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The Institutional Turn in Hegel's Philosophy of Right: Towards a Conception of Freedom beyond Individualism and Collectivism

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I. Myths, Interpretations and Reception

In contemporary moral philosophy and philosophy of law, Hegel's social theory of spirit is more controversial than ever. Attempts to apply his dialectical history of the structures of reason, autonomy and liberation in the modern age have been met with scepticism.[1] Discussion of the *Elements of the Philosophy of Right* has led time and again to the conclusion that Hegel favoured a conservative collectivism. What is wrong with such a collectivism, according to the popular view, is that it underestimates the importance and status of the individual person within a constitutionally organized body politic, or at least evaluates this status inappropriately.[2] Popper and, more recently, Tugendhat have gone so far as to suggest that Hegel's metaphysics of freedom goes hand in hand with a radical limitation of the individual's autonomy, which in turn would make possible conceptions of a totalitarian society.[3] Such a scepticism — one may even say aversion — towards speculative reflection on the *condition humaine* feeds off of an understanding of the philosophy of the enlightenment since Locke and Kant that prioritizes individual rights over the common good.[4] The merit of modernity must be seen in having helped facilitate the breakthrough of the idea of 'normative individualism', and of bringing the democratic control of power to fruition, which has by now found expression in a universally recognized protection of fundamental rights.[5] This juxtaposition of collectivism and normative individualism continues to characterize contemporary moral philosophy and the philosophy of law.

Yet, as we will attempt to show, this juxtaposition undermines the legitimization of order and freedom at the very basis of the modern body politic and, moreover, prevents us from comprehending Hegel's argument concerning individual autonomy, collective reason and legal recognition.[6] We will refer to controversies in contemporary moral philosophy and philosophy of law as a means to introduce one of Hegel's central but largely overlooked ideas

concerning a post-metaphysical justification of norms and subjects. We will argue that Hegel understood his philosophy of right primarily as the transcendental condition of the possibility of free action and judgement. In this sense, fully in line with Kant, he considers the individual, autonomous person to be an indispensable moral and legal entity.[7] In contrast to conceptions of methodological and normative individualism, this moral and legal entity is only conceivable as the result of an *institutionalization* successfully secured in the form of procedures. Thus, Hegel does not advocate a collectivist approach of the kind ascribed to him by contemporary critics, but rather one that is concerned with the relations between persons and oriented towards social practices. Nor does he oppose the claim of individual interests; on the contrary, social practices signify for him collective cooperation and inter-subjective understanding. Hegel seeks to circumvent the duality of individualism and collectivism in favour of a theory that sees institutions as legitimated by the actions of the citizens of a body politic and capable also of ensuring their freedom. Now the idea of an institutionalized order is nothing novel even in Hegel's time.[8] Rather, what is novel is the joining of the idea of freedom with the idea of the institution as a form of life and action. This understanding of right, of the political and the moral, presents itself to Hegel because he — unlike Locke, Mill, Kant and Fichte — joins the idea of legitimization to a sociological, historico-genetic and cultural-theoretical view.

Perhaps one reason Hegel's *institutional turn* has been misunderstood is that our interpretations of his philosophy of right have been coloured by the 'post-idealist' development of science and theory.[9] Hegel developed his *philosophy of institutions* at a time when the social sciences were establishing themselves, and, over the course of the 19th century, taking over the study of institutions from philosophy.[10] In order to understand Hegel's project, it is important to undertake a philosophical analysis of institutions and the normative conditions of social practices alongside sociological and cultural-theoretical perspectives. Before we devote ourselves to Hegel's philosophy of institutions in Part III, we will introduce in Part II the idea of the institution and post-metaphysical modernity. In Part IV we will discuss the critique that has been raised against it, and we will conclude by considering the potential the theory has for the current discourse of modern legitimization.

II. The idea of the institution and 'post-metaphysical' modernity

The idea of the institution and post-metaphysical modernity stands, with regard to moral philosophy and philosophy of law, in a relation that is as indispensable as it is tension-filled.[11] It is an indispensable relation insofar as the dispute concerning the conditions of validity and the importance of institutions is tied to

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a specifically modern development, which we may characterize as a progressive subjectivization of collectivist societies. The theoretical basis for this development may be found in Ockham's nominalism,[12] which carries over his distinction between the concepts of universality and reality (*res*) onto the concept of community and, in opposition to the model of *universitas*, grasps it as a union of individuals.[13] In this reinterpretation of moral-philosophical categories, we may see at the same time the birth of subjective right as an instrument of an individually accessible power (*potestas*), the force of which is unabated to this day. Over the course of history, one can see that idea of the individual is gradually disentangled socially and economically from the statically integrative forms of life, as they were still characteristic for the Greek *Poleis*, the *mos maiorum* of Rome and the Christian feudal orders of the Early and High Middle Ages.[14] By the time of the rise of the bourgeois subject in the 18th century, the individual counted not only as the originator of its own *identity* but also as the agent that asserts and realizes its own needs, claims and commitments in accordance with the given social context.[15]

The theoretical debate of the 19th and 20th centuries resituated this process in the paradigm of methodological and normative individualism. Luis Dumont speaks expressly of the metamorphosis of the 'outer-world' into the 'inner-world of the individual' and thereby calls attention to the unique character of pre-modern orders, to enable, if at all, authenticity and individuality only as an act of alienation from the world.[16] If the institutional fabric of these orders, the political just as well as the social and the familial, had the task of guaranteeing the *embedment* and necessary identification of the individual in the existing community, then the new institutional order is to be brought together with the calculation of needs and interests of the agents as well as with the distinction between state and society.[17] The process of social and economic disentanglement, corresponding simultaneously with the pervasive secularization of the world, leads to 'the great disembedding' of the individual or whole groups.[18] On a theoretical level of legitimization, a function of guarantee, exoneration and control is now conferred onto institutions and also demanded of them. Strictly speaking, they are to establish, but also limit, normatively the methodological and ideological priority of the social agents. By now the necessary tools for understanding this relation is provided by the individual sciences — jurisprudence, sociology and political science. Maurice Hauriou, Talcott Parsons, Max Weber and Hans Kelsen, for example, have developed innovative theories of institutions that contain conceptions of ruling, organization and procedure.[19] An institution, according to Hauriou, is the idea of a practice or a work, 'which finds realization and legal support in a social milieu.'[20] Especially in light of these (juridical) objectives, however, the problem concerning the legitimization of the post-metaphysical modern becomes obvious. The orientation towards an individualist concept for the justification of order and society leads to the question concerning how

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methodological individualism and institutional order relate to one another. Where, then, should the *idée directrice*, which can guide social action, come from? Above all, this understanding provides no answer to the question concerning how autonomy and freedom, the identity and subjectivity of the agents, is to be justified and guaranteed. The kind of explosive power that lies in this question is still manifest in the theories of Gehlen and Luhmann.[21] And its signature is visible in social philosophy in general where guarantees of autonomy and freedom play a prominent role, paradigmatically represented by the so-called liberalism-communitarianism debate.[22]

Disregarding for thematic reasons the occasionally exaggerated differences in the choreography of just orders,[23] one is nonetheless struck by the similar line of attack of theories that exhibit the modern model of law and society: Essentially it is a reflexive-transcendental concept of autonomy, which ought to not only ward off egoistic tendencies of pure utilitarian promises of freedom,[24] but also guarantee a social system of cooperation, individual self-determination and mutual self-realization. The institutional and organizational model of order is conceived against the concrete setting of political, cultural and legal resources of a body politic, and is supposed to guarantee the realization of (individual) freedom. It is striking that the configuration of the form of institutions or institutional parameters first comes into its own in the aftermath of the already presupposed interests of the autonomy of the individual, which means, methodologically, that it stands in a secondary relation of derivation. It is also clear, however — especially in light of the models of Rawls, Nussbaum and Sen — that the social conditions of constitution and enablement, which essentially determine and structure the space of freedom of the agents, do not themselves belong in any way to this 'space'.[25] Thus, for instance, Martha Nussbaum writes:

> 'Domestically it holds that one central purpose of social cooperation is to establish principles and institutions […]. If we say that its citizens have duties to maintain the system of property rights, the tax structure, the system of criminal justice, and so forth, we are in one sense saying something true and important. There are no living beings in the state other than its people; there is no magical superperson who will shoulder the work. Nonetheless, if each person tries to think individually what is to be done, this would be a recipe for massive confusion and failure. It is far better to create a decent institutional structure and then to regard individuals as having delegated their personal ethical responsibility to that structure'. (2007: 274, 307).

Strictly speaking, we are dealing with a theory of institutions, by which the various aspects of a legal and social order are joined together.[26] Hegel was critical,

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however, of such a combination theory of legal-moral freedom; this is evident especially in his confrontation with Hume, Locke and Kant. For Hegel the normative principles that constitute the core of legitimacy of the modern body politic, and especially the legal status of the persons, can be developed and justified not as independent and freestanding but rather only from out of a framework of institutions. In what follows, we shall consider in greater detail the understanding of institutions that is integrated in this social-philosophical holism.

III. The order of spirit and the meaning of institutions

Hegel's argument for an order of spirit is based on a holistic theory of freedom that intends to capture the political and social reality[27] as a network of highly differentiated concepts, which not only develops and reflects our collective action and judging, our thinking and willing, but also articulates and makes explicit the having-become [*Gewordensein*] of a complex 'culture of self-consciousness'.[28] How is this to be understood? We can understand Hegel as wanting to make us aware that we can explain and grasp our 'practical universe' — the underlying structures just as well as the surface tensions — only by recourse to the horizontal and vertical relations of dependence, that is, relations of rights and duties, of norms and interests, of individuals and collectives. On the face of it, this does not sound particularly spectacular. But §29 of the *Philosophy of Right* specifies the line of attack: 'That a reality is the realization of the free will [*Dasein des freien Willens*], this is what is meant by a right. Right, therefore, is, in general, freedom as idea.'[29] Emphasized here is both the ontological as well as the normative dimension of a 'social-philosophical holism'.[30]

With his social ontology, Hegel opposes both theoretical atomism as well as an undifferentiated conception of the common good. He chooses instead the Aristotelian ethos of an existing order in its twofold meaning as convention, place of living or custom [*Sitte*] and life-form, as the primary point of reference for a social theory of spirit.[31] By way of contrast, the normative argument is supposed to express the fact that the conventional debate on the basic structure of a constitutional state always refers already to the established 'social-legal' forms and with that also to the fundamental resilience and legitimacy of the existing constitutive conditions of a common social project.[32] It is well known that Hegel, with regard to his model of a philosophy of right, formulates this as an institutionalized ethical life [*Sittlichkeit*] in which the spheres of freedom and abstract right and morality are subsumed. In the development of the state, as expressed in §256, the ethical substance [*sittliche Substanz*] gains its infinite form, which contains the following elements: '(1) infinite differentiation even to the point at which consciousness as it is in itself exists for itself, and (2) the form of

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universality, which in civilization is the form of thought, that form by which spirit is itself in its laws and institutions. They are its thought will, and it and they together become objective and real in an organic whole' (2001: 194)[33]

Besides these normative and ontological presuppositions, Hegel's concept of institution, of the *objective spirit* as a liberal order relies on methodological presuppositions which must explicated in order to appreciate the concept's potential and attraction.[34] The starting point is the 'basic principle of the will' as it is introduced in §§5-7.

This structural principle of the will — we may recall — is based on further system-specific suppositions. Thus Hegel discounts an approach that intends to differentiate between an analytical and synthetic, an a priori and an empirical argument. Therefore Hegel considers it unreasonable to base a justification on elementary, analytically true propositions or synthetic a priori valid principles. At the centre of his reflections is instead a comprehensive conceptual analysis of recognized forms of speech, judgement and inference in the context of a speculative logic. At the same time Hegel rejects, like Davidson does later, a splitting of conceptual scheme and content, for his aim is to overcome the dualism between concept and intuition. Ultimately, Hegel is convinced that the differentiation of concepts may be depicted as a teleological process that is directed towards perfection. Developments of nature and spirit are the unfolding moments of organisms and praxis forms, at the end of which stands knowledge, i.e., the consciousness of their conceptual contents.[35] 'Although in the course of the scientific exposition the state has the appearance of a result', writes Hegel in §256, which marks the transition from civic community to the state, 'it is in reality the true foundation and cause. This appearance and its process are provisional, and must now be replaced by the state in its direct existence' (2001: 194).

Now this basic principle of the will is not to be identified in any way with a naturalistic and one-dimensional understanding of the will, characteristic of the modern social and human sciences. In contrast, Hegel's understanding of the will is conceived as multidimensional and concept-logical. In this respect, the concept of the will, i.e., the self-explication of the spirit, is precisely concerned with a mediation of three specific determinations: of (abstract) universality, particularity and individuality (as concrete universality).[36] With (abstract) universality Hegel aims at the phenomenon of individual consciousness, which manifests itself in first-personal reference, in the 'freedom of the void', and is realized in religious or political fanaticism of the fragmentation of all existing social order (§5). The will must therefore at once be grasped as surpassing Pyrrhonian thought. Particularity then captures how the individual consciousness as subject exhibits its freedom of choice. In decision-making, in the acts of the will, the contents of the will become their own, which is why one may also speak here of the acting agent, on which the forms of attribution, responsibility etc., (must) find application (§6). But the

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will first obtains a complete determination by means of a fusion of both dimensions (moments) in individuality or subjectivity. This individuality is concerned for its part with a reflected particularity that leads back to concrete universality (§7). It is only this one self-determined *Existenz* which ignores its (eccentric) particularity and emerges as a rational being. Universality, particularity and individuality of the will thus stand again in a holistic and internal relation.[37]

Turning to the social structure of interaction: Insofar as the individuals — with knowledge of their personal status (universality), and with a view to the practical-ethical universe (individuality) — decide (particularity) to pursue such aims, which may be portrayed as suitable contents of collective action and judgement, then the autonomy of the will is actualized. At this point we now also understand better the assertion of §29 mentioned above. The right as the realization of the free will institutes normative claims as subjective rights of the individual, while at the same time also justifying the legitimacy of the objective order with its explicit and implicit rules, norms and relationships of recognition.[38] Abstract right, morality and ethical life — as 'forms of spirit' [*Gestalten des Geistes*], to borrow from the *Phenomenology*[39] — depict this system of differentiation of the will as a project of a humane world. From the perspective of the community and the 'civil society', it is thus concerned with the establishment of constitutive conditions of right by means of action-guiding routines. For the single individual it is decisive that the social structures and orientations are universally recognized. For the individuals among themselves it ultimately depends on whether they treat each other reciprocally as persons and subjects and accordingly as bearers of rights and obligations, as formulated in §36: 'Personality implies, in general, a capacity to possess rights, and constitutes the conception and abstract basis of abstract right. This right, being abstract, must be formal also. Its mandate is: Be a person and respect others as persons' (2001: 53). It is now precisely this culture, as complex as it is tiered, of mutual inclusion of epistemic, ontological and normative standards, which represent themselves in the Hegelian model of institutions, and must thereby be actualized, updated and made plausible again and again.

Institutions are, then, both *praxis forms* and *legal forms*, in the comprehensive meaning of right that is customary for Hegel.[40] They are praxis forms because they maintain the idea of right, the reflected will, in the 'external world' of subjects as actualized (§33). In this way institutions as praxis forms justify an internal normative basis (an internal ought),[41] which articulate the grounds that are solidified in the contexts of interaction and the expectations of behaviour.[42] With regard to the subjects, the autonomy of the will in these praxis forms crystallizes into a political disposition [*Gesinnung*], into the concept of citizenship status that is often evoked today. In the centre stands accordingly 'the will which has become a custom' (§268). But also here, fully in the sense of a speculative

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choreography of the will, one is not appealing to a rigid ensemble of opposing positions. The demands and expectations of behaviour, the power of objectivity, only become understandable when they are related to the individual pursuit of freedom. For Hegel it is therefore a necessary insight of modernity, that 'reason must accommodate humans concerning right' (Ilting 1974: 96); they can thus have experience in practices and legal relationships of remaining 'in objectivity at once with themselves' (§28).[43] But it is equally clear to Hegel that the acting agents cannot (only) be conceived as disengaged or disinterested subjects. Instead, the model of disposition and praxis mentioned above is accompanied by an understanding of reflected consciousness. Hegel's concept for this is integrity [*Rechtschaffenheit*]. 'The ethical', writes Hegel in §150, 'in so far as it is reflected simply in the natural character of the individual, is virtue. When it contains nothing more than conformity to the duties of the sphere to which the individual belongs, it is integrity' (2001: 134). This is the point at which both perspectives may be joined together. The individual knows not merely individual approval, but rather identifies him or herself — not rarely performatively — with the social world; and insofar as the individual identifies him or herself, he or she approves the legitimacy of the 'ethical forces'. With this, however, according to Hegel, 'the various social forces are not something foreign to the subject. His spirit bears witness to them as to his own being. In them he feels that he is himself […]. This relation is more direct and intuitive than even faith or trust' (2001: §147, 133).[44] Institutions understood as praxis forms are thus cultures of inter-subjective recognition, which make the standards of collective reason and justice visible and viable.[45]

As legal forms, they exhibit opportunities of sociality, which, depending on their aim, can exhibit varying degrees of complexity, configuration and organization.[46] Here Hegel argues rather 'large-scale' by referring to the laws, the family, the civic community and institutions of the political state, and thus takes into consideration the importance and demand for order of the modern body politic, within which diverse, i.e., horizontally or vertically oriented spaces of freedom can unfold.[47] Central to his differentiated concept of right is the thought concerning praxis forms. At the same time one cannot overlook that Hegel, with the legal form of institutions, also wants to emphasize the function of positive right in establishing status and guaranteeing freedom. The roles that agents occupy and (ought to) fill as family members, cooperation partners, political officials etc., do not merely make reciprocal and moral demands. Much more significant is how the possibility is now made available to formalize publicly the rights and obligations of persons and also to forcibly implement them, meaning against the (subjective) will of those concerned.[48]

The emphasis of the forced implementation of the right is jarring, for it appears itself as a form of violence. As a rule, the procedure is justified by

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appealing to the perception of a 'second constraint'. Also Hegel is no exception. Nevertheless, he recognizes very well the ambivalence, not to mention paradox, which modern right generates with the recognition of the subjective right.[49] With subjective right the possibility is made available to the single individual to act in a negative way towards the universal, that is, to test out the range and horizon of interpretation of his or her own caprice [*Willkür*]. In reference to the basic principle of the will this means a partial and temporary shift of emphasis in favour of the (abstract) universality of the will. Subjective rights are to be grasped as 'rights of defence' [*Abwehrrechte*] insofar as they not only enable this free space but at the same time confirm the recognized status of right and freedom of the individual (§36). But also in this constellation it is clear that this does not entail a task for the (logical) context of interdependence of universality, particularity and individuality, as ultimately demonstrated also by the choreography of the civic community. The 'shading of the ethical' that is practised there is without doubt an expression of a pragmatic subjectivity. One need not think the ethical and 'the state' emphatically in order to nevertheless reflect and appreciate the background normative force, which takes effect precisely in the recognition, and especially in the utilization, of positive right. But when this is the case — that is, when the pragmatic subjectivity is ready 'to play along with the play of right' — then it also seems possible, with the use of universal rules, to turn the play against it.[50]

In this respect, the function of guaranteeing freedom of positive right has, with a view to the institutional constitution of the body politic, a double line of attack. On the one hand, the institutionalized social structures, such as forms of familial life or economic cooperation, are accompanied by — if one so likes — a secondary authorization, an external ought. This not only reveals the importance of these praxis forms, but also accounts for the agent's willingness to uphold the normative rules themselves in the case when someone disavows them or circumvents the corresponding aims, for example, the adherence to agreements that have been entered into. On the other hand, this argument of interventions and sanctions, which is now already visible, enables Hegel to expose systematically the 'institutions of the enforcement of right'. He speaks here of (state) powers, the legislative and executive, especially of the police, of administration — as we would call it today — and, of course, of the administration of justice.[51]

Especially with the administration of justice, and not least criminal justice, we can see clearly how Hegel ties his model of institutions as a form of right and praxis back to the speculative logic of the will. Thus in the abstract right, the formal standards guarantee — in the case of conflict, e.g., of neglecting the stipulated role — the status of the person, of the injured and the offender, but also (ought to) justify the application of the second constraint (see especially §§82, 90 ff.). But from the perspective of abstract right it is decisive for Hegel that only the formal dimension of the will (universality) prevails, which means

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that legal freedom is realized only by accident and can always transform into revenge. Therefore Hegel does not formulate a penal theory in the abstract right, but rather at most the potential and limits of a theory of constraint. With morality he can show that, for the question concerning the realization and restitution of freedom, it also comes down to the subjective side of the individual, of the motives and intentions of the reflected (particular) will. Only in this sense can there be talk of attribution and responsibility, albeit with 'the eccentricity of the subject'; also here the limits, namely, of a 'moral right', become visible (§§138 ff.). Ultimately, for Hegel the meaning and consequences of violations of freedom can only be apprehended in the context of ethical life, that is, in the relations of an organized body politic. For this reason the institution and the procedure of the administration of justice are systematically and conceptually presupposed by both of the perspectives mentioned above, for only in this wasy does the concrete universal will, or even the embodiment of freedom [*Dasein der Freiheit*], manifest itself. Consequently, only within this framework can there also be talk of sanctions as (just) punishments (expressed unambiguously in §§218 and 220).[52]

This reference to the embodiment of freedom also exhibits the (ethical) position of those involved. Restricting oneself to the behaviour of the offender, one can see that only the particular will has realized itself.[53] Now by means of the institutional procedure of the administration of justice two things occur. On the one hand, the offenders are reminded that they themselves partake in the basic structure of the universal will, that is, in the practices of recognition of social freedom; in this sense they are, in Hegel's pointed formulation, 'honoured as reasonable' (§100). On the other hand, one succeeds with this procedure, with the subjugation of the individual under the current law and the appropriate decision concerning the conflict, in ensuring that the authorization and legitimation of the institution of the administration of justice qualify, in Hegel's words, as a formation of ethical forces.[54] Nevertheless, the dialectical Hegelian concept of freedom and institutions has come again and again under fire.

IV. Over-institutionalization and alienation?

Dieter Henrich and Axel Honneth have articulated their immanent critique in light of the concepts of 'strong institutionalism' and 'over-institutionalization' (Henrich 1983: 30; Honneth 2001: 105). Talk of strong institutionalism expresses an objection that is not new: Hegel has, according to Henrich, absolutized the order of institutions to such an extent that they have become a burden to the individual. 'The single will, which Hegel calls the "subjective", is fully bound to the order of the institutions and altogether justified only insofar as these institutions are themselves this will.' The hegemony of the external world that is

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organized in accordance with the state is already evident in the definition of right as the embodiment of freedom, for this definition aims at the 'transition of the will into its objective correlate'. In this respect, one could indeed comprehend the idea that Hegel's development of the objective spirit 'is completely oriented to the justification of a concept of the state, which allows the subject no independent legal claim that can itself be set apart from the right of the state' (Henrich 1983: 31, 34). In contrast, Honneth criticizes the obvious dominance of the positive-legal emphasis in Hegel's theory of institutions. Hegel undervalues, according to Honneth, the importance of informal, but at the same time, shared inter-subjective routines and practices. Hegel thereby downplays, however, his own concept of ethical life, and emphasizes the primacy of 'social producibility' and the fact that ethical life may be 'generated through controllable interventions'. The various spheres of recognition thus remain tied back directly to the positive legislation of the state. Admittedly, Honneth concedes that for a multitude of social forms of interaction one is to assume a 'certain support function of state law'; albeit one ought not to make the mistake of 'a total identification with legally drafted institutions' (Honneth 2001: 112).[55]

The objection of a (too) 'strong institutionalism' is to be taken seriously because — if for no other reason — it highlights the debate which has persisted since the publication of the philosophy of right concerning the resilience of the Hegelian justification of right and state. That the critique is brought forth precisely by Honneth and Henrich reveals clearly that in Hegel scholarship the question concerning how to interpret the semantics and the approach of argumentation of the *Philosophy of Right* is a source of disagreement. But has Hegel in fact — to begin with the objection from Honneth — advocated such a 'total identification'? If we recall again his model of institutions, then one ought instead to say that Hegel has in mind a balanced relation between legitimacy and legality. For Hegel it is therefore not at all a matter of a 'demission' of informal moral and social forms in the context of ethical life, in the way they depict love and friendship (§7). On the contrary, such practices of 'being with oneself in another' are a habitual presupposition for the competencies of the acting agents in their roles in being legally responsible, for example, towards the child or the complete stranger, cooperation partners that depend on reliability. It thus seems likelier that Hegel saw, precisely in this tension-laden interplay of praxis and legal forms, the potential for the modern guarantee of freedom. Hegel's concept of moral autonomy and social recognition was certainly less emphatic than Honneth's. And that is why he was less disconcerted by positive right and the insight concerning the potential for a conflict of practical action and judgement. To see here a 'total identification' of both spheres is to simply miss Hegel's concept of right. Similar difficulties of comprehension also accompany Henrich's objection. These difficulties arise primarily because he translates Hegel's

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speculative, i.e., multidimensional, basic principle of the will into a static and one-sided relation of dependence, separating the individual existence from the ethical life and then applying the latter to the Hegelian theory of freedom. As we saw, it is Hegel's concern to apprehend our practical universe by means of a holistic model. In order to distinguish it from every form of contractualism, Hegel relies on the having-become [*Gewordensein*] and the connected history of reflection of ethical forces.

The esteem that Hegel shows for the 'spirit of the laws' and a (legal) culture of institutions implies in no way — this too was also already alluded to in light of Popper — the marginalization of the individual or the standpoint of the subject. What Hegel would like to draw attention to, however, is the limited horizon of individual convictions. Critique and dissent, whether towards the institutions or other practices of the body politic, is therefore to be understood as proposals for change, which must themselves be re-evaluated and questioned with regard to their normative content (§268).[56] A body politic that does not create and recognize these opportunities is in Hegel's eyes totalitarian and ready to renounce the subjective rights of the individual. Certainly talk of positions that are independent and separable from the right of the state would be incomprehensible to him. The reason is that Hegel conceives of subjective claims and subjective rights — here he diverges from contemporary legal and social philosophers — not merely in reference to the civic community or the institutions of 'civil society'. Rather, they are independent and separable from the right of the state only if they integrate at the same time the demands and content of the political disposition (§268). Hegel thus situates in the (legal) subject a tension between subjective right and the objectivity of the ethical, which only the individual can overcome, but precisely in the form of self-reflexive inclusion.[57]

Behind the objections of Honneth and Henrich, which here merely stand *pars pro toto*[58] for an expressed reservation in the face of the Hegelian model of freedom and institutions, there seems to lie hidden a deeply-rooted scepticism, which expresses itself in the concepts of 'alienation by' and the 'pathology of' institutions. Their objections are also an indication that we are dealing with fundamentally divergent conceptions of autonomy, right and subjectivity.[59] As seen, Hegel understands the existing culture of objective spirit as something that is — for the individual — approachable and understandable. Therefore it is for the subject not something alien (§147) but rather, on the contrary, something which engenders trust and which ought to be appropriated. But this 'attraction of the objective' becomes problematic when — and here Honneth and Henrich mistakenly assume this is Hegel's position — the ontological and epistemological status of institutions are not carefully distinguished from one another, and institutions are believed to grant not merely an advance but rather a guarantee of legitimacy.[60] The problem of such a blurring is obvious: If institutional facts are

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believed to be not merely epistemologically but also ontologically objective, the danger arises of institutions becoming self-evident and independent of our praxis forms. We would no longer see that institutions, on the one hand, are created by us and in this regard dependent on us, while on the other, have an objective validity, i.e., a subjective inaccessibility that one cannot deny. The primacy of objective reality would become an ideology that could justify the 'depletion' and 'erosion' of institutions, that is, the 'bad' institution and thereby prevent its rectification or even its elimination.

Such a position is certainly not Hegel's, though one could nonetheless judge his position as conservative, and even speak of a 'possible paternalism of right'[61] by pointing to the 'resilience of the ethical' [*Beharrungsvermögen im Sittlichen*]. Yet there is also critical potential in his model of institutions, since an order that knows no praxis forms but only positive legal forms, that is, that knows no actuality of the spirit but instead only forms that have disconnected themselves from the virtue and integrity of the agents, can no longer be described as a guide for action. In this regard, Hegel rejected a political constellation that came close to this as he addressed the constitution of Germany between 1800 and 1802.[62] Hegel seems well aware that the agents' relations towards the laws and powers of the body politic are characterized by trust, and yet already *de facto* the 'independence' of these laws and powers, their 'infinitely more solid authority and power', will surface again and again and, for their part, demand the repeated appropriation or at least pragmatic response from the agents (§§146, 265). Institutions are for Hegel without doubt actualizations of freedom. But what distinguishes his thought from emphatic theories of autonomy and recognition, from exaggerated demands and stylizations of the authentic[63] is that for Hegel the forms of freedom must be grasped and guaranteed specifically in their ambiguity. Thus manifestations of reification and disruptions of human interaction — one need merely think of the economic 'colonization of the lifeworld' — are to be contained with the 'spirit of institutions'; but they are to be contained, moreover, insofar as they render the problems visible, thereby preventing institutions from themselves becoming phenomena of alienation, i.e., pathological.[64]

For the stabilization of such processes of trust-building and authorization, Hegel never drafted a system of election or codetermination, compatible with today's understanding of democratically tempered societies. His fundamentally corporative-oriented participation rights are often seen as a (further) source of difficulty and conservatism. And indeed the areas of tension cannot be denied. They point anew to the dialectic of the will, but above all to the constitutional controllable safe-guarding of the calculations of legitimation and state powers mentioned above. At the heart of the matter is the question concerning the form in which the universal will can and should articulate itself legally and become politically effective.[65] Hegel sees here the difficulties and accompanying implications that arise within the Rousseauian model of the *volonté générale*, of a people's democracy.[66]

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Yet he also saw clearly the repressive technologies of power, employed during the *Ancien Régime*. Hegel resorts to a constitutional model of legitimation to protect the logic of institutions from the direct access of particular interests. A representational model as we know it today does not fit the Hegelian theoretical framework, which aims to ensure that the normative potential of the legal organization of freedom does not depend on weak utopian elements. Hegel's configuration of the systems of election and codetermination may not be defensible; what is worth defending is the normative core of his theory.[67]

To conclude, Hegel's philosophy of right calls for an understanding of practical cooperation and individual responsibility that sees the institutions of a body politic as the backbone of the social.[68] This understanding of the institutional clearly opposes the dualities characteristic of modern discourse between individualism and collectivism, or liberalism and communitarianism, that is, between two mutually exclusive models of legitimization for the justification of right and freedom.[69] In contrast, Hegel's philosophy of institutions ties elements of normative individualism to collective practices. As we have seen, Hegel insists that each of the individual positions of right and autonomy may be justified within the already existing contexts of tested collective practices. One ought not to abominate this as the marginalization of the individual or the demise of the subject. Understood correctly, we are dealing with a *relational context of dependence* that locates the integrative cultures of recognition of morality, the interests of the economy and the guaranteeing function of (positive) right in a dynamic field of powers.

Hegel's philosophy of institutions can make important contributions to current debates about institutions. One may see how neo-institutionalist approaches already take into account inclusive reciprocity and the normative importance of social adaptations of action.[70] But in contrast to some neo-institutionalists, such as Olsen for example, Hegel emphasizes the role of institutions as guarantors of autonomy and freedom and he sees them as a component and expression of the *condition humaine*. In this regard, Hegel is clear that the latent contradictions, pathologies and possibilities for reconciliation of the social can be articulated and discussed only within this praxis of institutions. Above all, he calls on us to reflect on the structure and revision of the forms of freedom and on the recognition of subjectivity in the context of right as the condition for autonomy and the basis for the legitimacy of institutional order.

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Notes

[1] See, for example, Menke (2010a), Pinkard (2008: 1) and Pippin (2010: 54).
[2] This is a claim made by Schnädelbach (1999: 108).
[3] See Popper (1971: 223) and Tugendhat (1979: 293, 349).
[4] For this understanding, see Nozick (1974: 11).
[5] Details can be found in von der Pfordten (2011: 317, 461).
[6] For the most common – wanted or unwanted – misunderstandings, see the account by Haym (1857/1927).
[7] In this direction, consider Pippin (1989) and most recently Weisser-Lohmann (2011).
[8] One must think simply of the idea of the *pax romana* and the *corpus iuris*. For an insight into the understanding of institutions of the Roman Catholic Church as a *corpus mysticum* and its being transferred onto the model of the worldly order, see Kantorowicz (1957: 193) and Dubiel (1976).
[9] For two paradigmatic cases, see Löwith (1988) and Schnädelbach (1983: 89).
[10] Concerning this process of transformation, see Habermas (1968: 48) and Plé (1996).
[11] I have already made an effort to clarify this complex relationship in a recent paper (2013: 62).
[12] See Ockham (1996: 16, 94, 136).
[13] With regard to the dispute concerning universals in general and the position of William of Ockham in particular, see Blumenberg (1985: 167), Flasch (2013: 512) and also Goldstein (1998). With a view to the history of political ideas, see Roth (2011: 573).
[14] With regard to this highly interesting structural history of (pre)modern orders see Gibbon (1994) and Vico (1990). With regard to the modern debate, see Berman (1990), Blumenberg (1966), Fried (2008: 8), Friedell (2012), Legendre (2005), Schmitt (1922).
[15] Most recently on this point, see Descombes (2013).
[16] Dumont (1991: 33) and for a political-economic perspective, see Polanyi (2001: 35).
[17] Concerning this process of differentiation, Hegel's account is admittedly still ground breaking. See Hegel (2001).
[18] Taylor (2007: 146).
[19] Hauriou (1965: 27), Parsons (1971), Weber (1980), Kelsen (1929: 3; 1960).
[20] Hauriou (1965: 27).
[21] Gehlen (1983: 366) and Luhmann (1965). A contribution to current debates may now be found in Seyfert (2011: 29).
[22] Brumlik/Brunkhorst (1993), Honneth (1993).
[23] Intended here is above all the justification of status of the individual in relation to the society or community. Michael Walzer, for example, views communitarianism not at all as an opposing position, but rather chiefly as a necessary recurring correction of liberalism (1990).
[24] Certainly also the classical liberal theory of freedom is concerned with enabling the individual to take part in social practices. John Stuart Mill (1859) speaks in this regard of an

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'atmosphere of freedom', which ought to establish a framework within which the agents could attain the maximum development of their individual characteristics, abilities and receptive capacities (1991). Berlin illuminates the background of the history of this idea (1969: 118) and Rawls (2008: 393), Taylor (1988) and the Zabel (2012: 82) analyse its philosophical significance.

[25] In this context consider also the accounts by O'Neill (1996); Rawls (1971; 2001, 2008); Scanlon (1999); Sen (2010), and for a summary, see Honneth (1993).

[26] Albeit this argument of addition or combination is not identical to the argument of contractualism, of social models based on the contract theory. See, for example, Honneth (2011: 14); Geuss (2005) and Menke (2010b).

[27] The difficulties that Hegel's use of the terms *Realität* and *Wirklichkeit* causes for us is related to the fact that today we barely distinguish (precisely) between both concepts. In contrast, for Hegel these concepts can only be understood from out of his speculative logic. In this regard, *Wirklichkeit* is to be understood as the unity of *Realität* and *Aktualität*. In this unity the reasonableness of the embodiment of freedom reveals itself. This also means for Hegel, however, that there may – indeed there must – be divergent, temporarily contingent, even real forms of action and judgement. This semantic difference is especially difficult to depict in English. Here we are dealing with a philosophical problem that, as we will see, becomes especially acute in other contexts – for example, in the distinction between natural law (*Naturrecht*), customary law (*Gewohnheitsrecht*) and positive law (*positives Recht*).

[28] A contemporary variant of such a conception can be found in the work of Pippin (2008: 121) and.McDowell (1994: 87); see also Brandom (1994: 3); Neuhouser (2000: 17); Quante (2011: 257) and Thompson (2008: 149).

[29] The *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (1820/1821) will be cited in the following only with paragraphs, for which E. Moldenhauer and K. M. Michel's edition (1970/1986) will be used. It will be quoted in accordance with Dyde's translation (2001). Quotations from other texts will be explicitly identified.

[30] See, for example, Pippin (1989: 91); Quante (2011: 257) and Thompson (2008: 149).

[31] It is not possible to pursue in depth the meaning of ἔθος and ἦθος and their transformation. Instructive are the papers by Kluxen (1966), Reiner (1972) and Ritter (1977: 110). Concerning Hegel's reception of the Aristotelian conception of praxis and nature, see also Pippin (2008: 58).

[32] Here the close connection between the ontological and normative arguments is, at least subtly, apparent, and again one can see the Aristotelian heritage: for the life form that is addressed with *ethos* – as ἔθος and ἦθος – encompasses a broad-ranging '*polis* culture', in which certain *nomoi*, binding praxis orientations, are already inscribed. 'Nomizein tous theous' means in this respect the worship of the gods, which is *nomos* (recognized) in the polis. *Nomos* thus means the right and can ultimately turn into the concept of the posited, the positive right. With regard to the history of this idea, see Fögen's work (2006).

[33] See also, for example, Honneth (2001; 2014), Quante (2011: 159), Pippin (2008: 58), Schnädelbach (2000), Siep (1992: 182, 217), Vieweg (2012: 93) and Zabel (2010: 51).

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[34] With regard to the logical-methodological presuppositions of Hegel's practical philosophy, see Fulda (2006: 25); Henrich (1982: 428), Quante (2011: 264), Siep (2003b: 63), Stekeler-Weithofer (2008: 385) and Vieweg (2012: 57). With a view to the main philosophical interest of this work, the terms practical philosophy, social philosophy and legal philosophy will be used as synonyms.

[35] Siep (2003b: 63); with regard to the re-appropriation of Kantian and especially Hegelian positions within analytical philosophy, see, for example, Quine (1951), Sellars (1956: 253), Davidson (1984: 183), Brandom (2002: 210) and McDowell (1994: 87).

[36] It is not possible to go into adequate detail with regard to the exceedingly complex technique of explication, which is developed especially in the *Wissenschaft der Logik* and the *Enzyklopädie*, starting with the logic of being, through the logic of essence to the logic of the concept, and beyond that the path from the logic of the concept through to the logic of judgement and the syllogism, from the determinations of objectivity and life right up to the idea. But see, for example, the analyses by Brandom (2004), Düsing (1984), Halbig (2002), Halbig (2001), Jaeschke (2004), Stekeler-Weithofer (2008: 385) and Vieweg (2012: 57).

[37] Further clarification is found in the *Note* to § 7: 'Here it can be noticed only in passing that, in the sentences, "The will is universal," "The will directs itself," the will is already regarded as presupposed subject or substratum; but it is not something finished and universal before it determines itself, nor yet before this determination is superseded and idealized. It is will only when its activity is self-occasioned, and it has returned into itself.'

[38] On this point, consider also the critical re-actualization by Menke (2012: 48) and the more general analysis by Zabel (2010: 51; 2013: 62).

[39] As is well known, in the *Phenomenology of Spirit* (1807) Hegel speaks of 'forms of consciousness' [*Gestalten des Bewusstseins*] (1970: 80).

[40] I would like to thank especially Pirmin Stekeler-Weithofer for helpful discussions on this difficult topic.

[41] Rödl (2002: 177) offers a convincing analysis. With regard to the 'paradox of autonomy', which we are not able to explore in the present analysis, see Menke (2010a).

[42] In a similar light, Popitz sees institutions, which arise (primarily) from social practices and norms, as 'cages of human coexistence' (*Soziale Normen* 2006: 90). The formulation recalls the 'iron cages' [*die stahlharten Gehäuse*] of Max Weber (1973a; 1973b) – although there the emphasis was on practices of forming and disciplining.

[43] There it reads more precisely: 'The activity of the will, directed to the task of transcending the contradiction between subjectivity and objectivity, of transferring its end from subjectivity into objectivity, and yet while in objectivity of remaining with itself, is beyond the formal method of consciousness (§8), in which objectivity is only direct actuality. This activity is the essential development of the substantive content of the idea (§21).'

[44] We will address the problem of a possible alienation and reification at another place in this paper.

[45] See also, for example, Pinkard (2004) and Stekeler-Weithofer (2011).

[46] See, for example, Dubiel (1976).

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[47] With regard to the demand for order, see Anter (2007) and also the author (2012: 75).

[48] Concerning the problematic relation between morality and right, especially the distinction between so-called moral rights and juridical rights, see Kervégan (2010). This does not mean that the *lawfully* enforced rights and obligations must always meet the respective ethical standards.

[49] Today we would speak of fundamental rights.

[50] We will come back to this. See Menke (2008a: 87; 2008b).

[51] See Hegel (1820/1829: §§209 ff., 230 ff. and 273 ff.) for discussion of his model of the division of powers and of the organization of the state.

[52] In §220 one reads: 'The place of the injured person is now taken by the injured universal, which is actualized in a special way in the court of justice. To pursue and punish crime is its function, which therefore ceases to be a mere subjective retaliation or revenge, and is in punishment transformed into a true reconciliation of right with itself' (2001: 178).

[53] Concerning Hegel's theory of crime and punishment (1820/21: §§90–100), see, for example, Brokes (2004: 113); Dubber (1994: 1577); Jakobs (2008); Hinchman (1982: 524); Mohr (2005: 95); Pawlik (2012); Schild (1996: 179); Seelmann (1995: 11); Steinberg (1983: 858); Stübinger (2008); Vieweg (2012: 136); Wood (1990: 108) and the author (2010: 51).

[54] It is especially noteworthy that Hegel, in contrast to today's legislative and constitutional models, situates the administration of justice in the context of the civic community. Hegel also applies his speculative logic of the will to the objective forms of the right and legal practices: then the civil society, in which the idea of the intrinsic universal is initially lost, returns with the administration of justice to 'the unity of the intrinsic universal with subjective particularity' – but 'only as one single case' (2001: §229, 183). However, §543 of the Enzyklopädie from 1830 reveals that Hegel here ascribes the *Gerechtigkeitspflege* to the 'ethical forces'. The question is whether with this anything changes concerning the status of the administration of justice in the civic community.

[55] Concerning Honneth's conception, see also the contributions by Siep (2009: 179), Saar (2009: 567) and Wingert (2009: 384-408).

[56] In the *Addition* to §268 one reads: 'Uneducated men delight in surface-reasonings and faultfindings.

Fault-finding is an easy matter but hard is it to know the good and its inner necessity.' And further Hegel states: 'Education always begins with fault-finding, but when full and complete sees in everything the positive.'

[57] Also following Hegel, this difficulty was a theme again and again. See as early as Benjamin (1997: 179), and also Derrida (1994) and Feinberg (1980), and Luhmann (1981: 45) for a system-theoretical approach.

[58] In contrast to Henrich and Honneth, Gehlen has developed a theory of institutions that deviated substantially from the premises of the Hegelian model, yet which seems to reflect in its modelling what is by now a common signature of praxis, freedom and right (See, for example, Gehlen (1983: 366; 1962: 48; 2004: §6 et seqq.). From Gehlen's point of view, the human subject is by nature *too* prone to drives and *too* dependent on stimulus to be capable of

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free self-organization under its own power. Institutions have in this respect not only a function of stabilizing and orientating, but also above all a function of disciplining and exonerating. 'The biological, the economical […] must objectify, substantiate itself, universalize itself from out of the exclusiveness of this individual, in other words: to alienate itself in the institution (of marriage).' Here Gehlen ties anthropological and normative aspects to a *model of authority* of institution that almost seems equally martial as it is fatalistic. 'Institutions are the great preserving and consuming orders and destinies that far outlast us and in which humans, with their eyes open, immerse themselves […]. And institutions such as marriage, property, church and state indeed alienate humans from their own immediate subjectivity, while bestowing them a higher one, but they also protect humans from themselves, leaving space, without demanding it, for an assignment of the soul that is higher and without comparison' (1983: 378). By now at least it is clear that Gehlen cannot (and wants not to) establish any internal link between a concept of reflexive and social freedom and a concept of ethical right. The individual already, in his or her egoism and instinctuality, breaks up on the institutions, which only then, while alienating the individual, ensure the necessary forms of freedom. But where the Gehlenian institutions obtain the ground for their 'guarantee of freedom' remains completely unclear. With regard to his theoretical conception of right and freedom, Gehlen falls back behind Kant's and Rousseau's insights and ultimately reactivates the leviathan-like model of subjugation of Thomas Hobbes.

[59] Concerning Gehlen's theory of a 'disciplining alienation to freedom' through institutions, see the preceding considerations; compare also the system-theoretical turn in Luhmann (1970: 27)

[60] See, for example, Searle (2005: 1).

[61] The significant idea here is the 'resilience of the ethical' which is thoroughly analysed by Quante (2010: 197).

[62] In this text, Hegel famously writes that no land 'as a whole, as a state' has a 'more miserable constitution' than does the German Reich, which is why – thus the famous consequence – Germany is no longer a state (Die Vertassung Deutschlands 1800-1802: 452, 461). We will clarify this statement in what follows.

[63] Concerning the current debate, see, for example, Anderson (2009: 433) and Quante (2011: 277).

[64] See Honneth (2005: 62).

[65] Consider simply Lucas and Pöggeler eds. (1986).

[66] See Kervégan (2008: 223).

[67] We cannot discuss here in adequate detail the alleged and actual problems of justification in Hegel's 'constitutional law'. For a detailed analysis of Hegel's model of (the division of) powers, see Vieweg (2012: 401).

[68] See Jaeggi (2009: 528).

[69] Compare with the explications in the first three chapters of the text.

[70] See Hall and Taylor (1996), Lepsius (1990: 53), Powell and Paul DiMaggio (1991: 340), Searle (2005: 1) Seyfert (2011: 29), Siep (2003a), and March and Olsen (1995: 9). 'Institutions,'

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according to Olsen, 'give meaning to behavioral regularities. They provide purpose und legitimacy to rules and practices. They equip individuals with an identity and constitutive belonging, cultural affiliations and boundaries, and interpretations and accounts which help individuals make sense of life. Institutions are carriers of the basic codes of meaning, value commitments, symbols, and causal beliefs of a political community.'

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