Political Theory in Modern Germany

AN INTRODUCTION

CHRIS THORNHILL

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For Hermione, Grace and John

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An Introduction

Chris Thornhill

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Abbreviations

CDU	Christian Democratic Union
CSU	Christian Social Union
DDP	German Democratic party
DNVP	German National People's party
DVP	German People's party
FDP	Free Democratic party
FVP	Progressive People's party
NSDAP	German National Socialist party
SPD	Social Democratic party
USPD	Independent Social Democratic party

Introduction

This book addresses the major figures in the history of modern political thought in Germany, from Max Weber to Niklas Luhmann. The figures selected for special discussion are thinkers whose ideas are crystallized around specific structures and problems in German politics. They are, therefore, selected for their representative quality. Max Weber's thought, for example, centres on the dilemmas of German liberalism in its post-classical phase. Carl Schmitt is the representative figure on the extreme right of the inter-war era, linking the conservative movements of the late-Wilhelmine period with the populist dictatorship of the National Socialists. Franz Neumann and Otto Kirchheimer form a bridge which connects the debates in the unions and the socialist parties of the inter-war period with the critical theories, especially the sociological examinations of National Socialism, which developed around the Institute of Social Research in Frankfurt and New York. Jürgen Habermas's work provides the clearest overall reflection of critical, left-liberal debate throughout the history of the Federal Republic. Niklas Luhmann's ideas refract the administrative reforms and the neo-conservative theories of the state in the 1970s and 1980s.

Many important thinkers are left out of this work. Although attention is paid to certain aspects of the unorthodox forms of Marxism associated with the Frankfurt School, Theodor Adorno, Max Horkheimer, Walter Benjamin and Ernst Bloch are not treated separately in this book. Their works have been addressed very extensively in recent literature, and it is also debatable whether they write about politics. Similarly, for analogous reasons, neither Martin Heidegger nor Karl Jaspers are considered extensively here, despite their considerable influence on political debate. Such

omissions do not imply that this work sets out to offer merely an intellectual history of the German political system. However, it seeks to illuminate the interrelations between political theory and political event in modern Germany, and the selection of the thinkers treated is always guided by this consideration. Although this book, also, is not intended primarily as a work of history, it is hoped that the fusion of social theory and political history which it employs will provide a clear set of analyses of the formations of political power in Germany in the course of the twentieth century.

Naturally, this work seeks to introduce readers to the defining characteristics of modern German political thought. This itself, however, is at times a complicated and paradoxical undertaking. In the post-1945 period, much political reflection in Germany has consciously turned away from what might be defined as the classical German forms of political philosophy. Neither Kantian liberalism, Hegelian statism, orthodox Marxist state-critique, nor simple nationalism are represented in their pure form amongst the thinkers treated here. The traditional 'primacy of politics' in German political thinking has been significantly diluted in modern theory (Beyme 1991b: 75). However, the theory of politics in modern Germany still has its origins in a determinately German history of thought, and the old antecedents are often visible just below the surface of even the most modern and innovative thinkers. Weber belongs to a tradition of liberalism which is marked by a reception of Kant, but which also has affinities with both Hegel and Marx. Schmitt's work is also coloured by a reception of both Kant and Hegel, although his ideas contain strong anti-Kantian and anti-Hegelian Roman Catholic elements. Neumann and Kirchheimer are influenced by a statist brand of Hegelian Marxism. Both Habermas and Luhmann, whose thought is characterized by its international eclecticism, still have their most important points of reference in the German tradition, and between them they owe heavy debts to Hegel, Marx, Husserl and various forms of neo-Kantianism.

Modern German political theory in general has its roots in the circumstances of modern German history. Not surprisingly, its characteristic features are various, complex and at times strikingly distinct from Western European political thought. The basic premise in modern German political thought is that the political sphere has a particular autonomy – that it is situated above the social arena, and that it cannot be reduced to the technical practices which determine the character of social or economic interaction. This idea, in different figurations, is at the very heart of the writings of Weber, Schmitt, Neumann, Kirchheimer and Habermas. Only in the postmodern – or post-political – writings of Luhmann does the political, in certain respects, forfeit its structural integrity.

The sources of the formal dignity accorded to the political sphere can be traced to the conditions of the genesis of the modern German/Prussian state. The German state in its twentieth-century form emerged from the post-medieval estate-based order of government (the dualist *Ständestaat*). This was a heavily protectionist system, in which both political authority and

economic co-ordination were concentrated in the state, and in which independent economic activity was strictly regulated. In this system, which was reinforced after the religious wars of the seventeenth century, the monarchical executive arrogated central political and economic control to itself, and it protected this power by placing heavy fiscal burdens on the population, and by levying high customs duties on all imported commodities. This had a twofold function. Externally, the protection of the economy enabled the state to avoid competition with more advanced capitalist countries, especially Britain and France (Wallerstein 1980: 233). Internally, the absolutist mode of economic management created (at least in its ideal form) an embracing order, in which social and political positions were hierarchically graded in accordance with professional standing and privilege (Gall 1993: 5). The scope for the emergence of independent structures of authority outside the monarchical executive was therefore relatively limited. In the system of the *Ständestaat*, the estates – provincial deputations composed of property owners and notables – were empowered to influence taxation and to advise the monarchy in matters of common interest (Stolleis 1992: 110). The right to approve taxation was the cornerstone of this system (Rachfal 1902: 199). The estate-system was, therefore, in certain respects, a proto-parliamentary structure of governance, in which the financial sovereignty of the state was sustained by certain concessions to economic deputations (Spangenberg 1912: 130). The power of the estates increased in accordance with the reliance of the crown on taxation. During periods of warfare, for instance, the power of the estates increased as the crown relied upon them for revenue. However, it is notable, as F. L. Carsten (1959: 441) has argued, that in Germany the outcome of the balance of interests between crowns and parliaments (estates) was not – or only very belatedly – the transfer of power to parliament, and the distribution of power between state and society. The essential form of the *Ständestaat* survived well into the nineteenth century.

In these respects, the course of German history contrasts strikingly, but not uniformly, with that of other European nations. The key, and most common, point of comparison is Britain. In Britain, after the late-medieval period a political order developed which was characterized by a weak state, with limited fiscal revenue (Clay 1984: 140). The emergence of a relatively strong bourgeoisie, coupled with an increase in the power of the minor nobility (Stone 1972: 73), made it impossible for the British state to restrict the socio-economic influence of independent groups to the same extent as in Germany (Mooers 1991: 154–5). After 1688 a parliamentary order was cemented in Britain which guaranteed an 'exceptionally free society' for those with independent property (Atiyah 1979: 13), and which reinforced regional and traditional rights against the central monarchy (Dyson 1980: 39; Mooers 1991: 165–6). In the British system, the state was not strong enough to expand its authority over the civil arena. Rather, the state became an organ which oversaw, and which provided favourable conditions for, the expansion of the capitalist economy, and the capitalist classes. In France, by

further contrast, although Louis XIV established a strong system of absolutism in order to combat the seigneurial power of the high aristocracy, by the 1780s the French monarchy was bankrupt, and extremely vulnerable (Doyle 1980: 114–15). The French Revolution itself, although it did not wholly remove the legacy of the ancien regime (Hinrichs 1972: 178), brought about the abolition of the feudal order, and the introduction of a political system which reinforced and reflected the liberation of the capital economy from absolutist control. Only modern Italy can be compared more directly with Germany. As late as the early nineteenth century, Italy, like Germany, had no central economy, and in some areas only a rudimentary exchange-system. Indeed, until 1861, when the Piedmontese system was imposed (Mack Smith 1997: 7), Italy did not have a customs union or a uniform currency (Greenfield 1934: 235–6). As in Germany, the processes of economic and political reform which marked the nineteenth century were, in Italy, carried out from above, often by enlightened landowners (Bellamy 1992: 105–6).

In Germany, even after the French Revolution, the provincial estate-system was re-established in modified form in most regions, with landownership the basis of rights of consultation and deputation (Koselleck 1989: 341). Importantly, also, through the early nineteenth century the economic influence of the estates in German politics was not coupled with equivalent political power (1989: 339–40). The role of the estates – at least in principle – was limited to the rights of economic deputation and consultative functions (Oestreich 1969: 280–1). German politics of the early nineteenth century was marked therefore by broad continuity with pre-1789 governmental forms, not by radical deviation from them (Scheuner 1977: 321). The earliest forms of constitutional organization in Germany, especially the Bavarian Constitution of 1818 and the Würtemberg Constitution of 1819 (Stolleis 1992: 100–11), were based expressly on the old estate-system, although they did make important additions to it. The concluding documents of the Congress of Vienna (1820) made provision for estate-based deputations – not for representative government (Boldt 1975: 21). Even the quasi-constitutional Prussian reforms of Stein and Hardenberg (1806–1821) only extended the legislative system to include the higher ranks of the bureaucracy. The Prussian council of state (*Staatsrat*), founded in 1817 by Hardenberg (Vogel 1983: 132), took the form of a parliament of civil servants, in which legislative decisions were made within the closed ranks of the bureaucracy.

Consequently, it has been widely argued that the broad division between state and society which inevitably marks monarchical systems was sustained in Germany considerably longer than in other European countries (Conze 1978: 214–15). In the nineteenth century, monarchical power in Prussia was naturally not unlimited, but the restrictions upon it were imposed by the bureaucracy, which fused legislative and executive powers, not by a free-standing legislature (Koselleck 1989: 264–6). Throughout the nineteenth century the Prussian state pursued processes of modernization from above

(Lütge 1966: 447). Through administrative innovation it adjusted gradually to shifts in economy and society (Breger 1994: 40–7). However, after the premature end of the reforms conducted by Stein and Hardenberg, the reformist administration of 1806–21 was soon restructured as a conservative wedge between state and society, which limited the openness of the state to alterations outside it (Vierhaus 1983: 40–1; Obenaus 1984: 519). Arguably, as Otto Hintze famously indicated (1962: 365–6), the strength of the Prussian bureaucracy obstructed the emergence of a genuine political society and prevented a coalescence of civil and political activity (Koselleck 1989: 331). Politics, in the early nineteenth century, became the province of the administration (Kehr 1965a: 38). The predominance of the bureaucracy was weakened gradually in 1847, when a united Prussian parliament was created (Koselleck 1989: 387), and by the 'revolutions' of 1848. However, the first Prussian Constitutions of 1848 and 1850 still contained a peculiar combination of provisions for social rights and for rule by an autocratic-bureaucratic elite (Bendix 1978: 427). These constitutions were organized around a three-level, estate-like division of the voting population (*Dreiklassenwahlrecht*), in which voting rights were allocated on the basis of contribution to public revenue (Boberach 1959: 150). Even those elected by the three-class system had only restricted influence on actual legislative processes. The highest level of legislative authority was still a ministerial bureaucracy. The estate-based concept that the socio-economic sphere is composed of a series of corporate formations which are properly distinct from the political arena thus remained a dominant aspect of the Prussian tradition of constitutionalism through the mid- to late nineteenth century (Boberach 1959: 150). The duality between the estates (the social sphere) and the imperial executive (the political sphere) was also a strong component of Bismarck's political outlook (Ellwein 1954: 314). The basic dualist scheme of the relation between politics and society remained (and was arguably reinforced) throughout the age of Bismarck (Scheuner 1977: 340).

Of particular significance for this work is the impact of the dualistic tradition in German history on the development of German law, especially the development of private law (see Brunner 1959: 124). The history of the private-legal system in Germany also underlines structural differences between German history and that of other European countries. In Britain, for example, the tradition of common law constituted an early, informal system of private law. This provided an important bastion against the centralization of power in the state (Pocock 1957: 49), and a crucial set of references for protecting property and private interests against the monarchy (Stone 1972: 103). Even the indictment of Charles I was in part articulated through reference to common law (Ives 1968: 121). Although a system of private-legal autonomy was not finally realized in Britain until the late eighteenth century, after 1688 rights of ownership, free disposition over property, and freedom of lateral contract were increasingly recognized as the foundation of the English legal order (Atiyah 1979: 87). Ultimately, the period 1770–1870, to follow P. S. Atiyah's argument, saw the development

of a legal system which guaranteed maximum liberty of contract and which thus based law on the requirements of the free market (1979: 398). In this period of British history, significantly, the economic contract was detached from the political conception of a binding vertical contract between citizen and state, and transformed into a fluid consensual agreement, based on the mutual recognition of autonomy on the part of the contractual parties. By 1800, therefore, British legal thought had moved decisively towards a theory of legal obligation which was premised not on pre-established compacts, but on autonomy and personal consent (1979: 442). In France, although the system of private law lagged behind that in Britain, prior to the revolution of 1789 extensive plans had already been made to strengthen the bourgeoisie by means of economic reform (Grimm 1977: 1234). Ultimately, the *Code Napoléon* (completed in 1804) provided the foundations for a free private-legal order. The *Code Napoléon* was subsequently reinterpreted through the nineteenth century in a manner which drew out a theory of consensual, autonomous exchange as the basic element of economic legislation (Bürge 1991: 62). In Italy, again in part comparable to Germany, Napoleonic law was widely assimilated in the north, but a uniform *Codice Civile* was not introduced until 1865 (Coing 1989: 19). In Britain and France, however, the early power of the capitalist class was refracted by the legal system, which either gradually, in the case of Britain, or in revolutionary manner, in the case of France, adjusted its laws to the principles of free, rapid exchange.

In Germany, by contrast, the private-legal order was formalized more slowly, and much more erratically (Coing 1985: 40, 393). Although some of the South German states already included recognition of economic liberty in their judicial systems (1985: 116), the first Prussian legal code (*Allgemeines Landrecht*, introduced 1794) scarcely went beyond the formal codification of absolutist law. Before the French Revolution, also, there already existed a strong tradition of common law in Germany, which was anchored in Roman law. Common law gave limited recognition to personal freedom, and freedom of property. However, common-legal obligations under Roman law were of personal character, and they did not amount to the express liberation of economic activity (Coing 1989: 431). Germany had no uniform system of civil law until 1866 (1989: 20). The level of private-legal autonomy guaranteed in Britain by 1770, and in France by 1789, was not reached in Germany until 1848, and, arguably, not at all (Grimm 1977: 1239).

The reasons for this peculiarity of the German legal tradition can be seen in the political structures of early nineteenth-century Germany. The German estate-system revolved around the rigid demarcation between private and public spheres (Brunner 1959: 115). In the estate-system, naturally, definite concessions were made to private-legal interest. Indeed, an abstract doctrine of private law had already developed by 1800, resulting from the ius-naturalism of the Enlightenment (Stolleis 1992: 51). By 1810 the reforms of Hardenberg and Stein had set the terms for a capitalist

private-legal order – for freedom of trade and freedom of contract (Vogel 1983: 165). The *Code Napoléon* was also widely, but unsystematically, received in the German states after 1807, especially in those under Napoleonic occupation (Wieacker 1967: 344; Fehrenbach 1974: 9). The *Code Napoléon* expressly guaranteed the inviolability of property-rights, and it remained the basis of private law in some areas of south-west Germany until 1900 (Wieacker 1967: 345). Despite this, however, the sphere of public law (the bureaucracy and the executive) retained a structural distinction from the private-legal operations of civil society (Dilcher 1977: 139). The civil sphere of economic activity had, for most of the nineteenth century, relatively limited impact on state-law. Indeed, although a private-legal sphere, with unrestricted commodity production, wage-labour and free circulation of commodities, was broadly (but not completely) developed in the early nineteenth century, this sphere existed separately from the strictly political order of the state (Habermann 1976: 4–5).

Generally, in the period of early European capitalism, the sphere of private law was a location in which anti-state energies were expressed, and through which property-relations were defined in opposition to the privilege- and obligation-based laws of the absolutist state. Through the separation of the economy from mercantilist state-regulation, private law, or common law, acted as formulae for differentiating the sphere of economic liberty (civil society) from the state (Stolleis 1992: 52; Grimm 1987: 198). In Germany, however, owing to the initial limitations placed upon the deputations of civil interest (the estates), the decorporation of the economy into a non-structured system of economic needs was a complex and tortuous process (Conze 1978: 248; see also Koselleck 1973: 80). Only relatively gradually did private law push back the limits of public law. Indeed, arguably, the sphere of public law retained its dominance through the nineteenth century. There remained in Germany during this century a body of non-liberal, social and autocratic legislation (especially in property law), which had its origins in the estate-system (Pohl 1977: 8), and which resisted the dominance of liberal private law (Wieacker 1967: 545). Although economic legislation was liberalized by the state in the period 1850–78 (1967: 468), as a result of the Great Depression (starting 1873) the impact of private law soon began to recede again. Bismarck's anti-liberal tariff- and welfare-laws after 1878 bear witness to the survival of a strong tradition of opposition to the recognition of the economy as the source of law. Bismarck continued the earlier tradition of administrative modernization from above, and he interpreted the economy, in neo-mercantilist manner (Pohl 1977: 24), as a subordinate component of political life (Krieger 1972: 24). This tendency is exemplified, theoretically, by the influential social-conservative writings of Lorenz von Stein (Lübbe 1963: 75–6), who postulated the need both for a strong state and for extensive social provision for the poor. Indeed, Stein imagined that the socio-economic sphere could be wholly integrated into the political order (Stein 1959: 138).

Above all, however, the primacy of the political sphere in nineteenth-century Germany is illustrated by the strong tradition of positivist legal theory which developed after 1815. In nineteenth-century Germany, the systematic elaboration of the principles of private law, contract law and property law, which had initially been theorized by Kant (Kiefner 1969: 25), was conducted by the Historical School, and later by the legal positivists. After 1815 a wave of attempts to systematize private law emerged from the pens of Germany's major legal theorists – firstly Savigny and Thibault, later Puchta, Jhering, Gerber and Laband. This culminated in the period immediately prior to 1848. It is notable, however, that these legal theorists, although committed to the clear separation of the private sphere of economic interaction from public or state-law, were not motivated by substantial liberal principles, or even by a strong sense that law contributes to the shaping of political conditions. Savigny believed that the formal liberty of the private-legal system could coexist with an authoritarian state (Dilcher 1977: 140). Puchta, Gerber, Jhering and Laband all saw law as a formally autonomous science. They argued that law should be separated from politics (Wilhelm 1958: 84), and they detached law from its foundation in the economy (1958: 101). Gerber, most significantly, belonged to the anti-liberal wing in 1848 (1958: 124). Laband supported the conservative-monarchical theory of state, and he was an admirer of Bismarck's anti-liberal policies (1958: 159). In nineteenth-century Germany, therefore, it can be argued that even the science of private law, which expressly intended to clarify the terms of socio-economic liberty, directly reflected and perpetuated the limitation of the social sphere which otherwise characterized German political life. Legal positivism implies, in essence, that no special status accrues to the private person or the private sphere and that these are defined only by the overarching public-legal order of the state (Wyduckel 1984: 280; Coing 1989: 270).

It is highly significant in this respect that whilst positivism emerged in the nineteenth century as the orthodox register for defining private activity, the nature of public life was widely represented in terms derived from historicism. By 1900 the Lutheran faith had broadly defined itself as the civil ethic of Prussian politics and Prussian culture (Hübinger 1994: 171–2). Cultural Protestantism, especially, saw national history and culture as an expression of the divine will (Harnack 1900: 128), and it saw the state as the highest achievement of national culture (Elert 1953: 168). Lutheranism, as a general ethic, represents national history as a series of collective historical reflexes, which are organically co-ordinated as political sovereignty. Out of Protestantism grew, by direct descent, historicism. Historicism, like Protestantism, also views national history as a fluid set of customs and beliefs which are united in the state. To a greater extent even than Protestantism, nineteenth-century historicism proposed itself as an ethic of integration which opposed the abstract values of the Enlightenment and sought to unite all the classes of the nation in the name of collective history and collective belonging (Iggers 1969: 35). The process of constitutional foundation in

Germany, after the failure of the liberal documents of 1848–9 (Hock 1957: 156), can itself be interpreted as a line of historicist projects which, until the revolutionary caesura of 1918–19, never made more than local adjustments to the fabric of state. In its ideology of statehood, continuity and collectivity, historicism directly obstructed the realization of democratic representation, which has its foundations in the tradition of natural law to which historicism is opposed. Even the founding fathers of the Weimar Constitution, in fact, especially Friedrich Naumann, saw their contributions as continuous components in the course of national history (*Verhandlungen der Nationalversammlung* 1920: 329/2189; Heilfron 1919: 964), in which the *Volk* wrote its own histories in law (Plessner 1969: 57). Naumann himself expressly linked the process of constitutional foundation back to the first political principles of Lutheranism (*Verhandlungen der Nationalversammlung* 1920: 328/1651). Broadly, in sum, it might be argued that positivism and historicism are in certain respects coexistent and co-emergent ideological structures. Positivism codifies private life, but it makes private life contingent upon public order. Historicism, analogously, sees public life as a series of reflexes, in which individual existence is passively assimilated into the national collective. It is no coincidence that historicism and positivism ultimately coalesce in the legal theories of the National Socialists (Rüthers 1994: 65).

Generally, the tentative systematization of private law in Germany can also be seen to reflect the defining traits of German liberalism and its limited theory of the legal state (*Rechtsstaat*). In the late *Kaiserreich*, German liberalism based its economic thinking on positivist assumptions and its political thinking on historicist ideas (Schieder 1980: 194). The German liberals ultimately accepted the legal preconditions for the capitalist private economy without a concomitant increase in political influence (John 1989: 89). The Civil Code (*Bürgerliches Gesetzbuch*) of 1896 marked the major systematic attempt of the Wilhelmine liberals to create an integrating ethic of politics based on the private-legal order. This Code was, however, notably marked by technical, positivist formalism rather than material values (1989: 254–5). The Code guaranteed freedom of property and freedom of inheritance. Nonetheless, it retained an attitude of compromise towards the old feudal structures and it framed the interests of the private economy in the vocabulary of positivist neutrality (Blasius 1978: 222). It barely recognized social issues (Wieacker 1967: 224; Kindermann 1981: 224).

The limitation of private law in the German tradition has important repercussions for twentieth-century political theory, on both left and right. Generally, the positivist conceptualization of private law in the nineteenth century forms the background to the chief preoccupation of all modern German political thought (excluding Luhmann) – namely, the attempt to propose alternatives to the pure formality of capitalist law. With the exception of Luhmann, all the major theorists of the twentieth century seek to develop a theory of politics which interprets law as a complex of

positive relations to the state, not as the negative, static defence of non-political liberties. Such theories, for all their diversity, reject the political neutralization of law in positivism. Max Weber, for example, following in the footsteps of Ferdinand Tönnies (Tönnies 1887: 267), attempts to explain how the pure formality of law can be overcome, and how law can frame a common political ethic. Although Weber equivocates on the question of whether law can truly be constitutive of political order, he certainly implies that it can provide the general terms for the life of the national collective. Likewise, although Carl Schmitt retains the positivist conviction that the private order is a subsidiary moment in public power, Schmitt's radically anti-capitalist theory of substantial law also outlines how law can express a positive political will. Habermas also, analogously, grasps law as a series of value-rational norms which can (potentially) constitute the consensual basis of legitimacy for the political order. In legitimate law, Habermas argues, the private (or formal) autonomy and the public freedom of citizens are not inevitably segregated, but potentially co-original and co-constitutive.

In short, therefore, modern German political theory reacts against positivism by determining law as a substantial connection between particular and collective interests. Furthermore, modern German political thought reacts yet more emphatically against the implications of positivism by denying that the legitimacy of law can in any way be based in the relations of exchange in the capitalist economy. Weber, Schmitt, Neumann, Kirchheimer and Habermas all see law as a set of terms in which individual life is elevated above the particularity of private interests. All avoid upholding a sphere of private liberty which is given prior to political life. All try, in sum, to explain how law can connect private interests and public life, but all seek, equally, to show how it can escape its apriori reduction to the formal expression of property-interests. In this respect, thinkers on both left and right – from Schmitt to Kirchheimer – all share the same conviction that public/political life has primacy over the formal ordering of private needs.

It is in this respect that the most fundamental distinction between the German tradition of political reflection and that of other European countries can be identified. As a result of these broad historical, intellectual and sociological preconditions, German political thought is generally marked by a hostility towards the theory of the social contract. Contract-theory, at least in its classical form, derives the conditions of political legitimacy from the social sphere, and argues that the sphere of human liberty, which it is the duty of politics to defend, exists prior to political life.

The rejection of contractarian theory in Germany can be identified at the beginning of the nineteenth century. The theory of the social contract had, in fact, been strongly represented in the theories of the early German Enlightenment, especially those of Althaus, who based the legitimacy of the public order on private interests (Gough 1936: 72). Later, Kant's political philosophy, although it contains, in part, a substantial theory of public political life (J. Ritter 1970: 81–2; Riley 1982: 132; Gough 1936:

173), also saw legitimate public order as an order in which the private interests of citizens are stabilized and defended by public law (Kant 1966a: 238). Although Kant argued that a legitimate legal state depends on (or is born out of) the transition from the sphere of private antagonism to the sphere of public law, he also asserted that the contracts which are formed privately set the basic terms of agreement for the establishment of the system of public (or civil) law, and therefore for the constitution of a republican legal order (Kant 1966b: 424). The stabilization of property-rights, Kant explained, is only possible under the constitution of civil law.[1] Therefore, Kant can still be viewed as a thinker in the tradition of contract-theory, for whom private interest is prior to political life (Koslowski 1982: 200). The economy, most importantly, is recognized by Kant as an area of operation which is not subordinate to political regulation, and which in certain respects provides the preconditions for political life (Saage 1989: 210).

Despite this, it is notable that the development of individualist or voluntarist contract-theory in Germany ended with Kant. Indeed, even Kant's own theory of the social contract does not imagine that the contract is constituted by free agreement between citizens and the state, but rather by the compliance of citizens with universal moral principles (Kant 1966b: 431). After Kant, the tendency to interpret political legitimacy in terms of personal or collective consent diminished in importance. In fact, this was not exclusive to Germany at this time. By the end of the eighteenth century, traditional contractarianism was widely criticized in most European countries. In Britain, the legal practice of recognizing the authority of free, lateral contracts had moved British political thinking away from the statically normative assumptions of the vertical contract (Atiyah 1979: 60). In France, Rousseau's brand of contract-theory turned radically against the individualist assumptions of classical contractarianism (Sened 1997: 25). Rousseau asserted popular unity, not private rights of ownership, as the basis of political legitimacy (Riley 1982: 102), and he argued that genuine political life could only be grounded on the total transformation of private rights into public obligations. For Rousseau, therefore, the contract does not protect private property and private liberty: it renders such rights and liberties public. Importantly, Rousseau's contributions to the economic legislation of the revolutionary era were subsequently criticized and eliminated by the bourgeois legal interpreters of nineteenth-century France (Bürge 1991: 42).

In Germany at this time, however, the tradition of contract-theory underwent a far more thorough modification than in Britain or France. After Napoleon, German political philosophy returned in part to the classical conceptions of political life which had initially been undermined by contractarianism (F. D. Miller 1995: 29). With the emergence of Hegel as the most influential political theorist of the immediate post-Napoleonic

1 Kant 1966b: 366. See also Diesselhorst 1988: 67; Küsters 1988: 76; Saage 1989: 194.

period, German political philosophy moved against the individualist favouring of private rights against public ethics, and set out a strongly neo-Aristotelian theory of political life (Riedel 1982: 93). In Hegel's theory, collectively constituted ethical life (*Sittlichkeit*) is placed above private rights (J. Ritter 1969a: 297). Indeed, rights are not considered private, or in any way anterior to common political existence (J. Ritter 1969b: 114). For Hegel, rights, whether of property or nature, do not exist outside the political sphere (J. Ritter 1969c: 168), but are worked out only through common ethics and interaction. The political sphere, for Hegel, has complete primacy over the private sphere. For this reason, therefore, post-Napoleonic political philosophy in Germany can be seen to put forward a positive theory of human political life and liberty, in which freedom is not prior to political interaction, but rather realized through it. Above all, in post-Napoleonic German political theory, the state, and the common political life which is engendered by the state, pre-exist all other aspects of political existence. Hegel shares with Rousseau the anti-Kantian belief that political life can only be based on the substantial unity of the collective (Fulda 1991: 62). Indeed, in certain respects Rousseau's theory of the contract is also an assault on the individualist principles of contract-theory. However, Rousseau's idea that political order might be based upon voluntary agreement rests, Hegel argues, upon the erroneous presupposition that individual choices antecede political life. In fact, Hegel argues, the converse is the case. Lateral agreements between citizens cannot be translated into vertical agreements with the state. The state is prior to all agreements.

Hegel's critique of contract, therefore, demonstrates a paradigmatic unwillingness to accept the rationality of the economy as the foundation of the political order. His essential argument is that the state cannot be based upon contract, because a contract merely codifies the rationality of private law. Contract is based upon the particular interests and antagonisms which the private economy produces. Although Hegel acknowledges that certain forms of liberty are generated by the economy, the logic of the economy, he argues, is self-interest. The state, in contrast, embodies a higher general rationality, which can intervene in the economy and reconcile the antagonisms which the economy engenders. Genuine politics, thus, can only – Hegel argues – be established by the state and the state-administration, to which he imputes the ability to enact the general will of the people, beyond the divisions caused by the economy (Hegel 1986: 407). Hegel's political philosophy might, therefore, be seen to contain a political *anthropology*, in which the composition of collective political life is the defining fact of human existence. Hegel maintains a strong attachment to the estate-system of government. He sees the estates as hinges which operate at the interface between civil society and the state. Estates, however, he asserts, do not have true political dignity, and they cannot constitute the political will.

This tradition of anti-contractual theory in Germany has produced a history of very distinct political formations. The traditional critique of the

individualistic political order grasps the social sphere (in the tradition of the *Ständestaat*) as a complexly composed set of organisms and spheres of activity, which are situated beneath the level of the state (H. Brandt 1968: 76), but which are also integrated into the state. Such theories were especially widespread in conservative German responses to the French Revolution (Bowen 1947: 18), and in reactionary thought prior to 1848. However, they also survived into the twentieth century, and they experienced a revival in the 1920s and the early 1930s, especially in Roman Catholic political theory (Spann 1921: 199). Nonetheless, there are also more radical versions of the organic – non-contractual – theory of law and state. The dream of a political order based on law-creating fellowship (national solidarity) rather than law-imposing sovereignty, grudging compromise between the classes, or mere formal contract, remained influential well into the twentieth century, especially in the Weimar Constitution (see Portner 1973: 236). Hugo Preuß's drafts for the Weimar Constitution, strongly marked by Otto von Gierke (H. Preuß 1926: 489; see also Gierke 1868: 1/135; Berman 1983: 219–20), sought to guarantee popular sovereignty by integrating all organizations into the state. The social legislation of the Weimar period also testifies to the survival of a corporate, or economic-democratic element in modern law. The social components in the Weimar Constitution attempted to bridge state and society by placing industrial relations on the juncture between private and public law, under the co-ordinating authority of the state, and by linking the political will-formation to active collaboration between social groups (classes) in the economy. The post-1945 political concept of the social-legal state, at the core of the founding documents of the Federal Republic, is itself in part indebted to this tradition of organic-corporate reflection. The relativization of private or contractual law remains therefore an active component even in the most recent German political tradition (Wieacker 1967: 545).

Many of the more recent theories of legitimacy addressed in this work also strongly recall Hegel's thought, and they mirror the Aristotelian recourse at the inception of modern German political theory. The plebiscitary dimensions to the thinking of Schmitt and Weber are also symbolic attempts to overcome the contractarian political order. Both Weber and Schmitt see the political dimension to human life as the manifestation and production of a collective political ethic. Neumann and Kirchheimer argue most radically in favour of a political order in which human life is not bound to any private obligations. Habermas's early assertion that the good polity cannot be anchored in the unmediated pluralism of interest contains a clear echo of Hegel's refusal to grant to technical reason the status of universality (Theunissen 1981: 27). German political thought after Hegel tends, therefore, to argue that the rationality of politics is distinct from other spheres of operation, and that the political sphere retains an autonomous status, as (ideally) a location of universal will-formation which is not categorically bound to prior concerns. Legitimate government is thus generally grasped as government which is not a mere clearing-house for

different, vacillating interests, but a condensation of non-specific collective needs. In this respect, the nineteenth-century duality of state and society has been refracted into twentieth-century theory as an insistence that state and society, if they are to be connected, cannot be simply linked in easy fluidity. They must, rather, be reconciled in a sphere of action which either antedates, or is constituted beyond, the forms of association and antagonism which characterize the technical aspect of human life.

Even the German liberal movements, which elsewhere pioneered contract-theory, did not, at least outside the marginal post-Kantian line, develop a theory of contractual freedom. The liberals of the nineteenth century – strongly influenced by the spirit of historicism – argued, generally, that national political organization would provide the key to the resolution of economic antagonisms (see Gagel 1958: 67–8), and that liberty could not be envisaged outside the state. The German vision of emancipation – especially liberal emancipation – was thus imagined, broadly, in terms which were derived from the state itself. There are clear historical and conceptual reasons for this. The liberal 'revolutionaries' of the *Vormärz* and 1848 certainly endeavoured to secure their own economic emancipation. But German unity and the borders of the German nation-state were, necessarily, their equally pressing concerns (Nipperdey 1983: 669). After the failures of 1848, the middle class did not constitute itself in civil opposition to the state, but acquiesced in Bismarck's system. Even liberal programmes of the first decades of the twentieth century were still complicatedly rooted in the governmental structures of the Hohenzollern era. For these reasons, German liberals tended to view the state as the precondition of liberal success, not as a contractual or representative body. This is illustrated most perfectly by Max Weber, who grasps politics both as the administration of economic advantage and as a collective quality which condenses and serves the national will. Even the early radical groups of the mid-nineteenth century and the social-democratic movement of the late nineteenth century retained an attachment to the strong state (Nipperdey 1961: 394). Although Marx's theory of politics interpreted the political sphere as a mere superstructural reflex of the economy, the formative years of the German labour movement were strongly marked by Lassalle's particular brand of strong-state socialism (see Morgan 1965: 33; S. Miller 1964: 35–7).

The nature of these relations between public and private life in the German legal and political traditions in fact closely reflects certain aspects of economic organization in Germany. Significantly, the tradition of laissez-faire liberalism never attained the same level of popularity in Germany as in Western European countries. Even in the age of high liberalism – the mid-nineteenth century – the insistence that control of the economy should be devolved exclusively to private bodies found little support in Germany. Notably, the ordering of the German economy in the nineteenth century was marked by far higher levels of organization and regulation than elsewhere. Political reflection in Germany, thus, displayed a practical opposition to freedom of lateral contract, as well as a theoretical hostility

to vertical contract-theory. In addition to the regulatory measures introduced by Bismarck after 1878, the period of accelerated industrial expansion in Germany (1870–1900) coincided with a rapid concentration of economic power in the hands of organized associations – cartels. These cartels were freely constituted bodies which were designed to limit competition and to fix prices in certain sectors of industrial production. The development of the cartels was the topic of fierce debate in the latter part of the nineteenth century. It is striking, however, that even most liberal thinkers approved of cartels, and saw them as mechanisms for protecting collective interests from the ravages of the unchecked private economy (Pohl 1979: 209). The cartels were originally viewed as semi-public associations which contributed to the will-formation of the state from the economy, but which remained just below the level of the political system (1979: 230). It can thus be inferred that the liberal class in Germany was not in principle opposed to the restriction of free trade and the imposition of limits on the competitive self-regulation of the economy. The cartelization of the economy increased rapidly through the early twentieth century, and it became a formal mode of economic steering during the 1914–18 war (Grossfeld 1979: 257). Significantly, the development of the cartel-system also had an effect on the structure of public law. In 1877 the cartels were declared legal by the Prussian judiciary, and were not deemed to be obstructions to the freedom of trade otherwise guaranteed in the system of private law (1979: 257). This judgement was reinforced by the Imperial Court in 1890 (Coing 1989: 181). The liberalization of the economy in the period 1850–75 was thus (in part) redressed by a system of cartel-based economic organization, which accorded semi-public status to bodies properly situated in the sphere of private law. In Germany, therefore, in parallel to the relativization of private law by the state (from above), private-legal associations quickly organized themselves (from below) in such a manner that they assumed a position on the intersection between public and private law. They were thus able to exercise quasi-legal authority over whole sectors of socio-economic activity. This meant, in short, that in Germany the sphere of private law was subject to a process of rigorous regimentation, and that an organized system of power emerged beside the state, which was able to regulate the economy, and which could also influence the decisions of the political executive. Not until the 1920s was it consistently argued that the cartels actually formed a mode of organization which did not reinforce the power of the state, but detracted from it. Gustav Streseman passed anti-cartel legislation in 1923. Similar legislation was again passed by Ludwig Erhard in 1957. In modern German political thought, notably, the cartel-system of organized capitalism is interpreted as a symptom of the absence of real political life in Germany. From Weber to Habermas, the technical and collective organization of the economy by bodies interposed between state and society is viewed as a poor surrogate for real political life, which prevents the mediation between the economy and the state that genuine political society presupposes.

The defining aspects of German political thinking, in sum – its historicism, its positivism, its statism, its integrative ethic, its positive theory of liberty and its anti-contractual theory of politics – can in general be interpreted as variations on the conviction that social rights do not exist in a neutral space outside, or before, the political order, and that the recognition of personal liberty always presupposes a political collective, centred around the state. In such theories, the liberal-democratic relation between interests and representation is inverted. Legitimate government, following such ideas, is not the particular representation of social interests, but rather a political life-form, in which particular interests have a subsidiary position.

The development of such ideas can, not lastly, be ascribed to the relatively late period of industrialization in Germany. By the time a non-aristocratic political class had developed, the Prussian state was secure enough – having already absorbed certain sectors of the middle class through administrative reforms (Nipperdey 1983: 31–82; Grimm 1988: 87) – to obstruct, at least until 1914, the assumption of power by anti-conservative forces and interests. The Prussian middle class, in particular, was assimilated rapidly into a politically restrictive, but economically beneficial compromise with the Hohenzollern state. The middle-class parties did not get hold of real power until after 1919, by which time the period of unrestricted bourgeois rule was already over (G. Schmidt 1974: 277).

It might also be observed in this relation that in Germany the classical arena for the expression of bourgeois interests – parliament itself – has never occupied a position of absolute centrality in the political order. The parliaments of the period 1849–1918 were really only budgetary chambers with fluctuating influence on the executive, whose power did not finally exceed rights of fiscal veto (Huber 1963: 776). Members of parliament were not permitted ministerial status. These parliaments were also characterized by low levels of party-political organization. Up until 1918 (and arguably afterwards), the political parties did not develop either as effective links between civil society and the state or as organs for intellectual/ideological formation. The constitutional organization of the Weimar Republic, in certain regards a model of popular democracy, did not recognize political parties as public bodies. The Weimar Constitution contained heavy presidial checks on the strength of the legislative body, and it was based from the outset upon extra-parliamentary compromises between the government and the military, and between big business and the unions. These placed prior limits upon the executive authorizations of the parliamentary government. Parliament, already effectively powerless by 1930, was dissolved finally by the Enabling Laws of the National Socialists in 1933. Even in the Federal Republic it has often been asserted that parliament has never completely asserted itself as the true location of power, and that its influence has always been counterbalanced or determined by the corporate functions of social and economic organizations. The separation of powers, in Western European democracies the chief political accomplishment of the

bourgeoisie, was also not finally achieved in pre-1945 Germany. Even in more recent traditions of German conservative thought, the separation of the powers is by no means an unquestionable component of the good political order. In post-1945 political thought, the conviction that the unrestricted ceding of power to the parliamentary legislature is a mere technical device for appeasing the economic ambitions of the middle class, rather than a means for engendering true democracy, remains influential (W. Weber 1951: 43). This argument is right at the heart of much interwar political theory. Analogously, much of the left-leaning theory of the Federal Republic is, despite its critique of parliamentary democracy, still concerned with the attempt to show how parliament might be transformed into the organ of real will-formation. The theory of politics in German thought is therefore always related to the position of the middle class. Schmitt, Neumann and Kirchheimer attempt to eliminate the systems of political life (private law) which the middle class has produced. Weber and Habermas attempt to revivify that space – public/political culture – which is customarily (or ideally) filled by the middle class, but whose weakness in Germany reflects the complex history of the German bourgeoisie.

The main question in German political thinking remains, therefore, the distance between state and society, and the difficult attempt to link the two. In the following studies, varying outlines are seen for models of democracy which unite both components. These include the charismatic integration of people into government by means of the personal qualities of leaders (Weber), the symbolization of politics as an aesthetically integrative appeal (Schmitt), the active mediation of civil society through political participation (Neumann and Kirchheimer), the production of radical-democratic discourse (Habermas), and the post-subjective functionalization of citizens for the technical needs of administration (Luhmann). In each case (except that of Luhmann), politics, conceived as radical-democratic politics, aesthetic politics, charismatic politics or discursive politics, is not reducible, merely, to the expression of already existing needs. It is the central dimension in varying forms of philosophical anthropology, in which human life is human only when it is political.

In each case, therefore, against the background of the wholesale dissolution of political action in modern society (see Narr and Schubert 1994: 215), the observer is invited to reflect upon the contemporary conditions of political liberty.