VII. INSTITUTIONAL THEORY AND INSTITUTIONAL LEGAL POSITIVISM

1. THE PROGRAM OF MY INQUIRY

Institutional theories were developed by B. Malinowsky, H. Schelsky and other sociologists. The philosophy of law has produced one interesting and important school of thought in the field of institutional philosophy which is represented preeminently by M. Hauriou, S. Romano, G. Renard and C. Schmitt. On its basis D.N. MacCormick and I independently from each other evolved a legal ontology and a legal-philosophical conception. This will be known under the name 'Institutional Legal Positivism' (abbr. ILP).1 Our conception is not based on the sociological theory of the institutions, nor is it in terms of the history of ideas an off-spring of Hauriou's theory of law. Our reflections were motivated by different questions from those which led to Hauriou's investigations, in particular the question: "What means social existence of a norm or of law as a system of norms?2; furthermore, there was the problem of different types of facts confronting man.3 In this point both MacCormick and I were influenced by Searle's and Anscombe's juxtaposition of 'brute facts' and 'institutional facts'.4

In view of the fact that my discourse will, as I hope, contribute significantly to the clarification of ILP it is a challenging task for me to be writing about the relationship between the institutional theories of sociologists and legal sociologists - mainly those of Helmut Schelsky -, as well that between Hauriou's approach on the one hand and ILP on the other.

Werner Krawietz' interesting study: "Begründung des Rechts - anthropologisch betrachtet: zur Institutionenlehre von Weinberger und Schelsky"5 has demonstrated to me the importance of such a comparison. His study has laid the foundations which have significantly facilitated the writing of this treatise.

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5 W. Krawietz, Begründung des Rechts - anthropologisch betrachtet: zur Institutionentheorie von Weinberger und Schelsky, in: W. Krawietz/H. Schelsky/G. Winkler/A. Schramm (eds.), Theorie der Normen. Festgabe für Ota Weinberger, Berlin 1984, pp. 542-556. (I am, of course, very grateful to my friend Werner Krawietz for the publication of this "Festgabe" and for this contribution which was particularly stimulating and instructive for me.)
In the course of it I intend to present observations concerning the following three interlinked problem areas:

a) fundamental problems of jurisprudence,
b) questions concerning the ontology and logic of norms, and
c) questions related to the theoretical basis of sociology where it is concerned with group phenomena, social structures of an organisational and/or intellectual kind, as well as with the relationship between individual and collective action.

*With reference to the problems of jurisprudence* I wish to investigate the following areas:

1. a concise definition of ILP and of the implications arising from this ontology for the theory of law, for the theory of legal argumentation and for the sociology of law;
2. a comprehensive survey of institutionalism from the point of view of legal theory, including the diverging views within this school of thought;
3. a critical juxtaposition of ILP and the conceptions of the Hauriou school emphasising both the major differences and the common ideas.

*My observations about the ontology and logic of norms* are intended to expound the anthropological pre-conditions for ILP and to demonstrate to what extent the ontology of norms is rooted in the theory of action and in what way - according to ILP - the existence of normative regulatives and of institutions relate to man's role as *zoon politicon* with the capacity to act.

*With reference to the realm of sociological problems* I want to advocate a thesis which in this point is comparatively close to Schelsky, namely that sociology in the above sense is not possible without reference to the ontological ideas of ILP, in particular those concerning the essence of sociological facts and their dependence on institutionalised practical informations. I wish to demonstrate that it is only on this basis that sociology can be simultaneously an empirical, a comprehending and an explanatory science.

In implementing this program I shall proceed in the following way: I shall begin by characterising ILP, the assumptions on which it is based and its implications (Paragraph 2). In order to explain my conception of ILP it appears to me to be necessary to add some remarks about my theory of action and about the semantic foundations of practical philosophy (Paragraph 3). I shall attempt to complement this exposition with remarks about a typology of institutions (Paragraph 4). Following these I intend to sum up the central concepts of the legal and sociological institutional theories (Paragraphs 5 and 6). The next part of my reflections is going to deal with the divergences between institutional theories and ILP and with the overlap between these theories. In view of the not inconsiderable differences between them the nature of this paragraph is going to be predominantly critical (Paragraph 7). In the final part (Paragraph 8) I shall touch on the relevance for sociology and legal sociology of the fundamental views underlying the ontological and methodological approach of ILP.

**2. A CHARACTERISATION OF INSTITUTIONAL LEGAL POSITIVISM**

*ILP is a form of normativism:* it regards the law as a system of norms