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Routledge
Taylor & Francis Group
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First published in 2013
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

A GlassHouse Book

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Croce, Mariano.
The legal theory of Carl Schmitt / Mariano Croce and Andrea Salvatore.
p. cm.
Includes bibliographical references.
1. Schmitt, Carl, 1888-1985 2. Law—Philosophy. I. Salvatore, Andrea. II. Title.
K230.S352C76 2012
340'.1—dc23

2012009627

ISBN 978-0-415-68349-4 (hbk)
ISBN 978-0-203-09373-3 (ebk)

Typeset in Baskerville
by Keystroke, Station Road, Codsall, Wolverhampton

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

The Legal Theory of Carl Schmitt

The Legal Theory of Carl Schmitt provides a detailed analysis of Schmitt's institutional theory of law, mainly developed in the books published between the end of the 1920s and the beginning of the 1930s. By reading Schmitt's overall work through the lens of his institutional turn, the authors offer a strikingly different interpretation of Schmitt's theory of politics, law and the relation between these two domains. The book argues that Schmitt's adhesion to legal institutionalism was a key theoretical achievement, based on serious reconsideration of the main flaws of his own decisionist paradigm, in light of the French and Italian institutional theories of law. In so doing, it elucidates how Schmitt was able to unravel many of the impasses that affected his previous conceptual framework. The authors also make comparisons between Schmitt and other leading legal theorists (H. Kelsen, M. Hauriou, S. Romano and C. Mortati) and explain why the current legal debate should take his legacy into serious acount.

Mariano Croce is Post-Doctoral Research Fellow at SOAS, University of London, and Adjunct Professor of Legal Philosophy at Sapienza – University of Rome. His research addresses legal theory, socio-legal studies, legal pluralism, political philosophy and democratic theory.

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Carl Schmitt is the most influential, but for political reasons, also the most controversial, German political theorist of the twentieth century. His influence reaches far beyond national borders and the field of jurisprudence. The literature on his work is endless. By now the political implications, all the way to the political theology, as well as the historical and biographical context have come under increasing attention. Thus, this book is a healthy provocation, since the authors understand Schmitt primarily as a theoretician of law. The core of his theory – contrary to the usual reduction on "decisionism" – is seen in his institutionalism and his concept of the concrete order. The attempt to view Schmitt's entire work "through the lens of his institutional theory" is a novelty. The authors move it – this is an unconventional view – into the proximity of H.L.A. Hart's concept of legal standards.

Hasso Hofmann, Emeritus Professor of Constitutional Law and Legal Philosophy, Humboldt-Universität, Berlin

Carl Schmitt was many things over the course of his long life: political theorist, theologian, intellectual historian, international lawyer, polemicist, opportunist, villain, antisemite, Roman Catholic, Nazi. However, first and foremost, Schmitt was a constitutional jurist. With *The Legal Theory of Carl Schmitt,* Mariano Croce and Andrea Salvatore present to an English-speaking audience for the first time a comprehensive account of Schmitt's legal thinking from across his entire brilliant and controversial career. The authors trace Schmitt's jurisprudence from its early neo-Kantian origins to its fully developed concrete institutionalism. With clarity and sophistication they examine Schmitt's basic concepts and outline the many debates he engaged in with other prominent *Staatsrecht* predecessors and contemporaries. A great achievement and an invaluable resource.

John P. McCormick, Professor of Political Science, University of Chicago

Acknowledgements

During the last years we have incurred many more debts than we can acknowledge. Our thanks are due to Nunzio Allocca, Daniele Archibugi, Renata Badii, Laura Bazzicalupo, Caterina Botti, Norbert Campagna, Ignazio Castellucci, Alfonso Catania, Dimitri D'Andrea, Luca Di Felice, Piergiorgio Donatelli, Seán Donlan, David Dyzenhaus, Alessandro Ferrara, Lyana Francot, Maurizio Fioravanti, Hanns Kendel, Teodoro Klitsche de la Grange, Michael Marder, Reinhard Mehring, Emmanuel Melissaris, Werner Menski, Andreas Philippopoulos-Mihalopoulos, Elena Pulcini, David Nelken, Dennis Patterson, Stefano Petrucciani, Geminello Preterossi, Martin Ramstedt, Massimo Rosati, William Scheuerman, Aldo Schiavello, Michael Stolleis, Katharina Strecker, William Twining, Bald de Vries, Gordon Woodman, Giovanni Zampetti. We are very grateful to Hasso Hofmann and John P. McCormick who have honoured us with their endorsements.

We benefited a lot from many discussions and exchanges with our mentor Virginio Marzocchi and our colleagues Vincenzo Rosito and Michele Spanò at Sapienza – Università di Roma.

We would like to thank Colin Perrin, who has immediately believed in our project, and Melanie Fortmann-Brown, Hayley Chelsom and Jack Webb for their professional guidance and precious advice.

A special thank you to our families, who made all this possible. Mariano wants to thank Valeria, who has always supported his undertakings, large and small, wise and otherwise, from our first meeting.

Finally, much gratitude to our friends (and, of course, enemies).

Although this work is the fruit of a unitary and jointly discussed project, Mariano Croce wrote the Introduction, Chapters 2, 3, 5, 7, 10, while Andrea Salvatore wrote Chapters 1, 4, 6, 8, 9.

Contents

Introduction

I

This book is not a reassessment of Carl Schmitt's work, nor is it an answer to the persistent question: 'Why read Schmitt?'. Hopefully our text (more or less indirectly) will offer an answer to the latter question and will also provide a critical interpretation of most of Schmitt's more relevant books. Nonetheless, our main goal is to provide a novel reading of Schmitt's legal and political theorizing by shedding a new light on some of his key writings. In short, our core thesis is that in between the 1920s and the 1930s Schmitt comes to acknowledge the flaws of his previous decisionist approach, partially gets rid of it and ends up adopting an institutional perspective mainly inspired by Maurice Hauriou's and Santi Romano's theories of law, as he himself will acknowledge some decades later: 'Hauriou, like Santi Romano, are my masters. (. . .) Perhaps, rather than masters, it is more appropriate to say predecessors' (Schmitt 1983: 166–7). As we will argue chapter by chapter, we do not intend to say that Schmitt discards once and for all the conviction that the decision of a sovereign is a basic pillar of every political community. However, we will demonstrate that what we call Schmitt's 'institutional turn' induced him to relocate his decisionist idea of politics in an entirely different theoretical framework, which enabled him to overcome many of the conundrums that had unceasingly affected his prior decisionist approach.

There is little point in trying to advocate this thesis in these pages, as many parts of the present book will substantiate our reading. We would rather like to explain what is the pay-off of this novel interpretation of Schmitt's works. With respect to this, let us stress two main points.

First of all, it is clear from the title that this is a book on Schmitt's *legal* theory. This is obviously not to say that his *political* thinking is of no importance. Yet, to some extent, this is an implicit criticism of all these interpretations that regard the idea of law provided by Schmitt as a mere, ancillary complement to what is considered to be his political theory. Too often the literature about him and his works fails to notice the central role played by law in his theory (Campagna 2004b: 1–20), notwithstanding the fact that he himself declares: 'I perceive myself as a jurist at one hundred percent and nothing else. And I do not want

to be anything else' (Schmitt 1983: 183). In the face of it, we will primarily concentrate on Schmitt's notion of 'concrete order', mainly developed in *On the Three Types of Juristic Thought* (hereinafter *The Three Types*), published in 1934. We will argue that by reading his overall work through the lens of this concise but precious book we can provide a strikingly different interpretation of Schmitt's theory of politics, law and the relation between these two domains. To achieve this end, we will need to show that his adhesion to institutionalism was not only and not so much a simple turn of mind due to historical or even biographical circumstances, but also and above all a genuinely theoretical achievement based on a serious reconsideration of his own works in the light of something he got familiar with between the end of the 1920s and the beginning of the 1930s, namely, the French and Italian institutional theories of law. His engagement with these seminal jurisprudential approaches made him become aware of the root of all the theoretical faults of his previous decisionism.

Secondly, Schmitt's contribution to jurisprudence is rarely assessed in its own right. Most of the literature tends to emphasize his critical attitude and his polemical opposition to many typical devices of the liberal state, such as parliamentarism and constitutional law. Now, it is certainly true that a crucial purpose of most of Schmitt's works is to provide a radical critique 'of modern thought that he sees as having been infiltrated by the technological, which he often equates with the economic and the positivistic' (McCormick 1997: 4). Nonetheless, since many books in this field of study draw out Schmitt's critical intent so compellingly, we will rather try to elicit his own view of law and of its relation to politics. With respect to this, we believe that his contribution is particularly relevant for two reasons. On the one hand, on the basis of his institutional turn, Schmitt is able to spot the limits of legal positivism much more strongly than he managed to do in his decisionist works, to such an extent that he seems to anticipate the powerful criticism that Herbert L.A. Hart will address to John Austin and Hans Kelsen some decades later in *The Concept of Law*. On the other hand, in his institutional writings, Schmitt investigates the nature of law and its role in society in such a way to bring out acutely and convincingly some of the most relevant law's distinctive traits. Even though Schmitt has always believed that 'law and morality are the products of a battle for political supremacy between hostile groups' (Dyzenhaus 1997: 2), in his *The Three Types* and other contemporary writings, he understands that to corroborate his analysis he can rely neither on a decision that creates an order *ex nihilo* nor on a constituent power able to *instituere* a society on the mere basis of its will. Schmitt realizes that law serves as a filter and a sieve in the hands of officials, who are required to operate in compliance with some general clauses, which in turn express the will of a leader.

In brief, we will start off by the presupposition that 'Schmitt is an adversary, but an adversary of remarkable intellectual quality, and one from commerce with whom we could benefit', as his insights 'can be used to rethink liberal democracy with a view to strengthening its institutions' (Mouffe 1999: 1). Based on this, our chief purpose in this book is to shed some light on those insights that are

particularly instrumental to the understanding of the nature of law and its relation to politics. Furthermore, we will aim to demonstrate that by looking at Schmitt's work as a whole through the lens of his institutional theory, we would be able to solve many of the theoretical mistakes that make his decisionism an abstract and untenable view. In doing so, we will maintain that Schmitt is not simply a challenge, a spur to revise critically the stock of camouflaged power and inequality which lurks behind the surface of the rule of law. He is also able to explain *why* the law is and can never completely avoid being a selective and exclusionary instrument: law is what assures the production of stable and common standards of correctness in a given collectivity; it contributes to producing and defending the ways people *normally* do things in a given tradition. Only in this way can law function as a stable means of guiding conduct and settling disputes. Of course, at the end of the book, we will also lay bare the limits of a view that only conceives law in this manner and thus fails to appreciate the way law operates as a device of criticism and social change. But before criticizing it, we think Schmitt's institutional proposal to be worthy of being carefully examined, and this is precisely what we will do once we have briefly sketched, in the next two sections, the structure of this book.

II

The first part – 'Concepts: decision, institutions and concrete order' – is mainly dedicated to exploring Schmitt's institutional theory and to showing that, contrary to what many interpreters in the field of Schmittian studies believe, the works he produces in the early 1930s represent the landmark of his political and legal theorizing.

In Chapter 1 we will argue that, ever since the first phases of his work, Schmitt has always been concerned with the idea of legal theory as an autonomous field and its role in the development of a concrete legal order. In the light of this, it will be our contention that his institutional turn was due neither to a change in his theoretical interests nor to biographical contingencies, which prompted him to put more stress on the function of institutions. Indeed, we will portray Schmitt's decisionism and his subsequent institutional approach as two different solutions to the same basic issue, which has always troubled him, that is: What are the conditions of existence of a stable and effective legal order? We will explain that while in the 1920s Schmitt took the concepts of decision and exception to be able to answer this question in a convincing though paradoxical manner, in the 1930s he gets acquainted with the multiple weaknesses of this solution and provides a theory of law which stresses the importance of social practices and normal ways of life. To corroborate our interpretation, we will go back to the works he produced between 1922 and 1928 to identify all the impasses that he was able to solve by embracing an institutional view of law.

Based on the analysis carried out in Chapter 1, we will concentrate on *The Three Types*, that we consider as the milestone of Schmitt's legal theorizing. In

Chapter 2 we will contend that a 'political' interpretation fails to grasp the import of this slim but dense book. We will then offer a 'jurisprudential' reading, according to which Schmitt's genuine theoretical goal is to lay the foundations for a new and sounder way to understand law. Even though many pages of *The Three Types* are devoted to criticizing both legal positivism and the ideology of the liberal state, we believe that this writing is mainly instrumental in the development of a core conception of law able to overcome the limits of both normativism and decisionism. The gist of this new conception is that, in order for us to understand law, we have to regard norms and decisions as intrinsically related to the social fabric in which they emerge and operate. We will show that, in this pivotal text, Schmitt comes to two relevant conclusions. Firstly, law is both the custodian of social reality and a condition of possibility for institutions to subsist and flourish. Secondly, law cannot autonomously create the concrete reality it is meant to safeguard: law is mainly a selective device that singles out some of the practices and models developed in the social realm and cuts out those that may be harmful to it.

In doing so, we will canvass two theoretical pillars of this institutional theory, namely normality and institution. However, as Schmitt's readers well know, one of the main defects of his analysis is that he tends to be more evocative and provocative than clear-cut and clarifying. This is why, in Chapter 2, we will make sense of his notion of normality by drawing a comparison with Ludwig Wittgenstein's. We will argue that an important conviction shared by these two prominent authors is that normality is the linchpin of everyday life. More specifically, a comparison with Wittgenstein's view will help us show that normality owns a normative character, in that normal ways of doing things in the social domain yield *standards* that people use in order to determine what is correct and what is incorrect in a given context. Then, while examining the notion of institution, we will make it clear that, contrary to some of his contemporaries, such as the German legal sociologist Eugen Ehrlich and the Italian jurist Santi Romano, Schmitt does not deem institutions to be self-organizing normative entities. Institutions are key components of a concrete form of life, which are reflected in the political form and must be preserved by legal means. To pin down the conceptual properties of Schmitt's idea of institution we will cast some light on the relation between his version of it, mainly developed in the field of legal theory, and the socio-anthropological concept of institution provided in the field of philosophical anthropology by Helmuth Plessner and Arnold Gehlen. In particular, we will maintain that Gehlen regards institutions as external supports that enable human beings to build a shared community, based on a firm cultural tradition, in which they can pursue stable common goals. On this basis, we will show that the introduction of the notions of normality and institution has a remarkable pay-off in the framework of Schmitt's theory. Indeed he can now realize that decisionism is as flawed as normativism: while the latter misconceives the character of legal norms, the former fails to capture the core nature of social life and its being vital to the establishment of a political order.

If Chapter 2 explores the conceptual foundations of Schmitt's institutional theory, Chapter 3 aims to determine its nature and to classify it in relation to other versions developed by his contemporaries. To achieve this end, we will sketch a basic typology of three main kinds of institutionalism: *monist*, *pluralist* and *decisionist* institutional theories. We will clarify the main traits of these different approaches in order to pinpoint three different ways to conceive the relation between law and social reality. Monist institutionalism considers social reality as consisting of a set of social sub-groups gathered around a common and socio-ontologically superior political centre. Pluralist institutionalism regards social reality as a large heap of different institutions (groups, associations, organizations), each of them having an inner legal order and thus being socio-ontologically equal to each other. Finally, decisionist institutionalism believes the role of a political centre to be essential, even though such a centre is not socio-ontologically superior to other institutions: it simply wields a jurisdictional power, as it has the (symbolic and material) resources to select and promote only a few of the jural relationships produced in the social realm.

In the light of this typology we will argue that Schmitt's model, which we will label 'institutionalist decisionism', can be regarded as a synthesis between the first and the third type. To cut a long story short, Schmitt's personal conception of the relation between institutions and law makes him reach the conclusion that the state legal order performs a twofold role, which none of the kind of institutional theory mentioned above manages to grasp. Firstly, the legal order is the filter of a society, in that it has to select those institutions that are compatible with each other and to repress those that may put social homogeneity in danger. Secondly, even though it selects and protects, law is not a mere system of selection and control, but the genuine voice of a leader, or rather, the instrument used by a leader to realize her own idea of how a society should be. We will then explain that in Schmitt's institutionalist decisionism a special role is assigned to the notion of *general clauses*: the only viable solution to the irremediable vagueness of all laws and all legal concepts is a firm control of legal education and legal training, and thus the creation of a body of legal officials who may dependably apply the law as it is interpreted by the leader. By using general clauses, officials serve both as a filter and as reliable appliers of the indisputable interpretation of the leader. It is then for officials, under the guidance of general clauses, to select and promote the institutions which prove to be homogeneous elements of a communitarian form of life. This is the way, in Schmitt's view, a legal order helps create a socio-political concrete order, which in the 1920s he straightforwardly believed to come out of a state of exception.

If Chapters 2 and 3 are mainly dedicated to showing that Schmitt's encounter with some seminal works in the field of institutional theory induced him to put forward an entirely new vision of the way a concrete socio-political order can be built and bolstered, in Chapter 4 we will argue that this reading cannot be confined to his writings of the early 1930s. The basic aim of this chapter will be to reject the *prima facie* convincing remark that *The Three Types* cannot be considered

as a milestone in Schmitt's theory as a whole. Contrary to this view, we will contend that the theoretical tools he offers (or better, refines and strengthens) in this little book represent a key achievement in the whole framework of his theory of law and politics. We will depict the legal theory of Schmitt, and more precisely his institutionalist decisionism, as a new foundation for a far more robust and consistent political theory.

Indeed, we will vindicate the claim that, without the decisive contribution of his institutionalist approach, many of Schmitt's most important conceptual tools would turn out to be either contradictory or untenable. We will show that in both *The Concept of the Political* and *Constitutional Theory* Schmitt fails to justify the key theoretical tools he employs to support his proposals. We will thus show that the conundrums that arise in these different but pivotal texts, and more in general his difficulties defining the key concepts of his own theory, help us understand the reason why Schmitt eventually came to see his 'concrete order and formation' thinking as a viable solution to all his theoretical problems. As a matter of fact, an institutional approach fulfils two main conceptual requirements. Firstly, beyond any form of exceptionalism, it brings to light the intimate link between the development of normal social practices in the sphere of everyday life and the constitution of a concrete community in the political domain. Secondly, on the basis of this, the institutional approach finally allows Schmitt to define the friendship relationship in a positive manner, or rather, to define the concept in question (who is the friend) independently of any opposite, polemical counterpart (the friend as the non-enemy).

As the title of the second part of the book expresses – 'Oppositions: his "enemies" and "friends"' – in Chapters 5–8 we will provide a comparison between Schmitt and some of the authors whom he regards as either his inspirers or his adversaries. This analysis, however, will not aim to assess whether Schmitt has properly understood the thought of these authors or whether he uses it in an appropriate way. It would be all too easy to show that he provides very idiosyncratic interpretations of what he approves of or rejects as nonsense. On the contrary, our analysis will be mainly devoted to clarifying Schmitt's own thinking and to explore the way his reading of some key authors changes over time by virtue of his institutional turn.

Chapter 5 will aim to clarify how Schmitt's institutional turn led him to modify the kind of criticisms he had levelled against his greatest rival, Hans Kelsen. In short, while before Schmitt's devising a concrete-order thinking their major point of disagreement was about the nature of legal theory (that is, whether legal theorizing can really be a 'pure', non-political activity), in *The Three Types* Schmitt understands that Kelsen (and positivism in general) first and foremost misconceives two points: the nature of social reality and the role played by legal theorists. Indeed, in the light of his institutional theory, Schmitt reproaches positivists for failing to see that law has not so much to do with abstract and artificial norms prohibiting a limited set of illicit behaviours, issued by legal authorities. Law has to do with normal standards of conduct, produced in the sphere of social life,

which are not and cannot be created by the officials. In this framework, we will unfold two powerful criticisms that Schmitt addresses to positivist approach in general. Firstly, positivists' (and particularly Kelsen's) convoluted strategy to show that law is a set of technical and artificial norms, hallmarked by a sanction and validated by a basic norm, is simply meant to cover up an essentially decisionist stance. Secondly, positivists (and particularly Kelsen) fail to acknowledge that society produces its own standards and that the legal order crystallizes some of them and makes these binding.

In Chapters 6 and 7 we will muse on the proposals of two prominent legal thinkers who are highly overlooked in the current Anglophone debate, namely Maurice Hauriou and Santi Romano. As we mentioned above, Schmitt's encounter with them significantly impacted on his theorizing. This is why we believe it to be essential to understand what precisely attracted his interests. In reality, Hauriou's and Romano's institutional models exhibit remarkable differences, to the extent that the former advocates a monist institutionalism while the latter a pluralist one. This implies that the theoretical and practical outcomes of their theories can hardly be identified with one another's and that Schmitt, at least to some extent, misuses at least one of these models. As we will show, Schmitt sees Romano's institutionalism as a variant of Hauriou's basic model, and this leads him (whether deliberately or not) to omit some of the most relevant aspects of a truly coherent institutional approach, such as that of Romano.

In Chapter 6 we will discuss some basic concepts of Hauriou's institutionalism, adopted by Schmitt as supporting pillars of his own theory. In doing so, we will argue that Schmitt's radical politicization of institutionalism may be seen as a consistent development of Hauriou's state-centred institutionalism (even though, as we will duly show at the end of this chapter, the peculiar liberal nature of Hauriou's theory marks an important difference from that of Schmitt). In Chapter 7, on the contrary, we will question Schmitt's (mis)reading of Romano's institutional model and will argue that their theories show less than feeble similarities. We will contend this on two grounds: their different conceptions of institution and the final upshot of these conceptions. Firstly, Romano thinks of institutions as full-fledged legal orders, which can be properly seen as autonomous normative entities (even though this leads him into the trap of what we call 'Romano's dilemma'). Secondly, in the light of his notion of institution, Romano believes that social reality is irretrievably affected by a legal pluralism, that every geo-historical context is composed of a heap of legal entities, which are compelled to find a peaceful way of coexistence.

Chapter 8 will discuss an interesting interpretation and reassessment of Schmitt's theory provided by the Italian jurist Costantino Mortati, who first introduced Schmitt's works in the public law debate outside the *Reich*. According to Mortati, Schmitt is the only theorist who was able to grasp in an adequate manner the inner nature of law and its structural relationship to social reality. Yet, in Mortati's view, Schmitt comes only close to a full development of his own insights and finally tends to mythicize the ideal of a 'communitarian totality'. Mortati

insists that Schmitt fails to place due stress on the actual social forces that determine the specific conformation and the unitary organization of a given community. On the basis of his critical review, Mortati was able to get Schmitt's more relevant conceptual tools (such as general clauses, the state of exception and the political enmity) out of their occasionalist and contingent context and to locate them in a more consistent theoretical framework.

III

The last two chapters comprising the last part – 'Implications: Schmitt's institutionalism and the current legal debate' – are remarkably different from the previous ones and this is why we need to place the discussion of them in a distinct framework. Indeed, Chapters 9 and 10 will be primarily aimed at showing why the institutional theory of Carl Schmitt, as we have reconstructed it in Chapters 1–8, should not be ignored in the legal and political contemporary debates. To this end, we will focus on two topical issues that are at the core of these debates, namely, legal indeterminacy and legal pluralism, so as to attend to what we can learn from Schmitt's analysis. At the same time, and as a consequence, the inspection of these two relevant issues from a Schmittian point of view will contribute to vindicating the interpretative framework we will have developed in Parts I and II of the book.

In Chapter 9 we will argue that Schmitt considers the question of indeterminacy neither as an irreversible condition of law per se nor as a problem that can only be solved with recourse to extra-legal (i.e., political or moral) means. He strongly denies that legal norms are unavoidably incomplete and that they must be supplemented by substantive sources. However, we will show that this position, which he takes from the very beginning of his career, proves to be tenable only in the wake of his institutional turn: if law is the shelter of a society and if a society is founded upon the normality of everyday life, then law and normal social practices cannot be seen as two separate realities. Conventional morality and political principles are not *incorporated into* the legal order: they *are* the legal order. This implies that if a given set of norms effectively governs the interaction in a given context, then it cannot be indeterminate. In other words, from an institutionalist-decisionistic point of view, Schmitt maintains that if an ordered society exists, then the law in force therein cannot be indeterminate.

To put it otherwise, we will claim that Schmitt's institutional legal theory contributes to showing that every legal order, as a selective practice, is necessarily based on a *finite* number of social practices and a *limited* range of interactional models. If this reading is correct, two considerations should be made about law's nature. Firstly, law, whether democratic or not, necessarily turns out to exclude a given set of social interactions as un-normal and un-normalizable practices (needless to say, the democratic character of a legal order significantly changes the way a legal order relates to the set of excluded practices and the criterion used for determining what is normal and what is not). Secondly, what may

appear as a form of indeterminacy, in reality, is the flip side of the leeway accorded to a supreme regulatory instance (be it a dictator, a parliament, or a supreme court) in order for it to carry out a social selection.

The interpretation of legal indeterminacy as a bogus problem is strongly related to the issue with which we will be concerned in Chapter10, that is, legal pluralism. In this framework we will argue that it is of primary importance to distinguish between *social* and *legal* pluralism and that Schmitt's insights are particularly helpful with respect to this. In fact, we will claim that he can well be listed among the authors who support the idea that every society is an ensemble of sub-groups and that pluralism is a permanent condition of social life. At the same time, however, he is fiercely hostile to a pluralism of entities which claim to be legal. In other words, Schmitt's institutionalist decisionism moves from a pluralistic conception of society and, *precisely* because of this, reaches the conclusion that the bigger risk a society can run is the emergence of legal pluralism. By framing Schmitt's argument in this way we will be able to identify the critical difference between social and legal pluralism: while the former is an inborn feature of social life, in which humans produce numerous rule-governed normative contexts, legal pluralism is a condition in which some of these normative contexts claim to be full-fledged truly legal entities, which produce rules of their own and are legitimized to exert their private justice within their own boundaries.

Of course, as we will show, Schmitt is aware that groups and associations cannot be effaced and that nothing can eradicate social pluralism. He is convinced, though, that law's rationale is precisely that of preventing social pluralism from becoming a legal one. In this regard, the state legal order must have an exclusive monopoly on the means of establishing what *normal situations* are and of producing the *standards of normality*. In brief, every political community must be based on a substantial homogeneity of the social domain, which is able to rule out all the expressions of the social which could jeopardize established customs and traditions. While carrying out this analysis, we will show that Schmitt's key term 'homogeneity' undergoes a significant change in between the 1920s and the 1930s. We will pinpoint two notions of homogeneity (*democratic-identitarian* and *institutional*) and will explain that, in the framework of the institutionalist decisionism, social pluralism is prevented from becoming a legal pluralism because the legal order makes sure that all institutions, however significantly they may differ from each other, incorporate a set of standards that guarantee a basic homogeneity of the social realm. Then, Schmitt has in mind an institutional homogeneity, which cannot be abruptly produced by a constituent will. It is a product of time and history, which has to be elicited by officials and put under the special wardenship of a leader. In this way, the innate pluralism of society is confined to the social domain and its political-legal consequences are pre-empted.

To conclude this introduction, let us say something about the last part of the present book. It is our claim that Schmitt's legacy cannot be disregarded and that his insights into the nature of law and politics are absolutely worthwhile, in spite of his appalling political choices. We are convinced that it is one thing to assess