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INO AUGSBERG

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Carl Schmitt's Fear: Nomos – Norm – Network

INO AUGSBERG*

Abstract
Carl Schmitt is still astonishingly present in the legal discourse. Yet instead of indulging in the study of his explicit 'lesson' and its possible impact on contemporary legal problems, it might be worthwhile to survey the primary cause of his greatest fear. Following this perspective, the article analyses Schmitt's concept of the nomos, distinguishing it from the traditional normativist approach on the one hand and confronting it with a more recent understanding of law in terms of the network conception on the other. Thus Schmitt's view of the developing legal system in the twentieth century proves to be relevant to our current efforts to grasp newly emerging legal phenomena in the twenty-first century.

Keywords
network; nomos; political; rhizome; textuality

1. Introduction

Carl Schmitt still plays a prominent role in current legal discourse on both the national and the international level, perhaps even more so now than before.[1] His later work, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*,[2] is, in particular, said to demonstrate an 'astonishing contemporaneity',[3] as it already confronted 'international law within a globalization process'.[4] However, the prominence of this 'very present and very powerful ghost from Old Europe's twentieth century past'[5] must cause some uneasiness, as his 'reprehensible association with the Nazis and his blatant antisemitism throw a well-founded shadow on his life as well as on some of his writings from that period'.[6] This is true not only of his writings from that period, but also of those from the post-war period, since his anti-Semitism lingered

* Dr. phil., Dr. iur.; Assistant Professor at the University of Munich [ino.augsberg@jura.uni.muenchen.de]. For helpful comments on earlier versions of this contribution I am indebted to Steffen Augsberg, André Luthardt, Alexandra Kemmerer, and, in particular, Helmut Aust. Unless noted otherwise, all translations from German texts are my own.

1 J.-W. Müller, *A Dangerous Mind: Carl Schmitt in Post-war European Thought* (2003), 221 ff.; see also the contributions in the specials issues of (2006) 19 LJIL and (2005) 104 (2) *South Atlantic Quarterly*.

2 C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1988); trans. G. L. Ulmen as C. Schmitt, *The Nomos of the Earth in the International Law of the* Jus Publicum Europaeum (2003).

3 F. Jameson, 'Notes on the *Nomos*', (2005) 104 *South Atlantic Quarterly* 199.

4 B. Levinson, 'The Coming Nomos, or, The Decline of Other Orders in Schmitt', (2005) 104 *South Atlantic Quarterly* 205. For a close reading of Schmitt's previous writings on international law, particularly during the time of the Nazi regime, see A. Carty, 'Carl Schmitt's Critique of Liberal International Order between 1933 and 1945', (2001) 14 LJIL 25.

5 W. Rasch, 'Introduction: Carl Schmitt and the New World Order', (2005) 104 *South Atlantic Quarterly* 177, 183.

6 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 424.

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on. In particular his anti-normativist concept of 'nomos' also has this anti-Semitic undertone (section 2). Nonetheless, as Martti Koskenniemi has pointed out, even these indisputable and inexcusable infringements 'fail to undermine the force of many of his insights about law and the political order'.[7] Yet these insights have a particular character. The most valuable insights do not necessarily belong to the 'lessons of Carl Schmitt',[8] that is to say, to the explicit content of his writings. Rather, the lesson to be learned from Schmitt can be found in the motivation underlying the explicit doctrine: his fear or, to be more precise, the object of his fear. Thus what I shall try to do is to analyse Schmitt's work in the sense of Freud's concept of negation; that is, as a 'kind of taking into account the suppressed, actually already a sublation of suppression, although, of course, not an acceptance of the suppressed'.[9] A close reading of *Politische Romantik*[10] reveals the suppressed object of Schmitt's fear to be a particular form of heterarchical connectivity: a network phenomenon (section 3). Hence Schmitt's fear can be used to outline a characteristic form of connectivity within our modern world society (section 4). However, taking into account that in addition to these new heterarchical connectivities the current situation is also characterized by important residues of the former hierarchical order, I suggest that the network model should rather be transformed into a rhizomatic conception (section 5). Against the background of this primary negative approach I shall eventually turn to another possible positive reading of Schmitt's texts, emphasizing the different *eigen*-rationalities of the political and the juridical sphere (section 6).

2. Nomos and norm

There is a long-standing tradition of conceptions of law combining a certain preference for the spoken word with distrust of positive law. The latter has had a frequent anti-Semitic subtext[11] since St Paul's teaching of the 'end of law' in which 'Jewish law' is contrasted with 'Christian grace'.[12] Carl Schmitt, the 'most-discussed German jurist of the twentieth century'[13] and, according to Hannah Arendt, 'without doubt the most important man in Germany in the areas of constitutional and public international law',[14] is a typical exponent of this tradition. A note in his posthumously

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7 Ibid.

8 H. Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (1998); see further, following the same perspective, A. Schmidt, 'The Problem of Carl Schmitt's Political Theology', (2009) 36 *Interpretation* 219.

9 S. Freud, 'Die Verneinung', in Freud, *Gesammelte Werke, Bd. XIV: Werke aus den Jahren 1925–1931* (1972), 9, 10.

10 C. Schmitt, *Politische Romantik* (1925), trans. G. Oakes as C. Schmitt, *Political Romanticism* (1986).

11 S. Kofman, 'Scorning Jews: Nietzsche, the Jews, Anti-Semitism', in Kofman, *Selected Writings* (2008), 123.

12 Schmitt, *Der Nomos der Erde*, *supra* note 2, at 39; see also R. Gross, '"Jewish Law and Christian Grace" – Carl Schmitt's Critique of Hans Kelsen', in D. Diner and M. Stolleis (eds.), *Hans Kelsen and Carl Schmitt: A Juxtaposition* (1999), 101.

13 R. Gross, *Carl Schmitt und die Juden: Eine deutsche Rechtslehre* (2000), 7. For Schmitt's followers see R. Mehring, 'Carl Schmitt und die Verfassungslehre unserer Tage', (1995) 120 *Archiv des öffentlichen Rechts* 177.

14 H. Arendt, *Elemente und Ursprünge totaler Herrschaft* (1986), 544, n. 53. For Arendt's – indirect – critique of Schmitt see A. Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (2008), 194 ff.

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published *Glossarium*, written in 1948, states,

> My disapproval of positivism came with growing age. Had it made more sense in youth? Compare with this the disapproval of 'positivity' by the young Hegel. Positivity = legality = Jewry = despotism = paroxysm of 'ought to do' and norm.[15]

Accordingly, Schmitt's own conception of norm, the 'nomos', is described as a deliberately anti-positivist figure, whereas law in a 'normativist' sense is supposed to be a phenomenon of degeneration. Schmitt intends to restore to the word 'nomos' 'its initial energy and majesty', although it had already in the course of time 'lost its original meaning and had sunk to the level of a general term lacking any substance, a designation for every normative regulation or directive passed or decreed in whatever fashion'.[16] Nomos is – in a philologically dubious way[17] – conceived of as original division and distribution, the 'Ur-Teilung und Ur-Verteilung'[18] of a people's land; it is designed as a 'space-dividing basic operation'.[19] In this 'original meaning', 'nomos' is 'the complete immediacy of legal power not mediated by legislative acts; it is a constitutive historical event, an act of legitimacy, whereby the legality of the mere statutory law is first made meaningful'.[20] Schmitt understands law as 'an expression of the fundamental – and irreducibly political – choice on which lay the unity of the human community'.[21] Thus he had distinguished, in his *Verfassungslehre* of 1928, between the constitutional law (*Verfassungsgesetz*) and the constitution itself (*Verfassung*), describing the latter as the unwritten, basically political, decision that is then patterned by the written constitutional law.[22] The concept of 'nomos' describes this fundamental decision in more detail. The basic legal operation is now regarded as being spatially organized: 'The Nomos is the immediate form in which the political and social order of a people becomes spatially visible.'[23] Thus the asserted difficulties of translating the word 'nomos' which motivate Schmitt to keep the Greek term are not only a consequence of a 'gesetzespositivistische Verwirrung'[24] (confusion of legal positivism) caused by the use of the 'fatal word' *Gesetz*,[25] but also due to the fact that the wholly adequate term was already in use in a totally different theoretical context. Despite its metaphorical form, which at first glance seems to suggest something else, Kelsen's *Grundnorm* is the radical antithesis to Schmitt's nomos. Kelsen openly affirms the fictitious, explicitly paradoxical character of this concept.[26] As a result of this fictitious character the *Grundnorm* is never an absolute phenomenon. Instead, it always appears mediated and furcated. Its manifest

15 C. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. E. Freiherr von Medem (1991), 209.
16 Schmitt, *Der Nomos der Erde*, *supra* note 2, at 36.
17 C. Meier, 'Zu Carl Schmitts Begriffsbildung – Das Politische und der Nomos', in H. Quaritsch (ed.), *Complexio Oppositorum: Über Carl Schmitt* (1988), 537, 553.
18 Schmitt, *Der Nomos der Erde*, *supra* note 2, at 36.
19 Ibid., at 36, 47.
20 Schmitt, *Der Nomos der Erde*, *supra* note 2, at 42.
21 M. Koskenniemi, 'International Law as Political Theology: How to Read Nomos der Erde?', (2004) 11 *Constellations* 492, at 496.
22 C. Schmitt, *Verfassungslehre* (1983), 21 f.
23 Ibid., at 39.
24 Ibid., at 38.
25 Ibid., at 41.
26 H. Kelsen, *Allgemeine Theorie der Normen* (1979), 206 f.

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necessity within the framework of Kelsen's theory cannot hide the fact that the nomos has thus become a nomad[27] crossing every national border. According to the Kelsenian understanding the *Grundnorm* is a comprehensive principle not only of national, but also of international, law.[28] This explains why Schmitt, using a typical anti-Semitic stereotype, could blame Kelsen's Pure Theory of Law for its groundlessness.[29] Not only did Schmitt explain 'normativism' as one of the 'three types of juristic thought', he also assigned it to an unnamed, yet easily recognizable, people. 'There are peoples', Schmitt declares, 'which exist without soil, without state, without church, only in the law. For them, the normativist thought appears to be the only reasonable thought of law, and every other form of thought is incomprehensible, mystical, fantastic, or ridiculous.'[30] For others the constitutive legal act had to be something else. As Koskenniemi puts it, 'Where a people (such as the Jewish) without land or State might well identify itself by reference to a formal law, the German substance – as indeed the substance of Europe itself – was based on principles of identification the most important among which was the original act of land-taking (*Landnahme*).'[31] Yet the relationship to common land was, for Schmitt, only one step in order to secure the necessary conditions for the German state and its political as well as its legal system. Resistance to the normativist type of thought committed only to positive law corresponds to an effort to contrast liberal legal egalitarianism with homogeneity of a different kind.[32] Schmitt fearfully observes that a plurality of voices pronounces the same words and sentences in different ways, and that this phonetic difference has serious effects on legal interpretation. His attempt, then, is to prevent this cacophony and at the same time to preserve the continuity of the legal system, in particular the 'legally secured position of the German public decision-makers and the independence of judges'. Schmitt searches for a legal system which guarantees predictable decisions beyond the classical liberal trust in the letter of the law. His solution to the problem is *Artgleichheit* (identity of kind):

> We are looking for a bond more reliable, more alive, deeper than the deceptive bond of pervertable letters of a thousand legal paragraphs. Where else could it be than within ourselves and our own nature? Here, facing the inseparable connection of officialdom and judicial independence, all questions and answers lead to the necessity of an identity of kind, without which a totalitarian state [*Führerstaat*] could not exist for one day.[33]

Consequently, for Schmitt the biggest threat to the legal system is not normativism as such but rather a certain process of 'degeneration', *Entartung*, which in his view is not

27 G. Deleuze, *Difference and Repetition* (1994), 36.
28 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (1928), 314.
29 Gross, *supra* note 13, at 225. See also on that stereotype N. Berg, *Luftmenschen: Zur Geschichte einer Metapher* (2008).
30 C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1993), 9.
31 Koskenniemi, *supra* note 6, at 415.
32 W. Hill, *Gleichheit und Artgleichheit* (1966), 182.
33 C. Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (1933), 46. For Schmitt's concept of *Artgleichheit* see P. Schneider, *Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt* (1957), 211; see further F. Hanschmann, *Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft: Zur These von der Notwendigkeit homogener Kollektive unter besonderer Berücksichtigung der Homogenitätskriterien 'Geschichte' und 'Sprache'* (2008), 12.

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limited to positivism but also comes with decisionism and a *konkretes Ordnungsdenken* (thinking of 'concrete orders'). Thus he considers the three 'types of juristic thought' in their 'sane as well as in their degenerate form'.[34] The aetiological categories used in this description give a particular tone to an explanation of the necessary elements for a functioning democracy written about ten years earlier:

> Every true democracy is based on the idea not only of treating equal things equally, but also, with inevitable consequence, to treat unequal things unequally. Thus, to democracy belongs first, of necessity, homogeneity, and second – if need be – the expulsion or elimination of the heterogeneous.[35]

Obviously it does not occur to Schmitt that democracy might be based on dissent rather than consensus.[36] Democracy is not conceived of as a political concept based on non-identity, in the sense that democratic procedures establish mechanisms in which governance is consistently fractured, political power bifurcated,[37] and the status of political subjectivity again and again newly disseminated.[38] Contrarily, Schmitt regards democracy as a concept based on identity. In his view, the basic precondition for the existence of a legal or a political system is the exclusion of otherness. The stranger, the alien, must be expelled, in order to safeguard social homogeneity and thus the desired equality between state citizens and, finally, the identity of a people and its government. Yet by introducing the concept of *Artgleichheit* into political and legal theory, he neglects the fact that homogeneity is the product of a certain dialectical process that never comes to an end. The logic of exclusion implies that the expelled person has been part of the expelling community.[39] Vice versa, the construction of an outer, hostile sphere creates an interior atmosphere of belonging. In both cases homogeneity is made, not given. It remains, therefore, always fragile, as does the distinction between friend and enemy based on it.[40] Astonishingly, this logic which Schmitt apparently neglects on the national level is described with great clarity in his writings on the problems of international law.[41] They explain that

> [A]ny relative and flexible pacification of Europe is achieved at the expense of the non-European world, against which holy wars – that is, total wars – are directed as a form of release or discharge (Schmitt speaks of *Entlastung*, 'unburdening') of unwanted violence. Europe imports relative peace and prosperity, as it were, by exporting violence.[42]

However, we can detect even in his writings on the national legal and political order figures tending to undermine the supposedly clear-cut distinction between friend

34 C. Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (1996), 8 (foreword to 2nd edn 1934).
35 C. Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1996), 13 f.
36 W. Rasch, *Sovereignty and Its Discontents: On the Primacy of Conflict and the Structure of the Political* (2004), 30; I. Augsberg, *Die Lesbarkeit des Rechts: Texttheoretische Lektionen für eine postmoderne juristische Methodologie* (2009), 113.
37 N. Luhmann, *Political Theory in the Welfare State* (1990), 231 ff.
38 J. Rancière, *Disagreement: Politics and Philosophy* (1999).
39 J. Derrida, 'Plato's Pharmacy', in Derrida, *Dissemination* (1981), 67, 130.
40 J. Derrida, *The Politics of Friendship* (2005), 116.
41 Schmitt, *Der Nomos der Erde*, *supra* note 2, at 64 ff.
42 Rasch, *supra* note 5, at 180 f.

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and enemy. In particular, in his book *Political Theology* of 1922 Schmitt presented

> a quite different, even contradictory, logic of the political. There, the structural function of the exception – the sovereign Godlike ability to declare a state of emergency and act outside of law – implies that the border between the law and lawlessness is permeable and, by extension, that the relationship of interiority (friends) and exteriority (enemies) is unstable.[43]

Yet on both the national and the international level the consequences remain the same: law in the sense of nomos is a law for equals inside the system, whereas the outsiders are excluded from the basic (as Arendt famously put it) 'right to have rights'.[44]

One should not be surprised, then, that the specific definition of 'nomos' as a territorial operation securing a common ground for a people, given in *Der Nomos der Erde* (which Schmitt published after the Second World War but which was for the most part written earlier)[45] has a remarkable predecessor:

> Following the will of the *Führer* is, as Heraclitus told us, a nomos, too . . . When we talk of leadership and the concept of the leader we may not forget that true leaders belong to this fight and that our fight would be hopeless if we had to be without them . . . We have them, and therefore I finish my lecture by telling two names: Adolf Hitler, *Führer* of the German people, whose will now forms the nomos of the German people, and Hans Frank, *Führer* of our German legal front, spearhead for our good German law, role model of a national-socialist German jurist. *Heil!*[46]

3. Law as textual network

Why, then, should we, against the background of such statements, still spend our time reading Schmitt? Why not take the both open and concealed anti-Semitic and fascist motivation as sufficient reason for assuming that modern legal theory has nothing to learn from Schmitt's ideas? In short, 'why Carl Schmitt?'[47] Because we can raise the question to what extent the work of this legal scholar 'corresponds to a problem that transcends the horizon of the suggested solution'.[48] The interesting phenomenon is, then, not what Schmitt propagated as his 'doctrine',[49] but what he feared most, and yet in this fear, in the 'courage of his fear',[50] perceived accurately and presented at least in an indirect way. Schmitt's thought and work

> repeatedly presaged the fearsome world that was announcing itself . . . lucidity and fear . . . drove this terrified and insomniac watcher to anticipate the storms and seismic

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43 K. Reinhard, 'Toward a Political Theology of the Neighbor', in S. Žižek, E. L. Santner, and K. Reinhard, *The Neighbor: Three Inquiries in Political Theology* (2005), 11.

44 On this concept see Arendt, *supra* note 14, at 614; S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (2004), 49.

45 On the historical background see R. Mehring, *Carl Schmitt: Aufstieg und Fall* (2009), 430 f.

46 C. Schmitt, 'Der Neubau des Staats- und Verwaltungsrechts', in R. Schraut (ed.), *Deutscher Juristentag 1933, 4: Reichstagung des Bundes Nationalsozialistischer Deutscher Juristen e.V., Ansprachen und Fachvorträge* (1934), 242, 251. See Gross, *supra* note 13, at 70.

47 B. Schlink, 'Why Carl Schmitt?', (1996) 2 *Constellations* 429; see also W. E. Scheuerman, *Carl Schmitt: The End of Law* (1999), 1; J. P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (1999), 11; Müller, *supra* note 1, at 2.

48 F. Balke, *Der Staat nach seinem Ende: Die Versuchung Carl Schmitts* (1996), 7, 15.

49 On this see Meier, *supra* note 8.

50 Derrida, *supra* note 40, at 107.

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> movements that would wreak havoc with the historical field, the political space, the borders of concepts and countries, the axiomatics of European law, the bonds between the tellurian and the political . . . etc. Such a 'watcher' would thereby have been more attuned than so many others to the fragility and 'deconstructible' precariousness of structures, borders and axioms that he wished to protect, restore and 'conserve' at all costs.[51]

In Schmitt's *Politische Romantik* the object of this fear is named the 'occasional'.[52] This concept is introduced to describe the Romantic movement. Romanticism makes the occasional come to light. By reshuffling a role previously reserved for God with the individual, and thereby subjectifying the traditional occasionalism, Romanticism sets the stage for the view that now everything can 'really become an occasion for everything, and everything that follows becomes in an adventurous way incalculable'.[53] What is emerging is

> an always new, but only occasional world, a world without substance, and without functional connections, without steadfast leadership, without conclusion and without definition, without decision, without last judgment, endlessly proceeding, led only by *the magic hand of chance*.[54]

For Schmitt, the meaning of the occasional becomes still clearer by regarding its antipode: the occasional 'negates the concept of the *causa*, i.e. the constraint of a calculable causation, and hence every commitment to a norm. It is a disintegrating concept'.[55] So which phenomenon is it that Schmitt describes here? Schmitt describes occasionalism as a world no longer constituted by a solid common fundament, a world no more characterized by an authoritative last ground binding for all social action taking place on it. Instead, the new Romantic world and its specific acts are constructed by contingent heterarchical connections. Romanticism claims that all its interior possibilities and necessities are created within the system, without any external constraint. From a modern point of view, we could regard this newly established world as the first emergence of a network of communicative operations which, during its communicative processes, experiences its own 'unfinishability' and its attached consequences.[56] These consequences include 'enabling of communication, despecification of the communicated meaning, favouring of connectability at the costs of form'.[57] Romanticism presents 'possibility as the higher category'.[58] What Schmitt fears, in this context, is not only a process of disintegration, in terms of an 'individually disintegrated society',[59] but also a change of epistemological

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51 Ibid.
52 Schmitt, *supra* note 10, at 22, and see on this K. Löwith, 'Der okkasionelle Dezisionismus von C. Schmitt', in Löwith, *Sämtliche Schriften, Bd. 8: Heidegger – Denker in dürftiger Zeit: Zur Stellung der Philosophie im 20. Jahrhundert* (1984), 32.
53 Schmitt, *supra* note 10, at 24.
54 Ibid., at 25 (emphasis in original).
55 Ibid., at 22.
56 Balke, *supra* note 48, at 27.
57 Ibid.
58 Schmitt, *supra* note 10, at 98.
59 Ibid., at 26.

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categories, from substance to function,[60] and a corresponding conception of reason transforming the old paradigm of hearing into the new one of comparing.[61] Romanticism initially regards things not necessarily as given but as 'interesting'.[62] Everything becomes interchangeable with everything.[63] *Causa* is understood not as a necessary condition, but – in the legal sense of the word – as an object of conflict and discussion.[64] Expressed in the vocabulary of systems theory, Schmitt describes a turn from hetero- to self-reference, from the foundation by a preconditioned fundamental connecting point which remains outside the system – God, nature, tradition, and so on – to a process creating its own interior connectivity. 'The *consentement* of romantic occasionalism creates a texture untouchable and therefore not disprovable by the outside world.'[65] Reality, for Romanticism, 'becomes but an occasion. The object is without substance, without essence, without function, a concrete point around which the romantic play of fantasy is floating'.[66] Therewith the specific Schmittian concept of function appears. Instead of contrasting substance and function, Schmitt conjoins them. Function is conceived of as a form of natural destination, a substantial quality determining the identity of an object. In contrast, a modern understanding of function would underline its non-substantial aspects. Hence, for instance, Niklas Luhmann explains the basic idea of functional analysis as comparison: if an object can be described by its functional aspects, then it can be described by the fact that it could be substituted with another object equally or even more up to the task. To think of function is to think of functional equivalents and thus of replaceability.[67] Function becomes an index for the lack of substantial identity. It is this modern concept of function that Schmitt negates. Whereas Kelsen regards the process of functionalization as a specific quality of modern science and thus also as an 'indispensable postulate for the development of an authentic science of law',[68] Schmitt describes it as a process of degeneration.[69]

What we can see from this is that Schmitt's thought is formed by a thoroughly analysed development being simultaneously fiercely combated and negated. There is something appearing inside the theory which the same theory attempts to suppress. With particular regard to the legal sphere, what he observes is a legal system without (territorial) foundation. It is a system that constructs (that is to say, feigns) its own certainties. Schmitt defines it as the conception of legal positivism. Such positivist theory serves 'as a theoretical ratification of the social process of *punctualization or occasionalization* of the political foundations – whether these foundations are

60 Schmitt, *supra* note 15, at 160, with reference to Ernst Cassirer's essay '*Substanzbegriff und Funktionsbegriff* (1910); sceptically, as to the coherence of Cassirer's distinction and the concept of *occasio*, Schmitt, *supra* note 10, at 193, n. 1; hereunto see Balke, *supra* note 48, at 126.

61 N. Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (1975), 8.

62 Schmitt, *supra* note 10, at 222.

63 Ibid.

64 Derrida, *supra* note 40, at 133.

65 Schmitt, *supra* note 10, at 146.

66 Ibid., at 123.

67 N. Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (1994), 83.

68 H. Kelsen, 'Gott und Staat', in H. Klecatsky et al. (eds.), *Die Wiener rechtstheoretische Schule: Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, vol. 1 (1968), 171, 193.

69 Gross, *supra* note 12, at 102.

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called state, political unity, or constitution'.[70] Positivism (or normativism) affirms the baselessness so typical of political Romanticism. In Schmitt's view, the contrast to positivist legalism is marked by the concept of pre-legal legitimacy. Consequently, he regards 'legitimacy' as an 'absolutely unromantic category'.[71]

Thus we can take Schmitt's account of Romanticism as a negative pattern that might be exposed in a different way. The negative image Schmitt draws can be taken as positive description of modern heterarchical linkings characteristic of contemporary law and society. As Schmitt describes occasionalism as a specific 'texture' (*Gewebe*) subverting the idea of a necessary 'imagination of the last authority, of an absolute centre',[72] we can read his description as characterizing a phenomenon of textuality. 'Textual' would thus have to be understood not in a narrow sense as a written form of language, but in a more formalized way as a particular form of intertwinement. Such a rather formalized understanding of 'text' can be found in post-structuralist perspectives on textuality: a 'text' in this sense is 'henceforth no longer a finished corpus of writing, some content enclosed in a book or its margins, but a differential network, a fabric of traces referring endlessly to something other than itself, to other differential traces'.[73] This concept of textuality fits nicely into describing the 'endless proceedings' of Romanticism. Thus what Schmitt calls the Romantic 'texture' is a form of textuality or positivism no longer directly bound to statutes and the hierarchical architecture of legal order. It is a legal system that constructs its own, no longer primarily vertical, but horizontal, heterarchical order. Instead of receiving its legitimacy from a supreme sovereign authority, the different singular legal operations are stabilizing themselves by alternate connections. Text, then, is no longer conceived of only as a written form of legal orders, but assigns the legal operation per se. This idea undermines the concept of a single subject – the sovereign will – deciding the law. The textual model implies self-referential operations without central control:

> 'Text' means 'tissue'; but whereas hitherto we have always taken this tissue as a product, a ready-made veil . . . we are now emphasizing, in the tissue, the generative idea that the text is made, is worked out in a perpetual interweaving; lost in this tissue – this texture – the subject unmakes himself, like a spider dissolving in the constructive secretions of its web.[74]

This heterarchical, textual conception of law is the main object of Schmitt's fear.

4. A FOURTH NOMOS OF THE EARTH?

In 1955, Schmitt described three possibilities of a developing global order.

> One was a universal empire under one great power – the United States . . . A second alternative was for the United States to take over England's place in the old

70 Balke, *supra* note 48, at 126 (emphasis in original).
71 Schmitt, *supra* note 10, at 174.
72 Ibid., at 22.
73 J. Derrida, 'Living On/Border Lines', in H. Bloom, P. de Man, J. Derrida, and G. Hartman, *Deconstruction and Criticism* (1979), 75, 84.
74 R. Barthes, *The Pleasure of the Text* (1975), 64.

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> territorial equilibrium as the 'balancer', the external guarantor of Europe's internal peace, accompanied by unquestioned primacy in the Western hemisphere. The third alternative – clearly preferred by Schmitt and perhaps seen by him as the one most likely to emerge – was a structure of territorial division between a limited number of large blocks (*Grossräume*) that mutually recognized each other and excluded external intervention.[75]

He did not, then, explicitly refer to the possibility of another, textual conception of law based on heterarchical mechanisms of self-referentiality.

However, within our contemporary society, such a conception of law as textual order is no longer a mere object of personal hypersensitivity or theoretical construction. In contrast, it has been the object of one of the most vivid debates in international law within the last years. These debates have dealt with the problem of constitutionalization on the one hand and fragmentation on the other.[76] Looking at the development of international law in the past few years, one could witness the emergence of a multitude of different specific legal regimes reacting to specific political problems. This phenomenon being fairly undisputed, the actual controversy is focused on the question whether or not these regimes can still be directed by central, superior rules or, contrarily, have to be co-ordinated via internal rules of collision.[77] International law, so it seems for some observers, can no longer be properly conceived of in terms of a hierarchical order.[78]

From a certain sociological perspective, the perspective of systems theory, this process of fragmentation and pluralization appears as no peculiarity of international law. Rather, it represents an ongoing process in our contemporary world society.[79] Accordingly, our society increasingly abandons hierarchical modes of organization. Instead, social structures are more and more based on functional differentiation.[80] These functionally differentiated social systems, as, for instance, economy, law, and science, have developed an internal complexity making it almost impossible to supervise (and thus to govern) the different fields of social action from a central point of view. Thus the sociological perspective substantiates the proclaimed inefficacy of centralized solutions.[81] In this view, a closer observation of societal structures shows us 'systems which are, on the one hand, so complex that they allow for a plurality of points of intersection and different chains of actions (and therefore are not determined in respect of unambiguous cause-and-effect chains) and which have, on

75 Koskenniemi, *supra* note 6, at 420.

76 For an overview on the debate see A. Paulus, 'Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts', (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 695.

77 On the ongoing discussion see, e.g., M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LJIL 553; A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999; B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', (2006) 17 EJIL 483.

78 Fischer-Lescano and Teubner, *supra* note 77.

79 N. Luhmann, 'Die Weltgesellschaft', (1971) 57 *Archiv für Rechts- und Sozialphilosophie* 1; Luhmann, *Die Gesellschaft der Gesellschaft* (1997), 145 ff.

80 Luhmann, *supra* note 67; see also W. Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (2000).

81 See on the possible relevance of systems theory for international law in general S. Oeter, 'International Law and General Systems Theory', (2001) 44 *German Yearbook of International Law* 72.

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the other hand (and within certain limits of variation), to remain stable'.[82] For this reason the traditional scheme of observation has to be modified from strict causality to mere probability. The multitude of potential ambiguous horizontal connections calls for a more complex form of organization which the traditional model based on linear hierarchies cannot offer.[83] 'Where complex combinations of regulation and networks of decision-making become decisive, there are dynamics, in particular back couplings, which cannot be caught by using the model of linearity'.[84] Hence what is needed is 'a non-hierarchical knowledge' that is generated by a distributed acentric process. This process 'produces (by historical dynamics of selectivity) a "process of fitting" of decisions creating its own standards of rightness'.[85] The development of concrete forms of law adapted to these societal processes, a law whose structures can no longer be determined by a sovereign supreme summit, can be observed in particular in the field of transnational law. 'Within the emerging world society the hierarchical model of the law of Western legal culture is facing a mutation which turns it into "something different" . . . All our well-known juristic patterns of legitimacy, interpretation and justification lose their foundation.'[86] What is emerging is a 'global law without a state',[87] woven by a network of interacting courts or court-like institutions,[88] which, although still mainly national and state-run, such as the national constitutional courts, are becoming increasingly internationalized.[89] Furthermore, not only public but also legal regimes established by private actors (in particular transnational organizations) have to be taken into account. In this context of an increasing fragmentation and pluralization of law in the international field, every hope for a 'hierarchically organized or conceptually dogmatic unity of international law' is, according to Gunther Teubner and Andreas Fischer-Lescano, in vain. Hence after the decline of legal hierarchies 'the only realistic option is to develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments of law'.[90]

The emergence of this 'global law without a state', which Schmitt did not (positively) foresee, although it corresponds in a certain way to his idea of the end of the epoch of statehood,[91] could be regarded as a cryptic fourth possibility for a new 'nomos of the earth'.[92]

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82 K.-H. Ladeur, *Das Umweltrecht der Wissensgesellschaft: Von der Gefahrenabwehr zum Risikomanagement* (1995), 23.
83 G. Teubner, 'Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts', in H. Brunkhorst and M. Kettner (eds.), *Globalisierung und Demokratie: Wirtschaft, Recht, Medien* (2000), 240.
84 W. Hoffmann-Riem, 'Gesetz und Gesetzesvorbehalt im Umbruch. Zur Qualitäts-Gewährleistung durch Normen', (2005) 130 *Archiv des öffentlichen Rechts* 5, 67.
85 Ladeur, *supra* note 82, at 35 f.
86 M. Amstutz and V. Karavas, 'Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum', (2006) 9 *Rechtsgeschichte* 14, 15.
87 G. Teubner (ed.), *Global Law without a State* (1997).
88 See on such a 'global community of courts' A.-M. Slaughter, *A New World Order* (2004); G. Nolte, 'Das Verfassungsrecht vor den Herausforderungen der Globalisierung', (2008) 67 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 129; E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', (2008) 102 *American Journal of International Law* 241.
89 Fischer-Lescano and Teubner, *supra* note 77, at 1000.
90 Ibid., at 1017.
91 C. Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (2002), 10.
92 C. Schmitt, 'Der neue Nomos der Erde', in Schmitt, *Staat, Großraum, Nomos* (1995), 518, 521.

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5. From network to rhizome

But how can we describe this new heterarchical conception of law in a positive way? Which model could serve us to point out its particular characteristics? Obviously, an adequate theoretical model for this new conception of law can no longer be the *Stufenbau* (the hierarchical ordering), for it is no longer a centralized vertical foundation but a horizontal connectivity that appears to be typical of the new situation.[93] However, even the metaphor[94] of the network, currently so fashionable,[95] does not adequately capture the modern constellation. The imagery of the net still suggests that we can confront the fundamental uncertainty of modern society with a homogeneous, symmetrically organized texture. This perspective underestimates the manifoldness of numerous communicative operations in contemporary society. We have to look for a kind of connectivity that is based neither on hierarchy nor on any other kind of predetermined homogeneity. Thus what comes to the fore is also insufficiently described in terms of a structuralist approach. For the 'general implication of this method . . . is that elements of a text do not have intrinsic meaning as autonomous entities but derive their significance from oppositions which are in turn related to other oppositions in a process of theoretically infinite semiosis'.[96] This perspective still attempts to control the irreducible plurality of the given circumstances by pressing them into a predetermined scheme. It operates with the idea of a recognizable underlying 'syntax' structuring the legal operations. The same criticism applies to the idea that one could reconstruct 'from the perspective of the complete system' a 'comprehensive context' by using different elements from within the network figure.[97] Moreover, the network model tends to suggest that all forms of possible connectivity have turned into the horizontal mode. Thus it neglects important residues of the former order. With particular regard to international law one must acknowledge that 'while the network model accounts for the diversification of legal regimes and the multiplication of actors in the international legal process, many central building blocks of the traditional international legal system, such as the rules on diplomatic protection or state responsibility, have remained remarkably stable'.[98]

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93 Paulus, *supra* note 76.

94 A. Kemmerer, 'The Normative Knot 2.0: Metaphorological Explorations in the Net of Networks', (2009) 10 *German Law Journal* 439.

95 K.-H. Ladeur, 'Towards a Legal Theory of Supranationality – The Viability of the Network Concept', (1997) 3 *European Law Journal* 33; Ladeur, 'Towards a Legal Concept of the Network in European Standard-Setting', in C. Joerges and E. Vis (eds.), *EU Committees: Social Regulation, Law and Politics* (1999), 151; Slaughter, *supra* note 88. From the perspective of private law see G. Teubner, 'Die vielköpfige Hydra: Netzwerke als kollektive Akteure höherer Ordnung', in W. Krohn and G. Küppers (eds.), *Emergenz: Die Entstehung von Ordnung, Organisation und Bedeutung* (1992), 189; Teubner, *Netzwerk als Vertragsverbund: Virtuelle Unternehmen, Franchising, just-in-time in sozialwissenschaftlicher und juristischer Sicht* (2004).

96 J. Culler, *The Pursuit of Signs: Semiotics, Literature, Deconstruction* (1981), 29.

97 G. Teubner, 'Paradoxien der Netzwerke in der Sicht der Rechtssoziologie und der Rechtsdogmatik', in M. Bäuerle et al. (eds.), *Haben wir wirklich Recht? Zum Verhältnis von Recht und Wirklichkeit – Beiträge zum Kolloquium anlässlich des 60. Geburtstags von Brun-Otto Bryde* (2004), 9, 23.

98 Simma and Pulkowski, *supra* note 77, at 484. Moreover, there are phenomena of network failure leading to the re-establishment of hierarchical orders; see G. Teubner, '"And if I by Beelzebub cast out Devils, . . .": An Essay on the Diabolics of Network Failure', (2009) 10 *German Law Journal* 115.

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A more adequate description of the modern legal system could use a different, even more pluralistic, model, a model which at the same time subverts any type of model-building: a rhizomatic conception[99] in the sense of Gilles Deleuze and Félix Guattari.[100] According to their concept, rhizome means – as a sort of 'generative network'[101] – a sprawling ramification no longer able to be reduced to a unitary master-pattern. Within rhizomorph formations, the entanglements programme themselves. Internal mechanisms of control in the form of binary codes which have to monitor their own proceedings with respect to continuous connectivity are not bindingly given in advance, but are 'only the product of an active and temporary selection, which must be renewed'.[102] Such a texture of self-dependent sprawlings, engraftments, recodifications, and modifying repetitions specifies the previous idea of law in its *textuality*: as an ongoing process.[103] Every new ramification is free, for it is neither determined by a previous ensemble nor committed to a particular intention. The dead end is also part of the rhizome.[104] And yet every nexus is integrated in the texture, for the rhizomatic 'principles of connection and heterogeneity' mean that 'any point of the rhizome can be connected to anything other, and must be'.[105] The rhizome

> enters in alien chains of evolution and knots transversal connections between divergent lines of developments. It is not monadic, but nomadic; it produces unsystematic and unexpected differences; it decomposes and opens; it leaves and connects; it differentiates and synthesizes, all at the same time.[106]

Hence when Schmitt assigns the 'classical' as being the 'possibility of unambiguous, clear decisions',[107] then the rhizome can be called the deliberately unclassical, if not to say Romantic, and, in Schmitt's sense, unpolitical texture, which subverts not only its own distinctions, but the idea of sovereign, supreme authority. If, according to Schmitt, within Romanticism 'everything ceases to be case and object, in order to become a mere point of contact',[108] then this description is even more valid for law as rhizomorph texture. Law, one might say, becomes an autonomous, depoliticized issue.

Yet of course we can never be sure that the movement will stop here. There can be no absolute depoliticization.[109] The rarer politics becomes, the more decisive its remnants might prove to be. We must be aware of the possibility that

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99 Differing from this C. Möllers, '*Netzwerk* als Kategorie des Organisationsrechts. Zur juristischen Beschreibung dezentraler Steuerung', in J. Oebbecke (ed.), *Nicht-normative Steuerung in dezentralen Systemen* (2005), 285, 287, who directly interrelates 'network' and 'rhizome'.

100 G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (1987), 3, 7.

101 The notion in K.-H. Ladeur, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation: Zur Erzeugung von Sozialkapital durch Institutionen* (2000), 69.

102 Deleuze and Guattari, *supra* note 100, at 10.

103 On this see in more detail Augsberg, *supra* note 36.

104 G. Deleuze and F. Guattari, *Kafka: Toward a Minor Literature* (1986); Deleuze and Guattari, *supra* note 100, at 14.

105 Deleuze and Guattari, *supra* note 100, at 7.

106 W. Welsch, *Unsere postmoderne Moderne* (1987), 142.

107 Schmitt, *supra* note 91, at 11.

108 Schmitt, *supra* note 10, at 26.

109 Derrida, *supra* note 40, at 129; and hereunto A. J. P. Thomson, *Deconstruction and Democracy: Derrida's Politics of Friendship* (2005), 161.

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depoliticization could just as well be 'the supplementary and inverted symptom, the abyssal hyperbole, of a hyperpoliticization'.[110] This perspective leads 'to a change in all the signs, and therefore *to having to measure politicization in terms of the degree of depoliticization* . . . The less politics there is, the more there is'.[111] And, where everything is political, nothing is political any more.[112] Maybe this hyperpoliticization was also one of the objects of Carl Schmitt's fear.

6. The ambivalence of the political

So far we have come to see Schmitt through the eyes of a Freudian analytic, describing which relevant insights in modern society and its legal system are enclosed by his thinking through trying to repress them. We have detected several objects of Schmitt's fear: the fear of a disintegrated society losing its constitutive character of interior homogeneity; the fear of occasionalism, as of a society no longer based on common grounds; the fear of extinction of the political. Thus our reading of Schmitt's work has been primarily a negative one. Yet what Schmitt's negative statements unwillingly describe could also be stated in a positive way: Schmitt observes the emergence of a heterogeneous, functionally differentiated society, that is to say of a form of heterarchical connectivity that might also – and perhaps more properly – be conceived of as a textual, rhizomatic phenomenon. The last-mentioned fear of hyperpoliticization, however, allows for still another rather positive reading. One might see the transition from a hierarchically organized legal system to the rhizome as development from fixed order to fluid process or, to use a Schmittian metaphor, from land to sea.[113] The question, then, is how the rhizome can avoid becoming an amorphous mass beyond all recognizable differences. Maybe we could read Schmitt's work as an attempt to answer this question. The territorialization of legal and political thought aims at the creation of boundaries between equal opponents. Schmitt's concept of the political, the famous distinction of friend and enemy, is thus 'genuinely a form of spatial thought, a "concept" that cannot be thought of independently of spatial relations'.[114] To this extent it would appear as a somewhat anachronistic idea, since it neglects the dimension of information as the 'new element that reproblematizes the spatial'.[115] Yet the distinction can also be regarded in a different context. Where everything is politics, nothing is politics any more – but the contrary seems just as valid. The abolition of the political is a political act.[116] The attempt to replace policy by police[117] merely reproduces the

110 Derrida, *supra* note 40, at 133.
111 Ibid., at 129 (emphasis in original).
112 Rasch, *supra* note 36, at 6.
113 On this distinction see C. Schmitt, *Land und Meer* (1981). Of course, Schmitt's own use of the metaphors does not refer to a turn towards network conceptions; it describes a development of international law from a European nation-state-centred perspective to colonialist, worldwide politics. See hereunto C. Burchard, 'Interlinking the Domestic with the International: Carl Schmitt on Democracy and International Relations', (2006) 19 LJIL 9, 11.
114 Jameson, *supra* note 3, at 203.
115 Ibid., at 204.
116 Rasch, *supra* note 36, at 97.
117 For a new discussion on this distinction see Rancière, *supra* note 38.

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friend–enemy distinction on a new level. The former foe is turned into a criminal, while the underlying mechanisms of inclusion/exclusion are kept intact. Schmitt's idea in this context is that if we cannot avoid these mechanisms, it is better that we should not try to hide them but rather come to terms with them in an open manner.[118] He argues for an acceptance of difference as opposed to a homogeneous new world order limiting violence at the cost of establishing an imperialistic regime.[119] Obviously, the problem has not lost its relevance. As Koskenniemi rightly remarks, it is the important task of current international law 'to avoid that kind of imperialism while at the same time continuing the search for something beyond particular interests and identity politics, or the irreducibility of difference'.[120] In a peculiar way Schmitt's work might help us to work on this task. Fear of hyperpoliticization thus means fear of de-differentiation. However, in the contemporary world society the differences that we wish to maintain can no longer be understood in spatial terms, thus founding difference on substantial identities.[121] It goes without saying that a certain kind of 'American imperialism'[122] or, more carefully, 'American unilateralism'[123] is a particular challenge for the further development of international law. Yet the critique falls short of the problem if the suggested alternative consists merely in a stronger European (or Asian, or African) influence on international law. Rather, the differences have to be regarded in the context of modern (world) society characterized by functional differentiation,[124] namely a society whose main sectors are no longer primarily spatially determined.

This change of perspective does not exclude stronger enforcement of human rights on an international level. However, such attempts have to be integrated in the larger context of the developing world society. Within the turn from a substantial to a functional perspective human rights can no longer be conceived of as the natural status of substantial entities. They must be described as genuine juristic constructions with a specific social function.[125] Within a poly-contextual world lacking a central point of observance, it is the task of fundamental rights to secure an independent sphere of action for each societal subsystem, and as such to serve as a bulwark against totalitarian tendencies of individual subsystems attempting to

118 Rasch, *supra* note 36, at 98.

119 Carty, *supra* note 4.

120 Koskenniemi, *supra* note 6, at 500.

121 See, however, on the ongoing relevance of borders in contemporary discussions on constitutionalism in European and international law I. Ley, 'Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus', in I. Pernice et al. (eds.), *Europa jenseits seiner Grenzen: Politologische, historische und juristische Perspektiven* (2009), 91.

122 On this perspective see G. L. Ulmen, 'American Imperialism and International Law – Carl Schmitt and the US in World Affairs', (1987) 72 *Telos* 43. See, moreover, with further differentiations, J. Tully, 'On Law, Democracy and Imperialism', in E. Christodoulidis and S. Tierney (eds.), *Public Law and Politics: The Scope and Limits of Constitutionalism* (2008), 69.

123 See the contributions in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundation of International Law* (2003); L. Viellechner, 'Amerikanischer Unilateralismus als Verfassungsfrage? Zur rechtlichen Begründung des einseitigen Handelns der USA auf internationaler Ebene', (2006) 45 *Der Staat* 1.

124 Rasch, *supra* note 80.

125 See, with respect to the concept of human dignity, K.-H. Ladeur and I. Augsberg, *Die Funktion der Menschenwürde im Verfassungsstaat: Humangenetik – Neurowissenschaft – Medien* (2008).

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take control of the entire society.[126] Consequently, the functional perspective is not identical with politicization. In contrast, one has to beware of an instrumental use of human rights turning them into mere means for the justification of new political configurations.[127] Thus a new '"culture of formalism" devoid of instrumentalist undertones',[128] as suggested by Koskenniemi with regard to the development of international law in general,[129] could also be applied to the more specific human rights discourse. 'Formalism' in this sense would mean to reflect and respect the specific *eigen*-value of juridical forms and juridical thinking, as opposed to political decision-making.

What is more, this change of perspective also has decisive influences on the concept of the political. If one wants to keep the political as a distinct sphere of social action, the political itself has to acknowledge the independence of other social spheres.[130] In this conception, the political has a characteristically ambivalent function – it marks the position of an autonomous social system which by establishing and securing conflict as a general societal principle paradoxically guarantees the coexistence of the conflicting social spheres. This ambivalent function of the political system can be found in the revisions that Schmitt made for the second edition of his *Begriff des Politischen*.[131] In contrast to the first edition of the book, Schmitt describes the political in the second edition – in an unmentioned, 'hidden dialogue' with ideas from Hans Morgenthau's dissertation[132] – no longer in the Weberian sense as an autonomous entity just like any other social sphere (such as morality, art, economics, etc.),[133] but states that it is a concept of intensity.[134] This ambivalence is another characteristic object of Schmitt's fear: Schmitt feared that in the context of functionally differentiated society

> the political is threatened with extinction – and with it, perhaps, the whole structure of modernity itself – if it cannot assert itself as something more or something fundamentally other than merely one of many such differentiated systems . . . Schmitt simultaneously champions the *autonomy* of the political system as well as the *primacy* of the political.[135]

Schmitt wants to count on and calculate with stable oppositions.[136] However, his attempt to stabilize the oppositions coinstantaneously undermines them. Obviously this ambivalence of Schmitt's concept is unsatisfactory. But if we think of – political

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126 Luhmann, *supra* note 61, at 79; G. Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors', (2006) 69 *Modern Law Review* 327; K.-H. Ladeur and I. Augsberg, 'The Myth of the Neutral State: The Relationship between State and Religion in the Face of New Challenges', (2007) 8 *German Law Journal* 143.

127 See on the problem C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007).

128 H. P. Aust, 'The Normative Environment for Peace – On the Contribution of the ICL's Articles on State Responsibility', in G. Nolte (ed.), *Peace through International Law* (2009), 13, 44.

129 Koskenniemi, *supra* note 6, at 500.

130 Rasch, *supra* note 36, at 5.

131 H. Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* (1995).

132 Koskenniemi, *supra* note 6, at 436; W. Scheuermann, *Carl Schmitt: The End of Law* (1999), 225.

133 On Schmitt's relationship to Max Weber see K. Engelbrekt, 'What Carl Schmitt Picked up in Weber's Seminar: A Historical Controversy Revisited', (2009) 14 *European Legacy* 667.

134 Schmitt, *supra* note 91, at 27.

135 Rasch, *supra* note 36, at 5 (emphasis in original).

136 Derrida, *supra* note 40, at 116.

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or legal – mechanisms whose task it is to guarantee a societal (international) order based on functional differentiation without taking control of society as a whole, but respecting the *eigen*-rationalities of the subsystems, then we may ask: do we have a better answer? Maybe a newly designed network model could at least point towards the direction in which we should look for one.[137]

137 See for another very interesting attempt to use the network model for further elaboration of political theory, with reference mainly to Jean-Luc Nancy, P. Armstrong, *Reticulations: Jean-Luc Nancy and the Networks of the Political* (2009).

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