Systems theory and legal theory

Luhmann, Heidegger and the false ends of metaphysics

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The political reception of Niklas Luhmann in the English-speaking world is still localized. His death in 1998 triggered a wider general interest in his work, and its susceptibility to reception in cultural theory has been clearly registered.[1] However, political debate on his writings is still largely confined to the theoretically tuned regions of legal sociology, and there have been few attempts in English to examine his sociology as a philosophy of politics.[2] In certain respects this is hardly surprising, as Luhmann distances himself from common definitions of both philosophy and politics.[3] Nonetheless, his work continues a distinct tradition of German political theory, and his thought is influenced by the political conceptions of Georg Simmel, Hans Freyer, Arnold Gehlen and Helmut Schelsky. His debates with such theorists thus place him close to the centre of widespread discussions on the nature of politics, on political legitimacy and the law, and on the theoretical preconditions of political humanism. Against this background, this essay has three primary intentions. First, it seeks to give an account of the political-philosophical foundations of systems theory. Second, it critically scrutinizes Luhmann's position in wider debates on political philosophy. Finally, it focuses on the relation of politics to law in his sociology, and in this respect it connects his work – both conceptually and politically – with the treatment of law and legitimacy in the writings of Martin Heidegger.

Underlying Luhmann's sociology is a critique of metaphysics. In his own words, his theory of social systems abandons 'the domain of metaphysics in the classical sense', and it also renounces 'modern subject-metaphysics'.[4] His sociology, in consequence, is premissed in a resolutely anti-foundational conception of social being, and it refuses to acknowledge the existence of any essential structures of meaning, value or agency existing prior to the positive facts of societal communication. Against classical metaphysics, he dismisses all claims that a structure can be imputed to human society which is not autonomously produced by the evolution of the particular systems that form society.[5] Against the metaphysics of the subject, he opposes all reconstructions of metaphysics as an account of original faculties of human cognition or existence. Like Foucault, therefore, he rejects all attempts to define invariable attributes of human reason or character which might explain, or even prescribe, the characteristics of social reality. In short, he opposes all attempts to interpret modern social systems in light of causes, values or attributes which can in any way be stabilized or universalized in contrast to the temporary emergence of these systems. Most especially, however, he sets himself against all variants on the original metaphysical claim that there is a distinct underlying order to events in society, and that this order can be isolated in the form of *law* (either causal or moral).[6]

This theoretical underpinning has direct consequences for the ethical and cognitive components of Luhmann's sociology. His theory of social systems hinges on the argument that each system of society is a closed or autopoietic unity of operations, and that no system is permeable to normative perspectives from outside it. Each system obtains a code, which enables it to differentiate itself from its environment, and to develop its own operations as an autonomous unity of self-referential, entirely *contingent* sense. The legal system, for example, differentiates itself from other systems by developing the code lawful/non-lawful, through which it selects information relevant to it. The political system constitutes itself by developing the code of power, and then by applying this to themes

which are relevant to power. No system can formulate its relation to its environment, or react to problems in its environment, except in the binary options of its own internal code. This is not to say that systems have no means of learning about their environment. Contrary to cruder renditions of his sociology, Luhmann clearly states that each system possesses facilities for learning, which allow it to register malfunctioning in its relation to the environment, and, where necessary, to alter the applications of its code. However, learning within a social system can only occur through the options which that system incorporates, and it cannot result from externally deduced information or instruction.[7]

Consequently, Luhmann's theory of systems develops an advanced position in the critique of metaphysical ethics. He rejects normative sociological or political perspectives, which argue that social agency can be regulated by theoretically sustainable moral axioms, and which place ethics externally to the local composition of meanings and expectations.[8] In its cognitive implications, his theory indicates that each system of society generates motivations for those social agents who are its addressees, and that the rationality of these motivations cannot be questioned either from inside or outside the system.[9] A system is *rational* if it can stabilize its own contingent reality against the complexity of its environment. This rationality, however, is never determined by criteria not produced in the system itself.[10] Claims from outside a system (sometimes known as 'protest') that a system is in some way 'untrue' or 'irrational' are at most systemic self-descriptions, through which a system might gain information about slight frictions in its relation to the environment.[11] In the rationality of a system, moreover, truth and ideology are indistinguishable, and there is no mode of human consciousness which might hold a measure of true validity against the operations of a social system. The 'truth' of a system is merely a variable in its functional rationality, and the functional rationality of a system is always assessed by the extent to which it successfully realizes itself – as contingency – against external or environmental realities.

At the heart of Luhmann's cognitive, ethical and political perspectives is therefore a claim for a unity of theory and praxis which attempts to dismantle all foundational epistemology.[12] Cognitively, Luhmann asserts that theory has no dignity against praxis: human consciousness cannot extrapolate itself from the operations of the systems which it inhabits in order to criticize its objective conditions. In his political ethics, likewise, he claims that political legitimacy, and above all

legitimacy in law, does not result from theories about right order. Rather, the legitimacy of political authority is obtained where the systems and subsystems which form 'politics' demonstrate that they can practically manage the complexity (perhaps communicated as 'public opinion') which is their environment, and if they can generate or manipulate symbolic consensus on that basis.[13] Legitimacy in politics is therefore 'the form in which the political system accepts its own contingency':[14] it is the system's representation of its own realized unity, and it does not imply congruence with founding norms. Theoretical reflection on legitimacy is in fact likely to undermine the legitimacy of the political system. The 'thematization of legitimation', he states, 'does not have a neutral effect as far as the politics of legitimation is concerned, but tends to greater delegitimation'.[15]

It is in his reflections on law, however, that Luhmann develops his most far-reaching assault on residually metaphysical assumptions. Legal theory, he intimates, is the most common bearer of quasi-metaphysical misconceptions. Indeed, legal theory is the habitual heir to the illusions of metaphysics, as it tends to echo the metaphysical conception that the world possesses an underlying universal order, and that this order can be theoretically reflected in law. This is apparent above all in its tendency to detach law from social facticity, and then to burden it with the expectation that it might impose invariable norms and values (justice, equality etc.) on this facticity. In fact, however, law is simply a self-reproducing complex of norms, which has assumed positive functional autonomy in the course of the evolutionary development(s) of modern society. Modern law is a medium that allows distinct systems (and especially the political system) autonomously to formalize their relations to their environments, and thus to gain positive, contingent legitimacy for themselves. The legitimacy of law does not derive from any source outside law itself: it does not depend on law's correspondence with broadly mediated social contracts, on its relation to rational-subjective prescriptions, or on any extra-legal principle or fact. Legal legitimacy derives merely from the success with which it secures acceptance for itself.[16] The foundation of legitimate law, therefore, is simply its own recursive positivity, and any attempt to make legal normativity reliant on extra-legal reflections threatens its legitimacy. Political legitimacy, consequently, is the ongoing reality of a political system, in which 'the legitimacy of pure legality finds recognition' and in which, through the positivization of law, 'legitimate legal validity can be claimed for any content'.[17]

Luhmann always distinguishes between the legal system and the political system. The legal system, he argues, only operates effectively because it is not political.[18] The political system can only function because it mobilizes processes of *legislation*, through which law provides a medium in which politics can confer acceptable form on its policies.[19] Close to the early theorists of the legal state (*Rechtsstaat*), in fact, Luhmann sees politics and law as invariably separate and invariably interdependent systems. Politics needs law to transform its decisions into generalizable media; to obtain this, however, it must also cede power to the legal system, as the legal system necessarily second-codes power in accordance with its own code of lawful/non-lawful. Power and law are held together in a differentiated interdependence of *second-coding*, in which law derives content from power, yet in which law also formally limits power, or opposes its own counter-power (*Gegenmacht*) to the power communicated by politics.[20]

In short, Luhmann sees legislation as a neutral process of transmission that communicates in the form of law the decisions which the political system produces, but for whose processing politics on its own does not possess adequate resources. Legislation is thus the moment in the decision-making of the political system which connects politics to its addressees (the public), which externalizes the relation of the political system to its public, and through which the political system secures its own long-term legitimacy. Significantly, Luhmann does not view legislation as the exclusive premiss of elected legislatures or representative bodies (normally defined as parliaments). Instead, legislation is a complex process of systemic self-stabilization, in which the political system secures its own legitimacy through *administration*.[21] Legislation can be the functional province of bureaucratic planning apparatuses, of discussion groups, of round tables between government and organized labour, of strategically created sub-executives, or, equally plausibly, of MPs appointed by popular election. Legislation is simply that multi-formed process which occurs wherever administration picks up decisions made in politics, and confers on these a medium (law), which might be recognized and accepted by the public. The public, then, will or will not re-endorse (through elections, complaints to the press, or common shows of acclamation) the government that first drafted the policies. Luhmann's political theory is especially suited to neo-corporatist theories of government, which identify legislation as a predominantly bureaucratic activity, and which reject the primacy given to the elected legislature in

classical or normative liberal theory.[22] In any case, it is in laws made by the *administration* that politics preserves its legitimacy and creates the probability of further legitimacy.

Running through all these reproaches against the metaphysical legacies in modern social theory is an attack on humanism, or philosophical anthropology. Indeed, Luhmann implies that the root cause of the major errors in modern social theory is the enduring focusing of reflection on human beings, as centres of needs and values distinct from the systems of social communication. The social world in all its complexity and contingency is, he indicates, only ever falsely construed by theories which make the human being, defined as a unique source of accountability and causation, the point of departure for their inquiries. Sociology, he indicates, must always be something quite radically different from anthropology.[23] The social systems of modern society, he states, do not operate in accordance with 'human' needs, and the laws which regulate these social systems do not have their origins in integral people. The widespread belief that this is the case is merely one last, most fateful trace of metaphysics, which transfers the original illusion of ontological order (or heteronomy) into an equally simplistic model of a world revolving around the autonomous legislative person. Congruence with formally measurable or legally determinable human needs cannot, however, be invoked as a measure for the legitimacy of modern systems. In fact, the modern legal and political systems become legitimate precisely in the process through which they decouple themselves from reflection on human attributes or interests.

A human law?

In these reflections, Luhmann places himself in direct opposition to the theoretical backbone of post-metaphysical debate in modern political theory, especially in the German tradition. Very summarily, it might be argued that, from Kant to the present, the main preoccupation of political reflection in Germany is to account for the anthropological source of legitimate political order. The major political perspectives since Kant – most obviously, Fichte, Hegel, Nietzsche, Weber, Simmel, Schmitt and Habermas – all indicate (albeit in very diverse terms) that legitimate political order must be anchored in a particular conception of the human person, and that the laws of legitimate politics must publicly re-present the essentially human structure of legal subjects. At the foundation of modern German political philosophy, in consequence, is a coupling of anthropology and representation, which

separates out the human being from all previous meta-physical or theological models of political legitimism and causality, and which posits the law-giving person, free of heteronomous determination, as the legal origin of legitimate order.[24]

Of greatest importance, however, is the fact that the most influential attempts to account for the non-metaphysical foundations of legality and legitimacy never finally abandon the terrain of metaphysics. Kant defines legitimate law as the objective expression of the quintessentially human capacities for reason and autonomy. Indeed, he conceives of human reason itself as intrinsically 'legislative', and views legitimate power as the objective form of such reason. However, Kant's metaphysical debts in this conception are quite mani-fest. He founds legitimate politics in the self-legislating legal subject – but the laws prescribed by this subject can only exist as an 'illusion', whose transcendental conditions are prior to all practical and historical expe-rience.[25] Following Kant, Fichte and Hegel also give essentialist-anthropological accounts of law. Fichte sees legitimate law as the practical self-positing of human reason, and Hegel sees it as the historical reali-zation of the innate idea of human freedom. However, both Fichte and Hegel still only manage to explain law's legitimacy as the manifestation of attributes of human reason, which are metaphysically prior to human practical life itself.[26]

Subsequently, Nietzsche criticized the Kantian legal subject as a malign distillation of economic calculation, and he imagined true existence beyond formal-metaphysical laws, which suppress vital exist-ence. Yet Nietzsche himself merely replaced formal values with an essentialist construct of decisionistic self-authorization, and paradoxically reintroduced the idea of willing self-legislation as the expression of humanity's founding substance.[27] Following Nietzsche, Weber argues that legitimacy in law emerges from truly *human* political responsibility, through which charismatic legislators infuse contents into law which are distinct from solely functional modes of legal-ity. Simmel, too, views legitimate law as a medium in which human existence can decisively articulate its most unconditioned imperatives. Carl Schmitt, although (like Nietzsche) not obviously a theorist of the legal subject, conceives legitimate law either as the expression of the historically cemented consciousness of the people, or as the *re-presentation* of ethical ideas, through which humans define themselves as other than functional or economic agents.[28] Nonetheless, Weber, Simmel and Schmitt only manage to account for the human legitimacy of law by positing a prior

typology of character, which asserts that certain types of people and certain types of interaction are more equipped to produce legitimate laws than others.[29] Analogously, Habermas describes legitimate law as an order of value-rational norms in which the human orientation towards rational agreement is given objec-tive public form,[30] and through which privately free citizens rationally authorize their political obligations. Yet Habermas only succeeds in envisaging legitimate law because he pre-defines certain modes of human interaction (discourse) as invariably oriented towards the production of universalizable laws.[31] Even Marx, who expressly depreciates law as a medium of pos-sible freedom, might also be seen to envision the emancipation of labour as the fulfilment of certain prior criteria of justice, which are always already inscribed in labour.[32]

Each of these key theoretical positions, therefore, makes a very specific claim for law: namely, that human practical self-realization occurs through law, that law gives objectively adequate form to the found-ations of 'the human', and that political life obtains legitimacy in so far as it is representatively transparent to the legislative substructure of the human being, as some variant on the legal subject. In each of these perspectives we encounter diverse types of legal anthro-pology, which explain the underlying composition of humanity as an independent capacity for obtaining law, and for grounding legitimacy on that original founda-tion. Yet each of these arguments still contains half-suppressed metaphysical elements and is ultimately unable to explain the production of legitimate law as a consistently post-metaphysical operation. In producing law as an autonomous legal subject, humanity simply elaborates its own prior orientation towards legislation. The original autonomy or humanity which founds the laws, therefore, is still 'metaphysical'. In each of these instances the shift from metaphysical to anthropologi-cal conceptions of legitimacy is not conclusive, and political legitimacy is obtained by faculties of reason or character, whose existence is always conceived as a prior component of the human constitution itself.[33]

Luhmann's systems-theoretical conception of law stands at the end of this tradition, and it directly sub-verts all humanist or residually metaphysical aspects of reflection on legality and legitimacy. The legitimacy of the political system is not an anthropologically meaningful condition, and it does not reflect any human experience of free self-legislation. Legitimate law is nothing more and nothing less than the con-tingent form of the legal system, and the contingent form of the political system as it externalizes its

Olivier Richon, from *Allegories*, Salvo 008, London, 2000.

Heidegger's debate with Kant, and, by distortedly stressing one aspect of his philosophy, they omit to notice the extent to which his thought hinges on a practical-historical reconstruction of Kant's legislative concepts of human subjectivity and validity. At the heart of Heidegger's work is the argument that in Kantian ethics and epistemology the residues of Platonist metaphysics have been remodelled into a conception of being, which formalizes the human person as the exclusive measure of moral and cognitive validity. This conception, for Heidegger, reifies the human against historical phenomena, and is unable to account for being (and also for human-being) in the full breadth of its occurring plurality. For this reason, Heidegger implies that, for all Kant's epoch-making endeavour to cut away the superstructure of classical metaphysics and so to account for human freedom and independence, he only succeeds in reorganizing metaphysics as a science of humanity (an anthropology), which transposes the primary legal order of metaphysics onto the human legal subject. This subject, then, as a ghostly universal legislator, is called upon to regulate the conditions for all possible knowledge.[38]

internal boundary-relation to citizens (its environment). Political legitimacy, therefore, is the system's own experience of self-legislation: it is a radically autonomous *occurrence* (*Ereignis*) of order,[34] in which the communications which form politics perpetuate their own reproduction, free of all obligation to categorically enduring laws. Indeed, where positive law is recognized and accepted as legitimate law, Luhmann explains, 'in a central question of human co-existence arbitrariness becomes an institution'.[35] This position has very close affinities with that other most influential attempt to dismantle the neo-metaphysical legacy in political thought: the philosophy of Martin Heidegger. Indeed, in the debate on legality, and on the legitimacy of legality, Heidegger's work is directly relevant for functionalist theory, and Luhmann might easily be viewed as the major political inheritor of Heidegger's theoretical lineage.[36]

Time, not law

Like Luhmann after him, Heidegger's thought has its critical centre in a debate with the legal-anthropological views in modern German philosophy, especially those deriving from Kant. Receptions of Heidegger have been badly affected by the early existential misreadings of his work, which take their lead from his concept of *Eigentlichkeit*, widely and mistakenly translated as 'authenticity'. Referring to this term, a view on Heidegger still persists (even amongst avowed-ly anti-existential philosophers) that sees him as a theorist of transformative subjective exper-ience, and so as a covert anthropological or even quasi-humanist philosopher.[37] Such interpretations, however, usually fail to appreciate

Above all, on Heidegger's view, Kant is only able to conceive of the human (and of human freedom) on the foundation of law. His idealism reduces human being to an empty series of legislative operations, in which pure reason regulates the extent of its cognitive validity, and in which practical reason regulates the conditions of ethical autonomy. His transcendental legal subject, thus, can only give the most impoverished description of human knowledge as the result of a reified or *juridified* unity of consciousness, and it can provide only the most depleted reflection of human freedom as an abstract moment of self-construction in the medium of *formal right*.[39] Kant's idealism, simply, cannot understand the complex and changing reality of the world: this is because it is still metaphysical, and because it desperately imputes a founding legal order to the complex realities which it encounters. In many respects, Heidegger's entire philosophical project might be viewed as an endeavour, after metaphysics, to liberate the human (and its freedom) from juridical

categorizations, and thus, contra Kant, phenomenologically to account for the limitless temporal plurality of human life-contexts, and of the infinitely diverse and truly autonomous meanings that compose these.

Opposing Kant, Heidegger gives an account of human cognitive existence in which human thinking is not the operation of a pre-stabilized legislating centre, but a practical process of interpretation, in which understanding is locally and fleetingly determined by the social and historical nexus in which it occurs.[40] Moreover, he proposes a model of ethical life in which human action obtains contextual legitimacy and is not validated by the prescription of prior conditions of right. He thus interprets human existence, and the historical concretions of human-being, as practically engendered arenas of validity, whose endlessly evolving structures are centred neither in essential-anthropological foundations, nor in quasi-metaphysical forms of cognitive or ethical justification.[41]

Importantly, in his early lectures Heidegger also gives an account of 'world-formation' (*Weltbildung*) as the constitutive activity of human cognitive and ethical being. The construction of 'world', he explains, is the gradual historical establishment of common orientations for human communication. By forming a 'world', particular historical agents create meanings in time; these enable the reliable co-ordination of action, stabilize social expectations, and cement historically and plurally normative orders of obligation. The world, in consequence, is the horizon of reality in which human-being interprets its simultaneous relation to, and difference from, Being (*Sein*) itself. The constitution of the 'world' is an event of social formation, in which theory and praxis are not antinomically distinct elements, but in which reflection, action and communication all combine to produce the dense fabric of terms, around which human beings give some kind of mediated foundation to their lives. The communicatively structured forms of the world are ever-changing, as they are not anchored in invariably valid prescriptions. There is no gauge of good praxis outside the world, or outside the local orders of meaning within it: the world, therefore, is both the shared reality and the shared fate of those people whose beginnings and ends are inscribed in it.[42]

This opposition to the juridically reified structure of human consciousness in Kantian and post-Kantian political theory is the premise for Heidegger's political thought.[43] Consciousness which is reified as a formal centre of reflection cannot, he intimates, produce political order as anything other than law: it can only generate political order as set of immutable conditions imposed on the otherwise constantly shifting circumstances of historical being. Reified consciousness, therefore, can only give rise to political order as metaphysics, anthropologically transcribed into laws (this is close to Heidegger's understanding of liberalism). Such order can never be truly legitimate, for at its core is a violent (legal/metaphysical) reduction of being itself. In a genuinely legitimate political order, in contrast, human historical consciousness would no longer formally extrapolate itself from being into universal ethical standards or values, but would endlessly produce practical forms adequate to its own conditions. The constitution of genuinely legitimate political order, Heidegger consequently implies, depends upon the end of the reification of consciousness, and so upon the *end of law* – or at least on the end of law as an antinomically deduced set of postulates, intelligibly placed on being by a legal subject. Legitimate political order occurs where human historical consciousness realizes itself in appropriate objective forms, against which no abstract theoretical measure (laws) can be mobilized. The legitimacy of historical or political form is for Heidegger, in short, a condition which cannot be predicated on particular or reasoning human beings. It emerges only as the particular or reasoning authorship of law and power recedes, and where this is replaced by commonly mediated, yet substantially relative forms of worldliness, as *Dasein*.

In their responses to the political legacies of metaphysics and metaphysical anthropology, Luhmann and Heidegger evidently have a great deal in common. Both assert that the processes of sense-composition in society have no discernible origin in the particular person, or in particular reason. The modes of local and practical co-ordination which build the *world* (Heidegger), or the self-referential communications which occur in *systems* (Luhmann), constitute an entire truthful reality, against which no external criterion can be invoked, and whose validity cannot be assessed by any recourse to static human essence. Common to both Heidegger and Luhmann is thus an anti-humanist hermeneutic, which suggests that the human mind cannot reflexively deduce or stipulate the defining terms of its existence, and that the plural events of human-being and human freedom can only be understood if they are detached from all anthropologizing foundation in *right*. Social realities, they thus suggest, generate and justify themselves not through juridically sanctioned principles of legal subjects, but merely through their own objective *contingency*.

In their common decoupling of human being from metaphysical and juridical form, both Heidegger and

Luhmann view *time*, not law, as the modality in which human life structures itself most adequately. For Heidegger, the 'world' is the concrete form of contingency, in which human relations are fleetingly yet authoritatively inscribed in time as action-orientations. The world does not result from any timeless human preconditions; most especially, it does not arise from the temporally unvaried encasing of human essence in law. The world is merely the formed order of being-in-time, in its contingent self-differentiation from the infinite chaos of possible meanings, which are outside of it.[44] It is a practical reality, in which human interpretation produces its own meaningful time, in contradistinction to the unstructured time elsewhere. Similarly, Luhmann identifies the genetic origin of social systems in the moment of reflected contingency, in which communications are co-ordinated (in double contingency) around multilaterally accepted sense or codes. Through such *double-contingency*, systems generate reliable expectations (or expectation-expectations), which give a temporal horizon of predictability to human operations.[45] Systems thus have the function of *time-binding*: they stabilize counterfactual norms against the complex temporal reality outside them, and so allow people to invest trust in the functions of a system, and to entertain even highly uncertain and alarming futures by reducing, or counterbalancing, the indeterminacy of the developing environment. Like Heidegger's 'world', therefore, the system is a place of 'sense', which detaches human meaning from the forms (cognitive or moral laws) that found timeless validity, and which *creates time* through its own self-organization as contingency.[46]

A direct parallel might also be drawn here between the relation of *Dasein* to Being (*Sein*) in Heidegger's fundamental ontology and the relation of system to environment in Luhmann's functionalism. Heidegger argues that human practical life, as *Dasein*, creates regions of meaning, which possess their own inner-temporal validity, but which are always *different* from Being itself. However, in its contingent self-differentiation from Being, *Dasein* is also always related to Being: it is only through the difference of the meanings which constitute the world of *Dasein* that any knowledge of Being itself is obtainable.[47] Similarly, Luhmann echoes this view by explaining the construction of social or systemic sense as a process through which *reality* is differentiated from *truth*. No system, he explains, can have knowledge about the truth of its functions in relation to its environment, except in the codes which it produces through its autopoiesis. A system, therefore, can only gain information about

its environment (and itself) by generating a contingent horizon of internally valid references, through which it negates, selects and constitutes its own outer reality. In this respect, both Heidegger and Luhmann concur quite fundamentally in the insight that no positive-ontological claim can be made about the conditions of Being. Being itself can only be addressed through processes of communication, which compose their own temporal reality as an infinite and paradoxical *difference* against their environment(s), and against Being itself.[48]

The political implications of these last points also warrant direct critical comparison. Both Heidegger and Luhmann imply that human order, either as *Dasein* or as system, can only ever give to itself a temporal reality of legitimacy, as difference: its legitimacy *is* this temporal reality. If a precise doctrine of legitimacy can be extracted from Heidegger's philosophy, he might be seen to suggest that a political order obtains legitimacy where, free of law, it develops a historical form, in which it both accepts and paradoxically denies the contingency (*difference*) of its relation to Being.[49] The legitimate 'act that founds a political state', he explains, anchors the political order in that revelatory moment in which 'truth comes to shine forth'. However, this originary founding truth of the polity only actually discloses itself through entities in the world, and so as difference against truth, or as *the shine of truth* – the shine of legitimacy.[50] Luhmann echoes this by indicating that the legitimacy of the modern political order relies on its ability to propose *paradoxes* (in the semantic sense of 'the state' or of 'sovereignty' or even of 'values'), which, both admitting and denying the fundamental contingency of the state, stabilize order as an unconditionally accepted and reflected temporal paradox.[51] 'Legitimation is', Luhmann states, mirroring Heidegger, 'the transformation of the absent into presence, as values.'[52]

On this basis, Heidegger and Luhmann endorse a political ethic which insists that there is no demonstrable alternative to the objectively formed life of the polity at any given moment in its emergence and evolution. The polity, both imply, is contingent and paradoxical, and it offers no firm standards by which it might be criticized. Indeed, in so far as either Heidegger or Luhmann subscribes to any clear political world-view, both might be seen to endorse a political reality which (however ironically) combines aspects of *pluralism* and *authoritarianism*. Heidegger's ability to combine a theory of the plural formation of meaning with an enthusiasm for extreme political authoritarianism has been extensively documented. This is not

the place to reconstruct the now almost impossibly ramified debates on Heidegger's involvement with the National Socialists, or on the extent to which this was or was not founded in the conceptual base of his philosophy.[53] It might simply be observed, however, that at the core of his political theory is the intimation that the worldly reality of *Dasein* constructs itself plurally and free of law, but that it lastly also prescribes itself, *as law*, to those whose particular being falls into it. *Dasein*, as the historically differentiated form of Being, cannot be other than legitimate, and its conditions must be accepted as such.[54]

The pluralist intention in Luhmann's sociology is also clear enough, as he obviously reflects (and perhaps advocates) a modern social order which is organized around constantly proliferating centres of sense. If Luhmann has a specific blueprint of political order in mind, in fact, he might be seen to support a politically diffuse and decentred society, in which the subsystems of politics generate legitimacy by differentiating themselves from, and ceding power to, the other systems and partial systems with which they interact. Political power itself, he claims, is a recursive resource in all the codes and decisions by which the political system stabilizes itself, and it can only be fictitiously attached to persons or identifiable foci of coercion.[55] Despite this, however, Luhmann's sociology also contains clear elements of aggressive anti-socialism and anti-consensual democratic minimalism.

Autopoietic legislation

Luhmann cannot be seamlessly aligned to mainstream reactionary political thought, and he has little attachment to the characteristic perspectives of European conservatism. He does not ascribe any degree of formal dignity to the state as a guarantor of integrative order, and he clearly emphasizes the limitations of politics and of political power, and their restriction by other social media. Quite manifestly, therefore, Luhmann has no axe to grind with political modernity, or with political 'post'-modernity. Indeed, it might plausibly be claimed that he is closest to a post-anthropological form of liberalism. At the heart of his sociology is an implicit insistence on the political value of the conditions of social plurality, differentiation and autonomy which have resulted from the functional de-centration of modern society, and he clearly resists attempts to recentre society on the monistic power of the political system.

Despite this, however, much of Luhmann's work can also be linked to the liberal-conservative backlash of the late 1970s and early 1980s. He is, for instance, extremely critical of the models of welfare democracy and participatory democracy propagated through the 1960s and 1970s, and is very close to the deregulation theorists who influenced the early Reagan–Thatcher–Kohl era. In *Political Theory in the Welfare State* (published in 1981) he strategically distances himself from fashionable conservative anxieties about 'ungovernability' and the 'crisis of state' in the Keynesian welfare systems of Western Europe after the oil crises. However, his demand there for the adoption of a more 'restrictive conception of politics' surely belongs to the critical debates on welfare and economic steering which characterize neo-conservative thought in this period.[56] Following this work, his hostility to welfare democracy became more pronounced through the 1980s, culminating in his characterization of plans to regulate economic interaction as potentially disastrous 'programmes of difference-minimization'. Welfare-democratic models of governance and legislation, he states at this point, are invariably based on the erroneous assumption that government can deploy *power* in the form of *law* to solve problems which are relevant only to the medium of *money*.[57] Whenever such solutions are attempted, government alters the self-regulating mechanisms of the economy. When it does this, government creates instabilities in the economy, for which it is then called to account; these instabilities are then repoliticized, and they ultimately overtax the functional efficacy (legitimacy) of the political system itself. Political intervention in the economy, therefore, is invariably detrimental to both the economic and the political system.

However, Luhmann's specific type of liberal/conservative perspective is again most obvious in his functional theories of legality and legislative reason.[58] Like other thinkers on the postwar right in the Federal Republic of Germany (FRG), he argues that the constitutionally enshrined separation of powers in the modern democratic state is not a framework for enabling popular legislative influence. It is, rather, a technical arrangement, which enables executive and legislature to operate as functionally distinct subsystems, each following its own rationality criteria.[59] Whenever excessive demands are made for popular participation in politics, however, or whenever excessive social responsibilities are imputed to the state, the functional limits of legislation become blurred, and law begins to conflate its objectives with functions properly belonging to the executive. The legitimacy of legislation thus relies not on its communication of universal norms of reason, but on the protection of

the legislature from social overburdening, and on its functional restriction to those minimal tasks which can be securely accomplished through law.

This theory of the legislature touches on two especially sensitive points in the theoretical history of the FRG. First, theorists on the left and liberal left, most obviously Habermas, have repeatedly diagnosed the traditional weakness of the legislature as the key source of the legitimatory deficits in the German political system, and they have developed theoretical models for increasing the openness of the legislature, and for enabling law to channel broad-based consensus into the executive.[60] Second, theorists in this line have also attempted to reinterpret the Basic Law of the FRG to include democratic rights of social participation in legislation, especially in questions of economic administration.[61] On both these points, however, Luhmann's position is quite clear: he is directly opposed to all radical-democratic conceptions of legislation as an expression of popular will-formation and to all social-democratic conceptions of legislation as a process of consensual distribution. More pointedly, in fact, he indicates that political democracy cannot coexist with radical democracy or with social democracy, and that excessive concern with social issues (rights of participation, material equality, equality of opportunity, etc.) dissolves com-petence in legislation, and erodes political legiti-macy. Consequently, those people who misrecognize the limits of law, and who attempt to transmit alternatives to power through law, do little more than 'cause damage'. Such people succeed at most in institution-alizing annoying types of bad behaviour within the networks in which power and law are transmitted. In short, therefore, although Luhmann is outside more conventional lines of reactionary political theory, the plural foundation of his conception of politics merely culmi-nates in the view that there are many different ways in which citizens must accept bureaucratic rulings and decisions (laws), and that law's power to change power is very limited.[62]

In these issues, more generally, we encounter an issue of fundamental importance for post- or anti-metaphysical political theory. In the work of Heidegger and Luhmann, the revolt against meta-physics, or against its juridical traces in epistemology and anthropology, is a move towards a plural conception of human validity, which interprets the legitimacy of human-being as internal to its particular locus of temporal operation, and which seeks to detach conceptions of true human reality from all prior juridical formation. Despite this, however, their perspectives might in some respects also be viewed as concluding positions in the cri-tique of legal-metaphysical heteronomy, which was first programmatically formulated by Kant. Kant's critique of heteronomy premisses personal autonomy (and therefore political legitimacy) in the timeless legal subject, possessed with universal legislative faculties. Heidegger and Luhmann both argue that this legal subject cannot account for the manifold and evolving reality of autonomy and legitimacy. Consequently, they correct Kantian political philosophy by developing a conception of socio-historical autonomy which is no longer centred in the legal subject, and in which legitimacy in law is the expression of objectively and temporally realized contingency. Thus, whilst Kant replaces metaphysical heteronomy with a juridical model, which defines human reason as the autonomous author of legitimate law, Heidegger and Luhmann also replace metaphysical heteronomy with a juridi-cal model: but this juridical model views legitimate law *as its own autonomous author*, and such law

forms a reality in which the human subject can no longer legislatively participate. If Kant endeavoured to translocate the origin of law from a classical-metaphysical superstructure into the autonomous realm of human reason, Heidegger and Luhmann actually paradoxically continue and radicalize this primary quest. Here, however, legislative autonomy (or legitimacy) is an unfounded condition, in which the sporadic arenas of human meaning authorize and valorize themselves. As a result, the forms of worldliness in which human actions and communications are ordered gain autonomy *against* human beings. These forms then, in an endless plurality of autonomous 'self-produced operations', perpetuate their own laws, which have no origin in anything other than the contingency of their reality, but which must nonetheless be accepted as valid by their addressees.[63] This unfounded condition of autonomy and legitimacy is the ironic apotheosis of Kant's first anti-metaphysical dream of autonomy: now, the realized autonomy of law's authorship finally obscures the subject of autonomy itself (the human being), which was initially proposed by Kant as the reason for rejecting metaphysics.

On these grounds, it might be asked whether the attempt to eliminate all metaphysical residues from the conception of political legitimacy does not almost necessarily *recreate* metaphysics, as a this-worldly order of heteronomy. If the major post-Kantian reflections on legality and legitimacy only supersede classical metaphysics by deploying a secondary metaphysics of the human person to explain the origin of law, it might equally be argued that the extreme opposition to the anthropological/metaphysical founding of legal philosophy also fails to surmount metaphysics. This latter view simply reconstitutes metaphysics as metaphysics of order, in which law is organized as a system of recursive prescriptions, whose source is separated out from the particular places of human life and experience. Luhmann always sees law as the externalized set of terms in which the political system *decides over* its relation to people, and in which it institutes role-playing procedures (trials, tribunals, hearings etc.), so that citizens become accustomed to showing obedience.[64] In distant analogy, Heidegger sees law as the form in which Being manifests itself as *fate* (*Schicksal*): law is the amalgam of obligations which weigh upon historical agents in so far as they are formed from the reflexes of a national history.[65]

To conclude, therefore, the pluralist or contingent critique of metaphysics, exemplified by Heidegger and Luhmann, only redesigns metaphysics as this-worldly coercion or this-worldly heteronomy. Indeed, for all their rejection of timeless juridical epistemologies and anthropologies, it might be argued that the theoretical turn instigated by Heidegger and Luhmann actually still leaves the temporal conditions of human-being *centred on law*. Law, now, is no longer the term through which human reason subjectively articulates its own capacities. Yet it is still, in objective enforcement, the medium which structures the temporal expectations of human-being, and which defines the conditions of human freedom, accountability and legitimacy. From Kant onward, the anthropological critique of metaphysics transposes law onto foundations of human determinacy, which are expressed in legislative reason or political ethics. However, this post-metaphysical critique ultimately turns full, paradoxical circle in the works of Heidegger and Luhmann, who disengage law from all statically timeless organizations of the human being, yet in fact merely re-propose political legitimacy as the empty, *repetitive* time of objective heteronomy. Time, therefore, becomes the law, and so reintroduces the original problem of metaphysics.

Beyond the law

Theorists working in purely normative lines of philosophy might claim that it is naive to be surprised at this underhand reconstruction of metaphysics in such thinking. On a purely normative view, clearly, the renunciation of all concepts of human endowment as the base of political order must necessarily lead to an endorsement of Hobbesian modes of governance. However, it might be pointed out that both Heidegger and Luhmann are quite emphatic in their claim that the problem with modern reason is that, as covert metaphysics, it cannot reflect the intensely diverse and unnervingly variable forms of independence, autonomy and contingency in which modern social agents exist.[66] On their own terms both believe that their anti-metaphysical theories help in accounting for the plurality of social being, and both envision truthful human reality as a condition of interpretive freedom and diversity, independent of all distortedly juridical conceptions of cause, essence and obligation. It is against this pluralizing theoretical intention, consequently, that it is most appropriate to measure and criticize the political content of their work.

The key question which arises from this debate is thus whether it is possible to describe the non-metaphysical conditions of human autonomy and political legitimacy without reproducing metaphysical preconditions. It is beyond the scope of this article to give an extensive account of possible responses

to this question. However, the observation that the attempt to conceive of legality and legitimacy as non-metaphysical realities either *remains* metaphysics or *becomes* metaphysics once again might at least provide an occasion for reconsidering metaphysics, and its relation to politics. Indeed, it might be noted here that there are other moments in recent German philosophy which, mirroring Heidegger and Luhmann, oppose the Kantian incarceration of human existence in the timeless juridical-anthropological structure of legal subjects, but which also discuss the conditions of legitimate being without sanctioning law in its evolving positivity. It is notable, though, that examples of such philosophy, found for instance in the works of Theodor Adorno and Karl Jaspers, are set quite adamantly *against* Kant's first expulsion of metaphysics from reason and politics, in the name of autonomy. These thinkers share the anti-Kantian conviction held by both Heidegger and Luhmann: namely, that human truthfulness cannot be defined by prior categories, and that human reality is falsely construed if conceived on a legal foundation. However, the problem of the juridification of human being, they suggest, is not caused by a *persistence of metaphysics* in modern reason. Rather, such juridification actually results from the fact that reason has resolved to *eradicate* all metaphysical traces from its activities, and can thus only realize itself in ongoing innerworldly self-regulation.[67] On the (otherwise very diverse) views of Adorno and Jaspers, in fact, the destruction of Kantian legal anthropology attempted by Heidegger is not a destruction at all, but a simple inversion and objective reinforcement of the tendency towards juridification which inevitably results from the idealist rejection of metaphysics.[68] This argument might equally be extended to include Luhmann, who also never finally escapes the juridical problems of idealism in the manner in which he claims.

On this last view, truly temporal, truly post-juridical consciousness would require an altogether different consideration of metaphysics than that countenanced by Kant and his adversarial successors. Indeed, whilst other thinkers addressed here wish to ban metaphysical contents from human reality, and imagine legitimate humanity only at the end of metaphysics, Adorno and Jaspers imply that the echo in metaphysics of a reality which human-being cannot positively or autonomously produce always provides the dialectical condition for imagining the legitimacy of the human – *beyond* the law. Existence which negates both its subjective and its objective reduction to law might call, therefore, on

the dialectical traces of precisely that alterity against which post-metaphysical reason, under the banner of freedom, originally rebelled.[69]

Notes

1. See: Frédéric Vandenberghe, 'Systemic Supertheorist of the Social: Niklas Luhmann, 1927–1998', *Radical Philosophy* 94, 1999, pp. 54–6; Art & Language, 'Roma Reason: Luhmann's *Art as a Social System*', *Radical Philosophy* 109, 2001, pp. 14–21.
2. For a recent informative overview of Luhmann reception in Britain and the USA, see Michael King, 'The Construction and the Demolition of the Luhmann Heresy', *Law and Critique* 12, 2001, pp. 1–32. Harro Müller touches on the political implications of Luhmann's anti-foundationalism in 'Luhmann's Systems Theory as a Theory of Modernity', *New German Critique* 61, 1994, pp. 39–54; 40.
3. Niklas Luhmann, *Social Systems*, trans. J. Bednarz, Jr with D. Baecker, Stanford University Press, Stanford, 1995, p. 101.
4. Ibid.
5. Niklas Luhmann, 'Soziologie des politischen Systems', in *Soziologische Aufklärung. Aufsätze zur Theorie sozialer Systeme*, 4th edn, vol. 1, Westdeutscher Verlag, Opladen, 1970, pp. 154–73; 158.
6. Niklas Luhmann, 'Soziologische Aufklärung', *Soziale Welt* 18, 1967, pp. 97–123; 108.
7. Niklas Luhmann, *A Sociological Theory of Law*, ed. M. Albrow, trans. E. King and M. Albrow, Routledge, London, 1985, p. 201.
8. Niklas Luhmann, 'Komplexität und Demokratie', *Politische Vierteljahresschrift*, vol. 10, no. 2–3, 1969, pp. 314–25; 314.
9. Niklas Luhmann, 'Wahrheit und Ideologie', in *Soziologische Aufklärung*, vol. 1, pp. 54–65; 64.
10. Niklas Luhmann, 'Politische Planung', *Jahrbuch für Sozialwissenschaft*, vol. 17, no. 3, 1966, pp. 271–96; 283.
11. 'The communication of protest' occurs '*in* society, otherwise it would not be communication, but *as if it were from outside*' (*Die Gesellschaft der Gesellschaft*, Suhrkamp, Frankfurt am Main, 1997, p. 853). The idea that protest might be able to confront society with fundamental truths about itself neglects to consider the fact that all communication occurs within society, as a complex self-description of all social functions, and that there is no privileged position of observation outside these. Luhmann also construes civil society, the founding bastion of modern liberal conceptions of anti-systemic or anti-organizational agency ('protest'), as a largely meaningless term (ibid., pp. 844–5).
12. Niklas Luhmann, 'Die Praxis der Theorie', in *Soziologische Aufklärung*, vol. 1, pp. 253–7; 262.
13. Niklas Luhmann, 'Selbslegitimation des Staates', in *Archiv für Rechts- und Sozialphilosophie Beiheft, Legitimation des modernen Staates* (1981) pp. 65–83; 76, 81.
14. Niklas Luhmann, 'Die Unbeliebtheit der Parteien', *Die politische Meinung* 37, 1992, pp. 5–11; 11.
15. Niklas Luhmann, 'Participation and Legitimation: The Ideas and the Experiences', in *Political Theory in the Welfare State*, trans. and introd. J. Bednarz Jr, de Gru-

yter, Berlin and New York, 1990, pp. 219–30; 226.

16. Niklas Luhmann, *Legitimation durch Verfahren*, Suhrkamp, Frankfurt am Main, 1983, p. 120.

17. Luhmann, 'Soziologie des politischen Systems', p. 167; 'Positives Recht und Ideologie', in *Soziologische Aufklärung*, vol. 1, pp. 178–203; 180.

18. What happens in the legal system is never simply 'the implementation of political programmes', and it is 'totally and absolutely impossible' to 'present political problems to the legal system and to expect it to solve them' (Niklas Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt am Main, 1993, pp. 418–19).

19. Ibid., p. 425. It is in fact a specific characteristic of democratic systems that they 'need alleviation of this kind', that they 'refer decisions to valid law', and that law can 'withdraw decision-premises and decisions from their long-term problematization' ('Machtkreislauf und Recht in Demokratien', in *Zeitschrift für Rechtssoziologie* 2, 1981, pp. 158–67; 166).

20. Niklas Luhmann, *Die Politik der Gesellschaft*, Suhrkamp, Frankfurt am Main, 2000, p. 390; 'Widerstandsrecht und politische Gewalt', *Zeitschrift für Rechtssoziologie* 5 (1984) pp. 36–45; 40; *Political Theory in the Welfare State*, p. 49.

21. Luhmann, 'Selbstlegitimation des Staates', p. 76; 'Machtkreislauf und Recht in Demokratien', p. 164.

22. Luhmann emphatically endorses the organized deputation of interests as an alternative to participatory democracy, and he clearly conceives his triadic differentiation of politics in terms which are expressly open to a neo-corporate reconstruction. In its differentiated form, he explains, 'the administration … cannot execute its decisions if organizations, citizen's initiatives, and the local press do not help it out by communicating acceptance or resistance of its decisions' ('Selbstlegitimation des Staates', p. 74). In his posthumously published work on politics, *Society's Politics*, he again speaks enthusiastically about 'the theory of neo-corporatism' and its understanding of 'communication, based in organizations, which represents systems' (*Die Politik der Gesellschaft*, p. 242).

23. He describes his approach as that of a 'radically anti-humanist, radically anti-regionalist and radically constructivist' theorist (*Die Gesellschaft der Gesellschaft*, p. 35).

24. It would be a gross simplification to argue that the entire history of post-renaissance European political thought seeks to install the person as the author of law, without theological or metaphysical addition. During the extended fragmentation of late-medieval scholasticism, a number of positions obtained influence which cannot be assimilated to this model. The moral perfectionism of Leibniz belongs, in part at least, outside this line. More strikingly still, Spinoza's political philosophy directly opposes purely anthropocentric conceptions of autonomy and political right, and it makes human freedom and harmony contingent upon a divine-natural order, of which human beings gain knowledge through rational wisdom (see Wolfgang Bartuschat, *Spinozas Theorie des Menschen*, Meiner, Hamburg, 1992, pp. 18–30; Baruch Spinoza, *Ethics*, ed. and trans. G.H.R. Parkinson, Oxford University Press, Oxford, 2000, pp. 310–11). The political works of Schelling and, later, of Ernst Bloch, also testify to the survival of classical metaphysics, and

even of natural metaphysics, in modern political thought. Nonetheless, from Kant onward the insistence that political debate should be anthropologically focused, and that the legitimacy of power depends on its representation of autonomous human capacities for legislation, assumes a dominant role. Note the opposition here to Ian Hunter's recent view on Kant, in his *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany*, Cambridge University Press, Cambridge, 2001, p. 282.

25. Immanuel Kant, *Critique of Pure Reason*, trans. and ed. P. Guyer and A.W. Wood, Cambridge University Press, Cambridge, 1998, pp. 678, 699, 546.

26. Johann Gottlieb Fichte, *Foundations of Natural Right, According to the Principles of the Wissenschaftslehre*, ed. F. Neuhouser, trans. M. Bauer, Cambridge, Cambridge University Press, 2000, p. 39; G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. A.W. Wood, trans. H.B. Nisbet, Cambridge University Press, Cambridge, 1991, pp. 58–9.

27. Friedrich Nietzsche, *On the Genealogy of Morality*, ed. K. Ansell-Pearson, trans. C. Dietme, Cambridge University Press, Cambridge, 1994, pp. 43, 126, 128.

28. Max Weber, 'The Profession and Vocation of Politics', in *Political Writings*, ed. and trans. P. Lassman and R. Speirs, Cambridge University Press, Cambridge, 1994, pp. 309–69; 367; Georg Simmel, *Das individuelle Gesetz. Philosophische Exkurse*, ed. and introd. Michael Landmann, Suhrkamp, Frankfurt am Main, 1968, p. 226; Carl Schmitt, *Verfassungslehre*, Duncker & Humblot, Berlin, 1928, p. 209.

29. Weber, 'The Profession and Vocation of Politics' p. 353; Carl Schmitt, *Legalität und Legitimität*, Duncker & Humblot, Berlin, 1932, p. 81.

30. Jürgen Habermas, *Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeois Society*, trans. T. Burger, Polity Press, Cambridge, 1989, p. 162; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law*, trans. W. Rehg, Polity Press, Cambridge, 1996, p. 73.

31. Ibid., p. 227.

32. Karl Marx, 'On the Jewish Question', in *Early Political Writings*, ed. and trans. J. O'Malley and R.A. Davis, Cambridge, Cambridge University Press, 1994, pp. 28–57; 44–7. Even in his later works, Marx interprets the expropriation of the proletariat in the production process as the alienation of species-being, and thus as the illegitimate separation of people from fundamental entitlements. See Karl Marx, *Capital*, Volume I, introd. E. Mandel, trans. B. Fowkes, Penguin, Harmondsworth, 1976, p. 171.

33. For a much more comprehensive treatment of this condensed argument, see Chris Thornhill, 'Politics and Metaphysics: A Problem in German Philosophy', *Studies in Social and Political Thought* 5, 2001, pp. 3–34.

34. Luhmann, *Social Systems*, p. 48.

35. Luhmann, 'Soziologie des politischen Systems', p. 167.

36. Many recent influential categorizations of Heidegger's work – as proto-pragmatism (see Carl Friedrich Gethmann, *Dasein, Erkennen und Handeln. Heidegger im phänomenologischen Kontext*, de Gruyter, Berlin, 1993, esp. p. 319), or as post-theistic existential theology (see Herman Philipse, *Heidegger's Philosophy of*

Being: A Critical Interpretation, Princeton University Press, Princeton, 1998, pp. 182–3; Theodore Kisiel, *The Genesis of Heidegger's Being and Time*, University of California Press, Berkeley, 1995, pp. 421–44) – have tended to obscure the fact that his political reflections coincide closely with the early functionalist line of political theory. Earlier readings of Heidegger often accentuated the functionalist components in his philosophy. Hannah Arendt, tellingly, warns expressly that 'behind Heidegger's ontological approach there is a hidden functionalism, which is not dissimilar to Hobbes's realism' (Hannah Arendt, 'Was ist Existenz-Philosophie?', in Arendt, *Sechs Essays*, Lambert Schneider, Heidelberg, 1948, pp. 48–80; 68–9). Heidegger's association with functionalist theorists, including Hans Freyer, Arnold Gehlen and Helmut Schelsky, was thus quite widespread at one stage in the reception of his thought. Luhmann often disavowed his own attachment to the main line of functionalist anthropology in Germany. See his obituary for Schelsky, 'Helmut Schelsky zum Gedenken', *Zeitschrift für Rechtssoziologie* 5, 1984, p. 1. However, his debts to Freyer's doctrine of objective form, to Gehlen's concept of alleviation, and to Schelsky's functional conception of juridical reason, are almost impossible to ignore.

37. See Jacques Derrida, 'The Ends of Man', *Margins of Philosophy*, trans. A. Bass, Chicago University Press, Chicago, 1984, pp. 109–36. Derrida's reading of Heidegger is in some respects close to that set out here, but Derrida, despite recognizing the contingency of meaning in Heidegger, still overemphasizes the transformative aspect of *Eigentlichkeit* (p. 133).

38. Martin Heidegger, *Phänomenologie des religiösen Lebens*, in *Gesamtausgabe*, vol. 60, ed. M. von Jung et al., Klostermann, Frankfurt am Main, 1995, p. 49; *Kant and the Problem of Metaphysics*, 5th edn, trans. R. Taft, Indiana University Press, Bloomington, 1990, p. 30; *Phenomenological Interpretation of Kant's Critique of Pure Reason*, trans. P. Emad and K. Maly, Indiana University Press, Bloomington, 1997, pp. 47–8.

39. On Heidegger's view, Kant is not able to imagine human liberty except as 'submitting-to-myself', which occurs in the self-legislation of reason (*Kant and the Problem of Metaphysics*, p. 111).

40. See Hans Sachsse, 'Was ist Metaphysik? Überlegungen zur Antrittsvorlesung von M. Heidegger', in *Zeitschrift für philosophische Forschung* 28, 1974, pp. 67–93; 72. Also Philipse, *Heidegger's Philosophy of Being*, p. 146.

41. Heidegger, *Phänomenologie des religiösen Lebens*, pp. 49, 80, 115. Heidegger repeatedly distances his thought from anthropological preconditions. See especially Martin Heidegger, 'Anmerkungen zu Karl Jaspers' "Psychologie der Weltanschauungen"', in Hans Saner, ed., *Karl Jaspers in der Diskussion*, Piper, Munich, 1973, pp. 70–100; 97.

42. Heidegger, *Phenomenological Interpretation of Kant's Critique of Pure Reason*, pp. 13–18; *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude*, trans. W. McNeill and N. Walker, Indiana University Press, Bloomington, 1995, pp. 304–5; 'The Origin of the Work of Art', in *Poetry, Language, Thought*, trans. and introd. A. Hofstadter, Harper & Row, New York and London, 1971, pp. 15–88; 77.

43. Martin Heidegger, *Die Grundbegriffe der antiken Philosophie*, in *Gesamtausgabe*, vol. 22, ed. Fr. K. Brust, Klostermann, Frankfurt am Main, 1993, pp. 146–7.

44. Heidegger, 'The Origin of the Work of Art', p. 74.

45. Luhmann, *A Sociological Theory of Law*, pp. 24–31. Luhmann describes this temporal horizon as a 'dimension of order for complexity' (ibid., p. 91).

46. Luhmann, *Social Systems*, p. 222; *Vertrauen. Ein Mechanismus der Reduktion sozialer Komplexität*, Enke, Stuttgart, 1973, p. 13.

47. Heidegger states: 'In so far as Dasein *is* its disclosedness essentially … it is essentially "true"' (*Being and Time*, trans. J. Macquarrie and E. Robinson, London, SCM Press, 1962, p. 263).

48. Luhmann's debt to Heidegger in this respect is quite clear. 'World', Luhmann explains, arises from 'meaning-constituted boundaries between system and environment.… Understood in this way, the world is the correlate of meaning's identity; it is co-implied in every meaning element.… This abandons, but does not simply dismiss, the traditional constitution [should read *centration* – CT] of the world around a "center" or a "subject". The center is replaced by the pivot on difference, or, more precisely, on system/environment differences that are differentiated in the world and that thereby constitute the world.… Systems theory begins with the unity of the difference between system and environment' (*Social Systems*, pp. 207–12). In his posthumous work, Luhmann also mirrors Heidegger's initial insight into the contingent constitution of sense, claiming that systems theory breaks with all positive-ontological conceptions of power. If, he claims, it is in any way possible to determine a metaphysical moment in political reality, this resides only 'in the differentiations' by which modes of systemic operation determine how experience and action should be organized (*Die Politik der Gesellschaft* pp. 28–9).

49. This is generally the case for the arenas of meaning occurring as *Dasein*. In *Dasein*, the truth of Being is always both closed and disclosed. Indeed, both the disclosure and the closure of Being are identical in the facticity of *Dasein*'s everydayness. The integrity of *Dasein* thus also arises from its difference against Being. See Ernst Tugendhat, *Der Wahrheitsbegriff bei Husserl und Heidegger*, de Gruyter, Berlin, 1967, p. 304.

50. Heidegger, 'The Origin of the Work of Art', pp. 62–3.

51. 'The political system', Luhmann states, 'allows the paradoxical character of its code to culminate in the formula of sovereignty, finally in the formula of popular sovereignty'. Through this process, the 'concept of the people transfers the paradox onto a sovereign which cannot even decide' (*Das Recht der Gesellschaft*, p. 418). This commonly leads to a misleading 'localization of "sovereignty" in the popular deputation' (*Die Wirtschaft der Gesellschaft*, p. 142). Elsewhere, Luhmann talks of the importance of *values* in the creation of political legitimacy. Values, however, do not account for substantial goods, to which order might be obligated. They are merely the *other-reference* of the political system, for they offer a medium for the filtration of information. At the same time, however, they are also the *self-reference* of the political system, as the ability of the political system to introduce policies under cover provided by values creates 'freedoms for decision-making', in

which policies are legitimized by apparent value-based concerns' (*Die Politik der Gesellschaft*, p. 362).

52. Ibid., p. 47.

53. See Peter Osborne, 'Tactics, Ethics or Temporality: Heidegger's Politics Reviewed', *Radical Philosophy* 70, March–April 1995, pp. 16–28.

54. Heidegger, 'The Origin of the Work of Art', p. 63.

55. Luhmann, *Political Theory in the Welfare State*, pp. 46–8; *Macht*, Enke, Stuttgart, 1975, p. 78. Luhmann states: 'It is only a slight exaggeration to say that today we are no longer ruled by persons, but by codes' ('Widerstandsrecht und politische Gewalt', p. 44).

56. Niklas Luhmann, *Politische Theorie im Wohlfahrtsstaat*, Günter Olzog, Munich and Vienna, 1981, p. 156. This section is not included in the altered and abridged translation.

57. Luhmann, *Die Wirtschaft der Gesellschaft*, pp. 342, 325.

58. In this functional conception of the legislature, Luhmann recognizes his debt to theorists on the far right, especially Ernst Fortshoff. See 'Der Wohlfahrtsstaat zwischen Evolution und Rationalität', in *Soziologische Aufklärung*, vol. 4, pp. 104–16; 112.

59. Formative for this argument, from the 1950s, is Ernst Forsthoff, 'Begriff und Wesen des sozialen Rechtsstaates', in *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1950–1964*, Kohlhammer, Stuttgart, 1964, pp. 27–56; 50–51. Exemplary of the developing scepticism about the linkage of welfare and political democracy in the 1970s is Wilhelm Hennis, 'Vom gewaltenteilenden Rechtsstaat zum teleokratischen Programmstaat. Zur "lebenden Verfassung" der Bundesrepublik', in *Politik und praktische Philosophie. Schriften zur politischen Theorie*, Klett-Cotta, Stuttgart, 1977, pp. 243–74. See also Helmut Schelsky, 'Mehr Demokratie oder mehr Freiheit? Der Grundsatzkonflikt der "Polarisierung" in der Bundesrepublik Deutschland', in *Systemüberwindung – Demokratisierung – Gewaltenteilung*, Beck, Munich, 1973, pp. 41–82.

60. Habermas, *Structural Transformation of the Public Sphere*, p. 221; *Between Facts and Norms*, p. 356.

61. Jürgen Seifert, *Grundgesetz und Restauration. Verfassungsrechtliche Analyse und dokumentarische Darstellung des Textes des Grundgesetzes mit sämtlichen Änderungen*, 3rd edn, Luchterhand, Neuwied, 1977, pp. 57–9. For a seminal theory of the constitution as a framework enabling participation and co-possession, see Wolfgang Abendroth, 'Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland', in *Antagonistische Gesellschaft und politische Demokratie: Aufsätze zur politischen Soziologie*, Luchterhand, Neuwied and Berlin, 1967, pp. 109–38.

62. Luhmann, *Die Wirtschaft der Gesellschaft*, p. 342; 'Widerstandsrecht und politische Gewalt', p. 45; 'Participation and Legitimation', p. 219; 'Widerstandsrecht und politische Gewalt', p. 40. Luhmann has naturally been the object of fierce criticism from the sociologi-cal and political-theoretical Left in the Federal Republic, although these debates cannot be exhaustively reconstructed here. Arguments against him have included the accusation that he is a post-Schmittian technocrat, that his positivism precludes reasoned social alteration, and that his neutralization of society as a distinct arena of human interaction serves only to concoct a covert brand of politically intransigent statism. Most influential for this line of critique are Frieder Naschold, 'Demokratie und Komplexität: Thesen und Illustrationen zur Theoriediskussion in der Politikwissenschaft', in *Politische Vierteljahresschrift*, vol. 9, no. 4, 1968, pp. 494–519; and Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann, in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?*, Suhrkamp, Frankfurt am Main, 1975, pp. 142–290. In a brief survey of arguments against Luhmann from the Left, however, the most accurate perspective is surely that set out by Peter Nahamowitz, who clearly identifies Luhmann as a deregulation-theorist, as an advocate of economic non-interventionism, and as a spokesperson for the neoconservative wave culminating in the mid-1980s. Peter Nahamowitz, 'Autopoiesis oder ökonomischer Staatsinterventionismus?', in *Zeitschrift für Rechtssoziologie*, vol. 9, no. 1, 1988, pp. 36–73.

63. Luhmann, *Das Recht der Gesellschaft* p. 45. Law, Luhmann argues, is 'valid qua decision'. As a fluid set of decisions, it makes its 'alterability' available for 'regulatory tasks' (ibid., pp. 38–9).

64. Niklas Luhmann, 'Die Paradoxie des Entscheidens', in *Verwaltungsarchiv* 84, 1993, pp. 287–310; 291. Procedural legitimation is not 'real consensus' or 'communal harmony'. It is merely a 'restructuration of legal expectations', which is 'largely indifferent to the question of whether the person who has to change his or her opinions agrees or not' (*Legitimation durch Verfahren*, p. 119).

65. Heidegger, 'The Origin of the Work of Art', p. 77.

66. This seems to be the ground for the approving comments on Luhmann in the article in *Radical Philosophy* 109, September–October 2001, by Art & Language (see esp. p. 19).

67. See especially Theodor W. Adorno, *Kant's Critique of Pure Reason*, ed. R. Tiedemann, trans. R. Livingstone, Stanford University Press, Stanford, 2001, pp. 178–9.

68. Both Jaspers and Adorno make it quite clear that they consider Heidegger to be a Kantian who has not overcome the legal formalization of reason in Kantianism. See Theodor W. Adorno, *Negative Dialectics*, trans. E.B. Ashton, Routledge, London, 1973, p. 131. See also Chris Thornhill, *Karl Jaspers: Politics and Metaphysics*, Routledge, London, 2002, pp. 112–13.

69. See Michael Theunissen, *Kritische Theorie der Gesellschaft. Zwei Studien*, 2nd edn, de Gruyter, Berlin, 1969, p. 53.