consist in the enforcement of legal norms protecting individual rights but, rather, in the defence, against insurrectionary challenges, of a certain form of social and political ordering that has already been declared off-limits to peaceful legislative change, it obviously makes sense to argue that the task of defending the constitution must fall to executive and not to the courts.

In that particular period between 1928 and 1933 Schmitt's attention is progressively drawn to materiality. He was toying with the idea that normativity does not

[8] On the revelatory importance of "institutional guarantees" see also Andrea Salvatore's considerations in CROCE, SALVATORE 2013, 26–29.

spring from the decision of a miraculous sovereign, but from one that emanates and at the same time is emanated by a concrete form of life. Indeed, *Constitutional Theory* fosters a conception of decision as deeply imbued with materiality. It is a decision on a concrete order (significantly, not on a state of exception) whose nomic power projects itself onto the future of a political community: «The constitution does not establish itself. It is, rather, given to a concrete political unity» (SCHMITT 2008, 76). Yet only later, most likely because of his closer involvement with Hauriou's and Romano's theories, did he clarify what this materiality is – namely, the normality of the concrete situation. In 1934, he made it clear that the legal system only works insofar as it presupposes «the system of coordination of a concrete order» (SCHMITT 2004, 71) that allows discriminating right from wrong. In other words, the concrete order is the possibility condition for determining what is lawful and what is not. The connection between legally wrong (the Kelsenian "delict") and socially wrong is as strong as the connection between legally right and socially right.

Despite the inextricable connection between social and legal normativity, *TTJT* – the book that ratifies Schmitt's adhesion to legal institutionalism – is characterized by what Negri names "integration". On the one hand, the transcendence of normativism, and positivist normativism in particular, is bitterly rejected not only as theoretically mistaken but even as morally depreciable because of its insensitivity to social normativity. On the other hand, however, social normativity does not coincide with the legal and political order. *TTJT* portrays widespread and repeated models of action that crystallize into historical institutional patterns (marriage, family, the army, etc.). As Schmitt put it, from Luther to Hegel, the culmination of the German culture, German authors always cherished the concreteness of the German form of life that is embodied in a delimited set of age-old institutions. In Schmitt's picture, this materiality seems to be at one and the same time independent of the legal order and in permanent need of political protection. The widespread normality of institutional patterns can never be translated into a body of formal norms. For example, the "good head of family", the "brave soldier", the "duty-conscious bureaucrat" (SCHMITT 2004, 55) can hardly be codified in detail. They, as it were, live a life of their own within the daily practice of the German people. Yet, the legal order cannot limit itself to registering the practical activity of social actors. As *TTJT* emphasizes time and again, a legal order that is inspired to concrete-order thinking is required to introduce the complementary elements of normativism and decisionism. Like concrete-order thinking, these two types of juristic thoughts are both "autonomous" and "eternal", in that they throw light on essential features of the law. Only through an integration of normativism, decisionism and institutionalism can Schmitt offer a stronger and more complete conceptual understanding of the relation between society and law.

Needless to say, integration does not merely take place at a theoretical level. Schmitt remarked many a time that conceptual frameworks reflect, and at once support, particular social and juridico-political arrangements. But arguably this is the flimsiest feature of Schmitt's institutionalism. Andrea Salvatore and I have called Schmitt's institutional solution "institutionalist decisionism". As I explained above, Schmitt found pluralist theories of the state both attractive and repulsive. For he believed they provide a tenable understanding of social normativity but fail to identify the risks associated to freestanding social collectivities and plural normative frameworks. He was adamant that social pluralism is the fiercest enemy of the state as a political project. Therefore, he thought it behoves the state to protect the set of institutions comprising the concrete order by making sure that all relevant institutions may incorporate a set of standards that guarantee the community's basic homogeneity. Obviously, this kind of homogeneity could not be obtained either through a miraculous decision or through a constitutional one. As a society's institutional tapestry is the product of time, a different type of integration is needed. Schmitt had in mind a hierarchical chain of command and responsibility connecting people who operated as leading figures within the various institutions and were answerable to a Leader – the ultimate interpreter of the concrete order.

5. *Invisible exceptions*

Although the ill-fated political upshot of this theoretical proposal is in plain view, I would like to leave this issue aside and discuss what image of exception the three models discussed so far have to offer. Kahn's (2011) interesting application of Schmitt's political theology to current (mostly US) politics reads the exception as a wake-up call for liberals to get to grips with the harshness of real politics. Political theology gives the lie to the political of the contract whereby the state establishes peace and order for humans' stable coordination and lays stress on political violence as a form of sacrifice. It puts «sacrifice at the point of origin» (Kahn 2011, 7). And yet, the sacrificial nature of political is not an initial, far-flung phase of production, as it infiltrates everyday politics regularly. For even when a constitutional court «declares a law unconstitutional, it is invoking some sort of exception: its decision marks the endpoint of the ordinary course of legislative majorities responding to shifting political interests» (Kahn 2011, 9). Kahn's conclusion is that «the exception is a necessary condition of any social order because human relations can never be treated as if they were simply natural phenomena that repeat themselves» (Kahn 2011, 113).

There is no denying that Schmitt's theory of exception and decision in the early 1920s can be interpreted along these lines. Certainly he had all intentions of

uncovering the blind spot that makes liberalism unserviceable, as it fails to explain what happens when the everyday routine of legal life is on the blink and what should be done when this circumstance arises. Yet, I believe that this largely obscures Schmitt's concern with the relation between norm and normality. In *PT* he thought this issue should be looked at through the prism of the exception. Kelsenian positivism provided us with an impoverished conception of normality as the inert material that can be assessed against the calculability of the legal norm. Schmitt reacted to this stance by advancing the imaginative conception of a social primer who, through her words, instantiates community life. In this framework, the exception plays out as the primeval utterance that brings society about. As I argued, this does not make the sovereign a creator, but as someone who exerts performative effects on the social by drawing the boundaries of the political community. *CoP* moves away from the abstractness of *PT*'s conception as it placed emphasis on the friend: the state's constitutive task is to defend normality by deactivating the performative occurrence of political conflicts within the community borders. Normality becomes the pivot of Schmitt's reasoning. The exception is no longer what instantiates the community, but a condition of peril that has to be avoided at all costs.

Still, the passage from transcendence to immanence did not solve the problem of what confers nomic power on the materiality of practices. Schmitt's later adherence to institutionalism made him change his mind about materiality's nomic force. It comes neither from a sovereign primer nor from a founding decision that constitutes the community of friends. The nomic inheres in social practices that do not need the political to be normatively active. At the same time, these practices need the political for them to exorcize the permanent risk of internal differentiation and disaggregation. Here the exception is deprived of its pre-eminent position in Schmitt's conception of law. The exception does not uncover; nor is there a founding, joint decision that brings the community about. The community is already there, as it made its way through time and history by developing a well-defined set of institutional practices. In Schmitt's reactionary understanding, the state has the duty to attach legal value to, and protect, those institutions.

In conclusion, the theoretical trajectory from Schmitt's initial exceptionalism to his later concrete-order thinking demonstrates that no exception is needed by a political sovereign who wants to keep her subjects together and her community alive. The view he elaborated on between 1928 and 1934 (and that he held on to afterwards) is far closer to a day-by-day activity of normalization whereby officials faithful to a political centre implement specific guidelines to domesticate humans' innate tendency to normative pluralism. Not only does the exception not generate social homogeneity; it could even be detrimental to it as it produces hazardous social rifts. The exception is the extreme situation that could draw the experience of statehood to a close. While Kahn is right that the exception in

contemporary societies characterizes routine politics more than many are inclined to think, the activity of normalization Schmitt imagined – however, as I remarked, affected by serious flaws – is much more widespread and capillary[9]. For sure, this is one trait of today's liberal constitutional regime that Schmitt would appreciate (though not many others of them, I submit). Apart from Schmitt's personal political inclinations, we could take it as an invitation to concentrate on the myriad invisible manners in which various processes of normalization are carried out on a daily basis. An invitation to look out for the exception in the utterly unexceptional.

[9] I cannot expand on this aspect here. Yet see CROCE, SALVATORE 2016b.

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