Revista Mexicana de Ciencias Políticas y Sociales | Universidad Nacional Autónoma de México
Nueva Época, Año LXX, núm. 253 | enero-abril de 2025 | pp. 323-327 | ISSN-2448-492X
DOI: http://dx.doi.org/10.22201/fcpys.2448492xe.2025.253.85080

RESEÑA

Legal and Political Normativity in Carl Schmitt's Theory

Normatividad legal y política en la teoría de Carl Schmitt

■ Croce, Mariano & Andrea Salvatore (2022) *Carl Schmitt's Institutional Theory. The Political Power of Normality*. Cambridge University Press ■

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Received: March 8th, 2023
Accepted: December 7th, 2023

In this book, Mariano Croce and Andrea Salvatore challenge the prevailing "exceptionalist decisionism" interpretation of Carl Schmitt's theory, which focuses primarily on *Political Theology* (1922) and *The Concept of the Political* (1928), overlooking earlier and later writings that reveal the evolution of his ideas. The book's relevance lies in dismantling this anti-normative reading of Schmitt's work, which is common in legal and political studies. Through meticulous exegesis of Schmitt's writings across his career and in-depth analysis of prominent interpretations of his political and legal theories, Croce and Salvatore argue, across seven chapters, that Schmitt was fundamentally a jurist focused on social stability, viewing the legal system as arising from institutional practices that embody the normality of a *concrete order*. This review summarizes their argument chapter by chapter, concluding that this book is a valuable resource for political theorists across various traditions.

In Chapter 1, Croce and Salvatore introduce the "exceptionalist decisionism" perspective derived from *Political Theology* (1922) and propose a jurisprudential interpretation of the state of exception. Typically, exceptionalism posits that the sovereign holds the power to suspend the legal order and create a new one *ex nihilo*, based on an unjustified, absolute decision. This view is often linked to *The Concept of the Political* (1928), where the sovereign's ungrounded decision identifies the enemy, creating a new political community through the friend-enemy distinction. However, the authors' jurisprudential reading of *Political Theology* (1922) reveals the state of exception as a "transitory, flawed jurisprudential option, rather than the funeral dirge of modern politics" (Croce & Salvatore, 2022: 12). In the late 1920s, Schmitt argued that exceptions are rare, lack stability for daily life, and do not capture the essence of the law.

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This research is founded by University of Guadalajara's program "Beca Institucional UDEG de Talento Global" Dictamen Núm. V/2022/347.

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According to Croce and Salvatore, Schmitt understood that this form of decisionism fails to recognize the role of ordinary law in shaping the legal order.

Chapter 2 exposes Schmitt's preoccupation with social stability throughout his intellectual life and his brief period as an advocate of decisionism. The authors point out that in the 1910s, Schmitt was an accomplished jurist who set out some of his institutional thesis, which later developed in the 1930s. In this way, Schmitt's decisionism stage is placed in the first years of the 1920s, and it is so if there is no attention paid to other essays written in the same period where he contends contrary to the exceptionalist decisionism posture. For example, in earlier and contemporary writings of *Political Theology* (1922), such as *Über Schuld und Schuldarten. Eine Terminologische Untersuchung* (On Guilt and the Types of Guilt: A Terminological Investigation) (1910), *Statute and Judgment: An Investigation into the Problem of Legal Practice* (1912) and *Roman Catholicism and Political Form* (1923), Schmitt advances an institutional orientation of the legal order based on the normal legal practices. In other words, Schmitt contends in those writings that concepts used by jurists should be cognized and recognized according to the legal order. Because of this,

> Schmitt presupposes that the entire legal order (and not only the single norms) should be ascribed specific and concrete ends, a sort of *direct normative orientation* that turns the different legal prescriptions into a consistent body. (Croce & Salvatore, 2022: 29-30; the emphasis in the original)

This undeniable normativist nuance is not based on an ideal conception but on a concrete orientation of the practices inside the legal order, the objective of which is to preserve its unity and stability.

In Chapter 3, Croce and Salvatore discuss how the connection *between Political Theology* (1922) and *The Concept of the Political* (1928) was established by Schmitt's critics during the Weimar Republic and later served his interests under the Nazi regime. This linkage perpetuated a flawed interpretation that treats exceptionalism as foundational to social order, overlooking its inconsistencies—such as the difficulty of explaining how an ungrounded decision can create lasting social stability. Decisionism fails to address fundamental political questions, such as the origins of sovereignty and how a sovereign decision might establish a new social order. In political terms, the decisionism of the 1920s is unable to explain from where the sovereign comes and why they are recognized as such, how a sovereign's single decision draws a new social order where there was a previous one, and "why her decision, among others actually emerging as potentially alternative decisions, gains support and hence becomes effective" (Croce & Salvatore, 2022: 64).

In Chapter 4, it is argued that Schmitt's vision of the political represents the beginning of its adherence to an institutional theory of law and a breaking with his exceptionalism. Their argument pivots a concretist view of the political: the concept of the political is an epistemic device that enables us to identify a people and its state and what this state must do to keep its monopoly on coercive power. The

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political appears when from whichever type of opposition (moral, religious, or economic) emerges the highest degree of intensity of union or separation conforming a uniform group. In this way, the concept of the political "is a criterion whereby one can measure the intensification and de-intensification of antagonisms, an epistemic criterion to assess the intensity of a conflict" (Croce & Salvatore, 2022: 72). The intensity of a conflict is *concrete* and *existential* showing the potential emergence of a mortal conflict. Along with *Constitutional Theory* (1928), published the same year that *The Concept of the Political* (1928), Schmitt posed an updated version of the concept of decision linked to this idea of constituent power conceived as the decision on which is affirmed the existence of a political community. The constitution of this political community is made up of the concrete order from where it emerges. Therefore, from here is inferred Schmitt's institutionalist vision, one which considers that

> The constitutional order is created through the exercise of constituent power, but in such a way that it can encompass the set of norms, principles, values, and practices that constitute the essential core of the underlying social order. (Croce & Salvatore, 2022: 75-76)

Then, the place of decision is not to create a new order ex nihilo but rather to confer legal effectiveness to its concrete social order where the decision takes place. The state should be the only entity with the political attribution of the decision to select a foe; consequently, to preserve the stability of its political community, the state eliminates the sub-state groups that might be able to make political decisions and thus destabilize the social order.

In Chapter 5, the authors challenge the "pan-institutionalist" reading of Schmitt, as advocated by scholars like Jens Meierhenrich, which overlooks the distinctions between Schmitt's early decisionism and his later institutionalism. Croce and Salvatore emphasize that Schmitt's priorities shifted from social order in the early 1920s to concerns about parliamentary instability by 1928. This change of preoccupation entailed a change of mind because he understood that

> in the face of the intensifying differentiation of forms of loyalty and alliance, homogeneity cannot be produced by miraculous, demiurgic decisions. Homogeneity must be obtained from the concrete dynamics of associative life. (Croce & Salvatore, 2022: 91)

If one goes to revise pieces such as *The Guardian of the Constitution* (1931), one can observe how the guardian of the constitution (the president) ought to have broad powers to meet its main task: to preserve the normality which is fundamental for the proper stability of the institutions and legal system.

Furthermore, the authors state that in the essay *On the Three Types of Juristic Thought* (1934) the main goal of Schmitt was "to overcome the shortcomings of exceptionalist decisionism" (Croce & Salvatore, 2022: 97). Norms, decisions, and institutions from the concrete order are equally fundamental for the existence of legal order and the exercise of jurisprudence. Schmitt's critique of normativism

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is not an underestimation of the norms but the idea of separating them from decisions and institutions. This triad is inevitably connected to the normal life of social order. The normal functioning of the legal system is to extract from social practices *exemplary models* that, once converted into laws, protect the social order's normality and, thus, the political community's identity. Theoretically, it collocates normality as fundamental to account for the legal order over the exception defended in *Political Theology* (1922).

In the following chapter, Croce and Salvatore describe the influence of the legal theorists Santi Romano and Maurice Hauriou in Schmitt's concretist thinking. Regarding the second author, Schmitt took his organizational view on the social field as composed of organizations that filter human practices along particular lines and control individual conduct. For Hauriou, institutions organize social reality because they count on the elements to turn de *facto situations* into *de jure* conditions. The work of the law is to select those practices from normality to ensure the continuity of the community's life. For Romano, the institution is an *interactional context* where there is an "accrual of the techniques whereby a practice gets fixed and is less and less exposed to change or better, change itself gets filtered and administered through these techniques" (Croce & Salvatore, 2022: 111). In this way, an institution is a synonym of a legal order because there are many entities with interactional contexts that deploy these techniques to limit disruptions. Both theories influenced Schmitt's legal theory, posing that order is absorbed by state law and that institutions conform to social practices.

In *On the Three Types of Juristic Thought* (1934), the criteria for conserving certain institutions is sharing a broader historical and sociocultural context. The main task of jurisprudence is to select these institutions, to investigate

> the interplay of decisions, norms, and the concrete order that manifests itself 'in its notions of what is a normal situation, who is a normal person, and what in legal life and legal thought are presumed to be typical concrete examples of the life to be justly judged'. (Croce & Salvatore, 2022: 114)

The legal norms articulate the substantive content of social institutions to establish them as the definitive characteristics of a political community. This is the political power of normality. The legal structure and political community are formed from normality and its norms, decisions, and institutions. Despite Schmitt's polemical and condemnable proposal of conceiving the historical and sociocultural normative context in ethical and ethnic standards, it is undeniable that the law functions embodying concrete behaviors to make them binding to the entire population.

Finally, in Chapter 7, Croce and Salvatore examine Schmitt's later post-World War II writings, which reflect a more jurisprudential approach. Works like *The Plight of European Jurisprudence* (1950) emphasize an autonomous legal order developed through the practices of jurists rather than sovereign decisions. Schmitt's later jurisprudence views

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law as integrating social practices with internal coherence to sustain institutional complexity. This interpretation is crucial for contemporary theory, showing that Schmitt's concern was with social stability and normative order, rooted in real institutions rather than abstract ideals. In this last stage of Schmitt's thought,

> legal science no longer depends on a political will that determines its structure and the modes of existence. Rather, it takes upon itself the task of making decisions while simultaneously limiting the absoluteness and pervasiveness of these decisions. (Croce & Salvatore, 2022: 136)

In a conclusive way for their argument, Croce and Salvatore present Schmitt's declarations given in one interview at 95 years old, on his role as theorist Schmitt at the end of his life stated:

> 'I feel one hundred percent a jurist and nothing else. And I do not want to be anything else. I am a jurist and I remain a jurist and I die as a jurist' […] This is his last will as well as his last self-interpretation. (Croce & Salvatore, 2022: 143)

This seldom but more accurate reading of Schmitt's thought is relevant to contemporary political theory. On the one hand, continental theoretical positions which postulate Schmitt's theses on the political as referents to exclude whichever type of political normativity should go beyond their misguided reading of *Political Theology* (1922) and the *Concept of the Political* (1928). As is well argued by Croce and Salvatore, Schmitt was a jurist concerned with social stability, contending that the source of normativity for politics is the concrete social order. On the other hand, political theorists from contemporary political realism might obtain insights about how to theorize the relation between law and politics from a realist approach. Akin to political realism's guidelines for normative political theory (Rossi & Sleat, 2014), normativity for politics in Schmitt's institutionalism is not formulated from an ideal conception but from the real institutions where politics and law intersect.

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Cicerón Muro Cabral is a PhD Student in Political Science at the Universidad Complutense de Madrid (UCM). He has a master's degree in Philosophical Studies at the Universidad de Guadalajara (UdeG). His lines of research are contemporary political theory and moral philosophy. His most recent publications include: "La deliberación como herramienta argumentativa para la educación en bioética" (2022) *Bios Papers,* 1(*2*); "Las pasiones en política. Emociones, democracia y populismo" (2020) *Revista Ciencias y Humanidades,* 11 (*11*).

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