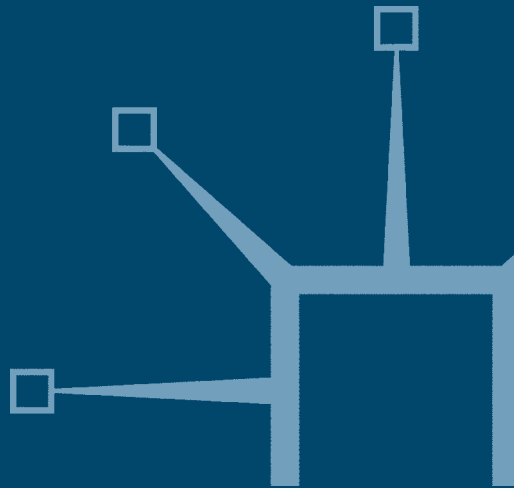


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Niklas Luhmann's Theory of Politics and Law

Michael King and Chris Thornhill



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1

Luhmann's Social Theory

Introduction

There is no doubt that Niklas Luhmann's social theory is complex. Yet this is not complexity for complexity's sake. It is complex because modern society itself is a mass of complexities, and Luhmann saw the task of a social theorist as observing complexity for what it is and avoiding simplified or reductionist accounts of the social world. He wanted to avoid above all else the idea that one could capture 'the truth' or essence of modern society in one theoretical account. No theory, not even closed systems theory or autopoiesis, can have the last word or give an exclusive or true account of what society, in its totality, is and how it operates. One could even suggest that the first principle of Luhmann's sociology is that the possibility not only of seeing things differently but of society actually being different is always present. He fully realized that one could never completely escape reductionism, since any attempt to address and understand events socially necessarily involves selection, rejection and interpretation. What he did accept as feasible, however, was a theory which embraced the possibility of infinite theories, accounts or interpretations of society or beliefs about society. In this theory none of these theories, accounts or interpretations is or could ever be final or definitive. What he wished to offer, therefore, was a social theory of social theories – a social theory which considered multiple ways of perceiving and understanding society.

But the price for this anti-reductionism, this acceptance of complexity, is a highly abstract and generalized notion of social events which often seems more appropriate to philosophy than to sociology. Nevertheless, it will be a principal tenet of this chapter, and indeed of the whole of this book, that what we are dealing with in Luhmann's writings is indeed a social theory which may be used to make sense of and analyse the historical and continuing evolution of society, as well as specific events and relationships between events. However, unlike most sociological theories it does not attempt to place them in some normative or ideological framework which

depends ultimately upon a particular view of human nature (what we refer to later as 'anthropocentric'). In this respect it does not fulfil the expectations of those many sociologists who still want a theory to be testable or, at least, to provide clear indications of causal factors and likely outcomes. Yet to label Luhmann's writings as philosophical speculation or pure abstraction is both to misunderstand his intentions and to underestimate their value as possible ways of making sense of events which today's theoretical fashions of post-structuralism, post-idealism and postmodernism tend often to regard as formless and meaningless.

A second difficulty in understanding Luhmann's sociology is the supposed anti-humanist and anti-individualistic nature of his theory. In contrast to almost all sociological (as opposed to philosophical or metaphysical) theorists that have preceded him, Luhmann's primary unit of analysis is not the individual or groups of people but *systems*. And these systems consist not of people, but of *communications*. For readers who already carry in their heads a concept of society derived from the traditions of 'classical sociology', from political theory, jurisprudence or socio-legal theories, the conceptual leap into Luhmann's world may be particularly difficult, for it means abandoning, at least temporarily, many of those safe preconceptions that have served as keys to understandings of social events. What Luhmann requires of us as readers of his works is that we become observers, not of people or groups or governments or states, but of *society*. But society for Luhmann means any social system which makes sense and gives meaning to the world, where the sense and meaning they produce is relied upon by other social systems. So what he is asking is for us, as sociologists, to become observers of observations – observers of all those theories, concepts and beliefs which people use to understand events, attribute causes, make predictions and so on. Nor is this just an exhortation to free ourselves from our own moral, religious, ethical, ideological and political beliefs and attitudes, and become neutral observers of the social world. He wants us to go even further, to disengage from a personal or particular perspective in a way that allows us to see our own morality, rationality, religious and political beliefs as systems engaged in the process of observing the social world. He wants us to see each of them not as privileged accounts of what is true or right, but rather as limited and limiting ways of making sense of what would otherwise have no meaning – and no more than that.

On the other hand, Luhmann is not advocating moral anarchy or pure ethical relativism, nor is he suggesting we should abandon any attempt to improve ourselves, or the world around us. Despite assertions to the contrary,¹ there is no moral lesson concealed within his theory. His message is rather that *sociological understanding* lies elsewhere than in adopting one or more ideological perspectives from where, by taking up positions on political, religious and moral issues, we commit ourselves to supporting social action whether through a religious organization, a political party or a protest

movement against, for example, the perceived causes of injustice or inequality in the world. Holding beliefs and values, and feeling the need to express them, may be necessary to convince ourselves and others of our humanity, our commitment to the well-being of others and our essential 'goodness', but, according to Luhmann, it has nothing at all to do with sociology or the analysis of *society*. More than that – when such beliefs and values become formulated as 'theories' they interfere with or block entirely access to sociological understanding for two reasons. Firstly, they rely upon an 'individualized', 'anthropocentric' or 'psychologized' notion of society by making it appear that satisfactory accounts of the causes of historical events are possible through explanations which focus upon individuals or groups of individuals, and seek to analyse their actions and their decisions by referring to their personalities, their motives, beliefs and values. In a similar vein, they often give the impression that the future may be brought under control through controlling or regulating people's personal beliefs and values, and inducing them to act in ways which are likely to lead to a better society than exists at present.

In the second place, the validity of such theories as reliable, accurate or authoritative accounts of the world depends upon the presumption that there exists some external referent, whether religious, scientific, rationalist, intuitive or political, which supports their particular view of human nature and human needs. For Luhmann, as we shall explain later, 'truths', which assume the existence of some external, objective arbiter of rightness, again stand in the way of any 'sociological' understandings of the contingent nature of society. They are remnants of the Enlightenment notion of 'perfection' through which precise external causes could be identified for each evident imperfection in society, and 'naturally good' and 'naturally bad' explanations and solutions could be readily distinguished from one another.² For Luhmann, social events are seen as the outcome not of definitive causes but of *contingent conditions*, and the art (or science) of identifying causes and providing and promoting 'true' explanations is itself part of society and not external to it, and is as much subject to contingent conditions as everything else. Clinging to beliefs in 'the right answer' or 'the only rational explanation', therefore, effectively blocks any attempt to go beyond the notion of 'perfection' and see society in any way other than that prescribed by a particular explicit or implicit system of understanding.

What is society?

As we have already mentioned, in contrast to most other chroniclers of modernity,³ Luhmann's notion of society does not consist of collections of people. For him, the central form of relationship in the social world is not that between individual and society, but that between a social system

and its environment. We should note at this stage that Luhmann does not envisage a universal environment within which all social systems exist, but a different environment for each system. Modern society, according to Luhmann, 'is differentiated into the political subsystem and *its environment*, the economic subsystem *and its environment*, the scientific system *and its environment*, the education system *and its environment* and so on'.⁴ This relation between system and environment is illustrated in Figure 1 (page 5).

The significance of these multiple environments will become apparent later, but what of the people who, in the mainstream of sociological thought as well as in common sense understandings, make up society? Luhmann sees people as self-referring systems, but not as social systems. People in Luhmann's scheme exist both as biological systems and psychic systems. Figure 2 sets out the three different categories of systems that he identifies: living, psychic and social. The distinction between these categories is fundamental to his general theory and relates to the different media through which they perform their self-referring operations and relate to their environments. Living systems exist within and perform their operations directly upon media that exist in the natural world, such as temperature, pressure, electrical impulses, proteins, viruses, bacteria and other living organisms. For psychic systems the medium is consciousness. This consists of all thoughts as well as feelings and emotions in so far as the individual being system is able to give them meaning and significance. Yet it is social, not psychic, systems to which Luhmann devotes almost all his extensive writings, and the medium for these systems is communications.

Luhmann's steadfast refusal to see people, their actions or their beliefs as the foci of attention for his particular version of sociology has attracted critical comment from many quarters.⁵ Yet it is not anti-humanism in any moral sense of the term or even sheer perversity that has led Luhmann to turn his back on human beings, but rather the logical outcome of his rejection of theories which reduce society to collections of individuals, each with his or her consciousness which cannot be observed directly. For him, sociology should be concerned with what is observable: the thoughts of people are not, whereas communications are.

Furthermore, Luhmann derides those sociological traditions which place the individual at the centre of the universe and the centre of necessarily simplified versions of society. He deplores the sociological usage of the many 'isms' of intellectual thought – for example, humanism, liberalism, conservatism, socialism. He rejects them not because they are wrong or misguided per se, but because they are quite inadequate as starting points for societal analysis. In part, this rejection concerns the insurmountable problems associated with the very notion of 'the individual' or 'man' in the singular that are relied upon by constructivist theories,⁶ when there is nothing inherent in any 'psychological reference system' which would allow generalizations to be made about the way in which 'the individual's' external world is

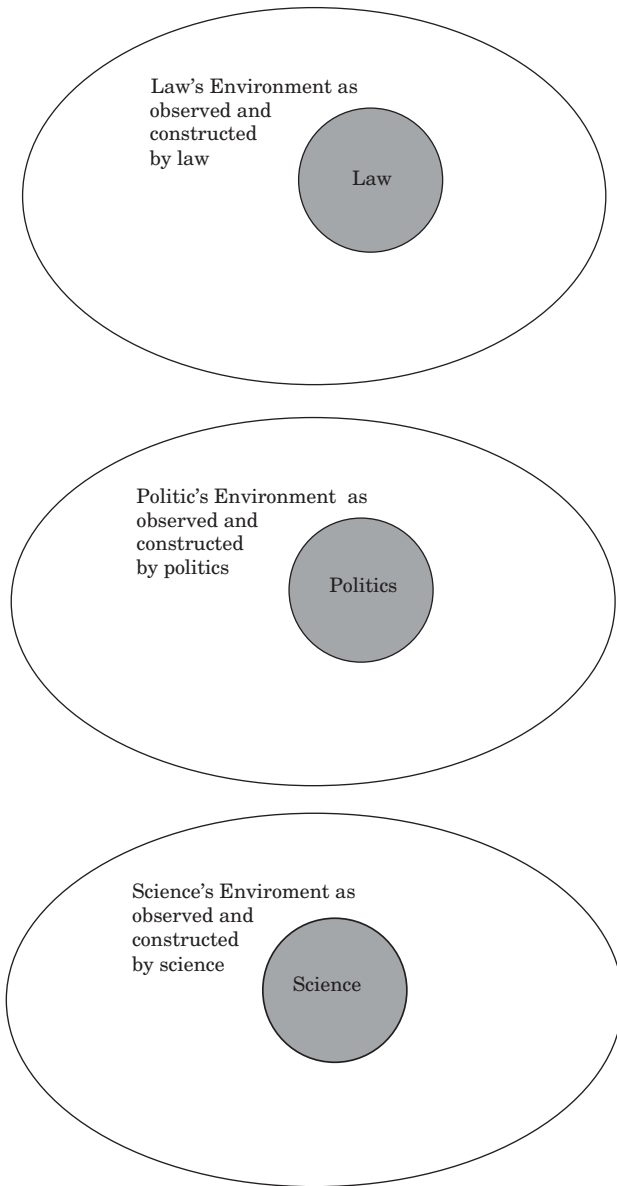


Figure 1: The relation between the social subsystems of law, politics and science, and their environment

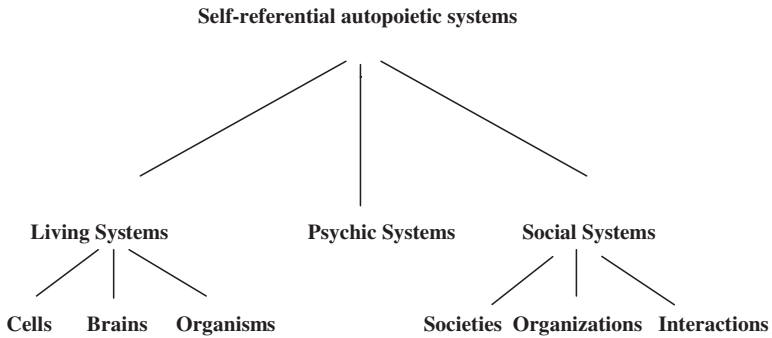


Figure 2: Types of self-referential, autopoietic systems (from Luhmann, *The Autopoiesis of Social Systems*, 1986)

understood and observed. 'There are now approximately five billion psychological systems. It has to be asked which of these five billion is intended.'⁷ Any statement concerning knowledge of individual social cognition, Luhmann asserts, has 'to be characterized as practising socio-communicative observation'.⁸ It has, that is, to recognize that social understandings exist within communications external to the individual, and that these communications cannot be captured by assuming that one or other individual's internalized observation of the external world will in some way offer a complete account of all possible understandings of society that exist.

Another reason for Luhmann's rejection of 'the individual' as the unit of sociological analysis concerns his historical account of social evolution. Those individualizing theories which may once have been accepted as adequate sociological accounts of the way that traditional societies understood themselves today can offer only partial, incomplete and limited explanations of the complexities of modern society. 'In stratified societies', he writes, 'the human individual was regularly placed in only one social system. Social status (*condition qualité, état*) was the most stable characteristic of an individual's personality.'⁹ However, this is no longer possible for modern society, which, as we shall explain, Luhmann sees as differentiated into social function systems to provide a firm definition of a person's social standing, status or role. 'Nobody can live in only one of these [function] systems', he states. But he then asks: 'if the individual cannot live in "his" social system, where else can he live?'¹⁰ Luhmann's answer is to see the individual as an observer of society, but not having an existence within society. 'The individual leaves the world in order to look at it. He does not belong to any [social system] in particular, but depends on their interdependence.'¹¹ Individual consciousness then clearly observes society and is dependent upon society, but it is not, in Luhmann's scheme, part of society.

In Luhmann's terms, modern society with its functional differentiation (see below) and with its fragmentation of 'people' into roles within social subsystems makes it necessary for social scientists to turn their attention from the individual to the operation of these systems which together constitute society. In this schema people, as we have seen, become living systems, which exist as bodies and bodily parts, and 'psychic systems', which produce meaning through consciousness. Society, on the other hand, consists of interdependent social systems which make sense of their environments through their communications. The two remain always quite separate, although dependent on and 'structurally coupled' to one another. This is not, it is worth repeating, to be seen as Luhmann denying the importance of individuals, nor a rejection of claims that humanity is worthy of attention, but rather as a deliberate separation of communication and consciousness, and a construction of both as having distinct existences 'as autonomous worlds of meaning'.¹²

Social systems, as Figure 2 indicates, consists of three different types of system: interactions, organizations and society. All three use communications as their medium of existence, but for society the only communications that are acknowledged as meaningful are those recognized by society's subsystems of politics, law, science, religion, education, art and so on. Put the other way round, society, for Luhmann, consists of (and only of) everything that is recognized as a communication by one or more of its subsystems: 'It is the encompassing social system which includes all communications, reproduces all communications and constitutes meaningful horizons for further communications.'¹³ Nothing that can be communicated as societal communication exists outside society. Interactions between people and organizations (or institutions consisting of people) may use and operate upon communications in a self-referring way, but these communications do not automatically become part of society. Only when they are seen as having significance for one or more of society's subsystems does this occur.

The same is the case for operations within and between 'interactions' and 'organizations'. Although these may use communication, their communications are not recognized as societal communications until they have been 'processed' by one or more communicative subsystems. Society, then has a very particular meaning for Luhmann. It is different from 'the social world', 'the social environment' or 'the social sphere'. For example, there may be information exchanges about the weather, last night's television programmes, the performance of politicians, the state of young people's morality. These may be seen as existing within a social world or the social environment, loosely defined, but Luhmann regards these exchanges as products of the social (but not society's) systems of 'interaction' and 'organization' only. Such exchanges, as we have seen, do not become societal 'communications' (or 'social communications') until they are recognized by *society's communication systems*, and so do not until this moment form part

of society.¹⁴ As soon as they are recognized as having the quality of communication, they become part of society, as, for example, law (in the form of evidence), as economics (in the form of advertiser's assessment of TV ratings), as politics (in the form of 'public opinion') or as health (in the form of medical statistics).¹⁵ Society, as Luhmann explains, 'is the encompassing social system which includes all communication, reproduces all communication and constitutes meaningful horizons for future communications'.¹⁶

Society cannot, for its part, communicate with its environment but only about its environment. The precise meaning that is attributed to any event will depend upon the meanings that society attributes to the event – a typical Luhmannian circularity – but this in turn is dependent upon the way in which any society organizes its communications at any particular time, which may, Luhmann claims, be empirically observed and distinguished. One specific consequence, therefore, of this way of understanding society is that 'it is no longer possible to characterize a society . . . by its most important part, be it a religious commitment, the political state or a certain mode of economic production'.¹⁷ Instead, Luhmann defines a type of society by 'its primary mode of internal differentiation . . . [this] means the *way in which a system builds subsystems*'.¹⁸

The environment in which society exists consists of nature and consciousness. Nature extends from biological phenomena, such as events in the human body or in the natural world of plants and animals, to stars and planets, atoms and nuclei, to natural catastrophes such as earthquakes or global warming. Consciousness, as we have seen, refers to events in the minds of people. These events cannot be communicated as such. Nothing in society's environment can become part of society until it has been communicated, that is, until it has meaning for society, that is for one or more of society's communicative subsystems.

Society for Luhmann has to be *world society*. This means that society represents the boundaries and the limits of all that is recognized as societal communications and transmittable as such. However, precisely what is meant by 'world society' will vary both historically and culturally in the sense that different organizations of communication subsystems will provide different versions of what that world comprises.¹⁹ If, for example, communication subsystems are organized feudally in a hierarchical manner according to rank or status, reinforced by a belief that this organization reflects a divine ordering of humanity, what is understood by 'the world' will appear very different from modern society, which, as we shall see, is organized in a very different manner. Society's environment will also differ, for both 'nature' and 'consciousness' will be understood in different ways. An example of a society where communications are organized in a relatively simple manner would be a completely isolated tribe in the Borneo jungle. Yet, even here, the society of the tribe is a 'world society' in that it does not know or understand anything outside the boundaries of its own knowledge,

and the environment for that tribe would be limited by its own understanding of 'nature' and 'consciousness'. In this sense, therefore, each society constructs its own environment. '[T]his does not mean that the tribe is incapable of imagining gods and supernatural causes for earthly events.'²⁰ Its understanding (or construction) of its environment may well go beyond the physically accessible or empirically verifiable. Planes flying overhead could be interpreted by the tribal witch doctors as gods with power to affect the fortunes of the tribe or its individual members. In Luhmann's terms, therefore, the tribe's subsystem of religion makes sense of events in its environment in ways that are meaningful for that subsystem, which, in a society where communications are organized in an uncomplicated manner, represents reality for all of that society. Within the hierarchical organizations of communications in the tribe, therefore, the witch doctor's pronouncements on the supernatural qualities of planes could well be accepted by the tribe as 'the truth'. In other words, no other interpretation would be possible. This is very different from the complex organization of communications in modern society.

The function subsystems of modern society

What makes a system 'functional'?

One needs to avoid entirely the idea that for Luhmann functional means 'useful' or that function systems are institutions which society has purposefully created to serve its members and ensure its own survival and continued well-being. This may be the way that other social theorists have used the term 'functional'. Indeed, some commentators on Luhmann's theory have assumed that 'functional systems' and 'society's functional subsystems' carry with them this notion of contributing to the well-being of society in the sense that anthropologists, such as Malinowski and Radcliffe-Brown, used the term. This has led to criticisms that Luhmann cannot account for social change and even has a vested interest in resisting change. Yet this is far from what he intended. For Luhmann, the evolution of society subsystems did not happen in any purposeful or rational way, but, as we have seen, through a process in which information was selected and given meaning as communication. Society's function systems became functional as soon as other communicative systems (and so society, as a whole) began to rely upon their communications. Systems are functional, therefore, in so far as they are able to organize communications and disseminate them in ways that they and other communicative systems may make use of them. In very general terms, *function systems create order out of chaos*: they give meaning to events which otherwise would be meaningless for society. Their functionality relates exclusively to communications and is in no way affected by the quality of their performance assessed on any other basis. The system of law,

for example, is no less functional if judges are 'out of touch' or the costs of litigation are prohibitively high. Likewise, the functionality of politics does not depend upon the integrity of politicians.

In Luhmann's account of how societies evolve he explains how functional differentiation was the liberating force which allowed social systems to develop an autonomous existence, no longer dependent on external authority. Through their codes and programmes it became possible for them to mark out the boundary distinguishing them from their environment. They were also able to develop their own identity and 'self-descriptions', seeing themselves as functional in very different ways from that which Luhmann identifies. By 'self-description' Luhmann is referring to the mode of operation by which systems generate their internal identity, 'whatever the observers of this process might think of it'.²¹ Law, for example, might see the purpose of its operations as doing justice, while politics might see itself as providing a democratically accountable (legitimate) government. As we shall see, these self-descriptions need bear no relation to the 'function' which Luhmann sees these social subsystems performing in a society consisting of communications. Even where they are couched in terms of their own functionality, 'self-descriptions' are for Luhmann very different from his notion of functions. 'They must be treated as selective choices',²² whereby the system conveys a particular impression, at a particular time, of itself and its activities. This impression relates to the system's self-serving, internal identity. Science, for example, may see and project itself as generating truth, but this may well conflict with the ways in which other systems (such as religion) observe scientific processes.²³

Functionality, for Luhmann, then does not represent some ideal state or blueprint which societies should use as a guideline for these self-descriptions. It is not a benchmark or 'an evaluation as perfection, as the best of all possible worlds, as the outcome of progress or as a system with superior efficiency'.²⁴ 'What is good for individual parts may be a mixed blessing for the total system.'²⁵ Each of society's subsystems represents an entity, existing within an environment which it itself constructs from its own operations. As such, it has no regard for such globalizing concepts as 'humankind' or 'nature' or even 'world society', for it is unable to conceive of these concepts except in its own limited terms. Furthermore, it reproduces its own identity within the environment that it itself has produced. In this sense the parts are more important than the whole. One could even say that the whole is *less* than the sum of its parts.²⁶ Moreover, as Luhmann points out, while a society organized in this way is likely to generate ever-increasing complexity which is in itself a source of creativity and adaptability, the price to be paid is 'more or less permanent crises in some of the subsystems'.²⁷ Far from depicting society as successfully balancing the needs and demands of its various subsystems, much of Luhmann's extensive

writing is devoted to describing these crises within various social function systems, and the strategies taken by the systems to overcome them.

Luhmann's functional analysis

Functional analysis in Luhmann's terms relates not to the identity of systems as evidenced by the contents of their communications, but specifically to the way in which Luhmann's sociology depicts and analyses society and in particular modern society, which is characterized by its high level of complexity and differentiation. Although Durkheim's concept of division of labour²⁸ and Talcott Parsons's action systems,²⁹ Weber's theory of rationalization³⁰ and Arnold Gehlen's account of technology³¹ are influences on Luhmann's ideas, Luhmann's method of functional analysis is far removed from any of these theorists. He sees, as already stated, functionally differentiated subsystems as organizing not labour divisions or social action, but meaning. Socially differentiated systems in their production of communications transform information into meaning, and without their operations meaning, and so society, could not exist. But more than that, each has its specific function in relation to the organization of meaning for society.³² Throughout his works Luhmann provides accounts of the functions served by different systems. Religion's function is to manage the inevitability of contingency;³³ science provides a way of distinguishing between what is true or likely to be true and what is not;³⁴ law stabilizes normative expectations in the face of actions that contradict such expectations;³⁵ the economy responds to and regulates scarcity for society via payments and so removes anxiety regarding the future satisfaction of needs;³⁶ and politics provides society with the means of making collectively binding decisions.³⁷

These organizations of meaning evolve as specific to each system, so that one system's particular way of organizing cannot take over those of other systems. Nor can other systems take over the function of that system. Such *functionally differentiated subsystems* become in effect diverging practices and spheres of activity in relation to the organization of meaningful communications. Together they represent a collection of autonomous but interdependent processes, and as such constitute society.

Communications

What is communication?

The term 'communication' has a very specific meaning for Luhmann. As we have seen, he defines informal exchange of views between individuals as *interaction* rather than communication. Communication is confined to the products of social systems. In its simplest terms a communication is a synthesis of information, utterance and understanding.³⁸ Through

communication, information is transmitted in a form which makes it understandable. This applies equally to verbal and non-verbal communication. Gestures and actions are types of communication, provided that they are capable of being understood.

Luhmann defines society as a social system which 'consists of meaningful communications – only of communications and of all communications'.³⁹ Since, as we have seen, society consists of the totality of all meaningful communications, it follows that no communications can exist outside society, so society cannot communicate with its environment or, as Luhmann puts it, 'it can find no addresses outside itself to which it can communicate anything'.⁴⁰ Consciousness cannot communicate and does not, therefore, belong to society. People may articulate thoughts which are present in consciousness and, if they are recognized as having meaning by one or more of society's subsystems, they become part of society. Luhmann refers to consciousness and society being 'structurally coupled' in the sense that each constructs the other within its environment and their operations assume the existence of the other, but each remains separate and distinct with no direct communication between them being possible.

The concept of form

Luhmann takes his account of the way that systems in general 'perceive' and 'understand' through differentiation and self-reference from George Spencer Brown's treatise on formal calculus, *Laws of Form*.⁴¹ Here Brown demonstrates how any 'cognitive' act or operation we may imagine has to begin with the drawing of a distinction. This is the case for any communication. A distinction which we may draw is a mark only with respect to what it is indicating as its area of interest, concern or relevance.⁴² What is not selected appears as 'the unmarked state' and remains indeterminate or undefined. However, this indeterminate area is not just a nameless void. It is labelled and exists as one side of a 'form' which has been brought into existence through the operation of making a distinction. To take an example, if the selection is on the basis of what constitutes law, it is 'law' which becomes the marked space and non-law which becomes the unmarked space. One cannot perceive a rule or norm simultaneously as law and non-law, just as one cannot perceive an object simultaneously as nature and as art, 'unless one enlists yet another distinction – for example, by adding that both are beautiful rather than ugly or interesting rather than boring'.⁴³ This creates a completely different form – another way of perceiving or understanding which does not apply the distinction law/non-law (or art/nature). However, all further distinctions made concerning law in opposition to what is not law, whether about the nature of law, its application, its interpretation etc., will take place in the marked space or state of the form, law/non-law: that is, in a space which has already been brought into being by what constitutes law and what does not. It will assume the

existence of something which is not law, without defining what that something might be. These communications are reproductions of the original form which, while relying on the existence of the indeterminate state of something which is not law, all take place within the marked state of law. Any operation of reproduction has to leave as indeterminate the unmarked space which it is excluding, while it selects the indication for the area it is choosing or including within the marked state.⁴⁴ For Luhmann this drawing of distinctions represents the foundation for all communications which, as we shall see, are able to become the building blocks for society only when these distinctions are made within communicative systems.

The more complex aspect of communications, which Luhmann identifies, concerns their central role in what he describes as 'a difference-theoretical theory of form'.⁴⁵ He sees communications as requiring 'articulated forms'. They require these, firstly, 'to serve as a condition for the cooperation of disparate psychic systems [people] that perceive words or signs as differences' and so ensuring 'the connectivity of communication'.⁴⁶ Secondly, however, communication also needs articulated forms because 'they must have recourse to past and future communications, that is, it must be able to identify something as repeatable'.⁴⁷ This is not simply a matter of situating the communication in time; communications must also be able to refer back to previous communications and the possibility of future communications of the same kind. They provide the form with an identity and continuity.

The theoretical concept of form, which Luhmann sees as essential to any understanding of communicative systems, presupposes the world as an 'unmarked state',⁴⁸ as a nothingness which cannot even begin to appear until a distinction is made and a boundary drawn between what is 'marked' and what becomes the unmarked side of the form. This can happen only once the operation of marking – the drawing of the distinction – has taken place. Once this initial distinction has been made, further distinctions may be drawn within the space of the marked side. These are always based on the presumption of the existence of the original distinction separating the marked from the unmarked side. As we have noted, every distinction reproduces the difference between marked and unmarked space. This occurs whether or not that distinction is made within a space that has already been marked. For example, a decision which makes a distinction between criminal and civil law reproduces the difference between law and non-law, the marked and unmarked space. Equally a decision that something is a political not a legal issue is based on the unmarked (non-law) side of the law/non-law distinction by creating a form called 'politics'. Drawing, therefore, on George Spencer Brown, Luhmann sees the communicative act of making distinctions as the essential operation for the creation of a society consisting of communications, for '[w]ithout distinction, one would encounter the world only as an unmarked state'.⁴⁹ As such *nothing would be communicable*. This act of drawing a distinction either 'does or does not happen – there is

no other possibility'.⁵⁰ As such it requires an initial 'motive', but once drawn, a 'sequence of operations is set in motion as it were spontaneously';⁵¹ further distinctions follow one another, and distinctions within those distinctions.

The crucial point that Luhmann derives from George Spencer Brown's *Laws of Form* is that 'a form without another side dissolves into the unmarked state' and as such cannot be observed, for it has no existence except in a transitory state as a distinction is being made.⁵² Only an observer of the form (and not the drawer of distinctions) is able to recognize both sides of the form, and an observer cannot observe the form unless both sides are distinguishable. Furthermore, this capacity for observation and for being observed is a necessary precondition for the existence of any society consisting of communications. Societies, therefore, could not exist if all that happened was the drawing of distinctions. Luhmann insists, however, that

[t]here are . . . form-coded systems – systems capable of employing a code of binary distinctions such as true/untrue, having/not having property, being/not being an official, in ways that permit them to operate on both sides of the distinction without leaving the system.⁵³

It is the formation and reproduction of these form-coded systems which permits both observation and the capacity to be observed, and so enables the existence of society. The legal system, for example, may distinguish both what is lawful and what is unlawful, and politics is capable of recognizing both the powerful and the powerless, but these distinctions necessarily take place within the system. It is only possible as a consequence of these systems applying their particular code to an environment which has already been designated by the system as the marked space in which law or politics operates.

Communications as the unit of analysis for systems theory and autopoiesis

Many of the frequent misunderstandings and misrepresentations of Luhmann's social theory are the result of omitting the all-important fact that his theory concerns not actions, not objects, not people, not language, but *communications*. As we have seen, this clearly distinguishes it from Parsons's *The Structure of Social Action*.⁵⁴ Parsons's theory relates to human action and the way that the integration of shared normative structures reflecting people's needs makes social order possible. He is concerned with the integration of particular people through norms and roles into society's structure. As such, he is often criticized for the rigidity of his theorized notion of society, its inherent conservatism and inability to deal with social change. Yet to direct such criticisms at Luhmann, simply because he studied with Parsons and adapted for his own purposes certain of Parsons's concepts, such as symbolically generalized media and the increasing complexity of

society, is misguided. Despite his admiration for Parsons, Luhmann refused to accept Parsons's optimistic and rather simplistic belief that the problems of subjective contingency had already been solved by the existing social system, or that they could ever be solved by any future social system.⁵⁵ Not only then is Luhmann's theory able to entertain the possibility of social change, but it sees change as inevitable, and it raises questions about the improbability and transitoriness of society, rather than questions about its solidarity.⁵⁶

It would also be misleading to see Luhmann's theory as a theory about people engaged in different social activities using different 'languages'. The reason for this is primarily that language, construed as a symbolic system, may be used by both conscious and social systems, while Luhmann, as we have seen, is quite clear that these two kinds of system should remain quite distinct. He insists that this distinction has to depend upon the two using different media – consciousness and communication. If language were conceived as a medium of communication, it would in effect merge consciousness and society, so that meaning would not be a necessary prerequisite for societal communication. Anything which was recognized as language – even nonsense phrases – would have to be treated as communication, as would every conversion from feelings or intuitions into language. The second reason why communication is not the equivalent to language, and why social subsystems must be seen as communicative systems and not linguistic entities, is that communication covers a wide range of possible modes and is not confined simply to words. A gesture may be a meaningful communication, as may an act or a scientific theory or concept, none of which will necessarily depend upon words, even though all may be observed and reconstituted through the use of words.

The problem of communications

Unlike many social theorists who take for granted the ability of people to communicate effectively, Luhmann problematizes the very possibility of communication. His theory 'starts from the premise that communication (and so, society) is improbable, despite the fact that we experience and practice it every day of our lives and would not exist without it'.⁵⁷ He identifies three 'improbabilities' associated with effective communication. The first is that of meaning: 'meaning can be understood only in context, and context for each individual consists of what his own memory supplies'.⁵⁸ The second improbability concerns the transmission of communications to recipients: 'it is improbable that a communication should reach more persons than are present in a given situation. The problem is one of the extension in space and time'. Luhmann calls his third improbability 'the improbability of success'. By success he means 'that the recipient of the communication accepts the selective content of the communication (the information) as a premise of his own behaviour', for 'even if a communication is understood,

there can be no assurance of its being accepted'.⁵⁹ Depending on the content of the communication, acceptance might involve acknowledging and acting in accordance with its truth, value, importance, lawfulness, potency, correctness and so on, but it may also involve 'processing experiences and other thoughts and other perceptions on the assumption that a certain piece of information is correct'.⁶⁰

These three types of improbability are mutually reinforcing. 'The solution of one problem makes it that much more difficult to solve the others.' For example, the 'better one understands a communication, the more grounds one has to reject it'.⁶¹ For Luhmann, as we have seen, if there is no meaningful communication then there can be no society, and, vice versa. So he sees the problems of communication as being central to any understanding of society and 'the connection between improbability and the formation of systems [as] one of the concepts that systems theory has to offer'.⁶² Without function systems to organize communications for society, there would be no basis on which the meaning of communications could be transmitted intact, that is without a high probability of distortion and misunderstanding.

The relationship between systems and communications

Another way of stating the problem of meaningful communication is as 'double contingency', which has its origins in the social theory of Talcott Parsons. Here is a simple example:

A makes a gesture to B expecting B to respond to that gesture in a certain way. B's response to the gesture will depend on his selection from a range of interpretations that he has internalized including how he, B, expects that A will interpret his response.

Even in this simple model there are already plenty of opportunities for misunderstanding. Firstly, A's expectations of B may prove to be wrong, since they are wholly contingent on B interpreting A's gesture in the way that B intends. Let us assume that B correctly interprets A's gesture. Any possibility of understanding between the two is still by no means assured, for it still depends on B's response conforming to A's expectation of the way that B will react to his gesture. All depends upon B's selection of the appropriate response. But the only way for B to know in advance what A expects or how his gesture in response to A's will be interpreted by A is to draw upon his own expectations of A's reaction to the particular gesture that he, B, selects. Any meaningful communication between A and B can be said to be doubly contingent, since it depends upon B interpreting correctly the meaning of A's gesture and also upon B selecting a response which A in turn interprets as conforming to his expectations.

This is why the fulfilment or disappointment of expectations plays such a central role in communication and thus in Luhmann's sociological analysis.⁶³ It is just at the point when A's and B's expectations coincide so that information passes between them that communication systems are formed. Once formed, every gesture or, in more sophisticated systems, every oral or written statement may be attributed meaning (or rejected as meaningless) through a process of selection – *it either belongs to the communication system or it does not*. Then, if it is seen as belonging to the system, any further selection is confined to a manageable and finite number of choices – it either means this or it means something else *which has meaning within the system's boundaries*. Communication systems, therefore, need continually to refer back to past communications in order to decide (a) whether the 'utterance' (act, gesture and so on) has meaning within its terms and is not mere 'noise', and (b) what that meaning might be.

Social communication and interaction

As we have seen, Luhmann makes the perhaps surprising distinction between systems of interaction and systems of communication. It is systems of communication and not interaction which constitute society. Systems of interactions, for Luhmann, are confined to exchanges between people who are present.⁶⁴ This confines the range of information that it is possible to exchange to 'the double process of perception and communication' – to the mutual understandings that are possible in interactive situations.⁶⁵ As systems for information processing, they also operate under severe constraints of time – the time that the participants have available to be with one another. This leaves 'little freedom of choice concerning forms of differentiation'.⁶⁶ It would, therefore, not be possible for systems of interaction to be part of what for Luhmann represents society. Nevertheless, as we have remarked, the results of interactions or simply the fact that they have occurred may become the subject of social communications, that is, may be observed as having meaning by one or more of society's communicative subsystems. Luhmann is then able to maintain that '[n]o man can communicate (in the sense of achieving communication) without thereby constituting society',⁶⁷ but 'achieving communication' has to go further than those exchanges which take place between people, as individuals or representatives of organizations, in each other's presence. This distinction between 'interactions' as transient communications and the communications of society's communicative subsystems is of considerable importance in Luhmann's theoretical scheme. It is the latter – societal communications – which provide the focus for all his writings on society.

Society's reduction of complexity

The more complex the society, the more numerous and the more differentiated will be its various communicative subsystems. The generalization of

media of communication, which we referred to earlier, become the nuclei for the development of subsystems. These subsystems together 'solve the problem of double contingency through transmission of reduced complexity':⁶⁸ that is, they produce communications which enable the reduction of complexity to meaningful and manageable proportions. 'They employ their selection pattern as a motive to accept the reduction, so that people join with others in a narrow world of common understandings, complementary expectations and determinable issues.'⁶⁹ They are also a necessary prerequisite for system differentiation, diffusing concepts such as power, law, money and love throughout the world of meaningful communications which constitutes society. This in turn allows each 'specialist' subsystem to rely upon the resonance of its own specific generalized medium in other subsystems which will, for their part, be performing similar exercises in selectivity in their particular sphere of operations.⁷⁰

System operations

First- and second-order observation

The concept of 'observation' is crucial to Luhmann's account of the evolution of society. It is in the difference between first- and second-order observers that he provides another way of explaining the theory of forms and distinctions that we set out in the last section. First-order observation is the initial making of a distinction – 'an indication of something in opposition to everything else that is not indicated'.⁷¹ Luhmann states that 'in this kind of observation, the distinction between distinction and indication is not thematized. The gaze remains fixed on the object. The observer and his observing activity remain unobserved'.⁷² As we have seen, society cannot exist at this level of observation. However, 'with the occurrence of second-order observation . . . whether or not the observer is the same . . . the observation indicates that the observation occurs as observation'. In other words, one can come to see how meaning can be attributed to events or objects only by observing how they are observed. This necessarily involves distinguishing the event or object from the observation that makes sense of them; this can only be done through second-order observation. It is, therefore, as second-order observation that the 'observer encounters the distinction between distinction and indication'.⁷³

The second-order observer, then, observes the first-order observer observing and, unlike the first-order observer, is able to distinguish between what is being observed (the object) and the result of the observation. He or she is able to see the result of the observation as one of many possible ways in which the object is capable of being observed. This, of course, is not possible for the first-order observer, who may only distinguish what is being indicated as a result of the observation from everything else – the

'unmarked' or dark side of the form. Luhmann puts it slightly differently by stating that 'second-order observation observes only how others observe. Once the question "How?" is posed, a characteristic difference between first- and second-order observation comes into view'.⁷⁴ The fact that first-order observation *is indeed an observation* becomes observable only in an observation of the second order 'on the condition that the second order, considered now as first-order observer, can now observe neither his own observing nor himself as observer'. It needs a third-order observer to point this out and draw the conclusion that 'all this observation of observation applies to himself as well'.⁷⁵ For Luhmann, the importance of this concept of the different levels of observation for sociology lies in the recognition that any disciplined, systematic approach to the understanding of society cannot simply treat the social world as if it were a collection of facts to be researched and analysed. Rather, the focus of study must be the different ways in which ephemeral and transient events are interpreted as if they were facts and given importance and significance.

Paradox

We now encounter for the first time Luhmann's particular use of the term 'paradox', which is extremely important for an understanding of the operations of social systems. He describes paradox as 'the blind spot that makes distinction and thus observation observable in the first place'.⁷⁶ Seen in terms of forms and distinctions, any operation – the making of a distinction – necessarily occurs on the marked side of the form. But the operation occurs as if the original bifurcation of the form into marked and unmarked spaces did not exist, as if what represents 'the world' for that operation is *reality* and not just a space that has been designated by the drawing of the original distinction. In *Risk: A Sociological Theory* Luhmann describes the inevitable existence of a paradox each time an observer gives an account of his or her own decision-making. 'Every observer', he states, 'uses a distinction for the purpose of indicating one or other of the sides. To cross from one side to the other requires time, so the observer is . . . unable to observe both sides simultaneously'.⁷⁷ Furthermore, the observer is unable 'to observe the unity of the distinction while he is making use of it, for to do so he would have to draw a distinction relative to the first distinction'.⁷⁸ For example, for an observer of the political system the very use of the government/opposition distinction precludes simultaneous accounts of events from a non-political perspective. The only way to achieve this would be for the observer to use 'a further distinction for which the same would apply', in the sense that the non-politics side would have to be identified and designated in some way – for example, as morality or art.⁷⁹ 'In brief', Luhmann concludes, 'observation cannot observe itself'.⁸⁰ In other words, the observer cannot simultaneously observe himself/herself and the unity of the form which allows him or her to make distinctions in the first place. For the

duration of the observation, the observer has to assume that the space in which the distinction is made represents totality and not only one part of totality. For example, the legal system observes itself as producing legal (and hence just) decisions, but it is the same system that decides what constitutes legality and illegality (or, in its terms, it cannot produce injustice). Hence the paradox. Only a second-order observer, an observer of the observer (see above), is simultaneously able to see this unity and view the first-order observer making a distinction (that legality is not necessarily the same as justice). This observing Luhmann calls 'the unfolding of a paradox'. Second-order observations achieve this by making a distinction between the original form (both marked and unmarked spaces) which now becomes the 'marked space' and a new unmarked space.

This highly abstract account becomes clearer when the same notion of paradox is applied to the operations of social communication systems. 'Paradoxes arise . . . when systems are involved in observing.'⁸¹ The very formation of systems takes place in a paradoxical way, for they constitute their own identity by distinguishing themselves from their environment while always denying that this is what they are doing. But since the environment is able to be distinguished only on the basis of internal operations, that is the same kind of operation as the denial, the making of both the distinction between the system and environment, and the distinction which constitutes the system's operation can never be anything other than the system's operations.⁸² In other words, what the system observes and treats as its environment is nothing other than its own creation. It has no access to reality or the world *as it really exists*, but always has to relate its operations to, and direct them at, an external environment which does not exist independently of itself. Translated into the terms of social systems, the external environment for the system – the society in which the system sees itself as operating – is in practice a construct of the system itself. By treating itself as if it existed in an objectively verifiable world the system has no awareness of the paradox of its own existence, and is able to operate *as if* its communications were justified and legitimated by universal notions of what is true, legal, morally right, scientific and so on. These systems are then able to apply these self-produced criteria of validity to their own operations. 'This situation is paradoxical in that the system has to distinguish itself from an environment which is not part of itself, while at the same time observing that this environment is nothing other than a product of its own operations'.⁸³ The blind spot for each system is located in this paradoxical situation, for, as we explained earlier, it is unable to recognize that what it observes as reality is only a part of a reality, the whole of which is inaccessible. Through its operations the system repeatedly and continuously reaffirms its vision of the external world and its own situation within that constructed world, and so forever conceals the paradox of its own existence.

In the more concrete and specific terms of the legal system that we referred to earlier, legal decisions apply 'the paradoxical applications of the legal code' to themselves, 'because the system believes it is legal (and not illegal)', and, therefore, able 'to decide over legality and illegality'.⁸⁴ For the legal system to operate as a system at all, the paradox must remain invisible. This is achieved through the construction of *positive law* which, because of its very nature, cannot cast doubt on the validity (or legality) of the law's claim that its decisions are legal. This concealment of the paradox of its own existence is equally true for science, politics, religion and any other social system. This concept of paradox is central to Luhmann's account of the relation of function systems to reality, and is frequently ignored by those who label autopoietic theory as constructivist or constructionist. In an article which specifically sets out to distinguish autopoietic theory from constructivism,⁸⁵ Luhmann points out the fallacy of believing that there is any way of knowing reality which is not paradoxical. Anyone who describes ways of understanding the world as constructions, therefore, 'is forced to begin his theoretical reflections with a paradox: it is only non-knowing systems that can know; or, one can only see because one cannot see'.⁸⁶ The very fact of claiming knowledge or understanding is based on a prior distinction which observers cannot acknowledge while they are in the process of observing, and this distinction inevitably makes observers blind to that part of reality which has been placed on the unmarked side of the distinction. Only by not knowing can one know. 'Cognition' has to deal 'with an external world that remains unknown and has to, as a result, come to see that it cannot see what it cannot see'.⁸⁷ One can know only through not knowing. The effect of this is that '[w]hen an observer... continues to look for an ultimate reality, a concluding formula, a final identity, he will find the paradox'.⁸⁸ As Luhmann explains:

This is not simply a logical contradiction (A is not A) but a foundational statement: The world is observable because it is unobservable. Nothing can be observed (not even 'the nothing') without drawing a distinction, but this operation remains undistinguishable. It can be distinguished only by another operation.⁸⁹

Tautology

Luhmann, in his typical style, begins his description of tautologies, as they exist in observation, with a paradox: 'Tautologies are distinctions that do not distinguish'. He goes on to explain how tautologies 'explicitly negate that what they distinguish really makes a difference. Tautologies thus block observations. They are always based on a dual observation schema: something is what it is'.⁹⁰ Law's self-description as 'lawful' and its assertion of this fact as a justification for legal authority is tautologous, because, in law's

terms, law could not possibly be anything else but lawful. 'This statement, however, negates the posited duality'⁹¹ – the original distinction between law and non-law, with state law taking on the identity of *all lawful law*. It negates also any possibility that law itself might be seen by an observer as unlawful (contravening, for example moral or religious laws) – 'and asserts an identity' of the legal system as positive law. Law has come to represent both the positive side of the distinction and the distinction itself. 'Tautologies thus negate what makes them possible in the first place, and, therefore, the negation itself becomes meaningless.'⁹² For Luhmann then, tautologies, like paradoxes, are a way of reflecting upon the identity of a system which blocks observations of the system.⁹³ This enables the system to achieve an autonomy, an independence from any external validation of its statements. This is one of the defining attributes of an autopoietic system.

Deparadoxification and detautologization

In Luhmann's scheme all self-descriptions of society are based on paradox or tautology – the unobservability by the observer of that observer-in-operation. Consequently, the problem for social systems 'is not to avoid paradox or tautology but to interrupt self-referential reflection so as to avoid pure tautologies and paradoxes and to suggest meaningful societal self-description'.⁹⁴ This involves concealing the paradox or tautology in ways that make it appear that system communications about its own operations are not based on self-reference. This may involve the invocation of universal truths, consensual values or 'reason' which appear to endow the system, its operations and its communications with the quality of meaning. Luhmann calls this process *deparadoxification or detautologization*.

The legal and political systems' paradoxes may always be replaced by a distinction. The legal system's distinctions between reasonableness/unreasonableness, legal/illegal, constitutional/unconstitutional, may be substituted for the problem of whether legal decisions are right or wrong in any absolute sense – whether, for example, the law may be justified in terms of universal morality or natural law.⁹⁵ In politics also the paradox of a system of power which itself determines what constitutes the exercise of power may be concealed behind such distinctions as democratic/undemocratic, freedom/state control, what the public wants/what the public rejects or in the national interests/against the national interests.

While the paradox of self-reference is always present, the distinctions which cause the paradox to disappear are temporary expedients to meet the particular demands of critical observers or, in the case of politics, popular opinion. 'Deparadoxification means to invent new distinctions which do not deny the paradox but displace it temporarily and thus relieve it of its paralysing power.'⁹⁶ The effects of the paradox of self-reference and tautological system identity, far from paralyzing or inhibiting systems' operations, act as spur to invention. Paradox has proved to be a rich source of creativity,

as systems are continually engaged in finding new and imaginative ways to conceal their paradoxical existence and endow their communications with meaning.

Coding and programming

For Luhmann, coding and programming are the closely linked operations of any social function system. The notion that systems distinguish themselves and make sense of their environments through their own particular binary code can be traced back to Talcott Parsons's *symbolically generalized media*, which Luhmann refers to as *the symbolically generalized media of communication*. According to this model, each sphere of social activity sees the world in its own terms. Economy, for instance, uses the medium of money, law the medium of legality, politics the medium of power, science the medium of truth, religion the medium of faith and sexuality the medium of love. While these media exist as ways of understanding events throughout society, they are specifically developed within individual subsystems as *binary codes* which the subsystem applies to its environment to 'understand' or produce meaning about its environment and its own identity within that environment.⁹⁷ Each code has a positive and a negative side. As we shall explain, the code for law, for example, is lawful/unlawful (or law/non-law), and for politics it is governing/governed, having power/not having power (or in modern democratic societies, government/opposition). Programmes exist as organizers of information which allow the application by the system of its binary code.

It was only after Luhmann's adoption and adaptation for social theory of the biological notion of autopoiesis that he came to see codes and programmes as central to the operation of systems. In 1986 he wrote: 'code and programming are the two pillars of the unity of an autopoietic system'.⁹⁸ Yet it would be a mistake to see them simply as reductionist, ways of filtering environmental 'noise' so as to make complexity accessible. Codes need to be understood as special kinds of distinction that exist only within the system and can only be operated by the system. Programmes are necessary filters for this operation, for, without them, the application of codes would appear as crude attempts to reduce everything in the world to simplistic binary propositions. 'Programming complements coding, filling it with content.'⁹⁹

Since all social systems are and can be nothing other than organizations of communication, it stands to reason that it is the codes and programmes of a system, rather than its structures, institutions or personnel, that are essential to the system's identity. While codes, as we have seen, are the 'abstract and universally applicable distinctions' between positive and negative values, good/bad, lawful/unlawful, government/opposition, true/false, healthy/ill, which allow systems to give meaning to their environment, their operation is always mediated by the system's programmes. The essential

difference between programmes and codes is that 'programmes can be modified or replaced, but the code remains identical throughout and identifies the system itself'.¹⁰⁰

It is the existence of the system's code which allows it both to determine which communications 'belong to' the system and to observe both sides of the distinction; through the use of codes both the positive and the negative sides of the form are capable of becoming 'marked spaces' or 'marked states' for the system. As we mentioned earlier ('What is communication?', p. 11), thanks to its code, 'the system may operate on both sides of the distinction without leaving the system',¹⁰¹ but these distinctions invariably take place only on one side of the predetermined form. So, in applying its code of lawful/unlawful the legal system has already excluded everything that cannot (according to its own criteria) be seen as having any relevance to law. Similarly politics has predetermined what for the purposes of political communications shall be political, what may be codeable through the binary distinction of government/opposition. Yet the reverse is also true. It is only under the condition of openness towards both the positive and the negative option, through the application of a binary code, that a system can identify with a code. So whenever a system is able to 'understand' its environment by applying the binary distinction of its code, the system 'recognizes such operations as its own and rejects all others'.¹⁰²

For Luhmann then the system's code represents 'the form with which the system distinguishes itself from the environment and organizes its own operative closure'.¹⁰³ Law, for example, recognizes everything that may be understood as either lawful or unlawful as belonging to the legal system and to no other system, while at the same time it alone is capable of determining the difference between lawful and unlawful. The identity of politics works in an identical manner. Everything capable of being interpreted as an issue between government and opposition is political, while only the political system is able to decide what pertains to government and what to opposition. It is the system itself, and not observers of that system, be they people or other social systems, which defines both its identity and its boundaries.

While the codes of society's system's code will (by definition) apply throughout modern society, this does not of course mean that they are applied identically everywhere, but rather that the distinctions lawful/unlawful, government/opposition, property/not property, and so on are the ways in which modern society gives meaning to its environment. Additionally, it provides within the system the means of creating order, and within society the knowledge that decisions will be made which may be relied upon by all society's social subsystems.¹⁰⁴

Codes, according to Luhmann, are system-specific, that is, positive or negative decisions in one system do not necessarily transfer to other systems. Science's version of what is true does not guarantee that this truth will be recognized by religion, morality or politics; to be lawful is not necessarily to

be right, and designating something as property does not answer the question of whether it is worthwhile acquiring it. All that coding does is to attach a specific meaning label. What happens after that label has been attached is contingent; it is beyond the control and knowledge of the system attaching the label. In Luhmann's words, 'the binary code lays the foundation for [the] connection between closure and openness by construing the world as contingent'.¹⁰⁵ Legal decisions as to what is right and what is wrong, for example, 'can be taken only within the legal decision itself'.¹⁰⁶ Systems, therefore, are always faced with an environment that cannot be controlled by the system so any decision 'will always remain a risky decision'.

The binary nature of codes

Coding is always binary in nature, imposing a distinction between two opposing values and effectively excluding third values. While these may be reintroduced into the system through programming, this does not in any way alter the code, but rather allows the ground to be prepared for the application of the binary values.¹⁰⁷ Luhmann is adamant that '[a] threefold code, perhaps of the type true/false/environment or legal/illegal suffering, is never a possibility'.¹⁰⁸ Nevertheless, this does not prevent environmental problems 'becoming the object of research programmes or human suffering and their prevention the object of legal regulations'.¹⁰⁹ Here the differentiation of coding and programme makes the reappearance of the third value possible, but only within a specific programme of the system to allow the system to designate one of the binary code values; in Luhmann's words, 'only to co-steer the allocation of the code-values on which it primarily depends'.¹¹⁰ Programming does not in any way modify the system's code – rather it 'complements coding, filling it with content'.¹¹¹

It would be a mistake, therefore, to view Luhmann's theory as reducing all the complexities of society to simple binary decisions. One needs to appreciate the role of programmes for system operations and the possibility of programmes becoming highly complex in response to the growing complexity of the system's environment. Within politics and law it is quite apparent from the high complexity of legislation, law reports and government policy papers that system codes rarely appear in their pure form. But this should not lead to the conclusion that the system's code has been altered or rejected in favour of some seemingly more appropriate way of making sense of its environment. The fact that statutes and legal decisions may deal with the issue of mental health, for example, does not mean that the code for politics and law has changed to mentally healthy/mentally ill or that mental illness has been added as a third option. Neither politics nor law has any way of deciding issues of mental health – all that they are able to do is to transform these issues into a form in which their specific codes may be applied. Programmes do not determine the nature of the coding; rather, it is the code which generates the programmes and gives them their

appearance of continuity and rationality. While the code itself may be described as rigid and invariant, programmes provide a flexibility, a plasticity which allows them to be moulded into whatever shape is necessary to apply the political and legal code to whatever has been pre-formulated (through the system's coding) as an issue for politics or law.¹¹²

The only alternative to binary coding which remains open to a societal subsystem is to reject the code in favour of a third value. Lawful/unlawful may through law's own programmes be rejected in favour of ill/healthy, property/not property or scientifically true/scientifically false. In these cases the rejection value enters the system as a trigger for the reapplication of the initial distinction law/non-law. The issue is seen by law as not justiciable and best dealt with through other forms of decision-making. The same situation exists within politics, where matters which initially enter the political system are subsequently held to be non-political.

Closure

In order to avoid the kind of misinterpretations that the concept of 'closed systems' has provoked in the past from writers critical of Luhmann, it is perhaps worthwhile restating that there is nothing in the theory to suggest that social function systems exist as hermetically sealed units which make it impossible for *people* to communicate across the boundaries between them. This communication between people, however, is quite different from societal communications. Society's communications are concerned with issues of acceptance and rejection of statements, interpretations, decisions, theories, policies and so on as valid, truthful, relevant, factual and so on. Each such operation produces an acceptance value and a rejection value – it is this, not that – which, in the way that we have already explained, distinguishes between a 'marked state' and an 'unmarked state'. Any further decision-making has to occur within the boundaries of the marked state.¹¹³ Since social systems are not people and have not acquired consciousness, they do not have the possibility of choosing other than in the form provided by their binary coding. They cannot 'see' the world in any way other than in these binary terms. The legal system, for example, cannot produce scientific finding; neither can the political system decide what is or is not good art. This is the first sense in which social systems can be said to be 'closed'.

The second sense of 'closure' concerns the need for each system continuously to refer back to itself in order to authorize or validate the meaningfulness of its communications. This sense refers to the ways in which the legal system 'knows' what is and what is not a legal issue, what is lawful and what unlawful? How does politics know what to treat as political, or science know what is and is not valid science, or art know what is art and what is not art, what is good art and what is bad art etc. To find answers in each case each system has to refer back to the system itself. Only law can answer legal questions; politics, political questions; science, scientific questions, and so

on. This has important consequences for the understanding of modern society. It means that once a decision has been made to treat information (in the broadest sense) as belonging to the system, a whole range of normative evaluations may come into play; these derive from the operations of that system and from no other. It is coded in the terms of that system. It becomes, in the eyes of that system, 'a legal issue', 'political', 'scientific', 'art', 'a religious doctrine', 'newsworthy information', 'medical treatment', or it is rejected as such. The system is able to achieve this operation because it has constructed within its communications a prior definition of its own identity which it now applies to all new information in its environment.

The corollary derived from the existence of this form of closure is indeed that systems are unable to communicate directly with one another, for each system uses different criteria of validity, different forms of authority and different codes for deriving meaning from and assessing the value of information. Put in the simplest terms, they see things differently and there is no possibility of one system being able to internalize the world-view of another. All that it is able to achieve is an internalization according to its own 'way of seeing' of what it understands from the communications of the other system.

How systems manage time¹¹⁴

Luhmann defines time as 'the interpretation of reality with regard to the difference between past and future'.¹¹⁵ But all this takes place against a background of time passing. In this manner, 'two kinds of present always exist simultaneously and it is only the difference between them that creates the impression of the flow of time'.¹¹⁶ One 'occurs in a regular manner', indicating through, for example, 'the hand of a watch, sounds, movements, the crashing of waves that something is always changing irreversibly'.¹¹⁷ Because 'the world changes frequently enough' this first kind of 'present' is 'symbolized as the inevitability of the flow of time'. The second kind of present, that associated with chronology – 'the standardized scheme of movement and of time' – takes place in the system's environment'.¹¹⁸

Time is constructed by systems to make sense of, or give meaning to, their own operations (decisions, evaluations, acceptance/rejection), all of which takes place *in the present*. This second kind of present is then, according to Luhmann, '[t]he space of time between past and future in which an event becomes irreversible . . . The present lasts as long as it takes for something to become irreversible'.¹¹⁹ A simple example of the way this idea of two concepts of 'the present' relates to conscious systems is that of birthdays. A birthday takes place within an ongoing concept of time moving inexorably forward, but for individuals whose birthday it is, the present also represents the anniversary of their birth, the adding of another year onto their age and probably an occasion for receiving cards and presents and for family celebration. This second kind of present attributes meaning which

places it within a chronology relating it to what happened before – birth and previous birthdays – and to what is to happen after, the adding of another year to an individual's chronological age and all that this might imply for schooling, job security, the chances of marrying, and so on.

Consequently, one has to make 'a clear distinction between movement, process or experience of change on the one hand and the . . . constitution of time as a generalized dimension of meaningful reality on the other'.¹²⁰ Different systems, therefore, will vary in their notion of what constitutes the present. For law, for example, it may be the duration of a trial or the moment when the verdict is pronounced; for politics it may be a parliament vote on a piece of legislation. In each system the present is no longer the present once something is seen as having changed. In the same way the future is always seen from the present – the *present future*, as Luhmann calls it – until something changes and the present becomes, not the future, but again the present future. The future always recedes beyond the horizon.

Both the past and the future are accessible only through the present and what that present consists of. The question of where the horizons of past and present begin is constantly being revised through communication within systems. 'Social systems', Luhmann clarifies, 'are non-temporal extensions of time.'¹²¹ While for time as chronology 'the present' moves inexorably onwards, within systems of meaning it may be controlled in a way that allows reversibility to occur. 'Self-reference makes it possible to return to earlier experiences or actions and continuously indicates this possibility.'¹²² Within law injustices may be redressed and, as far as the legal system is concerned, matters are restored to the state that existed before the wrong decision. 'The finality of an action can [therefore] be forestalled by a present intention, which has not yet become irreversible.'¹²³

In terms of individual experience, as explained by George Herbert Mead and Alfred Schütz (following Edmund Husserl and Martin Heidegger),¹²⁴ social communication 'defines the present for the actors'.¹²⁵ It commits them to the premise of simultaneity, of many events happening at the same time, while accepting that the limits of consciousness restrict their participation to only one of these at any one time. An individual may see an event in the world in a variety of different ways. It may, for example, be interpreted in the terms of both legal and political communications, and individuals may be free to switch from one interpretation to the other, although *they cannot manage both at the same time*. A social system, on the other hand, has only one way of understanding and interpreting these events, but their selective interpretation allows social communications to open up, as we have seen, the possibility of extensions of time which do not rely upon any external notion of the flow of time. This, according to Luhmann 'requires for social systems a double relation to time: a *sequential* one conceivable as process or as action in terms of means and ends and a *structural* one conceivable as the difference between system and environment'.¹²⁶ As far as the second is

concerned there can never be a point-to-point relationship between it and its environment. The political system, the economy, family relations do not stand still while law freezes its decision-making in a continuing present. Systems need time for their own operations.¹²⁷ The simultaneity of system processes prevents any one social subsystem taking control of events in the world, for 'whenever anything determinate occurs, something else also happens, so that no single operation can ever gain complete control over its circumstances'.¹²⁸ 'Simultaneity of all occurrence', Luhmann explains, 'means the uncontrollability of all occurrence.'¹²⁹ As we shall see in later chapters, this has major implications for the dissemination and exercise of power in modern society, and for Luhmann's account of what constitutes the essence of democracy. At the more general level of social theory we need to note that, for Luhmann, the only way that a system is able to give the impression of controlling time is by constructing its own non-temporal extensions of time within the system's communications – the space between reversibility and irreversibility.

Finally, on this subject of time, Luhmann brings into his critical focus the concept of *history*. By history, he explains, he does not mean simply 'the factual sequence of events, according to which the present is understood as the effect of past causes or as the cause of future effects', but it also includes the possibility of 'access to the meaning of past or future events' – that is to what the events meant within the context of past societies or will mean in the context of future societies. For Luhmann, therefore, 'history operates as a release from sequence'.¹³⁰ Each communication system has a history to the extent that it is able to limit itself through the selection of either specific past events or some finite future. Different systems will select different past and future events as having relevance or significance. Law, for example, may look to an offender's previous convictions and the likelihood of that person reoffending in future. Politics may look back to legislation or, in the context of the distinction between government and opposition, to the failed policies of the past government (now the opposition) and forward to the future and to the anticipated success of the present government. 'History [therefore] is always *present past* or *present future*, always an abstention from pure sequence, and always a reduction of the freedom of immediate access to all that is past and all that is future.'¹³¹ For Luhmann, then, the central thesis is that 'the *relevance* of time . . . depends upon the capacity to mediate relations between past and future in a present. All temporal structures relate to a present.'¹³²

The relationship between subsystems

The emergence of different communicative subsystems, as we have explained, may help people and social groups to solve the problem of double contingency, but the problem does not thereby disappear. As we have seen,

it transports itself to the relationship between these subsystems. Although we have already discussed these problems in terms of the functional specificity of systems, it is important to realize that they arise in any situation where two systems attempt to communicate with one another:

System A will depend for successful communication not only upon its own selectivity (that is its selection of meanings from those available to it) but also upon the selectivity of the other system, B. The problem is that the only way that system A can observe (or 'understand') system B is through its own (A's) selectivity. The same is true of B's observation of A. Each system then constructs its relationship to the other from meaning that is available exclusively to itself.¹³³

For each of these systems the other is a 'black box', in so far as the other's criteria for selection cannot be observed directly, but only through the 'reconstructions' of the observing system. Restricted to its selectivity, its way of making sense of its environment, A is able to see only the inputs and outputs of the other system and not the self-referential observation taking place within that system. In other words, all that is visible for one system (A) is the way that the other system appears to deal with its external environment. What is invisible is the selectivity of the other system. It has no way of seeing the way that B interprets the external environment (including A itself) except by the use of A's own selectivity. Moreover, any attempt by B to protest against or correct A's (mis)constructions makes sense to A *only in so far as the A treats them also as part of its constructions*.

As we have illustrated in the earlier example concerning individuals, the problem of contingency for systems occurs when a selection is made and other possibilities are thereby automatically rejected. Any system that is observed or 'understood' by the first (selection making) system will be engaging in the same selection making process, and the selection that it makes may be of a very different kind from that of the first observing system. This then reintroduces the phenomenon of *double contingency* as an internal system problem with which systems must come to terms. Each system observes the other as a system-in-an-environment, without being able to observe the internal operations of the other system or that system's selectivity, without 'understanding' its way of 'understanding' external reality. Since neither is able to 'get inside the head of the other', this means A's selection from its range of possible meanings is dependent upon B's selection of possible meanings and vice versa. Hence, the improbability of communications is made more probable by the development of functionally different subsystems. Indeed, according to Luhmann these have evolved as a direct response to the double-contingency problem. They operate in ways which attempt to govern uncertainty and risk through the reduction of available selections. This accounts both for the autopoietic (self-referential)

nature of social systems and their tendency towards increasing complexity in the face of uncertainty.

Systems deal with uncertainty by creating from their own communications structures which make uncertainty appear certain, or at least more certain. In becoming part of the environment that A constructs, B's selections become reduced to those available as selections for A, as those amenable to A's way of understanding. B's meanings become *B's meanings as construed within system A*. This enables A to avoid uncertainty and to cope with the problem of disappointed expectations arising from B's behaviour through the expedient of constructing everything that B says or does in terms of meanings provided by A. Only by communicating about its own communications is system A able to offer the semblance of certainty and to provide consistent explanations for disappointed expectations. Only by operating in a 'virtual world' in which it treats *its* ways of understanding as *reality* will uncertainty be avoided. But, as Luhmann is anxious to point out, this avoidance of risk is also 'virtual' since the system cannot see that it cannot see what it cannot see. To base actions or decisions on system certainty, therefore, avoids only those risks that the system is able to observe. As a result, 'all communication becomes a risk of having overlooked something that will subsequently seem relevant; or of having made a decision that subsequently seems wrong or in some other way objectionable'.¹³⁴ Even non-communication fails to provide any protection against risk, since it too, as many politicians have discovered, 'can be construed as the omission of a decision'.¹³⁵

Contingency

We have already encountered the notion of 'contingency' in Luhmann's account of how social communication systems come into existence. It is also an important concept in understanding the relationship between systems. As a philosophical term, contingency represents the simultaneous exclusion of necessity and impossibility. A contingent occurrence is an event which is neither necessary nor impossible. Contingency indicates the position of a given outcome, while directing attention to possible alternatives. For Luhmann, it 'has its core meaning in dependency and draws the attention primarily to the fact that the cause on which something depends performs itself a selection from other possibilities', so that the contingent fact comes about in a somewhat chancy, accidental way.¹³⁶

Given the interdependence and self-referring nature of systems, one system's selection of 'facts' from its environment, its attribution of causes and its predictions and prescriptions – what will and what should happen in the future – are all chancy or accidental occurrences, in the sense that other selections, attributions, predictions and prescriptions might have been possible. In short, things could have been otherwise. But their effects within society are also contingent on the observations, selections, validations and

meaning-attributions of other systems. There can be no guarantee, for example, that law will put into effect the policy agenda in the precise way that government intended, as this will always be contingent upon how judges choose to interpret legislation.

Luhmann points out that the concept of contingency has 'central significance in Parsons's work', but does not find adequate attention and elaboration' there.¹³⁷ He sees his work as in some way compensating for this deficiency. For Luhmann 'social systems need normatively instrumentalized structures to secure complementarity of expectations'.¹³⁸ However, as we have seen, the 'double contingency' which is inherent in interaction' creates problems for securing any such complementarity.¹³⁹ The same obstacle to communication that led to the evolution of differentiated social subsystems continues to exist in the relationship between systems, but with no possibility of a similar solution – the formation of further subsystems – being successful. Where two social systems 'mis-understand' or 'mis-interpret' one another, the fact of their differentiation, their unique coding of their environments, the impossibility of their interchangeability and their self-referential nature preclude any possibility of a third super-system or mediating system evolving to reconcile the two and allow them to communicate directly with one another.

A system's contingency, therefore, signifies both its identity in its success in distinguishing itself from its environment and its limitation – the transient, temporary nature of every selection of and interpretation by the system. These provide a possible, but not necessary, basis for further internal operations of the system, but offer no certainty beyond the fragile, virtual world that the system has itself constructed.

Structural coupling

This is a concept that Luhmann developed in his later 'autopoietic' writings to explain how two or more systems (or interactions or organizations) may co-evolve around particular issues or ideas. So far as systems are concerned, Luhmann intended the concept of *structural coupling* as a way of retaining 'the idea of highly selective connections between systems and environments' without relying on what he saw as the limiting and misleading ideas of direct input-output relationships between systems and an overarching causality.¹⁴⁰

Luhmann proposes the concept of structural coupling, first, to account for the continuing relationship between people, as conscious (or 'psychic') systems and social systems, consisting of communications. Although people clearly do not constitute social systems, they exist in the environment of these systems just as social systems exist in the environment of conscious systems. Of course, the environment for both kinds of system is itself a construction of the system, so that people exist not as 'total beings' but only in so far as aspects of their existence are recognized as having relevance to

social communications. In a parallel way, social systems exist for conscious systems only in the way that each individual recognizes and attributes meaning to them. There is no causal relationship between the two; society does not cause consciousness to occur, neither do people consciously create and manage society. Each presupposes the other just as '[w]alking presupposes the gravitational forces of the earth within very narrow limits, but gravitation does not contribute any steps to the movement of bodies'.¹⁴¹ The relationship between people and society is such that 'conscious systems cannot become social and do not enter the sequence of communicative operations as part of them; they remain environmental states for the social system'.¹⁴² The relationship between the two is rather one of constant *irritation*, with the one reacting to the other, but always on its own terms. 'Communications never becomes thought, but without being continually irritated by communication, an individual would not become a socialized individual.'¹⁴³ Socialization through irritation may occur over the whole range of communications, but always presupposes the existence of distinct communicative systems capable of structurally coupling in specific ways with conscious systems. Structural coupling, therefore, relates to the co-evolution of different systems (of whatever kind) whereby each includes the other in its environment, interpreting the outputs of the other in its own terms on a continuous basis.

Structural coupling may refer to the co-evolution when it occurs specifically between social systems. Luhmann states, for example, that '[t]he economic and the legal systems are and remain separate, and both operate under the condition of operational closure; but this needs a specific mechanism of structural coupling, above all in the form of property and contract'.¹⁴⁴ Politics and science may be structurally coupled through the specific mechanism of government research grants, while law and morality may be coupled through the concept of 'reasonableness'.

Conclusion: functionalism and conservatism?

In approaching Luhmann's theory we need to abandon altogether the optimistic idea of a body politic with each part contributing to the well-being of the whole, whether hierarchically organized with the sovereign or parliament at the head, or consisting of institutions operating according to a natural balance which if disturbed leads to chaos or anarchy. For Luhmann, social functions, as we have seen, are a product not of some external model indicating how society operates or should operate, but simply of self-description. Society describes itself as divided into social functions through its differentiation of these specialist activities and its construction of distinct institutions and discourses which confine themselves to the expression and reproduction of these activities.¹⁴⁵ In abandoning the previous notions of functionality Luhmann has also been able to rid himself of one of the major

sociological criticisms of functionalism as a social theory – namely, that it is unable to explain social change. Luhmann's notion of society which describes itself as *functionally differentiated* and consisting of *function systems* is not only perfectly able to accommodate social change, its social subsystems actually depend upon change for the effectiveness of their internal operations. Each perturbation in its environment is seen as an external change which requires some internal adjustment.

The only changes that cannot occur, according to Luhmann, are alterations in the system's code and its related 'functional specificity'. This is only 'conservatism' to the extent that it denies the possibility of any social system taking over the function of another or of reforming the other in accordance with its own directives. Whether Luhmann offers this only as a description of modern society, or as a normative model – an account of what modern society ought to be – remains debatable. As far as social change is concerned, however, within the constraints imposed by functional specificity this is not only possible, it is inevitable. Every decision changes the world in some way and millions of decisions are made every day. What Luhmann is fundamentally opposed to is totalizing or dogmatic accounts of society which claim that social change may be managed, controlled or predicted. Change for Luhmann is essentially contingent in nature. Something happens, a decision is made which, through a process of making distinctions – 'it is this and not something else' – gives rise to further decisions and the making of further distinctions. Explanations for such changes which incorporate, as they are bound to do, the identification of causes and rationalizations as to why one course of action was taken rather than another are themselves the result of choices, of selections and rejections. They are nothing other than attempts by communication systems to give meaning to contingent occurrences. Like all system operations, they are selective and exclusive; they see only what they are able to see. Any explanation or rationalization can in sum offer only a partial view of complexity.

2

Society's Legal System

Preliminary points

The legal system

Defining terms may seem a pedantic and unnecessary exercise, particular where the terms in question are used repeatedly and without apparent confusion both in popular parlance and academic texts. Yet the combination of subtle changes in concepts resulting from German to English translation, on the one hand, and the very specific meanings that Luhmann gives to terms such as 'system' within his theoretical scheme, on the other, makes it necessary for us to make it clear from the outset what he means by *Rechtssystem*, which we have translated by 'legal system'. It would perhaps be helpful from the outset to state what he does *not* mean. The 'legal system' for Luhmann is not those institutions – legislative chambers, courts, tribunals, lawyers' offices and chambers – which have a physical existence and are part of an organizational structure. Nor does it consist of all those people professionally engaged in the operation and administration of the law. Indeed, it does not consist of people at all. People are, of course, necessary for the operation of the legal system, but *das Rechtssystem* does not refer to their personal characteristics or even to the roles that they perform within the courts and other legal institutions. Neither does it consist of 'organized legal practice, that is mainly practice in the courts, parliaments and also occasionally in administrative organizations which make law based on delegated powers and law firms which channel legal access to the courts'.¹ Law, for Luhmann, is not subject to physical or geographical boundaries or defined by the status of individuals (judge, solicitor, law lecturer, court usher).

An alternative translation of *das Rechtssystem* is 'system of law', which, unfortunately, in English tends to invoke the rather too narrow concept of the written law as set out in statutes and legal judgments. Another, and one that we frequently use during the course of this book, is simply 'law'. This corresponds to Luhmann's use of the term *das Recht* which, in his terms, is

identical to *das Rechtssystem*. Law, in short, is the legal system; it is a *system of communications* which identifies itself as law and is able to distinguish between those communications which are part of itself and those which are not. Our use of 'legal system' then refers only to law as a system of communications,² not to any other institutions. Law consists of communication and nothing but communication.

But what kind of communications, one might ask, count as law? The inevitably circular answer to this question is: all communications that are recognized by law as belonging to the legal system, for only the legal system can say what is and what is not law. An obvious follow-up question is: 'How does the system recognize communications as legal communications?' Here the answer is more specific. A legal communication is any communication which is based on or relates to the distinction legal/illegal or lawful/unlawful. Law extends to all those communications that are understood as directly relating to the issue of legality or illegality.³ It extends, for example, to car-drivers arguing about which of them made the error of judgment which resulted in an accident, a customer insisting on his or her rights as a consumer that a shop reimburses him or her for faulty goods, a man refusing to pay maintenance for a child on the basis that the father could have been someone else. In all three examples what is invoked is law rather than some other system of communication. The legal system would recognize communications in all three examples as legal communications. Put the other way, law in each example is used as a way of giving meaning or significance to the events. Once the events have been communicated about in terms that make sense for law, these communications become part of the legal system and also of society. Yet, as Luhmann points out, it is not the act of being involved in a motor accident, of being dissatisfied with the goods one has bought or of refusing to accept that one has fathered a child which constitutes the event within the legal system. In fact people communicating about these matters may not even realize that they are involved in legal relations or may wrongly believe that the law does not apply to their particular situation.

In all three examples nonetheless the legal system recognizes the communication as a legal communication by the fact that what was used as the framework for understanding or making sense of the event was law. The starting point for Luhmann's sociological approach is always the social system consisting of communications which refer exclusively to other communications of the same kind and which construct their own meaning in this way. It is the communicated interpretation of the event by law as having meaning for law through its attribution of its binary values, lawful and unlawful, which brings it within the boundaries of the legal system and society. Deciding whether a communication is a legal communication is possible, therefore, only through observation of law's own operations.⁴

Luhmann and legal positivism

The question of whether Luhmann is 'a positivist' (or for some critics 'a legal positivist')⁵ is an important one, and so needs to be discussed as a preliminary issue. His description of the legal system recursively organizing information from its environment in such a way as to produce legal communications has led to some commentators labelling him a 'legal positivist'. It is Jürgen Habermas who among all Luhmann's critics has insisted most emphatically on an account of Luhmann as legal positivist. He argues that Luhmann separates facts from values in the way that he treats law as if it has no inherent ideological or normative content; indeed, Habermas directly defines his own legal-theoretical project as an attempt to overcome this type of legal positivism – a positivism which he associates expressly with Luhmann – in the name of a morally substantial, sociological conception of legal validity.

The status and nature of Luhmann's theory of law depends to a large extent on the way the question of his relation to positivism is answered. If Luhmann is indeed seen as a 'legal positivist', then his ideas may be slotted neatly into a category of pre-existing theories about law, thereby undermining the originality of the theory and its pretensions as offering a serious sociological enquiry. To address this issue, though, we need to distinguish between legal positivism and social or sociological positivism. In legal theory the term 'positivism' has a particular meaning. It depicts law as a free-standing series of norms not regulated by any moral, political or ideological superstructure, and it claims, consequently, that all legal problems may be addressed only as inner-judicial problems. From this perspective, legal science or jurisprudence becomes the study of rule creation and interpretation *within the legal system*. These rules are seen as norms or 'ought propositions' setting out the way that people and organizations should behave, but these are quite distinct from moral or political values.

Positivism initially developed as a hugely influential type of early legal-state theory in Germany in the early to mid-nineteenth century – starting with the school of historical positivism and culminating in the positivist models of public law, which propped up Bismarck's constitutional order. Representatives of early German positivism, in very different ways and for very different political agendas, focused on providing an account of legal validity, which explained law as a formal set of rules, defining the state as an accountable legal actor with limited entitlements and powers, and guaranteeing minimal conditions of private-legal neutrality and autonomy outside the directly political order of the state. However, perhaps the most influential of all proponents of the doctrine of legal positivism was Hans Kelsen, the eminent Austrian theorist of constitutional and international law. Kelsen argues that the pure 'validity' of law should be separated from all political, moral, or extra-legal demands.⁶ He conceives of law as a set of

autonomous norms which are operative solely in the world of 'the ought' and have no correlation with causes in the material or sociological 'world of being'.⁷ According to the principles of legal positivism, therefore, laws should be studied in their own right and not as an instrument for putting into effect values extraneous to law itself.⁸

Legal positivism stands in direct opposition to legal theories which seek out motives and justifications beyond the boundaries of the law itself; these include natural law theory, sociological theories of law, social contract theory, or theories which see law as putting into effect an expressly political agenda. In positivist theories, rules of law are taken as 'given', as 'facts', as 'data which it is the lawyer's task to analyze and order',⁹ to interpret according to the internal rules of the law itself. This treatment of law as a 'given', and the form of technically specific analysis that this demands, is analogous to the assumptions and techniques associated with positive science. Although there are clear differences between the work of legal scholars and scientists, the assumption of self-evident 'facts' existing within an enclosed framework of knowledge is common to both positive law and positive science. Such assumptions enable chemists, for example, to test for the presence of and identify certain chemicals and their properties, which in turn enable rules to be devised around the relationship between different chemicals.

Luhmann's work on law may certainly be seen as belonging to the legal positivist tradition, but to label him exclusively as a positivist both misconstrues his social theory and misses the most important aspects of that theory insofar as it relates to law. In the sense that, for Luhmann, it is only law that can decide what is law and what is lawful and unlawful, and the results of these decisions have to be accepted as 'social facts', regardless of the motives or intentions of the lawmakers and law-interpreters, the positivist label does have some validity. On the other hand, those who attach the positivist label tend to ignore the general theoretical context in which Luhmann conducted his enquiry into law, set out in Chapter 1 of this book, and they prefer instead to see him simplistically as a staunch defender of the present state of the law and a critic of those who agitate for change.¹⁰

If Luhmann is to be classified as a positivist, it needs to be acknowledged that his 'positivism' is of a very particular kind, and should be differentiated from that of all earlier legal positivists. The objective which he sets himself is not, like Hans Kelsen's,¹¹ to construct or to define law as a universally valid system of positive norms; it is rather to examine law as a contingent and infinitely alterable system of communications. Furthermore, if Luhmann is to be accused, in Habermas's terms, of separating facts from values,¹² and of treating law as if it had no inherent ideological or normative content, it should also be recognized that in his theoretical scheme this separation is inevitable. For Luhmann, law's 'facts' are only ever 'limited facts'; they are facts, truth or reality only for the legal system, and they

cannot be conflated with values. To accuse Luhmann, therefore, of corrupting law by detaching it from human concerns is simply a misrepresentation of how law, in his terms, constructs and explains its own reality and the extent of its validity.

For Luhmann, in short, law's facts are certainly the positive products of legal processes which make sense of a reality that is accessible only through the interpretations offered by law itself, using its distinctive code of legal/illegal or lawful/unlawful. However, the 'facts' recognized by law are not factual in any absolute sense, since law, like every other social system in Luhmann's scheme, constructs its own environment and the information which it obtains from that environment has already been pre-interpreted in ways that have meaning for its own operations. In this respect Luhmann differs markedly from the classical line of legal positivism. In its classical conception, legal positivism defined itself in express opposition to broader sociological or motivational accounts of the interrelation between law and other aspects of social reality, and it tended to separate law from all other areas of inquiry, as a distinct and privileged realm of validity. This is surely not the case in Luhmann's variant on positivism. Luhmann merely examines law, or positive law, as one of the distinct systems of meaning in which society communicates about itself. This clearly necessitates an account of how law communicates with politics, the economy, medicine and so on, and it clearly entails a relativization of the status and centrality of the legal system in modern society. For this reason alone, Luhmann cannot be aligned to any common conception of legal positivism.

Moreover, while Luhmann certainly removes all ethical content from the operations of the law, he does not attribute any permanent normative prescriptions to the legal system. If one chooses to ignore the general theoretical context of Luhmann's account of law and reads his description of law as representing some ultimate social 'truth' and not merely law's self-description, it is hardly surprising that one might interpret his writings on law as positivistic. The important point about Luhmann's very particular brand of positivism, however, is that, while law in modern society is, and has to be, positivist law, it is only so in the sense that the image of law that the legal system *presents to itself* is a positivistic one – one of law as facts, as 'givens' produced by judges and legislators. The important theoretical implication of such self-generated positivism is not that the legal system survives in isolation from the rest of society, basing its decisions exclusively on its own previous communications, but that it exists and should continue to exist as a comprehensive autopoietic system which puts into operation legal doctrine based on a knowledge, its own knowledge, of the world *as it really is*.¹³ This is what Luhmann sees when he describes law in the process of observing its own operations and representing itself to the external world.

In this light Luhmann's contribution to legal theory could well be seen as marking out the ultimate position in legal positivism – one where law

becomes a free-floating unit, detached from all substantive foundations. Despite this, Luhmann repeatedly emphasizes that law remains within the context of a society consisting of communications of which legal communications represent one and only one way of giving meaning to events and has no claim to special importance. Law, therefore, does not constitute a privileged system of positive norms. Moreover, for Luhmann, the autopoiesis of law is in itself neither a good nor a bad thing. It does not preclude social change through the medium of law, nor does it argue directly against others who criticize the law's operations and decisions from a moral or political standpoint. For Luhmann, however, whatever changes in society, and the form that social change takes, is a matter of contingency, of chance happening, which can be neither predicted nor controlled by political or moral programmes which attempt to use law as an instrument of change.

Although Luhmann observes law's self-description as 'positive law', for him, therefore, this self-description should not simply be accepted at face value. It is, as we shall see, based on paradox, on self-deception, and sustained by its continual successful attempts to conceal this paradoxical existence. The second-order observation that Luhmann undertakes is thus far removed from the uncritical acceptance of the image of law and its role in society conveyed by law reports, or the public pronouncements of judges or politicians. To describe Luhmann simply as a legal positivist, therefore, is to distort both the task which he sets himself as a sociological observer and the social theoretical context in which he undertook his analysis of law.

The normative nature of Luhmann's theory of law

As we have emphasized, Luhmann does not at any point in his extensive writings on law take sides in debates on justice and equality within the legal system or whether particular decisions or particular categories of decisions are good or bad for society. The only consistent *norm* that he recognizes as essential for law's operations is to be found in its function of stabilizing normative expectations for society. If the legal system failed for some reason to perform adequately this historically acquired function, the repercussions for itself and for all of modern society's other function systems would be catastrophic, for they would find themselves unable to produce the specific kind of communications which allows modern society to exist and evolve.

The 'threat' to law's effective operations as a social function system does not and cannot come directly from any of those failings frequently identified by legal and sociological analysts, such as unjust decisions, unequal access to justice, procedural complexity, the excessive cost of litigation, or class, gender or racial bias among the judiciary. The legal system is well able to absorb all these deficiencies and still perform effectively the social function that Luhmann attributes to it. On the contrary, the single threat to law's effectiveness is that of *dedifferentiation*: that means the dissolution of law's boundaries so that its legal communications lose their distinctiveness

and become corrupted through the legal system's adoption of other ways of attributing meaning (perhaps economic, political, scientific, medical/therapeutic or religious).

Where law's institutions (courts, tribunals, statutory drafting, prosecution services), for example, put into effect the policies of the government without giving due consideration to their legal applicability, overtly base their decisions upon the supposed reliability of witnesses who have wealthy connections, delegate responsibility for deciding cases to panels of scientific experts, actively seek to promote people's well-being or protect them from harm¹⁴ or leave matters to be decided by God's will, the legal system will have become dedifferentiated. It will have received directives that it cannot process in the form of law. The legal system in such situations will have ceased to be autopoietic and will therefore function in extremely erratic ways. It will no longer be able to produce the expectation-stabilizing communications on which other systems in society depend. In practice, it may be the case that legal institutions will from time to time indulge in some or all of these deviancies, but, provided that these are only temporary and are followed swiftly by a return to and embracing of the norm, the effects are unlikely to be detrimental. In fact the reaffirmation that usually follows such transgressions is likely to strengthen the belief that any such future deviations from the norm are likely to be declared unlawful.¹⁵

It is not even the case that total dedifferentiation will necessarily lead to terminally catastrophic effects, for under such conditions a social order – that is, some form of society – may well continue to exist. Indeed, society may well appear more orderly and less complex than it does today. The consequence of a high level of dedifferentiation would, however, be the end of 'modern society'; that is, the end of a society based on functional differentiation and, as such, the end of the complexity, dynamism, the almost boundless capacity for rapid evolution, and infinite creativity and diversity that, according to Luhmann, today's society offers. It would also, he argues, mark the end of that specifically democratic society that exists in modern industrial and post-industrial states. This is an issue which we shall develop in Chapter 3 when we come to discuss his political theory.

More generally, any linking of Luhmann's particular brand of legal positivism to a more general normative agenda is highly questionable, as his conception of the legal system can obviously accommodate a variety of different political regimes or types of rule. Indeed, the legal system can to a large extent be indifferent as to the party-political characteristics of particular governmental regimes (at least within democratic societies). In any event, there is absolutely nothing in Luhmann's writings on law which could be taken as a defence of specific laws or legal principles, or as resisting arguments against changes to specific laws or principles, except insofar as they may threaten the self-referential nature of the legal system and so

its differentiation. As far as Luhmann is concerned, the internal norms of law could change in whatever direction events both outside and inside the legal system took them, provided that the system remained autopoietic with clear boundaries and a unique code and function which distinguished its communications from other communications – provided, in short, that law remained law and did not become something else. To this extent, and only to this extent, it may be correct to see his position as advocating a ‘normative’ prescription regarding law in modern society.

Luhmann's ambitions as a sociologist of law

In a certain respect what Luhmann offers us in his theory of the legal system is an indirect solution to what he sees as the conceptual gap between legal knowledge and the sociological study of law. Both are concerned with ‘understanding’ law, but each ‘talk about different things, even if they use the same terms’.¹⁶ ‘Legal knowledge’, according to Luhmann, ‘is concerned with a normative order’.¹⁷ Those juristic theories that are produced in the practice of law are a by-product of the need to arrive at binding decisions; as such, they do not meet the expectations of what constitutes theory in the scientific field. On the other side, ‘sociology, depending on its theoretical orientation, is concerned with social behaviour, institutions, social systems’,¹⁸ and, as such, it has little or nothing to say about what lawyers regard as pressing legal issues. Luhmann goes on to elaborate on this conceptual gap by emphasizing that ‘[s]ociologists observe the law from outside and lawyers observe the law from inside. Sociologists follow only the ties that bind them to their own system which, for instance, might demand that they conduct empirical research.’¹⁹ Lawyers, on the other hand, respond, according to Luhmann, ‘only to the ties of their own system, but the system here, is the legal system itself’.²⁰

What Luhmann sees as lacking, therefore, is an adequate sociological theory of law able to ‘take full advantage of an external description which is not bound to respect the internal [legal] norms, conventions and premises of understanding’, while not losing sight of its *object*.²¹ Luhmann, therefore, sees both *external* observation and *internal* description as complementary and essential elements in any sociological presentation of the legal system. This approach has the advantage of avoiding pointless debates on the ‘true nature of law’, since law itself defines where its boundaries lie and what belongs to law and what does not. Instead, the focus of enquiry can shift to examining how law manages to arrive at this ability to define itself.²² ‘Everything which falls under the heading of legal theory’, he states, ‘has without exception come into being in conjunction with [such] self-descriptions of the legal system’.²³ The task of sociological enquiry into the legal system is then to account for such self-descriptions and not to (a) accept them as ‘givens’, as unquestionable facts, or (b) ignore them altogether and rely upon

some theory which claims to explain law without ever examining these self-descriptions.

Law and morality

Luhmann, among many others, recognizes that the positive law of modern society – a legal system which, in its own decision-making, is not subject to any external authority – presupposes the centrality of its own decisions as well as its ability to validate them (its own self-generated authority). Like those who criticize the false neutrality of law, Luhmann argues that legal decision-making steadfastly ignores the forces that shape the choices upon which these legal decisions are based. The economic forces, for example, which result in redundancies and rent arrears are no concern of law when it comes to decide whether an employee was unfairly dismissed or whether a tenant should be evicted. This 'blindness', he argues, is 'the direct consequence of a new kind of theoretical reflexion which occurred during the 18th Century', when 'European society re-organized new central problems of identity and order . . . along the lines of functional differentiation'.²⁴ While political theory in this period invented the constitutional state to deal with the accusations of arbitrariness arising from the effects of functional differentiation upon perceptions of sovereign power, '[t]he theory of law had to recognize the fact that the whole of law is contingent on legal decisions and therefore on legal rules which regulate the production of legal rules'.²⁵ Any references to natural law had to be disposed of and 'replaced by a "philosophy of positive law" or by purely historical foundations'.²⁶

According to Luhmann, by dispensing with the notions of natural law and divine law as a means of assessing whether legal decisions were legitimate or arbitrary, the legal system was able to free itself from any external criteria for legitimacy and rely instead upon its own determination of lawfulness and unlawfulness. This solved the arbitrary *v.* legitimate problem in respect of legal decisions by declaring that every decision made by the legal system would be legitimate and would remain legitimate until the legal system itself determined otherwise. From then on the phrase 'valid law' became a tautology for 'all law is valid law' and 'all law that is not valid is not law'.²⁷ It did not, of course, avoid external criticisms of legal decisions, but these now had to be formulated using the distinction between law and morality and, as such, did not threaten law's autonomy. It was up to law to decide what moral principles should apply, how they should be interpreted and whether, and to what extent, they should prevail in any decision of the court. '[T]he decision between right and wrong', Luhmann therefore concludes, 'can be taken only within the legal system itself'.²⁸

Much of Luhmann's writing on the legal system is concerned with how law achieves, sustains and defends its image of itself as having universal validity and both a distinct identity and independence from its environment.

It is this differentiation from its environment which allows it to distinguish between itself (*Recht*) and anything existing outside its boundaries (*Unrecht*). In the case of natural and divine law, the legal system has been able to transform the paradoxical situation whereby laws are lawful in the eyes of the state, but unlawful according to observers who differentiate between law and what they see as morality. 'This [transformation] makes it meaningful to replace the distinction right and wrong with the distinction legal and illegal . . . for example, a morally required disobedience to the law may appear in law as unlawful although morally justifiable'.²⁹ This is what Luhmann means when he refers to the normative closure of the legal system. 'Normative closure means, above all, that morality as such has no legal relevance'.³⁰ Moral principles then may enter legal decision-making only as 'information' from the environment which may be accepted or rejected by law.

Legislation as a structural coupling between politics and law

One of the key problems in interpreting the function of law in Luhmann's sociology relates to the complex relation between law and politics. The difference between law and legislation causes particular confusion. It is, however, necessary to understand the distinction between the two if one is to appreciate both the difference and the interdependence between politics and law. The changing of legal norms through legislation becomes an important issue in Luhmann's theory, whenever issues are raised over whether communications should be attributed to the legal or to the political systems. The question arises, for example, of whether debates in parliament concerning reforming the law belong to legal or political communications. Another example is the question of whether, as Gunther Teubner maintains, statute law 'acquire[s] validity [as law] only through the judge's act', which suggests that only the courts may determine what is and what is not a legal communication.³¹

At one level, the legal and political systems should not be seen as mutually exclusive, since any event may be subject to multiple interpretations and does not, *in itself*, belong exclusively to one system or another. The drafting of legislation may, therefore, be seen as both a political communication, being part of the political process of policy-making which depends upon the coding government/opposition, and as a legal communication, since it invokes and has to anticipate the application by the courts of the legal code of legal/illegal. On the other hand, much of what occurs in the legislature is not subjected to legal coding and so has no relevance to law. The content of political debates within parliament, for example, may be scrutinized as information which may be used legally to cast light on an ambiguity in a statute,³² but the various speeches made in the course of the debate are not subject to any legal scrutiny in the sense that the test of their validity is not their lawfulness or unlawfulness. They are not, therefore,

recognized by the legal system as legal communications. Similarly, a statute, once it has completed the political process, becomes law, both in the sense that it is a legal document and, from Luhmann's perspective, in that it sets out what is to be regarded as lawful conduct and what as unlawful conduct. In the political system the statute may, of course, also be seen as an expression of government policy, of government power being used to put into effect a particular agenda based on the principles of the ruling party. For politics, however, it ceases to be a relevant communication once it becomes law, until such time as it finds its way back onto the political agenda, for example, through reopening of the policy statements implicit in the statute, whether as the result of a change of government as a reaction to public opinion or as part of a continuing process of law reform. Once passed into law, it is the courts which may decide, according to strict legal criteria, upon correct interpretation that should be applied to the wording of the statute. They may even declare the statute, or certain of its sections, to be unlawful in that they contravene the constitution or offend human rights legislation. Unless and until this happens the statute is seen within Luhmann's theoretical scheme as *Recht* in both meanings of the German word. It is law, a communication within the legal system, as opposed to non-law, and it is lawful, as opposed to unlawful, since, before it can be declared non-law or unlawful, the law itself requires respectively a revocation of that law by the legislature or a decision of a court declaring it unlawful.

Legal argumentation

Argumentation as a form

Luhmann's discussion of legal argumentation exemplifies the highly original method of system research and analysis that he brings to his later, autopoietic, accounts of the operations of the legal system. This involves applying George Spencer Brown's *Laws of Form*³³ to locate forms and distinctions in legal communications. While space does not permit us to set out Luhmann's description of the role of argumentation within the legal system in all its rich detail, a summary of his approach will serve to emphasize both the importance that he places on this specific legal form making distinctions leading to decisions, and the methodological rigour that he brought to his presentation of the internal operations of law *as a communicative system*.

Legal argumentation, according to Luhmann, is one of the principal forms within which communication occurs within the legal system. It is one, but not the only, form of legal communication. By using the term 'argumentation' Luhmann refers not only to the arguments carried on between lawyers in legal cases, but also to the reasoning of judges in deciding a case one way rather than the other, or, put in the context of the legal system's binary

code, Argumentation communications thus 'appear when and only when the system arouses itself through *difference of opinion as to the attribution of the code values legal or illegal*'.³⁴ Strict liability or laws which make it an offence to drive a car over a speed limit, therefore, considerably restrict, but do not exclude altogether, the potential for argument. One can still dispute whether parliament intended or logic dictates that there should be some exceptions to the strictness of the liability, and one can always argue about the accuracy of the instrument measuring speed. By contrast, argumentation flourishes in such private-law debates as to whether contract terms are fair or unfair, whether the actions of the accused do or do not constitute a criminal offence, or in public-law debates on whether an article in the human rights convention has been breached or not. This is because these are all issues which require the attribution of law's code and consequently give rise to the possibility of disagreement over how the code should be applied.

The grounding of legal arguments

In order to be designated as 'good', 'correct', 'successful' or 'justified', arguments must give the impression of being well grounded. Those arguments which do not succeed are seen as being 'bad', 'in error' or 'less good'. Grounds and errors, therefore, mark the positive and negative sides of a distinction.³⁵ We should emphasize at this point that Luhmann's approach to 'grounds' and 'errors' is quite different from that of lawyers, and legal commentators much of whose work involves assessing the strengths and weaknesses of legal arguments usually by invoking principles of logic or rationality or, on occasions, by reference to what the empirical consequences are likely to be. Luhmann is not concerned with the efficacy of such debates as a method of arriving at 'the correct' or 'the best possible' decision. Rather, he observes them purely as an essential part of the communicative process which ensures the continuing capacity of the legal system to deal with events in its environment.

Luhmann's approach to legal argumentation is also very different to that of 'external' political, philosophical, psychological or economic analyses of the legal judgments. All of these start from the assumption that it is possible in legal cases to find both justifications in extraneous criteria for legal arguments or solid support for criticisms of such arguments and for the substitution of different decisions to that made by a court. Yet, it is not simply the case that for Luhmann such truth or value criteria cannot exist in modern society in a way that would justify a conclusion of absolutely right or absolutely wrong concerning a legal judgment. In his view, what these analyses fail to do is to provide a convincing theoretical account of the actual process of legal argumentation. All they succeed in doing is to assume that their preferred principles or criteria are the ones that the law should be adopting, and then proceed to analyse legal arguments according to whether

they live up to or fall short of expectations derived from these principles and criteria. Furthermore, even when legal arguments themselves claim expressly to rely upon scientific, political, economic or moral truths or values, these, as we have seen, will inevitably be reconstructions of such truths and values within the legal system and as such are likely to be rather different from those that observers from these disciplines would recognize. Their ability to describe how legal argumentation works in practice is, therefore, severely limited.

In his analysis of legal argumentation, Luhmann leads us to the inescapable conclusion that legal arguments should be treated exclusively as *events within the legal system itself*. The only reliable frame of reference for assessing 'the correctness' of legal arguments is legal argumentation itself, through which law justifies itself by reference to criteria that it has generated internally. Where, for example, a statement of principle occurs and is justified in legal texts 'the statement of a principle means only that the distinction is re-delegated back into the system',³⁶ for the capacity for distinguishing within law between right or wrong, correct or incorrect application of principles and criteria, derives only from legal argumentation and not from external criteria.

Despite what lawyers might want us to believe, even logic, rationality or 'reasonableness' is of no use as a criterion for distinguishing consistently between 'good' and 'bad' legal arguments, between those that have been declared 'grounds' and those that have been declared 'errors'. Principles of logic or rationality may well be used to bolster legal arguments or justify a legal decision, but where this occurs the same principle (proportionality, appropriateness, the balancing of values) could often, if not always, be deployed to justify the counter-argument or the opposite decision.³⁷

If one turns to the deployment of anticipated consequences (what is likely to happen as a result of the court's verdict or decision) as a justification for legal arguments and decisions, as occurs frequently in, for example, environmental and family law, one needs to recognize that any decision has to be taken in the present, without any sure way of knowing what those consequences might be. Such justifications, supposedly based on empirical data, often from experts in the field, then, 'move into the medium of the merely probable',³⁸ and so into the domain of speculation. Even so, this does not prevent the legal system from developing what Luhmann calls 'anticipatory reactions'; that is, it does not prevent legal texts making connections between regular occurrences and future situations. These might include the linking of long-term shock reactions with post-event trauma or family violence with psychological disturbance among children in such a way as to give the impression that these reactions could be justified scientifically.³⁹

'Lawyers', according to Luhmann, 'often seek to cope with these problems' of having to anticipate consequences with no reliable way of knowing what these consequences will be, by 'using the formulae "balancing"

benefits, interests or consequences . . . The balancing of interests is then a "program" for overcoming paradoxes [arising from the need to know the unknowable].⁴⁰ Once again, however, despite the efforts of lawyers and judges to locate these interests in a universe of truth and facts, it is law, and not politics, science or logic, which determines what are legitimate interests as well as which of them should prevail in a particular case. Once they have been recognized, legitimate interests become part of law's 'redundancy', avoiding the need for argumentation as to their legitimacy and, at the same time, providing a hook on which future legal cases may be hung.

The concept of 'reasonableness' is also widely accepted by lawyers and deployed as a sound criterion for distinguishing between grounds and errors in legal arguments. By justifying an action or a person as 'reasonable', law appears not only able to draw distinctions and so decide difficult cases: the concept of rationality also gives the law itself the aura of endowing its operations with an external validation. Many critics of the law have made the obvious point that legal assessments of 'reasonableness' rely heavily on value-judgments of the judges which are neither logical nor rational, but reflect instead on concealed factors, such as gender, class or race.⁴¹ This, they maintain, makes it impossible in law to challenge such decisions provided that they are given the appearance of rationality. Yet whether law itself is reasonable in attributing reasonableness to some people or acts and unreasonableness to others is never an issue available for legal argumentation. Luhmann sees this concealment of 'real' decision-making criteria neither in positive nor negative terms. Rather, in his analysis it is noted as an achievement that law secures through the use of the construct of 'rationality' 'which has the quality of being *its own justification*'.⁴²

Decisions emerge from the legal system with law's certificate of reasonableness stamped upon them. Regardless of what others outside the law might think of these decisions, the theory of legal argumentation has both identified what criteria should be applied to the legal debate and applied them in such a way as to make it appear that reason has prevailed. As far as law is concerned, the right decision has been reached and errors eliminated in a rational or logical way. Thus, at the level of systems theory analysis, law has succeeded in concealing the paradox of its own self-reference by invoking criteria which appear to have universal validity, even if not everybody agrees with the outcome.

The functions of legal argumentation

For Luhmann, the fact that external observers of law may detect inadequacies, some serious, in the different ways of justifying the difference between good and bad arguments is not at all surprising, given that legal argumentation, including the distinction between different arguments, is a product solely of the legal system and relates *solely to the operations of that system*. If one starts with the 'assumption that in communication which uses legal

argument the point is only to secure effects *within the system itself*, it then becomes apparent that 'legal argumentation is a means for the legal system *to convince itself*, to refine and continue *its own operations* in one direction (and not the other).'⁴³

What then are these operations that benefit from argumentation? Firstly, argumentation sets the boundaries for relevant communication. The dual concepts of 'grounds' and 'error' and the need to distinguish between them presuppose 'the law in force in the form of texts'.⁴⁴ This imposes a prior limitation on the content of the argument by limiting it to what the law considers of relevance to the legal question. These texts, in conjunction with the cases, issues and textual interpretations, 'produce the consensual dimension of the argumentation process. They ensure that the same thing is being talked about. They make sure that communication can be connected by making discrimination possible between *what is relevant and what is not*.'⁴⁵

Legal argumentation, therefore, delimits the nature of the legal debate by determining in advance what texts are likely to be appropriate, by providing the means for deciding what is pertinent to the issue in question and by presupposing that there exists some sound basis for judging and justifying the existence of grounds and errors. Each new case and each new decision (whatever the outcome) reinforce law's ability to mark out the space of relevance and, at the same time, the competency of the legal system to determine what is relevant and what is not.

This should not, however, be taken to mean that law is static or dismissive of any new arguments. It is rather that any arguments have to be recognized by law as valid and that it is law alone which is responsible for formulating, invoking and applying tests of validity. Here, Luhmann refers to the 'form' information/redundancy which is common to all communicative systems. These are 'two sides of one form because redundancy and information mutually presuppose each other and, at the same time, conceptually exclude each other'.⁴⁶ Redundancy makes information superfluous, but is necessary for the system to recognize information as belonging to itself. In order for 'surprises', that is, (new) information, to be introduced into the system, it has to be seen as belonging to the system, and this process or recognition transforms the information into redundancy. Another way of describing the same process is to use the concepts of 'events' and 'structures'. The redundant aspect of the communication becomes structure, providing the means for a communication to be recognized as belonging to the system. The event relies upon this recognition for its inclusion as a communication belonging to that system. 'Redundancies . . . do not only exclude information, but also produce it by specifying the sensitivity of the system.'⁴⁷ At the same time as the system is able to distinguish structures and events according to their relevance for the system, it also communicates its own capacity to make such distinctions when confronted with different events in its environment. In addition, the aspect of the event (or new

information) which is recognized by the system, which is accepted rather than excluded, now becomes part of the structure of the system. Any future identical situations in the system's environment will no longer provide new information for the system. The relationship between redundancy and information may, therefore, be seen as a 'learning' by the system.

In his account of the role of arguments in the legal system Luhmann replaces the general concept of information by that of *variety* (or variability). 'Variety provides a measure of complexity, namely the number and multifariousness of events which set off information within the system.'⁴⁸ These may be either external events or internal events, such as new statutes or regulations or 'the increase in the number of binding precedents in common law'.⁴⁹ Any increase in variety involves cases and decisions – 'the primary operations of the legal system' (ibid.) This increase in the number and nature of events allows the law to increase its responsiveness to its environment. In other words, it allows law to involve itself in a wide range of social spheres with the potential always for its introduction into new spheres. There is a temptation that law will react to every 'irritation' in its environment and, therefore, increase its variety, so that each new situation encountered by the legal system will have to be met with new laws, new interpretations of existing law, in other words, in situation-specific ways of coping with them. This would overload the system and make it very difficult for law to operate as a stable, normatively closed, communicative system. Argumentation serves to counter this temptation and 'restore adequate redundancy. This is the function of grounding':⁵⁰

Argument overwhelmingly reactivates known grounds, but in the practice of distinguishing and overruling occasionally also invents new ones, to achieve a position where the system can, on the basis of a little new information fairly quickly work out what state it is in and what state it is moving into. Using argumentation, the system reduces its own surprises to a tolerable amount and allows information only as 'differences added in small numbers to the stream of reassurances'.⁵¹

This in turn permits, on the one hand, a controlled reduction of the complexity perceived to exist outside the system and, on the other, an increase in complexity within the legal system. 'The reduction in complexity promotes the increase of complexity'.⁵² This works both to retain a measure of consistency and cohesion between its various programmes and, simultaneously, to allow the law to observe itself as moving forward in a seemingly purposeful way. As Luhmann explains, the point of communications using legal arguments is only to secure effects within the system itself. Seen in this way, legal argumentation is a means for the legal system 'to convince itself, to refine and continue its own operations in one direction (and not the other)'.⁵³

Given the autopoietic nature of the modern legal system, which frees it from all direct ties with morality, politics or science, the question of law's legitimacy, for Luhmann, can be answered only by reference to *law itself*. In other words, however they may appear to lawyers, it is not possible in modern society for legal arguments to be grounded in natural laws, universal truths or even rationality. Regardless of the ways in which they are presented, they relate only in law's own *internal constructions of the external world*. This creates a paradox, '[t]hat grounds are needed which cannot be grounded; that is, grounds which are not grounds'.⁵⁴ In order for us, as observers of the legal system, to make sense, therefore, of these internal operations of the law, Luhmann insists that we need to see legal argumentation not as a debate between values or truth-claims, but as a mode of operation solely of the legal system. It is, according to Luhmann, 'a mode specialized in self-observation' so that what we, in our attempt to understand law's operations, find ourselves observing is law's reflexivity – that is how, as a legal operation, it makes use of its own self-observation of legal argumentation. Legal texts, 'for the purposes of argumentation, represent the system within the system';⁵⁵ they are the system's self-description. These may be 'statutes or legal opinions to be found in the relevant literature or court decisions, or other noteworthy documents from legal practice'.⁵⁶

Luhmann identifies logic as having 'a special function in the context of systems theory. Formulated negatively, it makes the *proof* of errors possible'.⁵⁷ It provides the task of refuting previous interpretations of texts, whether statutes or judgments with grounding or justification, and so avoids the impression that old-fashioned ways of thinking have been jettisoned in favour of new laws more in keeping with modern conditions or overtaken by changes in society or scientific knowledge. It allows law to give the impression of a continuous and seamless unfolding. The formulation of principles based on logical proof of errors, therefore, 'may serve to pretend that unity exists where rules have been changed over the course of time, that is, to present inconsistency as consistency'.⁵⁸

More importantly, however, Luhmann sees logic as having a positive function for law in *channelling irritations* from law's environment which risk casting doubt on normative expectations. On their own such factual irritations are not directly translatable into norms. The fact that employers may regularly breach safety regulations, for example, does not in itself have any effect on the norm that these regulations should be obeyed. It could, however, lead the way for campaigns to modify the norm, for example, through making employers liable to punitive damages if an employee was injured as a result of a breach or, alternatively, in the other direction, through classifying certain regulations as non-mandatory. Luhmann sees logic as a device which makes it possible to resist such pressures for change, whether for or against the interests of employers, by helping one to recognize 'what consequences would flow from a change of norms, from an

overruling within the system'.⁵⁹ Another example would be moves to make parents liable for contracts for non-necessities entered into by minors who lied about their age. Again, logic may come to law's assistance in defence of the norm by drawing attention to the difficulties that might arise in parent-child relationships and also in establishing who was the purchaser, for sale of goods law. This does not mean that normative expectations supported by law never change, but rather that 'logic protects the system against the far-reaching effects of change. It makes the introduction of change easier';⁶⁰ so it contributes to law's stability.

Luhmann's concerns with logic and rationality, therefore, are very different from theorists', who see them both as essential attributes of the system and as objective criteria against which law may judge its own decisions. For Luhmann the system simply cannot 'guarantee . . . a rational state'.⁶¹ To analyse the law as if this were a possibility or even an ideal to be aimed at is not only to demand the impossible, but also to miss the important roles logic and rationality play for legal argumentation in promoting rationality and concealing the paradox of self-reference.

Law's function

Embarking upon an account of law's function it is worthwhile reminding ourselves of the warning set out in Chapter 1⁶² concerning the specific meaning of function as a general term in Luhmann's theory. This warning is of particular importance for the legal system, for, in identifying law's function, Luhmann is not concerned with the usefulness of the legal system to individuals or groups of individuals. Law as a system of communication may be useful to some people and irrelevant to others. It may serve a person's interests at one time and create difficulties for the same individual on another occasion. It is not the psychological, or even the anthropological aspects of the legal system that interest Luhmann, but its contribution to the existence and preservation of a society which consists of communicative social systems. The question that he seeks to answer, therefore, in his account of law's function is: what is the essential social role that law plays which allows other systems, such as economics, science, politics and personal relations, to continue to organize communications, each in their specific ways?

Moreover, for Luhmann, social communicative functions exist quite independently of the tasks or roles which different systems themselves identify for their operations, and '[c]ontrary to popular belief, the notion of function has nothing to do with the purpose of actions or institutions'.⁶³ His hypothesis in fact is that 'law solves a problem in relation to time' which always exists in social communication when the communication is concerned with or is premised upon expectations'.⁶⁴ In his terms, law's unique social function is, therefore, to stabilize normative expectations *over time*.

This concern with time lies within what Luhmann sees as 'the function of norms' that is 'the attempt to anticipate, at least on the level of expectations, a still unknown, genuinely uncertain future'.⁶⁵

Law's function, in consequence, is to ensure that societal communications operate according to expectations formulated on the basis of norms, that is expectations on how things *ought* to be. These normative expectations will have been produced by decisions of the legal system as marking a particular moment in time – the present. They have the effect of constructing a relationship between the pre-decision past, where such expectations, if they existed at all, were not endorsed by law as subject to the legal/illegal distinction, and the post-decision future, where future events will be subject to the possibility of communications based on this legal/illegal distinction. In its production of norms, therefore, law's function is to create time relationships or to make time connections (*Zeitbindungen*), so that an uncertain and unpredictable future may at least become certain and predictable within the network of interpretations which law provides. Law allows at least for the possibility of expectations being based on established norms so that it is possible to anticipate whether conduct will be legal or illegal, subject to the law or not subject to the law. This avoids the need for expectations to be reliant upon experience.

According to Luhmann, there are two distinct ways of learning, one cognitive and one normative. While cognitive learning is dependent upon continually adjusting expectations in accordance with new events in the environment, normative learning frees the process from these endless, relentless, destabilizing adjustments and, instead, makes it possible for norms – the way things ought, or ought not, to be – to be treated as the building blocks of the learning process. Law provides the norms on which society, in the form of other subsystems, is able to rely and, in doing so, avoids learning from experience. The problem is, of course, that experience may negate normative learning by demonstrating that the norms have little or no validity as reliable indicators of future events; they may serve to undermine normative expectations. In order to be effective in stabilizing expectations, therefore, legal norms need to be counter-factual events. It becomes necessary to establish expectations of the sort that resist and survive their own disappointment, rather than merely corresponding to reality.

The normative expectations that need to be established have to be of a sufficiently general kind to allow 'conflicts to be decided in advance, without knowing who will be involved in them'.⁶⁶ They must not be of the kind that could be invalidated by pointing to individual instances where the expectations have not been met. They must restrict freedom of conduct in advance, so that it can be known by 'anyone who wants to act in that way that they will be violating expectations and so be disadvantaged right from the start'.⁶⁷ Yet, we all know that thieves are rarely caught, cheats and frauds prosper, debtors are never made to pay, disqualified drivers continue to

drive, public services are not sanctioned for failing to fulfil their statutory obligations. Nonetheless the legal norms that are contravened remain unchanged. This is the case even where the *moral* norms have been modified, at least among those who regularly engage in specific kinds of unlawful behaviour, such as tax evaders or cannabis users, but this disregard for the law in itself has no effect directly on *law's* normative expectations. These may continue to be relied upon whenever it is necessary for social function systems to anticipate the future. Within the framework provided by legal communications, it is safe to assume that this future will *normatively* be no different from the present, that the same distinctions marking what conduct is legal and illegal will exist tomorrow as they exist today. Contraventions of the legal norms do not in themselves change them, however prevalent they may be and however widespread the unlawful practices. Only changes in the law itself are able to change legal norms. Put the other way round, society is entitled to rely upon the normative expectations provided by the legal system until such time as the system itself by producing new laws (or repealing old ones) replaces one set of stable expectations with another.

If one takes a cynical perspective, law could well be seen as constructing a make-believe world which simplifies psychological, political, economic and other 'realities' to enable it to reject all knowledge which threatens to undermine the validity of its normative communications. Telling the judge that you had no control over your behaviour, that you could not earn a decent living if you kept strictly to the letter of the law, that nobody was harmed, or that what you did was justified politically or sanctioned by the words of the Bible or Koran is likely to do you no good in court.⁶⁸ Only where law itself has determined in advance that particular psychological, economic, moral or political motivations constitute acceptable defences will these excuses carry any weight. According to Luhmann, such a selective vision, such partial blindness is necessary and inevitable. Only by insisting on the reality of this 'virtual' social world based on law's counter-factual normative expectations is law able effectively to perform its social function and provide communications which enable relations within and between social systems to continue to be based on a solid footing.

This does not, of course, mean that for Luhmann the law never changes or never itself learns from experience. Rather, any changes and any learning necessarily occur within an operational process and within a time frame formulated exclusively by the legal system. Legal norms are immune from having to change in response solely to disappointed expectations. As Luhmann puts it, 'The task facing the system is not to achieve a framework of references to *knowledge* and to be cognitively closed, but rather to achieve a framework of references to *norms*.'⁶⁹

The emphasis placed on the temporal dimension of law's function represents a concerted attempt to break with previous theoretical accounts of law which stress concepts such as 'consensus', 'social control' and 'integration',⁷⁰

and to contrast his approach with the integrative theory of law set out by his intellectual sparring partner, Jürgen Habermas.⁷¹ Luhmann builds upon this very abstract foundation to develop a sociologically innovative and highly complex account of the ways in which law stabilizes normative expectations *over time* and, in doing so, provides a consistent and seemingly predictable environment in which trust and reliance may be placed upon communications both within and between systems. Even in a social world where instability and unpredictability abound, the law is able to offer stable norms of conduct which recognize only one measure of time – time before and time after the legal communication which established, changed or abolished the normative expectation. The expectations generated by law exist, therefore, as fixed signposts pointing in the direction of the way things ought to be. No matter what occurs, the signpost continues to point in the same direction until law authorizes that it should be moved or removed altogether. It is in this sense that Luhmann defines the function of the legal system as ‘producing and maintaining counter-factual expectations in spite of disappointments’.⁷²

This is not to suggest that maintaining counter-factual expectations over time is a cost-free or risk-free exercise. As Luhmann remarks,

If, and to the extent that, in order to stabilize these temporal connections it becomes necessary to sustain expectations which do not in any way correspond to reality, but which are supposed to resist eventual disappointments, the social problematic grows radically.⁷³

Law may be able to conceal the problematic nature of trying to maintain time-connectedness through counter-factual expectations by attributing to itself some ‘motivational function’ such as reforming criminals, encouraging economic activity or promoting children’s welfare. In this way disappointments are not fatal to norms, since good reasons can usually be found for maintaining the norm in spite of the lessons of experience.

Law’s code and programmes

Recht/Unrecht

Throughout this book we have translated *Recht/Unrecht*, the code that Luhmann attributes to the legal system, in two ways. Firstly, we have used the formula ‘legal/illegal’ (or ‘lawful/unlawful’) when it refers to law’s performance in processing information obtained from its environment and transforming this information in ways that have meaning as legal communications. Secondly, we have employed the formula law/non-law when it refers to the unity of the legal system, its ability to determine which communications are recognized as legal communications and which are not.

This second formula, consequently, refers to communications which are recognized by the law as legal communications, that is as *relevant for law*. The fact that the English language needs to make this distinction between the two uses of the term should not mislead us into thinking that Luhmann saw them as two quite separate concepts. On the contrary, as we saw in our discussion of legal communications earlier in this chapter, the recognition of a communication as a specifically legal communication depends upon the legal system's deployment of the lawful/unlawful code in the interpretation of its environment.

However, as Luhmann explains, 'there are always two possible interpretations of the code'. The one treats the code as dividing the world in to two halves – the lawful and the unlawful'.⁷⁴ No matter what the situation, from the legal system's perspective '[e]verything, is either lawful or unlawful'.⁷⁵ Put in the terms of George Spencer Brown's *Laws of Form*,⁷⁶ whenever the form of law is applied, 'one side of the code is specified and the other side is treated as a residual category, that is, as remaining unmarked space'.⁷⁷ According to Luhmann, this leads again then to two possible models. 'One can treat *either* lawful *or* unlawful as the "inner side" of the code and, the other side, therefore, as the "outer side", categorized each time as a residual'.⁷⁸ Problems arising from having to choose between whether to treat lawful or unlawful as the inner side of the code 'can be resolved by formulating relatively indeterminately the norms which respectively permit or prohibit something'.⁷⁹ This leaves the system's programmes free to orientate their task of designating how the code should be applied towards either one or the other of the two sides of the code. In civil law it will move more towards the 'being right in law' (*Recht-Haben*) position, while in criminal law it will move more towards being 'in the wrong' (*Im-Unrecht-Sein*).⁸⁰

The interpretation of behaviour as *Unrecht* may be seen as positioning that behaviour outside the space or 'form' of law. Its unlawfulness may exclude it from being part of a legal system consisting of law – as opposed to non-law – communications. For example, in civil law, the fact that the defendant to an action for breach of contract was also the suspect in a murder enquiry at the time is not normally a relevant issue to the legal question as to whether the breach of contract occurred. As such, it is excluded altogether from consideration by law. Alternatively, the behaviour which gave rise to the suspicion of the defendant's involvement in murder may in the criminal inquiry be seen as *Unrecht*, as being 'unlawful', and so, in these different legal circumstances, it might be brought it into the form of law, as a matter for the legal system, rather than being treated by law as a residual category. All depends upon how the code is deployed in any particular situation.

The subtlety and complexity of the relationship between *Recht* and *Unrecht* and the flexibility with which it may be adapted by the legal system's programmes to suit the particular situation are unfortunately and inevitably

lost in translation, owing to the need to change the English words according to the context in which they are used. It is nonetheless important that the limits of this English translation be recognized; otherwise readers of translations of Luhmann's writings may find the idea of one binary code as representing the totality, the unity and the identity of the legal system to be banal and simplistic, which is far from the case.

Law's code applied to its own operations

Law's binary code applies not only to events outside the legal system, but to legal decisions themselves. As legal communications, they too need to be seen by law as either lawful or unlawful. To be lawful, not only must the legal decision conform to all the procedural requirements laid down by law; it must also correspond to what is acceptable as valid legal reasoning. This will usually, but not always, mean steering the path laid down in previous cases of a similar kind or at least not deviating too far from that path. Even legislation may, as we have seen, be observed by law and pronounced unlawful, if it conflicts, for example with articles in the constitution or human rights statutes. Turning its code in on itself, perhaps even declaring its own decisions unlawful, is far from being a self-destructive act. On the contrary, each time this occurs, the legal system reaffirms its unity, its autonomy based upon self-reference. Law is lawful, until the law decides otherwise. No matter how strong the evidence in favour of innocence that some investigative journalist may produce, a person found guilty of a criminal act remains a criminal until the appeal court decides in its own time that the earlier decision was wrong. To be sure, he or she may be released from prison where the court's decision exonerating him or her is no more than a formality, but this in itself does not wipe clean his or her criminal record or relieve the court of responsibility of formally correcting the miscarriage of justice.

Mutual exclusion

The values explicit in the code legal/illegal are mutually exclusive. Something cannot be legal and illegal at the same time. In legal argument it is not possible for both prosecution and accused, plaintiff and defendant to be right. They can agree not to dispute issues of the lawfulness or unlawfulness, but only by accepting that one side of the distinction or the other should be applied to the conduct in question. Moreover, the fact that in some legal cases a clear-cut winner and a clear-cut loser fails to emerge, because some issues are decided in favour of one party and some in favour of the other, does not in any way undermine the validity of law's coding. Each of these sub-issues will require a decision between the positive and the negative sides of law's code. Situations where in pure monetary terms the winner loses more than he or she gains, either through the high costs which he or she has to pay or the low level of damages awarded or both, do not disturb law's binary code. It remains intact despite the winner's lack of

success. In itself the code holds out the promise neither of financial gain, happiness nor justice, but provides merely the certainty that a decision will be made determining what is lawful and what is not. All other results are contingent; they may or they may not happen, and whether they do or do not depends upon forces outside the control of the legal system.

Third values

Luhmann is insistent on the binary nature of law's code. Any introduction of a third value, such as 'legal, illegal and the common good' or legal, 'illegal and the maintenance of political control' at any time during the evolution of modern society 'would eventually have led to a complete disorientation of legal practice'.⁸¹ Today, the apparent introduction of third values into legal decisions always turns out to be an intermediary coding applied by law's programme in order to make possible an eventual decision between the two sides of law's code. What child psychiatrists or paediatricians see as being the best way of promoting the welfare of the child does not become an alternative option to the binary choice of lawful/unlawful. Rather, it allows that binary choice to be made on the basis of information fed into law's programme for decisions concerning children. What is accepted as the best way of securing the child's 'welfare' or 'best interests' enters the code on the positive side; it is the lawful alternative. Conversely, any proposal which does not meet this criterion becomes a negative choice for law.⁸² A court which accepts such a proposal will be acting unlawfully and is likely to have its decision reversed on appeal. This does not, of course, mean that judges are expected to possess the power of prophesy allowing them to know in advance that one solution will be better for a child than another. All that happens is that information from experts on the child's welfare is selected and simplified in such a way as to allow a *legal decision* to be made. Whether it achieves the desired effect is immaterial to the legality of the decision.⁸³ The same is true of legal decisions which appear to consider issues of good race relations, cost-effectiveness or moral integrity. None of these become alternative values for law's code. They exist as values outside the legal system and their only access to legal decisions is as information which permits law's programmes to achieve the formulation of issues according to the binary code of lawful/unlawful. In no circumstances can they be incorporated within law by adding a third value.

The only possibility for third values is for them to confront law's binary code by becoming what Luhmann calls 'rejection values', that is values 'which open up the possibility of rejecting . . . the decision between legal and illegal or the validity of regarding this option as the only option'.⁸⁴ Yet 'one cannot impose higher standards on the code by rejecting it',⁸⁵ since there is no supreme authority to decide which social system's code is superior to another. All that society can do is to substitute a different code, for example, by organizing its decision-making in such a way that the

code of science, economics or that of therapy or religion is applied rather than that of law. Law may play its part in such organization of decisions by determining that some areas of conflict, such as questions as to whether an act of adultery was or was not provoked or whether a teacher should have used one method rather than another, should be placed outside the form of law and become 'non-law' issues. Yet the boundaries between law and non-law may become increasingly difficult to maintain at times when human rights legislation and a surplus of people qualified as lawyers create pressures for more and more situations to be decided by applying the binary code of the legal system.

The relation between law's code and programmes

Luhmann emphasizes the importance of the distinction between codes and programmes for 'the autopoietic self-determination of the system'.⁸⁶ The concept of programmes complementing 'coding, filling it with content'⁸⁷ is particularly apt as a description of what happens within the legal system. Programmes take information from the environment and, as we have already observed, reformulate it in such a way as to make it possible for law to apply its binary code. He adds that 'One could also say . . . that codes generate programmes'⁸⁸ in the sense that the identity of the system depends upon the maintenance of its code and, in the absence of this identity, law would have no programmes. Code and programming represent then, in Luhmann's words, 'the two pillars of the unity of an autopoietic system such as law'.⁸⁹

As Jean Clam explains in his book on Luhmann's theory of law, code and programme 'are complementary in the sense that the fixed nature of the code makes possible variations in the programmes, which are pivotal to for its operations' and '*programmes permit*, through their flexibility, the integration into the law of values external to its code.'⁹⁰ There is, however, an important difference between the two concepts. 'A change of code is nothing less than a change of system', while programmes represent ways of organizing information and may be changed according to the demands of the particular situation.⁹¹ An example would be judicial review in English law. Seen as a programme of the legal system, it organizes information from administrative decisions in order that law may apply its *Recht/Unrecht* code, both in the form of law/non-law (i.e. relevant or not relevant to legal decision-making) and in the form of lawful/unlawful (applied to the administrative decision or process). It examines these decisions but only in respect of their conformity to certain specific criteria, such as the taking into account of all matters relevant to the decision. It does not allow courts to substitute their judgment for that of the administrative body. As a result some decisions may be declared unlawful and referred back by the court to the administrative body for a new decision which meets the legal criteria. This filtering of the complexity of administrative decisions, reducing it to

manageable proportions, and this treatment of the 'values' of administrative decisions as 'rejection values' not to be coded by law's binary distinction or added as a third value (legal/illegal/administratively correct) are typical of law's programming of information and its conversion into legal communications. Moreover, this combination of code and programme allows the legal system to adapt to a multitude of variations and instabilities in its environment, or, in our illustration, to the variety and constantly changing nature of administrative decisions in a way that always allows it to apply its binary code.

This distinction between codes and programmes is also essential to what Luhmann refers to as 'the unfolding of the paradox' of the system.⁹² The fact that only the legal system can decide what is and what is not law and in doing so refers only to its own communications and not to some universal values needs to be concealed from itself.⁹³ The code assures the closed nature of decisions by limiting the decision-making possibilities. A decision that an act is legal is always confronted and limited by a contrary determination that it is illegal. This restricted choice avoids any need to invoke universal values, finality or perfection. '[I]f it relied only on its code, the system would be incapable of performing and concealing the intolerable acknowledgement that law is what it is (not)'.⁹⁴ Yet programmes are able to give the impression of incorporating universality, finality and perfection by reconstructing them within the legal system, or alternatively by treating them as 'rejection values', that is treating them as if law had no responsibility for making a distinction between them.⁹⁵ In its human rights programme, for example, law is able to give the impression that it is engaged in determining absolute and universal values, such as the freedom of speech. In practice, however, the issues that fall for legal decision-making concern whether a particular restriction on public expression is lawful or unlawful. Although moral principles are likely to be invoked and referred to in the legal decision (as well, of course, as interpretations of the wording of the constitution or international convention guaranteeing freedom of speech) their invocation will always be in the context of the legal programme. This programme will ensure that 'universal' moral values will consist only of what law selects and interprets as having this status and that, where the choice lies between one moral principle and another, such hierarchical ordering of values will be the product only of law's programming.

Another example of this would be law's reconstruction of science as universal knowledge whenever it is faced with the need to bring scientific information into the system. As Brian Wynne remarks, "To treat "science" or "expertise" as an autonomous, objective entity which has authority independent of the institutional settings in which it is used . . . may be a practically necessary mythology for legal institutions to employ."⁹⁶

This treatment of science as 'perfection', that is, as able to provide the court with truths, even extends to such imprecise and contested sciences

as child psychiatry, with child psychiatric knowledge entering law's programmes as universal knowledge uncontaminated by factors of cultural relativity or personal motivation. This allows courts in their decisions, firstly, to distinguish between what is and what is not reliable information and who is and who is not a reliable expert, and, secondly, to use these distinctions in ways which allow law's code of lawful/unlawful to be applied to issues concerning children's past and future well-being.⁹⁷

Law's conditional programmes

All legal programmes take the form of conditional programmes (*Konditionalprogramme*), that is, of 'if . . . then . . .' programmes. 'The conditional programme spells out the conditions under which it is considered whether or not something is legal.'⁹⁸ It refers to past facts and situates these in the context of present legal structure. Having determined the past facts, the law then decides the present issue by its application to these facts.⁹⁹ This does not mean that the future is lost from sight. On the contrary, law's programmes always keep an eye on the future, but they do so always with reference to past behaviour and the assessment of that past behaviour using criteria existing in the present. Those going to law, therefore, have to formulate their dispute with reference to the legal text and try to anticipate the conditions for a decision in their favour.

According to Luhmann, what the 'if . . . then . . .' formula of law's conditional programme does is 'to prevent any future facts not accounted for at the time of the judgment from being relevant to the legal/illegal decision'.¹⁰⁰ This protects the legal system against criticisms based on subsequent failures in the anticipated benefits of the legal ruling, which, if accepted as valid, would make law's norm-stabilizing function untenable. 'It would be a disaster for law if measures had to be considered illegal, if it turned out that their purpose could not be achieved.'¹⁰¹ Clearly, this is an important feature of conditional programmes which Luhmann contrasts with the characteristics of what he calls *Zweckprogramme*, that is purposeful or purpose-oriented programmes, where the ultimate aim is the achievement of some objective which is stated within the programme itself.

In modern society these purpose-oriented programmes take the form of intentional programmes, that is of programmes based on present intentions projected into the future. Examples of such programmes would be financial investment, town planning or the control of dangerous drugs. By relying on present intentions, these programmes are able to mask uncertainties about the future and, more particularly, 'the problem that future versions of the present will not be what they are now projected to be'.¹⁰² Nevertheless, they are judged on their performance; that is, on whether the purpose that was intended is in fact achieved. Unlike conditional programmes, these purposeful programmes do not permit restrictions to be placed on the facts that have to be considered in decisions. They allow anything to

become a relevant factor, just as long as it can be shown to have a bearing on whether objectives may or may not be achieved. They do not lay down in advance, in the manner of conditional programmes, what information can be brought into the programme as pertinent to the enquiry. Their openness to the future and their inability to exercise any control over the information to be considered combine to make purpose-oriented programmes ill-suited to law's expectation-stabilizing function. By contrast, sequences of communication which structure statements in terms of the realm of the possible are able to offer guarantees that are resistant to counterfactual information, since what is possible is not a fact and need not actually occur.¹⁰³

The fact that, seen politically, legislative programmes which generate laws are indeed purpose-oriented, in that their success (and to a large extent their validity in political terms) is judged directly by results, or the perception of future results, may seem confusing. The issue for law, however, is not the same as it is for politics, and the same legislation may be subjected to different programming by different communicative systems depending upon the circumstances. Law and politics do not, according to Luhmann's scheme, share the same aims. In contrast to programmes based on the coding of power, for law the effects of decisions are not a criterion for determining their success.¹⁰⁴ All of this, however, does not deal with those situations, of which there are many, when the legal system appears in its communications to set itself quite specific aims and purposes. These may be to deter criminals, to redress wrongs, to protect the environment, to resolve conflicts, and so on. Luhmann explains this by pointing out that whenever purpose-oriented programmes exist within the legal system, they are to be found always nesting in conditional programmes.¹⁰⁵

Luhmann takes the example of purposeful programmes directed towards promoting child welfare. Law's programmes specifically relating to these issues appear to take on board the ambitions of those (whether judges, politicians or academic lawyers) who wish to see the legal system fully involved in promoting the future welfare of those children who are seen as requiring special protection, or whose parents are unable to resolve conflicts between them. Yet, when it comes to the legal decision, the judges, according to Luhmann, have no choice in such cases but to 'ignore the questions as to what future presents will look like'. Instead, they are obliged to

make their decisions according to the law, exclusively on the basis of what they see as the future at the moment of their decision, that is on the basis of what appears to them – after careful examination of all the facts of the case – to be the present future.¹⁰⁶

Theoretically, therefore, there are then two possibilities: either the decision is made according to law's conditional programme which by its very nature

has to ignore 'future presents'. The law has to refuse to contemplate the possibility that the rightness of the decision may be doubted in the future in the light of evidence of the child's or parents' post-decision behaviour. Alternatively, it attempts to anticipate the possibility of such 'errors', in which case the decision cannot be a legal decision, since there will be no application of law's legal/illegal code. It exists rather as the product of child therapy or child protection, or of family administration or ordering, to which a judge has temporarily lent his or her authority in the knowledge that plans will be changed extra-judicially if matters do not turn out as expected.¹⁰⁷

If one looks carefully, one can always find in the practice of the courts further supportive evidence of what Luhmann calls the 'nested' status of every incidence of judges setting themselves a performance objective. Any specific purposes can only exist if 'nested' within the context of a 'host' conditional programme which translates law's binary coding into practical strategies for decision-making. It is useful to make a distinction here between procedural and substantive law. Legal procedures allow the legal system to apply its binary coding to its own operations. Legality concerns not only the decisions of the judges on substantive issues, but also the issue of whether these decisions have been arrived at legally, that is according to the norms of the legal process and judicial decision-making. Judges, at least in Anglo-American jurisdictions, always have to be mindful of the demands of the rules of evidence and procedure as well as of those legal norms derived from precedent and statutory interpretation which, if contravened, may expose their decisions to challenge in a higher court. Law, therefore, provides its own conditional programmes for its own operations. No matter how scientifically correct or morally impeccable a judge's decision may be, procedural defects will prevent it from becoming law or, at the very least, delay its full implementation. On the positive side of the legal/illegal distinction, procedures tie the parties into a process, where, however uncertain the outcome, there can be no doubt that there will be an outcome. Legal proceedings feed on the uncertainty of the outcome to engage the parties; they encourage the parties to become, in Luhmann's words, 'prisoners of their own participation, who afterwards have only the slightest prospect of contesting the legitimacy of the proceedings'.¹⁰⁸

Law, justice and equality

To treat justice as if it were the primary goal or driving force of the legal system is for Luhmann like treating science as if it represented progress, politics as if it stood for democracy, or religion as if it provided the path to salvation. It is necessary for the legal system to describe *itself* as 'just'. What this means in essence is that, in Luhmann's terms, justice is the basic reference of the legal system in the same way that politics 'refers to' legitimacy and economics to scarcity. The political system may even help to promote

the legal system as a perceived guarantor of justice, but justice as a concept is quite inadequate for any analytical, sociological understanding of law in a society where no absolutes exist and there can be no consensus as to where, in the final analysis, justice lies. There is not even any agreement as to what the final analysis should involve.

Most jurisprudential or legal theory would, of course, deny this elusive nature of justice and in their terms they are right. The law can (and must) define where justice lies. Yet, in Luhmann's view, the problem that legal theory, which seeks to retain a belief in *absolute justice*, faces is that society's evolution away from any possibility of relying upon natural or divine law and towards functional differentiation has left the legal system with no choice but to define for itself what constitutes justice. 'The system itself has to define justice in a way which makes it clear that justice must prevail and that the system identifies with it as an idea, principle or value'.¹⁰⁹ This does not mean that different legal systems cannot be seen as more just or less just than one another.¹¹⁰ In making such comparisons, however, we need to note, firstly, that what counts as 'just' depends upon the pre-selected criteria of the external observer – the legal system being observed cannot do other than see itself as just. Secondly, in addition, there can be no guarantee that even legal systems judged to be more 'just' will do 'justice' in absolute terms or even according to a consensus or majority view of what constitutes justice.

At the same time, there is no denying that the self-identity of law is bound up with the concept of justice, in that it sees itself and is projected into social communications as the social institution where justice is done. Far from regarding the necessarily fragile and temporary nature of modern society's assessment of what constitutes justice and equality as a problem for law, Luhmann sees it as indispensable for the effective operations of the legal system.

The norms of justice and equality

Luhmann sees the notion of equality as being 'identified with' justice 'in a long and binding tradition'.¹¹¹ 'Equality', he explains, 'is seen as a general formal element which contains all concepts of justice but which means only something akin to regularity or consistency'.¹¹² Since there is no longer any possibility of achieving an absolute of substantive justice (as there are no absolutes to rely upon) law's notion of justice takes on the same restricted form as that of equality before the law. Nobody expects law to provide social equality, but everyone who comes before the law is treated equally in the sense that, at the formal level at least, the same legal principles apply, regardless of status, wealth, colour or creed. In Luhmann's words, equality becomes, like justice, 'a formula for contingency . . . a formula which legitimizes itself',¹¹³ and does not rely upon external notions of who or what should be treated equally, but adapts in a uniquely legal way general abstract

notions of equality. In the same way the concept of justice becomes a formula for contingency in the legal system:

that is neither a statement about the essence or nature of law, a principle for substantiating the validity of law, nor finally a value which presents law as the preferred choice . . . The formula for contingency is only a *schema searching for reasons and values*, which can become legally valid only in the form of programmes.¹¹⁴

Many commentators on the legal system have made the distinction between procedural and substantive justice, and followed this distinction with a criticism of the 'false impression' which law is able to present of being just, whereas all it has achieved is a formal justice masking gross injustices implicit in its decisions. In contrast to such views, Luhmann's point is not simply that there is no way of determining in any absolute manner what constitutes justice and injustice, but also that the different forms of procedure which need to adhere to law's image of 'natural' justice, far from being a mask to hide the gross injustices perpetrated in the name of law, become programmes within law, providing a spectrum through which generalized, abstract notions of justice may become refracted into legal principles.

Justice and equality represent supreme principles for law; the basic requirement that it should be fair and be seen to be fair. In terms of legal theory, justice operates as a normative guide as to where the point of balance between competing norms, values and interests should lie – what Luhmann describes as a 'mid-point between normative positions and values' and as a symbol 'of moderation and the middle way'.¹¹⁵ However, Luhmann makes it quite clear that principles of either justice or equality are unable to operate *as norms* within the legal system. They cannot be treated as norms, because they do not provide any basis for law to extract values which could be helpful in decision-making.¹¹⁶ To say that a case has been justly decided does not in itself provide law with any indication as to where injustice lies or what it means. In the same way, a case determined according to the principle of equality does not contain 'any directive as to what should be treated as unequal', which could serve as 'a marker for law's programmes'.¹¹⁷

Even if they want to do so, judges cannot find in favour of a litigant because he or she was a 'good person' who conducted himself or herself honourably throughout, or, rather, this cannot become the rationale of the legal decision. The fact that 'justice was done', in that well-motivated behaviour appears to have been rewarded, does not mean that a litigant in another case who might be equally virtuous can expect to win on that ground alone. Nor does it mean that a litigant in a subsequent case with similar facts will lose because the judge is suspicious of their motivation.

The same reasoning disqualifies equality as a value on which cases may be decided. Until recently, for example, all adults guilty of first-degree

murder were treated equally by those American states which inflicted the death penalty for this crime. Now, those adults who suffered from learning difficulties at the time when they killed are considered different from normal adults and cannot, for that reason alone, be executed. It is not the norm of equality which has changed the law, but the legal perception of the level of responsibility which justifies taking the life of a murderer. It is not simply that the notions of justice and equality change unpredictably over time, but that, in the absence of some higher authority than law itself, there is no way that the law can be certain of where justice or equality lie at any one time, except, of course, by reference to law itself, that is to legal constructions of these concepts based on law's understanding of its environment.

In Luhmann's scheme, therefore, it is not feasible to consider justice or equality as norms for legal decision-making. Moreover, they cannot be substituted for law's legal/illegal coding or added to that coding as a third value. Nor do they represent, on their own, separate programmes for law's operations 'alongside construction law, road traffic law, the law of succession or intellectual property law'.¹¹⁸ Nevertheless, Luhmann leaves us in no doubt about the centrality of these concepts for the legal system which goes far beyond a recognition of justice and equality as important societal values, and beyond any simple acknowledgement of the role of the legal system in helping modern society to maintain a belief that, despite our fragmented world, justice and equality are still possible.

Formulae for contingency

It is only in modern society that, to a large extent at least, a concept of justice based on some version of natural law, and with it the deployment of justice as a fixed value for decision-making within the legal system, has vanished. It is this which gives rise to the possibility for a 'value-free' notion of justice, a justice liberated from any normative roots to evolve into a formula which may be generalized across the whole range of social situations which law is obliged to confront. This notion of justice serves, firstly, to make these situations relevant for and amenable to legal decision-making and, secondly, to package information for legal decisions in such a way that the appearance of 'a theoretically systematized positive law which is based on rules and principles'¹¹⁹ may be maintained.

By referring to justice as a 'formula for contingency', law is able to solve two of the major problems which beset its self-identity. In the first place, a system which is obliged to describe itself as a system for justice 'cannot at the same time specify what is meant by justice – unless it defines its own operations as *irrelevant to the issue*',¹²⁰ unless it starts from the assumption that it itself is just. Secondly, the legal system in modern society faces the problem of defining 'justice in such a way as to make it clear that justice must prevail and the system identifies with it as an idea, principle or value', at a time when 'the conditions for a concept of justice based on natural law

have vanished. Nature is in no conceivable way just. In other words there is no inference from "natural" to "just" as is implicitly assumed by the natural law tradition.¹²¹ Law's solution to this second problem, according to Luhmann, lies in 'replacing the assumptions about nature with assumptions concerning justice as a self-specified formula.'¹²² As a formula for contingency, 'justice' or 'injustice' becomes a circular form based on circular references produced by law itself. In the same way that politics validates itself by claiming legitimacy, and the economy perpetuates its operations by proposing itself as a solution to problems of scarcity, all operations of the legal system are ultimately validated by law's capacity to refer to justice and its claim to be able to identify where justice lies.

To a legal system which is obliged to presume itself to be just, injustice serves as a negative indicator of what the system is not and must not be. It represents the self-formulated criterion by which law judges its own performance and by which it explicates its operations in such a way that legal rulings are likely to secure compliance. Past injustices are always converted by law into present justice, and decisions made in the present can only be just until law declares them to be unjust. To speak of a just legal system in this situation become a tautology, for the legal system cannot be anything but just, since it alone defines for itself what is and what is not justice. Yet, despite impressions, justice is indeed a formula *for contingency* and not a formula *for determinacy*. Legal decisions may well give the impression of inevitability, of having been reached through the inescapable consequence of the application of principles of justice, yet it is also the case that all legal norms and decisions, all reasons and arguments, could take a different form. If the decision had been different, it would still have been 'just'. The function of 'justice' for law is thus to cross the boundary between determinacy and indeterminacy, and, in doing so, conceal the paradox of injustice which declares itself to be just.

Luhmann, as we have seen, regards justice as closely identified with equality. In an identical manner to the form of justice, equality may be seen as a scheme which allows one to search for 'grounds' and values which become valid only within the context of law's programmes. Both justice and equality are thus organizational concepts for law, both in the general sense of providing a cohesive identity, a unity for legal decision-making across all fields of law, and in the particular sense of ensuring that in all of law's programmes argumentation revolves around principles to which the facts and values relevant to that specific area of law may be orientated.

Justice and equality within law

'Doing justice' and 'equal treatment' are clearly linked as guiding principles for the legal system. But there is also another form of linkage which allows the principle of justice to take a specific form within the legal system. This is the rule that like cases should be treated in like manner and different cases

differently. In hierarchically structured societies differences between the status of individuals, generated by caste or class or other ranking systems, largely determined how the law considered their legal entitlements. Once a society had moved from a predominantly hierarchical structure to a structure based predominantly upon functionality, where individuals are seen as starting from positions of equality, it was free to generate different forms of inequality. The same social evolution enabled the legal system to develop its own version of equality in decision-making which recognized the existence of these inequalities while, at the same time, ignoring them for the purposes of legal decision-making. With the emergence of distinct legal texts, legal terms and principles, 'justice' came to be synonymous with consistency in decision-making. This 'principle of consistency in decision-making', according to Luhmann, 'is separate from other value judgments which circulate in society, for instance, whether participants are rich or poor, or whether they lead morally impeccable lives, or whether they are in urgent need of help'. He sees such considerations as being taken into account if and only if 'they are represented in the programme structure of positive law, that is, only if they have to be taken into account as "facts" of the case. Otherwise they are ignored'.¹²³

Through this principle of consistency in decision-making, law is able to acknowledge the external complexity generated by the social system, but allow its 'high walls of indifference' to protect its internal complexity from having to treat all socially defined inequalities as relevant to law.¹²⁴ The issue becomes then not merely whether, the outcome for the individual litigant was fair 'but also whether a concrete case handled by the legal system has been correctly decided'.¹²⁵ A decision made according to law's account of what constitutes fairness in its external environment 'will correspond to the requirement of justice only if it is still compatible with the principle of consistency of decision-making'.¹²⁶ Within the legal system, therefore, justice is linked to equality through the rule which decides that like cases should be treated in a like manner (and different cases differently).

3

The Political System

This chapter focuses specifically on the function and character of the political system in Luhmann's account of modern society. In English-speaking receptions of his work, this is perhaps the least-known aspect of his sociology, and it may come as a surprise to some readers that Luhmann sets out a detailed account of the political system and of the conditions of its legitimacy, and that he clearly enters a field of debate usually monopolized by ideal-type conceptions of government and by normative preconditions. Indeed, one unusual aspect of Luhmann's reflections on politics is that, at first glance at least, they might appear to sit rather uneasily with the resolutely anti-normative methodology which he deploys in his more general sociology. At times, moreover, Luhmann expressly distances his work from all prescriptive conceptions of political theory and political philosophy.¹ As will be discussed, however, in his views on politics he is keen to show that the political system can only fulfil certain functions, and that its legitimacy relies on its recognition of these and its adequate reference to these and these alone. On these grounds, although he never fully subscribes to one categorical and exclusive model of good political order, Luhmann does offer a broad and flexible blueprint for determining which types of political system tend successfully to preserve themselves (that is, maintain legitimacy) and which do not.

While recognizing the unusual status of political reflection in the overall composition of Luhmann's sociology, this chapter argues that the apparent conflict between his general anti-normativism and his sociology of the political system is not insoluble and need not mean that his political perspectives should be viewed as a fully distinct or anomalous component of his work. In fact, as will be discussed, Luhmann indicates that one characteristic of the functionally differentiated reality of modern society is that it is *democratic*, and that the process of social differentiation necessarily creates broad-ranging societal conditions of liberty, pluralism and autonomy, which are usually construed as the features of democracy. Luhmann is keen not to promote differentiation and systemic rationalization as a normative agenda

for world-improvement or as an ideal standard which might in some way measure the quality of a given society. However, it can still be assumed that he sees advanced differentiation as the most adequate condition of modern social life, and that he considers undifferentiated societies as in some respect deficient and prone to inappropriate and unsustainably centralized modes of legislation and power-application. Therefore, if we accept this basic but rarely spoken implication of systems theory, it can also be seen that Luhmann's description of the political system, and of its relations to other systems, offers not only a positivistic account of how power works in modern societies, but also an analysis of the ways in which a given political system might fail to reflect the plurality of societal differences around it. Indeed, it also shows how a political system might fall behind or even obstruct the democratic conditions already existing through the reality of differentiation. The normative components of this description are rarely absolutely explicit, yet, as discussed below, certain underlying political perspectives can surely be inferred from Luhmann's political sociology.

The codes of politics

As we explained in Chapter 1, Luhmann sees all systems in modern society as having evolved through a process of differentiation and functional specification. This is also the case for the political system, which, according to Luhmann, results from the differentiation of a particular system of communications, whose unique function is the *production of collectively binding decisions*. As such, the political system is the function system of modern society which provides *power* as a universal resource. It is, therefore, the system which enforces decisions in questions whose implications extend beyond the boundaries of one or another system, and which then create problematic couplings between distinct systems. Power is the necessary medium for the implementation of collectively binding decisions, and it is within the political system that issues which might be resolved by the application of power are addressed.

On this basis, the importance that Luhmann ascribes to the political system is strictly limited. The political system cannot do anything more than apply power to issues and problems which can be regulated by power; yet most issues occurring in society require neither power nor collectively binding decisions. The role of the political system, therefore, is at most to provide broad orientations in questions which cannot be adequately resolved in the autopoietic systems of economics, medicine, art, law, and so on. As far as the political system is concerned, this means that problems such as choosing investments, deciding on treatment for illnesses, judging the aesthetic worth of a painting, or giving judgment on a point of law have no directly political content, and may be regulated respectively in the systems of economics, medicine, art or law. The political system might apply

power, however, where two systems address an issue which they perceive in completely different ways, and in respect of which they therefore create the probability of conflict, with the attendant risk of societal instability. For example, if an investment policy begins to have disastrous consequences for the health of the inhabitants of a particular region, or if medical treatment has serious financial implications, the political system might attempt to resolve the issue by means of a collectively binding decision concerning the relation between the two systems concerned. A further situation where politics may perceive the need for collectively binding decisions is that of a crisis produced within one system which threatens to damage other systems, including politics itself. An example of this type of situation might be a financial scandal, where the political system responds to problems of corruption or fraud by producing collectively binding directives in the form of regulations or demands for self-regulation which are intended to restore confidence in the integrity of the markets. In such instances, the activation of *power* as a means of resolving issues located outside politics does expressly not create a structural coupling between politics and other systems or threaten to politicize other systems. Rather, it serves to elucidate and reinforce the differentiation between one system and another. The application of power thus has its most specific function in the avoidance or obviation of unnecessary structural coupling.

The political system, in this light, might be conceived as a residual instance of power-application, which can only effectively address matters which, from a political perspective, cannot be resolved by other systems, or which, more particularly, cause clear conflicts between one system and another distinct system. The political system's application of power is likely to have the effect of maintaining the conditions of systemic differentiation and of preserving the integrity of distinct systems. Luhmann's scheme does therefore not conceive of politics as a monistic organ of power which has ultimate and determinate authority over other systems. Most issues, he intimates, are not perceived by politics as political, and are left unpoliticized.

As we explained in Chapter 1, for Luhmann, each social system operates in accordance with a specific code. The political system is no exception to this. In fact, politics is organized around a two-level coding. First, it is structured around the opposition between *government* and *governed*. This means that the political system defines itself in the most primary way as focused on the relation between those who do and those who do not participate in government, and on the subsequent distinction between those issues which are relevant to government and those issues which are not. The exercise of power, on which the political system is functionally concentrated, is thus only possible for those who are in *government*, and who apply power to those who are not in government. The basic precondition for the existence of a political system is its capacity to identify those who are entitled to wield power and those who are subject to power, and then to determine which

issues are relevant to those who wield power and which are not. This differentiation enables the political system to constitute the governed (those who are subject to power) as its internal environment, and so to treat these as the addressees of collectively binding decisions. Second, however, the side of government in this binary scheme is itself then split, as a relation between *government* and *opposition* – the opposing sides of which are articulated by political *parties*.² This means that the exercise of power, as government, explains itself in reference or contrast to other organs or associations, which always compete for a share in power. The conflict between the two sides of government is commonly represented by the code conservative/progressive or even left-wing/right-wing. These terms act as simplifying rubrics, which enable figures in the political system to express and schematize their own position, and to make their demands and intentions relevant and identifiable in easily explicable debates.

In the same way, therefore, that the legal system uses the basic distinction law/non-law (or lawful/unlawful) to make sense of its relation to its environment, or the economic system takes property/not-property (or payment and non-payment) as the determinant of its own functional scope, the political system focuses on the distinction government/governed as a way of restricting its communications to issues of relevance to itself. By centring itself on this distinction, politics ensures that it only transmits power through the circles of government, it excludes most social bodies from participation in the direct exercise of power, and it restricts the number of themes which it perceives as relevant to politics. In consequence, politics does not apply power to non-governmental issues, to which power is not relevant, and nor does it devolve power to extra-governmental groups, which cannot meaningfully use power. Then, by developing the second distinction between government and opposition, the political system ensures that the application of power is subject to internal restrictions, and that it remains focused in bodies which are (for whatever reason) most equipped for its effective implementation. Political parties therefore have a key role to play in enabling the political system to describe to itself the most appropriate way in which power should be applied, and in projecting the most adequate strategies for facilitating more effective power-application. If one party which was previously in opposition takes on the role of government, the outcome of this is usually registered in the code *reform/no-reform*.

Politics and political legitimacy

The particular problem of the political system is that it requires *legitimacy*. The political system can only make sense of its communications 'under the condition of legitimacy'.³ This means that the political system is always called upon to generate within itself justifications for its collectively binding decisions, and to explain its operations in forms which are likely to be

accepted – the political system cannot work effectively if this condition of legitimacy shows signs of dissolving. The necessity of obtaining legitimacy is in fact, Luhmann claims, an especial characteristic of political systems in modern society. It is only fully differentiated, autonomous political systems which are required to explain themselves to themselves in internally consistent terms, and which thus depend upon the formula of legitimacy. In pre-modern societies, according to Luhmann, political systems which were not yet differentiated from other systems, or from personal-hierarchical traditions of rule, demonstrated their validity by reference to the immutable principles of divine law, or natural law. Early-modern political systems then justified their decisions by referring to interests of the ‘common weal’ (*Gemeinwohl*), as a specific set of public interests which could be fostered by the state.⁴ It is only in modern societies, however, where the political system stands independently as an autonomous and fluctuating system of communications, that the specific reference to *legitimacy* is required for the continued operations of the system.

In these ideas Luhmann differs quite manifestly from other major modern theorists of political legitimacy. The political system, for Luhmann, does not, or not primarily, obtain its legitimacy from any of the determinable forms of accountability, contract or consent, which are widely viewed, in modern political thought, to constitute the civil origins of public authority.⁵ Likewise, it most certainly does not derive legitimacy from any active or participatory processes of social integration and will-formation. Indeed, Luhmann expressly classifies the pairing of the ‘twin ideas’ of legitimation and participation as a ‘disaster’,⁶ and he states that any attempt to tie legitimacy to the participation of citizens necessarily leads to a bureaucratic overburdening of the state.⁷ Equally, the legitimacy of the political system is not held together, in the manner famously proposed by Max Weber, Robert Michels and Vilfredo Pareto, by any special attitude or attributes of character displayed by its leading figures. Against all these views, Luhmann argues that legitimacy is not a resource which is engendered outside the political system itself, or by any localized or personalized point of communication in the political system. Legitimacy is simply the formula which the political system produces for itself in order to underwrite and give value and plausibility to its operations – so that it might effectively present its ‘activity as the furthering of public interests’.⁸

Legitimacy, consequently, is the ‘formula of contingency’ for politics.⁹ The political system does not obtain and utilize legitimacy by conforming to externally deduced norms or obligations. Rather, it secures legitimacy by conferring upon itself a form which will allow itself to establish a level of predictability *in its own communications*, and so to gain acceptance for itself and to establish its political processes as valid and plausible sequences of operations. Legitimacy in the political system is thus a form in which the political system can consistently and persuasively talk about itself to itself,

and then provide itself with an essentially coherent account of what it does and why it does it. Having established its legitimacy, the political system is able to create a core of self-referring communications through which its operations become meaningful, plausible and likely to be met with compliance. As the *formula of contingency*, in short, legitimacy is the realized *self-reference* of the political system, and the legitimate political system is a political system which has woven a convincing web of legitimacy out of its own, utterly contingent, operations. 'Legitimation', Luhmann thus states, 'is the form in which the political system accepts its own contingency'.¹⁰

For a system to be legitimate does not mean, therefore, that it conforms to standard or categorical definitions of what legitimacy might be; it merely means that the system proposes itself in its contingency as a meaningful reality. All motivations for political obedience are then based on that fragile foundation. The concrete hallmark of a legitimate political system is that it can introduce positive 'laws' (or policies which ultimately assume the form of law), which are then *accepted as legitimate*. A political system thus becomes legitimate if it can explain itself as legitimate, and if it can confer plausibility on the policies and laws to which it gives rise. Importantly, this theory of legitimacy makes no substantive claims about the necessary character of government or about the necessary content of policies and laws. Government is legitimate wherever, and for whatever reason, it can motivate citizens to recognize and follow laws – wherever 'the legitimacy of pure legality finds recognition'.¹¹ In principle, this allows for an extremely high degree of relativity in the definition of political legitimacy and legitimate law. In fact, if a political system can explain its operations in a satisfyingly plausible and consistent manner, 'legitimate legal validity can be claimed for any content'.¹²

Luhmann's virtual conception of legitimacy has often provoked the accusation that he formulates legitimacy as a technocratic management-concept which eliminates the consensual, the democratic, the cultural and the moral dimensions to legitimacy.¹³ However, it should be borne in mind when considering Luhmann's ideas on politics that he identifies legitimacy as an extremely precarious and variable resource, which cannot be taken for granted as a quantity which can be determined in invariable categories, and whose source is sporadic, uncertain and often elusive. Legitimacy, he therefore argues, cannot be defined as a stable and enduring quality derived exclusively from shows of approval – government does not simply *become legitimate* because it obtains more votes than the opposition. Equally, legitimacy cannot be conjured up by politicians who make elaborate or speculative promises – a government is not miraculously rewarded with legitimacy because its premier pledges himself or herself to a popular set of objectives. Likewise, legitimacy cannot be derived from attempts to bind the political system to overarching theoretical principles – a government does not secure

legitimacy because it declares support for reasoned convictions or for moral commitments.

Such accounts of legitimacy, Luhmann suggests, give only the most simplistic insights into the operations of a political system. The processes through which a political system creates legitimacy for itself are in fact extremely complex and diverse. All endeavours to establish mono-causal models of legitimacy inevitably neglect the variable and endlessly evolving character of the political system. They also neglect the extent to which the political system has disembedded itself from concrete sociological and anthropological structures. In depicting legitimacy as *the formula of contingency*, therefore, Luhmann seeks to develop a vocabulary for reflecting the ephemeral and intricately fabricated nature of legitimacy and the unpredictable ways in which political decisions, and indeed the whole political system, can gain or lose the impression of consensus.

At the same time, however, despite accounting for legitimacy as the formula of contingency, Luhmann claims that the political system's plausible self-description as legitimate depends (or might be likely to depend) on certain factual conditions, and his political relativism does not extend to the argument that all systems are equally legitimate. In fact, he states quite openly that certain broad observations can be made about the attributes of a political system which is likely to be successful in describing itself as legitimate, and about the attributes of a political system which is unlikely to gain plausibility in its attempt to obtain legitimacy. Specifically, then, a political system will stand a good chance of obtaining and preserving legitimacy if it securely maps out its *boundaries*, and if it effectively *differentiates* itself from all other systems. A system which cannot sustain its own identity and difference against other systems falls behind the reality of political modernity, and it palpably reveals its own lack of legitimacy.

The preconditions of legitimacy in the political system will, therefore, most probably be: first, that it successfully identifies and communicates those issues in its environment which are relevant to politics; second, that it avoids unnecessary preoccupation with issues outside its own definition of what is communicable as 'politics'; third, that it engenders sufficient internal complexity in its own subsystems to communicate these issues; fourth, that it generates sufficient plausibility to gain acceptance for its decisions concerning these issues. In other words, a political system will obtain legitimacy where it defines and conserves itself as a plausible unity of self-referring difference against its environments, and if it consistently maintains this difference against its environments. None of this can be taken to mean that the legitimate political system is impervious to the events in its environment. On the contrary, Luhmann clearly states that the obtaining of legitimacy relies on the 'installation of possibilities for learning', by means of which the system can respond to factors in its environment.¹⁴

Institutions which neglect to respond to their environment, and which privilege a counter-intuitive 'clinging on to normative expectations', are always likely to 'obstruct possibilities for learning', and ultimately to undermine their legitimacy.¹⁵ However, the legitimate political system can only learn about its environment through those structures for cognition (selection and meaning-formation) which it develops for itself, and it can only maintain legitimacy by reproducing itself as an internally consistent sequence of operations. Any attempt to impose external standards of legitimacy upon the political system is likely only to undermine its legitimacy, since such standards inevitably make the system accountable for questions of principle in respect of which it cannot effectively assume authority. 'Systems theory', in short, 'excludes . . . all legitimation *ab extra*'.¹⁶ Indeed, 'the thematization of legitimation' in light of external principles 'does not have a neutral effect as far as the politics of legitimation is concerned, but tends to greater delegitimation.'¹⁷

Politics and the state

For the reasons set out above, it is important to bear in mind that Luhmann's concept of legitimacy revolves around a *limitation of politics*. Indeed, it revolves around both a theoretical and a practical restriction of the scope and remit of political decision-making. First, theoretically, Luhmann opposes all political theory which imputes to politics any special entitlement to elaborate or represent the conditions of human freedom. Against such perspectives, he argues that politics is merely one social system among others, whose legitimacy depends precisely on the extent to which it is *not* identified as a privileged sphere of human activity. All suggestions that politics has some special place compared to other regions of human existence, or that, in some remote Aristotelian sense, politics might reflect a profound quality of 'good life',¹⁸ badly misinterpret the functional limits of politics. Likewise, on a more practical level, Luhmann also opposes the dualist conception of political authority which posits the state as a centre of coordinating authority positioned over and against the rest of society, with ultimate regulatory influence in all social communications. 'The state', he observes, 'is nothing outside society.' It is simply 'one of its function systems'.¹⁹ For this reason it is fallacious to assume that the state has greater importance than, for example, the economy, art, medicine or law.

In his historico-sociological reflections upon the emergence of the modern political system, Luhmann makes it clear that the concept of *the state*, in its common definition as the final and decisive organ of representative authority, is extremely misleading. The political system in differentiated societies is simply a function system for making decisions. This system encompasses an immense number of very distinct institutions, interacting in a complex manner with other social systems, and it cannot be geographically localized

in one place or as one stable process of decision-making. The modern state, therefore, is nothing more than a 'formula of unity for the self-description of the political system'. The concept of the state is a paradox or fiction which the political system itself produces (for simplicity's sake) in order to grasp its unity as a recursive and formally autonomous set of communications.²⁰ By reflecting itself to itself as 'a state', the political system gives some kind of recognizable order to its own absolutely contingent and autonomous form, and it paradoxically enables political communications to simplify themselves and give a solid point of reference for the social motivations, for the interactions among people and organizations, on which these communications rely. The 'political system', Luhmann concludes, 'describes itself as a state' because communication that uses this formula is likely to be 'treated as understandable'.²¹

Consequently, it is deeply misguided to imagine the political system as a monolithic agent or moral centre. Power in the political system is not a personal or static quantity, and it is not a quantity which can be monopolized by one particular apparatus. The inflated conception of the state, in fact, is a fallacy dating from the original differentiation of politics as an autonomous system in the seventeenth and eighteenth centuries. During this time, Luhmann claims, the state obtained great, but temporary, semantic importance as a reference giving discernible form to the political system as it gradually differentiated itself from its pre-modern personal and historical context, and began to deploy power as a positive juridical medium.²² The concept of the modern state thus initially emerged as the form in which the newly differentiated political system was able to translate its autonomy and contingency 'into distinctions and operations', and so to manifest an appearance of validity for itself. For Luhmann, however, the distorted inflation of the state is not appropriate to the political system in modern society. The modern political system is merely 'a self-regulative autopoietic system of power-application'. In this system, power is divided and communicated between a great number of distinct points and distinct institutions (including, for instance, legislatures, lobbies, cabinets, protest groups, civil servants and so on), and many of which cannot be directly identified with what we would commonly perceive as 'the state'.

The modern political system, in consequence, is in fact a 'non-hierarchical system',²³ which consists of an enormous sequence of recursively closed communications of power. The anachronistic inflation or over-estimation of the state, however, leads to exaggerated conceptions of what the state is and what it can actually do. It creates a situation in which the state is identified as an immediate agent for problem-solving, and it gives the impression that the entirety of society is centred on the state, and that the state has primary responsibility for the whole of society in a localized geographical area. Most importantly, the inflated semantic interpretation of the state also suggests that the state and politics are the same, and that in

some way everything which is 'political' falls into the regulatory competence of those restricted political organs usually viewed as 'the state'. Luhmann always stresses that 'the political' is not identical with the state. The political is an intensely complex fabric of communications, which is certainly 'oriented around the state',²⁴ but which cannot be reduced to conscious decisions made by particular individuals or departments within the state. It is, in fact, in the character of the modern political system, in a differentiated society, that power can never be identified with one apparatus or any particular conglomerate of institutions.

Politics and the welfare state

The state

In Luhmann's account the simplifying semantic device of 'the state', through which the political system originally differentiated itself, ultimately becomes a problem for the political system itself, and it leads (as discussed below) to a general misrepresentation of what the function and limits of politics actually are. Indeed, Luhmann repeatedly indicates that the main problem for modern political systems does not reside in specific external issues which they are expected to address, but merely in the excessively enlarged self-conceptions which modern states have themselves promulgated.

In addition to conceptualizing the limitations of the political system, therefore, Luhmann also advocates limiting its practical responsibilities. Owing to the theoretical confusion about the semantic device of the state, the actual function of the state, he claims, is widely misconstrued, and often erratically exaggerated. In reality, the extent of the problems which can be solved by the state is very restricted indeed, and wherever the state attempts to resolve problems which cannot be politically regulated it merely creates further problems, both for itself and for the systems in which it interferes. This is especially pressing in the contemporary political order, usually characterized as the *welfare state* – for here the state is routinely identified with areas of complexity which cannot be effectively organized by collectively binding decisions, and in which the system of politics has been expanded to incorporate problems which it cannot adequately address. 'If we wish to characterize the welfare state in the most extremely compressed manner,' Luhmann therefore argues, 'we can talk about an *overtaxing of the state by politics*'.²⁵ In the welfare state the limited form of the state is distorted by the assumption that the state is the centre of society, which can assume accountability for all manner of concerns. The political system then becomes the addressee for problems which are best addressed by other administrative resources, and it is even made accountable for economic issues, whose susceptibility to regulation by political decisions is minimal.

Luhmann's characterization of the welfare state as an overtaxing of the state by politics has two quite distinct implications. First, it means that in the welfare state all communications which occur in the system of politics have become falsely attached to 'the state' (or to the narrowly legislative and executive functions usually perceived as 'the state'), and that 'the state' is consequently made responsible for regulating all political issues. Second, however, it also means that in the welfare state the system of politics itself has become excessively inclusive, and so runs the risk of de-differentiating itself in its relation to other systems. The welfare state is thus 'a continual self-overtaxing of the political system',²⁶ in which the necessary differentiation of politics from other systems has been undermined.

State, administration and the welfare state

On the first point, we encounter one of the most important and also most contradictory questions in Luhmann's sociology, and especially in his sociology of the political system. This is the question of the relationship between *politics* and *administration* in the political system of modern society. In modern complex societies, Luhmann explains, the political system cannot be reduced to the simplified structure of 'the state'. Complex societies are in fact marked by the fact that their political systems actually divide into two distinct systems or subsystems. The constant 'increase in the structural complexity of the political system' means that a 'functional-structural internal division of the political system' into distinct subsystems becomes necessary, so that the political system is equipped to process all the communications which occur in it.²⁷ This primary division of the political system is the division between *politics* and *administration*. Politics and administration are distinct functional components of the political system, both of which operate under their own autonomous criteria of rationality,²⁸ and both of which develop their own particular mechanisms for reducing complexity and processing information. Through this division the specific arena of *politics* is specialized on 'the production of binding decisions',²⁹ or, more properly, on the 'establishment of *decision-premises* for future decisions'.³⁰ The bureaucratic *administration* (which includes parliaments, sub-executives, councils, regional committees, discussion-groups, quangos, tribunals and so on) is, by contrast, specialized on the 'elaboration and issuing of binding decisions, in accordance with politically prescribed criteria of correctness'.³¹ As a consequence of this division of the political system, the administration assumes a high degree of autonomy in its relation to politics:

Politics sets decision-premises in its relation to the administration. It decides, when it plans and programmes, over decisions, but it does not make these decisions. It can only remain politics in the specific sense, if it lets the administration develop its own processes for the reduction of complexity.³²

The modern political system thus depends on the fact that it is functionally differentiated into politics and administration.³³ The highest level of *politics* possesses a symbolic legitimizing function, and it has responsibility for giving manifest form and unity to the entire political system. However, the maintenance of legitimacy in the political system also depends in crucial ways on the system's ability to devolve significant decision-making competence to the *administration*, and it relies on the ability of both politics and administration to develop autonomous (and distinct) processes of rationalization in order to reduce the complexity of their environments. The 'transformation of political rationality into administrative rationality' is therefore a key moment in the maintenance of the political system in modern society.³⁴ Systems which do not elaborate complex independent administrative resources tend to focus all responsibility on a relatively narrow set of political institutions or people. As a result, they are always unlikely to manage their complex internal and external complexity realities, and they run the manifest risk of self-delegitimation.

The division between politics and administration, most importantly, is the condition of the existence of the political system as a *democratic* political system. Systems which do not permit the functional-structural division of the political system (that is, which attempt to preserve all 'power' in the hands of a small executive cartel, or of a one-party elite) incorporate only very limited options for planning and legislation. In consequence, they suffer from inflexibility in their reaction to their environment, and they rapidly exhaust and overburden their planning functions. Multi-party (democratic) systems, which manifestly accept the existence of 'fissures between "party and state"',³⁵ necessarily allow (and encourage) the separation of administration and politics. Such systems are far better equipped to develop functional mechanisms for the reduction of complexity than one-party systems, which fuse administration and politics.³⁶ The efficacy and legitimacy of the political system are therefore always greatest where the administration operates autonomously, following the criteria of its own rationality, with minimal conditional determination.

The upshot of Luhmann's reflections on this relation between politics and administration is that complex political systems in complex societies create extensively ramified administrations. The more ramified and complex the administration of the political system is, the more able the system is to maintain itself at the level of the complexity of its environment, and so to uphold its legitimacy. At the same time, however, the administration is also the bulwark of democracy – not, as Weber would argue, its limit or its nemesis. The emergence of administration as a differentiated component of the political system always provides a counterweight to the focusing of power in a small elite, and it stimulates the evolution of new avenues of communication between the political system and its public.

Luhmann sees in the welfare state, however, a situation where both politics (in the strict sense) and administration are hopelessly overtaxed by the regulatory burdens which are placed upon them. Under such conditions the specific subsystem of politics, which Luhmann calls *politics*, is forced to assume excessive accountability for planning welfare provisions, for resolving social conflicts in the name of welfare, and for guaranteeing social conditions likely to foster general material security. In order to do this, however, it is forced to employ the administration as a tool for addressing the conflicts and problems which it has politicized. The administration, thus instrumentalized and colonized for the processing and transmission of collectively binding decisions, becomes overburdened by the welfare-related tasks which it is expected to execute. The consequence of this is that politics becomes exclusively centred on the strict executive functions of the state, and this leads almost by necessity to a short-circuiting of the complexly differentiated, plural systems of communication which make modern politics flexible and *democratic*. The apparent expansion of democracy in the welfare state thus actually represents a reduction of democracy. The welfare state erodes the functional differentiations at the heart of the democratic political system, and it tends to fuse administration and politics together in one prerogative unit, thus eliminating the counterweights, checks and balances installed through their separation.

State, administration and welfare democracy

On the second point, concerning the excessive inclusivity of politics in the welfare state, Luhmann argues that the welfare state leads not only to an internal dedifferentiation between *politics* and *administration*, but also to a broader dedifferentiation between politics (as an entire social system) and other subsystems of society. Generally, wherever the political system attempts to assume control of areas of communication which cannot be regulated by collectively binding decisions, it necessarily undermines the legitimacy which it obtains as an autonomous and self-referential system. As discussed above, the legitimacy of the political system hinges on its capacity to define that section of the environment which is relevant to political communication, and then to respond in an adequate manner to this section of the environment. This capacity requires that the system must effectively distinguish between matters which are capable of being regulated in the medium of political power and those which are not. The functional differentiation of politics, however, is undermined wherever the state is conceived as a universal decision-making body, which can freely regulate non-political communication. The extensive types of state intervention which are characteristic of welfare democracy produce a number of problems, all of which burden politics with issues which it cannot control, and thus contribute either to a real or symbolic undermining of the precious resource of legitimacy.

Luhmann draws together his diffuse and highly critical writings on the politics of welfare in *Society's Economy* (*Die Wirtschaft der Gesellschaft*, published in 1988).³⁷ In this book he offers an extensive systems-theoretical discussion of the interventionist tendencies in modern political systems. In such systems, he states, there is an uncontrollable tendency to make political legitimacy contingent on political 'steering',³⁸ and specifically on the implementation of 'difference-minimization-programmes' between politics and economy. This tendency fundamentally misinterprets the extent to which the function systems of modern democratic societies refer only to themselves, and begin to malfunction wherever their self-reference is obscured or contaminated. Extensive attempts in the political system of the welfare state to control and regulate interactions in the economy must inevitably, Luhmann explains, collide 'abruptly with the fact of functional differentiation': that is, they undermine the immensely intricate levels of differentiation on which democratic societies rely, and they trigger highly unpredictable structural couplings between distinct modes of communication. Such attempts at regulation are thus (at best) doomed to failure; at worst, as discussed below, they create chronic instabilities in the systems between which they effect a coupling. No politics, Luhmann concludes, can effectively or productively manage the economy by directly applying power to money in the form of collectively binding decisions. Moreover, where a system referring properly to legitimacy (politics) becomes coupled with a system referring properly to scarcity (the economy), innumerable disturbances for both these basic forms of self-reference become probable. The economy, in short, can only be managed by money – by the economy itself.³⁹

The 'postulation of equality' in the modern welfare state, Luhmann concludes here, is fraudulently deployed as a device for legitimizing 'the steering mania of modern society'.⁴⁰ This leaves the state as the final 'addressee' for all tasks of 'crisis-management and crisis-avoidance'.⁴¹ The theoretical principles which underpin welfarism and welfare democracy – the 'differentiation equal/unequal', and the resultant endeavour to alter this difference via the allocation of fiscal resources – are, he claims, founded on a misconception of what political systems can actually accomplish. Wherever these principles are internalized by the political system as programmatic directives, they lead inevitably, via 'difference-minimization programmes', to an illegitimate fusion of areas of social activity which should remain distinct.⁴²

Politics, inclusivity and bureaucracy

Perhaps the best way into Luhmann's treatment of these issues is through a consideration of his concept of *inclusivity*. It is in the nature of modern social systems, he explains, that they have the characteristic of inclusivity,

and that their communications have relevance for increasingly diffuse and interconnected social operations. All systems respond to the complexity of their own internal and external environments by generating internal levels of complexity, which enable them to react to, to learn about, and also to *include* an ever-increasing volume and an ever-increasing diversity of communications. In the political system, this necessary increase of inclusivity is a process which is commonly interpreted as *democratization*. From the beginning of modern political society, commencing with the 'dissolution of the stratified society of European estates',⁴³ democratization occurs as a development through which a constantly increasing number of areas of communication interconnect with politics, and in which a constantly increasing number of themes become relevant for the code of power in the political system. Democracy is thus the political reflection of a condition in which all social systems approach a level of maximum inclusivity, in which they can respond to extremely diffuse and complex environments, and in which all events in society have relevance for one or more social system.

Inclusivity in short is both the reality and the precondition of modern democracy. Democracy is premised in a high level of differentiated inclusion,⁴⁴ and it is characterized by the 'encompassing of the entire population in the performances of the individual function systems of society'.⁴⁵ Of crucial importance in this development, however, is that each function system only integrates the total population in those 'sections of its mode of living' which are functionally relevant to its own communications.⁴⁶ The conditions of inclusive democracy can be maintained, consequently, only on condition that the economic system integrates people as sellers or buyers of property, that medicine integrates people who wish to remain or to become healthy, that politics integrates people in those sections of their life where they require collectively binding decisions, that law integrates people who become subject to decisions concerning lawfulness and unlawfulness, and so on. Inclusivity only founds democracy where each system is adequately and rationally defined, and where it includes only that sphere of communication to which that particular system can meaningfully react. Wherever modern society tends towards an undifferentiated inclusivity (that is, where systems are made accountable for themes which are not their own), the basic principle of inclusivity, on which democracy relies, becomes unstable. In fact, this principle begins to undermine itself: properly differentiated systems begin to lose the capacity for discerning which themes they should include and which not, and all systems become, in some measure at least, annexed to the political system. An example of this in European politics is, Luhmann states, 'the socialist states of the Eastern bloc', which fail to differentiate economic from political functions, and thus tend towards a total conditioning of politics and society.⁴⁷ Closer to home, however, in the capitalist West of the 1970 and 1980s the welfare state is also a deeply problematic example of 'the realization of political inclusion',⁴⁸ which

'tends towards ever greater inclusion of themes and interests' in the system of politics.⁴⁹

One consequence of such cases where the political system confronts itself with improbable levels of inclusivity, or with forms of complexity which cannot directly be regulated by politically binding decisions, is that the system must produce *bureaucracy*. The production of bureaucracy is evidently, for Luhmann, by no means an invariably critical or pathological symptom in modern political systems. As discussed above, the democratic political system relies on its ability to generate bureaucratic or administrative resources which are not directly accountable to, and which in fact counter-veil, the imperatives of political steering. For Luhmann, the greater the complexity which the political system encounters, the greater its internal complexity must be. The internal complexity of the political system is to a large extent determined by its ability to engender new resources for collectively binding decision-making, that is new administrative or bureaucratic networks. The 'bureaucratic administration', which is 'to a large extent independent of those whom it affects' and which generates its own autonomous criteria of 'rationality and efficiency', thus has a key role to play in the legitimation of the entire political system.⁵⁰

Despite this suggestion of a reciprocal dependence between administration and democracy, however, Luhmann also identifies certain types of bureaucracy which have deeply problematic consequences for democracy. Bureaucracy, as distinct from administration, develops when systems, especially the political system, attempt to provide 'performances' (*Leistungen*), in areas which are not relevant to their own operations.⁵¹ A practical example of this, for instance, might be if the political system nationalizes a branch of industrial production – perhaps in the name of social welfare or economic redistribution. Where this occurs, a situation will emerge in which inordinate bureaucracy prevails, as the state will be forced to deploy new resources for channelling investment, for overseeing production, for overseeing those who oversee production, and ultimately for overseeing its own mechanisms for overseeing those who oversee those who oversee production. Excessively inclusive democracies tend therefore to generate diffuse and unwieldy bureaucracies, which emerge specifically at the boundary between one system and another. The emergence of unmanageable levels of bureaucracy is often a sign of malfunction where one system is in danger of coalescing with another, or at least of undertaking obligations which conflate its own codes with those of another. Such bureaucracy clearly obstructs the facility of democratic government as it means that the resources of a social system (especially politics) become specified on issues peripheral to its proper function, and each system loses sight of those functions to which it is most properly adjusted.

On this basis, therefore, one could argue that Luhmann sees *administration* as the necessary result of the autonomous and legitimate *functioning* of

the political system, whereas he views *bureaucracy* as the result of requirements placed upon the political system to offer *performances* outside those areas organized by collectively binding decisions. This most especially characterizes the welfare state, in which the development of bureaucracy in the political system reaches a level where the political system becomes primarily concerned with the regulation of its own internal complexity, and it consequently disables itself in its reactions to the complexity in its environment. 'The welfare state', Luhmann explains, always 'tends to extend tasks' and to create new bureaucratic links – but this occurs especially in 'domains where binding decisions about law and money work only in very uncertain causal connections'.⁵² In the welfare state, for this reason, 'the bureaucracy grows constantly',⁵³ and it soon exceeds the limits of what is 'organizationally possible'.⁵⁴ Against this background, Luhmann promotes a sharper theoretical 'differentiation between function and performance', and he advocates a more restrictive conception of state intervention on this basis.⁵⁵

At the heart of Luhmann's reflections on politics is the argument that excessive *expansion* of the objectives of the political system engenders chronic rationality and legitimacy deficits in it. This is especially the case in issues of economic regulation. The welfarist demand that the political apparatus should assume a high degree of authority for issues of social well-being, inclusion and exclusion creates 'an expansive dynamic and a politics of self-overtaxing'.⁵⁶ This invariably leads to the referral of problems to the political system for which it cannot be held accountable and which it cannot resolve; this then undermines the symbolic and practical legitimacy of the political system. Such problems, Luhmann suggests, could only be solved by the adoption of an altogether more 'restrictive conception of politics', which would be reluctant to politicize social problems, which could not be effectively solved 'by binding deciding'.⁵⁷

In Luhmann's account, therefore, the process of democratization in modern society contains a striking and occasionally destabilizing paradox. It is, as discussed above, in the character of modern political systems (known commonly as *democracies*) that they tend towards ever-greater inclusivity, and that they do not generate absolute criteria for regulating which communications can be categorized as *political*, and which not. At the same time, however, political systems, like all social systems, still require certain strict terms of differentiation which enable them to create a reality of meaning which cannot be identical with that engendered within other systems. Indeed, implicit in this theory of democratization is the dialectical suggestion that where democracies become *too inclusive* (that is, where they begin to expand into areas of communication which cannot be meaningfully politicized), they forfeit the differentiated administrative efficacy which they require in order to function as democracies. For this reason, political systems in democracies always require methods for avoiding *dedifferentiation*: that is,

the dissolving of subsystem identity and the disappearance of the borders between system and environment. Political systems must always be able to reflect on economic or legal or medical or artistic issues, and so on, in terms distinct from those that these systems use to describe themselves, and they must develop mechanisms for alleviating themselves of burdens which arise in other areas of communication. Consequently, although he is prepared to entertain the inevitability of very limited 'difference-minimization programmes', in which the political system exercises some degree of control on 'the self-steering of the economy', Luhmann repeatedly emphasizes that the extensive politicization of economic issues is both futile and highly perilous. Only 'political programmes can be realized in politics,' he explains, 'and only economic programmes can be realized in the economy'.⁵⁸ Modern democracies emerge through a primary differentiation of economics and politics, and they must maintain this differentiation as their own precondition. 'Modern society', in sum, 'relies on the differentiation of politics and the economy, of power and money. It cannot solve economic problems by allocating power to obtain scarce resources'.⁵⁹

Politics, administration and public

The theory of the differentiated political system which motivates Luhmann's critical reflections on the welfarist 'overtaxing of the state by politics' is in certain respects very close to classical legal-state reflections on the separation of powers, and it is very closely linked to early liberal perspectives on the relation between legislature and executive. In making democracy contingent on the essential differentiation of *politics* and *administration*, Luhmann suggests that there must be distinct spheres of accountability in the political system, and that the adequate treatment of political issues depends on a functional division between high-level decisions (politics) and the departments of government (administration) which organize these into generally acceptable media (laws, regulations, codes of practice, guidelines, and so on). Luhmann's schematic differentiation of politics thus hinges on a re-categorization of the executive as *politics* and on a re-categorization of the legislature as *administration*, and he insists that the efficacy and legitimacy of the entire political system depend on the stable *separation* of these two units.

In the welfare state, however, where universal planning-demands are focused on the state, and where the state is consequently called upon to put into operation administration as a mechanism for structuring whole areas of social interaction, the administration forfeits its autonomy as a free-standing set of planning or legislative organs. Instead, administration becomes centred on rather implausible political prerogatives, and its legislative functions are monopolized by the executive component of politics. In his call for a change of course in welfare policies, Luhmann expressly

claims that democratic society is only made possible by the extent to which the separate subsystems of politics (executive and legislature) can *observe* each other and check that each properly accomplishes its specific and independent tasks. 'Democracy is primarily the capacity of the political system for self-observation.' It is through this capacity alone, he argues, that politics can 'relate autonomously to politics': that it can decide what belongs to politics and what not, and then refer political themes to the appropriate points of power in the political system.⁶⁰ This capacity for self-observation – for rationality-checking – is chronically undermined, however, wherever the political system undertakes performances in areas which it cannot regulate or interpret, wherever it deploys administration for fully politicized motives and programmes.⁶¹ The undifferentiated inclusivity of the modern political system thus actually threatens to undermine the institutional separation of powers upon which democracy itself originally evolved.⁶²

This conception of the political system in which the system is divided into the two distinct systems or subsystems of politics and administration is especially characteristic of Luhmann's earlier works, written around the mid-1960s. In this model, as we have seen, politics establishes broad plans for the administration, and the administration, deploying its own separate rationality of decision-making, gives universalizable legal form to these plans. This does not mean, it must be stated clearly, that the administrative component of politics is also a part of the legal system – this would clearly run counter to the overall theory of differentiation. Administration does not directly 'make' or interpret laws. It does, however, prepare decisions and policies, or statutes, with a view to transmitting these through society; for this reason it is forced to be attentive to the extent to which these decisions might find legal recognition, and it imposes legally appropriate forms on the political contents which it processes. Administration, consequently, is (at this point) to a large extent synonymous with legislation, and Luhmann argues that it fulfils the functions usually imputed to the legislature.

In later formulations of this concept, however, the political system in its entirety consists of *three* subsystems: *politics*, *administration* and the *public*, which together constitute a recursive system of democratic political communication. Underpinning this later triadic differentiation of politics is a historical account of the democratic evolution of the political system in modern societies. During the formation of the modern political system, Luhmann explains, *politics* emerged firstly as a functionally distinct, autopoietic system of decision-making (a state). Confronted with ever-increasing levels of political complexity, the political system then equipped itself with new techniques of complexity-management by differentiating itself into *politics* and *administration*. This process enabled it to refer distinct problems to distinct components of its own internal structure, reflected in the separation of powers at the heart of modern democracies and modern legal states. The further three-point differentiation of the system to include

a 'politically relevant *public*' then marked the final realization of the political system of modern democracy.⁶³ The *public* is both a part of the environment of the political system, communicating consensus or friction back to the administration and to politics, and an internal component of the political system itself. As one of the three internal points in the political system, the public recursively accepts power from and transmits power to the other subsystems; as part of the environment of the political system, the public provides resonances for the political system and brings dynamism and mobility into its communications. Democracy, to use Luhmann's own term, is the ultimate 'title' for this triadic system of differentiated inclusivity,⁶⁴ in which *politics*, *administration* and the *public* communicate with and moderate each other in the medium of power.

In this scheme Luhmann emphasizes that only the truly political sphere, not the administration, is responsible for the original production of political legitimacy. He states that the 'production of legitimacy' is performed by politics, and that 'the usage of legitimacy' is the basis of the administration.⁶⁵ Administration, consequently, has to 'work under clearly formulated conditions of legitimacy': it 'utilizes legitimacy without having to produce it by itself'.⁶⁶ The administration operates effectively precisely when it is freed of the compulsion to generate its own resources of legitimacy,⁶⁷ and politics (that is, leading figures, high-ranking members of political parties) creates legitimacy as a symbolic motivation precisely because it does not already possess it.⁶⁸ *Politics* creates legitimacy *ex nihilo*, as a symbolic resource; it generates this resource by proposing plans or politicians to the *public*, or by filtering themes from the public which might find some degree of popularity. This symbolic resource of legitimacy is then deployed and preserved by the administrative system, which communicates these plans back to the *public*, in the form of laws. The *public* is the moment in the system of politics where collectively binding decisions are enacted in the form of laws, and where consensus for further collectively binding decisions can be stimulated, offered or withheld.

There are moments in his theoretical career where Luhmann slightly dilutes the consistency of this argument, and the distinct roles of politics and administration in the overall legitimization of the political system are on occasions rather cloudy. In some of his early works he describes the administration as an independent function system which is itself concerned with the 'production of binding decisions', and which underwrites the terms of its own legitimacy.⁶⁹ In his writings of the early 1970s he also describes politics and administration as two separate 'major systems' of society.⁷⁰ Even in his later works, in fact, the claim that the administration merely *uses* legitimacy without being able to *produce* it is not always cogently articulated, and sometimes a direct legitimacy role is ascribed to the administration.⁷¹ There is, in any case, sufficient hesitancy in Luhmann's view on the relation between politics and administration to suggest that, at least in part, he

still views administration in terms derived from Parsons's sociology – as an organizational subsystem or subsystem of the action system, equipped with autonomous resources of self-reproduction and self-legitimization.⁷² However, whatever the precise balance between administration and politics in his concept of the political system, it is of the greatest significance that Luhmann always identifies *administration* as the *legislative* component of politics. Administration is the point in the political system where the actual political arena has its contact with the *public*, where this relation is externalized in the form of law, or legislation (*Gesetzgebung*), and where the positivization of law permits the political system to learn about its environment. Administration thus clearly contributes in important ways to maintaining the factual legitimacy of the political system, and the sum of legitimacy possessed by the political system derives in comparable measure both from the uniting symbols of *politics* and from the cognitive operations of *administration*. It might in fact even be observed that, although *politics* creates the symbolic resources of legitimacy through its ability to generate consensus in the *public*, *administration* is more properly the area where legitimacy is practically secured, and preserved.

In this triadically structured concept of the democratic political system, the specific practices and operations usually associated with the political apparatus (voting, passing laws, lobbying, cabinet meetings, and so on) are in fact objectivizations of ways in which the three subsystems of politics communicate among themselves. In fact, the visible processes of political decision-making, legislation and self-legitimization are nothing other than moments in which the system externalizes its own internal communications, and so makes manifest the *boundary-relations* between its distinct components – between *politics* and *administration*, between *administration* and the *public*, and between the *public* and *politics*. In consequence, what are usually taken to be the core activities of legitimately founded government (reshuffles, policy-making, legislation, elections, publicity, opinion-sounding, canvassing, and so on) are in fact merely observable references through which the political system talks to itself about itself, tests the resources which it has at its disposal, and reflects on the adequacy and legitimacy of its decisions. *Politics*, for example, articulates its relation to *administration* in the form of discussions between particular persons (*Personaldiskussion*). These discussions might include debates between politicians, exchanges between members of a cabinet, or briefings between politicians and high-level civil servants. The outcomes of these discussions are then passed into the administration where they form the decision-premises for the *administration*. The administration absorbs these premises, and it transforms them into *law*. Law is always the medium through which the administration externalizes its relation to the *public*. The public, as the third point in the political system, is the addressee of law. As such, the public externalizes its own relation to *politics* by expressing public opinion, by

campaigning, complaining, and most commonly by voting in political elections.⁷³ By dividing itself into three distinct components, the political system thus creates a situation in which constant self-observation is possible, and in which clear points of self-externalization are guaranteed, at which the system can consider and if necessary correct the techniques of complexity-management which it supports.

A consideration of the triadic structure of Luhmann's political system provides the clearest insight into his understanding of politics, and of political legitimacy. It is, he indicates, deeply mistaken to assume that the political system incorporates an anthropologically or sociologically specific set of activities, which can be invariably described as *political*. Likewise, political legitimacy does not result from any invariable process in which external opinion or manifest consent might be recruited and processed as the bedrock of power. Instead of this, the practices normally perceived to constitute politics are moments or events in which the political system reflects on its own consistency, and tests and legitimizes its own processes of self-stabilization. For instance, a policy discussion between two members of a cabinet, or between a politician and a high-ranking civil servant, is an externalized moment of the system's ongoing self-referential communication. In discussions of this kind, the political system tries out different options for policy-making, and it generates flexible alternatives at the overlap between two of its internal subsystems. Equally, the drafting of bills and the preparation of laws and statutes are not operations in which some rational construct of the common good is assimilated into the political apparatus. Rather, they are a tentative manifestation of the unstable and uncertain relation between administration and public. Therefore, when the members of the public go to vote in elections they are not creating the inalienable foundation of governmental mandate, but are instead merely allowing the political system to air and demonstrate its own options and problems, and so to consolidate its legitimacy through thematic self-testing and self-externalization.

Despite the virtual and technically self-referential character of his conception of democracy in these arguments, Luhmann is quite clear that the system of politics cannot secure and preserve legitimacy without public consensus – in the form of *public opinion*. The argument that the decisions made by *politics* must be transformed into law by *administration* in a manner which enables them to obtain consensus from the *public* is, certainly, a very unusual variant on democratic theories of legitimacy. It is, however, still quite categorically a theory of democratic legitimacy, which gives a distinct emphasis to the role of consensus in the generation of legitimacy; it imagines consensus as a mode of successful self-reference in the political system, through which this system affirms the viability of its own reality. Clearly, Luhmann does not see consensus as a quantity, which is engendered by universal or rational agreements externally dictated to the state or the administration.

However, motives for political obedience cannot be generated from above by pure prerogative. They require complex processes of transformation in which opinions are politicized, policies are juridified, and laws are then addressed to the public. A political system which creates resources of legitimacy for itself in this threefold logic of self-differentiation and self-stabilization may certainly be contingent, and so without normative, contractual or historical foundations; it is not, however, without consensus.

Politics, sovereignty and representation

In this reformulation of the role of consensus in the justification of acceptable government, Luhmann's theory of legitimacy does not only call into question normative and contractual accounts of political legitimacy. It also launches a far-reaching assault on the basic concepts which underpin the history of modern European political thought. Most particularly, Luhmann rejects the conception that *sovereignty* is a founding condition of political order, and he also attacks all common notions of *representation* as a necessary prerequisite of government.

First, from Luhmann's perspective, the general concept of sovereignty is based on a gross simplification of what politics is and does. In modern societies, according to Luhmann, the political system does not consist of a monistic or monolithic apparatus. As discussed above, it takes the form rather of a contingent reality, differentiated from other regions of complexity. The political system is *merely one system among others*; it is limited by other systems, and it is therefore likely to undermine itself whenever it misconstrues its reality as a condition of fully elaborated 'sovereignty'. The idea of the 'sovereign state' is one component of the series of fictions which initially allowed the political system to differentiate itself from other systems in society. In its original formulation, the 'sovereignty' of the state was a formal or semantic paradox. It enabled the political system to explain and justify to itself its own differentiated location and contingent function, and it helped the political system to provide some convincing account of the fact that it was now in possession of autonomous power, without any external accountability, and without any foundation in divine or natural law.⁷⁴ In modern society, however, the persistence of the fiction that society is centred on the sovereign system of politics exacerbates political agents' grossly inflated view of the importance of the roles which they perform. This fiction of sovereignty is one obvious further cause of the overburdening of the political system which characterizes modern society.

Consequently, the key ambition of political Enlightenment, *popular sovereignty*, appears to Luhmann as a most especially questionable concept. Reflecting on this idea, he observes that the 'formula of popular sovereignty' does not describe a mode of governance in which the state represents either the unified will or the particular interests of the people. Rather, it is a term

which gives final concrete form to 'the paradoxical character' of the code of politics. It is a fiction which simplifies the complex contingent processes of political communication, and makes these intelligible and plausible to the political system itself and to its environment. This fictional reflection of political accountability then ultimately leads to a misleading 'localization of "sovereignty" in the popular deputation',⁷⁵ owing to which it is widely believed that parliamentary delegations have sole sovereign power and sole regulatory authority in all society. In modern society, therefore, the concept of popular sovereignty weighs heavily on the political system itself, and the original paradox of sovereignty suffers a chronic inflation and distortion. Under such conditions the legitimacy of the political system is made dependent on its ability to demonstrate its congruence with the wishes and interests of 'the people', and political power becomes identified with one narrowly accountable body of centralized institutions. The original fiction of sovereignty, which first allowed the political system to differentiate itself from other systems, has now engendered a greater, wholly counter-productive, fiction. This is namely the fiction that good government is government by the will of the people, that the will of the people can in some way be made *present* in government, and that the will of the people is politically relevant to all areas of communication. The semantic formula by which the political system first differentiated itself thus now tends to stimulate its dedifferentiation.

For Luhmann, the legitimacy of the political system is definable only as its ability to realize and maintain its contingent complexity, in internal and external differentiation. In Luhmann's own terms, popular sovereignty would mean that *politics* would be immediately accountable to the *public*, and politics would be legitimate or not legitimate to the extent that it would or would not directly channel the wishes of the public into government. As discussed above, however, *politics* generates legitimacy only insofar as it is not the same as the *public*, and the relation between politics and the public is mediated through the *administration*, which is also distinct from both politics and the public. More pointedly, in fact, if it attempted to integrate the public as a measurable quantity into its plans, politics would be forced to suit its decisions to exigencies which it could not fully recognize, and its decisions would always be likely to be inconsistent. The legitimacy of the political system, in short, always and invariably requires that one subsystem of politics accurately marks itself out from others; it certainly does not depend on the unity of these subsystems in the form of popular sovereignty. Apart from its paradoxical semantic utility, therefore, popular sovereignty is a sure recipe for destroying the legitimacy of the political apparatus, not for underwriting it with inviolable principles.

Secondly, after deconstructing this concept of sovereignty, Luhmann also turns his attention to *representation*, the second conceptual pillar of European political philosophy. Clearly, following the rejection of sovereignty,

Luhmann leaves no doubt that decisions made in the political system do not have a claim to represent anything beyond the objective exigencies of the political system itself. The legitimacy of the political system does not rely on the extent to which it re-presents ethical principles, social attitudes or humanist attributes, or on the ways in which it re-presents the will of the people back to the people itself. On this level, Luhmann is a quite outspoken critic of representative democracy.

At the same time, however, Luhmann's approach to representation is rather more dialectical than his critique of sovereignty and popular sovereignty. The fact that the political system does not reflect the will of the people or the ethical essence of the people does not mean that representation is a meaningless concept in modern politics, and it does not mean that the political system has no recourse to a reservoir of *values*, by means of which it justifies and obtains legitimacy for its policies. In fact, like Rudolf Smend before him,⁷⁶ Luhmann argues that the contingency (legitimacy) of the political system hinges on its capacity to *re-present* broader principles of validity – *values* – in order to facilitate the 'continual business' of obtaining legitimacy.⁷⁷ If the political system can take for granted and constantly refer to a stock of preconditions regarding what is or is not politically acceptable, or regarding what may or may not be ethically valid and so on, it can articulate its policies in relation to these assumptions and it can claim that its decisions are guided by selections of time-honoured principle. In so doing, it can disencumber itself of much of the tortuous process of explaining its contingency in terms likely to ensure universal consensus. Political values, consequently, make possible 'the impression of continuity' in policy-making, and they tend to obviate excessive scepticism on the part of the public.⁷⁸

In this argument, however, Luhmann does not backtrack into a moral vision of the state which makes legitimacy hinge on ethical presuppositions. The existence of a reserve of political values, he in fact indicates, merely serves to create a set of options through which the political system formulates its own decisions *for itself*, not in accordance with socially ingrained norms.⁷⁹ Values set out a number of political options or ideals which offer a vocabulary to the political system in which it can make its choices meaningful to itself. For example, the existence of the moral values which are widely held in modern societies (for example, peace, justice, freedom and equality) and of the practical political values which are also usually considered desirable (for instance, the absence of inflation, a minimum of unemployment, or a lack of corruption) means that the political system can always filter information through the vocabulary given by these values, and it will always be able to rationalize and legitimize its choices insofar as it responds to problems in this vocabulary.⁸⁰ Values thus form a convenient matrix in which the political system can make its internal operations externally persuasive.

In this respect Luhmann comes close to a paradoxical theory of representation. Values, he states, are the *other-reference* (or *hetero-reference*) of the political system, for they offer a medium in which the system interprets information from the environment about the viability and necessary presentation of its policies. At the same time, however, values are also the *self-reference* (or *auto-reference*) of the political system; the acceptance (and even the professed re-presentation) of values by the political system creates 'freedoms for decision-making', in which policies are always covered by the legitimacy which the system derives from its (apparent) concern with values.⁸¹ The presupposition of values, and the response to values, are therefore key moments in the political system's acquisition of legitimacy for its decisions. In fact, by re-presenting values or by referring its policies to common discourses on values, the political system gains the most secure basis of legitimacy for its operations. This does not mean, of course, that politics fully internalizes these values; but values give a unifying form to the self-reproducing contingent reality of the political system, and they provide the most persuasive device for maintaining its stability. Ultimately, however, values reflect only the absence of substantial legitimacy. The entire legitimacy of the political system is 'nothing other than the transformation of the absent into presence' in the form of 'values'.⁸²

Despite its reliance on symbolic values, however, the public re-presentation of values by the political system will always be a rather risk-filled undertaking, which – like the concept of sovereignty – can easily threaten the stability of the political system. The political system necessarily undermines its own legitimacy wherever it dedifferentiates itself in its relation to other systems, and wherever it pledges itself to principles or tasks which it cannot adequately justify. Above all, the political system de-legitimizes itself wherever it is publicly perceived that it cannot accomplish all the objectives which it sets itself. The political system must therefore walk a fine line between an admission of its contingency (through which it would abandon its legitimacy) and the tendency to make its legitimacy reliant upon obligations which it cannot carry out, or principles of validity which distort its functions. Indeed, Luhmann expressly sees the expansion of political responsibility in the welfare state as arising directly from the incautious identification of politics with 'value-formulae' and from the subsequent 'extension of the concept of democracy to include performances of provision'.⁸³ The emergence of the welfare state, therefore, is the classic example of how the political system risks de-legitimization wherever it unselectively harnesses its legitimacy to inflated concepts of value and impractical models of sovereignty.

Politics and pluralism

These views on sovereignty and representation give an important clue to Luhmann's position in the spectrum of common political opinions. By

dismissing interpretations of the political system as an organ which is tied to the specific interests of the constituent body, or which is called upon to re-represent either the particular will (interests) or the general will of the people, Luhmann places himself resolutely not only against the founding assumptions of liberalism, but also of contemporary political activism, pluralism, and indeed of all current left-of-centre debate.

First, for example, he derides what he construes as the simplistic presuppositions of modern pluralist thought, and he has little time for the concrete manifestations of contemporary radical or radical-liberal politics. Ecology, feminism, student politics, protest groups and other 'social movements' become, at various points in his theoretical trajectory, the objects of critical reflection. Such movements, he explains, are parasitic modes of communication, or at best critical self-descriptions or 'reality tests' which the political system gives to itself wherever it encounters interference or resistance in its communications.⁸⁴ Protest movements thus always 'protest inside society' – however much they might act 'as if they were doing so from without'.⁸⁵ The claim that protest might be able to confront society with fundamental truths about itself, or with overarching 'alternatives' to all existing modes of social communication, neglects to consider that all communication occurs within society, and that protest is simply one process in which society communicates about itself. It does not, in any case, reflect a privileged position outside society, in which people tell society what is wrong with its functions, or how these might be rectified.

Second, more fundamentally, Luhmann also construes civil society, the founding bastion of modern left-liberal conceptions of anti-systemic or anti-organizational agency, as a largely meaningless term.⁸⁶ Civil society, he indicates, is not an arena in which normatively motivated opposition to social systems can co-ordinate and organize itself. Indeed, the suggestion that a particular arena of society might act as an especially entitled location of reasonable protest is a residue of archaic and reductively dualist preconditions regarding societal formation. The notion of civil society hinges on two misguided beliefs: first, that the political system takes the form of a hierarchical order, directly opposed to society; second, that society as a whole (or civil society) possesses resources with which it might either immediately approve or contradict decisions made in the political system.⁸⁷ For Luhmann, evidently, this is simply not the case. The political system is just one function system among others, with no special significance compared with other systems, and society is merely the environment of all function systems. It is not a place where people pursue 'social' activities, or where they organize themselves in a manner which reflects an elevated or distinct type of motive or interaction. The left-liberal claim that society might generate either agreements or contradictions, to which the functions of the political system in turn owe some specific, quasi-contractual accountability, is thus, for Luhmann, quite simply absurd.

Pluralism and the concept of differentiation

In short, Luhmann turns against all widespread principles of political pluralism, and he emphatically rejects the assumption that societal pluralism is expressed and safeguarded by the proliferation of one-issue social movements or groups, attempting to draw political capital from a very selective account of the entirety of social reality. Nonetheless, beneath the obviously polemical tones to his reflections on social movements, Luhmann actually sets out a highly nuanced theory of issue-politics, which has important implications for theories of pluralism. Indeed, he might even be seen to argue that issue-based political associations are deficient only because they secure the most illusory types of pluralism – and even that the conditions of genuine pluralism are ultimately eroded by the apparently pluralist intentions of groups who campaign on one-issue mandates. Luhmann's ridicule of the false pluralism represented by social movements might thus easily be seen to reflect the fact that a concern with pluralism, and with its theoretical underpinning, is very close to the centre of his own sociological objectives.

Most important in this respect is the fact, as discussed above, that Luhmann's work is founded in a concept of *differentiation*. Manifestly, he does not develop this concept because he wishes to set out a normative defence of diversity, or because he thinks society is teleologically inclined to maximize the number of lifestyles or standpoints which it incorporates. On the contrary, his idea of differentiation merely describes the evolutionary path of distinctive function systems in modern society. However, this concept of differentiation might in some ways be seen to possess certain political implications, and a specific concept of social organization might be extrapolated from it, which place Luhmann outside a fundamentally conservative hostility to societal pluralism.

As we have seen,⁸⁸ the concept of differentiation implies that social systems – including the system of politics – operate adequately and rationally only if they can sustain the conditions of their *difference* from other systems. This difference is the irreducible ground of their contingency, autonomy, rationality and legitimacy. Consequently, Luhmann intimates that the true and necessary condition of modern society is its essential polycentricity, and that modern political system presupposes pluralism as its own enabling condition. The systems of modern society can only function if they consistently differentiate themselves from other systems, if they constantly communicate this differentiation to themselves through their own codes, and if they sustain a sufficiently high level of internal complexity to reflect the complexity of the environment from which they differentiate themselves. The operative unity of any social system depends on the extent to which it can accept, both within itself and outside itself, an infinite number of differentiated arenas of meaning. Each system defines its own autonomy

and rationality by accepting what is outside itself, or what is irrelevant to its communications, and by allowing other areas of sense to develop and evolve without unnecessarily concerning itself with them. Each system also defines its own autonomy and rationality by accepting that it must allow its own subsystems to create their own autonomous sense-orientations, without binding these to overriding conditional programmes. The result of these processes of differentiation, if they are effectively achieved, is that all modern social systems admit (or necessitate) an extremely high degree of external and internal systemic *plurality*.

As a consequence of this, Luhmann's opposition to manifest political pluralism is rather different from standard neo-conservative views, which tend to oppose pluralism either because of its threat to social cohesion, or because of its tendency to undermine the integrity of political order. Indeed, Luhmann is just as hostile towards conservative anti-pluralism as he is towards modern types of pluralist politics.⁸⁹ In fact, if set alongside common conservative invectives against pluralism, Luhmann appears precisely as a spokesperson *for* pluralism, albeit for a much more far-reaching and less immediately transparent concept of pluralism than that promulgated by social movements. In his reflections on differentiation and pluralism, Luhmann might be seen ironically to suggest that normative arguments for pluralism and conservative political views which oppose it are actually only two sides of the same misguided perspective. Statist conservatism argues that the political system represents a hierarchical pinnacle of authority which controls all of society, and that it can be called upon to represent fixed resources of power against this society (if necessary by force). Anti-statist activism, however, offers little more than a naive inversion of this statist conviction; it hinges on the belief that 'society' can arrange itself as a forum of concerted opposition to events which specifically occur in the political system, and it proposes that the political apparatus should be minutely attentive to all specific 'needs' in all areas of society.

For Luhmann, however, both conservatism and radical liberalism base their perspectives in a reductively schematic theory of society, assuming erroneously that society finds 'its unity either in a hierarchy or in a dualism'.⁹⁰ Both of these assumptions are, in Luhmann's view, equally and analogously self-deluding. Both cling to a binary theory of the relation between state and society which falsifies the essentially plural difference and interdependence of the many social systems which constitute modern complex societies. Moreover, both commit the cardinal error of assuming that certain subsystems can exercise measurable authority over others. The radical or left-liberal claim that 'society' – first in the form of popular sovereignty, latterly in the form of social movements – can obtain direct power over the political system, and the conservative belief that the political apparatus can dominate other social systems or act as an ultimate focus of representative authority for all of these, both fail similarly to reflect the fact that systems in advanced

societies justify themselves by the extent to which they differentiate themselves from other systems, not by the degree to which they regulate them.

Luhmann's pluralism, therefore, is such that it exposes as residually anti-pluralist the radical or left-liberal argument for social diversity and political inclusion. Modern society, he indicates, is not possible without pluralism: modern society *is* pluralism – it is 'a society without an apex or a center'.⁹¹ The pluralism of modern society is both the precondition and the result of the contingency, rationality and autonomy of all social systems. In fact, the great paradox of more common conceptions of social plurality is that they counteract the possible fulfilment of their own objectives. Wherever the political system seeks to represent some ethically deduced commitment to pluralism, and so tries to protect the interests and freedoms of minority groups or particularist movements in society, the political system is forced to extend its own operations well beyond its actual range, and to regulate practical and moral problems which it is not equipped to address. As a result of this, the avowedly pluralist political system can only undermine its differentiation from other systems. Such dedifferentiation, in the name of pluralism, can only succeed in undermining the contingency of the political system, as well as that of other systems, and, in doing so, destabilize those fragile fabrics of difference and interdependence from which societal plurality actually evolves. In short, wherever the political system attempts to protect or reflect the plural interests of society, it inevitably works to the detriment both of itself and of these plural interests. The conditions of pluralism can thus only be guaranteed if society is not viewed as being centred in specific regions of interaction, specific issues or specific people, if it is decoupled from all mono-focal constructions of reality. This decoupling is called into question wherever the political system is theoretically re-centred in oversimplified preconditions concerning political accountability and obligation.

Politics and political economy

Of particular significance in Luhmann's pluralist account of modern social systems is his discussion of politics and political economy. On this issue, his thought can once again, in some respects, be seen as a recapitulation (albeit in very idiosyncratic terms) of a classical-liberal argument: namely, that economic autonomy is one important precondition of an acceptable social order. Quite clearly, Luhmann does not simply retrace either the old liberal dualist or the individualist argument that private and economic interactions should be kept free from state power. Nor, of course, does he view the economy as a region of activity whose liberty produces immediate social goods or benefits. Nonetheless, he does indicate that one of the conditions of pluralist social evolution is that the economic system acquires a degree of liberty against other systems (especially against the system of

politics). In Luhmann's view, in fact, the differentiation of 'the money of the economy' from the power of the political system is, together with the differentiation of politics from law, the most precarious yet also the most important case of systemic differentiation,⁹² the realization of which is pivotal to societal plurality. Indeed, at various junctures in his work Luhmann is close to admitting that the economic system has a certain degree of primacy over the political system. The 'restructuring of society' through its functional differentiation means that the political system of society 'cedes its leading position to the economy' and must therefore 'subordinate itself to problems posed in the economy'.⁹³

Luhmann makes his position on such questions quite clear in his writings of the early 1980s. As discussed above, here he makes a direct distinction between the *function* and the *performance* of the political system. The operations of the political system, as it makes decisions or allocates fiscal resources in the economy, are performances; they are not functions. The outcome of these performances is to produce additional risk, additional instability, and – as a consequence of this instability – more *bureaucracy*.⁹⁴ The underlying political implication of all Luhmann's writings on political economy is therefore clear enough. Where the political system approaches the economic system with the intention of organizing interventionist performances and of subjecting production or exchange to direct control, it ties its own legitimacy to its success in administering the economy (in resolving scarcity). In so doing, however, it necessarily undermines its own legitimacy and efficacy as a political system, as it produces increasingly unmanageable levels of bureaucracy which then obstruct its operations. As a consequence of this bureaucracy, it actually forfeits the regulatory skills which it originally imputed to itself, and on the basis of which it first intended to alter the economy. At the same time, moreover, state intervention in the economy is always likely to trigger malfunctioning in the economy itself – this in turn creates more and more economic problems which, with its now diminishing administrative competence, the political system is still called upon to resolve. The inevitable outcome of regulatory politics is therefore an escalation of the burdens placed upon the state and a decrease in its capacity for solving them.⁹⁵

Against this background, Luhmann's commentary on the crises resulting from inappropriate interrelations between politics and economy form one of the most important strands in his sociology, and they count among the most far-reaching and provocative contributions to recent theories of political economy. In *Society's Society* (*Die Gesellschaft der Gesellschaft*, published in 1997), the last major book to appear in his lifetime, Luhmann makes his position on economic intervention and regulation emphatically clear. 'All political systems which attempt politically to steer the economy by planning production', he states, 'have the problem that they cannot obtain information about economic viability which is independent of their own

decisions. They therefore develop into a massive network of internal manipulations, whose economic failures then become a political problem once again.⁹⁶

On this evidence, Luhmann can be quite securely categorized as a neo-liberal theorist of the political system. Indeed, in this quotation he not only opposes state-led regulation of the economy and demonstrates the necessity of private autonomy in the economic sphere – he also openly declares the need for economic deregulation. One key structural problem in modern democracies, he suggests, is that the state is defined as an executor of economic performances, for the accomplishment of which it charges itself with responsibility, and it then becomes incapable of guaranteeing that these performances will be carried out in a satisfactory manner. This problem can be solved only through a minimization of the economic burdens which are placed upon the state, and a guarantee that most economic functions, even those of relevance to politics, will be carried out by non-political units. In other words, in its application to political economy, Luhmann's pluralist sociology contains an implicit doctrine of privatization and deregulation.

Luhmann himself only rarely expressly touches on the questions of economic regulation and deregulation. In his posthumously published work *Society's Politics*, he argues that the opposition *regulation/deregulation* is in fact merely a paradox of self-reference which permits the political system to construct in its own terms a problem of its own making. By proposing regulation or deregulation as alternative options for addressing the relation between state and economy, for instance, communications in the political system are able to create a manageable matrix for policies, and even to appeal to the public through a simplistic reduction of extremely complex issues. However, apart from its semantic function, the supposition that a political system might be able thoroughly to regulate the economy is rather ludicrous, and it relies on the application of a counterfactual 'causal scheme' to the relation between politics and the economy.⁹⁷ In this relation, in fact, Luhmann whispers playful words of advice to politicians who seek to demonstrate competence in steering the economy. The most adequate means by which the political system might react to the economy, he suggests, are 'justification and hypocrisy'. Politicians who wish (however implausibly) to give the impression of control over the economy as a way of recruiting support for their policies will only obtain this support by promising things which they cannot deliver and then by scrambling for justification when their promises remain unfulfilled. In any case, politicians who attempt to build their careers on the pledge to implement effective regulatory policies are unlikely to enjoy long or productive political lives.⁹⁸

Underlying these views on political economy is once again the problem of the welfare state. The problem of excessive state-regulation of the economy becomes especially pronounced, Luhmann explains, in political systems which link their legitimacy as democracies to the maintenance of

welfare programmes, and to the 'provision of advantages which the individual person has not earned'.⁹⁹ This is because, as a central distributor of goods, the welfare state necessitates high levels of taxation, and it must institute extensive programmes of economic regulation in order to ensure that sufficient tax revenue is generated. Excessive taxation, consequently, always occurs where the political system inadequately manages its 'opening and restriction' towards the economy,¹⁰⁰ and where it assumes co-ordinating power in influencing the economic conditions in which citizens live. High-level taxation, however, inevitably leads to economic problems – to problems registered in the medium of money, but caused by the medium of power. These problems might, for instance, take the form of possible under-production, flight of capital, loss of investment potential, or increasing prices, imbalances in the relation of supply and demand in the private economy, difficulties in the circulation of capital, worsening international competitiveness of firms,¹⁰¹ or excessive regulation of available capital by central banks.¹⁰² All such tendencies, in Luhmann's view, characterize societies which are drifting away from the ideal condition of realized plural differentiation towards a more authoritarian (less differentiated) mode of political economy.

The economic system

On a most fundamental level, Luhmann argues that the economy is a differentiated system of society whose functional self-reference is *scarcity* (*Knappheit*).¹⁰³ The function of the economy is that it 'provides for the future in a stable manner' by developing mechanisms for dealing with scarcity,¹⁰⁴ or at least for referring to the fact that they deal with scarcity. This means that, just as the political system explains its operations under the formula of legitimacy, the economy validates all its communications by referring to the scarcity of exchanged goods, and it renders its communications plausible by suggesting that transactions over commodities are necessary and justified because of the absolute value of these scarce things. The economy initially responds to problems of scarcity through the code of possession or property (*Eigentum*), and then through the second-coding of ownership as *money* – money is a medium which facilitates the systemic internalization of scarcity in the form of 'monetary scarcity',¹⁰⁵ such that economic role-players will accept the scarcity of money as a signifier for the original scarcity of goods. Consequently, communications in the system of the economy must always be communications about scarcity, and in modern societies these must occur in the medium of money. Such communications are therefore always reflected through the binary opposition between *payment* and *non-payment*, which means that the economy can register communications only in the form of transactions: the economy explains its operations to itself by referring to scarcity via processes of financial exchange. The system of money accordingly develops its most accurate self-description in the form of *prices*.¹⁰⁶

It is by applying prices to the goods covered by transactions that the economy creates a universal reference for its initial reference of scarcity. Prices then become a medium for articulating the relative scarcity of goods.

The primary implication of Luhmann's theory of scarcity is that scarcity, translated initially into the code of property/not-property, and ultimately into that of payment/non-payment, is the self-reference for all things which are communicable as 'the economy'. Scarcity is the primary motive and 'catalyst' for everything which happens as economy: for work, payment, exchange, distribution – in short, for all means of gaining *possession*.¹⁰⁷ The economy would not be able to organize work, payment, exchange or circulation if its role-players were not ceaselessly referred to the primary scarcity of goods, and to the secondary scarcity of money.

This interpretation of the economy as the function system which refers to scarcity through money influences Luhmann's political theory in a number of ways. Most obviously, it implies that issues of scarcity can be communicated only through money, and cannot be transported into the systems of law, politics, art or any other system, for these systems will be able to reconstruct economic problems only through their own particular windows or perspectives. The political system, especially, does not possess resources which might enable it simply to annex the economy and regulate it in accordance with its own programmes. Politics, in short, is never *money*; it is always only *power*, and it refers only to *legitimacy*, never to *scarcity*. For this reason, then, the application of power to the economy (as redistribution, regulation of production or welfare provision) always tends to obscure the scarcity of goods, and to blur the basic reference under which economic communications occur. Even where the political system attempts to regulate the economy through legally enshrined fiscal allocations or deductions, this is always likely to interfere with the self-referential processes of economic operation, often with extremely unpredictable consequences. If, by way of example, a political decision is made to impose environmental tax on heavy industrial companies, this, Luhmann explains, will have unforeseeable, conflicting, and diversely destabilizing results for the two systems which are affected by such policies – economics and politics. The political system will judge the success of the decision to impose the tax by the extent of the resultant reduction (or otherwise) of environmental pollution, or perhaps by the amount of tax revenue which it generates. The economic system, however, might register the outcome of this decision in very different ways – if, say, it leads to the bankrupting of firms that damage the environment and cannot afford to pay the tax penalty. The political system will then, in all probability, have to set up a programme for the support of the firms which it has driven into bankruptcy. The economy, in turn, will respond to this by recognizing that bankruptcy can actually offer great financial advantages to individual firms (even to those that can afford to pay the tax), which might then lead to further bankruptcies.¹⁰⁸ The outcome

of this entire process might easily be that the government is finally called upon to reinflate the manufacturing sector originally accused of producing too much pollution – thus leading to a net increase in the actual volume of pollution.

In simple terms, Luhmann's construction of the economy as the communicative self-reference of scarcity means that a whole series of practical processes – that people go to work, that they are paid salaries, that commodities are produced and exchanged by companies, that money stays in circulation – depend on the adequate and differentiated coding of these processes in relation to scarcity. Wherever the code payment/non-payment is made subordinate to power, which ordinarily occurs through taxation, distribution and regulation, the self-sustaining dynamic which determines the above processes becomes unstable. This, in turn, has adverse repercussions for the political system, which clearly requires that people work, exchange money, draw wages and so on, and whose legitimacy as a competent raiser and distributor of tax revenue necessarily depends on those processes.

Direct political engagement in the economic system is therefore always likely to homogenize the success criteria of one system with those of another, and to trigger entirely uncontrollable consequences.¹⁰⁹ Perhaps the only guaranteed outcome of economic difference-minimization programmes is that the political system will undermine its own legitimacy, as it will confront itself with external problems which it could not anticipate, and it will also create internal problems which it cannot solve. Indeed, as discussed, where the political system attempts a thorough regulation of the economy it might easily be forced to alter its own differentiated structure as democracy, and to introduce coercive plans (for example, enforced demand-stimulation, compulsory investment-channelling, expropriation of productive units, or even restriction of professional freedom) in order to meet the objectives which it has set itself.

In these issues, the pluralist aspect of Luhmann's work forms the basis for an anti-normative variant on early liberalism, which shares with classical liberal theory, and with classical-liberal political economy, a privatist model of social autonomy. He favours economic deregulation not because of any theoretical endorsement of liberty in economic interaction, but because he thinks that the coalescence of economy and politics undermines the self-reference of both systems (scarcity and legitimacy). Locating economic operations outside the political system, he claims simply, is more in line with the evolutionary tendency towards differentiation which characterizes the entirety of modern society. However, the fundamental perspectives in these reflections – namely, that government which imposes power on the economy is both potentially authoritarian and liable to malfunction, and that democracy in government presupposes economic autonomy – are straight from the heart of the early liberal canon.

Politics and power

Underlying Luhmann's theory of democracy is a recursive or communicative theory of power. He argues that in modern society power is not a stable resource. It is not situated in a physically identifiable person or location,¹¹⁰ and it cannot be exclusively monopolized for one political agenda or set of interests. Power, to be sure, clearly has its remote origins and ultimate reference in 'physical violence' and in the possibility of coercion.¹¹¹ In fact, Luhmann is quite clear about this. He states that 'the symbolic generalization of the medium' of power is only possible because 'the means of power can be deployed'.¹¹² This means that power can develop as a medium of communication only because it latently contains the threat and potential for the coercive securing of compliance.

In its usual modern and democratic form, however, power is a recursive and virtual medium, the volume and efficacy of which are maximized as the political system reflects its own complex contingency through reference to *legitimacy*, rather than to violence.¹¹³ Power, thus, expressly does not rely upon the concentration of the means of violence in one sovereign body. In a modern society power does not reside in the hands of a monarch, or in a cabinet of politicians, a political party, an apparatus of state, or an electorate.¹¹⁴ Instead, the political system, and each subsystem within this system, constantly disposes of power as it generates the conditions of its own autonomy and legitimacy, and as it communicates with other systems on that basis. The system obtains and disposes over power insofar as it maintains an expansive series of options, or 'preferences',¹¹⁵ for the functions occurring within it, and insofar as it can effectively stabilize itself through these options. This means that the modern political system manifests power through its ability to develop and sustain a maximum of alternatives for those whose communications fall within it, thereby limiting – not augmenting – the probability of open conflict or of open compulsion.

A political system in full possession of power, consequently, would be one which might open and uphold sufficient options for communication, and sufficient alternatives in choices of action, so that the forceful imposition of collectively binding decisions would always be little more than a distant threat. In Luhmann's view, political systems which deploy power coercively (as force or violence) are invariably primitive or malfunctioning systems which are 'short of possibilities'¹¹⁶ and struggle to maintain the internal selections required by the complexity of their functions.¹¹⁷ In complex and largely peaceful democratic societies, however, power is an almost invisible quantity. In such societies, the bearers of power 'can only develop their power' if they accept the necessity of power's recursivity. This means that bearers of power in modern democracies can use power effectively only if they 'allow themselves to be influenced' by other, often countervailing, communications in the medium of power.¹¹⁸ This recursivity of power in

the modern political system has the primary advantage that it enables the political system to test out its policies, or to run a number of concurrent alternative policies. Such self-testing eliminates (or at least restricts) the probability of popular dissent, widespread disaffection, or the manifest use of force, and it obviates the systemic malfunctioning which results from such underdeveloped modes of communication.

In differentiated societies, therefore, the application of power is never the province of one point in the political system. Rather, power is transmitted through a circuit of communication, in which different points in the political system respond to options given to them by other points in this system. For this reason, power always triggers a 'counter-circuit' of power, in which the systems or subsystems which receive power also communicate power, and then create resistances to the purely hierarchical deployment of power. This especially characterizes the differentiated modern political system, which, as discussed above, is subdivided into *politics*, *administration* and the *public*. In this system, each subsystem deploys counter-power to the power of the other subsystems, and there are clear points of intersection (*Schnittstellen*) between the different subsystems, where the collision of power and counter-power becomes manifest, and where false or inappropriate deployment of power can become apparent. The self-testing of the political system thus occurs at the seams or junctures between *politics* and *administration*, *administration* and *public*, and *public* and *politics*.

This communicative self-testing of the political system takes on three different forms of appearance at different points in the system's triadic structure of self-reference. First, for example, at the intersection between politics and administration, the political system communicates counter-power to its power by insisting that 'legally adequate forms' must be found for policies. This means that the administration responds to and accepts political directives only if it can translate these into a medium which it finds manageable, and which it considers likely to be effective as a medium for transmission through society. Actors in the administration bring 'factual knowledge' and legalistic 'calculations of consequence' to bear upon policies, and they alter the form of policies – or of power itself – in accordance with the exigencies of the administration.¹¹⁹ The administration thus provides preconditions or blueprints against which the power of politics must be tested, and the power of politics is constantly reflected through the power which the administration itself contains and transmits. Politics, in short, cannot exercise power if it does not accept the power (or counter-power) of the administration, and the legal forms provided by the administration provide a crucial means of disseminating power. At this point, therefore, the power of politics tests itself against the legal forms communicated by the administration, and power must accept its legal coding and restriction in order to disseminate itself as a diffuse medium through society.

Second, analogously, although the public receives power from administration in the form of law, the public also provides terms of acceptance through which this power can be mediated. The public 'impacts on the administration through the greatest variety of channels', Luhmann explains. Co-ordinated 'interest organizations' (or pressure groups) make apparent power's communication about itself at the juncture between the public and administration. Social movements, unions, lobbies and civil associations might also be viewed as formations which grow out of the self-testing of power at the interface between administration and the public. The 'shedding of tears in the office' when those at whom laws are directed reflect on the impossibility of their fulfilment is also part of this cyclical communication.¹²⁰ In such processes, the public generates some kind of counter-power (*Gegenmacht*), which limits and modifies the expressions of power directed to it.

Third, then, in the intersection between public and politics, the public also exercises counter-power, as it 'chooses leading personalities and political programmes' which it wishes to see established as government.¹²¹ Politicians are forced to present policies in a manner likely 'to persuade the people to elect them', that is, by calling on values, principles, strategies or paradoxes, and they must promise that their policies will lead to specific desirable and often morally intonated results.¹²² In fact, politicians might also be seen to communicate a certain type of counter-power to the public, for politicians (either manifestly or covertly) have the function that they test themes derived from the public for their political viability and communicability, that they limit the demands imposed by the public on the political system, and that they attempt to persuade members of the public to accept certain minimal levels of realism and modesty in the burdens which they place upon politics.

The most successful political systems, consequently, are systems which are sufficiently refined to maintain internally complex capacities for self-testing through the recursive transmission of power and counter-power. Such systems tend to militate against the monopolization of power by single agents or group, and they are consequently often termed 'democracies'. These systems are characterized by the fact that they can 'activate' enough power to propose 'more alternatives' and 'greater selection-performances' to the agents whose communications occur within them,¹²³ and they usually find the direct or obligatory exercise of power unnecessary.¹²⁴ Most importantly, though, such systems can hold themselves at the level of even the most complex environments, and they can make decisions, as power, in the face of extremely unpredictable external realities, for such systems contain innumerable complex resources for deploying different strategies and different options. Democracy, therefore, is the diffuse reality of complexly communicated power, which provides systemic and structural 'guarantees for a broad region of selection' in politics,¹²⁵ enabling the political system to demonstrate great flexibility in responding to its environment.

In short, the more rational, autonomous (self-referential) and legitimate a political system is, the more power it has at its disposal, and the more coercively a system imposes power, the less rational, autonomous and legitimate it is. Power is a 'symbolically generalized medium' which gives form to the manifold functions of politics, through which the autonomy of the political system is secured.¹²⁶ The decline of power, manifest in the restriction of options in the political system, and the resultant increased necessity of coercion, invariably characterizes political systems which show signs of forfeiting their autonomy and legitimacy. The most 'powerful' systems and subsystems are always those which allow for the greatest number of possibilities and options in their internal functions, and which effectively cede power to the other systems or subsystems from which they differentiate themselves.¹²⁷

Politics, power and democratic second-coding

In the strict sense of Luhmann's own terminology, power is exclusively the medium for coding the political system. Where power is deployed in systems other than politics, this merely reflects a borrowing of power by a different system, and it always relies on a 'conditional reference' to power originally produced in the political system.¹²⁸ This restrictive conception of power naturally runs counter to broader sociological concepts of power, for example in Weber, Foucault and neo-Marxist sociology, all of which argue that power also manifests itself in the law, in the economy, in the education system and so on. This specification of power as an exclusively political medium is therefore one of the most controversial aspects of Luhmann's social theory, as it appears to do little justice to the types of compulsion and conflict which exist outside politics.

There exists, however, a certain degree of ambiguity in Luhmann's limitation of power to the political system. At times, especially in his later work, he admits that power can develop in a 'parasitic' manner in other systems, and that other systems can colonize and deploy the 'opportunities for sanction' which result from political power.¹²⁹ Other systems, consequently, might at times also produce their own sources of power and processes of power-application, which offset and counteract the power of the political system. One obvious example of this would be the techniques of power-generation developed in the economy by unions, by corporate bodies, and even by cartels, which create specific modes of political organization and authority, and on occasion set themselves against power communicated exclusively in the political system. These economic organizations, however, rely indirectly on power immediately sanctioned by and localized in the political system,¹³⁰ and they sustain themselves only by channelling power from politics to authenticate their own operations. Such parasitic deployment of power is guaranteed only 'limited duration' and assumes only an 'occasional' quality.¹³¹

In addition to this, Luhmann also shows how power is also, in certain instances, applied as cover for operations outside the political system. For example, property and possession are primarily coded in the opposition payment/non-payment, and as such they refer to scarcity. However, this relation is also subject to legal coding (theft of property, for example, is both a legal and an economic issue), and the legal prohibition of the misappropriation of property is also supported by power (the sanctions against theft ultimately rely on political decisions, although these are coded in the form of law). In such cases, Luhmann shows how power is transmitted from one system to another, and how structural coupling with the political system is of key importance in the operations of other systems. The result of such coupling is that there emerges an extremely complex interpenetration of codes between different systems, in which the communications of one system are often both related to, and also checked by, those of another. Indeed, even those function systems (for example, education and medicine) which ostensibly have little need for power are, like law, 'ultimately reliant on politically centred power',¹³² for their communications must be underwritten by political power wherever an aspect of their relation to other systems requires a collectively binding decision.

The most important qualification regarding the restriction of power to the political system resides, however, in Luhmann's concepts of interdependence and *second-coding* (*Zweitcodierung*). Complex societies, he argues, are always characterized by a high degree of second-coding, as a result of which power extends beyond the political system into other areas of communication. This means, for instance, that a decision made in and applied by the political system will not be coded solely through the basic code of government/governed. Indeed, the government/governed distinction only provides the term by which the political system can differentiate itself, in the form of a marked space, from all that is not communicable as politics: it does not, however, offer a medium in which decisions or policies can be transmitted through society. Decisions in the political system thus need also to be coded in the form of law – as lawful/unlawful. It is only by accepting that it must assume legal form that power can generalize itself as a medium of communication. In modern complex societies, political decisions risk remaining unworkable and impracticable if they appear exclusively as governmentally imposed prerogatives. They therefore have to be second-coded as law, and by law, in order to obtain compliance and to communicate themselves effectively to different regions of society. If they are second-coded as law, decisions will not appear as prerogatives, directives or fiats – they will take the form of flexible programmes for legislative debate or decision-making, and ultimately they will appear in the form of statutes, refined by the administration to the issues which they address. Political decisions are thus fed (in their raw form as decisions, or perhaps as policies) into the administration (the legislature). Here, the decisions are processed in such a

manner that they are likely to receive compliance from the public, that they are unlikely to contravene or invade other existing social systems, and that they can ultimately be communicated in the medium of law. Consequently, policies entering the administration are re-coded, or second-coded, as *law*, and subsumed to the 'scheme lawful/unlawful'.¹³³ It is in this form that they are transmitted to the *public*. Owing to this process of second-coding, power is never applied directly as power, but always as law. Indeed, owing to its transformation into law, power must also accept its restriction by the code of law. Power itself must become lawful – otherwise it will not be able to transmit itself as law, and it is very unlikely that it will obtain long-term consensus.

The second-coding of power by law and as law is, therefore, a highly significant development in the emergence of the modern and differentiated types of political system, and it might be viewed as a defining feature of governance which is not exercised by direct coercion. If a modern political system were to attempt to enforce power solely in prerogative form, as implied in the original code government/governed, it would run the risk of stimulating unmanageable levels of direct dissent or resistance, and it would be compelled to focus all its resources on addressing these. More importantly, however, it would also fatally simplify its own internal operations, as it would overburden itself with mandatory responsibilities of control and regulation, which it could not effectively fulfil. Law is therefore essential to politics for two distinct reasons. First, power relies on legally appropriate forms (provided to a large extent by administration) to disperse and transmit power and to create new, universal opportunities for obtaining consensus. Second, law helps preserve the internal complexity of the political system, and it protects the system from unnecessary overspecification on regulatory tasks. The implementation of political policies thus necessarily involves a shift of code from power to law. It is in the medium of law (not of power) that political communications are transmitted to those who are to be subjected to the exercise of power. It is only in the medium of law that power becomes 'effective power',¹³⁴ and successfully secures enduring compliance. Through such second-coding, however, the legal system also obtains a degree of power over power. Politics needs the legal system to assist in its communications, yet the legal system can only assist politics by imposing its own form on power, and so by placing formal checks on what can and cannot be done by power.

This explanation of second-coding is particularly crucial to Luhmann's interpretation of democracy. When political decisions (as power) are second-coded as law, he explains, 'the pure code of power' experiences an 'enormous expansion'; once it is legally second-coded, power takes on the form of a medium capable of producing generalizable communications,¹³⁵ and of obtaining universal social acceptance. Legal second-coding, thus, liberates power from its original hierarchical communication in the form of coercion,

and it bestows on it a positive mediating form more adequate to the complex environments which power confronts. It is only through the positive legal second-coding of power that the democratic communication of power becomes possible. Democracy, in fact, is not really a 'form of rule': it is a 'technique of systemic steering', which arises as law becomes a positive medium for transmitting legal decisions through society.¹³⁶ Second-coding, and the resultant iterability of power, is therefore one key insignia of a democratic political system, and of a democratic society.

To conclude this section, it can be seen that, in Luhmann's own precise vocabulary it would not be exactly accurate to describe *society* as *democratic*, for democracy is a condition of the *political system alone*. It is the sequence of evolutions in the application of power which maintains a sufficiently refined 'circulation of communications borne by power' to provide options which facilitate the avoidance of direct or mandatory coercion.¹³⁷ However, Luhmann also has a construct of a democratic society in mind, in which all social systems countervail the direct vertical application of power by the political system. Indeed, he indicates that the democratic organization of the political system is only possible because 'other partial systems of society' provide 'conditions of compatibility' for it,¹³⁸ and so transmit and limit power through their own differentiated autonomy. Analogous to a powerful democratic political system, therefore, a powerful or democratic society is a society in which distinct function systems communicate with politics about the limit and scope of its use of power,¹³⁹ and in which power is externally second-coded from outside (especially by law). Democracy, in this account, might be seen both as a mode of realized systemic differentiation in the political system, and as a mode of realized pluralism in society, in which no system can assume total authority for all of society, or indeed for any specific arena of operation in society. Democracy, for Luhmann, is the term most aptly used to describe a strictly political system possessing sufficient resources and options to continue with the production of binding decisions without ever dramatically risking its overall complexity and stability.¹⁴⁰ At the same time, however, democracy might also be seen to describe a decentred overarching condition of societal organization – a total societal context of systemic plurality and autonomy. In fact, the internal differentiation of the political system in the form of political democracy is actually just one moment in the broader evolution of a functionally differentiated society, without which democracy in politics would not be possible.

Politics, democracy and the legal state

As indicated above, Luhmann's theory of the modern political system is very close to a theory of the democratic legal state (*Rechtsstaat*), and he shares with positivist theorists of the legal state the classical conception that 'the state does not stand above the law', and that sovereign power is always 'legal

power, and thus always bound by law'.¹⁴¹ The modern democratic political system, he explains, emerges as the result of a number of distinct processes, some of which are internal to the political system itself, some of which are universal to all social systems. In the former category, he argues that the evolution of democracy occurs through the multi-stage internal differentiation of the political system. Democracy emerges, firstly, with the constitutional formalization of the separation of executive, legislature and judiciary in the modern legal state, and then, secondly, with the 'separation of politics and administration' into two distinct subsystems of the political system.¹⁴² This subsystemic differentiation of politics is the advanced form of the original separation of powers; through this differentiation, executive and legislative functions are conferred on decision-making and administrative bodies which were 'not foreseen' in the primary conception of the separation of powers.¹⁴³ However, this differentiation continues the tendency towards internal differentiation which was initiated by early legal-state constitutions; the separation of powers is given new and more expansive form in this evolution, but it still remains the 'basic scheme of our order of state',¹⁴⁴ and it marks the crucial foundation of the political system's self-organization in the form of a democracy. As an internally differentiated order of the political system, then, democracy is a condition in which the political system develops a variety of resources and points of reference for its communications, and in which political power is not located exclusively in one centre of execution. Democracy is, therefore, 'a formula for the self-reference' of the differentiated political system of modern society.¹⁴⁵

By simultaneously acknowledging the internal separation of the political system into administration (legislature) and politics (executive), and the external differentiation of society into autonomous fields of economic, legal and political activity, Luhmann's political theory has much in common (in principle if not in spirit) with early legal-state theory. He expressly claims that the 'functional balancing' of the constitutional state demands 'greatest admiration' as a technique for adequately relating distinct regions of social and political accountability to each others,¹⁴⁶ and for securing the 'decentralization of political authority'.¹⁴⁷ In fact, in his late works he also claims that the modern state is only meaningful as a schematic formula for the 'structural coupling of the legal system and the political system',¹⁴⁸ and he describes the state merely as a semantic term which simplifies that transposition of power into law which power requires in order to disseminate itself. The modern state, therefore, is the *formula of self-reference* for the intersection between law and politics: it is the term by which law explains to itself its own contingent origin and by which politics depicts itself as bearer of moral and rational legitimacy. As such, in consequence, the modern state is always necessarily a legal state.

Unlike the classical legal-state theorists of nineteenth-century and early twentieth-century positivism, evidently, Luhmann does not argue that the

political system should be circumscribed and regulated by a formal order of legal norms externally imposed upon it. This, clearly, would run counter to the essential principles of his theory. Just as money and politics cannot be immediately interconnected, the system of law and the system of politics are always two distinct systems, and they cannot operate effectively if they are not properly differentiated. What happens in the legal system, therefore, is never simply 'the implementation of political programmes':¹⁴⁹ it is 'totally and absolutely impossible' to 'present political problems to the legal system and to expect it to solve them'.¹⁵⁰ On this level, therefore, the very term legal state (*Rechtsstaat*) is always, for Luhmann, a 'grandiose tautology', as the law can never be the state and the state can never be the law.¹⁵¹ At the same time, however, the formal separation of the systems of politics and law does not prevent the development of 'intensive causal relations' and complex interdependencies between them.¹⁵² As we have discussed above, the modern form of politics is acutely dependent on the positivity of law, and it is only as law that politics can activate its decisions.

In the interdependence between politics and law, therefore, the legal system has the function that it can react to the 'political stimuli' arising from *politics* and that it can alter these stimuli, and frame them in the form of 'valid law'. In a rather simplified reconstruction of Luhmann's view, his argument here is that law can pick up decisions in the political system and give to these a universally meaningful form. The political system, in the strict sense, is responsible for making decisions, as power: 'The political system . . . attempts to condense opinion-formation in such a manner that collectively binding decisions can be made.' However, in modern societies the political system cannot actually *do* anything with its power: in pre-modern societies it might have been able to transmit decisions as formally coercive prerogatives, underpinned by claims to natural or divine right. But in modern societies it requires a general medium for communicating the options which power contains. For politics, this is the function of law: 'Thanks to its positivity (which means changeability),' law can transform political decisions into a manageable general form. As such, moreover, law also contributes to 'the depoliticization of problems':¹⁵³ it removes political decisions from the political system, and it enables politics to restrict its function to making more decisions without burdening itself with the implementation of decisions which it has already made. It is in fact a specific characteristic of complex and finely balanced democratic systems that they 'need alleviation of this kind': that they can 'refer decisions to valid law', and that law can 'withdraw decision-premises and decisions from their long-term problematization'.¹⁵⁴

On these grounds, therefore, although the formula 'legal state' is – for Luhmann – never a wholly convincing description of the relation between law and politics, this term does at least represent the 'mutually parasitic relation' which exists between them, and it reflects the mechanisms for the

alleviation and increase of complexity which the democratic political system possesses.¹⁵⁵ 'All in all,' Luhmann states,

the positivization of law and the democratization of politics give mutual support to each other and they have marked today's political system and legal system so strongly that it is difficult to see them as two different and in fact operatively closed, non-overlapping systems.¹⁵⁶

The positivization of law provides politics with an infinitely alterable medium in which it can transport its own decisions into a universally adaptable form, and in which, on this basis, it can extend power to all areas of communication which can be regulated by collectively binding decisions. At the same time, the legal system (including the administration) unburdens the political system of the decisions which it has made,¹⁵⁷ and it removes these from the communications of politics so that they no longer weigh upon the legitimacy resources of the political system.

Luhmann's political theory thus quite clearly has its practical outcome in a technical doctrine of the legal state which is very close to the checks and balances of classical liberalism. In this legal state, based on the reality of second-coding between power and law, it is, he states, 'only a slight exaggeration to say that today we are no longer governed by persons, but by codes'.¹⁵⁸ Modern government, thus, is the reality of interdependent second-coding between law and politics. Any attempt to undo the differentiation between the legal system and the political system upsets the infinitely complex yet still precarious balance upon which the democratic inclusivity of modern democracies is based. This, manifestly, is why Luhmann is concerned about the various prospects for a dedifferentiation of the political system, especially in the unbalanced relation between politics and legislation in the welfare state, which tends to subject law (or at least administration) to political control, and so to focus the political system on self-simplifying regulatory tasks.

Politics, the constitution and the coding of private law

On the basis of these observations on the legal state, Luhmann also develops an important concept of the constitution which connects directly with the broader relation of his ideas to early forms of liberalism. In a similar manner to liberal constitutional theorists, he sees the development of constitutional states as coinciding with 'emerging dominance of the economy as a partial system of society'.¹⁵⁹ He accepts, moreover, that the constitution gives form to the consolidation of the economy as an arena of communication separate from the state. Indeed, he might even be seen to sympathize with the view that the constitution originally limited the inherited power vested in the political system, and that it played an important role in

securing and preserving private rights and private liberties against the interventions or prerogatives of the political system (in the form of a sovereign or monarch). Unlike most standard positions in liberal constitutionalism, however, he directly rejects the claim that constitutions, or the *basic rights* anchored in constitutions, form a clear block or check which is imposed on the authority of the state *from outside its own order*.

Luhmann argues that the constitution does not owe its origins to anything outside the political system. On the contrary, he sees the constitution as being produced by the political system itself. Classical constitutions, imposing a separation of powers on the state, and inscribing certain basic rights or inalienable social liberties in a catalogue of political precepts binding the state, are, he argues, merely semantic forms for the 'self-description of the political system'.¹⁶⁰ They are legal structures which enable the political system to reflect and reformulate the conditions of its interdependence and compatibility which exist both between its own different subsystems, and between itself and other social systems.¹⁶¹ The constitution, in other words, is a document which externalizes the difference between the subsystems of politics, and between politics and other systems of society as a whole, so that the political system can establish and preserve its internal complexity 'as a differentiated autonomous function system'.¹⁶² As a result of this, the constitution first fulfils a 'filter function between politics and administration'. By separating legislation out from politics, the constitution prevents the focusing of all themes on the political executive,¹⁶³ and it frees issues transmitted through the political system from their 'continual politicization', so giving latitude to the administration in its legislative tasks.¹⁶⁴ At the same time, however, in specifying the relation between the political system and its environment, the constitution also alleviates the political system of responsibility for complexity which it cannot regulate, and it provides a framework for checking the terms in which it relates to other social systems.¹⁶⁵ The constitution thus limits the planning activities in which the political system must engage,¹⁶⁶ and it refers information from the environment to points in the system which are able appropriately to form binding decisions.

In his posthumously published work on politics, Luhmann reiterates this model of the constitution by explaining that the constitution is a self-description – as an 'artistic arrangement' – of the structural coupling between the political system and the legal system. The constitution, in this view, attempts to maintain a basic differentiation between politics and law by indicating that some legal processes must be technically separated out from politics, and some political processes must be distinguished from purely legal communication. Within the complex interdependence of law and politics, therefore, the constitution marks a minimal distinction between them and consequently assists 'the increase in liberty both of the political system and of the legal system'.¹⁶⁷ For this reason, most especially,

the constitution cannot be effectively construed as a universalizing 'project for a good society',¹⁶⁸ to be implemented through the transformation of political decisions into money and law. On the contrary, the constitution may be seen as a device which allows the political system to engage exclusively with issues which are truly political.

On these grounds, Luhmann also claims that basic rights in the constitution are not 'simply suprapositive norms of mysterious origin, which nature imposes on the state as law'.¹⁶⁹ Instead, these provide frames by means of which the system of politics reflects and defines the limits of its own competence, and through which it effectively demarcates itself from other systems of communication, and so allows other processes of communication to develop without political 'corruption'.¹⁷⁰ In a differentiated order of society, Luhmann states, the basic rights in the constitution are mechanisms which free social communication from direct political control, and it is through these that the political system (or the state) obviates the 'danger of dedifferentiation'.¹⁷¹ Freedom of the individual, professional liberty, sanctity of property, the right to vote and so on are all semantic formulae which demarcate spheres of communication which cannot be regulated by the political system, and with which the political system cannot actively concern itself.¹⁷² Basic rights thus have the function that they serve 'the preservation of the differentiation which constitutes the total order'.¹⁷³ Constitutionally enshrined rights are not limits placed upon the state as a result of some normative-political consideration; nor are they devices for social integration. They are in fact merely the form through which the state itself articulates its own 'interest in stabilizing its boundaries',¹⁷⁴ and through which the state avoids 'fusing with society', which would clearly lead to its collapse.¹⁷⁵

The defence of property, of political equality, of freedom of opinion, and of freedom of movement and labour set out by most liberal constitutions does not, therefore, give form to popular interests in freedom of speech or ownership, or to external imperatives uniting all society. Rather, they merely mark a semantic device by means of which the political system traces the extent of its communications, and places limits on its own competence. Luhmann therefore reflects with great irony on tendencies in modern societies to construe the constitution as a fixed set of moral standards to which the state itself is bound and subjected. In such tendencies, the constitution figures as a highly paradoxical 'provocation to provocation' – as a document by which, it seems, the political system can be held to account for itself, and judged against criteria implicit in its own founding self-definition.¹⁷⁶ This is particularly the case with 'social movements' which seek to hold up the constitution as a *correct image* of the state in order to scrutinize and condemn its operations which fall short of the ideals laid down in the constitution. It is also the case with liberal advocates of 'constitutional patriotism',¹⁷⁷ who perceive the constitution as a broad normative framework

within which the obligations of citizenship can be defined, and in reference to which approval for political events can be granted, or even withheld. For Luhmann, such conceptions of the constitution merely misinterpret the semantic character of the constitution. The constitution serves only to reflect the internal plurality of the political system, and the external plurality of all social systems. Even the basic rights instituted in liberal constitutions simply provide means and rules for the alleviation of politics, for the 'self-organization' of the state,¹⁷⁸ or for the 'limitation of the political system to itself'.¹⁷⁹

This irony regarding the legal state and the constitutional state does not, however, imply that Luhmann denigrates these political forms. On the contrary, as far as he is willing to endorse any one particular model of government against any other, he expresses great enthusiasm for the early constitutional state. He sees this as a 'shining example of theory which has become practice',¹⁸⁰ in which the political system codifies the differentiation of power from other communications, and so restricts its communicative operations to issues which can be determined by collectively binding decisions. His writings on politics, the constitution and law, in any case, voice a clear preference for the legal state over the welfare state, and they endorse political democracy over social democracy. Indeed, these writings expressly defend the constitutional state against its own advocates, who falsely interpret it as an opening for broad-based participation in decision-making, and for the political underwriting of questions of private interest and social equality.

In his opposition to more widespread perceptions of the constitution, Luhmann sees one particular advantage of the constitutional state, or the classical legal state, in the fact that these are political inventions which allow whole areas of society to regulate themselves with minimum intervention by central public authority. More pointedly, in fact, he shows particular respect for these institutional forms because they grant maximum independence to *private law*, and they construe the sphere of private law as a subsystem of communication in which most individual legal cases are protected from complex and unwieldy processes of public politicization.

On occasions, Luhmann argues that the separation of private and public law is an extremely reductive way of imagining the relation of law to the state, which results from common dualist accounts of the state-society model. At other times, however, he sees in private law a positive medium which helps both to disencumber the state of unnecessary legal authority, and to consolidate the autonomy, outside politics, of both legal and economic communication. Indeed, he argues that private law makes a highly important contribution to the differentiation of the political system itself, and that the existence of a sphere of legal jurisdiction which is not subject to 'state authority' is a central precondition of the 'democratic constitutional state'.¹⁸¹ He therefore stresses the 'political importance attached to *private*

law', and he argues that the 'constant reproduction and reactualization' of private law is one of the ways of preventing 'short-circuits' between non-political communications and the use of power. This means that decisions can be made in courts and tribunals of private law which do not require a mobilization of political resources, and such courts in fact provide 'a greater variety of opportunities for action' than could be ensured by high-level decisions or directives in the political system.¹⁸²

Private law, for Luhmann, thus has the benefit that it makes 'political resolution' of social conflicts unnecessary, and intercepts issues before the implementation of collectively binding decisions becomes essential. Constitutional democracies depend structurally on private law as a medium which obviates excessive coupling between power and law, and so facilitates the self-limitation of the constitutionally self-describing state.¹⁸³ Private law therefore contains a series of legal relations which play a key role in enabling the 'adequate differentiation of politics and the economy',¹⁸⁴ and in creating liberty for the emergence of the state as an autonomous set of specifically *political* communications.

Politics and political parties

As we shall discuss more extensively in the next chapter, Luhmann's ideas on the constitution, the relation between law and state, on political economy, on private law, and on the broader conditions of societal pluralism constitute a body of insights and arguments which relate in complex and important ways to the tradition of *liberal* political thought. Above all, these reflections offer a perspective which, in practical terms, endorses the institutional reality of classical liberalism, but which, in theoretical terms, also calls into question the normative, humanist and general anthropocentric criteria which liberal political theorists commonly utilize. This critical reconstruction of liberalism is also evident in his view on *political parties*, which, in Western Europe at least, were originally the prime bearers of liberal political initiatives.

As outlined above, Luhmann argues that the deployment of power in the modern political system is organized around the coding *government/opposition*. The development of this coding describes a transformation in the distribution of power in the political system. Originally, the basic code of the political system was *subject-to-power/not-subject-to-power*, and then *government/governed*.¹⁸⁵ Following these basic codings, the access to power or political office was extremely limited, and the transmission of power was undertaken by very few people through relatively crude and simplified processes of power-application (for example, by force, or by basic techniques of persuasion). This original coding refers to ancient and early modern political systems, in which the liberty to deploy power or the exclusion from power depended on the sanction of a monarch or a prince, and was only

feasible for a small and privileged class. In such ancient political systems, therefore, the coding of power referred strictly to *the holding of office* and to the personal competition for high-ranking offices: that is, those who were in government were in office and those who were governed were not in office. The dynamism in the political system could consequently result only from the exchange of offices between personal rivals, adversaries or accomplices.

However, following the differentiation of society and the internal differentiation of the political system, the political system has experienced a great 'expansion of access to politics'.¹⁸⁶ The system first registers this expansion by dividing itself into legislature and executive, and thus by creating points of internal complexity to which different issues might be addressed. Ultimately, even the separation of legislature and executive is 'pushed back into secondary position',¹⁸⁷ and the communication between the subsystems of politics is increasingly structured around *parties* – these parties articulate the themes which have relevance for the political system.¹⁸⁸ It is finally as a party state, therefore, that the political system acquires the chief institutional hallmarks of a democracy, that it demonstrates techniques of integration and inclusion which open political communication to a wider spectrum of 'popular delegates',¹⁸⁹ and, lastly, that it activates political communications among the *public*. In differentiated democratic systems, 'politics has to be organized as labour in parties',¹⁹⁰ as parties, campaigning and competing in *elections*, are the most effective means by which the political system can externalize the relation between public and politics. The contemporary coding of power as *government/opposition* is thus a reflected description – or even a 'second-coding' or metacoding'¹⁹¹ – of the 'structure of office' of the modern political system.¹⁹² As such, it demonstrates how the distribution of office has altered, and how competition for office has expanded into new areas of communication. However, this coding does not finally obscure the fact that the holding of office means that some people are excluded from power and that some people execute it.

In a political system coded as *government/opposition*, parties enable the system to describe, test for itself, and then (where necessary) modify the options and alternatives which it presents to the public and through which it includes the public in its communications. Competition between parties becomes the key medium for understanding and making sense of political issues, and for generating manageable formulae through which the political system communicates with its environment. Above all, the coding *government/opposition* has the great benefit that it allows the political system to integrate *conflicting* or even directly antagonistic options, and so to deploy highly complex and multifaceted strategies when addressing the environment. Political systems which form a 'unitary bloc' and prohibit inter-party communication – for example, the Communist Party of the former Soviet Union – do not possess the same level of adaptability in their reaction to

the political environment. Such systems are consequently forced either to suppress public communication, or even to resort to crude uses of violence,¹⁹³ wherever they encounter information and communications which they cannot process.

As we have explained, the defining strength of the democratic political system is that it can offer to the public different means for generating consensus, and it can offer various options and alternatives to those whom it addresses. The scheme *government* and *opposition* plays a crucial role in enabling this to occur.¹⁹⁴ A political system ordered around a binary opposition between parties can always give an alternative, as *opposition*, to the existing government. Only *government* has 'political power which can be applied in the form of law'. Opposition, in contrast, is defined precisely by the fact that it does not participate in the application of power. However, the existence of an opposition faction guarantees that the political system can sustain long-term reflection on its own possible variety. It also permits the constant presence of a perspective which indicates that 'everything could be or could have been done differently'.¹⁹⁵ The shadowing of government by opposition means that the entire political system possesses great symbolic resources of flexibility and variety, and that manifest resistance to politics or laws can easily be overcome or sidestepped through the activation of the alternative options for law- and policy-making which the political system incorporates: that is, through a change of government.

Expressed in more concrete terms, this means that, since the middle of the nineteenth century, in modern differentiated societies politics has tended to organize itself along a binary division of political parties, one of which (generally) is in government, one of which (generally) is in opposition, and both of which manifest a boundary communication between *politics* and the *public*.¹⁹⁶ In democracies, parties produce leaders who either acquire or do not acquire the favour of the public. Those leaders who do find favour in the public eye then receive authorization (through elections) to draft policies in the form of collectively binding decisions, which, once adjusted to legal forms, ultimately either do or do not obtain the support of the public. This, in turn, then impacts on whether the leader and the party, who initiated the policies, will or will not secure further support from the public, or whether they will be forced to give way to an opposing party. In this way, parties and the leaders of parties act as concrete points in the political system at which 'occurrences' become manifest, through which the system can test its overall contingency, demonstrate its own selective rationality, and so 'reproduce itself' under the symbolic formula of legitimacy.¹⁹⁷

Luhmann stresses that it is a major advantage of political parties that they contain *people*, in the role of politicians, and that individual politicians gain publicity for themselves by campaigning for particular themes and on

particular mandates. The association of specific themes with individual people commonly enables the political system to address topics which it cannot yet fully absorb and which still possess 'too much complexity' and 'too much contingency' to be processed through its normal decision-premises.¹⁹⁸ The personalization of issues as they are represented by specific figures in different parties is therefore, so to speak, a filter mechanism, through which the system initially tries out new options or rehearses its reactions to new problems. This might, in a practical light, account for the way in which certain politicians attach their reputation and ambition to individual questions, only to see these fade from the spotlight, and to find their own ambitions ruined.¹⁹⁹ Whatever their own personal motives, Luhmann suggests, politicians really only operate in order to expose the political system to emerging, uncertain or as yet indistinct problems, and to test and consolidate the vocabulary of the system in its response to these. The very fact that politicians are *persons*, and that they *personally* identify (and become identified) with single issues, allows the system to change its response to these issues rapidly and with minimum loss of legitimacy – it can always ascribe its change of option to some personal deficiency on the part of the politician. It is for this reason that politicians can so easily be discredited, and tend to enjoy short careers and to suffer cataclysmic falls from public grace. These are cases where the system has tried out and rejected one strategic reaction to new and especially indeterminate political themes.

Conservatives v. progressives

The binary distinction in the political system between *government* and *opposition* is commonly codified as an opposition between *conservative* and *progressive*, or between *left-wing* and *right-wing* policies and parties. The common opposition of left and right derives, Luhmann argues, from the French Revolution, where 'radical representatives of revolutionary principles' were identified as the left, and 'moderate, if not restorative tendencies' were viewed as the right.²⁰⁰ Since the French Revolution, the opposition *left/right* has been able to provide a 'schematic orientation' for political parties and voters.²⁰¹ The further coding of *government/opposition* as *left-wing/right-wing* or *conservative/progressive* is thus a useful semantic facility which makes possible the 'transformation of themes into decision-making programmes',²⁰² and which allows disparate issues to be selectively addressed under different options within the system. Indeed, the primary function of the left-wing/right-wing or progressive/conservative coding is to engender 'self-produced images' in the political system, which trigger popular communication (especially among 'the uninterested'), and allow the political system to test levels of resistance and enthusiasm for given policies or programmes.²⁰³

The introduction of new (perhaps reformist, progressive or even left-wing policies) does not, however, imply that the political system subjects itself to some kind of far-reaching overhaul or transformation. The implementation of progressive policies simply means that the political system deploys options which differ slightly from those which it has most recently sustained, and that, by so doing, it demonstrates its internal variety. The underlying implication of Luhmann's view on parties, and the common classification of their members as conservative or progressive, is thus that there is very little difference between them. The main purpose of parties is to provide 'extreme simplifications' in the categorization of political themes,²⁰⁴ so that resonances for these themes can be obtained in the public.

Luhmann concludes that parties are essential to the political system as it operates in modern society. Furthermore, they possess great symbolic importance in obtaining legitimacy for the whole political system,²⁰⁵ and the code government/opposition is one of the most decisive means of self-reference and self-legitimization in the political system. However, the implication that alternative parties are anything more than alternative options which the system of politics generates for itself crudely misinterprets the internally self-regulating nature of politics. Parties are not organizational units which represent radically divergent world-views or radically divergent solutions to political problems. They may on occasions allow the political system to entertain the dramatic paradox that it is capable of fundamentally transforming itself, and they even allow the options presented by the system to take the form of conflicting visions of what is true, good or right. In reality, though, the function of parties is publicly to thematize issues, to introduce 'new themes into political communication',²⁰⁶ to create a binary scheme according to which political themes can be identified, and, not least, to generate manifest consensus for one of the options which the political system entertains.²⁰⁷ Most significantly, parties are not organs of civil society,²⁰⁸ and they do not produce legitimacy for the state by communicating between the state and civil society. In fact, where they seek to extend politics into civil society they directly undermine their own function. Their function is simply to select information for the political system in order to facilitate the making of collectively binding decisions, and introduce new people into office to make collectively binding decisions.

Politics, parliament and the paradox of corporate democracy

In all aspects of Luhmann's sociology treated above, it can be seen that, for all his attachment to the reality of liberal democracy, he rejects two of the primary and abiding foundations of liberal and liberal-democratic political argument. Firstly, he rejects the belief that parliament, conceived as an

elected legislature of delegates who represent the sovereign or general will of the people, is the fulcrum of political power and the institutional bedrock of democracy. Secondly, he dismisses the claim that this legislature sets the founding conditions (laws) which condition the exercise of political authority, transmit consensus and representation, and constitute the terms of the overall legitimacy of the political system.

Luhmann, as we have shown, provides numerous accounts of democracy. He states, first, that democracy resides in the realized differentiation and plural contingency of the political system; second, that democracy is the sum of all the complex communications, decisions and self-references of this political system; third, that democracy develops as the necessary and desirable result of the functional differentiation of society as a whole, of the specification of the political system on the making of decisions, and of the resultant adequate interdependence of all social systems. Luhmann, therefore, is quite clearly not an anti-democratic theorist. Indeed, he gives a detailed characterization of democratic political systems, identifying certain necessary (or at least probable) preconditions of democratic rule. These are, first, the internal differentiation of the political system into politics, administration and the public; second, the formal limiting of the exercise of power by law; third, the existence of a number of political parties and other mechanisms for the self-testing of power and the maintenance of options in the political system; fourth, the implementation of further semantic means (laws of state, constitutions, and so on) by which the political system stabilizes its internal subsystems against each other, and protects itself from conflation with other arenas of social communication.

Evidently, therefore, Luhmann views some sort of democracy as the necessary and perhaps even ideal mode of governance in the modern political system, and in modern society more generally. Indeed, it is not too controversial to identify in his thought an endorsement of a very specific model of democracy. He supports a model of democracy which restricts political power through law, which protects the autonomy and independence of legislature and executive, which rejects the theoretical association of welfare and democracy, which limits direct public participation in political decision-making, but which identifies the universal societal condition of socio-economic pluralism as both the foundation and the corollary of the democratic use of power. On these grounds, Luhmann's favoured model of democracy might be directly linked to the model of the legal state which was widespread in the nineteenth century. In the context of more recent debate, his views show similarities with the neo-liberal political conceptions which found expression in the anti-welfarist theories of the late 1970s and early 1980s.

At no point, however, does Luhmann suggest that democracy arises from or necessarily leads to the development of a free-standing legislature, comprising delegates appointed by popular election, or that law has primary

constitutive significance in the establishment of legitimate government. Indeed, to get to the heart of the institutional fabric of Luhmann's concept of democracy, it is necessary to turn away from customary liberal-democratic definitions of the role of the legislature, and to focus on the role played by the administration in preserving democratic conditions.

In his early works on administrative science, Luhmann sets out a schematic model of the relation between legislature and executive. This model, although certainly taking on a more complex form in his later works, nevertheless remains present throughout all his writings, from the first to the last. In this model he argues that in modern political systems the legislature (that is, the elected assembly of parliament) is not substantially different from any other component of the extended administration (*Verwaltung*) of the political system. The activities of members of parliament merely constitute one type of 'administrative work' among others,²⁰⁹ and all types of administrative work have a legislative function. Luhmann thus argues that the statutory basis of law originates in the administration of the political system, not (or not exclusively) in the consciously or rationally articulated debates of parliamentary delegates. He concedes, to be sure, that law might in part be produced by parliaments; it is not possible or plausible to deny that parliaments do indeed assemble, that elected deputies of the people do indeed deliberate and make decisions, and that directives are then issued from within parliaments which ultimately result in laws. The production of legislation, however, cannot be limited to the debated decisions of an elected chamber. Law is the medium in which the entire political system generalizes and externalizes its decisions insofar as these are applied to the public, and the legal formalization of political decisions occurs in all components and departments of the administration.

In contrast to pure parliamentary models of legitimacy and democratic legislation, therefore, Luhmann identifies the administration as a complex legislative subsystem of politics, comprising a number of institutions whose function it is to make decisions within the broad premises or programmes which they accept from the leadership of political parties (government). The administration certainly includes parliaments. But it also contains an endlessly escalating series of other possible legislative organs – ranging, for example, from cabinet sittings, to executive round-tables, to high-level discussion groups, to bureaucratic sub-executives, to neo-corporate bargaining fora, to delegations of organized labour, even to local administrative networks, such as councils, regulators and regional executives. All of these positions have some degree of accountability for transforming policies into a legally acceptable form, for maintaining the political system at a level of adequacy to its environment, and for ensuring that the external relation between politics and its addressees (the public) is smoothly preserved. Indeed, law itself expressly requires the existence of finely developed administrative and legislative fora in which its own learning processes and its own

contribution to the preservation of legitimacy can be activated.²¹⁰ To assume that one single institution, the chamber of elected delegates, might on its own take responsibility for the infinitely complex task of systemic self-stabilization is thus, for Luhmann, almost impossibly simplistic. In fact, it can be inferred from his general pronouncements on politics that elected legislatures are particularly disabled in their attempts to demonstrate competence in stabilizing and managing the complexity of the political system. Such legislatures are always obliged to uphold the fiction that they are directly accountable to groups of agents outside the political system (the public), and they are always forced to reflect some higher rational, ethical or human motive to explain their decisions. The administration, however, is not called upon to defend this fiction, and so it has greater autonomy to generate laws and test their adequacy.

For this reason, at distinct moments in his intellectual career Luhmann also emphasizes that he feels great sympathy for corporatist or neo-corporatist models of governance. He explicitly endorses the 'organized representation of interests' as an alternative to participatory democracy.²¹¹ In fact, he directly conceives his triadic differentiation of the political system in terms which welcome a neo-corporatist reconstruction. In its three-point differentiated form, he explains, 'the administration . . . cannot execute its decisions if organizations, citizens' initiatives, and the local press do not help it out' by communicating acceptance or resistance of its decisions.²¹² Corporate organizations of civil interest thus contribute in important ways to communications at the juncture between the administration and the public, and they constitute the 'broad periphery' of the state, which ensures its 'greater openness' for 'neglected themes'.²¹³

The most obvious virtue of neo-corporate governance is the fact that the corporate organization of interests allows communication between the political system and other systems – especially, but not exclusively, the economy – without necessitating an extensive structural coupling between them, and without requiring that themes must be transmitted through all points in the political system. For instance, a farmers' lobby or a doctors' association can organize itself in such a manner that it makes the political system aware of particular concerns, belonging properly to the economic or the medical system, and it can obtain assistance or settlements in these concerns without triggering the full and direct implementation of power in their treatment. Sub-executive organizational contact between the political system and civil delegations thus allows limited communication, and subsequent conflict-minimization, between these systems. It does not, however, lead to a fully elaborated structural coupling 'at the level of central steering',²¹⁴ and it does not raise the threat that the political system might overburden itself, or that other systems might be unduly colonized and destabilized by power. In a similar voice to many institutional theorists of the 1970s, and even to official policies in the Federal Republic of Germany

at this time,²¹⁵ consequently, Luhmann often accentuates the importance of installing sub-executive decision-making or planning organs in the administration. Such organs, he suggests, can intercept issues from the public before these enter the complex process of executive politicization, and before they tax the time and patience, and overtax the complexity and the legitimacy, of the entire political system.²¹⁶ The great advantage of corporatist interest-delegation is that issues and antagonisms can be regulated and decided via private agreements, or at most via legal agreements situated in the sphere of private law. Such private resolution of conflicts permits greater freedom and flexibility in response to individual problems, and it tends to avoid the inflation and resultant distortion of the original questions.

Ostensibly, Luhmann's enthusiasm for corporatism relates only to the regulation of private-legal issues. It contains the caveat that public-legal or political regulation might become essential where a need for collectively binding decisions is present, and where social conflicts reveal a fundamental and insoluble friction between two systems. Nonetheless, his comments on corporatism and private-legal settlements also obtain significance for his broader perspective on the relation between politics, law and administration. Indeed, his commitment to corporatism is not finally restricted to questions of civil or private interest, but touches on a much more deep-lying aspect of his approach to law, and to its political origins.

The corporatist aspect of Luhmann's thinking contains the very important implication that the resolution of particular social questions is essentially accomplished as a process of *political self-unburdening*. In this, social problems addressed to the political system are channelled towards the points in the administration which are equipped to address them, and the administration then forms agreements or rulings concerning these issues in order to appease those groups affected by them. The agreements formed in the administration might, for instance, take the shape of collective wage-settlements, of edicts regulating imports or exports, of measures to protect certain professional bodies or sectors of the economy, or of guarantees of conditions of employment or labour.

What this means is that – for Luhmann – the settlement of most social questions is best accomplished if the political system transports their point of address to a distinct subsidiary location within its overall systemic structure. Through this transfer, legislation is not entirely removed from politics, and it still complies in certain ways with clear political agendas. Even in private-legal or civil-legal conflict resolution, legislation cannot contravene the 'decision-premises',²¹⁷ which the administration acquires from politics. However, the administration forms a complex of semi-independent planning units which comply with high-level political directives, yet which also nonetheless shield the executive from the full complexity of all the social interests which can, in certain circumstances, be politicized.

In these respects, Luhmann's work contains a model of governance in which the political administration, circumscribed by overarching executive decisions, is given a very high level of legislative latitude, both in its negotiations with civil organizations on civil questions and in its relation to the executive. In this scheme, however, legislation does not have the power to prescribe constitutive or binding norms to the executive, and it can only deploy its own legislative resources of conflict-settlement as a *limited subdivision* of politics, depending on the overarching directives of executive power. As in more standard versions of corporate theory, consequently, Luhmann reconstructs the separation of the powers – the internal differentiation of politics and administration – as a mere differentiation of competence within the structure of the executive itself. This reconstruction involves a clear expansion in the *positive* autonomy and influence of legislation, as it sees the preparation of law as a multi-formed process which allows the political system to secure consensus, and to ensure and transmit the working legitimacy of the entire political system. Yet this reconstruction also involves a quite fundamental curtailment of the *constitutive* political power of legislation, as legislation cannot here propose founding terms to government about the conditions and substance of the legitimate use of authority.

The underlying and most far-reaching implication of Luhmann's interest in corporatism, in sum, is that, in keeping with classical theories of corporate governance, he clearly favours a model of democracy in which the actual sphere of governmental direction cannot easily become the topic of legal debates in the political system. This, in other words, is a model of democracy which suggests that the supreme programmes or orientations of government should be altered as little and as rarely as possible, and that rulings should be effected at a point where they have little resonance for the highest legitimacy resources of the political system. The reason why the political system needs to avoid making its overall direction and content a theme of legislation is clearly quite straightforward. It is because the political system does not actually (or necessarily) possess an overall direction and content, and, if it were called upon explicitly to thematize its direction or character, it would, as a plausible reality of contingency, risk being forced to disclose its own founding paradox.

Conclusion

On the basis of the interpretations set out above, it might be concluded that Luhmann's sociology of politics is primarily a non-prescriptive account of the processes of political communication in modern society. Indeed, it might be viewed as a highly ironic riposte both to the many moral and rational commonplaces of political theory, and to the many empirical preconditions of political science. The political elements of Luhmann's sociology

directly deconstruct the normative, ethical and humanist preconceptions which usually inform political reflection, and they fundamentally refigure the institutional features (parties, legislatures, constitutions and so on) which underscore more widespread models of political reality and legitimacy. At the same time, however, though this is perhaps not his main objective, Luhmann's political writings do themselves also contain certain reflections and insights which, taken together, might be viewed as a *political theory*, or even as an ideal-type of the political system. In this respect, in fact, it is possible to see Luhmann's writings as setting out a model of the type of political system which is likely to obtain plausibility for its functions, which is unlikely to assume accountability for tasks which it cannot accomplish, and which is thus likely to reflect its own contingency in such a manner as to engender the impression of legitimacy. If not a normative model, therefore, this at least constitutes a minimal practical definition of what political systems should and should not do if they wish to operate effectively, and if they wish to put out consistent motivations for compliance.

As discussed above, Luhmann's intimated ideal model of a political system has much in common with what we normally understand or classify as 'democracy'. Indeed, it seems quite clear that Luhmann sees democracies as political systems which are uniquely adjusted to the plural and differentiated reality of modern society, and uniquely equipped to enjoy legitimacy. Certainly, he is very hostile to political systems which fall short of that complex and plural type of political reality which is normally viewed as 'democratic'. At the same time, however, Luhmann's model of the political system also contains many elements which are not compatible with liberal-parliamentary democratic thought, and it includes certain elements which are more widely associated with corporatist perspectives. These prevent the straightforward categorization of Luhmann's political thought as an unreserved defence of democratic rule or governance.

All Luhmann's reflections on democracy are in fact held together by one straightforward argument. This is, namely, that all the characteristic attributes of modern democracies are produced by the political system itself, in order to serve and meet its own functional necessities. Consequently, all the institutional features which are usually taken to define 'democracies' – for example, the limiting of power by law, the need for legitimacy, the plural differentiation of the political system, the existence of devices for producing and testing popular consensus – are in fact merely the characteristics which a modern political system must necessarily give to itself in order to fulfil its functions. These features become obligatory as the political system confronts the expanding external complexity of modern society and seeks to alleviate for itself its own internal complexity. As will be discussed in the following chapter, however, in the key question in democratic theory – namely the question of how law relates to power – Luhmann's theory is

positioned outside the standard tradition of democratic thought. In fact, it marks an assault on the irreducible first principle of modern democratic argument: namely, that law founds legitimate power, and that legality is (in one way or another) the basis of legitimacy.

4

The Subject of Liberalism

Political and sociological Enlightenment

Introduction

This chapter has a twofold purpose. First, we examine Luhmann's writings on politics and law in terms of their contribution to the theoretical development of modern sociology and legal and political theory. We shall offer an account of the conceptual foundations of Luhmann's thought, and in this we emphasize the importance of his criticisms of the theoretical assumptions concerning politics, law and society that are widely accepted within contemporary philosophy and sociology. In so doing, we seek to place Luhmann's thought within a broad theoretical perspective, and to stimulate the reflection that his work represents a ground-breaking response to the mainstream of post-Enlightenment legal and political thought. Second, we also seek to reconstruct the specific debates which shaped the development of Luhmann's theoretical ideas. The reconstructive sections included here will focus in part on the obvious influences on his work, such as Parsons, Weber and Arnold Gehlen. However, we shall also discuss his dialogues with other theorists – for instance, with Kant and Habermas – through which he cemented his theoretical observations of the social system. In addition, we shall examine some of the rather less obvious debates in which he engages, such as, for instance, those with Martin Heidegger and Michel Foucault, whose work might not obviously or immediately be connected with legal and political theory.

Luhmann organizes his social theory as a commentary on the most central and defining problems of modern European and Anglo-American legal and political thought. Indeed, he makes no secret of the fact that his work is designed quite specifically as an attempt to undermine and critically to refigure the central principles of political and legal reflection deriving from the *European Enlightenment*. He published the six-volume collection of his miscellaneous essays under the title *Soziologische Aufklärung (Sociological Enlightenment)*, and this was also the title both of his inaugural lecture at

Münster University and of one of his most theoretically influential essays. More generally, as we shall discuss, Luhmann usually develops his theories around the store of theoretical terms which have become established currency through the discourses of the Enlightenment – but he employs these terms to develop political conclusions which differ very greatly from, and which in fact intentionally subvert, those set out in the more widespread lines of post-Enlightenment reflection. The overarching rubric of *sociological Enlightenment* might thus be taken as a programmatic announcement that his work intends to fuse the perspectives of sociology and Enlightenment, and indeed that Luhmann views his own work, even in its entirety, both as commenting on the Enlightenment and as altering its founding premises.

Luhmann's decision to centre his theory on a sociological reconstruction of the legacy of the Enlightenment obviously contains an element of intellectual strategy, and it manifestly reflects an intention to place his work at the very heart of the key theoretical debates in modern philosophy, sociology and political theory. From Nietzsche to Derrida, all the most influential philosophical views have, in one way or another, defined themselves as part of a continuing critique of the universalist, normative and rationalist programmes of the Enlightenment. From Weber to Habermas, all the most far-reaching perspectives in modern sociology and political theory also revolve around a critique or theoretical transformation of the socio-ethical and explanatory principles of the Enlightenment. Before Luhmann, for instance, Weber famously argued that the processes of rationalization and demystification associated with the Enlightenment (or with capitalism) have not produced the emancipation which they promised, but have led to a widespread experience of depersonalization, to a perceived loss of substance, and ultimately to new forms of socio-political coercion. Weber, therefore, attempts a critical reprocessing of the rationality of the Enlightenment in an attempt to overcome the false and formal modes of rationality which, he alleges, it has generated. Likewise, Theodor Adorno and Max Horkheimer, and later Foucault, all take as their point of departure the conviction that the rational and taxonomic organization of knowledge in the Enlightenment has betrayed the interests of human liberation which it first claimed to serve. They therefore, in different ways, seek to reclaim the Enlightenment from its formal-rationalist proponents. More recently, Habermas has also proposed a renewal of the 'project of Enlightenment' under the aspect of communicative, dialogical rationality, which he opposes to the technical or monological rationality of scientific reason.¹ More recently still, Ulrich Beck has developed his sociology as a means of elucidating the possibility of new forms of social and political reflexivity which the first Enlightenment – or, in Beck's own terms, the first modernity – has suppressed.²

Even on the basis of this quick sketch one can infer that Luhmann is quite clear about the centrality and weight, in sociology, philosophy and political

theory, of the debates in which he engages in defining his own work as sociological Enlightenment. Indeed, in entering these debates, as will be seen, he makes a strong (though implicit) claim for the conceptual core of his sociology. This claim is, no less, that his own work is a (if not *the*) defining perspective in post-Enlightenment political thought, that it both exposes the fallacies and resurrects the miscarried potentials of the Enlightenment, and that his work accomplishes a reconstruction of the Enlightenment more effectively than those who came before him and those with whom he engages in debate. It is against this claim that it is perhaps most appropriate to comment on and judge his work, and that the full importance of his perspective can be critically assessed.

An Enlightenment of society or an Enlightenment of people

Underpinning Luhmann's strategy of *sociological Enlightenment* is a far-reaching change of paradigm, which is most especially aimed at the anthropocentric assumptions of the first Enlightenment. Luhmann makes it clear that he shares many preconditions associated with the processes of rationalization and self-reflexive elucidation that characterized the first Enlightenment. Like the first Enlightenment, his sociology is committed to explaining human evolution, and to reflecting (and affirming) the development of society away from static, religious and traditional conceptions of its own essence and necessary structure towards a condition in which it can freely provide positive terms for its own internal justification. Moreover, Luhmann clearly shares with the first Enlightenment a hostility to metaphysics, and above all a rejection of all suggestions that the universe is dominated by a once-and-for-all founding order, existing independently of the local or passing events of social reality. In fact, his argument that in modern society the formation of meaning and the construction of concepts of validity are entirely positive, and are not bound by definite structure, is clearly intended to demonstrate that all metaphysical fictions of a founding essence in society must be rejected. In this regard, Luhmann might be placed on a direct continuum with the original advocacy of human autonomy and self-determination found in the Enlightenment. Each particular system of communication, he indicates, possesses its own internal mechanism of self-validation and self-explanation, and cannot be held to account by standards of rationality which they have not themselves generated. On these grounds, therefore, it is clear that Luhmann's particular interest is directed towards the key Enlightenment concept of *rationality*. It is also quite clear that he, like thinkers in the tradition of Enlightenment theory, is committed to accounting for the function of rationality in modern society, and for the ways in which rationality determines the shape of modern society and frees it from immutable structural principles.

Despite this, however, Luhmann also underlines the apparently paradoxical nature of his coupling of sociology and Enlightenment, and so places

himself against the objectives of the first Enlightenment. Enlightenment and sociology, he explains, belong to distinct historical epochs, and they are separated by a fundamental change in theoretical outlook. Indeed, the linkage of sociology and Enlightenment in political and legal thought is especially problematic, as the early history of sociology was marked by a fundamental rejection of normative or foundational accounts of political order, and it incorporated a move towards non-evaluative interpretations of the political system which sought to elucidate only how this system factually generated motivations for compliance and obedience. In Luhmann's account, therefore, Enlightenment is the original 'endeavour to construe human conditions in new ways through the use of reason, free from all connections with tradition and prejudice'. Sociology, by contrast, 'looks for a hold less in immutable laws of universal-human reason than in ascertainable facts and the social conditions of behaviour'.³ This juxtaposition provides the key for understanding the aims of Luhmann's methodological and political reconstruction of Enlightenment. Although Enlightenment, he concedes, has its own claim to validity in its original attempt to rationalize and clarify social conditions, it is invariably flawed because it associates rationalization and clarification with a specific operation of individual human beings, conceived as atomized and morally empowered social agents, all of whom are in possession of like intellectual faculties.⁴ From a sociological view, therefore, Enlightenment invariably misunderstands both rationality itself and the processes of rationalization in modern society, for it incorrectly identifies the origin of rationality by locating it in the faculties of the human mind, to which, extrapolating from all factual social process, it imputes the power to establish binding theoretical insights and truths.

Social and political theory in the wake of the Enlightenment, for Luhmann, is obsessively preoccupied with questions relating to the 'essence (the nature) of the human being', and it consequently lacks the means which might enable it to comprehend 'the social as such',⁵ unless it is deduced in some essential way from human attributes. For these reasons, from a sociological perspective, the Enlightenment only ever offers the most reductive and inadequate account of social events and transformations, and it is incapable of grasping the plural, simultaneous and multi-causal character of social development. As we have discussed above, the rationality which triggers social change, even that which brings social improvement, is not – for Luhmann – the reflexive rationality of concrete people, but the internal rationalization of systems, as they reduce and develop complexity in the process of their self-stabilization. It is for this reason, therefore, that, in Luhmann's account, Enlightenment needs sociology: that Enlightenment needs to be a *sociological Enlightenment*. Sociology, in Luhmann's view, categorically denies that 'the individual human being can, by reflecting on his or her own rationality, find things common to all people, obtain consensus

or even truth'.⁶ It consequently corrects the naivety and simplicity of the Enlightenment, and is uniquely able to account for the occurrences of societal evolution without necessarily ascribing these to personalized causes in human character or reason. Underlying Luhmann's proposed fusion of Enlightenment and sociology is, therefore, an attempt to refract our view of society and its systems through a multi-paradigmatic methodology which is capable of accepting a number of quite different types of rationality and social causality, and which shifts the explanation of society away from its normative focus on human endowments.

Nonetheless, Luhmann still argues that sociology and Enlightenment are not finally 'heterogeneous, incomparable or incompatible attitudes of mind'.⁷ On the contrary, he maintains that the most fundamental role of sociology is to clarify the original insights of the Enlightenment, to refine the methodological means by which these are obtained, and so to integrate these insights into a perspective on society which fundamentally differs from the mono-centric outlook of classical Enlightenment theory.⁸ Sociology can accomplish this, however, only if it examines the facts of social development and evolution under the aspect of 'latent functions',⁹ not as rationally ordained processes originating from some manifest human cause. Luhmann thus proposes a fusion of sociology and Enlightenment in the form of a *functional analysis* of the role of rationality; this method relinquishes rationalized or external 'laws of causality' as the hypothetical basis of inquiry, it scrutinizes social developments and realities as components in the overarching evolution and self-rationalization of function systems, and it is willing to acknowledge extreme diversity in the accounts which function systems provide for themselves of their own rationality and legitimacy.¹⁰

Unlike other critics of the Enlightenment, Luhmann's sociological correction of Enlightenment philosophy is not guided, in the style of Weber or Adorno, by some sense that the Enlightenment has betrayed or devalued the conditions of true humanity (this, for Luhmann, would merely be Enlightenment by other means). In fact, he argues simply that the deficiency of the Enlightenment is that it cannot effectively interpret the processes of social transformation which it describes (and advocates), and that it cannot plausibly account for the emerging forms of rationality and social autonomy which it counts as its own. This, he states, is because the Enlightenment conceives of rationality and rationalization as *human* properties and *human* processes. The key theoretical weakness of the Enlightenment, he argues, resides in its claim that people, not systems, are at the origin of social evolution. In reality, however, it is systems themselves, not integral people, which actually stimulate and perpetuate the processes of societal rationalization: systems, consequently, are the genuine 'medium of Enlightenment'.¹¹

Luhmann's method of sociological Enlightenment might consequently be defined as an observation, in an attitude of 'critical reflexivity',¹² of

the processes of rationalization and evolution which characterize modern society. This method, like the first Enlightenment, acknowledges that there are certain characteristics (that is, increasing complexity, increasing rationality, functional differentiation, increasing autonomy, legal positivation) which mark modern society out against earlier historical eras. Indeed, in his insistence on rational differentiation and plural autonomy as the only adequate conditions of modern society, Luhmann's thought is clearly pledged to the Enlightenment, and to the social reality envisioned by the Enlightenment; Luhmann, quite evidently, has no sympathy at all for obviously pre-Enlightenment modes of rigidly structured organized social organization. At the same time, however, the sociological Enlightenment is expressly *sociological* in that it rejects all explanations of the complex reality of modern society which link the emergence of social systems to simple causes or simple modes of rationality, which are in some way *outside* the systems of society in which evolution occurs.¹³ Most especially, the postulation of human reason as a fixed standard which can be invariably held against the complex and changing realities in which social change takes place, and by which social evolution can be measured and organized, is, in Luhmann's account, a desperately reductive analysis of social development which manages to make sense of the world only by positing the most crudely abstracted, mono-rational schemes of causality.

As an alternative to such approaches, Luhmann develops a model of observation which integrates all systems of society, and which avoids judging and explaining transformations in these systems by unchanging or essentialist criteria. He interprets the developmental patterns of social systems not as the results of determinable external causes – but simply as manifestations of the general necessity for the 'reduction of complexity', which, in different ways, is internal to all systems.¹⁴ The necessity of reducing complexity, he argues, affects the formation and the rationalization of every system: indeed, a system *is* rational insofar as it effectively reduces complexity. However, this is not a necessity which can be schematized as a determinate sequence of scientifically demonstrable or normatively enshrined causality; rather, the reduction of complexity is a necessity about which no universal pronouncement can be made, and which assumes highly variable forms depending on the particular social system in which it occurs.

For Luhmann, in short, the only meaningful form of rationality is 'system-rationality'. He views rationality as a process of reflection situated outside the individual human being, and, therefore, not limited to particular 'structures of experience-processing'.¹⁵ Rationality is the operative self-organization of a system in its autonomous contingency and complexity. 'A system acts rationally', Luhmann explains, 'to the extent that it can absorb complexity and can solve the internal problems thrown up by this . . . to the extent that in an extremely complex world it can preserve a higher, more intelligible world, which excludes other possibilities.'¹⁶

Rationality, conceived in this way, is not a specific human property, located in one consciousness or in the dialogical interstice between one person's consciousness and that of another person. Certainly, it is not an endowment which might allow particular people to acquire immutable insights into necessary social conditions – it cannot be stabilized against factual reality in exemplary theoretical postulates or criteria. Instead, rationality is simply the internal reality of an effectively functioning social system. A system obtains and enacts its rationality insofar as it fulfils its functions of self-stabilization, complexity-reduction and complexity-maintenance. Rationality and practical reality, consequently, are always functionally identical in the self-processing operations of a social system. Systemic rationality is not manifest in a fixed and invariably demonstrable series of postulates or norms: it is simply that evolving reality of an operative social system, and it is always already realized – 'as an occurrence' – at each moment in the system's self-perpetuation.¹⁷

Sociological Enlightenment, therefore, is always conceived as something very different from a *human Enlightenment*. It renounces all preconditions concerning the 'common possession of reason and the foreseeable purposes of humanity'.¹⁸ Indeed, Luhmann claims that 'classical conceptions of correctness and rationality of individual decisions' are wholly inadequate to the functional complexity of modern society, and in fact they place apriori limits on society's potential for complexity.¹⁹ Such conceptions, he suggests, should be expanded to include a 'concept of system rationality'.²⁰ 'Rationality in the world', he concludes, can only be 'stimulated by the construction and stabilization of more encompassing, more complex systems'.²¹

It is worth repeating, however, that Luhmann's paradigm does not abandon the theoretical plan behind the Enlightenment. In stressing the need for multi-rational and multi-perspective approaches to social reality, Luhmann does not finally abdicate the belief of the Enlightenment that reason is a dynamically transformative force in the emergence of modern society, creating conditions of greater independence and self-reliance. The task of sociological Enlightenment, he states, is truly to account for the great plurality and diversity of the rationalizing processes in society, and so to recognize the 'conditions and chances of a real Enlightenment': not a causally or morally reduced Enlightenment.²² Indeed, as we shall consider more extensively below, one key theoretical implication of Luhmann's sociological Enlightenment is that the first Enlightenment, which focused on single aspects of human reason and human autonomy, is not actually Enlightenment at all. By separating out human reason from the events of social evolution, and so imagining that reason can act as a universal theoretical gauge and cause of such evolution, the rationalist Enlightenment, on which modern humanism is based, is in fact *still metaphysics*. The rational Enlightenment, he implies, fails to understand social modernity because it clings to a counter-intuitive image of a society centred on, and interpretable by,

simple monadic forms of reason – in short, because it reconstructs ontological metaphysics as ‘metaphysics of consciousness’ or a ‘metaphysics of reason’, and it believes simply that it is sufficient ‘to use one’s own reason’ in order to ‘find true being’.²³ This inevitably results in a simplification of social complexity and of the ‘unlimited possibility’ of modern social reality.²⁴ Such Enlightenment in fact merely reproduces those same metaphysical assumptions which it criticizes, and it crudely replicates essentialist metaphysical arguments that the universe is organized in accordance with some underlying plan, some regulatory structure, or some original founding principles.

For Luhmann, therefore, the imputation of rational, causal or moral criteria standing independent of all social reality is in fact only the most rudimentary, underdeveloped expression of Enlightenment. Genuinely post-metaphysical Enlightenment, in contrast, would be prepared to accept the complex and changing forms of reason, and it would reflect on the extent to which the processes of social evolution follow extremely variable and fluctuating rational imperatives. Above all, real (*sociological*) Enlightenment necessarily rejects the quasi-metaphysical fictions that the social world has an essential structure and that this can somehow be causally divined in the medium of human rationality, or morally prescribed in the medium of human law.

In his reflections on sociology and Enlightenment, to summarize and conclude, Luhmann places himself on common ground with the first Enlightenment, as he too attempts to interpret the reality of rational society outside traditional or inherited metaphysical constructs. However, in his conception, this reality cannot be adequately observed through the prism of a concept of reason, defined as the attribute or possession of human beings. In fact, at the heart of Luhmann’s critique of Enlightenment is the conviction that the *human being itself* is just one more metaphysical construct which conveniently (but rather foolishly) imagines the entire evolving complexity of the social world as revolving around the fixed intellectual faculties of individual persons. Real Enlightenment must, in any case, always both accept and fundamentally contradict the premises of the first Enlightenment.

Legal autonomy, enlightenment and liberalism

After rationality itself, perhaps the central term in political reflection emerging from the Enlightenment is *autonomy*, and it is in the consideration of this term that Luhmann’s perspective on the political achievements of the Enlightenment becomes most apparent. In the discourses of the Enlightenment, autonomy means human self-legislation: strictly, it means *the capacity of rational human beings to determine and validate their actions by laws which are not derived from any source outside human reason*. It is therefore opposed to *heteronomy*, which means *the determination of human action by laws derived*

from one or more distinct external sources (for example, natural instinct, coercive political tradition, metaphysical and theological ethics). In very general terms, the Enlightenment might be viewed as a period of history which seeks to provide conceptual models for overcoming the legacy of metaphysics and theology in modern thought and action, and for accounting for the human person, equipped with universal rational faculties, as the irreducible origin of human justification, in both politics and ethics. *Autonomy* and the critique of *heteronomy* are, therefore, the key categories in this quest of Enlightenment; autonomy is the term under which the human being divests itself of all obligation to the independent influences of nature, illegitimate power, metaphysics and religion, and under which human reason, and human being itself, are conceived essentially as independent legislative functions.

The Enlightenment theory of necessary human autonomy obtains its clearest exposition in the works of Immanuel Kant, who might in many respects be viewed both as Luhmann's chief antecedent and as his chief adversary in the history of European political thought. On a purely epistemological level, it is possible to discern various ways in which Luhmann is very strongly indebted to Kant, and defines his own thought in relation to Kantian paradigms. First, his argument that systems create meanings by producing a series of orientations, which are virtually detached from factual or local reality, might easily be seen to build on Kant's original doctrine of transcendental reason, and most particularly on the epistemological tenets of neo-Kantian philosophy, which dominated German university philosophy around 1900. In this respect, Luhmann's general argument that systems have the function of *time-binding*,²⁵ that they formally stabilize their own communications against the complex temporal reality outside them, is derived in part from the neo-Kantian conception of value systems as normative realms which are not directly derived from historical factuality. Second, more specifically, Luhmann's formal-rational model for conceiving of legal validity, opposed to all historicist or traditionally *ius-natural* (natural law) models for explaining law's origin, can also be traced to Kant's initial perspective on law. Indeed, Luhmann's interpretation of law as a realm of 'pure meanings', or of positive yet counterfactual norms, which obtain validity by virtue of their closure against non-legal facts and experiences, directly links Luhmann, as we have seen, with the neo-Kantian tradition of legal positivism.²⁶ Like Kelsen before him, in fact, Luhmann's legal thought is most especially indebted to Hans Vaihinger's brand of neo-Kantian philosophy, which argues that cognitive and legal systems only obtain validity on the basis of hypothetical, or even paradoxical, presuppositions,²⁷ and they cannot be conflated with ontological forms of reference. Luhmann's exclusion of material or particular experience from the systemic formation of meaning can thus, in general terms, be traced to a distant origin in Kant's model of transcendental reason, and he draws quite clearly on important positions in the neo-Kantian tradition.

However, in certain other respects, Luhmann also structures his theory (especially in its implications for politics, and the politics of humanism) around a fundamental correction and repudiation of Kant's philosophy. On an epistemological level, first, Luhmann places himself directly against Kant, as he obviously differs from Kant in claiming that meaning and validity cannot derive exclusively from the functions of one human consciousness; they result rather from the recursive references and communications which form transpersonal social systems.²⁸ Yet more importantly, however, Luhmann also rejects the humanist foundations of Kant's ethical, legal and political arguments, arguing that human reason cannot ascribe to itself the autonomous capacity to define the norms by which human behaviour (individual or collective) might be obligated.²⁹ Social norms, he claims, in fact emerge independently of all human foundations of reason and prescription, and they are largely indifferent to human cognitive and moral processes. In his rejection of Kant's politics and ethics, therefore, Luhmann's attention focuses directly on the concept of *autonomy*, and he strikes at the heart of Kant's entire philosophy, which (broadly reconstructed) can be viewed as an attempt to explain the terms of human autonomy, and to define autonomy as the necessary precondition of right action, right order, and indeed of all human validity.

For Kant, autonomy refers to a condition of personal, rational self-legislation. As reflexive agents endowed with faculties of practical reason, he argues, all individual people are oriented toward a condition of maximum autonomy: they are able to deduce binding conditions for justifying their own actions, and so to account for their actions without any external additions (for example, reference to theological or metaphysical preconditions). Where their faculties of reason are adequately deployed, human beings may (at least potentially) obtain a condition of individual moral freedom, and also a condition of collective political independence, in which people exercise reason in order legally to define those political obligations which can be considered universally necessary, justifiable and, therefore, *legitimate*.

In enunciating these views, Kant, it might be argued, sets out the culminating principles of the political Enlightenment. For Kant, *rational human autonomy* and *political legitimacy* are very closely related concepts. The form and content of valid political authority result from the prescription of universally valid rational principles (laws), and political authority forfeits its legitimacy wherever it deviates from such laws. Political legitimacy, in short, is the objective form of rational human autonomy, and the power of the political system becomes legitimate where it represents the rationally realized autonomy of the human subject – where it is premised neither in purely private, traditional or natural interests or instincts, nor in some transcendent source of authority. The legitimate political order represents the autonomy of the human subject because it enacts *prior laws* which are rationally deduced by this subject, and whose universal applicability can

be rationally affirmed by this subject. As a consequence, Kant argues that political legitimacy is only secured in the positive form of the *legal state* (*Rechtsstaat*).³⁰ In the legal state, power becomes legitimate because it is always constituted by and subject to the control of *law*: because it is constituted by and subject to the rationally deduced and universally binding norms of autonomous human practical reason. The *legal state* is, therefore, the concrete corollary of the *legal subject*. The legal state comes into being only because it recognizes its citizens as bearers of inviolable rights and entitlements, because it acknowledges the status of all citizens as addressees of law, and – in the fundamental, Kantian sense of the legal subject – because it represents and complies with the stipulations (laws) of the adequately reasoning and autonomous human subject. Underlying the Kantian Enlightenment is thus always the argument that *legality* is prior to, and constitutive of, *legitimacy*.

At the heart of Kant's moral and political conceptions of autonomy is also an argument about the essential structure of the human being itself. Quite simply, Kant argues that the human being only fully realizes its qualities as a human being if it rationally obtains the condition of moral autonomy: if, as a legal subject, it can regulate its actions by universally binding reflected principles. Consequently, he also implies that the collective condition of human beings (their political organization) only becomes adequately *human* if it obtains the condition of autonomy: if, as a legal state, it can regulate itself in accordance with immutable principles of reason. Legitimacy in politics thus emerges only as the outcome of the legislative functions of human reason, and such legitimacy is always transparent to the emergence of the human being as a rationally self-legislating (autonomous) agent. This association between the rationally self-legislating autonomy of the ideal person and the public legitimacy of the state remains perhaps the core conception of post-Enlightenment political theory. Even in contemporary political debate, the most influential orthodoxies, for instance the works of Habermas and Rawls, are in many ways little more than contextualized reiterations of the original Kantian insight into the founding principles of rational autonomy and the legal subject.³¹

On a socio-historical level, Kant, like other major thinkers of the Enlightenment, sought to found political power in the human capacity for rational autonomy because he hoped to establish political order itself as a free-standing and autonomous arena of administration and representation, distinct both from the private interests of a person or of a dynastic family, and free of ecclesiastical influence – because, in short, he wished to define the state itself as a legal person, subject to its own laws, with clearly circumscribed authorizations and limits. The legal subject thus served as part of a strategy for disconnecting the body politic from modes of obligation which were not covered by rationally determinable right, and for rendering the state accountable to abstractly sanctioned norms. This sociological

dimension to the concept of autonomy was manifest in all the major processes of political upheaval and reorganization arising from the long Enlightenment period – from the early reinforcement of parliament in Britain, to the French Revolution, to the Prussian and Austrian reforms of the early nineteenth century. All of these transformations were to no small degree driven by an attempt to differentiate governmental power from private or inherited prerogatives, and so to define the state as an autonomously representative and responsible unit. It is worth bearing in mind, as background to Luhmann's thought, that the realization of the legal state in Germany was an extremely fitful and inconclusive process, and that the concept of the legal subject underwent a series of political attenuations through the nineteenth century. In the positivist line of legal and political thought which became the backbone of German political doctrine in this period, the model of the legal subject was eventually conceived as little more than a formal device for counteracting full dynastic control of the political order, and for imposing minimal norms of legal formality and procedural compliance on the state.³² This positivist model of the legal subject, differed from the initial Kantian conception of the legal subject, in that it made only modest claims for the power of legally reasoning people to determine fundamentally the content of policies and laws. Political theory in post-Enlightenment Germany thus ultimately settled for a very restricted model of the legal state, and for a very reduced conception of the legal subject. Nonetheless, despite the peculiarities of the legal-state tradition in Germany, it is still fair to say that, apart from its purely theoretical implications, the theory of the autonomous legal subject always originally envisaged a limitation of the arbitrary power of the state, and a transfer of authority away from traditional and non-accountable monopolies of political violence. Likewise, it can also be argued that the Enlightenment concepts of human autonomy and legal subjectivity were central to the processes of democratization and constitutionalization which emerged in the medium-term wake of the Enlightenment. Most importantly, these concepts also contributed to the consolidation of *liberalism* as an influential political creed which directly endeavoured to establish the state as a legally regulated set of autonomous functions. Liberalism, at least in its more widespread manifestations, initially took its lead from the conception of the inviolable rational human being, which, possessing rights of freedom, dignity and self-legislation, could place limits on the extent to which the state may exceed its autonomous, rational and functional roles.

Against the background of these issues, in sum, it can be concluded that behind the political and theoretical changes associated with the Enlightenment there occurs an epochal shift in the concept of the human role in the world. Through this shift, the formal concept of the rationally autonomous human being (the legal subject) is separated out from traditional or metaphysical associations, and transformed into the source of political order and

political legitimacy. The legitimacy of the political apparatus then becomes (at least in principle) dependent on the extent to which, viewed itself as an autonomous apparatus, it represents the human being, with its newly formulated entitlements of freedom and autonomy. The political Enlightenment, culminating in the model of the autonomous legal subject and the autonomous legal state, is, therefore, always a *human Enlightenment*, or a quite explicitly *anthropocentric Enlightenment*. This Enlightenment has its origin in the definition of the rational human being as a quintessentially legislative creature whose innate legislative faculties are the sole origin of the legitimacy of the political system.

In common with the Kantian Enlightenment, Luhmann also argues that the evolution of modern society, especially in its political functions, tends to be marked by an increment of autonomy. What defines the modern political system, he claims, is that it is liberated from all structural determination, and that it obtains maximum autonomy in the exercise of its functions. 'With increasing differentiation,' Luhmann explains, 'the autonomy of the system increases'. In 'the domain of politics' this increase in autonomy 'means that the political system can regulate only itself and can only through self-regulation react to environmental problems'.³³ Politics thus develops 'a strongly abstracted systemic structure' which is 'specialized on one particular function' which has 'no parallels anywhere else in society'.³⁴

Like the classical theorists of the Enlightenment, therefore, Luhmann directly identifies *autonomy*, and especially *autonomy in politics*, as a quality through which modern society distinguishes itself from pre- or early-modern society.³⁵ Societies whose political systems cannot establish their own internal autonomy in relation to other systems, or which tend to conflate the sources of their legitimacy with other systems, clearly suffer from deficits of rationality and legitimacy, and they consequently fall behind the level of differentiation which characterizes modern societies. Luhmann thus even goes as far as to imply, like theorists of the first Enlightenment, that rational autonomy in politics is the precondition of societal liberty.

However, it is clear in this that Luhmann's notion of autonomy differs quite fundamentally from that employed within mainstream post-Enlightenment political thought, and that he positions himself in a complex and highly ambiguous manner towards the political principles of the Enlightenment. Most importantly, he rejects the conception of political autonomy or social autonomy as conditions which reflect a specific emancipation of the human being, or which represent a condition in which human beings successfully legislate the terms of their own political or social liberty. The autonomy which characterizes modern society is, in fact, not the autonomy of human beings at all, but the autonomy of systems themselves. The autonomy of the political system does not arise from the ability of one subject or several subjects to deduce universal laws, to which social systems owe obedience, and which then free the political system from

extraneous obligations. Systems do not become autonomous because those whose actions are relevant to them prescribe or reflect terms to validate their autonomy, or because they engender formal criteria by which to validate their own operations. On the contrary, Luhmann sees autonomy simply as the contingent prerequisite of a functioning social system. Systems, he claims, become autonomous as they accept (or find paradoxical ways of obscuring) their own contingency, as they acknowledge (or paradoxically obscure the fact) that they cannot be effectively guided by externally deduced motives, and as they consequently create and communicate their own reality as plausibly contingent meaning. The conditions of autonomy in modern politics thus reflect a social system's own experience of its own self-legislation: they do not reflect any personal or human experience of freedom from political coercion or heteronomy. Autonomy has no externally determinable content. It is merely the form in which a social system effectively organizes its own contingency, and manages its own operations by its own internal laws. Above all, Luhmann does not see autonomy as a state in or through which individual agents realize any type of primary anthropological essence. The autonomous reality of the social systems of modern society is absolutely contingent, and it cannot be causally reduced to any essential foundation.

This anti-humanist and anti-normative concept of autonomy has clear political implications which are directly relevant to Luhmann's understanding of *legitimacy*. Like thinkers in the main tradition of Enlightenment theory, he argues that it is characteristic of modern political orders that they positively underwrite the terms and criteria of their own legitimacy. 'Now that the sources of legitimacy outside the political system can no longer be presupposed,' he states, 'the system must produce its own legitimacy'.³⁶ Like rationality and autonomy, therefore, Luhmann also views the positive construction of legitimacy as an inalienable feature of modern enlightened society; indeed, he too sees the legitimacy of a political system as a clear indicator of the level of autonomy and rationality which it has reached. A system operates effectively, he explains, where it consistently and plausibly rationalizes itself, and so plausibly and consistently determines and reflects the sequences necessary for its own autonomous operations. In complying with its own self-generated *rationality*, in short, a system secures its own *autonomy*, and it thereby demonstrates, *de facto*, that it possesses *legitimacy*.

Like the mainstream Enlightenment, therefore, Luhmann claims that rationality, autonomy and legitimacy are very closely correlated terms: that rationality is the source and measure of autonomy, and that rationality and autonomy together are the source and measure of legitimacy in a social system – especially in the political system. At the same time, however, by reconstructing rationality here as 'system rationality', Luhmann also disavows all commonly held views on legitimacy, and he subverts the meanings usually imputed to rationality, autonomy and legitimacy. The

legitimacy of the modern political system, he states, clearly does not hinge on its moral integration and representation of human beings, or of any qualities of autonomy and rationality which these might possess. Legitimacy in the political system is not (or not in any primary way) derived from *people*, and it is certainly not based on reflexive prescriptions of universal-rational norms.³⁷ The qualities of rationality, autonomy and legitimacy in politics in fact appear only as variables in the momentary self-reproduction of the political system, as it makes plausible and persuasive decisions about the information which it encounters from its environment.

Most importantly, in consequence, Luhmann's sociology of politics obtains its greatest political-philosophical significance by breaking with the claim, central to the Enlightenment, that the rationality, the autonomy and the legitimacy of the political system are determined by *prior laws*, and by arguing that these conditions cannot explain themselves as substantively universalizable legal facts. The systemic attributes of rationality, autonomy and legitimacy certainly require law, and they most definitely preserve themselves through their positive interdependence with law in the legal system. Indeed, as we have seen, Luhmann is quite clear that the positivization of legality is an essential component in the dynamic process through which social systems engender their autonomy, and that law is indispensable to politics as a medium for transmitting power as legitimate power. Legitimacy, thus, cannot exist entirely without legality. He argues, nonetheless, that rationality, autonomy and legitimacy do not have their constitutive origin in prior legal norms or prior legislative faculties, and that law does not (and indeed cannot) provide constant terms to judge the existence or validity of these qualities. Rationality, legitimacy and autonomy are thus, for Luhmann, fundamentally detached from their customary post-Enlightenment association with the *legal subject* or with *legislative conceptions of reason*: they are qualities which develop independently of individual legislative subjects, and any attempt to make these realities contingent on the prescriptions of human subjects in fact directly undermines them. In his analysis of the rationality of politics, consequently, Luhmann cuts away the most fundamental conceptual pillar of modern political philosophy – the legal subject itself.

The Enlightenment, liberalism, and the critique of metaphysics

In these issues, however, rather than following Habermas in viewing Luhmann as a simple critic of the rational-legislative aspects of the project of the Enlightenment,³⁸ it is perhaps more accurate to see his work as an endeavour positively to refigure and even rescue the founding theories of political legitimacy, autonomy and rationality as they are conceived in the Enlightenment. Perhaps the best way to approach this idea is by looking at the critique of metaphysics in the Enlightenment, and at the significance of this critique for Luhmann's work.

As stated above, the Kantian Enlightenment revolves around a rejection of classical metaphysics and theological ius-naturalism, around an attempt to place human reason and human freedom on independent grounds, and consequently around an endeavour to determine the conditions of political legitimacy without recourse to non-rational (traditional or metaphysical) additions. This is why Kant's critique of metaphysics is centred on the concept of *autonomy*. This term is the category under which Kant explains the conditions of human existence *after metaphysics*, or at least on the basis of an anthropocentric reconstruction of metaphysics, through which human reason alone independently regulates the terms which govern the extent of its practical and cognitive validity.³⁹ In Kant's account, therefore, autonomy is the quintessential condition of true humanity, and of true Enlightenment.

Luhmann positions himself in dialectical manner towards the problem of metaphysics in Kantian thought. On one level he himself follows the anti-metaphysical dimension running through Enlightenment theory. His theory of 'system-rationality' clearly echoes and perpetuates the Enlightenment reaction against the grounding of human validity in non-rational or transcendent precepts, such as those provided by religion or metaphysics. On a different level, however, his concept of system-rationality also clearly indicates that the figuring of autonomy and rationality in the Enlightenment is not sufficiently rigorous in its quest to detach human society from metaphysical foundations, and that, by positing human rationality (especially in law) as a universal standard of ethical and political correctness, it only manages to articulate a very incomplete critique of metaphysics. In Luhmann's view, then, the Kantian Enlightenment remains founded in secular-metaphysical goods such as universal reason and universal legal validity. These separate rationality and autonomy from the evolving locations (systems) of social communication, and they fraudulently stabilize them as the specific attributes of human – not social – being. The Kantian Enlightenment is, therefore, not Enlightenment at all: it is *still metaphysics*, and it cannot account for its most cherished human qualities of autonomy, rationality and legitimacy except on the foundations of secondary metaphysical principles.

In his rejection of the first Enlightenment as an unfulfilled Enlightenment, or as secondary metaphysics, Luhmann implies, first, that the great weakness of the Enlightenment is that it detaches *law*, as rational or universal law, from factual social reality, and that it then burdens law with the expectation that it might prescribe terms to the factual social reality from which it originated. This, for Luhmann, clearly indicates that Enlightenment has not adequately disentangled itself from the originally metaphysical or theological convictions that some invariable juridical order prevails in the universe, and that human thinking is charged with responsibility for divining this order. In Luhmann's view, the legal ideas of Enlightenment

simply replicate, in a new form, the ancient metaphysical belief that social reality is in itself insufficient, and that the truth of reality resides outside itself. Second, though, Luhmann's rejection of the Enlightenment as metaphysics has much to do with the humanist or anthropological principles by which it is underpinned. In its attempt to define rational-legal principles as the basis of legitimate order, the Enlightenment (for Luhmann) claims that the human being, or the common human capacity for rational deduction, is the centre of social and political existence, and that this capacity for reason is able to dictate terms to all other areas of social being. For Luhmann, however, the postulation of the human being as the legislative centre of reality serves only to transpose the fiction of metaphysical order onto an equally simplistic model of social reality, revolving causally and morally around the human subject.

On these grounds, Luhmann ultimately concludes that the objectives of rationality, post-metaphysical social autonomy and independent political legitimacy have not been effectively accounted for by the Enlightenment; these can only be explained if they are dislocated from all association with the human person and human reason, and if they are interpreted as finally temporary and particular functional forms. On a cognitive level, therefore, Luhmann implies that the Enlightenment finds its perspectives in a conception of the rational human being which fictitiously imputes a high degree of regularity to social reality, and which counterfactually imagines that this reality can be interpreted in accordance with invariable laws, deduced and prescribed by human beings. Likewise, on a political level, the argument in the Enlightenment that the conditions of political legitimacy depend on the invariable enshrining of order in law also offers only a most reductively metaphysical conception of the legitimate polity, and it only conceives of political freedom and autonomy on the basis of a metaphysically simplified construction of what freedom and autonomy might actually be. Both cognitively and politically, therefore, the Enlightenment (for Luhmann) fails to reflect the evolution of society in all its self-legitimizing complexity and plurality, it acknowledges only inadequately the true autonomy, positivity and independence of social formations, and it cannot understand the diverse and unnervingly variable forms of liberty, autonomy and legitimacy with which modern social agents are confronted.

At the very heart of Luhmann's theory, in consequence, is a quite radical attempt to unmask the humanist and rationalist conceptions inherited from the Enlightenment, which still plague and simplify the principles of contemporary socio-political debate, and which prevent the Enlightenment from accomplishing its own stated conceptual objectives. He seeks to develop concepts of autonomy, rationality and legitimacy which abandon all attachment to metaphysical foundations, and which accept the necessary independence and the final contingency of all social forms. His own theory, he concludes, decisively abandons 'the domain of metaphysics in

the classical sense' and it also renounces all rationalized 'subject-metaphysics'.⁴⁰ As a result, he construes the autonomy, rationality and also the legitimacy of social systems as infinitely local, and absolutely contingent, qualities. The validity of these qualities cannot be reconstructed on any foundational basis, either of reason or character.

The consequence of this anti-metaphysical turn, most importantly, is that Luhmann identifies the theoretical mainstay of modern liberal political theory, the legal subject, as a fictitiously metaphysical concept, which is the root cause of the misinterpretations of political Enlightenment. The accounts of rationality, autonomy and legitimacy proposed by Luhmann are characterized by the following attributes. First, they are not predicated on the *human being*. Second, they are not conceived as the realization of any originally *human* attributes. Third, the human beings which exist in the communications of social systems (here, of the political system) have no specific independence from them, and they have no determinately *legal* control over them. In fact, the social systems of modern society obtain autonomy, legitimacy and rationality only to the extent that they do not confuse themselves with human beings, and that they develop modes of communications which have no identical or unitary human substructure. The condition of autonomy, rationality and legitimacy cannot in fact in any meaningful way be grasped as a human condition: it is a *societal* condition, which results from the fact that, owing to the necessity of systemic differentiation and rationalization against the emerging complexity of modern society, all systems produce their own rationality, autonomy and legitimacy. All attempts to explain *social* modernity in a manner which confuses the autonomy, rationality and legitimacy of systems with *human* autonomy, rationality and legitimacy rely – for Luhmann – on the crudest anthropocentric or quasi-metaphysical presuppositions, which greatly falsify the evolutionary processes of modern society.

In his discussion of these concepts, Luhmann's sociology might be seen to fall almost indefinitely between liberal and conservative theoretical preconditions, between Enlightenment and counter-Enlightenment. On the one hand, his anti-humanist conceptual perspectives are at times close to an anti-normative brand of conservatism. For instance, he obviously disputes the very idea that a modern decentred society might have any specific *interest* in human autonomy or emancipation. Certainly, society is not susceptible to reforms, upheaval, or processes of self-correction which might be stipulated by evidences regarding a greater need for human self-determination. Likewise, he clearly implies that the legitimacy of a system depends to a large extent on its functional efficacy, not on any requirement of rational substance. Most particularly, though, he also rejects the theoretical conviction which usually supports and justifies the legal-state tradition of liberal democracy: that is, that the political system might be required to secure legitimacy by displaying some accountability to moral or theoretical

prescriptions which can assume universality in the subjective-rational form of law. Legitimate power, he thus suggests, is essentially indifferent to the content of its law. On the other hand, however, Luhmann is also quite manifestly at odds with the perspectives of European conservatism, and he mirrors many aspects of post-Enlightenment thought. As discussed above, he does not ascribe any degree of encompassing dignity to the state as a source or guarantor of integrative order; the political system expressly allows and presupposes autonomy in itself and in other social systems. He also tirelessly campaigns against 'hierarchical thought-patterns' in his description of the political system, and he rejects all suggestions that society might have a direct centre of political control and coercion;⁴¹ all focusing of society on political power in fact necessarily undermines the rationality of the political system and of other systems. In addition, most importantly, his conception of the legitimate political system also overlaps closely with liberal, and even Kantian, theories of the legal state, as he repeatedly accentuates his belief that legitimacy in politics hinges on the legal-rational self-limitation of the political system against other social systems (via second-coding).⁴² As we have seen, law, for Luhmann, is the rationalized form of power, and legitimate power cannot exist without law.

Consequently, the theoretical image of politics and society which can be distilled from Luhmann's sociology is extremely contradictory and dialectical, for it expressly contains both a critique and an endorsement of the defining components of liberal political theory and philosophy. More particularly, in fact, it also contains both a critique and an endorsement of liberal democracy and of the legal state. For this reason it is perhaps most accurate to see his work as being close to an anti-humanist version of liberalism (if such a position is conceivable). Indeed, one effective way of interpreting his political and philosophical perspective would be to view it as liberalism beyond the Enlightenment, or indeed as *liberalism beyond liberalism*: that is, as a model which validates the socio-economic, legal and institutional realities of liberalism without relying on the substantive or anthropocentric foundations which liberalism has acquired in the Enlightenment. In other words, Luhmann's political-theoretical position might be viewed as a type of liberalism which surely recognizes the role of law and rationality in establishing and communicating legitimacy, yet which is *not premised in prior law*: as liberalism, thus, without the rational legal subject, or liberalism without metaphysics. The pluralist and democratic reality of modern politics, he states, results only from 'the complete positivization of the normative premises of collectively binding decision-making', and it is characterized by the ability of 'positive, contingently established law' to secure validity for political decisions.⁴³ Power, in short, needs law to maintain legitimacy, but it needs law only in a form which is finally divested of all substantive foundations.

Given the extremely paradoxical nature of his views on liberalism and the Enlightenment, it barely requires a leap of the imagination to see Luhmann's

theory as an (admittedly highly ironic) attempt to demonstrate to liberal thinkers in the tradition of the Enlightenment that they must develop new theoretical tools if they wish coherently to preserve their liberal visions of autonomy, rationality and political legitimacy. There is, Luhmann evidently argues, no normative or juridical *justification* for the qualities of autonomy, rationality and legitimacy in modern society, which liberals seek to defend. Moreover, the tendency to confuse the description of these systemic attributes with normative or ethical arguments is always self-defeating. As discussed above, the quest to ascribe the development of modern systems to particular characteristics of human reason is always likely to undermine precisely those liberal pluralist realities of freedom and autonomy which evolve through modern social systems. As a result, although he is never explicit about this point, Luhmann might plausibly be seen to intimate that, if society is to be an enlightened society – if it is to continue its enjoyment of the social benefits of rationality, autonomy and legitimacy provided by its functionally differentiated systems – social theorists (and especially liberal social theorists) should not attempt, through simplifying and even corrupting processes of prescription or attribution, to derive these systemic features from fixed concepts of human and personal need. The job of political theory or social theory, therefore, is not to warm up mono-structural ethical or personal norms to guide social systems – it is to facilitate a ‘critical understanding’ and ‘a utilization’ of the ‘opportunities’ afforded by the reality of rationality, autonomy and legitimacy, which is engendered by the fundamental positivity of all systems of social exchange and communication.⁴⁴

This does not mean, for Luhmann, that post-Enlightenment liberal theory is in some way ‘wrong’ in its perspectives on the composition of modern society and in championing the characteristics of autonomy, legitimacy and rationality. It does mean, though, that liberal theorists cannot understand the socio-political conditions which they most prize, and, still worse, that they actually jeopardize the basis of these by linking them to mono-causal, anthropologizing schemes. In modern societies, for Luhmann, the probability that social systems will engender a reality characterized by high levels of rationality, autonomy and legitimacy can be discerned on the basis of an evolutionary theory of functional differentiation and complexity. This probability, however, can only be described or *observed* as the outcome of societal processes of evolution: it can under no circumstances be substantively *prescribed*. The plurally differentiated reality of modern social developments cannot, in consequence, be adequately interpreted if it is viewed *anthropologically* or *metaphysically*. It is only when this reality is addressed *sociologically* that the defining characteristics of modern society can be understood. For this reason, Luhmann is clearly not (or not intentionally) a thinker of the counter-Enlightenment. He is, however, an anti-humanist thinker for whom the practical, and indeed liberal, intentions of the Enlightenment require more adequate elucidation than that afforded by its self-appointed

humanist proponents. Indeed, most theorists of the Enlightenment are, in Luhmann's account, not theorists of Enlightenment at all. Such theorists are in fact still metaphysicians, and, as metaphysicians, they are not able to explain the legitimacy of modern society without recourse to archaic foundational constructs. For this reason, they always fall behind the claims of real Enlightenment.

Luhmann's work, to conclude, can be seen to stake out a decisive position in contemporary philosophy, sociology and political theory. While other currently influential positions remain within the broad spectrum of the Enlightenment, and draw still on the venerable foundations of theoretical humanism and the rational-subjectivist model of choice and agency, Luhmann demolishes the entire foundational substructure of liberal and normative theory. The humanist foundations of normative theory, he indicates, directly obstruct an adequate interpretation of society, of the role of humans in society, and of the conditions of possible freedom, legitimacy and rationality in society. At the same time, however, Luhmann does not present himself as an opponent of Enlightenment, or of its political objectives. Rather, he indicates simply that Enlightenment, if it is conceived – as, for example, by Habermas – as an ongoing quasi-anthropological 'project', or – as, for example, by Rawls – as a constantly refined quest for maximum rational consensus, cannot understand or articulate itself, and cannot obtain the goods which it seeks to secure. If liberal Enlightenment is a condition of post-metaphysical freedom, which is characterized by basic guarantees of social independence, by the protection of a variety of optional individual liberties, by the imposition of limits on political coercion, by the legal sanction of social pluralism, yet also by a certain degree of security amid the disturbing complexity of the modern world – then, Luhmann argues, liberal Enlightenment is simply the outcome of a process of functional and social *evolution*, not of moral prescription. The enlightenment of this Enlightenment, however, requires a thorough and radical change of paradigm.

Influences on Luhmann's concept of the legal subject

The legal subject

In its political implications, the most significant component of Luhmann's sociological Enlightenment is his response to the theory of the *legal subject*, and it is in this that Luhmann might be seen to make his most far-reaching contribution to the theoretical foundations of modern political thought.

Luhmann is naturally not alone in his questioning of the legal subject, or in his rejection of concepts of political legitimacy founded in legislative models of human reason. Indeed, much political theory after Kant has focused on the refutation of the Kantian conception of the legal subject, and of its realization in the legal state. Especially in Germany, the dominant

post-Kantian political positions – including Hegel, Weber, Carl Schmitt and Habermas – all criticize the formality of these key Kantian ideas, and all attempt to mark out their conception of human politics from the abstract juridical form given to it by Kant. Above all, they each seek to give greater scope to *political freedom* than is the case in Kant's work, and they each reject the constraints imposed on freedom by conceptions of political legitimacy predicated exclusively in prior *laws*. Indeed, like Luhmann, each of these thinkers indicates that Kant's rational-humanist attempt to cut away the superstructure of metaphysics is ultimately not successful, and that the derivation of human autonomy and legitimacy from the functions of the rational subject does not open the way to post-metaphysical freedom, but still persists in organizing autonomy and legitimacy around insubstantial and quasi-metaphysical principles. Despite this, however, all the major post-Kantian thinkers still adhere, implicitly or expressly, to Kant's belief that valid political order is underpinned by a particular conception of the human being, and that good order involves a process of public representation which gives manifest form to the legislative potentials of the human being. The major political conceptions of post-Kantian thought are thus still sustained by a perspective which couples *representation* and *humanism*, and so argues that the most legitimate order is that which gives most adequate public-legal representation to the human being itself. This line of reflection culminates in the contemporary normative perspectives of Habermas and Rawls, in whose work the construct of *the reasonable person* or of the *reasonable group of persons*, endowed with innate capacities for law-giving and law-deduction, always plays a central role.⁴⁵ Although political theory after Kant abandons Kant's formally conceived legal subject, therefore, it does not wholly relinquish the anthropocentric implications of his thought. The founding of legitimate order in the human person persists through later perspectives, and it remains perhaps the most abiding consequence of Kant's original endeavour to base political Enlightenment in a post-metaphysical, post-theological concept of human nature.⁴⁶

There also exist certain moments in post-Enlightenment political thought, however, where the claim that human reason or the human being can legislate the conditions of justifiable power is called fundamentally into question. Examples of this are usually found outside the Kantian lineage, although, as discussed below, Max Weber and Georg Simmel – neither of them resolutely anti-Kantian – can at times also be cited as examples of such thinking. In any case, the background to Luhmann's thought can be placed on a continuum with arguments of this kind, which seek to dispel the illusions of legislative reason.

Nietzsche

Although not an immediately obvious source for Luhmann's thought, for example, Friedrich Nietzsche's political reflections clearly have their critical

centre in a commentary on the legal subject. Nietzsche argues that the legal subject is a spurious and illusory, yet also psychologically convenient, construct. He claims that human beings imagine themselves as legal subjects, as centres of legal imputation, entitlement and prescription, because this allows them legislatively to interpose a comfortingly formal and temporally stable series of values and norms between their own existence and the chaos of natural being outside them; through their self-fictionalization as legal subjects, human beings create sequences of predictability over time, and they protect themselves and their societies from the terrifying confrontation with their own nothingness. Nietzsche thus describes the legal subject as a device or mask by which the human being establishes modes of rationality, predictability and calculability, through which it can take control of natural reality and organize this reality in accordance with its own strategies of domination. In this account, the legal subject is a metaphysical illusion, designed conveniently to obscure the arbitrariness of all social organization,⁴⁷ and to confer a reassuring sense of predictability and moral purpose on human actions and experiences.

Nietzsche and Luhmann are naturally irreconcilably distinct from one another in many respects. In manifest contrast to Luhmann, Nietzsche outlines a quasi-existential response to the problem of the legal subject, and his rejection of social order premised on the legal subject is developed under the banner of a voluntaristic philosophy of life which envisages that the end of the legal subject will give rise to new experiences of spontaneity and creativity.⁴⁸ Nonetheless, Luhmann echoes Nietzsche's first categorization of the legal subject, and indeed of the human subject more generally, as a mask for strategies of social control and stabilization, and as a block on adequate interpretation of the alarmingly contingent nature of social being. Like Nietzsche, in fact, Luhmann describes the human subject as a semantic device which creates a fiction of self-reference and individual accountability. Echoing Nietzsche, he argues that the concept of the human subject originally developed as a fictitious focus or peg for concepts of rights, entitlements and social participation; it acted as a facilitator for political integration and 'inclusion' at a point in European political evolution where the traditional integrative functions of 'social standing', 'religious adherence' and class-related 'provenance' had been eroded.⁴⁹ Like Nietzsche, thus, Luhmann argues that the legal-rational subject cannot be credited as a substantial foundation of political legitimacy and social autonomy. The subject acts at most as a point of reference and ascription through which processes of systemic evolution and inclusion confer an image of essential validity upon themselves.

Simmel

Extrapolating from Nietzsche, then, the sociologist Georg Simmel, whose writings anticipate Luhmann in many respects, also argues that the Kantian

postulation of a unitary subject as the legislative source and centre of socio-political order is not sustainable in modern societies. Opposing this, Simmel attempts to account for society as a functionally differentiated reality in which each arena of operation detaches itself from all mono-focal and mono-causal substance, and so eventually also from the human being itself. Each arena of functional activity, he explains, generates and perpetuates itself by promulgating systems of value which no longer have any physical or objective origin in the human persons,⁵⁰ but which create a reality of co-ordinated sense in which functional interactions can be correlated.⁵¹ Unlike Luhmann, Simmel's thought also occasionally takes on existential and quasi-Nietzschean overtones.⁵² However, in many respects he sets out both a critical reading of Kant and a functionalist, anti-humanist critique of the core ideas of the Enlightenment which mark him out as the first major sociological precursor of Luhmann.

Weber

Max Weber, writing at approximately the same time as Simmel, also develops a number of theoretical principles which assume key importance for Luhmann. First, like Luhmann, Weber proposes the concept of social rationalization as the essential term under which the formation of modern society can be interpreted. He argues that modern social systems, including law, the sciences, the economy and culture, are characterized by a constant increase of rationalization, and that a high degree of rationality is the main defining characteristic of social modernity.⁵³ Rationalized social systems, he consequently claims, ultimately assume a systemically independent or autonomous function, and, no longer subject to measurable human control, they transform human beings into subsidiary mechanisms, engaged within their own internal operations.⁵⁴ Second, Weber also focuses his theory of rationalization on the political institutions of the legal state and the legal subject, especially in the conceptual form pioneered by the Kantian Enlightenment.⁵⁵ He rejects the promise of human political emancipation which was originally attached to these constructs, arguing instead that the legal state and the legal subject embody a depersonalizing mode of technical rationality which simplifies and formalizes the vital experiences of human life, and so turns against and imprisons the people whom it originally claimed to serve. The types of political legitimacy produced by 'reason' are, therefore, not truly legitimate at all, but wholly insubstantial, and even latently tyrannical. Like Luhmann after him, consequently, Weber provides a functional account of the role of reason in modern society, and he argues that the association of reason with humanist or moral concerns, or with teleological visions of freedom or political progress, is very self-deluding. Like Nietzsche and Simmel, however, Weber is also manifestly distinct from Luhmann in the way that he phrases his functional account of reason as a lament on the death of substantial realities underlying human life

(especially in Western Europe), resulting from changes in contemporary political and economic conditions. Indeed, he even uses his sociology as the theoretical base for an attempt to revitalize modes of true, non-formal legitimacy in modern politics and modern law; hence his famous contributions to the development of the theory of elite democracy.⁵⁶ It barely requires emphasis that such schemes run directly counter to Luhmann's altogether more modest claims for political rule and personal power.⁵⁷

Heidegger

After Simmel and Weber, however, it is in the writings of Martin Heidegger, again perhaps not the most obvious origin of Luhmann's ideas,⁵⁸ that we encounter the most far-reaching critique of the legal subject, especially in its Kantian conception, and the clearest prefiguring of the political-philosophical components of Luhmann's work.

In certain respects, Heidegger's entire philosophy is conceived as an attempt to account for social reality *beyond* the legal subject and beyond all attempts to understand this reality as rooted in the cognitive and moral faculties of a particular reasoning person. His perspective centres on the argument that Kant's theory of the legislative subject only manages to break away from metaphysics because it recreates the human subject as the founding source of all cognitive and moral validity, thus maintaining a spurious appearance of essential order and regularity, where in a fundamental critique of metaphysics these qualities would be denied.⁵⁹ In Heidegger's own view, however, social reality does not occur as the consequence of reason's exercise of control over it, but as a series of historical events, on which human reason and agency have no measurable cognitive or ethical influence. If a clear theory of society and politics can be extracted from Heidegger's thought, therefore, he implies that social reality is badly simplified by attempts to impute a legislating subject as the basis of human order, and that normative conceptions of social reality merely account for this reality as secondary metaphysics – as a dubiously moralized and humanized account of fundamentally unfounded historical occurrences.⁶⁰ Social (or political) legitimacy would, in fact, for Heidegger, be a condition in which reality was not restricted or explained by fixed norms or values,⁶¹ but in which the forms of political life could shape themselves freely out of a common historical horizon. Thus, although Heidegger retains a slender attachment to humanist perspectives, his philosophy attempts to push the concept of human reality beyond reductive, legal-subjective or quasi-metaphysical notions of human essence, reason and authority, and he develops a highly pluralizing, decentred view on the multiple arenas of human existence and validity.

Most importantly for Luhmann's general method, Heidegger repeatedly accentuates the claim that the meaning of human interactions in society is not attributable to the founding intentions or rational motivations of

specific agents, but rather to the differentiated social horizon (the 'world') in which actions take place. All human beings live in a 'world', he explains; the world is the location in which human communications gain meaning, and in which the co-ordination of signifying terms is possible. By forming a 'world', particular historical agents create temporal sequences of meanings, and these enable the reliable structuring of action, they stabilize social expectations, and they cement locally and plurally normative orders of obligation.⁶² However, this world has no material, anthropological, ethical or ontological substance which might provide a foundation of *identity*, on the ground of which stable meanings might be produced which could be recognized and accepted across all areas and regions of communication. The world, in fact, is simply the agglomerate of human meanings and expectations established through long traditions of historical and linguistic interaction. Moreover, the world is the horizon of historical reality in which human existence construes its simultaneous relation to, and its *difference* from, the vast realm of uncontrollable and alarming prospects, which is the totality of Being (*Sein*) itself. The world thus emerges in ongoing and incessantly variable *difference* from all substantive, metaphysical essences of right and reason. Indeed, it is only by referring to itself as *difference* from the non-structured reality outside of it that the world is able to constitute sense and meaning.

On these grounds, it is arguable that Heidegger's philosophy marks the first consistent phenomenological attempt to conceive of social reality as a reality of meaning which has no anthropological centre and, therefore also, no legislative centre. Luhmann's anti-foundational observations on the post-subjective contingency of meaning in the world, on the system–environment relation and on the acentricity of social reality clearly have their origins in Heidegger's analysis of the differentiated relation between world and Being.⁶³ Indeed, he makes no secret of his indebtedness to Heidegger's philosophy, and to Heidegger's critical elaboration of Edmund Husserl's initial phenomenological method.⁶⁴ '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 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.⁶⁵

In his claim that social meaning and communication result only from 'the differentiations' between distinct social systems, and that such meaning has

no self-identical source in reason, place or character,⁶⁶ Luhmann clearly follows Heidegger (and Derrida) in describing the modes of sense-constitution in modern systems as entirely post-ontological events which do not presuppose any underlying substance or identity as prerequisites in the formation of reliable meanings. Systems, he argues, create their own ordered reality only by their difference from other realities, not from any substance which they might contain. The foundation of meaning only ever resides, therefore, in its difference from other meaning, not in its own substantial or essential significance.⁶⁷ In this, Luhmann closely replicates Heidegger's original view on meaning as the result of the mediated difference of reality from Being.

Most important on a political or ethical level, however, is the fact that Luhmann follows Heidegger's argument that political and cognitive theory in the Enlightenment only succeeds in interpreting human reality in the reductive categories projected on the basis of an abstract and therefore quasi-metaphysical legal subject.⁶⁸ For this reason, in fact, both Heidegger and Luhmann oppose the epistemological and political principles at the heart of the Enlightenment by arguing that *time*, not *law*, should be viewed as the primary premise of human social reality. For Heidegger, the 'world' is the concrete form of contingency, in which human relations are fleetingly inscribed, *in time*, as action-orientations. The world is the historically formed order of being-in-time, in its contingent self-differentiation from the infinite chaos of other possible meanings, which are outside it. Analogously, as discussed above, Luhmann identifies the genetic origin of social systems in the moment of reflected contingency in which communications are coordinated (in double contingency) around multilaterally accepted sense or codes. Through double contingency, systems generate reliable expectations (or expectation-expectations),⁶⁹ which give a temporal horizon of predictability, or a 'dimension of order for complexity',⁷⁰ to human operations. On the basis of these expectations organized as temporality, it becomes possible for people to invest a certain degree of trust in the functions of a certain system. Indeed, it even becomes possible for people to entertain highly uncertain and alarming futures by creating mechanisms which reduce, or at least counterbalance, the vast indeterminacy of the developing environment which is not yet structured in meaningful temporal sequences. Luhmann thus defines the system, like Heidegger's 'world', as a locus of meaning in which human communication decouples itself from all timeless legal-metaphysical and legal-rational forms, and organizes itself in its pure contingency as *time*.⁷¹ Heidegger is quite explicit about the fact that he sees time as an alternative to law as a form for interpreting the structure of human reality. Luhmann does not in any way mirror the quasi-existential overtones to Heidegger's formulation of these arguments. Nonetheless, this idea still filters into Luhmann's view on social reality, for his account of society as a variably evolving set of temporal sequences obviously contradicts all models

of society which are anchored in static moral and cognitive prescription, and which fail to reflect the intensely contingent temporality of social communications. Both Heidegger and Luhmann thus develop their rejection of metaphysics, and its subjective-rational aftermath in the Enlightenment, by interpreting human meaning as irreducibly *temporal*, not *legal*, and thus by shifting human reality away from normative or moral focusing.

After Heidegger: Foucault and Derrida

In addition to considering Luhmann's direct indebtedness to Heidegger, it is also illuminating to compare Luhmann with other inheritors of the anti-foundational legacy, which was initiated by Nietzsche and most consistently articulated by Heidegger. Various influenced by the critique of legal rationality set out by Nietzsche and Heidegger, for example, Foucault and Derrida have also developed important perspectives on law and legal subjectivity which have a certain relation to Luhmann. Foucault follows Nietzsche's unmasking of the strategic core of the legal subject, and he too argues that the post-metaphysical imputation of stable faculties of knowledge to a rationally self-legislating subject serves only to crystallize an ideological discourse which facilitates the reduction of the human being to its functions of exchange and labour in the modern economy.⁷² Like Nietzsche again, Foucault also argues that law operates solely as a component in the complex discourses of power which characterize social (capitalist) modernity,⁷³ and it cannot be meaningfully invoked as a bearer of value-rational norms adequate to the shaping of legitimate political existence. The insinuation of fixed centres of accountability (human subjects) as the ground of social order is therefore nothing more than a fiction through which overarching strategies of social domination are effected.⁷⁴ Indeed, Foucault is even more hostile than Luhmann toward the focusing of social interpretation on humanist or anthropological constructs. Anthropocentric analysis invariably proceeds, according to Foucault, from 'the pre-critical analysis of what man is in his essence', and it transforms such naive essentialist postulates into an 'analytic of everything that can, in general, be presented to man's experience'.⁷⁵ Such analysis offers only the most corrupted and reduced perspective on social reality.

Foucault clearly shares certain preoccupations with Luhmann. Both view social reality as a decentred complex of discourses which are grossly simplified by the projection of any normative essence at their centre, and both predicate their socio-political theory on the abandonment of legally determinable concepts of subjectivity as the foundation of acceptable order. However, certain very great distinctions between Foucault and Luhmann are also evident. Luhmann opposes the theories of Enlightenment because he thinks they are interpretively inadequate. Foucault, in contrast, rejects the theories of Enlightenment because he thinks they mark a deep corruption of human existence. Luhmann rejects the concept of the legal subject

because it cannot effectively account for social reality. Foucault, however, dismisses the concept of the legal subject because, like Nietzsche and Weber, he sees it as part of a strategy of social domination and stabilization. He describes the 'anthropological sleep' in which science attempts to grasp the human as the source and centre of social reality as a deep and pernicious malaise in post-Kantian rationality, which insidiously proclaims the 'man of nature, of exchange, or of discourse' as the sole form of possible existence. Foucault consequently aims at an 'uprooting of anthropology',⁷⁶ and he sets his sights on a quasi-Nietzschean quest to free human existence from the regulatory coercion to which it is commonly exposed by its own subjectively centred self-conception. In short, therefore, although Luhmann and Foucault intimate that the true plurality of social life-contexts is obscured by the subjectivist simplicity of post-Enlightenment social and legal perspectives, Foucault's argument is clearly tied to some kind of transformative political and interpretive agenda, whereas Luhmann's position manifestly is not. Luhmann clearly makes no normative or existential claims for his account of necessary social plurality. He merely indicates that the interpretation of social reality *as if* it were controlled by pre-structured modes of reflexive or legal agency is always distorted, and it always leads to misleading conclusions.

After Foucault, Derrida's pronouncements on politics and law have on occasions also been placed in a certain analogy to Luhmann. Indeed, Luhmann's own writings – contrary to his own intentions – have often been compared to Derrida, and they have at times been viewed as an extreme theorization of the conditions of postmodernity,⁷⁷ and as a most far-reaching rejection of all attempts to impute a universal or identical order to the processes in which meaning is engendered. There is, indeed, obviously scope for legitimate comparison between Derrida and Luhmann – although, like comparisons between Luhmann and Foucault, these can easily be overstretched. Like both Foucault and Luhmann, for example, Derrida seeks to deconstruct the mythical base of law's authority, and to examine the false vestiges of metaphysics in the assertion of a categorically or rationally valid structure to law's origin and order. In this, like Luhmann, he too turns vehemently against Kant's moral universalism and formal humanism.⁷⁸ Indeed, at times Derrida and Luhmann move close to each other in the way they echo and alter Heidegger's initial critique of Kant. Both Derrida and Luhmann share the pluralizing, anti-metaphysical dimension of Heidegger's thought, and both follow Heidegger's attempts to dismantle the formal legislative priority of the human being in explanations of social reality.⁷⁹ Beyond these obvious overlaps in their responses to Heidegger and Kant, however, Luhmann and Derrida are manifestly engaged in very different theoretical enterprises, and their unravelling of the legal subject leads them to very different conclusions. The abandonment of the legal subject does not, for Luhmann, mean that social reality can somehow be imagined

beyond law, but merely that social reality cannot be derived from one juridical focus. The deconstruction of Kantianism, however, takes Derrida into an attempt to envision true political existence (legitimacy) as a condition of wholly unregulated and spontaneous freedom, no longer structured or determined by law.⁸⁰

Beyond Heidegger

Against this background, consequently, although Luhmann might be linked with Foucault and Derrida as a powerful critic of the metaphysical foundations of modern social and legal theory, the concrete result of his thought has little more than passing similarity with their views. Apart from Kant himself, the most important direct philosophical antecedents for Luhmann can be found, first, in the early functionalist accounts of systemic differentiation and depersonalization in modern society which are set out by Simmel and Weber. Second, however, Luhmann's broad similarities with other post-metaphysical theorists of law and authority are due mainly to the fact that he, like them, is most fundamentally influenced by Heidegger. As discussed, his accounts of sense-formation, difference, contingency and temporality all call quite explicitly on Heidegger's opposition to the explanations of reality and meaning premised on the rational legal subject. He also shares with Heidegger the key philosophical belief that social interpretation should move away from conceptions which equate the human being with *law* towards an account of social reality which is both fully plural and phenomenological, and adequately temporal.

Despite these great similarities, however, it is clear that there are also major theoretical differences between Luhmann and Heidegger. These become especially evident in their reflections on the problem of humanism, which is one of the most notoriously difficult issues in Heidegger's thought. In this respect, in fact, Luhmann's work might easily be seen as an attempt to pursue Heidegger's own anti-humanist line of inquiry to still more anti-humanist conclusions than Heidegger himself. As discussed above, on one level Heidegger interprets the condition of human existence as one of spontaneously and plurally self-forming temporality, not regulated by specific human subjects. In this respect, he is quite clearly an anti-humanist thinker. At the same time, however, he also argues that the temporally mediated structures of social life are always components of a distinctly and peculiarly *human* reality. The life of the human being, he explains, is directly determined by the particular temporal reality in which it finds itself, and each human being necessarily interprets itself on the ground of a particular experience of its own historical horizon. Indeed, Heidegger also implies that each nation or national culture forms itself into a historically unique order, so creating its own unique way of being in time, and that the historico-temporal forms of each national culture have an inviolable prescriptive authority towards those whose lives fall within them. As a consequence, Heidegger repeatedly argues

that the temporal reality of each culture is the preordained *fate* of all who exist within it.⁸¹ At the heart of Heidegger's philosophy is thus a conception of historicity as the defining aspect of human life. Although the temporal conditions of human national and cultural life are mediated spontaneously and contingently out of time alone, they possess nonetheless, he states, a specific importance and value in that they provide the determining context of collective human life, and of each individual life.

What this means, paradoxically, is that, for all his anti-subjective anti-humanism, Heidegger ultimately re-centres his conception of social being on a determinately *human* reality, and that he reintroduces exactly that humanist or anthropocentric line of reflection which he wishes to surmount. This results in a construction of social reality in which all normative and ethical substrates have been eliminated from human life, but which is still eminently focused on human beings. The human being thus re-emerges as a passive, normatively disabled reflex within historical reality, condemned to acquiescence in the shared collective forms in which it lives. Political life beyond the legal subject is, therefore, still a reality in which the human being is fundamentally implicated as a unique historical agent. At the same time, however, it is also a reality over which the individual agent cannot claim or establish any legitimate influence.

It is in this respect that Luhmann differs most considerably from Heidegger. As seen above, Luhmann's anti-normative anti-humanist theory also shares common ground with certain types of political authoritarianism, or at least with certain types of conservatism. However, he always avoids the argument, central to Heidegger's work, that social systems and social institutions have any collective importance, validity or uniqueness beyond the simple fact of their contingency and existence. For Luhmann, each evolving system could always be other than how it is, and, if it were other than how it is, it would not in any way cease to be valid, or become more or less valid. The temporal contingency of a system means precisely that it evolves as a purely temporal sequence of communications, such that it has no substantive connection with place, region or people. Social systems thus possess no special ability to represent or reflect the cultural or national distinctions of individual people.⁸² On the contrary, the logic of systemic development always inclines towards a globalization of possibilities for communication in the world-society.⁸³ For this reason, it can be concluded that Luhmann finally goes far beyond the anti-humanist argument in Heidegger's thought, or, equally, that Heidegger fails in his attempt to think in post-anthropocentric terms, because he remains attached to conceptions of national-historical particularity. Heidegger, in other words, never manages to interpret social reality as pure *time*, but always conflates time with *place*. This is not the case for Luhmann. This last historical residue of humanist thinking disappears from Luhmann's work, and this, paradoxically, allows him to envision historically and regionally disembedded and transnational

types of social validity in a manner which is not open to Heidegger, who is still inclined to historicist notions of collective national form.

On the basis of this reconstruction, it can be seen that Luhmann elaborates a theoretical perspective – proceeding from the deconstruction of the legal subject – which is widely associated with anti-liberal, anti-Enlightenment philosophy, most perfectly exemplified by Heidegger. It is equally arguable, though, that he elaborates this perspective in such a manner that it moves away from its common reactionary implications, and indeed from all openly declared political positions. Luhmann's overcoming of the legal subject as the basis of political and social order does not share Nietzsche's vitalism, Simmel's functional existentialism, Weber's political personalism, Foucault's pluralist criticism, Derrida's strategy of deconstruction and deferral, or Heidegger's historicist nationalism. On the contrary, his overcoming of the legal subject is simply an attempt to conceive of social reality as a sequence of infinitely iterable occurrences, in which human beings are not particularly or generally implicated as authors or legislators. The more prescriptive and socially interventionist inclinations of Nietzsche, Simmel, Weber, Foucault, and Heidegger are in fact, in Luhmann's view, merely reflections of the fact that they have themselves not yet finally abandoned the foundation of legal subjectivity, and that they still conceive of social reality as a condition which is distinctively meaningful for *people*. All of these perspectives ultimately remain caught in those problems of metaphysics and anthropocentric humanism which they attempt to evade.

Luhmann's perspective might consequently be construed as the most conclusive move beyond the conception of the legal subject as the centre and author of social and political reality. Unlike his fellow critics of this key Enlightenment concept, however, his renunciation of legal subjectivity does not lead him to political conclusions which are categorically at odds with the practical ideas of liberalism or of the Enlightenment. Indeed, as discussed above, the receding of the human being from the centre of social reality and sociological analysis serves only to open up a view of a society which actually fulfils the main liberal criteria of autonomy, plurality and post-traditional legitimacy, and which (at least in intention) dispenses with outmoded conservative ideologies such as nationalism, statism, communitarianism and historicism. The precondition for the emergence of a liberal society, however, is always that it is not wedded to any fixed conception of human essence or expression. All attempts to make the function systems of society accountable to essentialist constructs, Luhmann indicates, necessarily destroy the freedoms which these systems are able to engender. All attempts to connect the contingent temporal realities of post-personal society back to specifically human quantities, such as local place, human action or social interest, always threaten to dissolve the plurality and independence which these realities provide. The key to envisioning the practical reality of the Enlightenment is thus the relinquishment of its

most central political and theoretical tools, and its central attachment to humanism.

Law and anthropology in Luhmann's intellectual formation

Parsons

If the philosophical sources for Luhmann's thought can be found generally in critical interpretations of Kant, and especially in Heidegger's critical continuation of Husserl's phenomenology and epistemological critique, the sociological roots of his thought are usually traced to his direct experience of American functionalist theory in the wake of Talcott Parsons, under whom he studied at Harvard in the early 1960s. It is not difficult to see what Luhmann borrowed from Parsons, and why he borrowed it. Indeed Luhmann clearly saw himself, at least in his early publications, as a Parsonian theorist, committed to applying functionalist-institutionalist methods to problems of public administration in the Federal Republic of Germany.

Most obviously, Luhmann overlaps closely with Parsons in his views on the structure of social action. His conception of social systems directly recalls Parsons's anti-individualistic interpretation of human action as a series of contextually motivated processes occurring within a specific 'frame of reference',⁸⁴ which provides a normative and temporal structure for the organization of actions.⁸⁵ He expressly calls upon Parsons in his questioning of the extent to which individual social agents are able volitionally to determine the frames of meaning in which their lives are structured. Likewise, he clearly assimilates the concept of the 'unit act' in Parsons, which measures and classifies human action, not by the intrinsic or conscious intentions behind it, but by the extent to which it becomes relevant for one or other action system.⁸⁶ At the heart of the work of both Parson and Luhmann, in consequence, is the implication that the human subject is not a determinable or atomized centre of action: it is in fact 'a member of a plurality of groups', often in fact of 'many at the same time',⁸⁷ and it can only be adequately understood as it becomes relevant for distinct functional contexts.

In addition to this, Luhmann also follows Parsons's modified interpretation of Weber's concept of rationalization, and his account of the processes of evolution in modern society is clearly indebted to Parsons's theory of systemic differentiation and autonomy. Both Parsons and Luhmann view societal rationalization as a process through which distinct systems of action (Parsons) or communication (Luhmann) emerge and differentiate themselves, without individual or personal determination.⁸⁸ Through this process, they argue, the rationality which motivates and structures human life-forms exists independently of subjective-rational motivations, or of other types of consistently reflected self-interest, and each system develops

its own internal value-patterns and its own symbolic media, which are not necessarily transferable to other systems.⁸⁹

Despite his evident debts to Parsons, however, Luhmann also puts clear water between himself and Parsons's functionalism. At the core of Parsons's sociology is the argument that all systems in society are subsystems of *action*: that is, that all systems, including the social system and the cultural system, constitute 'generic types' of action in which human action is organized and related to other systems in distinct ways.⁹⁰ An account of a social system thus necessarily focuses on the modes of social exchange between individual members of a society: on 'the conditions involved in the interaction of actual human individuals who constitute concrete collectivities with determinate membership'.⁹¹

In this respect, Luhmann differs fundamentally from Parsons. In Luhmann's view, in fact, Parsons's work suffers from the deficiency that it is not finally distinct from the earlier individualistic models of human action and rationalization which it criticizes. Parsons still conceives of a society in its entirety as an integrated agglomerate of particular human actions (or acting units). In a society, he explains, distinct action systems are interconnected in a complex manner, and all subsystems contribute in different ways to the long-term preservation and independence of that specific (regionally localized) society. On this basis, he argues that the subsystems in society tend to organize action in a generalizable manner, and they always respond in certain predictable ways to the *behavioural emphases and characteristics* of the human beings who constitute them. Indeed, social systems are always centred on certain primary 'functional imperatives', which they must perform in order to maintain their own stability towards their environment, and which derive originally from the interactions between the human beings whose actions they organize.⁹² The four imperatives which all social systems must fulfil result from the general need for *pattern-maintenance*, from the general need for *goal-attainment*, from the general need for *adaptation* and from the general need for *integration*.

A social system, Parsons thus concludes, must be able to do four things. It must be able to sustain and institutionalize *values*, which give predictability to human actions; and it must be able to provide *motivations* for human actions, so that these contribute to the long-term stability of the system; it must be able to generate flexible *facilities and resources*, which allow the system to weigh up the costs and benefits of a number of different goals; and it must be able to produce legal *norms* (in the form of rights and obligations), which make possible the integration of subsystems of action. Where a social system cannot comply with these imperatives it necessarily runs the risk of malfunctioning, and it contributes to malfunctioning in all society. The stability or otherwise of a social system is thus to a large extent contingent on the ways in which it responds to and co-ordinates the actions of its constituent agents.

Unlike Luhmann, evidently, Parsons does not interpret the social system as a free-standing reality of communication which exists amid various other social systems or function systems. Instead, he proceeds from a study of 'empirical systems' based in the 'interaction of pluralities of human individuals'.⁹³ On this basis, he views the social system as a component of a specific society, and he concludes that the actions which it incorporates can be organized by means of values, motivations, resources and legal norms, so that they contribute to the security of that society. In Luhmann's perspective, however, this means that Parsons's model of socio-systemic evolution is still founded in a rather simplistic construct of original human attributes and behavioural orientations which provide imperatives for systemic organization. Indeed, for Luhmann, Parsons falls some way short of accurately characterizing society as a geographically and anthropologically decentred set of communications, and his critique of individualistic, volitional or utilitarian sociological approaches is, consequently, ultimately inconclusive. More fatally still, in fact, Parsons might (for Luhmann) also be accused of still adhering to a deeply politicized conception of modern society. He argues, for example, that the polity operates as a distinct functional subsystem of action, which has a privileged function at the level of goal-attainment, and which can intervene in other subsystems (especially the economy) and regulate the allocation of resources via boundary interchanges with them.⁹⁴ The differentiation of society, therefore, is always linked back to overarching political prerogatives.

The influences of post-war German sociology

In addition to the critical importance of Luhmann's tutelage under Parsons, however, there also exists a quite specifically German context for the development of his early work, before his encounter with the fully developed form of functional institutionalism in the USA. This context, although much neglected in English-language receptions of Luhmann's thought, can be found in the re-emergence of political debate in the Federal Republic of Germany during the 1950s and early 1960s, when Luhmann was approaching intellectual maturity. His formation can perhaps not be linked directly to one or other specific intellectual school or theoretical camp of the post-war era; however, it is nonetheless possible to discern contours of reflection in post-war Germany to which his work is related, and which decisively influenced his ultimate hostility to anthropocentric sociology.

Most crucially, it should be noted that debate on political legitimacy in the early Federal Republic of Germany after its foundation in 1949 was widely centred on questions directly relating to political humanism, natural rights and the anthropological origins of law.⁹⁵ Indeed, the combined traumas of National Socialism, the war and subsequent occupation by the allies gave rise to an intellectual climate in which refuge was often sought in religious, secular-religious or at least ethical-humanist concepts of

political obligation and right. For this reason, post-1949 Germany saw a wave of neo-natural-law theories, whose exponents claimed moral humanism as the necessary basis for all legitimate legislation.⁹⁶ Broadly neo-Kantian forms of ius-naturalism, often with a slight existential tone, were also highly influential at this stage, exemplified particularly by the political writings of Karl Jaspers.⁹⁷ Similarly, Hannah Arendt's anthropological conception of public-political interaction as the basis of political legitimacy also fed directly into political-philosophical debate through the 1950s, especially into debate on the nature of totalitarianism.⁹⁸ At this time a line of legal phenomenology also developed, which, strongly influenced by Gerhart Husserl,⁹⁹ asserted that right law is always embedded in the ontological structure of human existence, and that legitimacy in government depends upon the interpretation of law as a moral component to human existence which is inscribed in all temporal and historical social forms.¹⁰⁰ Elsewhere, in more mainstream political science and constitutional theory, it was widely argued through the 1950s that democratic government must be focused on a determinate image of the human being, and that the representative function of government is to give shape to a morally tenable conception of human existence.¹⁰¹ Such perspectives even found their way into the programmatic debates of the political parties.¹⁰²

For all their very considerable differences, therefore, the neo-humanist theories around Luhmann during his intellectual formation all converge on the claim that, if the disasters of totalitarian government are to be avoided, and if the political order of the Federal Republic was to be placed on a secure and legitimate footing, the human being, in its capacity as an ethical and political agent, must be proclaimed as the creator of laws. These perspectives on government also come together in the verdict that the human foundations of democratic rule are negated by *technology*, that technology undermines the representative competence of the democratically constituted state,¹⁰³ and that the technical resources of the modern state erode fundamentally that dimension of human life which qualifies it as *political*. In this view, consequently, in the modern technical state *politics* is usurped by *planning*, and the most basic moral requirements of political democracy – self-determination, ethical representation, rational argument and common will-formation – cannot be upheld.

Underlying this critique of technology and planning in the political theories of the 1950s and 1960s is the general conviction that the modern welfare state has subsided into a technical-corporatist apparatus. The welfare state, in this account, simply administers laws in accordance with the need to arrange appeasement for the different interest groups which it incorporates, and to plan the allocation and distribution of goods between the bodies which vie for a share of its resources. This view indicates that the modern welfare state, or planning state, has overseen a decline in the innermost quality of law itself. Indeed, the anti-technocratic theorists of

the early Federal Republic structured their critique around the claim that, in modern society, law no longer arises from broad-based social or political agreements, and that it merely provides a medium for technocratic prerogatives which obtain legitimacy only where they appear to secure the temporary support of lobbying organizations. In this perspective, therefore, modern law loses its *human* or *political* content, and it forfeits its defining capacity to represent human characteristics and principles. Owing to this 'crisis of legality', the political orders which pass such laws have no human origin, and, therefore, they have no bedrock of representative political legitimacy.¹⁰⁴

These anti-technocratic, anti-corporatist and neo-humanist arguments ultimately culminate in Habermas's famous and extremely influential verdict on the tenuous legitimacy of the political system of the Federal Republic of Germany – set out in *Structural Transformation of the Public Sphere* (published in 1962). He argues here that non-administered public interaction is the necessary foundation of true democracy, and that true legitimacy has its structural precondition in the opening of the legislature (perhaps via direct democracy) to norms derived from civil interaction in the public sphere.¹⁰⁵ Underscoring Habermas's argument is the prevailing intuition that human beings, if they are allowed to interact without technical or corporatist regulation from above, will show a natural interest in arriving at binding insights into the conditions of universally valid laws, and they will consequently order their political institutions as a direct representation of such laws. Habermas's early attempt to weld together aspects of political humanism, a radical variant on Kantian legal-subjective republicanism, and libertarian Marxism can be viewed as perhaps the most important critical touchstone in the development of Luhmann's thought. As is well documented, theoretical relations between Habermas and Luhmann became most publicly strained in the 1970s and 1980s; at this time, Habermas turned on Luhmann, vaguely accusing him of direct complicity with the neo-conservative movements gaining influence in Germany before Helmut Kohl's assumption of power in 1982,¹⁰⁶ and Luhmann responded in kind by ridiculing the (alleged) theoretical naivety of Habermas's state-society model and by rejecting his consensual, radical-democratic interpretation of political legitimacy.¹⁰⁷ Much of Habermas's later work revolves around an attempt, against Luhmann, to defend conceptions of rationality, autonomy and legitimacy, which remain attached to essentially humanist models of agency, reason and legislation.¹⁰⁸ His mid-career revitalization of Kantian moral philosophy, in the form of discourse ethics, in fact bears especial witness to his constant concern with Luhmann's work, and to his desire to protect the underlying ambitions of the Enlightenment from what he perceives as their reductive and schematic critique – both from Luhmann on the moderate right, and from Adorno and Horkheimer on the left.¹⁰⁹ However, the basic terms of antagonism between Habermas and Luhmann were already quite

manifest by the early 1960s, and in many respects Luhmann's first political writings can all be viewed – directly or indirectly – as responses to the perceived naivety of Habermas's legal and political essentialism in *Structural Transformation of the Public Sphere*.

Parallel to the broad redevelopment of political humanism in the early Federal Republic of Germany, however, there also emerged, even in the immediate aftermath of the war, a further influential line of thinking which set itself against the rebirth of humanist ideals at this time, and it is here that the earliest contours of Luhmann's political position can be identified. This theoretical line had its origins in the conservative circles of the 1920s and 1930s, and it showed clear traces of the socio-political ideas of Martin Heidegger and Carl Schmitt, and of the controversial perspectives of Hans Freyer's Leipzig School of sociology.

First, Hans Freyer himself remained an influential intellectual in the political and sociological debates of the 1950s, and his works clearly prefigure and shape some of Luhmann's main themes. In his work of 1955, *Theory of the Present Age*, Freyer sets out a functionalist account of modern social and political life, which both sets the tone for an anti-humanist vision of technological modernity and for a purely functionalist perspective on law and legitimacy. Freyer argues here that substantively determined conceptions of political legitimacy are no longer tenable in modern societies. In such societies, he argues, 'institutions have no "legitimacy"' – at least not 'in the sense that a complete life recognizes them as an essential order'. Instead of this, they obtain legitimacy only via their 'factual validity': by the extent to which, for whatever factual reasons, they are considered legitimate, and so secure obedience and compliance.¹¹⁰ For Freyer, thus, political legitimacy is the result of successful administration.¹¹¹ Democracy itself, in consequence, 'is not rule over people by people': it is merely the effective 'administration of things',¹¹² and the administrative functions of modern society have primary importance in upholding the minimal conditions of democracy. On this basis, Freyer identifies and affirms a drift away from legally, constitutionally or consensually enshrined power. Indeed, like Luhmann after him, he claims that the attempt to give a rationalized legal basis to institutions actually destroys their legitimacy, which depends on their operative untouchability.¹¹³

Most importantly for a discussion of Luhmann, Freyer underscores his vision of modern society with a series of anthropological arguments. The institutions of modern society, he explains, are 'secondary systems', whose functional directives no longer accord with integral human needs. Indeed, the citizens of society are merely the 'human substratum' of technical institutions; they are the neutral agents who are 'affected, integrated, occupied and provided for' by these institutions, but these citizens do not form a foundation by which the legitimacy of these can be gauged.¹¹⁴ Freyer thus develops a theory of 'open systems' which clearly anticipates Luhmann's

own sociology. The open systems of modern societies, he explains, are self-engendering technical organs which produce the internal conditions of socio-institutional stability without recourse to any substantive principles or anthropological essence.¹¹⁵ The human being presents itself to such institutions only as the 'functionalized person',¹¹⁶ or as the 'bearer of a distinct, schematizable and organizable interest'.¹¹⁷

Of perhaps greater importance for Luhmann, however, are the anthropological works of Arnold Gehlen, who had been a senior academic and dominant influence at the School of Administrative Science in Speyer, where Luhmann was employed as *Referent* in the early 1960s. Much early criticism of Luhmann's work, including that set out by Habermas, accuses him of simply redeploying Gehlen's concepts.¹¹⁸ Unsurprisingly, Luhmann rejected this accusation, and he often denied any fundamental debt to Gehlen. Nonetheless, in certain respects Gehlen was surely a very significant influence on the early Luhmann, and it is illuminating for the development of Luhmann's work to consider the relation between them.

Gehlen's essential sociological argument is that the institutions of modern society have their origins in what he terms the 'principle of alleviation' (*Entlastungsprinzip*). By this he means that social institutions develop in order to alleviate particular human beings of their original necessity of fulfilling needs. Institutions thus result from specific human instincts; they are objectivized forms which enact and manage originally instinctual emphases of behaviour. At the same time, however, institutions also gradually develop refined technical or technological mechanisms by which they detach themselves from the original instincts which they are designed to satisfy, and which then ultimately replace the human being as the organizing centre of social life. Institutions, in short, produce technological means to perform the primary tasks initially performed and required by humans, but in performing these tasks they disconnect themselves from their origin in the human being, and they acquire an independent reality which relinquishes its original foundation in, and accountability towards, the human being.¹¹⁹ The institutional reality of modern society is, therefore, characterized by an extremely high degree of technological development, in which technology has obtained a high degree of independence from its anthropological source. In this reality, most expressly, substantive forms of political representation are highly improbable. The modern state, Gehlen argues, can no longer claim directly to reflect the human needs out of which it originally developed, and it acts now solely as an 'aggregate of manifold modes of function',¹²⁰ and thus also as 'an extremely powerful alienated apparatus'.¹²¹

Despite his obvious political conservatism, Gehlen's social anthropology differs from that of Freyer in that, at least in its post-1945 form, its commitment to political authoritarianism is somewhat softened. In fact, although he clearly rejects representative or normative conceptions of political legitimacy, Gehlen suggests that the most plausible and adequate

condition of modern society is one of social polyarchy,¹²² in which distinct institutions tend to neutralize and balance each other out. In the plural condition of modern society, he explains, the traditional apparatus of politics is gradually replaced by low-level associations or administrative units,¹²³ and the centring of society on 'real macro-decisions' becomes less and less likely.¹²⁴ The overriding probability, therefore, is that a pluralized social order will develop in which power will be distributed between competing corporate groups, between which, over long periods of time, a certain equilibrium will be established. The institutional circumstances of modern society tend, in any case, to obviate the emergence of one supremely powerful political group, but they also prevent the articulation of substantive or universal-consensual principles of order. It is to such circumstances that Gehlen's famous characterization of modern society as 'the dictatorship of the standard of living' refers.¹²⁵

The most explicitly political version among these types of functionalist institutionalism which developed in the early Federal Republic is found in the conservative constitutional writings of Ernst Forsthoff, who also exercised a clear influence on Luhmann, and whose works were often approvingly cited by Luhmann – even in his later publications.¹²⁶ Forsthoff's main interest was to set out a critique of the welfare state, especially as it emerged after the war under the chancellorship of Konrad Adenauer. In his writings of the 1950s, Forsthoff argues that the constitutional organization of the legal state is undermined by the responsibilities for social amelioration and allocation which are imposed upon it. Indeed, like Luhmann after him, he warns that the attribution to the state of the primary function of distribution necessarily blurs the boundaries between legislature and executive, and so leads to the creation of an 'administrative state' which can no longer effectively function as a 'legal state'.¹²⁷

Forsthoff does not oppose the distributive definition of the state because it contradicts any ethical, representative or historical definition of statehood. On the contrary, he argues that in modern society it is not accurate to interpret the essential character of the parliamentary legal state as one of representation, or to identify its operations with broad-based agreements. Instead, the role of the modern state is simply one of 'function',¹²⁸ and this quality is undermined wherever the legal state is falsely organized around considerations of 'co-possession' or 'participation' which characterize the welfare state and welfare democracy.¹²⁹ Forsthoff clearly differs from Luhmann, as he subscribes to a much more obviously power-political conception of the functions of the state. Indeed, following his mentor Carl Schmitt, Forsthoff asserts that the 'power of the state is always domination',¹³⁰ and that a functioning constitutional state must necessarily possess a structural grandeur, such that it 'stands above the conflict of social interests'.¹³¹ In his influential work of the early 1970s, *The State in Industrial*

Society, he intensifies this line of argument. Here, unlike Luhmann, he insists that the 'differentiation of state and society' is the precondition of functional legitimacy,¹³² and he identifies the state as a supreme planning instance which deals exclusively with those functions which the other systems of industrial society cannot address.¹³³ Forsthoff thus obviously opts for a far more Schmittian argument than Luhmann is prepared (at least openly) to countenance. However, he shares Luhmann's later view that the modern state is nothing other than a functional planning apparatus, underpinned by the technical arrangements and differentiations of the constitution. He also pre-empts Luhmann's later argument that the state forfeits its operative legitimacy wherever it is required to assume extensive accountability for corporate bargaining, economic distribution or social engineering.

Although from rather different perspectives, Freyer, Gehlen and Forsthoff clearly share much common ground in their views on humanism, technology and politics, and all set the theoretical terrain for some of Luhmann's later views. All describe the demise of politics as a distinct substantial category of human agency; all explain the decline of value-rational legitimacy as the precondition of the modern political order; all, most importantly, examine the institutions of modern society as formal technical systems which have detached themselves from, and then stabilized themselves against, the human being itself. All, therefore, suggest that conventional notions of accountability, responsibility and consensual representation possess only very limited meaning in the modern political system.

Despite his indebtedness to these different perspectives within the early functionalist line of German political theory, however, Luhmann's greatest debt is probably to the conservative sociologist Helmut Schelsky. The importance of Schelsky in the development of Luhmann's sociology, and of his entire career, can in fact hardly be overstated. Schelsky approved Luhmann's first and second doctoral theses, he gave Luhmann a leading research position in Dortmund in 1965, and he then oversaw and supported the early stages of his professorial development at the University of Bielefeld in the late 1960s and early 1970s.

Schelsky's political and socio-anthropological position changes considerably over the duration of his career. In the immediate post-war period, his ideas were strongly marked by Gehlen's theory of alleviation. During this period he described the development of modern social institutions as the result of a functionalizing transformation in the composition of human existence, and he argued that only those institutions which reflect the purely functional character of modern humanity are 'likely to obtain stability',¹³⁴ and so to be accorded legitimacy. In his later works he tentatively suggests that there is a sphere of social and practical interaction which is not absolutely subject to functional or technical regulation,¹³⁵ and in which

determinately human resources might be identified. However, the writings through which Schelsky gained the greatest influence and prominence were those of the early 1960s, especially his (in)famous essay of 1961: 'The Human Being in Scientific Civilization'. In this essay he argues that the modern political apparatus is no longer ordered around the formation of a 'popular political will', and that the 'classical substance' of democracy has been superseded by a logic of functional competence. The modern political system thus legitimizes itself solely insofar as it can develop technical solutions to the problems which it confronts,¹³⁶ and politics 'in the sense of a normative will-formation' is no longer a sustainable concept.¹³⁷

In conclusion, the debates on technology in politics which surrounded Luhmann and marked his intellectual formation in the 1950s and 1960s were sharply divided between neo-humanist ethical perspectives and functionalist arguments. The former attempted to reinvigorate humanism as the core of a political doctrine, while the latter described the withdrawal of the human being from the decisive arenas of political agency. This latter theoretical line might in fact ultimately be seen to culminate in the works of Luhmann – for his work can, in certain respects, be viewed as the apotheosis of the political-sociological arguments of the functionalist theorists described above.¹³⁸ These theorists all generally pave the way for Luhmann's later account of a society which cannot be centred on any stable foundation of human reason or agency. More specifically, however, they all also indicate that the conditions of modern society are not legislated by the rational faculties of the human being, and that commonly held representative, consensual and anthropological notions of political legitimacy are misguided: all thus organize their theories around an attempt to break apart the traditional coupling of legitimate political representation and the legislative human being. Instead of this, all claim, technology is the foundation of legitimacy in modern politics. The legitimacy of the modern state, each argues, is a technical condition, and the laws which characterize and perpetuate political legitimacy cannot be made transparent to determinable human interests, needs or agreements. Each of these theorists argues that the modern state obtains legitimacy on the basis of its functional adequacy to the complex burdens placed upon it by its internal and external environments. It passes laws simply as objective responses to such burdens, and these laws cannot be measured by subjective criteria: certainly not by criteria proposed by human reason in the form of the legal subject. Each of these theorists also draws more or less obviously reactionary political conclusions from their assessment of the demise of substantial political legitimacy. Freyer and Forsthoff favour a more authoritarian argument which supports the liberation of the state from its social commitments in the welfare state, and which hopes to reconstruct the state as a strong planning apparatus. Gehlen and Schelsky fall into line with the more general culture of political acquiescence in post-war Germany, and they describe the modern state merely as

a technically founded apparatus which is beyond the direct control of citizens and politicians alike.

The origins of Luhmann's political sociology can be identified in part in the writings of these post-war sociologists, perhaps to a greater extent even than they can be found in Parsons. Despite this, though, in many respects Luhmann's sociology also makes a direct break with many aspects of such early institutionalist thought. Indeed, in his debates (implicit or explicit) with these theorists he indicates once again that these anti-humanist arguments remain still entangled in the misconceptions of humanism, and have not yet separated themselves from a residual focus on the human as the centre of social reality.¹³⁹ What generally characterizes these social and political theorists is that all of them, either implicitly or explicitly, consider the post-human, post-legitimatory condition of modern politics to be the outcome of a process of cultural degeneration. Indeed, each of these views is marked by a wistful reflection on the demise of the human in contemporary politics, and even on the loss of human substance and *authority* as the central focus of modern society. Rather perplexingly, for example, Schelsky complains about the 'metaphysical homelessness' of the modern human being;¹⁴⁰ Hans Freyer argues that human 'alienation' is the defining attribute of modern social existence;¹⁴¹ Gehlen worries about the endemic mediocrity and boredom in modern life.¹⁴² Even Forsthoff laments the inability of the modern institutions to provide a political expression for true 'humanity'.¹⁴³ For this reason, even where these sociologists and political theorists describe modern systemic conditions as an essentially contingent reality, they still suggest nostalgia for a specifically human politics; they still express a lamentation on the loss of integrally human political power, and their acceptance of the technological death of human politics is never absolutely conclusive. Like Heidegger before them, therefore, these positions, for all their anti-humanist reflexes, are still components of a line of reflection on human essence, human character, and human authority and obligation, and all belong to the conservative legacy of metaphysical-humanist political reflection. Even when they reflect on the dissolution of legitimacy, of coherently valid human power and of substantively accountable human rationality, all these views are still committed to the last traces of specifically human (or post-human) structure in modern politics. It is for this reason that they incline towards authoritarian models of social organization, for the power and authority of technology at least provide a *semblance* of founding order, structure and essence.

Luhmann's own position is significantly distinct from the more or less open authoritarianism manifest in such views. His thought carries no trace of nostalgia for a cultural or political condition of integral humanity, and his sociology relinquishes all attachment to anthropocentric accounts of institutional functions in modern society. For this reason his thought is also relatively unsusceptible to visions of society which embrace technology as

a new type of authority with any particular or residual claim to legitimacy. His attitude to the disappearance of the human being from conceptions of legitimacy is merely one of neutrality and observation. The institutional fabric of modern society, he argues, owes its character and evolution only to *society* itself, and to the fluctuating interdependence of the function systems in society – not to the human beings from which society might in some remote way originate. The normative indifference and operative autonomy of function systems cannot, consequently, be explained by examining changes in a human or cultural condition apparently underlying these systems. Society constructed around social systems is not in any palpable way a *human* condition, and it is not causally produced out of human interaction or human directives. All the ‘partial systems of society, all organizations and even the whole political system’, he states, simply ‘exclude the human being as a totality of proper identity’.¹⁴⁴ The technological or technical reality of the modern political system does not, therefore, mean, in some distantly essentialist manner, that contemporary human beings have suddenly become alienated from themselves and from their representative institutions. Similarly, the increasingly technical functions of the modern political system do not indicate that new modes of authority and coercion have developed which supplant the more vital or organic nature of pre- or early-modern political life, and expose human beings to unprecedented or specifically challenging techniques of domination. On the contrary, technology and functionality, in Luhmann’s view, do not characterize a condition which has any special implication for human beings: there is certainly no fundamental antagonism between technology and humanity – nor ‘between technology and democracy’.¹⁴⁵ Technology, or the technical communication of power, is simply one aspect of the evolved reality of social contingency, and it is, therefore, not an issue which need unduly preoccupy humans – either positively or negatively, either as the beginning or end of legitimacy. Indeed, theory (either humanist or technocratic) which gives special weight to technology merely demonstrates its own conceptual backwardness.

The death of human politics is, for Luhmann, a condition in which society is liberated from the traditional metaphysical illusions of politics – from all archaic ideas of representation, obligation and accountability, from all implied identity between legitimacy and reasoning humanity – and in which the plurality of social freedom can develop unhindered by such illusions. Luhmann’s alternative to institutionalist conservatism thus hinges on a construction of society in which all metaphysical and anthropocentric traces have finally been eradicated from politics and law, and in which political power, interdependent with law, evolves simply as an occurrence of constant positivity. This evolution could always be different from what it is, and consequently no special authority can be claimed for it.

Law and the nature of democracy

The question of liberalism

In our reflection on these issues, however, we ultimately find ourselves confronted yet again with the theoretical problem which is at the heart of Luhmann's political sociology. As we discussed above, the great paradox in Luhmann's political thought is that he argues for the *practical reality* of democratic liberalism (social plurality, legally enshrined democratic legitimacy, private autonomy free of political coercion) while at the same time dismantling its *theoretical foundation* (the construct of the rationally self-legislating human being). This paradox reappears once again in the theoretical premises of his work. As we have explained above, Luhmann extends the anti-Enlightenment theoretical principles of non-Kantian social theory, and his critique of humanist rationalism revolves around a deconstruction of the human being itself, construed as a centre of political order. Yet at the same time he also endorses the differentiated plural reality usually associated with the consequences of the Enlightenment, and he is clearly (as in the above examples) opposed to paradigms in political theory which use the critique of social and political rationalism as a pretext for returning to manifestly pre-Enlightenment models of power and authority.

Beneath the complex and dialectical nature of his perspective on the Enlightenment, however, it is still important to question the particular facets of the model of legitimacy and legality which Luhmann sets out, and it is crucial to consider whether his concept of sociological Enlightenment does indeed, as he claims, open a theoretical horizon which marks an advance both on the classical Enlightenment and on the classical counter-Enlightenment. For all his ground-breaking attempts to reflect the origins of legitimacy and legality in the disembedded reality of post-rational, post-humanist systemic contingency, Luhmann does not simply escape accountability for the great questions of modern political theory – or indeed for the great questions of the Enlightenment, and of its offshoot in liberalism. His theory must, therefore, still be questioned, first, on the extent to which it plausibly provides an account of democracy, and, second, on whether his conception of law as a positive medium which (among other functions) communicates power effectively secures the reality of political legitimacy in the manner in which he envisages. Indeed, in this light it is also necessary to inquire whether the construct of sociological Enlightenment does truthfully differ quite as fundamentally from the counter-Enlightenment as Luhmann himself is keen to suggest.

In order to pose and respond to these questions, it is necessary briefly to revisit and reconsider the question of the relation between law and politics in Luhmann's sociology. As discussed above, at a philosophical level,

Luhmann argues that the basis of function systems in modern society does not result from the prescriptions of a rational legal subject, but instead from each system's autonomous and contingent self-reproduction. This applies to both law and politics, both of which evolve and are sustained by their own self-referring communications. At the level of institutional politics, however, Luhmann also argues that, at least in the political system's own account of itself, the concrete origin of law is in the *administration* (*Verwaltung*), and that the raw substance of law (that is, before it has been processed by the courts) is indeed authorized by a particular series of legislative roles in the political system. The administration transforms power (as policies) into law, or into forms which are likely to be accepted by the legal system as law, and it is the administration which plays the key role in maximizing the chances that power, as law, will be commonly accepted as legitimate. The administration thus has the greatest importance in securing the legitimacy of the entire political system. As set out above, the balance in the generation of legitimacy between *politics* (in the strict sense) and *administration* is at times rather ambiguous in Luhmann's thought, and both have a degree of responsibility for its production and preservation in modern democracies. In some respects the administrative formalization of laws, though crucial for the stabilization of the system, might be viewed as a subsidiary aspect of the self-legitimization of the political system. Policies prepared in legal form by the administration, Luhmann indicates, derive their original legitimacy from the themes, formulae, symbols and options which are publicly tested in the highest symbolic arenas of politics; these policies therefore, however indirectly, can be traced back to high-level policies, or to the strictly political parameters (decision-premises) with which they must comply. The validity and acceptability of laws are therefore contingent upon the extent to which they articulate political decision-premises in a form which will be likely to secure plausibility and compliance. However, beneath the precarious overarching resources of legitimacy created and supported by politics, the chief practical task of securing legitimacy clearly belongs to the administration, which transforms the abstract quantity of legitimacy into workable forms which are assimilated by law as laws, and so maintains the probability that legitimacy will be conserved.¹⁴⁶

In according this role to the administration, Luhmann does not merely refer to the political bureaucracy in the narrow sense of the word. Administration includes a number of very diverse fora, and it also includes areas of political competence which are more usually assigned to the legislature (for example, activities such as the drafting and preparation of bills, debate on the wording of statutes, referral of bills to second chambers). Indeed, most functions of parliament, and even many departments of government itself, are actually components of the subsystem of the administration. All points in the political system which might be seen to be engaged in the translation of political resources into legally acceptable or plausible forms – all points which are

commissioned to produce binding decisions in accordance with political criteria – have a primary administrative character. Despite this extended use of the word, however, in many respects Luhmann's definition of administration as the legislative heart of the political system is very close to what would more commonly be described as a model of *government by political executive* – or perhaps as *government by executive bureaucracy*. Legitimate law, he argues, has its primary (albeit remote) origin in the highest symbolic resources of legitimacy produced by top-level personal decisions, and through the competitive distribution of authority between political parties. However, law also results (more immediately) from the complexly ramified series of offices, councils, delegations, discussion groups, public debates, closed deals, bureaucratic rulings and elected assemblies which evolve from one moment to the next at various points beneath the highest symbolic arenas of the political system, and which have the function of elaborating decisions into legally acceptable media.¹⁴⁷ On this reading, consequently, Luhmann's theory of politics might be seen to outline a multi-levelled executive which is symbolically crystallized in *politics*, but which is functionally centred on *administration*. *Administration* cannot function without *politics*, for *politics* communicates legitimacy and power in the form of decisions which affect the content of laws. Yet *politics* cannot function without *administration*, for *administration* gives universalizable (legal) form to power, and it mediates between power in its pure symbolic form (*politics*) and its addressees (the *public*). Together, therefore, *politics* and *administration* constitute an immensely dense and interwoven executive bloc which has ceaselessly evolving responsibility for stabilizing the political system via the transmission of power as law.

It is important to note, additionally, that in his historical reconstruction of the development of *politics* and *administration* in the modern political system, Luhmann clearly emphasizes that the first and founding component of the political system was the administration. In its original function, he claims, the political system was simply an apparatus for the administrative solving and regulating of problems by means of decisions. The emergence of 'party-based politics' (*politics* proper) as an arena of symbolic consensus-production was only a secondary (or even tertiary) evolutionary phenomenon. This became necessary, first, when the administration began to trigger levels of complexity which could not be managed without public compliance,¹⁴⁸ and then when, owing to its complexity, it began to require freedom and latitude to order its relation to its environment through the transmission of power as positive law – not through substantive claims to legitimacy or through the hierarchical application of power. The development of 'a particular sphere of politics, . . . which concerns itself with the forming of political support for various programmes and decisions' was thus initially an evolutionary occurrence resulting from a historical process in which 'the decision-making criteria and programmes of the bureaucracy become variable', and in which 'law is positivized'.¹⁴⁹

Politics, in other words, only emerges as a functional subdivision of the political system because the *administration* requires resources of legitimacy which it cannot on its own engender. Politics develops contingent criteria of legitimacy – for example, ‘election victories, maximization of votes or maximization of posts’. These, in turn, create a framework in which the administration is enabled to continue with its own primary obligation, which is to ‘make consistent decisions’,¹⁵⁰ and to apply these as law. On a most fundamental level, therefore, Luhmann indicates that all politics is originally administration, and that no substantive or specific character attaches to the symbolic resources of legitimacy produced in and as politics. These are simply options and fictions which are necessitated by the administration, and which give the administration freedom to continue its work relatively untroubled by thematic questions or by matters of principle.

In this, in sum, Luhmann argues that there is a direct and constitutive relation between administration and democracy. First, he suggests that the entire systemic structure of modern democracies develops as a response to the fact that the administration requires greater internal differentiation, that it has to unburden itself of the direct function of producing legitimacy, and that it needs freedom to communicate power in legally adequate media. This leads to the partial separation of executive and legislative functions in the political system, and it stimulates the processes of legal second-coding and self-testing described above. Democracy, in this view, is created by administration, because the administration needs democratic forms in order to relieve itself of tasks which impede its primary functions of decision-making and transmitting power through legislation. Second, then, Luhmann explains that in developed modern democratic societies the administrative executive is the location which upholds the conditions of democracy, and which fulfils the role of checking and observing power, which theorists of democracy more usually ascribe to the legislature. Administration, he states repeatedly, is the point in the ‘official circuit of power’ where operations assume legal form and where the legitimacy of decisions is subject to ‘legal control’.¹⁵¹ The administration, consequently, is not only accountable for transmitting policies in universal form; it also ensures that laws are congruent with the people to whom they are applied, it registers frictions between the people and the laws, it filters information from other systems, and it attempts to ensure that political decisions are adjusted to these. On these grounds Luhmann’s political sociology can be seen to revolve around a theory of *executive democracy*, which identifies the symbolic resources of the highest executive, and, above all, the complex interactive subsystem of the administration (the bureaucracy) as the basis of democratic organization.

It is in this facet of his political theory that the practical implications of Luhmann’s deconstruction of legal rationalism and legal subjectivity in the Enlightenment become clearest. By defining the administration as the legislative organ of politics, he transfers the democratic origin of law-making

from the consciously reasoning individuals who form the political constituency, and who are represented in the legislature, to the administrative mechanisms and functional exigencies of the political apparatus and the political executive itself. From the perspective of the political system, law results only from the complex interdependencies and communications between politics and administration, and legislation is merely an internal operation of the political system through which politics applies power and preserves its legitimacy. Above all, therefore, Luhmann argues that laws (in the form of legislation and other statutory regulation) can never come from outside the political system itself. Laws might have the capacity formally to check power, as the legal system inevitably communicates its own autonomous references when it picks up directives from politics: administrative rulings do not finally become law until they are communicated in the legal system. Yet, most crucially, law, as an autopoietic system, cannot *constitute* power; nor are the legislative (administrative) functions of politics able to alter power or place any fundamental external constraints on power. Indeed, Luhmann is quite clear about the limitations of law (and laws) in relation to power. In modern societies, he explains, power is always coded by law, and 'the use of power is tied to a prior decision [*Vorentscheidung*] as to whether it is lawful or non-lawful'. However, this second-coding of power is 'in itself not a limitation of power, but merely its formal condition'.¹⁵² Laws, consequently, operate as the universalized form of power, but in key respects they remain subordinate to power. The creation of laws is never the primary dimension to the political system, and it is first in the transmission of power, and only secondarily in law-creation or self-limitation through law, that government forms and stabilizes itself.

In the strict terms of his own theory, Luhmann might plausibly claim that the categorization of his political theory as *executive democracy* badly simplifies and distorts his real theoretical intentions. Indeed, it would obviously be incorrect to claim, as some less cautious critics have done, that Luhmann wishes to set out an apologia for a simple prerogative system of government. Certainly, he often sets himself against interpretations of his work as a theory of the strong executive or the strong state, and he also repeatedly indicates that even the state's 'self-description as the state' tends to obstruct its ongoing self-reproduction by fixing it on a hierarchically ordered set of functions.¹⁵³

However, viewed by standards external to his own theory, it can be argued that Luhmann only accounts for that institutional reality normally known as democracy by describing it as the technical outcome of the internal self-differentiating evolution of the political system. Democracy is the form in which the political system explains itself to itself as it reacts to, and holds itself at the level of, the internal and external complexity which, in modern society, it faces and constructs. The features we associate with democracy, thus, are simply those external characteristics which the

political system gives to itself as it develops techniques for organizing and supervising its own complexity. In consequence, the institutions of democracy (parliaments, judiciaries and so on) are in fact nothing more than components of the administrative executive itself, and they develop only to the extent that the executive requires them for producing and communicating legitimate power. In a democracy the highest unifying creation of legitimacy is the province of the symbolic arena of personal leadership and party politics. Administration, by contrast, is made accountable for imposing standards of efficacy and consistency (laws) on politics, and so for communicating decisions in legitimized form. Yet this democratic division in the political system never envisages democracy as anything beyond a problem of systemically internal complexity-management. In Luhmann's account, in short, *democracy is simply the reality of the system as it responds to and organizes its own complex reality*. Democracy cannot derive substance from any source outside the political system, and it cannot channel extra-political principles into politics (as law, perhaps) because democracy is simply a condition of politics itself, in which the political system maximizes its own ability to address its own constantly escalating complexity and to transmit power without overburdening one particular point in its communications.

In its practical implications, therefore, Luhmann's account of the political system offers only a very limited theory of the positive-democratic or liberal-democratic legal state. Crucially, this theory neither places the restriction of arbitrary power under the independent authority of laws, nor does it bestow countervailing power on institutions (e.g. parliaments, chambers of review, regional legislatures, councils and so on) which possess free-standing legislative power. The restriction of power in fact occurs only because power needs to restrict itself in order to be communicated in a legally acceptable form.

Democracy and power

Luhmann clearly sees himself as an eminently modern theorist, for whom the democratic reciprocity of power and law is of central theoretical importance. 'Effective power', he states, 'must now be lawful power. The separation of powers only lets lawful selections through, and it filters out non-lawful selections.'¹⁵⁴ Nonetheless, his administrative theory of legislation can give only a contextual account of the content of law, and it can only quantify the validity of law by considering the functional efficacy of its contribution to the self-unburdening and the self-stabilization of the political system. This means that it is erroneous to assume that the founding or defining principles of a political order can be made in the form of laws which then set enduring norms to which the state is accountable. Politics can no longer 'presuppose the foundations of its decisions', but must 'create them'. It must 'produce its own legitimacy in a situation which is defined as open and structurally undetermined in respect of chances of

consensus and desired results'.¹⁵⁵ For this reason, Luhmann claims, it is misguided to think that legislation can alter or influence the character of the political system. Legislation, in practice, might be seen most accurately as the gradual reflexive adjustment, usually via slight alterations to administrative norms, of the subsystems of politics and of administration to their own internal and external environments, which include the *public*. The purpose of such legislation is always to secure 'an almost motiveless, unthinking acceptance of binding decisions'.¹⁵⁶

On these grounds, it is reasonable to ask whether Luhmann's theory of society does truly account for a sustainable model of democracy. Indeed, it is also legitimate to ask whether a democracy which does not include a discursive-rational or participatory shaping of the laws, which sees legislation as the administrative communication of political power, can actually *be* democracy. If it is possible to identify irreducible principles in Luhmann's view on the political system, he might be taken to indicate that the first and original fact of politics is the existence of a decision-making administrative apparatus which applies decisions through the medium of power. Owing to the processes of differentiation, evolution, positivization and, not least, pacification which characterize the democratic conditions of political modernity, this apparatus comes to deploy power in distinct ways, such that power is increasingly recursively communicated through all three subsystems of politics: politics, administration, and the public. As a result of this dynamic, power gradually allows itself to be second-coded by law. Despite this, however, the second-coding of power by law in the democratic legal state does not imply that law can actually decide over power, or that the legitimacy of power hinges upon its accountability to substantively determined and prescribed standards. On the contrary, for all his apparent closeness to the legal-state perspective, Luhmann is quite clear that power is always *before the law*, and indeed that power always possesses a certain primacy over law. The circular recursivity of power in modern society does not mean that power has lost authority, or that obedience is not due to power. In fact, it does not even imply that law can prevent its own exploitation to nefarious ends by the bearers of power.¹⁵⁷ The second-coding of power by law in modern democracies simply creates a situation in which power exists in a 'circuit' which is not attached to specific people or locations. This itself merely means that, seen over a long period of time, it will tend to be rather improbable that one person, one party or one movement will be able to install itself as a rigid organizational centre, with a monopoly of power.¹⁵⁸

It is in these respects, consequently, that Luhmann's critics have the greatest justification in their accusation that his theory of politics, like that of his institutionalist precursors in post-1945 Germany, actually marks a covert return to the political theories of pre- or counter-Enlightenment Europe, not a decisive move beyond these. As discussed above, in one guise or another the history of Western liberalism, from Kant through to Habermas and

Rawls, might be seen to rely on the postulation of a certain human quality of *legislative reason*. This is expressed theoretically in the complex philosophical history of the legal subject, and it is manifest practically in the core liberal-institutional conception of the legal state, which stipulates that the legislative body should be separated from the executive and that the executive should be formally and substantively answerable to the legislature. On the broadest theoretical level, moreover, liberal-democratic theory always culminates in the question of the relation between *legality* and *legitimacy*, and of the conditions under which legality can *produce* and *safeguard* legitimacy. Luhmann's position in relation to these questions is obviously highly ambiguous.

In this respect, in fact, it might (however schematically) be argued that the great dividing line in modern political philosophy falls between a Kantian-liberal legal-state tendency, which argues that legitimacy relies on (or is co-emergent with) a prior substructure of legality, and an Aristotelian-conservative tendency, which claims that legitimate order comes before law, and that the contents of legitimate law cannot be stipulated by prior or invariable criteria. Clearly, Luhmann is not in any obvious way an Aristotelian philosopher. In fact he rejects Aristotelian political ideas on several quite separate counts. First, he dismisses Aristotelian philosophy as a false conflation of politics with fundamental features of human nature and historical character; he thus derides the naivety of neo-Aristotelian or communitarian theorists,¹⁵⁹ and he speaks mockingly of those who seek to resuscitate Aristotle's politics in modern complex societies.¹⁶⁰ Second, he often echoes aspects of Kantian philosophy, especially concerning the virtuality and formality of social norms and laws (hence his sporadic closeness to legal-state theory), and so he rejects the Aristotelian claim that laws derive directly from practical agreements between citizens. Likewise, third, the importance which he ascribes to private and economic autonomy, coupled with his sporadic depreciation of politics altogether, clearly opposes Aristotle's privileging of public or political existence as a most noble region of human self-expression. Despite this, nonetheless, Luhmann still shares a certain element of anti-individualism and anti-formalism with Aristotle, and he sets out various convictions which are most definitely not at odds with the Aristotelian line of thought. These are, first, that the law cannot prescribe abstract terms of legitimacy to politics; second, that political legitimacy precedes valid law (that there are no pre-political entitlements or rights); and, third, that the laws serve to reflect and stabilize the conditions of political legitimacy in the form which it assumes at any given moment in time.¹⁶¹ In this light, paradoxically, Luhmann might be seen as a theorist of the legal state emerging from a tradition which habitually rejects the legal state. Or, at least, he might be seen as a thinker in the tradition of early German positivism, who defines the political apparatus as a legal person, with legal responsibilities and obligations, but who does not include, in this sense of

power's obligation to law, substantial preconditions regarding the content and extent of the legitimate exercise of power. Like Carl Schmitt before him, therefore, in the juxtaposition of law and politics, Luhmann argues that, in the political system, politics inevitably comes before law, and that law has a very limited capacity to make prescriptions for politics.¹⁶² A fundamental function of the entire political system, and especially of the administration in the political system, is, he argues, 'to ensure the acceptance of still indeterminate, random decisions – thus, to ensure the *legitimacy of legality*'.¹⁶³ In other words, the content of legislation is established prior to legislation, and legislation merely has to make acceptable legal sense of this content.

The political system is legitimate, consequently, wherever it can pass its rulings off as legitimate: wherever these decisions act as trusted and accepted universal motives for obedience. The political system obtains this goal because of the complex processes of symbolization, transmission, second-coding, proceduralization, adjustment and complexity-management described above, not because of what the laws themselves mean. In fact, law acquires legitimacy only where it is recognized and accepted as a reliable and plausible motivation for compliance. Where this occurs, Luhmann explains, 'in a central question of human co-existence' – that is, the legitimacy of public power – 'arbitrariness becomes an institution'.¹⁶⁴

In sum, the main objective of post-Enlightenment political philosophy is to account for the balance between legality and legitimacy, and so either, after Kant, to show how the constitution of legitimacy can be measured and controlled in the medium of legality, or at least, after Hegel, to explain how legitimate power produces laws which can command some degree of universal recognition. Luhmann also recognizes this issue as the major issue in modern political philosophy.¹⁶⁵ However, he also provides a radically new perspective on this key question. Indeed, he fundamentally reorganizes this most important political debate by claiming that *legitimacy* is always an arbitrary variable, depending on the system's momentary contingent self-stabilization as order, and that *legality*, far from being the gauge of legitimacy, is merely the universalized medium and transmitter of this variable. It is for this reason that Luhmann, to a large extent, replaces *politics* with *administration*. Administration is the place where virtual forms of legitimacy can become virtually valid laws, and as such it is the defining point in the operations of the political system.

The question, however, of whether this is still Enlightenment, or indeed whether Luhmann's attempt to think *beyond* the Enlightenment does not actually fall *behind* the Enlightenment, remains open.

5

Risk and the Environment

In this chapter we turn to Luhmann's writings on risk and environmental issues set out in his books *Ökologische Kommunikation: Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen* (1986)¹ and *Soziologie des Risikos* (1991).² Our reasons for devoting a chapter to these two books are twofold. In the first place, they offer an opportunity for readers with some knowledge of Luhmann's theoretical ideas concerning politics and law to see how these may be applied to the actual operations of the legal and political systems in the context of today's functionally differentiated society. Secondly, and more generally, in these two books Luhmann holds a mirror to two of the most important preoccupations of modern society. Of course, Luhmann would never have claimed that the image reflected represented absolute truth or accuracy, since no one way of making sense of the world could ever capture the complexity of all possible communications. Nevertheless, in these two books he does invite society to see itself in terms which do not depend upon the flattering and distorting images to be found in the paradoxical self-generated descriptions of its function systems. Equally, Luhmann's analysis does not rely upon claims made by these systems for their own rationally based achievements or their ability to control the future through reasoned decision-making. Instead, what he offers us is a unique account of society's struggle against the odds to find ways to make sense of events which lie outside the complexity of communicated meaning which constitutes society.

Luhmann's book on risk is clearly a reaction to the popularity of Ulrich Beck's book *Risikogesellschaft: auf dem Weg in eine andere Moderne* (*Risk Society: Towards an Alternative Modernity*) which was published in German in 1986. However, Luhmann's conception of risk as a social construct and the perspective it takes towards the problems that risk presents to modern society, and the possible solutions to these problems, could hardly be more different from those offered by Beck. As we have made abundantly clear in Chapter 4, he does not share Beck's dystopian vision of the destructive effects of scientific and technological rationality and the

domination of politics by technological considerations. Furthermore, Beck's seeming faith in the Green movement and mass participation in decisions concerning the future of society contrasts markedly with Luhmann's total scepticism concerning social movements, protest and the politics of participation.

In contrast to Beck's guarded optimism for the future, Luhmann's is a none-too-reassuring message, and one which flies in the face of all idealist or utopian solutions to the world's problems. Politics and law, which, according to idealistically inclined commentators on the human predicament, should be working symbiotically and in tandem to solve the world's problems, are reflected in Luhmann's mirror as operating very much within their own frameworks upon a reality which they themselves have created. And these operations, far from embodying a spirit of co-operation and mutual understanding, all too often conflict with one another and limit each other's effectiveness.

Luhmann's descriptive accounts of the operations of law and politics, as set out in Chapters 2 and 3 of our book and our discussion of the notion of 'autonomy' in Chapter 4,³ give some indication of the enormous achievements and, at the same time, substantial limitations of these systems once they had drawn clear of the anchorage of universal truths and supreme authority, and become free-floating, autopoietic systems, capable of constructing their own reality, their own understandings of society, nature and individual consciousness. What we examine now are, firstly, the ways in which these two systems operate within the context of a general social communicative framework of 'risk' and, secondly, how they respond both individually and in conjunction with one another when faced with a specific problem – the degradation of the natural environment and the danger of ecological disaster. These general specific perspectives, as we shall see, become closely intertwined whenever environmental issues are understood as 'environmental risks'.

Risks and dangers

Luhmann begins with the belief that society's 'obsession . . . with extremely improbable but potentially severe damage or loss can be explained in terms of communication, i.e. in sociological terms'.⁴ Moreover, he argues, this sociological account is capable of occurring against a background of 'entirely normal, plausible postulated reality: namely the future depends on decisions made in the present or, if already made, that have not been revised'.⁵ Luhmann sets out to explain this social phenomenon of risk by examining 'risk communication'. This is not the same as engaging with other social commentators in the rational calculation of risks, assessing the likelihood of their occurrence in various areas of social activity, for Luhmann is not interested in whether risks do or do not exist in some objective way.⁶ His

concern is rather to analyse sociologically the general discourse of risk which permeates today's representations of the future. For Luhmann, it is '[r]isk communication itself' and not the existence of risks that 'has become reflexive and thus universal'.

For his sociological analysis Luhmann chooses the conceptual distinction between risk and danger, rather than that of risk on the one side and security or safety on the other, which is commonly held to represent the choices that one must make. He acknowledges that security as a counter-concept to risk has wide usage in political rhetoric 'as a variation on the distinction desirable/undesirable' and also, in 'a somewhat more refined version', among safety experts, who impose arbitrary standards of social acceptability upon calculations of the probability of future events.⁷ However, he finds the concept of security or safety less useful as a sociological tool than might first be apparent. 'The apparently "safe" alternative' implies the double certainty that no loss will occur and also that there could not possibly have been anything to be gained by choosing the risky alternative. Yet, what may have appeared the 'safe' path could have resulted in a lost opportunity which one may well regret. 'This is a question that will frequently be impossible to answer if the opportunity is not taken up . . . It is not possible to forgo an uncertain advantage with absolute certainty'.⁸ Not investing in the stock market, for example, may appear as a safe option, but it may also be seen as a risk of missing the opportunity for making money or of losing money through inflation. As an analytical device, therefore, security does not work effectively as a counter concept to risk.

Secondly, it may be possible for those, such as safety experts, who see themselves as making risk/security or relative risk/relative security decisions to perceive things in terms of facts and information, so that safety or security (or an estimation of their probability) may appear possible, provided sufficient information is available. The critics of these decision-makers, those who, as 'first-order observers' share with them a vision of what they take to be the real world, may, of course, accuse them of not obtaining enough information or information of sufficient quality. Yet this shared understanding of the parameters of the situation does not hold 'for a second-order observer who is observing another observer *to see what the latter can and cannot see*'.⁹ Security or safety as a counter-concept to risk cannot, therefore, do justice to the situation of second-order observers.

For these reasons Luhmann in his analysis of risk turns to the conceptual distinction *risk/danger*, which sees risk defined as 'loss which social processes attribute to decisions' and danger as arising in cases where 'future losses are seen not at all as the consequences of a decision that has been made, but are attributed to an external factor'.¹⁰ To give an example, travelling to a country where terrorism is rife is likely to be seen as a risk, while the possibility of being struck by a meteorite is likely to be interpreted as a danger.

The most important advantage arising from the risk/danger schema,

according to Luhmann, 'is in the concept of attribution, for this concept relates to second-order observation', for '[i]t is now possible to observe how another observer makes attributions, for example, internally or externally in relation to himself or to others, and either to constant or variable factors, to structures or to events, to systems or to situations'.¹¹

This means that the distinction risk/danger is not in any way fixed in advance. Being killed by an earthquake or emotionally devastated by marriage breakdown may usually be seen as dangers – that is events which are not attributable to decisions – but before such events occur and attributions made as to their causality, 'it remains open whether [they are] to be regarded as a risk or as a danger'. If we want to know which is which, Luhmann tells us that 'we must observe the observer'. In principle it is always possible to see every loss as avoidable, 'by making a decision, thus classifying every loss as a risk. For example, we could decide to move from an earthquake-prone area, or not marry'. Yet '[t]his means that one cannot avoid risks if one makes any decision at all'. Luhmann points out that:

We may calculate in any way we wish to do so, and in many cases we may arrive at unambiguous results. But these are only aids to decision making. They do not mean that if we do make some decision or other risks can be avoided.

Furthermore, 'in the modern world not deciding is, of course, also a decision'.¹²

What Luhmann is concerned with, therefore, is not whether any specific assessment of risk is right or wrong, accurate or inaccurate. Nor is he interested in the reasons that some events are commonly regarded as 'risks' and others as 'dangers'. His concern is rather in observing the observers of future uncertainty and describing how in modern society the concept of risk is used to link what might happen in the future to present decision-making. Of course, this future orientation of decisions ('present futures') relates to 'future presents', that is to how decisions made in the present will be regarded in the future. Events that have already taken place present opportunities for causal attributions which relate (or blame) their occurrence on past decisions. These attributions in turn feed into present decisions which are seen as having repercussions for the future, so that the avoidance or minimization of risk becomes a product of past understandings of causality, with the result that it proceeds in a self-referential manner.

Since, for Luhmann, the meaning of events can be communicated only through social systems, which in modern society are organized on the basis of functional differentiation, it is only through society's functional subsystems that meaning can be made and communicated. Any sociological examination of risk as a product of decisions, therefore, should be conducted by observing the various ways in which these make sense of future uncertainty,

and attribute their control and management to decision-making. For Luhmannian sociology, the problematic of risk becomes, therefore, not simply how each functional subsystem is to deal effectively with risks, but how each such system conceptualizes risk in *its own terms* and is able (or unable) to contribute to a general societal belief that risks are indeed controllable, and avoidable through a process of causal attribution.

There is another dimension which may help to explain the paradoxical nature of Luhmann's dichotomy of risk and danger. This relates to his own social systems theory and, more particularly, the distinction between system and environment. From within a system risks may be identified and taken into account in system communications. Risks are in effect possibilities of future loss which the system is able to see and 'understand'. Dangers, by contrast, represent the contingency of the system, the unknown, the possibility of future loss occurring not within the system's environment. Events which occur outside that environment are necessarily seen by the system as dangers, that is as occurrences which are beyond the reach of the system's code and programmes, and which there is no possibility of the system being able to anticipate. These dangers may, of course, be recognized by an observer of the system in the same way as second-order observers may see what a decision-maker cannot see. For observers of the system, using different distinctions from that which the system employs, these dangers may appear as risks, that is as losses that may be avoided or reduced through decisions. One is left with the paradox, therefore, that only system communications offer any assurance of risk management or control. Only within the system is there any possibility of security. Yet this relative safety depends upon the existence of a social reality beyond the horizon – that of functional differentiation – where there is no security, where unforeseen and unforeseeable dangers are lurking. Not only does what seemed relatively safe now appear dangerous or risky, but the very security offered by the autopoietic nature of the system depends upon an omnipresent danger that something might happen which the system has no possibility of predicting. Seen from this perspective, systems are inherently risky, for there can be no certainty that any communication will be seen as true, valid, authoritative, good or right, beyond the boundaries of the system in which it is uttered.

Law and risk

Luhmann sees law's time-binding function, its stabilization of norms over time, as providing forms which are able to transform risks into norms. This happens 'in ever-changing situations' so as to enable 'facts' to be established, repetitions to be recognized, for learning to occur.¹³ It is not only law that imposes its construct of time upon events. For Luhmann, everything happens simultaneously and only social systems are able to organize time into sequences within which causes and attributions may be made. This

time-binding should not be seen merely as a way of imposing structure on some external reality. Rather it is implicated in the actual 'coming into being of factual states',¹⁴ the construction by the system of an environment of facts and assumptions about their causes within which system operations may take place.

These operations give temporal meaning to events and, at the same time, generate 'structures in the autopoietic process of continuous self-renewal of the system'. According to Luhmann, this appears to cause a social problem for society in that the generation of structures through time-binding lays 'claim to material and social meaning, thus altering forms and influencing social distributions'.¹⁵ The effect of this is that the legal system's transformations of risk and its attribution of causes into legal norms – the rules and laws which determine what is lawful and unlawful – are likely to be taken as representing social truth. Things are so, because the law claims them to be so. To take a simple example, a legal norm may state, for example, that it is unlawful for parents to use any physical punishment on their children, because it encourages an acceptance of violent behaviour among those who are punished in this way. The need to reduce risk of future violence is thus transformed into a legal rule based on the causal attribution of violent behaviour to the childhood experience of violence. Moreover, this norm remains unchanged even if research finds that the relationship between mild corporal punishment and violence is at best tenuous or that there are other factors, such as a genetic disposition, which are far more influential in the production of violent behaviour. 'The norm is valid, as long as it is valid . . . it can be amended . . . [b]ut as long as it is valid, *there is no risk in being guided by it*'.¹⁶ This would be the case even if there were actual evidence that physical punishment was a deterrent to violence, and that the norm of outlawing physical punishment actually increased the risk rather than reducing it. Legal norms, as we have seen, do not depend upon a foundation of facts born of experience, but, on the contrary, they serve society by producing counter-factual expectations which may be relied upon for generating lawful conduct. As we shall see, however, law's stabilizing of expectations through time-binding may lead to disastrous consequences when legislation designed to reduce or avoid environmental risk is based upon scientific 'truths' which subsequently turn out to be false. One may appear to risk nothing by using the law to guide one's behaviour, but this avoidance of risk has no meaning outside legal communications. As Luhmann puts it, '[w]e can . . . hardly expect that risk problems, if they are problems of time binding, can be solved within the framework of suitable legal forms'. He insists that '*in the case of risks we are not dealing with a future for which we can in our present determine how others are to behave in future situations*'. Unlike a legal norm, 'a risk cannot be violated, so that [i]f the law can be expected to assume risks, this can only occur by detemporalizing the assessment of what is right and wrong'. This means, in other words, that 'symbols such as

legal force or legal validity have to be deployed with “binding” effect regardless of whether the future proves a decision right or wrong’.¹⁷

The fact that the law is obliged to ‘invent’ consequences for its decisions which cannot possibly be known in advance results from its need to conceal the paradoxical nature of its own self-reference – the fact that there is no justification for law beyond law itself. Legal decisions cannot be left to appear either arbitrary or simply the product of the legal system’s own operations. They must be justified by an appeal to some seemingly external authority. Yet, as we saw in Chapter 2, this authority exists only within an environment which law has itself constructed. For law to assume consequences for its decisions, and devise attributions of causality to justify such consequences, may be necessary for its autopoietic self-reproduction, but ‘from a sociological point of view it is a symptom that law is expected to assume and process risk, which the form of the legal norm is at a loss to cope with’.¹⁸

One further dimension in law’s assumption and processing of risk lies in the role played by scientific experts within the legal system whenever a legal decision has a future orientation. Decisions concerning harm to children or the environment and harm from dangerous offenders or psychiatric patients all fall into this category. As a general rule, where law recognizes future harm it will also find risk in Luhmann’s sense of some possibility of future loss attributable to decisions. Some risks may well exist prior to their legal recognition. It is, however, also the case that any future loss selected by law as capable of transformation into legal norms must also be treated as a risk, if only because it would be pointless for legislators to attempt to control, or judges to reduce the likelihood of, future ‘dangers’ which are not amenable to influence through decisions. It is also highly likely that, in recognizing the existence of a future harm, law will also ‘discover’ the existence of expert knowledge capable of estimating the likelihood and predicting the nature of such harm. The processes by which future harms become constituted as risks rather than dangers involve complex and intricate interplay between the scientific, political and legal systems. It is certainly the case that the attribution by the legal system of loss to decisions has helped to generate areas of expert knowledge which otherwise are unlikely to have existed. What is more, the structural coupling through individuals and organizations of law and science within these areas of knowledge has made possible the rapid transformation of ‘dangers’ – future losses for which nobody could be blamed – to ‘risks’, that is to losses where an attribution of responsibility is expected or even demanded.¹⁹

Risk and politics

From within the political system, problems may arise from perturbations caused either ‘by the expectation of being able to guarantee a risk-free

society', or by 'public opinion demanding stricter regulation [of risky situations] than decision makers and experts would consider rational'.²⁰ In each case the problems for politics occur when perceived risks are transformed into political risks. What appears, for example, to medical science as a major risk to public health may within the political system be ignored because it is decided that there is a 'risk that a . . . risk limitation policy', as Luhmann puts it, 'will not pay off politically, will not pay dividends in the form of electoral victory – for example, because other subjects of overwhelming urgency have since caught the public eye'.²¹

Again, Luhmann observes the important part that time plays in risk management. Political time is not the same as legal time or, for that matter, as any other organization of time in the social system or in its environment. Unlike in the legal system, where time is bound in such a way as to allow present cases to be decided as if future uncertainties could be known or their probability accurately estimated, the sequence of decisions within politics, according to Luhmann, 'is punctuated by the [specific] time structures of the political system – for example, by the rhythm of elections, the legislative periods, the stability or instability of governments'. These structures also determine 'the foreseeable consumption of time by the process of making decisions and seeking consensus',²² which may be manipulated by strategic devices of urgency and delay, but only within politically acceptable limits. Its own time organization places the political system under constant pressure to deal with disturbing events in its environment, so that selections have to be made regarding to which of these politics will react and to which it will remain indifferent.²³ Even if politics does react, there is no guarantee that the response in terms of political risk management will correspond to what is required to avoid or reduce the risk as it exists outside the system of politics, or that timing of political measures will be commensurate with the urgency of that risk. According to Luhmann, therefore,

Politics works in episodes, in short stories each finishing with a collectively binding decision, a symbolic gesture of conclusion. The political system is thus free to turn to new topics or to await feedback from old ones. But whatever happens with the risks?²⁴

In terms of its ability to manage risks on society's behalf, the image of the political system that emerges from Luhmann's account is quite the reverse of that promoted by government and opposition. These both optimistically tend to present themselves as having the capacity to gain and remain in control of risks, even if their respective methods of gaining control are very different from one another. Luhmann, by contrast, sees major problems arising from 'the impossibility for the political system to control other systems with an adequate grasp of consequences',²⁵ and above all from the way that politics is organized into party politics. The party political

organization of politics creates a situation where information is politically selected by the media as positive or negative to one or other of the parties, as intrigue, in the promotion and demotion in political careers or in 'the political election with everything that it reputedly or actually influences'.²⁶ These factors all compound the difficulties that politics faces in responding in a way that might avoid future loss through its decisions.

Luhmann identifies the political system's self-appointed role as regulator of other function systems within the welfare state as particularly problematic, since the range of matters calling for regulation by politics is 'endless', demanding intervention in such matters as 'the economy in the shape of tax raising or borrowing, [in] amendments to patent law, [in] changes in divorce law, [in] education policy, [in] the granting and withdrawal of subsidies for scientific research, [in] the approval or rejection of drugs, [in] changes in the reimbursement of medical expenses'. Moreover, for Luhmann, 'the impossibility for the political system to control other systems with an adequate grasp of consequences and limited risk is inversely proportional to the facility with which such decisions can be put into force and, however sporadically, actually implemented'.²⁷

This 'astonishing expansion of accountability' of politics in the welfare state, according to Luhmann, 'begets a gigantic and uncontrollable machinery for increasing risk'.²⁸ The problem is intensified by the coding of government and opposition, which creates a temptation for all decisions to be made 'with an eye on their electoral effects'. 'The opposition principle' rewards the ability to impose particular definitions of perceived social problems and push forward decisions to deal with the issues as they have been pre-defined, 'so that more attention is paid to catchwords and presentation than to evaluation of consequences'.²⁹

Luhmann is not alone in his complaints about the state of the party-political system and the exaggerated ambitions of politics in the welfare state.³⁰ What makes his fierce critique of the unrealizable ambitions of politics in relation to 'risk' rather different from other critical accounts of the welfare state from both right and left, however, is the highly original theoretical perspective he offers under the heading 'The demands on politics'. He goes on to analyse these *demands* through the construction of social issues in terms of risk. In this analysis he identifies two important factors which combine to produce enormous difficulties for the political system. The first of these is the way in which society reproduces issues as distinctions between 'decision makers' and 'affected parties', and is then 'able to offer only political solutions to the resulting conflicts'.³¹ Yet politics is ill-equipped to find such solutions to transform social risks into political risks of a kind that can then be eliminated or reduced through political means.³² To give affected parties legal rights or to introduce legal regulations to protect their interests may satisfy pressure groups for a time, but it merely passes the problem over to law without offering any political solution to the

conflict between decision-makers and those affected. Luhmann concedes that juridifying risk problems might help to 'break down complex issues into partial decisions' and 'provide each side with opportunities to attain its goals',³³ but in depoliticizing the problem by transferring it to the legal system, there is no guarantee that the legal system will accept the political view. Politics runs the inevitable risk, therefore, that the most expedient political solution might not be a lawful one. Law cannot be relied upon to carry out political objectives. Transferring risks to law is, therefore, itself a risky business for politics – the risk being the delegitimization of the political system through its failure to manage, or give the impression that it is able to manage, risks. Moreover, the 'politically relevant difference between decision makers and affected parties' still remains a political issue. One person's risky behaviour becomes a danger to others – that is a loss over which they (the others) see as not controllable through their own decisions. Politics inevitably formulates the conflict in terms of this distinction and a resolution of the conflict remains outstanding, despite any successes in the courtroom or in negotiations.

The activities of protest movements and the mass media intensify the difficulties for politics and 'traditional agendas of legal protection and corrective distribution no longer suffice'.³⁴ The problem that the political system has to confront is not the risk issue at the root of expert scientific or medical concerns, but, as we have seen, the conflict between decision-makers and those affected. Yet the very construction of the problem in these terms may be far removed from any reality outside of the political system, and does not provide a stable basis for managing the risk – even the political risk. The dividing line, for example, between decision-makers and those affected is often unclear. Those affected may also be decision-makers – frequent air travellers, for example, may complain that the policies of oil companies are increasing global warming, but may fail to recognize themselves as contributing to oil consumption ('One man's risk is another man's danger').³⁵ Moreover, solutions which invite the participation of affected parties may have to acknowledge that the status of an affected party does not stop at those directly or most seriously affected. As Luhmann remarks, 'There are no limits to stepping up participation'.³⁶ In practice, only those who are organized into effective pressure groups are likely to participate. Again, the original problem becomes mutated in ways which make it amenable to political coding but for which the political system is unlikely to have a solution.

The second important factor that Luhmann identifies concerns appeals to the reasonableness and goodwill of the parties and the forging of solutions based on participation, co-operation and exchange of information. These, he argues, while often proposed as solutions to risk-engendered conflicts, are unlikely to succeed except perhaps as a delaying strategy. Attempting to resolve conflicts between decision-makers and those affected by appealing to the parties' participation in seeking solutions based on the exchange of

information is only likely to succeed where there is a degree of trust and confidence in the honesty and completeness of the information that each puts forward. Yet, this is impossible, because each is working on necessarily incomplete models of the future, which they interpret in ways which reinforce their own particular interests. Opening up channels of communication is all very well, but, as Luhmann states, '[a] communication, if understood, always provides the opportunity for accepting or rejecting the content offered'. Why, he asks, 'should more communication incline the addressee to accept what he is offered rather than reject it'? In order for the communication to be accepted, one would have to be able to communicate its truth and honesty, but 'as we have long since recognized, . . . this is impossible'. 'What is likely in such circumstances', according to Luhmann, 'is that the communication will reinforce an existing disposition'.³⁷

Nor, for Luhmann, is there any possibility of influencing the conflict between decision-makers and affected parties by presenting a quantitative analysis of risky situations, at least not where the risk is seen as potentially catastrophic. 'It may be possible to calculate that the danger to which one is exposed by the existence of a new nuclear power station in the neighbourhood is no greater than the risk of deciding to drive a further three miles per year.'³⁸ Yet this kind of calculation is 'hardly likely to impress anyone, in the first place because quantitative calculations are widely known to be capable of manipulation; secondly, because the danger of being exposed to injury from a nuclear power station is seen as a disaster, and 'quantitative analysis always becomes irrelevant where disasters are to be feared'.³⁹ What actually counts as 'a disaster' is, of course, not decided on the basis of objective criteria, but is subject to individual interpretation. Luhmann draws up a negative test which identifies a disaster as occurring 'whenever the affected party refuses to allow himself to be convinced by quantitative analyses'.⁴⁰ Public opinion and above all the mass media set 'the disaster threshold' in different ways at different times. The consequence for politics is that it 'cannot rely upon the quantitative calculation of a risk and cannot be expected to do so'.⁴¹ Rather, the political system has to operate on the basis of guesses and 'above all on the acceptability of *its own decisions*'.⁴²

The situation of having to resolve such conflicts in order to obtain collectively binding decisions 'confronts politics with a presentation problem. Politics has insufficient universal knowledge; above all no knowledge of the future. It must therefore make risk decisions'.⁴³ Yet, if it wants to retain its self-image of legitimacy, it cannot present its own decisions as risky. Nor is finding *the rational solution* a possibility, since claims to have arrived at 'the right answer', after having weighed up all the alternatives and selected the most appropriate, inevitably restrict the range of possible rational solutions and invite criticisms that the alternatives which were not chosen were equally founded on sound rationality. Furthermore, politics simply does not

operate like this. Rather, as Luhmann suggests, it 'has to learn from unanticipated secondary effects of its own generalizations *after* having determined them . . . In this way the decision can be determined on the basis of *observable* factors'.⁴⁴ According to Luhmann, therefore, the legitimacy of the political system depends not on the successful formulating policies derived from logical analyses of problematic situations, but upon observing the responses to its own communications and adjusting its decisions accordingly, thereby maintaining a fiction of plausibility.

Another possible answer to politics' presentation problem is that of finding an *ethical* solution. Luhmann is particularly sceptical towards the suggestion that politics is able to use ethics in this way. 'Whenever a weak spot in society is suspected', he argues, 'ethics are called for'.⁴⁵ Using ethics as a guide means that '[r]esponsible conduct is recommended', but how does one set about finding an ethical solution 'when the problem consists precisely in the fact that consequences cannot be anticipated?'⁴⁶ Similarly the maxim 'that one may behave in a risky manner as long as others are not affected'⁴⁷ assumes that one knows whether or not they will be affected and so avoids confronting the problem of risk. Luhmann, however, acknowledges that '[t]he debate on ethics . . . has at least established one thing: a dependence [in politics] on additional decisions not determined by rules or maxims or value patterns' but which have to be added:

Ethics cannot of itself overcome this built-in hiatus . . . Politics, expecting ethics to help it make decisions, is referred back to itself; and for all practical purposes it is referred to organizations that are in a position to formulate resolutions, take votes and communicate the results.⁴⁸

In other words, ethics neither solves political presentation problems nor allows it to escape from its self-referential closure. All it does is throw the problem back to the political system in a way that makes it clear that there are no purely ethical answers.

The conclusion of Luhmann's discussion of the possible responses of the political system in relation to risk is that the political system 'only has the opportunity to transform . . . external risks into internal ones, into risks incurred by its own decisions'.⁴⁹ This being the case, 'Its own risks then take on two forms'. In the first, 'one can decide to regulate the matter in question and thus take the responsibility for the consequences', while in the second, 'one decides to wait and see, to commission further expert opinions; and then one either witnesses a dedramatization of the situation or is confronted by progressive degradation by growing cost, by less time to manoeuvre'.⁵⁰

Luhmann recognizes, widespread consensus that problems of risk cannot be reduced to a matter of rational decision-making – 'since identifying the conditions for rationality alone requires far too much time (and in principle

infinite time) thus amounting to postponement'.⁵¹ Nevertheless, he insists that 'it would . . . be just as wrong to conclude that politics is in principle irrational' but 'there are good reasons for observing political decision making as risk instead. And also to do so precisely when politics, as we have suspected, is not in a position to present itself as risky decision making'.⁵²

Luhmann argues, therefore, that [t]he rationality of specifically political risk' could be seen as 'weighing the risks of deciding one way or the other' solely from a political perspective, taking into account only political factors, such as 'the protest potential of side effects' or the electoral power of those affected'. He adds as a final thought that, 'depending on the solution chosen, it may be advisable to stress the possibilities or the difficulties of intervening for the purposes of control'.⁵³

The environment

Luhmann's motivation

It may be tempting to see Luhmann's *Ecological Communication* as a wholly sceptical account of the ability of society's function systems to control destructive and anti-societal behaviour, even where the future of earth and the whole of humanity is in jeopardy. Indeed, much of the book is devoted to pointing out in no uncertain terms the limitations of these systems in generating effective action to prevent wholesale environmental destruction and the impotence of protest groups to do more than protest.

The political rise of the Greens in Germany and the publication and influence of Ulrich Beck's *Risk Society* seem to have had the effect of dragging Luhmann down from the theoretical stratosphere and motivating him to confront head-on current social issues, just as the German preoccupation with welfare in the 1970s had inspired him to challenge the concept of 'the welfare state' in his book *Politische Theorie im Wohlfahrtsstaat (Political Theory in the Welfare State)* (1981). In each of these 'social policy' books Luhmann, untypically, seems to relish the opportunity to intervene in current political debates and to transform them from their usual right-left, capitalist-socialist, industrialist-conservationist forms into a much more complex, much more intriguing and much more challenging discussion of the issues. Of course, it is always possible to attribute as the motive behind Luhmann's interventions impatience with half-baked ideological formulations and simplistic and myopic solutions. Nevertheless, it may also be the case that he chose to interrupt his programme of completing a major work on each of society's function systems to write this book and *Risk: a Sociological Theory*, because of a sincere and deeply felt concern for the predicament of the planet and the future of humankind. Indeed, given his belief that his own account of the structure of modern society as consisting of functionally

differentiated, autopoietic systems of communications offered the most comprehensive and accurate sociological model available, he could well have felt himself under some kind of obligation to make this model available to those who were in the throes of grappling with the dangers of environmental degradation. Moreover, his overreaching argument that social systems at present were impotent effectively to handle these dangers could well be seen as a way of warning to the world of impending disaster, unless some way was found of reconceptualizing society's environment.

Towards the end of *Ecological Communication*, Luhmann writes: 'Our aim was to work out how society reacts to environmental problems, not how it ought to react or has to react if it wants to improve its relation with the environment'.⁵⁴ Nevertheless, he goes on to support the idea of a new rationality, 'social rationality' – one that 'would naturally require that the ecological difference of society and its external environment is reintroduced within society and used as the main difference'.⁵⁵ Yet how is this to be done when the prerequisite for social communication is functional differentiation? Society cannot operate as a unity when the only way in which it can conceptualize itself is in the form of difference. 'System rationality is never concerned with unity but with difference'.⁵⁶ The message may be a bleak one, but the very fact that Luhmann has chosen to undertake the difficult and unpopular task of unmasking the self-images of function systems, and undermining their claims for progress and control, suggests that he saw this as a first tentative step towards a new understanding of society which in turn might lead to new forms of communication about society's environment.

Ecopolitical analyses

Luhmann's first port of call in his tour of society's functional subsystems' handling of ecological issues is the economy. While his analysis of the difficulties in expecting economics to control itself in ways that benefit the environment are beyond the scope of this book, his passage from economics to law and politics is well worth mentioning here. Luhmann is critical of 'contemporary ecopolitical discussion' in which, he claims, 'the contrast between the language of prices and the language of norms is as striking as it is disarmingly simple'. He argues that it leads to the belief that 'whatever does not fit within the language of prices has to be expressed in the language of norms'. Whatever the economy does not bring about on its own has to be accomplished by politics with the help of its legal instrument.⁵⁷

This in turn results in the kind of analysis that tells us that 'more is required of politics than it can perform', with the consequent 'overburdening of the political system', which is 'forced to offer hasty, false solutions, defer problems or try to gain time, which inevitably leads to radical

disappointments with it'.⁵⁸ Interestingly, Luhmann rejects the overburdening of politics as a sufficient explanation 'because it tends towards over-politicization and consequently to political fiasco', and replaces it with his own analysis based on the familiar systems theory account of a functionally differentiated society'.⁵⁹ In this analysis 'politics as well as the economy are only subsystems of society and are not society itself'.⁶⁰ A systems theory account, he adds, also demands 'that the function systems of politics and law have to be distinguished more clearly than usual'.⁶¹

Politics and law and the environment

In our short summary of Luhmann's account of society's response to ecological problems we start with the political system and then move on to consider the relation of politics with law in addressing environmental issues. We have already seen how politics, in Luhmann's theoretical scheme, is 'the force whose task it is to put things in order', which works mainly through removing restrictions on appeals to it, and so broadening its scope for intervention and with it the prospect of improvement. Politics, according to Luhmann, 'regenerates hopes and disappointments and continues to thrive because the themes in which this occurs can be changed quickly'.⁶²

For Luhmann, '[t]he inclusion of ecological problems within politics may reinforce this see-saw effect because through them it becomes clear how much politics would have to accomplish and how little it can'. The consequence of this gap between ambition and achievement is that 'the political system is constantly tempted to try to do this', that is, bridge the gap, 'through a different government, a different party, eventually through a different constitution'.⁶³ Yet, for Luhmann, 'there is little sense in attributing a special social position to the political system, like a leading role or complete responsibility for the solution of ecological problems', simply because the political system, like every other social system, is incapable of acting 'outside its own autopoiesis, its own code and its own programs. If this happened then such an activity would not be recognizable as politics at all'. Politics is 'limited to executing a practicable politics . . . and [t]he conditions of practicability have to be regulated and, if necessary, changed within the system itself'.⁶⁴ Politics, according to Luhmann, also needs to take account of its own 'resonance', that is the echo of its communications from beyond its own boundaries. This 'arises because "public opinion", as the true sovereign, suggests the chance of re-election'.⁶⁵ In other words, the political system and public opinion are 'structurally coupled' around the possibilities of gaining or retaining power, in the sense that their communications co-evolve and feed off one another, amplified, mediated and edited, of course, by the mass media.

As we have previously remarked, for Luhmann, political power, backed up by physical force, has 'little chance for application in highly complex

societies', and 'the crude application of such power is almost useless for the regulation of ecological problems, because no one can be forced into any specific behaviour which would improve the relation of society as a whole to its environment'.⁶⁶ He points to a further limitation of political power, which 'ultimately rests on the threat of physical violence, i.e., on fear', for fear '*can neither prohibit nor prevent anxiety*'.⁶⁷ Violence may be used as a counter-force to violence, but 'anxiety cannot be used to combat anxiety'.⁶⁸ According to Luhmann, there are few ways to combat anxiety effectively. One is that practised by the Green parties, which amounts to abandoning any rational attitude towards ecological questions and practising the 'politics of obstruction' – 'no cutting down of trees, no nuclear energy', and so on.⁶⁹ This leaves politics limited to imposing restrictions upon blockages with no responsibility for consequences, which hardly begins to solve the problems of the environment.

Luhmann sees politics, both in its attempts to solve the problems of the environment and more generally, as being restricted essentially to two measures, one requiring intervention in the legal system and the other in the economic system. 'It can use power to enforce new laws and it can use power to procure money without a return for it'.⁷⁰ Political use of law and money is able to break through the barriers that usually restrict the legal and economic systems, 'because it can use its power and threaten with force'.⁷¹ Another restriction that Luhmann identifies 'arises out of the national, territorial limitation of the coding of political power'⁷² and . . . from the lack of effective international, legal regulation of the transformation of ecological problems into national politics'. 'As a result, society's political resonance is restricted by territorial sovereignty'.⁷³

As we have already discussed earlier in this chapter, Luhmann's systems theory sees social systems as constructing their own concept of time. Time within the political system is unlikely to coincide with the time agenda set by environmental issues. Politics, according to Luhmann, 'has to be ready for a short-term change of political directions because of elections . . . This is in marked contrast to a constantly needed long-term ecological politics'.⁷⁴ Moreover, not only is the temporal structure of politics, the political agenda that we discussed earlier in this chapter, likely to be at odds with the timing of changes in the ecological environment, but it is also likely to agree 'only to a small degree with the requirements of other systems'.⁷⁵ As Luhmann remarks, new regulations for car exhausts may be urgent in order to save dying forests, but 'the more that politics depends upon cooperation and the development of consensus the greater is the probability of delays, of new unexpected initiatives and of long-since obsolete bodies of regulation'.⁷⁶

Turning now to the legal system, Luhmann expresses grave doubts whether the standard legal method is capable of dealing effectively with ecological problems. 'Natural law ceases to function precisely where it concerns

nature', he declares, 'and even consensus (a kind of ersatz natural law) seems unattainable'.⁷⁷ He describes how law, in its desire to establish order, is able to react 'only in its own system-specific way to environmental dangers'. As in his discussion of risk, he emphasizes how law's codes and programmes 'translate danger into the conditions of correct action', which 'is fixed in the future-perfect tense... It imagines an action as completed in the future'.⁷⁸ For example, if exhaust emissions are reduced according to the law, then the destruction of forests will have been avoided. But, as Luhmann points out, 'no matter how much talk there is about "goals", the law can never attempt to capture all causal factors successfully or to determine all processes legally'.⁷⁹ It may be able to make a contribution to the attainment of political objectives, but how important this contribution turns out to be will always depend upon other factors which are outside the control of law.

Luhmann sees this use of law to control future behaviour in ways which protect the environment and reduce dangers as 'a specific technique for dealing with highly structured complexity', which requires 'an endless restructuring of the law'. Uncertainty over what will happen and what the consequences will be make it necessary to wait until unforeseen consequences begin to reveal themselves. These are perceived by law and politics as problems and 'occasions for new regulations'. Further unforeseen consequences will occur, and 'it will be impossible to determine if and to what extent they apply to that regulation. Again, this means an occasion for new regulation, waiting, new consequences, new problems, new regulation and so on'.⁸⁰

Any attempt to make consequences more certain and so more amenable to regulation through law is fraught with difficulties, since certain knowledge about the future simply is not available. So law may be faced with conflicting versions of what the consequences might be without any sound way of choosing between them. Arbitrariness in decisions is likely to increase, and any attempts to invoke principles, such as that of establishing 'a balance between public interest with individual concerns and reconciling this with the requirements of environmental protection', or formulas such as 'equalising', 'balancing' or 'proportionality' can be achieved only arbitrarily. In resorting to 'technically informed arbitrariness' law may succeed in resolving conflicts, but at a cost to its own integrity, to its own autopoiesis, because such solutions are not specifically legal ones.⁸¹

Another solution available for the legal system is to maintain that ecological questions 'have to be decided politically, so that a third code – an exclusion code⁸² – is added to that of legal and illegal. Here, 'the legal legitimization of political decision-making leads to the the reintroduction of the excluded third value into the system... In this way the legal system makes use of a constitution and democratic legitimization to deceive itself that politics can handle problems better than law'. In this way also 'all arbitrariness

can be transferred into this [the political] system for appropriate treatment and reintroduced as a legal norm'.⁸³ Luhmann remarks that 'this stunning logical achievement . . . may be admirable', but that it may well result in the political system seeing law 'as its own instrument of implementation' and lead to decisions within the legal system which are both arbitrary and not arrived at in a specifically legal way.⁸⁴

Attempts to avoid arbitrariness by developing rules 'for establishing a hypothetical consensus, procedural consensus and norms' (à la Rawls) – where consensus can be assumed when someone behaves in a way that implies recognition of these norms – are all based on a false assumption when applied to environmental problems. The assumption is that the problems 'have their roots in society and therefore can be solved in the social dimension'.⁸⁵ As Luhmann points out, these solutions are rendered inadequate by 'the inclusion of the environment of society in the genesis of social problems'.⁸⁶ These are not problems that are amenable to solution through social consensus, since they do not exist within society and changes in society affect them only indirectly, in ways which are for the most part unpredictable. The only consensus that is attainable is a 'preventative' one, 'an abstract agreement about preventing all possible damage in so far as the costs of prevention do not have to be accepted'.⁸⁷ Under these circumstances, according to Luhmann, 'the precipitation of political activity, social solidarity and the legal solution of environmental problems remains as abstract as it is inconsequential'.⁸⁸

Seen from the perspective of politics, the possibility of transferring ecological problems to the legal system has its attractions. It appears to offer a convenient way for politics to give the impression of being able to deal effectively with environmental (and other) risks. As we have remarked, the legal form is a form with two sides, 'one which indicates what is forbidden, the other what is permitted',⁸⁹ and, as such, provides considerable scope for regulation. Luhmann gives the example of rules designed to regulate the skin of apples, 'which ought to be as smooth as possible to stop bacteria adhering to it too easily'. Not without a certain irony, Luhmann suggests that:

a regulation is conceivable that fixes the permissible depth of wrinkles on marketable apples. A limiting value of this sort digitalises the problem; it is a form with two sides one of which indicates what is forbidden, the other what is permitted. The forbidden and the permitted are thus skilfully combined under a single marking, and this marking can be shifted if changes in the state of knowledge or political pressure make this advisable.⁹⁰

He insists, however, that this use of law by the political system should not be seen in terms of hierarchical authority with politics as the dominant

power, 'for both the political system and the legal system are far too strongly determined by their own complexity'.⁹¹ Again, he returns to the concept of 'structural coupling'⁹² to replace what he sees as the superseded hierarchical relationship between the two.

Nonetheless, Luhmann is concerned by the ways in which the political system uses law in its attempt to manage risks, not because he fears domination of law by politics, but rather on account of the distorting effects upon the legal system and its function of stabilizing norms. Risks are not the same as norms, and the use of the legal system to regulate what politics sees as risks by making them appear in a form appropriate for legal norms serves to provide political authorities with negotiating power. 'These agencies can . . . threaten strict application of the law or corresponding exercise of discretionary power to obtain tractability . . . in other, not directly enforceable respects'. Pressures to 'do what we say' are reinforced by the danger of recourse to the courts. This sort of negotiated application of the law 'represents an unofficial form of delegating and enhancing political power.'⁹³

Luhmann expresses his concerns for the legal system if the political system transmits to it 'its sensitivity to questions of risk'. This is likely to create pressure for the legal system to deform itself in order to accommodate these political demands.⁹⁴ A little later he writes of his impression that the legal system 'is progressively giving up incorporating the predictability of the legal consequences of its own conduct into norm programmes as a condition and limit. This means that even self-determination on legal matters is no guarantee against surprises'.⁹⁵ In other words, there is a danger of law taking upon itself the regulation of expectations which go beyond the normative and in doing so finding that the stability of such expectations are disappointed by events over which the legal system has no control.

Politics and law in the protection of fishing stocks

The story of European fish conservation may help to illustrate this point. European regulations were devised and introduced to preserve fish stocks by specifying the maximum size of the holes in fishing nets, so that smaller fish could escape and continue to breed. Regulations also specified the minimum size for the marketing of fish of different species, once again to allow the smaller fish to return to the sea. As law this worked well. It was clear what was legal and what was illegal, and regular inspection was able to enforce the regulations both as to the size of the net holes and the size of fishes that could be brought ashore for sale. The first 'surprise' was the reports of fishermen that those fish under regulation size which were caught in the nets rarely survived the experience. Most died before or shortly after they could be thrown back into the sea. If the fishermen had been allowed to bring them ashore for sale they could have supplemented the available

fish for marketing, but, since this was illegal, they were simply wasted. The second 'surprise' came in 2002 when marine scientists cast serious doubt on the policy of catching and eating the larger fish. Far from preserving fish stocks, they reported, it may well have had the reverse effect, since by taking the larger fish and leaving the smaller ones, fishermen were taking out of the genetic stock those which were more likely to breed and to produce good-size fish in future generations. If this proves to be the case, an efficiently operated regime of legal control has in fact contributed to the degradation of the fish stock.

Law was in this instance drafted in by politics, not for the purpose of stabilizing normative expectations in the face of counter-factual disappointments, but to reinforce a policy supposedly based upon 'the facts' of sound science. The norm in this case was that depleting fish stocks should be protected. Transformed into the legal system's legal/illegal code this would have established as law the illegality of behaviour likely to threaten directly both the fish and the fishing industry. What emerged, however, from the political process of negotiating and bargaining between states with strong fishing industries, and between interest groups within these states (such as representatives of the fishing industry), was a set of regulations which both responded to 'the public' expectation that the environment would be protected and balanced the competing demands of marine scientists and the fishing industry. The norms that the political system established for law to put into effect arose out of a process of risk assessment where only those dangers which were known could be translated into risk, into a matter for decision-making. Law was asked to take upon itself responsibility for the regulation of expectations based upon the outcome of a politically generated risk assessment. The laws that emerged were designed more for strengthening the negotiating and enforcement powers of fishery inspection agencies than for interpretation and control by the courts. Any 'disappointments' that occurred could not be countered by a readjustment of legal norms. There was no space or programme within the legal system for the law to 'learn' from its environment.

The response to the scientific research which revealed the disastrous consequences of the European regulations upon fishing stocks was, therefore, not a reassertion by the courts of the norm that fish should be protected. The issue had not even entered the legal system in this form. It was rather the drawing up by the administration of a set of new regulations totally banning the catching of certain species of fish. For Luhmann, this removal from the legal system of any control over the stabilizing of normative expectations in the light of disappointing events is a matter of some concern, as it represents a dedifferentiation of social systems, with law becoming little more than an official stamp on decisions that have already been taken through political internalization of 'scientific facts'. It is as if the trend towards risk analysis has convinced the political system that it may now

operate in the belief that its reliance on such 'scientific facts' is able to take decisions about the future out of the realm of the normative, and that scientific or technological 'knowledge' offers a wholly adequate legitimacy for the exercise of power to control the future.

6

Conclusion: Luhmann and his Critics

Nobody would deny that Niklas Luhmann remains a controversial figure in contemporary sociology. In his native Germany especially, his uncompromising position as a highly critical observer of radical and idealistic social movements earned him a reputation as a reactionary social theorist and as a major exponent of conservative political ideas. At the same time his observations of the legal and political systems, and in particular his refusal to accept at face value widely accepted accounts of justice, equality, democracy, stability, dominance, exploitation and so on, have led to accusations of anti-liberalism. In some quarters his accusers have been so incensed by the stance which he supposedly took against their radical, humanist or social reformist positions, and their visions of progress and claims for achievement, that their reactions to him have fallen only a little short of demonization. Indeed, in a talk he gave in London not long before his death, Luhmann, not without some relish, even described *himself* as 'the devil'. During the course of this book we have considered some of the more extreme accusations directed against him and we have concluded that many of his accusers have acquired only a partial understanding of his ideas generally, and particularly of his conception of modern society, and of his notion of the role of sociological theory. Moreover, in our view, they have both misunderstood and misrepresented the motives which lie behind his scepticism about moral, scientific and social improvement.

We are not suggesting that all criticisms of Luhmann are based on ignorance of his ideas or misreadings of his motives. However, we would argue that if one is going to offer a legitimate critique of Luhmann's theory, this should be done on the basis of a thorough examination of his writings. We have attempted such an examination in this book. In this concluding chapter we shall consider some more reflective criticisms that both have been and might be directed against different aspects of his work. We shall assess the validity of these criticisms and respond to them in the light of our own understanding of Luhmann's account of his theory of self-referring systems – autopoiesis. The purpose of this exercise is not so much to defend

Luhmann against his critics – his own writings offer a more eloquent defence than we could reasonably muster. Rather, it is to point out the differences between Luhmann's theoretical position on a number of fundamental issues concerning sociology, law and politics, and the views of other social theorists, whether classical or contemporary. It is these differences, we suggest, which go a considerable way to explaining both the misunderstandings of and the hostility towards Luhmann.

More informed critiques of Luhmann usually refer to the following themes or variations upon them:

1. his theory's excessively eclectic nature in the sources from which it is drawn and its tendency, therefore, towards incoherence and inconsistency
2. his failure to demonstrate empirically that his theory contributes to the sociological analysis of the contemporary institutions of politics and law
3. his failure to build into his theory any recognition of local or historical variations which may significantly affect and condition the operation of legal and political systems
4. his reluctance to engage in debates over current political or legal issues
5. his refusal to see law and politics as instruments for progress in society
6. his failure to account for human agency in directing change through law and politics, or in using law and politics to resist change
7. the failure of his theoretical ideas to offer anything more than a new brand of conservatism
8. his rejection of rationality as a universal arbiter of validity, value and legitimacy.

1. Luhmann's eclecticism and the multi-conceptual nature of his theory.

One of the main problems for critics of Luhmann is that, despite attempts to categorize him within some philosophical or sociological position, his work refuses to fit neatly into any pre-existing categories. This problem results from and is compounded by the fact that Luhmann weaves together several different strands of theoretical reflection, derived from quite different intellectual disciplines, into his social theory. We have identified these strands during the course of the book. We would summarize these as follows:

- a. general social systems theory, as initially explicated by Talcott Parsons, emphasizing the function of different systems for society
- b. autopoietic theory, derived from the biological theory of autopoiesis set out by Varela and Maturana, which stresses the closed nature of systems and the indirect relations between systems and environment
- c. Heinz von Förster's theory of trivial and non-trivial systems – his notions of paradox, tautology and self-description and first- and second-order observation arising from the nature of non-trivial systems

- d. George Spencer Brown's 'laws of form' – a formula from calculus describing the formation, development and replication of systems
- e. Heidegger's phenomenology – referring especially to the distinction between chronological time and system time
- f. a non-normative political theory, influenced by German 'institutionalism', which sees law as a functional medium for politics.

A legitimate criticism of Luhmann would be that there is always likely to be a certain tension between these diverse theoretical strands. The conceptual preconditions for each theory are never identical and the units of analysis – functions, codes, programmes, concepts of time, level of observations, system–environment relations – are never likely to sit easily alongside one another. Luhmann rarely, if ever, directly confronts the possibility of incompatibilities and incongruities between the paradigms with which he operates. Instead, he moves adeptly and often imperceptibly from one theoretical perspective to another. In so doing, however, he lays himself open to the criticism that he wishes to synthesize the unsynthesizable, to reconcile the irreconcilable. Worse, he could also be accused of using theoretical concepts in an instrumental way, switching from one to the other to suit his argument on any particular occasion. However, while it is certainly the case that Luhmann habitually concentrates on one of his conceptual strands and sets the others temporarily to one side, it is also the case that such a selective approach is unavoidable, given the complexity of his vision of modern society. Indeed, a major problem for Luhmann and for those who apply his theory is its sheer complexity and multifaceted nature. Luhmann sees this problem as an inevitable by-product of the search for what he sees as the neglected goal for sociology – that of providing 'a general theory which claims to be valid for all social phenomena'.¹ Luhmann thus views the multifaceted nature of his theory as essential if the theory is to be capable of relating to all the knowledge that exists concerning all the operations of society. 'The higher the number of concepts', he states, the more numerous are the interfaces between the theory as a system and its environment, and the greater are the possibilities of contact points between theoretical concepts and research knowledge across a number of fronts.²

It would be, consequently, a mistake to confuse Luhmann's ambition of developing a general theory for all social phenomena with sleight of hand or lack of intellectual integrity. There is no hidden ideological agenda that inspires him or drives him to confront such a wide and varied range of ideas. On the contrary, his eclecticism appears to be motivated by a determination to develop a set of paradigms which are adequate to the complex challenges presented by modern society or, in Luhmann's own terms, to the environment of the theory. Luhmann argues that theory always suffers a loss when it chooses to concentrate on one theoretical concept rather than another, as 'every choice correspondingly limits the possibility of introducing further

specifications'.³ This loss is the inevitable result of the equally inevitable self-referential closure of any social theory. His own theory, which proposes multiple contact points between theory and environment, and juxtaposes one concept with another, does not totally prevent such a loss. However, at least it avoids the pitfalls of theories which rely entirely upon and consist solely of the reinterpretation or clarification of a single concept or a small corpus of concepts.

If the diversity of the concepts that Luhmann employs within his broad theoretical framework do cause problems at times, these are never such as to undermine the totality of his vision or to prevent a coherent conception of society emerging from these apparently diffuse perspectives. In our view, Luhmann's synthesis, if it can be called that, represents an outstanding achievement not only for the breadth and depth that it allows him to bring to his social analysis, but also for its ability to speak meaningfully to an impressively wide range of intellectual disciplines. Today Luhmann's works are read by, among others, philosophers, historians, anthropologists, sociologists, political theorists, systems analysts, accountancy theorists, psychotherapists, psychologists, economists, biologists, legal theorists, management theorists and media theorists. This is the mark of an important social theorist and is in no small degree due to his ability to bring together in one theory a number of seemingly disparate ideas.

2. Luhmann's failure to demonstrate empirically that his theory contributes to the sociological analysis of the contemporary institutions of politics and law.

For those who are concerned about the scientific status of Luhmann's general theory, the issue of empirical testing may be broken down into two related questions. These are, first, the question of whether the theory is capable of being subjected to validation through empirical evidence, and, second, whether any factual evidence can be found for the operation of autopoietic systems. Taken at face value, the answers to these questions, as we shall see, may not be quite as important as stringent advocates of verifiability would have us believe. They do, however, lead to further questions which are of considerable importance: these are the questions of whether Luhmann's theory has anything to contribute to the understanding and day-to-day practice of social institutions in the real world, of whether it provides a truly sociological (not exclusively abstract) account of society as it exists, and of whether, put under the specific focus of this book, it has anything useful to say about politics and law *as they operate in modern society*.

The first criticism of Luhmann is obviously informed by Karl Popper's belief that a statement's susceptibility to refutation through testing in accordance with empirical research methods creates a valuable distinction between what we call science on the one hand and pseudo-science, metaphysics or mere speculation on the other.⁴ For Karl Popper, among other positivist social theorists, the importance of this refutation criterion is that

it allows us to dismiss some ideas as unfalsifiable and, therefore, immune to rational criticism. According to this perspective, moreover, such theories cannot be graced with the honorific label of science, and so cannot claim to provide a valid intellectual framework for the exploration and discovery of 'the real world'.

Following Popper, some socio-legal critics of Luhmann and his followers reject both the validity and the usefulness of the autopoietic theory of law, on the basis that it cannot be tested against reality. It should not, they therefore conclude, be considered as a social scientific statement, and should not be deemed to say anything of value about the *factual operations* of the legal system.⁵ However, these critics often ignore the major problem with Popper's criterion of empirical falsification in distinguishing science from non-science.⁶ This is that whether or not a statement is capable of refutation through empirical testing may depend not upon the content of the theory, but upon the methods that are available to researchers. Some statements may not be capable of refutation simply because existing research methods are not able to determine their validity empirically.⁷ Moreover, as Luhmann himself points out, 'the repertoire of empirical methods in present-day sociology is very limited and completely inadequate for . . . self-observing objects with highly structured complexity'.⁸ Consequently, it is not (or not necessarily) the case that 'fundamental incompatibilities' exist 'between the theory of self-referential systems and empirical research', but rather that 'there is an uncomfortable tension between theoretical conceptions and the present possibilities of empirical research'.⁹

Not surprisingly, our second question, whether social systems *do indeed operate autopoietically*, now turns out to be far more complex than it originally appeared. This question has also already been hotly debated in the context of the sociology of law.¹⁰ Paterson and Teubner, in the first study using autopoietic theory as the framework for empirical research,¹¹ answer the question by casting further doubts on the validity and appropriateness of Popper's hypothesis concerning falsification through research. The doubts they raise, however, are of particular pertinence to Luhmann's social theory. In the application of Popper's model, they ask – what is being tested against what? Empirical hardliners are clear that it is the theory, or concepts derived from theory, which are being tested against fact or reality. Quite apart from the general issue of investigative capacity, which we have already discussed, this assumes that social reality or 'the environment' from which 'the facts' may be obtained is accessible to researchers. This may well be the view of scientific positivism, but adherents of Luhmann's theoretical perspective clearly do not share it. While Luhmann's general theory certainly accepts the existence of 'the environment', it also insists that this 'environment cannot be reached by [any] system's operations'. Accordingly, 'the system is forced to invent internal constructs of the external world in order to cope with' the problem of making sense of that external world.¹² This means that

the system of scientific research is obliged to construct for itself *an internal environment* using its own codes and programmes. It is this internal environment that the system observes and investigates – not an external ‘reality’, against which the veracity of statements might be measured and verified. Empirical observations within the scientific discourse, therefore, ‘can never reach the outside world’. In fact, they ‘only produce artificial data for science as a social system to enable it to cope with the unknown outside world’.¹³ Seen from a Luhmannian perspective, therefore, attempts to validate theoretical concepts by testing them against data produced by empirical research methods do not set speculative hypotheses against hard facts; rather they compare one system’s account of its environment against another’s. The so-called facts about the external world produced by empirical research ‘are in reality highly artificial constructs, excessively selective abstractions, mere internal artefacts of the scientific discourse that are both as real and as fictional as are theoretical constructs’.¹⁴

This does not in any way avoid further questions relating to the fundamental issue of the usefulness of autopoietic theory in ‘real-life social situations’. What it does, however, is shift the argument away from an over-simple test of empirical falsifiability – conceived as the sole criterion for the theory’s relevance to scientific study of law and politics – to a much more complex representation of the relationship between theory and practice.

We can approach the same issue in a slightly differently manner, using Heinz von Förster’s distinction between trivial and non-trivial machines. For von Förster non-trivial systems are deterministic systems whose input–output relationship is not invariant, but is determined in a self-referring way by the ‘machine’s previous output’.¹⁵ If, as Luhmann would have us accept, law and politics are indeed non-trivial systems, then, ‘for all practical reasons they are unpredictable: an output once observed for a given input will most likely not be the same for the same input given later’.¹⁶ For autopoietic researchers, therefore, it makes no sociological sense to apply to the operations of the legal and political systems research methods which assume a consistent observable relationship between system and environment. Above all, it is illusory and simplistic to assume that we can develop invariable and constant theoretical paradigms, which can then be applied as universal explanatory schemes to all areas of social practice.

What has still been left unanswered are difficult questions concerning the precise ways in which autopoietic or self-referential accounts of law and politics, as non-trivial machines, might assist in sociological understanding, and even sociological amelioration. Daniel Zolo has expressed his concern that a general theory of social systems which presupposes self-referential systems means that it is necessary to give up any idea of non-circular theoretical constructions *and with it the very notion of progress through ‘normal science’*.¹⁷ Luhmann, in his brief reply to Zolo, agrees that, seen from a deductive point

of view, the formulations of his theory 'are rather fruitless'. However, he also accentuates his belief that 'they have a heuristic value, because they stimulate and define the search for other possibilities',¹⁸ and they trigger self-critical, self-problematizing modes of social reflection. Furthermore, it is clear from the selection of his writings that we have covered in this book that he does not accept Zolo's premise that, seen historically, social progress can be attributed to advances in 'normal science'. This claim itself, he argues, is merely part of the self-identity and the self-description of science. For Luhmann, the term 'progress' needs to be defined differently from the conception of a linear advancement of society towards ever-higher achievements resulting from more rational or more enlightened capacities for problem-solving. Progress, in his terms, implies the recognition of possibilities that hitherto have remained unrecognized:

There are no solutions for the most urgent problems, but only restatements without promising perspectives . . . On the other hand, we can see fascinating possibilities of arriving at a higher level of intelligibility. It requires at present a kind of stoic attitude to stay at the job and 'to do the formulations'.¹⁹

It is through the recognition that 'things could always be different' – through the element of surprise generated by the contingent nature of events in the social world – rather than through the linear cause-and-effect structure of normal science, that, for Luhmann, this 'higher level of intelligibility' may be achievable. Change results only from the communication of ideas that challenge the identity and the self-image of social function systems. These act as irritations to those systems and what ensues may (or may not) be regarded as progress. Indeed, there is already some clear evidence that Luhmann's ideas have impacted on sociological conceptions of the social world and the operations of its subsystems.²⁰

3. Luhmann's failure to build into his concept of 'world society' any recognition of local variations which may significantly affect the operation of the legal and political systems, and of the different forms that these systems may take under different social conditions.

This is a criticism often directed at Luhmann and autopoietic theory by comparative researchers, often influenced by Ernest Gellner, who use concepts such as 'legal culture' or 'political culture' to identify differences in the way law and politics operate in different social settings, and to clarify different social perceptions of the legal and political systems.²¹ Researchers using such approaches usually emphasize the role of specific historical, geographical or ethnographic conditions in the formation and development of distinct legal and political systems.²² Clearly, it is not difficult to see why a theory which posits functional differentiation as the sole logic of social

change, and which recognizes the existence only of a 'world society' in which politics and law exist as global subsystems, might appear to deny any importance to the local variations which these researchers identify.²³

Notwithstanding Luhmann's scathing comments about the use of 'culture' as a conceptual instrument for sociological research,²⁴ however, these critics also misunderstand Luhmann's intentions in certain quite fundamental respects. Far from denying the importance of local variations, Luhmann expressly recognizes that all social systems assume distinct forms and follow distinct lines of evolution in different settings, and that in different locations different systems are likely to enter characteristic structural couplings. What he does deny, however, is that regional variations on systemic differentiation *pertain to, or are constitutive of, what he sees as 'society'*.

As we explained in Chapter 1, Luhmann sees society as consisting of all communications recognized by communicative subsystems. Both society and its constituent subsystems are quite separate and distinct from organizations and interactions. At the level of interactions and organizations, he fully recognizes the existence of regional forms and local variations. Indeed, throughout his writings he demonstrates an extensive knowledge of particular legal and political issues, not only within different geopolitical areas, but also at different historical times. At this level, both individuals and organizations may become 'structurally coupled' to produce endless possibilities in the way that law and politics is practised and perceived. The point that Luhmann insists upon, however, is that these interactions and organizations do not become part of society until they are given meaning and significance by one or more of society's functional subsystems, until they have been coded by these systems and become recognizable as communications belonging to that system. It does not matter politically, for example, whether the law is practised by a single legal profession or one split into barristers and solicitors, for law still continues to perform the same role in relation to the legislature, the administration and the public. In the same way, it is of no consequence for law's tasks of distinguishing between lawful and unlawful, or of stabilizing normative expectations, that judges in some jurisdictions are elected, while others qualify for their positions through an examination system. These variations become significant for law, and so for society, only if they become 'legal issues' – if, for example, a judge's appointment is challenged in the courts.

It would thus be a mistake to see Luhmann's seeming indifference to the characteristics of particular societies, which other social commentators find fascinating, as representing a *reductio ad absurdum*, where anything and everything that does not fit into his scheme is denuded of any significance. For Luhmann, the absurdity lies rather in the belief that it is possible to create out of the great mass of contingent structural couplings generated by interactions and organizations a sociology which claims to determine with certainty how specific (that is, regional or developmental) factors might

trigger certain events, and to produce theoretical schemes which explain how and under what conditions these events might occur. Luhmann's sociology simply denies that this is possible. For Luhmann, things happen because they happen, and the identification of causes and effects is bound to be a subjective, selective and self-referring exercise. All that is possible for sociology is to describe and analyse how communications are organized functionally within social systems. This is not in any way to deny the importance of other forms of knowledge and understanding. It simply refutes the belief that these have any claims to 'the truth' or analytical or predictive value beyond the theoretical framework which generated them. They are interpretations and can never be anything more than interpretations.

4. Luhmann's reluctance to enter into debates on contemporary legal and political issues.

It cannot be denied that Luhmann's writings are a source of constant frustration for political theorists, for lawyers and for others who seek answers to social problems or at least some direct guidance on where these solutions might be found. He does not, to be sure, provide answers, only more questions or enigmatic responses to questions. 'The only thing we know about the future is that it will be different from the past.'²⁵ It is not so much that Luhmann, as a social commentator, is shy of committing himself to predicting the future, or that he wishes to avoid any direct diagnoses or prognoses. It is more that he sees any specific intervention in everyday reality as flying in the face of his own theoretical conviction: namely, that contingency, rather than conscious planning by specific people, determines what the future is likely to hold. In this Luhmann is not merely stating the obvious – that nobody knows much about the future with any degree of certainty. That much is taken for granted. 'Today we know that like it or not we have to live without much confidence in secure prospects for the future.'²⁶ His point is rather that the general acknowledgement of ignorance, insecurity and impotence does not appear to prevent widespread (and at times extravagant) claims to knowledge about the future appearing regularly in law and politics. For Luhmann, expectations of the prophetic and predictive powers of these systems may well appear necessary for their operations. Nevertheless, he continually stresses that any similarity between attempts to fulfil these expectations and what the future actually holds are purely coincidental.

Yet for Luhmann the demands made of law and politics, which make it necessary for them to give the impression of being able to perform the impossible, are not to be seen entirely negatively. They are not to be regarded as undermining the authority of these systems, but rather as a source of creativity allowing the system to evolve and develop. In any event, politics cannot avoid formulating policies on the basis of economic forecasts, predicting future demands on welfare provision, anticipating the effects of

crime control measures, and so on. Law, for its part, as we have seen, is obliged to make lawful/unlawful decisions on the strength of present futures – of expectations about the future from what is knowable in the present.²⁷ In both systems these decisions founded on speculation are presented as if the future that they predict is highly likely or indeed certain to occur. By the same token, the interventions promoted by government policies or court decisions are presented as certain or highly likely to prevent catastrophes occurring or to bring about changes for the better.

For Luhmann to take sides in political debates or courtroom contests – for example, to argue for or against the granting to or exercise of civil rights by particular individuals or groups, to deliberate on what types of conduct should be subject to sanction and what punishments should be applied to transgressors, to assess how wealth should best be distributed, and taxes imposed and enforced – would involve taking a position which would immediately jeopardize the theoretical orientation of an observer of social systems. He would be forced to operate within the very systems he was observing and, in doing so, accept all the limitations restricting their vision of the world as well as their claims that the future should, with the aid of 'reliable' knowledge, be predictable.

Clearly, Luhmann's refusal to compromise his theoretical position by entering directly into political or legal debates is linked to the issue of his moral agnosticism, which we discuss later in this chapter. However, it is worthwhile remarking here that this agnosticism is for Luhmann an essential part of his theoretical identity. Once he had assumed the identity of an observer of social operations *within social systems*, rather than that of an observer of humanity and of the decision-making of people as individuals and within organizations, this precluded the introduction of issues of morality and values into his analysis, for they had no relevance to the operations of social systems as systems of communications. The observer of systems' operations has to adopt an attitude of total indifference on the question of whether these operations produce morally good or morally bad results, or whether they result in progress or regression.

5. Luhmann's refusal to see law and politics as instruments for progress or conservation.

Luhmann's understanding of politics and law, of their capabilities, their functions, their limitations and shortcomings, stands in sharp contrast to that of other contemporary legal or political theorists. For these other theorists the political and legal systems, speaking generally, can be harnessed to secure a better, more just, more equal society, or at least to preserve what is of value in society against unwelcome change. Law and politics, according to this view, may resolve conflicts, redress imbalances of power and wealth, protect the property and the democratic process, and promote the welfare of children and of other vulnerable members of society. Luhmann

does not deny that, on occasions, legislation, political rulings, court decisions and even the mere prospect of litigation may be interpreted as achieving some or all of these objectives. His problem is with interpretations which place law and/or politics at the centre of social activities and see them as the prime cause of events in society. Such interpretations are always possible, but they inevitably have to stand alongside other interpretations which may see law and politics in a different light, or point to different causes as producing the effects which are claimed for them. Luhmann's autopoietic theory avoids these interpretative problems by avoiding mono-causal explanations for and moral evaluations of social events.

Law, for Luhmann, as we have seen, serves society through its capacity for organizing communications.²⁸ This occurs in two distinct but related ways, the one in the political system and the other in the legal system. The first sees the political system as deploying law in the form of legislation. Legislation may then act as a medium for the diffusion of political communications containing prescriptions and prohibitions throughout society, and, if successful, it may secure compliance for particular policy programmes. Law as legislation is able to bring together people, as individuals and representatives of private and public institutions, around specific focal points which these policies have predetermined – be they consumer protection, the regulation of corporate bodies, the preservation of the environment, the guaranteeing of material welfare, the management of health, the prevention of crime or any others which the government selects. These focal points may take the form of meetings, consultations, reports and so on required by statutes or other legislative regulations, or even of public protests. These in turn provide opportunities for structural coupling whereby the communications of people and institutions become linked in ways that allow and encourage a continuing relationship between them, their co-evolution.²⁹ Each constructs the communications of the other in its own terms around pre-selected themes.

In the field of child protection, for instance, the communications of social workers, police, paediatricians, lawyers, child psychiatrists and parents become structurally coupled around such issues as risk assessment, surveillance, resource allocation, exchange of information, parenting capacity, non-accidental injury, evidence and court proceedings. Each participates not as an agent freely choosing to meet and interact, but as the objects of policy designs which statute and legislative regulation have made possible. This is the case across a wide range of social interactions, where, through the power of legislation, government has been able to influence the form (in George Spencer Brown's sense) of communications and the structural couplings that evolve from these communications. This does not mean necessarily (although governments try to persuade us otherwise) that the ensuing decisions are likely to be any better or based on more reliable knowledge than if these structural couplings had not occurred. What it does mean is that

politics has been able to make possible communications that follow one particular political agenda rather than another. Both the kinds of issues raised and the form in which problems are presented are likely to conform to pre-designed patterns. This is an important aspect of the Luhmann concept of the power of law.

There is in Luhmann's writings, therefore, no denigration of the political power of law, but rather a total theoretical reorientation in the issue of how law might introduce politically determined contents into social communication. Autopoietic theory may share with conventional political theories a view of legislation as an instrument designed to produce and capable of producing specific effects within society, and so of ensuring compliance with political demands. However, for the autopoietic observer this instrumental account of legislation exists solely as a product of the political system. From an autopoietic perspective, legislation cannot achieve objectives in any systematic or predictable way. For this to be the case, the political system would have to identify with certainty the stimuli and outcomes of its policies, which is never possible. The power of legislation for Luhmann, as an autopoietic observer of the political system, consists rather in its ability to create the possibility that social communications will take one form rather than another and that the communications of individuals and institutions will become structurally coupled around predetermined themes.³⁰

The second way in which law organizes communications is covered in some detail in Chapter 2 of this book. This takes the form of the reconstruction by the legal system of anything in its environment into issues of legality and illegality. As in the case of politics, Luhmann's intentions are not to belittle or denigrate the achievements and potentials of the legal system. They are rather to draw attention to its transformative powers, to its ability to reduce complexity into issues that may be decided by the law by reference to its own previous communications, rather than to the interventionist aspects of law upon which other theorists insist. For Luhmann, the supreme achievement of law is to organize communications so that society is able to rely upon normative, often 'counterfactual', expectations rather than those derived from experience. This permits decisions to be made and action to be taken on the foundation of normative certainty (or relative certainty) based on the law's understanding of social events, so that law does not have to rely upon the uncertainties of experience and projections of that experience into the future.

In the same way, Luhmann identifies limitations of the legal system's organization of communications for society which are very different from those associated with the limits of legal intervention that other theorists discuss. For Roscoe Pound, for instance, the life of law lies in its enforcement, in its effectiveness in achieving desired ends for litigants, judges and legislators.³¹ If the law falls short in its attempts to achieve these ends, it has failed: it has exceeded the limits of its capabilities as an instrument for social control

or social change. For autopoietic theory, on the other hand, the very belief that law's programmes are able, through legal decisions alone, to achieve specific objectives (*Zweckprogramme*) represents a misconception of the social function of law. Both law's achievements and the limitation of such achievements lie not in the results of its decisions, but in the organization of society in such a way that decisions may be underpinned by a reliance upon a normative order. The legal system creates a world of expectations in which conduct will continue to be seen as either lawful or unlawful, and the courts will continue to be able to distinguish between lawfulness and unlawfulness. The limitations of law lie, first, in its inability to see what it cannot see; that is, to take account in its decisions of unknowable factors which could affect outcomes. This is not, as many legal commentators in different fields of law would have us believe, a defect which can be remedied by making more information and more reliable information available. Complexity cannot be captured and tamed in this way. More information leads not to clarity and reliability, but only to the need for still more information. Partial vision is endemic to the legal system, as it is to all social systems; as such, it is incurable. The second limitation relates to law's inability to penetrate directly other social systems and its dependence upon those systems' reconstruction of legal communications. Again, this is not a state of affairs that can be remedied entirely. All that law is able to do is to try and anticipate the likely effects of its communications within other systems, but it is always restricted in this by its inability to project itself into those systems. Its understanding will always remain a selective, legal reconstruction of those systems. This being said, however, Luhmann suggests that the achievements of modern law far outweigh its limitations. In fact, we could say, paradoxically, it is through its limitations as a self-referring system that law has been so successful in ordering communications for society.

6. Luhmann's failure to account for human agency in directing change through law and politics or in using law and politics to resist change.

At the centre of Luhmann's conception of modern society is the belief that the claims made for human agency, as the shaping force in social life, are greatly exaggerated. As discussed in earlier chapters, Luhmann identifies systemic evolution – the internal system reactions to events in its environment and the externalization of these reactions in ways that provoke responses from other systems – and not human action as the source of the dynamic processes which bring about alterations to social structure. He argues thus, as we have seen,³² that social reality cannot be viewed as a distillation or product of human agency, and that social agents do not have an originating or constitutive role in social formation. In fact, he indicates that the widespread, yet counter-intuitive, reluctance to abandon the concept of the acting and thinking human being as the author of social reality badly disables sociological attempts to understand this reality.

In these respects, Luhmann shares common ground with somewhat unlikely theoretical companions. Apart from its specific context within functionalist accounts of social development, his systemic model of social change is also, somewhat paradoxically, close to aspects of neo-Marxist theory.³³ For example, his views on the limits of effective steering, on the inevitable crises of social democracy, on the overproduction of bureaucracy in welfare states, and on the necessity of a shoring-up of government through corporate techniques are certainly articulated from a perspective on the political-economic right. Yet these views also offer a set of diagnostic analyses which can easily be used by left-oriented agendas seeking to make sense of the regulatory and legitimatory predicaments of the political system under the conditions of advanced capitalism. His concept of evolution also provides a model for modernizing Marx's determinist theory of history, and for expanding the notion of class-based determinism to include a broader conception of how society is shaped by systemic complexity, and by complex and uncontrollable interpenetration between systems. Luhmann's sociology thus makes itself available for revisions of Marxist thought which reject actionistic, humanistic or voluntaristic claims that human agency, organized in classes or political parties, might assume direct responsibility for governing economy and society, and for steering them towards desired objectives.

However, despite this, Luhmann's devaluation of human agency is also one of the chief reasons for his vilification by many contemporary political theorists. Indeed, one could see the altered configurations of political discourse since 1989 – across all points in the spectrum of political interpretation – as having created a theoretical climate which is particularly unresponsive to Luhmann's ideas concerning the social role of action. Since 1989, even left-oriented political theory has drifted generally towards more liberal, and often closer to Hanna Arendt's, conceptions of human agency. Through this process, it has tended to renounce the old paradigms of political economy and systemic or structural determinism, replacing these instead with eulogies to civil society, to local participation, to social movements and to anti-systemic agency. This tendency is most apparent in Habermas's late political moderation, and in his turn to an interactive paradigm of 'radical democracy'.³⁴ However, the move towards a 'post-ideological' or radical-liberal approach to societal constellations is manifest across the entire breadth of left-of-centre political opinion.³⁵ It lies at the heart of the popularity of Ulrich Beck's atomistic and actionistic views on sub-politics, protest and civil society,³⁶ and even of David Held's model of cosmopolitan democracy.³⁷ It clearly informs Giddens's third-way pattern for modern democratic systems,³⁸ and his claim that new types of emancipatory social agency are emerging which alter our traditional understandings of social and political systems.³⁹ The post-ideological change of paradigm is also behind Hans Joas's influential attempts to revivify the pragmatic

theories of the Chicago School as the basis for a model of creative democratic foundation.⁴⁰ The great influence of the sociological works of Pierre Bourdieu, not least, can also be traced to the ways in which it reconfigures the parameters of social agency on the basis of a thorough reconstruction of Marxist dialectics.⁴¹ Of these theorists, most are extremely critical of Luhmann. Beck, for example, describes Luhmann's thought as an 'extreme counter-position' to the 'challenges of democracy'.⁴² Joas dismissively compares Luhmann's work to the 'theatre of the absurd' or to 'romantic irony'.⁴³

Against this background, it is not difficult to see why Luhmann should be so widely reviled among contemporary social theorists. On a most obvious level, his social theory can easily appear as a politically intransigent type of anti-liberalism, which attacks the core assumptions of contemporary liberal thinking, especially the principles of social co-determination, freedom of agency and civil society. At the same time, however, to thinkers on the left who are now attempting to salvage certain basic stances from the partly discredited Western Marxist tradition, Luhmann can actually appear unnervingly close to precisely those doctrinaire and anti-humanist expressions of Marxist theory,⁴⁴ which they now wish to throw overboard.

Nonetheless, we believe that the fact that Luhmann's writings have acted as such a powerful irritant to contemporary social theory is an index of his importance. His perspectives on the origins of political and economic power, on the foundations of democracy and on the extent to which power might be susceptible to active democratic control act, at the very least, as a crucial corrective to the claims for the shaping force of human action which we find in dominant contemporary social theory. His views demand, at least, that *hard evidence should be forthcoming* wherever theory allows itself to exalt on the constitutive power of civil society, sub-political groups, or participatory organizations. Indeed, we believe that theory which champions human agency as the motor of social transformation obtains legitimacy only if it reflects on the challenge presented by Luhmann's work, and if it absorbs the questions he raises regarding the impact of human action. Luhmann's denial of the formative impact of action on power requires at least that those who speak for human action should be precise and self-critical about the limits and contexts of agency, and that they should avoid positing agency as a universal substratum for all social formation. If viewed against this criterion, in fact, the proclamations for agency and reflexivity which we find in much contemporary sociology might easily be found to be sadly lacking in evidence and substance.

7. The failure of Luhmann's ideas to offer anything more than a new brand of conservatism.

It is difficult to deny that, as far as an expressly political outlook can be distilled from his social theory, Luhmann was emotionally and politically some kind of conservative. Obviously, he is opposed to classical conservative views

on the role of the state, on pluralism, on social unity and on political values. However, in his perspectives on welfare, regulation, participation, social movements and economic distribution, his work might be viewed uncontroversially as a morally neutral variant on the neo-liberal/neo-conservative theoretical tendencies of the 1970s and 1980s. Indeed, if we can argue (as seems reasonable) that in contemporary debate the classification of theory as conservative or as non-conservative hinges on whether it tends to endorse or tends to reject political intervention in the economy and social participation in political decision-making, Luhmann can be placed securely in the conservative camp. This is the camp favouring minimal state intervention and minimal social participation in the political process.

Rather than accepting Luhmann's conservatism as yet further grounds for a wholesale rejection of his theory, however, it is important that this conservatism should not stand in the way of a full consideration of the broader implications of his work. Luhmann's conservatism is not simply a political outlook tending to conform to standard definitions of conservative politics; it contains, as discussed above, a set of theoretical models which cut at the heart of the common foundations of all post-Enlightenment political theory – whether on the right or on the left. On this basis, consequently, Luhmann's brand of conservatism should be assessed not only in terms of its specific implications for political organization, but also as a perspective which throws important light on other social and political perspectives around him – even those which are commonly categorized as 'liberal' or even as 'radical'.

In the world of political theory, Luhmann is usually judged to be a conservative when he is compared with the two other key protagonists in recent debate: Habermas and Rawls. Analogously, he is usually judged to be a conservative in the world of social theory when he is put alongside the other most influential views in contemporary sociology: those of Giddens, Beck and Bourdieu. The perspectives of these other thinkers are usually seen to be 'liberal', 'radical' or even 'radical-liberal' because they make explicit the belief that social systems, and especially the political system, must be centred on a conception of human endowments and human needs. Above all, these other theories demonstrate their liberal, radical or radical-liberal credentials by insisting on a degree of popular involvement (via participatory action, the free exercise of reason, or both) in the administration of the state, and in the goal-setting operations of the political system.

Measured against such criteria, Luhmann is clearly no liberal, and certainly not a political radical. However, a comparison between Luhmann and his liberal and radical adversaries illuminates in important ways the rather fluid and insubstantial nature of the categories used to classify political theories, and it raises questions about the exact extent of the divergence between him and his opponents. Indeed, just as Luhmann throws doubt on the agency-model developed in rival contemporary theories of society, he

also shows up the sometimes rather specious claims to liberal or radical status made by other influential social and political positions.

In political theory, for example, Habermas and Rawls originally secured for themselves the titles of 'liberal' or even (in the case of the former) 'radical-liberal' by defining their theoretical profiles on the basis of the argument that human reason sets the terms for the legitimacy of the political order, and that these terms also include consensually obtained standards of fairness and equality for the organization of interactions in the economy.⁴⁵ However, both Habermas and Rawls have in their later works modified their original bold claims for the regulatory scope of reason. Latterly, both have settled for a much attenuated version of their original economically inclusive conception of true democracy and political legitimacy, and both have (in distinct ways) come to accept the necessary differentiation between political and economic democracy.⁴⁶

Placed in this light beside his two great rivals and interlocutors in modern political theory, Luhmann appears far less conservative, and Habermas and Rawls appear far less liberal or radical, than is commonly supposed. Indeed, the actual institutional organization of the political systems which the later Habermas and the later Rawls define as legitimate is not very greatly distinct from the condition of legitimacy projected by Luhmann himself. All three views converge in imagining legitimate democratic society as a property-owning democracy in which conditions of production are to a large extent beyond the remit of rational or consensual regulation, and in which democratically or consensually formed political power can only be applied to a very selected number of issues. Above all, all three views share the belief that economic production and political governance are organized in two distinct systems, and that the founding terms of government cannot be effectively applied to production. Far from setting out a substantively 'liberal' or 'radical' model of society, therefore, Habermas and Rawls ultimately uphold their reputation as liberals only through their rather hollow insistence that the use of reason is truly of constitutive importance in the emergence of the social systems in which human action is organized. It is not because they demonstrate how this constitutive role might actually be performed.

Analogously, in a brief survey of the most influential perspectives in recent sociology and social theory, only Bourdieu might be seen to envisage a society which differs substantially from the reality of liberal-capitalist democracy which Luhmann especially endorses. Beck (expressly) and Giddens (implicitly) both lament and contradict Luhmann's defiantly ironic views on social engagement and political action. Yet even they agree with Luhmann that certain spheres of human interaction cannot be determined by civil agreements, and that the new arenas of civil politics or sub-politics or life-politics whose virtues they extol are in actual fact marginal to the most important regulatory questions of the political process. On the

overriding question of economic orientation, and of the relation between politics and economy, neither Giddens nor Beck seriously contradicts the founding political principles of Luhmann's sociology.⁴⁷

We would argue, therefore, that one of the main reasons for the political demonization of Luhmann is that he ironically mirrors and undermines the gestures and the theoretical posturing contained in other, reputedly far more radical, social and political theories. More pointedly – one reason why Luhmann is so often held in contempt by his fellow theorists is that he gives bold and unapologetic expression to beliefs which appear in much more suppressed form in their own writings. Luhmann's simple observation that in complex democracies overarching social consensus does not and cannot form the basis of political and economic power might have a scandalous ring in the ears of liberal and radical-liberal theorists of politics and democracy. Yet the same argument, in rather mollified expression, is also implicit in the works of Habermas, Rawls, Giddens and Beck. In these works, however, this view appears through a prism of limited activism, resigned moral humanism, and chastened or disappointed anti-capitalism. Refracted through this prism, arguments close to Luhmann's own view propose themselves as plausible and laudable to the moral conscience of contemporary social and political theory.

8. Luhmann's rejection of rationality as the final arbiter of validity, value and legitimacy.

As we have discussed earlier in this book,⁴⁸ Luhmann positions his general theory in direct relation to the broad debates on the content of the Enlightenment and on the role of reason. Moreover, he expressly defines his work as a contribution to, and continuation of, the critiques of metaphysics which characterize the first Enlightenment. It is in this context that he dismisses that elevation of human reason to the position of ultimate judge of the way society *does* and *should* operate, which otherwise characterizes the extended aftermath of the Enlightenment – and especially the Kantian Enlightenment. The belief that reason can extricate itself from all social conditions, and propose itself as the regulatory centre of all occurrences in all society, including all policies, laws and legal judgments, is, for Luhmann, an antiquated view. This view derives from a rather simplistic attempt to eliminate transcendent beliefs – that is, the conviction that universal principles exist beyond reason – and to replace this metaphysics with a vision of the universe centred on the reasoning human being. Against such conceptions of essential rational order, Luhmann develops a category of systemic rationality which is prepared to accept *many forms of reason*, and which sees the evolution of the world, and of politics and law in this world, as the result of multiple processes of rationality existing within different systems. It is for this reason that he denies that rationality has any integral moral component, and that he opposes the belief that any monadic

construct of reason might act as the final arbiter of the validity of laws and political rulings. He views the attribution of unchanging moral qualities to reason as a particularly crude type of metaphysics. For Luhmann, rationality is no guarantee at all of morality or even of the possibility of being able to identify where morality lies, and it is certainly no guarantee of validity in law or of legitimacy in politics.

The accusation that Luhmann undermines the moral dimension of reason is therefore surely correct. Indeed, this is quite clearly a central aspect of his philosophical position. In this respect, however, it is once again illuminating to place his work beside that of his major critics and theoretical sparring partners, and so to assess its significance in terms of its position in overarching debates. As we examined earlier in this book,⁴⁹ Luhmann's attempts to reconstruct the concept of reason in the Enlightenment are not unique. On the contrary, these attempts mark out one position in a broad and long-standing tradition of social-theoretical discussions, in which Nietzsche, Weber, Adorno, Horkheimer and Foucault are among the more noteworthy participants. In its specifically ethical aspect, however, Luhmann's quest to sever rationality from its last foundations in metaphysics – from the belief that there exist necessary causal and moral substances which can be deduced by reason – also draws him into the sphere of normative political theory. Here, as we have seen, there is important common ground between himself and the two other great political theorists of the last three decades: Habermas and Rawls.

For all the otherwise almost innumerable differences between them, Habermas, Rawls and Luhmann are connected by the fact that they attempt to develop a notion of reason, and of reason's role in society, which corrects the metaphysical or transcendental preconditions of the Kantian Enlightenment. On this basis, they seek to show how reason can freely obtain securities in the everyday processes and activities of social and political life, and how legitimacy in politics and law might give expression to the securities of such reason. All three theorists thus move together methodologically, in however distinct a manner, in the endeavour to give a conclusively secular and autonomous description of reason's character and scope, and to conceive of legal validity and political legitimacy as corollaries of a post-metaphysical rationality. Luhmann's treatment of the Kantian legacy has been addressed extensively above: it revolves around the reinterpretation of rationality as an attribute of systems, not of persons, and around the claim that legitimacy in politics expresses the political system's own reason, not formally deduced postulates or prescriptions. By contrast, Habermas, far more of a Kantian than Luhmann, attempts to explain the role of reason as an operation of communicative consensus-finding,⁵⁰ which ultimately founds legitimate laws. In direct analogy to this, Rawls also argues that universal or binding principles of reason can be obtained either through the use of reason in a constructivist procedure, which does not presuppose any

transcendent privilege for reason,⁵¹ or through the historical structure and daily fabric of reasonable societies.⁵² These principles then also become the basis for legitimate laws.

It is at least arguable, however, that neither Habermas nor Rawls ultimately escapes the metaphysical preconditions which they criticize, and that neither successfully accounts for political and legal legitimacy as post-metaphysical realities. Both in fact remain ultimately in a Kantian paradigm, and they arrive at a non-metaphysical account of reason, and of reason's role in founding legitimate law and legitimate power, only by translating the metaphysical belief in founding substantial order into an invariable ethical doctrine of human reason and human nature, which proposes a categorical model of inalienable rational faculties as the primary cause and chief legislative arbiter of acceptable social reality. It is on this fixed doctrine of rational human nature that they found their views on political ethics, and that they define the conditions of legitimacy in all social, political and legal institutions.

Luhmann's legal and political response to the problems of metaphysics and reason in the Enlightenment is certainly far less morally attractive than that of Habermas and Rawls. His argument is that if we are to be serious about the claim that human reality is not determined by external laws and is not defined in terms of pure essential structures, then we must also be serious about the politics of human nature and human essence. We must not, in other words, seek easy refuge in the secular solace offered by rational humanism. We must not imagine that all legal and political issues can be made transparent so as to reveal the clear moral principles, the moral prescriptions which gave rise to them or the moral conflicts or dilemmas which they generate. Nor must we endorse categorical concepts of legitimacy or validity simply because these might appear to comply with convenient conceptions of reason or nature. We must, in short, be wary of replacing the reductive and simplistic order of metaphysics with the equally reductive and simplistic order of the human being, ready-endowed with capacities for binding legislation.

On these grounds, it can once again be legitimately claimed that the uncompromising analytical stringency of Luhmann's thinking produces insights which undermine and disconcert his critics. While in his reflections on the role of reason he pursues the same anti-metaphysical line of inquiry as his neo-Kantian contemporaries, he is ultimately prepared to draw more consistent, though less placatory, conclusions from the primary critique of metaphysics. This leads him to refuse all constructs of human reason and agency defined with the help of residually metaphysical constructs, and to oppose all models of legality and legitimacy premised on such constructs. Underlying his disparagement of theoretical attempts to derive normative principles from universal foundations is the ironic statement that rational theory, in the wake of the Enlightenment, is fundamentally unable to

account for the very types of political freedom and legitimacy, and of pluralism and human rational independence, which the Enlightenment itself seeks to defend and promote. This, he states, is because such theory is still metaphysical. It has not mustered the courage to examine the conditions of freedom, plurality and independence liberated from the legacy of metaphysics.

At the very least, the inference we would draw from Luhmann's relativizing and pluralist account of reason's role in politics and law is that other rationalist views on metaphysics should follow the example of his theoretical rigour, and should allow themselves to be challenged by this uncompromising vision of social and political reality after the end of all metaphysical traces. To stand the test of relevance and validity, in short, theory must be quite serious in its attempts to imagine a social reality beyond metaphysical principles, and it ought to follow Luhmann's implication that the critique of metaphysics, especially in its resonance for law and politics, should not be cut short before its full implications have been drawn out.

Concluding note

We would conclude in sum that, while there might indeed be understandable reasons for the dismissiveness, scepticism and ridicule that Luhmann's ideas often provoke, there are much better grounds for taking him seriously, and for engaging earnestly with the methodology and implications of his legal and political sociology as well as with his philosophical and political ideas. We take the view that his theory has had and will continue to have an important impact upon a number of distinct areas of intellectual debate – including law, legal theory, sociology, political theory, political economy, moral philosophy, metaphysics, aesthetics and cultural studies, to name only the most obvious. Indeed, in light of the substantive and methodological questions he raises for those who work within them, each one of these areas would, we believe, be well advised to take seriously the ways in which he describes and makes sense of the social world, and to broaden their own theoretical framework so as at least to consider the unique perspective that he brings to debates about the nature of modern society.

Finally, if we were challenged to list Luhmann's major contributions to contemporary thought identified during the course of this book, the task would not be an easy one, for, as with all major social theorists, each reader takes with him or her those ideas which most closely reflect his or her own prevailing interests and beliefs. Nevertheless, we believe that listing the most important legacies from Luhmann's theoretical perspective is a task worth undertaking, if only to justify to ourselves, as authors, the value of the enterprise that we have just concluded. We do not, however, expect others to share our list or to cite it as if it offered a definitive summary of Luhmann's greatest conceptual achievements.

We believe that Luhmann's most enduring additions to contemporary legal and political thought are as follows:

1. The challenge he issues to all legal and political theorists to reflect upon the first principles of their theoretical ideas – including what they commonly understand by the terms 'law', 'politics', 'reason', 'nature' and 'society'.
2. His introduction and development of a major paradigm-shift for sociological theory and research. As we explained and exemplified in Chapters 2 and 3, Luhmann's sociological method concerns itself with the ways in which different social systems organize their communications. For Luhmann, it is the particular forms that communications take, rather than the content of the communications, that are the essential objects for sociological study. As far as the meaning and value of these communications are concerned, there are always diverse ways of interpreting them and of attributing validity and significance to them. For Luhmann all these interpretations attributions may be left to politicians and jurists or to external observers of the legal and political systems (such as moral philosophy). For autopoietic sociologists, social communications are explained in terms of the identity, function and code of the system which generated them. To some sociologists this analytical method may appear as dry, abstracted and self-denying (even unethical) in its refusal to recognize the imputation of causes and effects and the expression of values and beliefs as belonging to sociological enquiry. To others it may be seized upon as a golden opportunity to take sociology into unexplored territory, to develop new concepts for understanding societies and their constituent parts. What cannot be denied, however, is the considerable contribution that Luhmann has made in synthesizing, philosophical and linguistic and mathematical concepts to create a radically new sociological method.
3. The mirror which he holds to simplistic types of humanism or anthropocentric philosophy, which invariably posit the human being (and its thoughts and actions) as the causal and moral centre of the universe.
4. His argument that the importance of the political use of power through legislation does not, as widely understood, reside in its ability to put into effect specific purposes or to select the agenda for political debate, but rather in its ability to create restrictive frameworks for discussion and decision-making.
5. His refutation of the belief that the legal system can be viewed as an effective vehicle for social engineering. Far from being a wholly negative message, this encourages lawyers to reflect upon the complex interdependencies that exist between law and all other systems, instead of seeing their own professional activities as central to all that happens in society

and expecting legal decisions to have a direct structural impact upon behaviour in different spheres.

6. His encouragement to political theorists and politicians to see the political system in its intricate interdependence with other systems, and to understand political legitimacy as a complex variable arising from this interdependence, not as a static good, tied to simple values and simple or personal notions of competence. This view of the political system allows us to understand how political systems are able to maintain legitimacy, that is, provide motivations for compliance, under even the most precarious conditions. It also provides insights into the changing role of the political systems of modern society.
7. His concept of dedifferentiation, and the importance of this for theories of pluralism. Luhmann suggests that the reality of differentiation, of coexisting centres of authority for truth, validity and legitimacy, is a fundamental prerequisite for a society characterized by a high degree of social pluralism. Consequently, all the freedoms taken for granted in modern societies – that is, economic freedom, health, artistic and aesthetic interest, legal redress, love and intimate relationships, speech, choice of work – are necessarily jeopardized when society begins to centre itself on one system, or to de-differentiate itself. It is for this reason that Luhmann goes to such lengths to point out the dangers of de-differentiation, whether in politics, science or law, and it is this process of de-differentiation that he identifies as the greatest threat to modern society.

Notes

1 Luhmann's Social Theory

1. For example, Bankowski, 'How Does It Feel to be on Your Own? The Person in the Sight of Autopoiesis' (1996).
2. King and Schütz, 'The Ambitious Modesty of Niklas Luhmann' (1994), p. 265.
3. For example, Foucault, *The Archaeology of Knowledge* (1972), *The Order of Things: An Archaeology of the Human Sciences* (1974) and 'Governmentality' (1979); Bauman, *Modernity and the Holocaust* (1989); Gellner, *Postmodernism, Reason and Religion* (1992).
4. Luhmann, 'The World Society as a Social System' (1982), p. 132, emphasis added.
5. For example, Mingers, 'Can Social Systems be Autopoietic? Assessing Luhmann's Social Theory' (2002). Cf. Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' (2001), p. 40.
6. Luhmann, 'The Cognitive Program of Constructivism and a Reality that Remains Unknown' (1990), p. 78.
7. Ibid.
8. Ibid.
9. 'The Individuality of the Individual: Historical Meanings and Contemporary Problems' (1986), p. 318.
10. Ibid.
11. Ibid., p. 319.
12. Teubner, 'Economics of Gift', p. 40.
13. Luhmann, 'The World Society as a Social System', p. 131.
14. Luhmann, 'The Evolutionary Differentiation between Society and Intereaction' (1987) and *Social Systems* (1995).
15. Luhmann, 'The Evolutionary Differentiation', p. 114.
16. Luhmann, 'The World Society as a Social System', p. 131.
17. Ibid., p. 132.
18. Ibid. (emphasis added).
19. See Beyer, *Religion and Globalization* (1994).
20. King and Schütz, 'The Ambitious Modesty', p. 268.
21. Luhmann, *Art as a Social System* (2000), p. 248.
22. Ibid., p. 244.
23. Ibid., p. 248.
24. Luhmann, 'The Self-Description of Society: Crisis, Fashion and Sociological Theory' (1984), p. 64.
25. Ibid., p. 65.
26. King and Schütz, 'The Ambitious Modesty', p. 269.
27. Luhmann, 'The Self-Description of Society', p. 64.
28. Durkheim, *The Division of Labour in Society* (1893) (English translation, 1984).
29. Parsons, *The Social System* (1952).
30. Weber, *On Law in Economy and Society* (1958) and *Economy and Society* (1978).

31. Gehlen, *Die Seele im technischen Zeitalter: Sozialpsychologische Probleme in der industriellen Gesellschaft* (1957) and 'Soziologische Voraussetzungen im gegenwärtigen Staat' (1968).
32. Luhmann, *Art as a Social System*.
33. Luhmann, *Funktion der Religion* (1977), p. 33.
34. Luhmann, *Die Wissenschaft der Gesellschaft* (1990).
35. Luhmann, *Das Recht der Gesellschaft* (1993), ch. 3.
36. Luhmann, *Die Wissenschaft der Gesellschaft*, pp. 64–5.
37. Luhmann, 'Soziologie des Politischen Systeme' in *Soziologische Aufklärung*, vol. 1 (1970).
38. Luhmann, 'The Autopoiesis of Social Systems' (1986), p. 174.
39. Luhmann, 'The Unity of the Legal System' (1988), p. 18.
40. Ibid.
41. Spencer Brown, *Laws of Form* (1969).
42. Baecker, 'Why Systems?' (2001).
43. Luhmann, *Art as a Social System*, p. 29.
44. Baecker, 'Why Systems?'.
45. Luhmann, *Art as a Social System*, p. 28.
46. Ibid., p. 18.
47. Ibid.
48. Ibid., p. 29
49. Ibid., p. 31.
50. Ibid.
51. Ibid.
52. Ibid., p. 65.
53. Ibid., p. 56.
54. Parsons, *The Structure of Social Action* (1937) and *Social Systems and the Evolution of Action Theory* (1997).
55. Luhmann, 'Generalized Media and the Problem of Contingency' (1976).
56. See Wolfe, 'Sociological Theory in the Absence of People: The Limits of Luhmann's System's Theory' (1992), p. 1730.
57. Luhmann, 'The Improbability of Communication' (1981), p. 122.
58. Ibid., p. 131.
59. Ibid.
60. Ibid.
61. Ibid., p. 124.
62. Ibid., p. 131.
63. See Luhmann, *Social Systems*, ch. 3, 'Double Contingency', p. 143.
64. Ibid., p. 412. One has to assume that physical presence is not necessary for interaction. Presence on the phone or internet chat-line is equally possible.
65. Ibid., p. 414.
66. Ibid., p. 416.
67. Luhmann, 'The Unity of the Legal System', p. 18.
68. Luhmann, 'Generalized Media and the Problem of Contingency', p. 512.
69. Ibid.
70. Ibid., p. 521.
71. Luhmann, *Art as a Social System*, p. 61.
72. Ibid.
73. Ibid.
74. Ibid., p. 414.

75. Ibid.
76. Ibid., p. 31; Luhmann, 'The Paradox of Form' (1999).
77. Luhmann, *Risk: A Sociological Theory* (1993), p. 15.
78. Ibid.
79. Ibid.
80. Ibid.
81. In Baraldi et al., *GLU: Glossario dei termini della teoria dei sistemi di Niklas Luhmann* (1990).
82. This is an adaptation of the definition of paradox set out in Baraldi et al., *GLU*, p. 130.
83. Ibid.
84. Luhmann, *Observations on Modernity* (1998), p. 15.
85. Luhmann, 'The Cognitive Program of Constructivism and a Reality that Remains Unknown' (1990).
86. Ibid., p. 67.
87. Ibid., pp. 64–5.
88. Luhmann, 'The Paradox of Observing Systems' (1995), section 5.
89. Ibid.
90. Luhmann, *Essays on Self Reference* (1990), ch. 7, p. 136.
91. Ibid.
92. Ibid.
93. Ibid., pp. 126–7.
94. Ibid., p. 137.
95. Luhmann, 'The Third Question: The Creative Use of Paradox in Law and Legal History' (1988), pp. 159–60.
96. Teubner, 'Economics of Gift', p. 32.
97. King and Schütz, 'The Ambitious Modesty', p. 269.
98. Luhmann, 'Codierung des Rechtssystems' (1986), p. 194.
99. Luhmann, *Das Recht der Gesellschaft* (1993), p. 190.
100. Luhmann, 'Codierung des Rechtssystems', p. 195.
101. Luhmann, *Art as a Social System*, pp. 65–6.
102. Luhmann, *Risk: A Sociological Theory*, p. 78.
103. Ibid.
104. See *ibid.*, p. 79.
105. Luhmann, 'The Coding of the Legal System' (1991).
106. Ibid.
107. Luhmann, *Ecological Communication* (1989), p. 41.
108. Ibid.
109. Ibid.
110. Ibid.
111. Luhmann, *Das Recht der Gesellschaft*, p. 190.
112. This is borrowed from King, 'Future Uncertainty as a Challenge to Law's Programmes: The Dilemma of Parental Disputes' (2000). Its specific application to law in this article can be generalized to include all social function systems.
113. Spencer Brown, *Laws of Form*.
114. A summary of several of the issues in the following account may be found in Luhmann, *Social Systems*. The references provided, however, present a much fuller discussion.
115. Luhmann, 'The Future Cannot Begin: Temporal Structures in Modern Society' (1976), p. 135.

116. Luhmann, *Social Systems*, ch. 2, 'Meaning', p. 78 (translation modified).
117. Ibid.
118. Luhmann, 'Generalized Media and the Problem of Contingency', p. 135.
119. Ibid.
120. Ibid.
121. Luhmann, *Social Systems*, p. 79.
122. Ibid.
123. Ibid.
124. See Chapter 4.
125. Luhmann, 'Generalised Media and the Problem of Contingency' (1976), p. 146.
126. Ibid., p. 149.
127. Ibid.
128. Luhmann, *Social Systems*, p. 42.
129. Luhmann, *Observations on Modernity*, p. 109.
130. Luhmann, *Social Systems*, pp. 79–80 (translation modified).
131. Ibid., emphasis added (translation modified).
132. Luhmann, 'The Future Cannot Begin', pp. 135–6.
133. King and Schütz, 'The Ambitious Modesty', p. 272.
134. Luhmann, *Risk: A Sociological Theory*, p. 189.
135. Ibid.
136. Luhmann, 'Generalized Media and the Problem of Contingency', pp. 508–9.
137. Ibid., p. 508.
138. Ibid.
139. Ibid.
140. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992), p. 1432.
141. Ibid.
142. Ibid.
143. Ibid., p. 1433.
144. Ibid., p. 1435.
145. Luhmann, 'The World Society as a Social System', p. 132, and *Political Theory in the Welfare State* (1990), ch. 3.

2 Society's Legal System

1. Luhmann, *Das Recht der Gesellschaft* (1993), p. 66.
2. See Chapter 1, pp. 11–18.
3. Teubner, *Law as an Autopoietic System* (1993), p. 88.
4. Although Luhmann insists on this definition of law throughout his writings, one can observe in his earlier, non-autopoietic writings a certain slippage, whereby a more structural image of the legal system as courts and legislature creeps into the texts.
5. Cornell, 'Time, Deconstruction, and the Challenge of Legal Positivism: The Call for Judicial Responsibility' (1995).
6. Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses von Staat und Recht* (1922) and *General Theory of Law and State* (1945).
7. Kelsen, *General Theory of Law and State*, p. 10.
8. Cotterrell, *The Sociology of Law: An Introduction*, 2nd edn (1992), p. 9.

9. See Tim Murphy's discussion, in 'Modern Times. Niklas Luhmann on Law Politics and Social Theory' (1984), p. 103.
10. Cornell, 'Time, Deconstruction, and the Challenge of Legal Positivism'; cf. King, 'The Construction and Demolition of the Luhmann Heresy' (2001).
11. Kelsen, *A General Theory of Law and State*.
12. See Habermas, *Between Facts and Norms* (1996).
13. See Cotterrell, *The Sociology of Law*, p. 9.
14. Roscoe Pound refers to the use of law to right emotional damage when he identified what he saw as the limits of effective legal action (Pound, 'The Limits of Effective Legal Action', 1916). Luhmann, however, goes further than Pound in his contention that law does not by taking on such tasks merely exceed its limits, it also acts in ways which are detrimental to society and to its own identity. See Chapter 6, p. 214.
15. The case in the House of Lords *Re W and Others* [2002] 2 All ER 192 serves as an example. Here, the Court of Appeal has previously given courts a role in overseeing the child welfare function of local authority social service departments where this function involved potential breaches of the Human Rights Act. The House of Lords reversed this decision and reaffirmed the principle that the court's role should be limited to the resolution of disputes.
16. Luhmann, *Das Recht der Gesellschaft*, p. 14. The translations of *Das Recht der Gesellschaft* in this book are by the authors and are unpublished.
17. *Ibid.*
18. *Ibid.*
19. *Ibid.*, pp. 16–17.
20. *Ibid.*
21. *Ibid.*, p. 18, emphasis added.
22. *Ibid.*, p. 15.
23. *Ibid.*, p. 18.
24. Luhmann, 'The World Society as a Social System' (1982), p. 136. See Chapter 1 of this book, pp. 8–9.
25. *Ibid.*, p. 136.
26. *Ibid.*
27. Luhmann, *Das Recht der Gesellschaft* (1993), p. 102.
28. Luhmann, 'The Coding of the Legal System' (1991).
29. Luhmann, 'The Third Question: The Creative Use of Paradox in Law and Legal History' (1988), p. 160.
30. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992), p. 1429.
31. Teubner, *Law as an Autopoietic System*, p. 42.
32. See, on the 'mischief rule' in English law, note 104 below.
33. Spencer Brown, *Laws of Form* (1969), ch. 1.
34. Luhmann, 'Legal Argumentation: An Analysis of its Form' (1995), p. 286, emphasis added.
35. *Ibid.*, p. 289.
36. Luhmann, *Das Recht der Gesellschaft*, p. 348.
37. *Ibid.*, p. 347.
38. *Ibid.*, p. 294.
39. 'In decisions about the welfare of children in divorce cases, for example, indicators of the future available at present can be used as rules of decisions. Like plants and animals, the legal system develops "anticipatory reactions" to present

occurrences which are quite regularly correlated with future situations (or so it is assumed). But these correlations are, in turn, uncertain precisely where they are supposed to be scientifically guaranteed, (Luhmann, 'Legal Argumentation: An Analysis of its Form', p. 294).

40. Luhmann, 'Legal Argumentation: An Analysis of its Form', p. 294.
41. See, for example, Griffith, *The Politics of the Judiciary* (1991).
42. Luhmann, 'Legal Argumentation: An Analysis of its Form', p. 343, emphasis added.
43. *Ibid.*, p. 286, emphasis added.
44. *Ibid.*, p. 289.
45. *Ibid.*, p. 290, emphasis added.
46. *Ibid.*, p. 291.
47. Luhmann, *Das Recht der Gesellschaft*, p. 354.
48. Luhmann, 'Legal Argumentation: An Analysis of its Form', p. 292.
49. *Ibid.*
50. *Ibid.*
51. *Ibid.* Luhmann refers here to Shapiro, 'Toward a Theory of *Stare Decisis*' (1972), p. 125.
52. Luhmann, *Das Recht der Gesellschaft*, p. 354.
53. *Ibid.*, p. 286.
54. *Ibid.*, p. 285.
55. *Ibid.*, p. 287.
56. *Ibid.*
57. *Ibid.*, p. 400, emphasis in original.
58. *Ibid.*, p. 347.
59. *Ibid.*, p. 401.
60. *Ibid.*
61. *Ibid.*
62. See pp. 9–11.
63. Luhmann, *Art as a Social System* (2000), p. 138.
64. Luhmann, *Das Recht der Gesellschaft*, p. 125.
65. *Ibid.*, p. 130.
66. *Ibid.*, p. 129.
67. *Ibid.*
68. It is true that the criminal process in common law countries allows some departure from this narrow vision of what defences are acceptable by leaving the decision to juries, which may decide to ignore the strict letter of the law and find for the defendant for reasons which are not recognized by law. To some extent the legal system in these countries is able to protect itself against the effects of such aberrant decisions by relieving juries from giving reasons for their decisions and by insisting on the secrecy of jury deliberations. In this way only the decision becomes a legal communication and not the rational for this decision. If by chance jurors subsequently reveal to the media that extra-legal considerations lay behind their decisions, the law is well able to ignore these revelations by refusing to allow them to form the basis of any appeal.
69. Luhmann, *Das Recht der Gesellschaft*, p. 81.
70. See Pound, 'Social Control through Law' (1942), and Bredemier, 'Social Control through Law' (1942), and D. Black, *The Social Structure of Right and Wrong* (San Diego and London: Academic, 1993).
71. See Habermas, *Between Facts and Norms*.

72. Luhmann, 'Operational Closure and Structural Coupling', p. 1427.
73. Luhmann, *Das Recht der Gesellschaft*, p. 129.
74. *Ibid.*, p. 185.
75. *Ibid.*
76. See Spencer Brown, *Laws of Form*.
77. Luhmann, *Das Recht der Gesellschaft*, p. 185.
78. *Ibid.*, emphasis added.
79. *Ibid.*
80. *Ibid.*
81. *Ibid.*, p. 180.
82. See King, 'Future Uncertainty as a Challenge to Law's Programmes: The Dilemma of Parental Disputes' (2000).
83. *Ibid.*
84. Luhmann, *Das Recht der Gesellschaft*, p. 181.
85. *Ibid.*
86. *Ibid.*, p. 191.
87. *Ibid.*, p. 190. See Chapter 1, pp. 23–5, of this book.
88. *Ibid.*
89. Luhmann, 'Codierung des Rechtssystems' (1986), p. 194.
90. Clam, *Droit et société chez Niklas Luhmann: la contingence des normes* (1997), p. 282.
91. *Ibid.*, p. 281.
92. Luhmann, *Das Recht der Gesellschaft*, p. 190.
93. See Chapter 1, pp. 19–21 and p. 24.
94. Luhmann, 'Codierung des Rechtssystems', p. 198.
95. Luhmann, 'The Coding of the Legal System'.
96. Wynne, 'Establishing the Rules of Laws: Constructing Expert Authority' (1989), p. 29.
97. See King, 'An Autopoietic Approach to the Problems Presented by "Parental Alienation Syndrome" for Courts and Child Mental Health Experts' (2002).
98. Luhmann, *Das Recht der Gesellschaft*, p. 182.
99. *Ibid.*
100. *Ibid.*, p. 198.
101. *Ibid.*, p. 200.
102. *Ibid.*, p. 198.
103. *Ibid.*, p. 196.
104. Even if the English 'mischief rule' of statutory interpretation, whereby the intentions of parliament may become relevant to legal decisions, might appear to confuse matters, it must be emphasized that this rule operates only to resolve ambiguities in the wording of a statute. There is no suggestion that the court should in any way take over responsibility for eliminating or reducing the 'mischief'. The programme which law operates, therefore, remains a conditional one: *if* there is an ambiguity in the wording of a statute, *then* recourse may be had to parliamentary debates to determine the mischief which parliament intended the statute to address.
105. Luhmann, *Das Recht der Gesellschaft*, p. 197.
106. *Ibid.*, p. 200.
107. The role of the *juge pour enfants* in France is an example of such non-legal decision-making. See É. Catta, *À quoi tu juges?* (Paris: Flammarion, 1988),

- A. Cooper, 'In Care or En Famille? Child Protection and the State in France and England' (1994) and R. Hetherington et al., *Protecting Children: Messages from Europe* (Lyme Regis: Russell House, 1997).
108. Luhmann, *Das Recht der Gesellschaft*, p. 209.
 109. *Ibid.*, pp. 218–19.
 110. *Ibid.*, p. 218.
 111. *Ibid.*, p. 222.
 112. *Ibid.*
 113. *Ibid.*, p. 223.
 114. *Ibid.*, emphasis added.
 115. See Clam, J., *Droit et société chez Niklas Luhmann. La contingence des normes* (1997), p. 207. (Translation by authors.)
 116. Luhmann, *Öffentlich-rechtliche Enschädigung rechtspolitisch betrachtet* (1965), p. 66.
 117. *Ibid.*
 118. Luhmann, *Das Recht der Gesellschaft*, p. 216.
 119. *Ibid.*
 120. *Ibid.*, p. 218.
 121. *Ibid.*, p. 219.
 122. *Ibid.*, p. 220.
 123. *Ibid.*, pp. 227–8.
 124. *Ibid.*, p. 225.
 125. *Ibid.*, p. 227.
 126. *Ibid.*, p. 225.

3 The Political System

1. Luhmann, *Social Systems* (1995), p. 101.
2. Luhmann, 'Theory of Political Opposition', in *Political Theory in the Welfare State* (1990), pp. 167–86.
3. Luhmann, *Die Politik der Gesellschaft* (2000), p. 126.
4. *Ibid.*
5. On the theoretical shift at the inception of modern conceptions of legitimacy, see Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p. 41.
6. Luhmann, 'Participation and Legitimation: the Ideas and the Experiences', in *Political Theory in the Welfare State*, p. 222.
7. *Ibid.*, p. 223.
8. Luhmann, *Die Politik der Gesellschaft*, p. 125.
9. *Ibid.*, p. 125.
10. Luhmann, 'Die Unbeliebtheit der Parteien' (1992), p. 11.
11. Luhmann, 'Soziologie des politischen Systems', in *Soziologische Aufklärung* (1970), p. 167.
12. Luhmann, *Die Politik der Gesellschaft*, p. 180.
13. As discussed below, Luhmann's works began to appear during a period of widespread debate in Germany on the problem of technocracy, and his own writings (not wholly implausibly) have often been seen to side with conservative and technocratic theorists such as Ernst Forsthoff, Hans Freyer, Helmut Schelsky and Arnold Gehlen, who strategically depreciated the consensual aspect of governance, and accentuated the functional role of the state as a technical

instance of planning and limited regulation. On this, see especially Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann' (1975), p. 157. For this reason, Luhmann has often been accused of offering only a very 'reduced' concept of democracy which does not consistently accommodate the normative and participatory dimensions to political legitimacy. See Naschold, 'Demokratie und Komplexität: Thesen und Illustrationen zur Theoriediskussion in der Politikwissenschaft' (1968), pp. 494–519. Similarly, influential theorists have also alleged that he degrades political theory itself to the level of technical consultancy for governments unsure of how to balance and stabilize themselves against their environment. See Bubner, 'Wissenschaftstheorie und Systembegriff: zur Position von N. Luhmann und deren Herkunft' in *Dialektik und Wissenschaft* (1973), pp. 112–28. Other theorists, rather more plausibly, have construed his sociology as a model for explaining how the political system might devolve authority to its own subsystems, and so more effectively address and palliate conflicts of social interest. See Teubner, 'Neo-korporatistische Strategien rechtlicher Organisationssteuerung: Staatliche Strukturvorgaben für die gesellschaftliche Verarbeitung politischer Konflikte' (1979), pp. 487–502.

14. Luhmann, *A Sociological Theory of Law* (1985), p. 201.
15. Luhmann, *Ausdifferenzierung des Rechts* (1981), p. 137.
16. Luhmann, 'Selbstlegitimation des Staates' (1981), p. 69.
17. Luhmann, 'Participation and Legitimation', p. 225.
18. Luhmann, 'Komplexität und Demokratie' (1969), p. 315.
19. Luhmann, 'Political Theory in the Welfare State', in *Political Theory in the Welfare State* (1990), p. 30.
20. Luhmann, 'State and Politics: Towards a Semantics of the Self-description of Political Systems', in *Political Theory in the Welfare State* (1990), p. 128.
21. *Ibid.*, p. 123.
22. *Ibid.*, p. 136.
23. *Ibid.*, p. 134.
24. *Ibid.*, p. 123.
25. Luhmann, 'Staat und Politik: zur Semantik der Selbstbeschreibung politischer Systeme' (1984), p. 115. The translation (p. 123) badly distorts the sense of this.
26. *Ibid.* (once again, the English translation is not reliable).
27. Luhmann, 'Politische Planung' (1966), p. 284.
28. *Ibid.*, p. 285.
29. *Ibid.*, p. 271.
30. *Ibid.*, p. 272.
31. Luhmann, 'Soziologie des politischen Systems', pp. 163–4.
32. Luhmann, 'Politische Planung', p. 286.
33. *Ibid.*, p. 293.
34. *Ibid.*, p. 295.
35. *Ibid.*, p. 285.
36. *Ibid.*, p. 296.
37. For an insightful critical view on Luhmann's position in political economy, see Nahamowitz, 'Autopoiesis oder ökonomischer Staatsinterventionismus?' (1988), pp. 36–73.
38. See also Luhmann, 'Limits of Steering' (1997).
39. Luhmann, *Die Wirtschaft der Gesellschaft* (1988), p. 325.

40. Ibid., p. 342.
41. Ibid., p. 164.
42. Ibid., p. 342.
43. Luhmann, 'Political Theory in the Welfare State', p. 35.
44. Ibid., p. 39.
45. Ibid., p. 34.
46. Ibid., p. 35.
47. Ibid., p. 37.
48. Ibid., p. 35.
49. Ibid., p. 50.
50. Luhmann, *Legitimation durch Verfahren* (1983), p. 209.
51. Luhmann, 'Political Theory in the Welfare State', p. 76.
52. Ibid., p. 85.
52. Ibid., p. 88.
53. Ibid., p. 91.
54. Ibid., p. 80.
55. Ibid.
56. Luhmann, *Politische Theorie im Wohlfahrtsstaat* (1981), p. 154. This section is not included in the abridged and altered English translation.
57. Ibid., p. 156.
58. Luhmann, *Die Wirtschaft der Gesellschaft*, p. 346.
59. Ibid., p. 150.
60. Ibid., p. 127.
61. Ibid.
62. In this respect Luhmann echoes the thinking of many conservative and liberal-conservative social theorists of the 1970s and earlier, who suspected that the social-democratic, welfarist and Keynesian experiments of the post-war era might ultimately lead to a dissolution of the differentiated institutional fibre of political democracy itself. Formative for this argument, from the 1950s, is Forsthoﬀ, 'Begriff und Wesen des sozialen Rechtsstaates', in *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen, 1950–1964* (1964), especially pp. 50–1. Exemplary of the increasing hostility to the linkage of welfare and political democracy in the 1970s is Hennis, 'Vom gewaltenteilenden Rechtsstaat zum teleokratischen Programmstaat: zur "lebenden Verfassung" der Bundesrepublik', in *Politik und praktische Philosophie* (1977), pp. 243–74. See also Schelsky, 'Mehr Demokratie oder mehr Freiheit? Der Grundsatzkonflikt der "Polarisierung" in der Bundesrepublik Deutschland', in: *Systemüberwindung – Demokratisierung – Gewaltenteilung* (1973), pp. 41–82. Although he does not manifestly attach himself to the more conservative aspects of the anti-welfare, anti-Keynesian backlash of the late 1970s, Luhmann's position on these issues clearly connects him to critical debates on governability and the overburdening of the state, widespread in Germany and the USA at this time. In the Federal Republic of Germany through the 1970s anxiety was widespread about the apparent ungovernability of the political system as a result of its welfarist expansion during the period of Social Democratic government under Willy Brandt. Examples of this, apart from in Luhmann, can be found in the following: Hennis, 'Demokratisierung: zur Problematik eines Begriffs', in *Die mißverständene Demokratie: Demokratie-Verfassung-Parlament: Studien zu deutschen Problemen* (1973), pp. 26–51.

63. Luhmann, 'Political Theory in the Welfare State', p. 47.
64. Luhmann, 'State and Politics: Towards a Semantics of the Self-description of Political Systems', p. 125.
65. Luhmann, *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (1971), p. 62.
66. Ibid.
67. Ibid.
68. Ibid.
69. Luhmann, *Theorie der Verwaltungswissenschaft* (1966), p. 67.
70. Luhmann, 'Politische Verfassungen in Kontext des Gesellschaftssystems, I' (1973), p. 8.
71. Luhmann, 'Machtkreislauf und Recht in Demokratien' (1981), p. 164.
72. We are very grateful to Jean Clam for engaging in debate on these questions, and for broadly supporting the interpretation given here of politics and administration as originally distinct systems.
73. Luhmann, 'Political Theory in the Welfare State', pp. 60–1.
74. Luhmann, 'State and Politics: Towards a Semantics of the Self-description of Political Systems', p. 126.
75. Luhmann, *Die Wirtschaft der Gesellschaft*, p. 142.
76. Smend, 'Verfassung und Verfassungsrecht', in *Staatsrechtliche Abhandlungen und andere Aufsätze* (1968), pp. 119–276.
77. Luhmann, *Die Politik der Gesellschaft*, p. 196.
78. Ibid., p. 359.
79. Ibid., p. 361.
80. Ibid.
81. Ibid., p. 362.
82. Ibid., p. 47.
83. Ibid., p. 364.
84. Luhmann, 'Systemtheorie und Protestbewegungen: ein Interview', in *Protest: Systemtheorie und Soziale Bewegungen* (1996), p. 194.
85. Luhmann, *Risk: A Sociological Theory* (1993), p. 139. See also his *Die Gesellschaft der Gesellschaft* (1997), p. 853.
86. Ibid., pp. 844–5.
87. Luhmann, 'Alternative ohne Alternative: Die Paradoxie der "der neuen sozialen Bewegungen"', in *Protest: Systemtheorie und Soziale Bewegungen*, p. 76.
88. See Chapter 1.
89. Luhmann, 'Der Wohlfahrtsstaat zwischen Evolution und Rationalität', in *Soziologische Aufklärung*, vol. IV (1987), p. 112.
90. Ibid., p. 106.
91. Luhmann, 'Political Theory in the Welfare State', p. 31.
92. Luhmann, *Das Recht der Gesellschaft* (1993), p. 425.
93. Luhmann, *Ausdifferenzierung des Rechts*, p. 149.
94. Luhmann, 'Political Theory in the Welfare State', p. 76.
95. Luhmann, *Die Wirtschaft der Gesellschaft*, p. 321.
96. Luhmann, *Die Gesellschaft der Gesellschaft*, p. 357.
97. Luhmann, *Die Politik der Gesellschaft*, p. 112.
98. Ibid., p. 113.
99. Ibid., p. 423.
100. Ibid., p. 424.
101. Ibid., pp. 286–7.

102. Ibid., p. 425.
103. *Die Wirtschaft der Gesellschaft*, p. 178.
104. Ibid., p. 64.
105. Ibid., p. 252.
106. Ibid., p. 33.
107. Ibid., p. 252.
108. Ibid., p. 347.
109. Ibid., p. 348.
110. Luhmann, *Trust and Power* (1979), p. 131.
111. Luhmann, *Die Politik der Gesellschaft*, p. 55.
112. Ibid., p. 53.
113. Luhmann, *Trust and Power*, p. 145.
114. Ibid., p. 159.
115. Ibid., p. 146.
116. Luhmann, 'Klassische Theorie der Macht' (1969), p. 152.
117. Luhmann, *Trust and Power*, p. 151.
118. Luhmann, 'Soziologie des politischen Systems', p. 163.
119. Luhmann, *Die Politik der Gesellschaft*, p. 259; emphasis added.
120. Luhmann, *Politische Theorie im Wohlfahrtsstaat*, p. 46. The English translation distorts this as 'emotional appeals' (p. 49).
121. Luhmann, 'Klassische Theorie der Macht', p. 164.
122. Luhmann, *Die Politik der Gesellschaft*, p. 258.
123. Luhmann, 'Klassische Theorie der Macht', p. 168.
124. Luhmann, *Trust and Power*, p. 150.
125. Luhmann, 'Komplexität und Demokratie', p. 320.
126. Luhmann, *Die Politik der Gesellschaft*, p. 52.
127. Luhmann, *Trust and Power*, p. 160.
128. Luhmann, 'Politische Verfassungen in Kantext des Gesellschaftssystems, II' (1973), p. 179.
129. Luhmann, *Die Politik der Gesellschaft*, p. 69.
130. Ibid., p. 79.
131. Ibid., p. 69.
132. Luhmann, *Die Wirtschaft der Gesellschaft*, p. 304.
133. 'Widerstandsrecht und politische Gewalt' (1984), p. 40.
134. Ibid., p. 40.
135. Ibid., p. 41.
136. Luhmann, *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung*, p. 49.
137. Luhmann, 'Klassische Theorie der Macht', p. 161.
138. Ibid., p. 163.
139. Luhmann, *Trust and Power*, p. 134.
140. Luhmann, 'Komplexität und Demokratie', p. 320.
141. Jellinek, *Allgemeine Staatslehre*, vol. I, *Das Recht des modernen Staates* (1905), pp. 463, 468.
142. Luhmann, *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung*, p. 62.
143. Luhmann, 'Politische Verfassungen . . . I', p. 8.
144. Luhmann, *Theorie der Verwaltungswissenschaft*, p. 75.
145. Luhmann, 'Machtkreislauf und Recht in Demokratien', p. 163.
146. Luhmann, 'State and Politics: Towards a Semantics of the Self-description of Political Systems', p. 141.

147. Ibid., p. 140.
148. Luhmann, *Die Politik der Gesellschaft*, p. 390.
149. Luhmann, *Das Recht der Gesellschaft*, p. 418.
150. Ibid., p. 419.
151. Ibid., p. 424.
152. Ibid., p. 421.
153. Ibid., p. 424.
154. Luhmann, 'Machtkreislauf und Recht in Demokratien', p. 166.
155. Luhmann, *Das Recht der Gesellschaft*, p. 425.
156. Ibid., p. 416.
157. Ibid., p. 424.
158. Ibid., p. 44.
159. Luhmann, 'Politische Verfassungen . . . I', p. 4.
160. Luhmann, *Die Politik der Gesellschaft*, p. 352.
161. Luhmann, 'Politische Verfassungen . . . I', p. 6.
162. Luhmann, *Die Politik der Gesellschaft*, p. 352.
163. Luhmann, 'Politische Verfassungen . . . I', p. 11.
164. Ibid., p. 12.
165. Ibid., p. 172.
166. Ibid., p. 167.
167. Luhmann, *Die Politik der Gesellschaft*, p. 391.
168. Luhmann, 'Politische Verfassungen . . . I', p. 21.
169. Luhmann, *Grundrechte als Institution: ein Beitrag zur politischen Soziologie* (1965), p. 12.
170. Ibid., p. 37.
171. Ibid., p. 24.
172. Ibid., p. 37.
173. Ibid., pp. 71–2. See Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002).
174. Luhmann, *Grundrechte als Institution*, p. 183.
175. Ibid., p. 176.
176. Luhmann, *Die Gesellschaft der Gesellschaft*, p. 856.
177. The idea of constitutional patriotism became widespread among German liberals and radical liberals in the 1980s, as a result of Habermas's constitutional theory. See Jürgen Habermas, 'Grenzen des Neohistorismus', in *Die nachholende Revolution: Kleine politische Schriften*, vol. VII (1990), pp. 149–56. However, the beginnings of this theory can already be found among the neo-humanist democratic and constitutional theorists of the Federal Republic of Germany in the 1950s. See Sternberger, *Lebende Verfassung: Studien über Opposition und Koalition* (1956).
178. Luhmann, 'Die Unterscheidung von Staat und Gesellschaft', in *Soziologische Aufklärung*, vol. IV (1987), p. 72.
179. Luhmann, *Die Gesellschaft der Gesellschaft*, p. 856. In the German context, Luhmann's theory of the constitution as a form of 'external demarcation' of the political system is directly opposed to the left-leaning theorists of the Federal Republic of Germany, who sought to expand the constitution to include rights of popular participation, and even economic co-possession and participation (*Die Politik der Gesellschaft*, p. 213). Formative for this argument is Wolfgang Abendroth, 'Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland', in *Antagonistis-*

- che Gesellschaft und politische Demokratie: Aufsätze zur politischen Soziologie* (1967), pp. 109–38. For an important commentary on these debates, see Jürgen Seifert, *Grundgesetz und Restauration: Verfassungsrechtliche Analyse und dokumentarische Darstellung des Textes des Grundgesetzes mit sämtlichen Änderungen* (1977), pp. 57–9.
180. Luhmann, 'Der Wohlfahrtsstaat zwischen Evolution und Rationalität', p. 109.
 181. Luhmann, 'Political Theory in the Welfare State', pp. 140–1.
 182. Luhmann, *Ausdifferenzierung des Rechts*, p. 172.
 183. *Ibid.*, p. 42.
 184. *Ibid.*, p. 172.
 185. Luhmann, *Die Politik der Gesellschaft*, p. 98.
 186. *Ibid.*, pp. 96–7.
 187. *Ibid.*, p. 249.
 188. Luhmann, 'The Future of Democracy', in *Political Theory in the Welfare State*, p. 236.
 189. Luhmann, *Die Politik der Gesellschaft*, p. 103.
 190. Luhmann, 'Positives Recht und Ideologie', in *Soziologische Aufklärung*, vol. I (1970), p. 182.
 191. Luhmann, *Die Politik der Gesellschaft*, p. 103.
 192. *Ibid.*, p. 97.
 193. *Ibid.*, p. 94.
 194. *Ibid.*, p. 102.
 195. *Ibid.*, p. 20.
 196. Luhmann, 'Machtkreislauf und Recht in Demokratien', p. 164.
 197. Luhmann, 'Die Unbeliebtheit der Parteien', p. 24.
 198. *Ibid.*, p. 10.
 199. See Luhmann, 'Politicians, and the Higher Amoralty of Politics' (1994), pp. 25–36.
 200. Luhmann, *Die Politik der Gesellschaft*, p. 95.
 201. *Ibid.*, p. 94.
 202. Luhmann, 'Der politische Code: konservativ und progressiv in systemtheoretischer Sicht' (1974), p. 261.
 203. *Ibid.*, pp. 262–3.
 204. Luhmann, 'Political Theory in the Welfare State', p. 44.
 205. Luhmann, *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung*, p. 63.
 206. Luhmann, 'Die Unbeliebtheit der Parteien', p. 7.
 207. Luhmann, 'Theory of Political Opposition', p. 185.
 208. Luhmann, 'Die Unbeliebtheit der Parteien', p. 5.
 209. Luhmann, 'Politische Planung', p. 294.
 210. Luhmann, *Das Recht der Gesellschaft*, p. 567.
 211. Luhmann, 'Participation and Legitimation: the Ideas and the Experiences', in *Political Theory in the Welfare State* (1990), p. 226.
 212. Luhmann, 'Selbstlegitimation des Staates', p. 74.
 213. Luhmann, *Die Politik der Gesellschaft*, p. 315.
 214. *Ibid.*, p. 401.
 215. For example, see Groser, 'Verbände und Staat: Positionen der CDU' (1979). On this, see von Beyme, 'Der liberale Korporatismus als Mittel gegen die Unregierbarkeit' (1981). On the historical background to this, see Thornhill, *Political Theory in Modern Germany* (2000), pp. 180–97.

216. Luhmann, 'Der Wohlfahrtsstaat zwischen Evolution und Rationalität', p. 113.

217. Luhmann, 'Politische Planung', p. 286.

4 The Subject of Liberalism

1. Habermas, 'Die Moderne – ein unvollendetes Projekt', in *Die Moderne – ein unvollendetes Projekt: philosophisch-politische Aufsätze, 1977–1990* (1990), pp. 32–54. Luhmann speaks in derisive terms about the programmatic implications of Habermas's perspective. See his *Die neuzeitlichen Wissenschaften und die Phänomenologie* (1996), p. 26.
2. Beck, *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (1997), pp. 94–109.
3. Luhmann, 'Soziologische Aufklärung' (1967), p. 97.
4. In an important article on these themes, Dirk Baecker emphasizes Luhmann's hostility to the 'lazy rationalism of the 18th century', and he examines his proposal of a concept of 'self-critical reason' as a counter-term to this. Like this discussion, Baecker also stresses Luhmann's sense that sociology also has a potential for Enlightenment, insofar as sociology 'observes society in a manner different from the way society in its different milieus observes itself'. Yet Baecker does not fully account either for ways in which Luhmann's concept of sociological Enlightenment perceives itself as a rectification of the original intentions of Enlightenment, or for the philosophical foundations of his attack on Enlightenment rationalism. See Baecker, 'Gypsy Reason: Niklas Luhmann's Sociological Enlightenment' (1999).
5. Luhmann, *Die Politik der Gesellschaft* (2000), p. 12.
6. Luhmann, 'Soziologische Aufklärung', p. 98.
7. *Ibid.*
8. *Ibid.*, p. 103.
9. *Ibid.*
10. *Ibid.*, p. 108.
11. *Ibid.*, p. 109.
12. *Ibid.*, p. 123.
13. *Ibid.*, p. 120.
14. *Ibid.*, p. 123.
15. *Ibid.*, p. 114.
16. Luhmann, 'Politische Planung' (1966), p. 283.
17. Luhmann, *Wirtschaft der Gesellschaft* (1988), p. 278.
18. *Ibid.*
19. Luhmann, 'Soziologische Aufklärung', p. 114.
20. Luhmann, 'Politische Planung', p. 293.
21. Luhmann, 'Soziologische Aufklärung', p. 114.
22. *Ibid.*, p. 123.
23. *Ibid.*, p. 106.
24. *Ibid.*, p. 107.
25. Luhmann, *Social Systems* (1995), p. 222.
26. See Lask, 'Rechtsphilosophie' (1907), pp. 269–320; 308.
27. Vaihinger, *Die Philosophie des Als-Ob* (1911); Kelsen, 'Zur Theorie der juristischen Fiktionen' (1919), pp. 630–58.
28. Kant, *Groundwork of the Metaphysics of Morals* (1998), pp. 58–59.

29. *Ibid.*, p. 58.
30. Kant, *On Perpetual Peace: A Philosophical Essay* (1972), p. 121.
31. Habermas, *Moral Consciousness and Communicative Action* (1990), pp. 116–94; John Rawls, *A Theory of Justice* (1973), p. 418.
32. As examples of this positivist tradition, see G. F. Puchta, *Cursus der Institutionen*, 3 vols (Leipzig: Breitkopf und Härtel, 1841), vol. I, pp. 29–31; C. F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig: Tauchnitz, 1865), p. 2; P. Laband, *Das Staatsrecht des deutschen Reichs*: 4 vols, 4th edn (Tübingen: Mohr, 1901), vol. I, pp. 89, 195.
33. Luhmann, 'State and Politics', *Political Theory in the Welfare State* (1990), p. 123.
34. Luhmann, 'Soziologie des politischen Systems', in *Soziologische Aufklärung*, vol. I, *Aufsätze zur Theorie Sozialer Systeme* (1970), p. 158.
35. *Ibid.*
36. *Ibid.*, p. 167.
37. Luhmann, *Die Gesellschaft der Gesellschaft* (1997), p. 35.
38. Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (1975), p. 170.
39. Kant, *Critique of Pure Reason* (1998), p. 678.
40. Luhmann, *Social Systems*, p. 101.
41. Luhmann, 'State and Politics', p. 138.
42. Luhmann, 'Klassische Theorie der Macht' (1969), p. 166.
43. Luhmann, 'Komplexität und Demokratie' (1969), p. 317.
44. *Ibid.*, p. 318.
45. Habermas, *The Inclusion of the Other: Studies in Political Theory* (1998), pp. 49–74; Rawls, *Political Liberalism* (1993), p. 137.
46. For a much more thorough treatment of this compressed argument, see Thornhill, 'Politics and Metaphysics: A Problem in German Philosophy' (2001).
47. Nietzsche, *On the Genealogy of Morality* (1994), p. 43.
48. *Ibid.*, p. 126.
49. Luhmann, *Die Gesellschaft der Gesellschaft*, p. 1025.
50. Simmel, *The Philosophy of Money* (1990), p. 146.
51. *Ibid.*, p. 399.
52. Simmel, *Das individuelle Gesetz: philosophische Exkurse* (1968), pp. 174–230.
53. Weber, *The Protestant Ethic and the Spirit of Capitalism* (1992), p. 181.
54. *Ibid.*, p. 182.
55. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), p. 954.
56. Weber, 'The Profession and Vocation of Politics', in *Political Writings* (1994), pp. 309–69; 367.
57. See Luhmann, 'Zweck-Herrschaft-System: Grundbegriffe und Prämissen Max Webers' (1964).
58. Parallel to this account, see also Clam, *Was heißt, sich an Differenz statt an Identität orientieren? Zur De-ontologisierung in Philosophie und Sozialwissenschaft* (2002), p. 9.
59. Heidegger, *Kant and the Problem of Metaphysics*, 5th edn (1990), p. 30.
60. *Ibid.*, p. 111.
61. Heidegger, *Phänomenologie des religiösen Lebens*, in *Gesamtausgabe* (1995), p. 49.
62. Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (1995), pp. 304–5.
63. 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' (see Arendt, 'Was ist Existenz-Philosophie?', in Arendt, *Sechs Essays*, 1948, pp. 48–80; 68–9). His 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.
64. Despite this, Luhmann always remains critical of Husserl's abiding debt to transcendental philosophy. See *Die neuzeitlichen Wissenschaften und die Phänomenologie*, p. 29. Clam accentuates Luhmann's critical attitude to Husserl. See Clam, *Was heißt, sich an Differenz statt an Identität orientieren?*, p. 39. Like this account, Clam also provides a study of the reception of the world-concept in Luhmann's thought, and he shares our verdict on its importance, especially for Luhmann's notion of meaning (*ibid.*, p. 96).
 65. Luhmann, *Social Systems*, pp. 207–12.
 66. Luhmann, *Die Politik der Gesellschaft*, pp. 28–9.
 67. *Ibid.*, p. 29.
 68. In Heidegger's view, Kant is not able to imagine human liberty except on a prior juridical foundation: except as 'submitting-to-myself', which occurs in the self-legislation of reason (*Kant and the Problem of Metaphysics*, p. 111).
 69. Luhmann, *A Sociological Theory of Law* (1985), pp. 24–31.
 70. Luhmann describes this temporal horizon as a 'dimension of order for complexity' (*ibid.*, p. 91).
 71. Luhmann, *Trust and Power* (1979), p. 12.
 72. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1973), pp. 317–18.
 73. Hunt and Wickham, *Foucault and Law. Towards a Sociology of Governance* (1994), p. 59.
 74. Foucault, *The Order of Things*, p. 341.
 75. *Ibid.*
 76. *Ibid.*, pp. 340–42.
 77. Beyme, *Theorie der Politik im 20. Jahrhundert: von der Moderne zur Postmoderne* (1991), p. 200. Beyme does not align Luhmann to a simplistic model of 'post-modern' politics, but he illuminates ways in which Luhmann's model of legitimacy belongs to a climate of political reflection in which characteristically 'modern' models of legitimacy have been degraded.
 78. Derrida, *Politics of Friendship* (1997), p. 255.
 79. Derrida, 'The Ends of Man', in *Margins of Philosophy* (1984), pp. 109–36.
 80. *Ibid.*, pp. 183, 232.
 81. Heidegger, 'The Origin of the Work of Art', in *Poetry, Language, Thought* (1971), pp. 15–88; 77.
 82. Luhmann, *Die Gesellschaft der Gesellschaft*, p. 35.
 83. Luhmann, 'Die Weltgesellschaft' (1971).
 84. Parsons, *The Structure of Social Action*, vol. II, *Weber* (1968), p. 748.
 85. *Ibid.*, p. 732.
 86. *Ibid.*, p. 746.
 87. *Ibid.*, p. 747.
 88. Parsons, *The System of Modern Societies* (1971), p. 26.
 89. *Ibid.*, p. 8.
 90. Parsons, 'Social Systems', in *Social Systems and the Evolution of Society* (1977), pp. 177–203; 178.
 91. Parsons, 'An Outline of the Social System' (1961), pp. 30–79; 34.

92. Ibid., p. 40.
93. Ibid., p. 33.
94. See on this Robert J. Holton and Bryan S. Turner, *Talcott Parsons on Economy and Society* (1986), p. 74.
95. See Pfetsch, *Verfassungspolitik in der Nachkriegszeit: Theorie und Praxis des bundesdeutschen Konstitutionalismus* (1985), p. 50.
96. See Neumann, 'Rechtsphilosophie in Deutschland seit 1945' (1994), pp. 145–87.
97. Jaspers, *Vom Ursprung und Ziel der Geschichte* (1955), p. 153.
98. Arendt, *The Origins of Totalitarianism* (1986), p. 341.
99. See especially: Husserl, 'Recht und Zeit', in *Recht und Zeit: Fünf rechtsphilosophische Essays* (1955), pp. 9–65.
100. Exemplary for this are Kaufmann, *Naturrecht und Geschichtlichkeit* (1957), p. 31; Maihofer, 'Die Natur der Sache' (1965), pp. 52–103; 83.
101. See Scheuner, 'Das repräsentative Prinzip in der modernen Demokratie' (1961), pp. 222–46; 222–3.
102. See Stammer, 'Die Freiheit des Menschen in der industriellen Gesellschaft', in *Politische Soziologie und Demokratieforschung: Ausgewählte Reden und Aufsätze zur Soziologie und Politik* (1965), pp. 326–59; 356.
103. See Huber, 'Das Recht im technischen Zeitalter' (1971), pp. 57–75; 73.
104. Huber, 'Niedergang des Rechts und Krise des Rechtsstaates', in *Rechtstheorie, Verfassungsrecht, Völkerrecht* (1971), pp. 27–56; 41.
105. Habermas, *Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeois Society* (1989), p. 64.
106. Habermas, 'Dialektik der Rationalisierung' in *Die neue Unübersichtlichkeit: Kleine politische Schriften*, vol. 5 (1985), pp. 167–208; 181.
107. Luhmann, 'Alternative ohne Alternative: Die Paradoxie der neuen sozialen Bewegungen', in *Protest: Systemtheorie und soziale Bewegungen* (1996), p. 71.
108. Habermas, *Theory of Communicative Action*, vol. II (1987), p. 391.
109. Ibid., p. 403.
110. Freyer, *Theorie des gegenwärtigen Zeitalters* (1955), p. 97.
111. Ibid., p. 104.
112. Ibid., p. 101.
113. Ibid., p. 68.
114. Ibid., p. 141.
115. Ibid., p. 155.
116. Ibid., p. 103.
117. Freyer, 'Das soziale Ganze und die Freiheit des Einzelnen unter den Bedingungen des industriellen Zeitalters' (1976), p. 216.
118. Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?', p. 157.
119. Gehlen, *Die Seele im technischen Zeitalter: Sozialpsychologische Probleme in der industriellen Gesellschaft* (1957), p. 109.
120. Gehlen, 'Industrielle Gesellschaft und Staat: über einige Triebkräfte des politischen Lebens der Gegenwart' (1956), pp. 665–74; 667.
121. Glaser, *Soziales und Instrumentales Handeln: Probleme der Technologie bei Arnold Gehlen und Jürgen Habermas* (1972), p. 38.
122. Gehlen, 'Soziologische Voraussetzungen im gegenwärtigen Staat' (1968), p. 329.
123. Gehlen, 'Industrielle Gesellschaft und Staat', p. 667.
124. Gehlen, 'Soziologische Voraussetzungen im gegenwärtigen Staat' (1968), pp. 320–39; 337–8.

125. *Ibid.*, p. 329.
126. Luhmann, 'Der Wohlfahrtsstaat zwischen Evolution und Rationalität', in *Soziologische Aufklärung*, vol. IV, p. 112.
127. Forsthoff, 'Begriff und Wesen des sozialen Rechtsstaates', in *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen, 1950–1964* (1964), pp. 27–56; 54.
128. Forsthoff, 'Zur heutigen Situation einer Verfassungslehre' (1968), pp. 185–211; 204.
129. Forsthoff, 'Begriff und Wesen des sozialen Rechtsstaates', p. 39.
130. Forsthoff, 'Verfassungsprobleme des Sozialstaats' (1968), pp. 145–64; 146.
131. *Ibid.*, p. 159.
132. Forsthoff, *Der Staat der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland* (1971), p. 21.
133. *Ibid.*, p. 42.
134. Schelsky, 'Über die Stabilität von Institutionen, besonders Verfassungen', in *Auf der Suche nach Wirklichkeit: Gesammelte Aufsätze* (1965), pp. 33–58; 47.
135. Schelsky, 'Die juristische Rationalität', in *Die Soziologen und das Recht: Abhandlungen und Vorträge zur Soziologie von Recht, Institution und Planung* (1980), pp. 34–77; 68.
136. Schelsky, 'Der Mensch in der wissenschaftlichen Zivilisation', in *Auf der Suche nach Wirklichkeit*, pp. 439–80; 453.
137. *Ibid.*, p. 456.
138. Gehlen even discusses the need for a cybernetic approach in modern sociological interpretation. See Gehlen, *Die Seele im technischen Zeitalter*, p. 22.
139. This is clear in his obituary for Schelsky in 1984, in which Luhmann recounts his critical debates with him regarding the status and importance of the human being in social theory ('Helmut Schelsky zum Gedenken', *Zeitschrift für Rechtssoziologie*, 5, 1984, p. 1).
140. Schelsky, 'Der Mensch in der wissenschaftlichen Zivilisation', p. 468.
141. Freyer, 'Das soziale Ganze und die Freiheit des Einzelnen unter den Bedingungen des industriellen Zeitalters', p. 215.
142. Gehlen, 'Soziologische Voraussetzungen im gegenwärtigen Staat', p. 339.
143. Forsthoff, *Der Staat der Industriegesellschaft*, p. 168.
144. Luhmann, 'Komplexität und Demokratie', p. 316.
145. *Ibid.*
146. Luhmann, 'Politische Planung', p. 286.
147. Luhmann, *Die Politik der Gesellschaft*, pp. 260–62.
148. Luhmann, 'Soziologie des politischen Systems', p. 163.
149. *Ibid.*, p. 164.
150. *Ibid.*
151. Luhmann, *Die Politik der Gesellschaft*, p. 260.
152. Luhmann, 'Widerstandsrecht und politische Gewalt' (1984), p. 41.
153. Luhmann, 'State and Politics', p. 152.
154. Luhmann, 'Widerstandsrecht und politische Gewalt', p. 40.
155. Luhmann, 'Komplexität und Demokratie', p. 317.
156. Luhmann, 'Soziologie des politischen Systems', p. 159.
157. Luhmann, 'Widerstandsrecht und politische Gewalt', p. 41.
158. *Ibid.*, pp. 41–2.
159. Luhmann, *Die Politik der Gesellschaft*, p. 7.
160. *Ibid.*
161. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* (1995), pp. 114, 122, 138.

162. See Thornhill, *Political Theory in Modern Germany* (2000), p. 62.
163. Luhmann, 'Soziologie des politischen Systems', p. 159.
164. *Ibid.*, p. 167.
165. *Ibid.*, p. 159.

5 Risk and the Environment

1. 'Ecological Communication: can modern society prepare itself against ecological dangers?' which was translated in the English edition as *Ecological Communication* and published in 1989.
2. Translated in English as *Risk: A Sociological Theory* and published in 1993.
3. See pp. 141–3 of this book.
4. Luhmann, *Risk: A Sociological Theory*, p. ix.
5. *Ibid.*
6. *Ibid.*, p. x.
7. *Ibid.*, pp. 19–20.
8. *Ibid.*, pp. 20–21.
9. *Ibid.*, p. 21, emphasis added.
10. *Ibid.*, pp. 101–2.
11. *Ibid.*, p. 25, emphasis added.
12. *Ibid.*, pp. 27–28.
13. *Ibid.*, p. 53.
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*, p. 54, emphasis added.
17. *Ibid.*, p. 59, emphasis in original.
18. *Ibid.*, p. 60.
19. For an account of risk construction in legal decisions concerning children's welfare, see King and Kaganas, 'The Risks and Dangers of Experts in Court' (1998). The recognition by courts of post-traumatic stress disorder as a harm which is avoidable through decisions is another area where science and law have contributed to the transformation of dangers into risks.
20. Luhmann, *Risk: A Sociological Theory*, p. 162.
21. *Ibid.*, p. 64.
22. *Ibid.*
23. *Ibid.*
24. *Ibid.*, p. 165.
25. *Ibid.*, p. 145.
26. *Ibid.*
27. *Ibid.*, p. 162.
28. *Ibid.*, p. 145.
29. *Ibid.*
30. See, for example, Habermas, 'Law as Medium and Law as Institution', in G. Teubner (ed) (1985).
31. Luhmann, *Risk: A Sociological Theory*, p. 148.
32. *Ibid.*, p. 152.
33. *Ibid.*, p. 153.
34. *Ibid.*, p. 148.
35. *Ibid.*, p. 153.

36. Ibid., p. 154.
37. Ibid., p. 155.
38. Ibid., p. 148.
39. Ibid., p. 149.
40. Ibid.
41. Ibid., p. 150.
42. Ibid., emphasis in original. The British government's responses to the recent 'disasters' of BSE, foot-and-mouth disease, and child murders at the hands of paedophiles are all too familiar examples of this process.
43. Ibid., p. 155.
44. Ibid., p. 156, emphasis added.
45. Ibid., p. 158.
46. Ibid.
47. Ibid., p. 159.
48. Ibid., p. 160.
49. Ibid., p. 173.
50. Ibid.
51. Ibid.
52. Ibid., pp. 173–4.
53. Ibid., p. 174.
54. Luhmann, *Ecological Communication*, p. 133.
55. Ibid., p. 138.
56. Ibid.
57. Ibid., p. 63.
58. Ibid.
59. Ibid.
60. Ibid., pp. 63–4, emphasis added.
61. Ibid., p. 64.
62. Ibid., p. 85.
63. Ibid.
64. Ibid., p. 89.
65. Ibid. (see pp. 86–91 of this book).
66. Ibid.
67. Ibid., emphasis in original.
68. Ibid., p. 90.
69. Ibid.
70. Ibid.
71. Ibid., p. 91.
72. See Chapter 6, pp. 209–11.
73. Luhmann gives as examples here the disproportionate consumption of energy by the United States, the dumping of atomic waste beyond a nation's boundaries, and the avoidance of legal duties by transferring production to countries which have no ecological politics. A more recent example of the territorial programming of the political system is the United States' refusal to sign the Kyoto Convention on the reduction of fossil fuel consumption. (Luhmann, *Ecological Communication*, p. 133.)
74. Ibid., p. 133.
75. Ibid., p. 92.
76. Ibid.
77. Ibid., p. 69.

78. Ibid., p. 65.
79. Ibid.
80. Ibid., p. 66.
81. Ibid., p. 69.
82. See pp. 26 and 58–9 of this book.
83. Luhmann, *Ecological Communication*, p. 73.
84. Ibid.
85. Ibid., p. 74.
86. Ibid.
87. Ibid.
88. Ibid.
89. Luhmann, *Risk: A Sociological Theory*, p. 166.
90. Ibid.
91. Ibid., p. 167.
92. See Chapter 1 of this book, pp. 32–3.
93. Luhmann, *Risk: A Sociological Theory*, p. 167.
94. Ibid., p. 168.
95. Ibid., p. 172.

6 Conclusion: Luhmann and his Critics

1. Luhmann, 'The Theory of Social Systems and its Epistemology: Reply to Danilo Zolo's Critical Comments' (1986), p. 132.
2. Ibid., pp. 132–3.
3. Ibid., p. 130.
4. Popper, *The Logic of Scientific Discovery* (1965).
5. Blankenberg, 'The Poverty of Evolutionism: a Critique of Teubner's Case for "Reflexive Law"' (1984); Rottleuthner, 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989).
6. They also ignore the problem of Popper's extremely tenuous grasp of many of the reputedly 'metaphysical' theories which he condemned.
7. As a commentator on Popper's criterion has observed, falsification 'reflects as much on our investigative powers as it does on the contents of the statement in question. Popper's criterion (like the positivists' verification criterion) amounts to saying that a statement is scientific if it happens to fall within our investigative capacities'.
8. Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992), p. 1438.
9. Ibid., p. 1439.
10. See Beck, 'Is Law an Autopoietic System?', (1994); Paterson and Teubner, 'Changing Maps: Empirical Legal Autopoiesis' (1998); Rottleuthner, 'The Limits of Law: The Myth of a Regulatory Crisis' (1989) and 'A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System' (1989).
11. This empirical account is of the regulatory development of occupational health and safety in Britain's off-shore oil industry. See Paterson and Teubner, 'Changing Maps: Empirical Legal Autopoiesis'.
12. Ibid., p. 480.
13. Ibid.
14. Ibid., p. 455.

15. *Ibid.*, p. 454.
16. von Förster, *Observing Systems* (1981), p. 201.
17. Zolo then asks: if progress is no longer possible through normal science, through identification of causes and effects, through systematic testing and observing, how is it possible? See Zolo, 'The Epistemological Status of the Theory of Autopoiesis and its Application to the Social Sciences' (1992).
18. Luhmann, 'The Theory of Social Systems and its Epistemology', p. 132.
19. Luhmann, 'The World Society as a Social System' (1982), p. 137.
20. For instance, a number of researchers (for example, King and Piper, Rogowski, Nobles and Schiff) have used descriptive techniques to explore the autopoietic character of the legal system and the structural coupling between law and science in legal decision-making concerning the future of children's welfare in the practice of labour law and industrial relations, and in criminal justice. Bob Jessop has applied autopoietic analysis to examining the relationship between economics, law and the state, while Kickert has noted positive and fruitful results in his application of the autopoiesis model to the relationship between organizations, and Michael Power has provided a description of accountancy, not as an economic reality, but, following autopoietic theory, as a 'hybrid body of expertise' that facilitates the flow of information within and between organizations. Finally, Paterson and Teubner have developed from autopoietic theory a research methodology using 'cognitive maps' which they deploy to trace the selections of different systems involved in the regulation of the off-shore oil industry. See Kickert, 'Autopoiesis and the Science of Public Administration' (1993), King and Piper, *How the Law Thinks about Children*, 2nd edn (1995); King, 'An Autopoietic Approach to the Problems presented by "Parental Alienation Syndrome" for Courts and Child Mental Health Experts' (2002); King, 'Future Uncertainty as a Challenge to Law's Programmes: The Dilemma of Parental Disputes' (2000); Rogowski, 'The Concept of Reflexive Labour Law: Its Theoretical Background and Possible Applications' (2001); Nobles and Schiff, 'Miscarriages of Justice: A Systems Approach' (1995); Jessop, 'The Economy, the State and the Law: Theories of Relative Autonomy and Autopoietic Closure' (1991); Power, 'Constructing the Responsible Organization: Accountancy and Environmental Representation' (1994); Paterson and Teubner 'Changing Maps: Empirical Legal Autopoiesis' (1998).
21. See, for example, Gellner, *Anthropology and Politics, Revolutions in the Sacred Grove* (1995). There are also those who criticize autopoietic theory for in some way supporting or promoting globalization. See, for example, Fitzpatrick, 'Abiding the World: Globalism and the Lex Mercatoria' (2001).
22. See, for example, Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998); Friedman, *The Legal System: A Social Science Perspective* (1975).
23. See Beyer, *Religion and Globalization* (1994).
24. See Luhmann, *Observations on Modernity* (1998), pp. 101–3.
25. Luhmann, *Risk: A Sociological Theory* (1993), p. 21.
26. Luhmann, *Observations on Modernity*, p. 143.
27. See pp. 62–3 of this book in relation to decisions concerning children's welfare.
28. See pp. 108–9 of this book.
29. See Teubner, 'Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism' (2002), for an account of the structural coupling of institutions.
30. This is close to Stephen Lukes's third dimension of power, but, unlike Lukes, makes no assumption that the setting of political agendas is likely to be suc-

- cessful in attaining the objectives of those with power. See Lukes, *Power: a Radical Theory* (1972).
31. Pound, 'The Limits of Effective Legal Action' (1916) and 'Social Control through Law' (1942).
 32. See pp. 136–43 of this book.
 33. Luhmann shares with Marx the belief that human agency cannot simply be extrapolated from the complex systemic reality of modern society, and that it is clearly naive to impute a substructure of human interest or human need as the integral origin of systems or institutions. For this reason, his work offers especially useful support to the anti-humanist arguments running through more systemic versions of dialectical materialism. Interview with Bob Jessop conducted by Mürekkep (Ink), Aukara,' published by the Department of Sociology, Lancaster University at: <http://www.comp.lancs.ac.uk/sociology/soc074rj.html>
 34. Habermas, *Between Facts and Norms* (1996), pp. 359–87.
 35. Beyme, 'Theorie der Politik im Zeitalter der Transformation' (1996).
 36. Beck, *The Reinvention of Politics* (1997), pp. 97–103.
 37. Held, 'Democracy and the New International Order' (1995), p. 97.
 38. Giddens, *Beyond Left and Right. The Future of Radical Politics* (1994), pp. 1–21.
 39. Giddens, *The Consequences of Modernity* (1990), p. 156.
 40. Joas, *The Creativity of Action* (1996), p. 237.
 41. Bourdieu, 'Social Space and the Genesis of "Classes"', in *Language and Symbolic Power* (1991).
 42. Beck, *Gegengifte: die organisierte Unverantwortlichkeit* (1988), p. 166.
 43. Joas, *The Creativity of Action*, p. 213.
 44. For example, Althusser, *For Marx* (1996), p. 223.
 45. Rawls, *A Theory of Justice* (1973), p. 259; Habermas, *Legitimation Crisis* (1976), p. 90.
 46. Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (1997), 'Replik auf Beiträge zu einem Symposium der Cardozo Law School' (not included in English translation) p. 379; Rawls, *Political Liberalism* (1993) p. 369.
 47. See especially Beck, *Was ist Globalisierung? Irrtümer des Globalismus – Antworten auf Globalisierung* (1997), p. 257.
 48. See pp. 129–61 of this book.
 49. See pp. 149–61 of this book.
 50. Habermas, 'Metaphysics after Kant', in *Postmetaphysical Thinking* (1992), pp. 10–27.
 51. Rawls, *A Theory of Justice*, p. 136.

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