

Post-decisionist institutionalism in the political and legal thought of Carl Schmitt

summary

The subject of the dissertation is the work of the German jurist Carl Schmitt written after 1933, thus after he had abandoned the decisionist theory of law that had marked his thinking in the 1920s. This abandonment was significant insofar as Schmitt, who in the 1920s stated that the exception to the law was more interesting than the norm, began to focus precisely on the notions of norm and normality, developing first a theory of law inspired by French and Italian institutionalism - in particular the work of Maurice Hauriou and Santi Romano - which he described as concrete-order thinking, and then his own interpretation of the history of international law, in which the crucial was the notion of the earth as the source and ultimate confirmation of the validity of law.

In the introduction, I discuss Schmitt's decisionist theory from the 1920s, pointing out its limitations - particularly those related to the most salient point of reference Schmitt adopted in creating it, that is, Christian theology. I analyse his attempts, which arose while he was still a decisionist, to replace theological legitimation with mythological one (in the sense of Georges Sorel's political myth). Furthermore, I situate Schmitt's thinking from the 1920s on the background of earlier and his contemporary German philosophy of law, showing how he entered through it into a dispute with the positivist dogma dominant in German-speaking countries at the time, finding its most radical development in the normativism of Hans Kelsen. I juxtapose Schmitt's work with, among others, the thinking of Friedrich von Savigny, Georg Jellinek, and Paul Laband, also pointing out the historical circumstances of its creation - both in the context of Schmitt's biography and the history of Germany at that turbulent time. My main thesis is that, since decisionist thinking, legitimised in theology, was at some point no longer sufficient for Schmitt to describe legal phenomena, and mythological legitimation did not fit into decisionism, he was forced to break with it in the late 1920s and early 1930s.

In the first chapter, I describe this very break and the basic assumptions of Schmitt's concrete-order theory, discussing its programmatic text, *On the Three Types of Juristic*

Thinking from 1934. I focus primarily on the title distinction, interpreting the meaning of concrete-order thinking from the other two types - decisionism and normativism - which Schmitt, as a polemical thinker, critiques. I indicate how, with institutionalist thinking, Schmitt responded to the critiques of his decisionist theory (in particular those formulated by Leo Strauss and Karl Löwith). I compare Schmitt's thinking with the work of Hauriou and Romano, indicating what he drew from both these thinkers. At the same time, I point out that, although in the aforementioned text, Schmitt describes with some precision the very model of legal thinking he intends to work within, and the sorelian theory of political myth as a legitimation of law is more than hinted at in the text, Schmitt does not explicitly indicate what exactly in his contemporary Germany should be the content of a similar myth.

In chapter two, I deal with such an indication made by Schmitt at the same time and shortly thereafter, which is closely linked to his joining the Nazi party. In order to emphasise the originality of Schmitt's texts written during this period - 1933-1936 - I compare them with the works of other Nazi jurists, including Helmut Nicolai, Reinhard Höhn, and Otto Koellreutter. I analyse Schmitt's work as something more than the glossary to which German jurisprudence was confined during Adolf Hitler's reign, so as an original proposal for a model of public law in concrete-order thinking, which for Schmitt would have been primarily a reworking of the work of another German thinker: Hegel's *Elements of the Philosophy of Right*. It is in this spirit that I discuss such his texts such as *Weiterentwicklung des totalen Staats in Deutschland* and *Staat, Bewegung, Volk: die Dreigliederung der politischen Einheit*, which are most separate from Nazi rhetoric, and *Das Judentum in der Rechtswissenschaft* and *The Führer Protects the Law*, which are close to it. As the myth Schmitt proposed to legitimise the Nazi system of law, I acknowledge the perpetual presence of Adolf Hitler as the leader of the nation in the lives of those who are led by him, and thus a model of sovereignty different from that proposed in the Western post-Hobbesian science of politics and law. I also describe the circumstances by which Schmitt's proposal did not find an audience among the Nazis and the crown of leading jurist of the Third Reich fell from his head in 1936.

The third chapter is devoted to issues which, adopting a biographical key, can be described as, firstly, Schmitt's settling of accounts with the years spent in the brown shirt and, secondly, as an attempt to put the same shirt (and crown) anew. The two are closely linked insofar as, by settling accounts with the Third Reich in a camouflaged manner after 1936,

Schmitt was settling accounts with the formula of the political that it had adopted - the state. In doing so, he continued his reflections on the crisis of the state, already undertaken in the 1920s, except that after 1936 he diagnosed this crisis as immanently rooted in the institution of there state itself. Among his many other writings, I analyse above all his *Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, pointing out that Schmitt's reflection on the crisis of the state led him to develop, in his work *The Grossraum Order of International Law*, a model for a different formula for the organisation of the political, more - according to him - appropriate for the late 1930s, so the large space, *Grossraum*. I place this concept on the map of Schmitt's earlier struggles with international law (mainly his critique of the League of Nations) and the transformations of the latter in his time, pointing out that what Schmitt wanted above all to achieve with the *Grossraum* concept was - in addition to proposing a new, post-state formula for the organisation of political unity - to discredit the juridical international tendency to revive, in a new model, the medieval institution of just war (called by Schmitt discriminatory war). I also point to the new incarnation of concrete-order thinking that Schmitt developed for his international law theory, so thinking using the law in the Greek sense of *nomos*. I understand the latter, firstly, as a method of seeing by a political unity its legal order in a given territory with concerning its neighbours, and a method of using that order, changing with the changing ways of knowing and conquering earthly space. Through the prism of this first understanding, I analyse *Grossraum* theory as Schmitt's proposition for the *nomos* of his time, as for other times the *nomos* was the *respublica christiana* or the sovereign European state with a point of reference in the form of a colony.

This, however, is only one understanding of the term *nomos* - I deal with the second in chapter four, which treats it as binding law to the earth as such, thus being the final mythological legitimation of law that Schmitt projects. I analyse those of his writings in which he approaches a mystical conception of the planetary surface, seeing it as the ultimate means of obtaining certainty for the normative description of reality: above all: *The Nomos of the Earth, Land and Sea, Hamlet or Hecuba* and *The Theory of the Partisan*. I conclude that it was in rooting political action as then normatively described in the land as such - thus in the terrestrial way of life, not the maritime way of life Schmitt described in the case of England in *Land and Sea* and the text on *Hamlet*, nor the aerial way of life he personally experienced

in the final years of the Second World War - that Schmitt found a way to overcome the positivist dogma of his era, which he interpreted as detached from the surface of the planet. I conclude by analysing the above-mentioned writings (above all *The Theory of the Partisan*) additionally in the context of *Political Theology 2* and the lawyer's polemic with the Protestant theologian Erik Peterson, pointing out that with his semi-mystical treatment of the earth, Schmitt came close to the theological legitimation of legal norms that he proposed in his writings from the 1920s, that is, a legitimation in a structure transcendent to them that is given to man - for this structure meant for him the ultimate *katechon* of the legal order.

The work concludes with a summary, in which I conclude the earlier strands of my work, as well as an exhaustive bibliography.