

Normative Rationality: Hegelian Drive

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Abstract: This article examines the resources which Hegel's thought could offer to the current theory of the normative rationality, in particular by means of the concept of ethicicity (*Sittlichkeit*). The examination concerns at first Hegel's theory of the "abstract law", which develops an original vision of the relationship of law and right(s). Relationships between legal and moral normativity are then studied, about which Hegel's arguments converge to a certain extent with those of legal positivism. Finally, the article analyzes Hegel's institutional theory of the ethical "dispositions", which tries to overtake the opposition between subjectivist and objectivist visions of the society.

Keywords: law, philosophy, normativity, right, Hegel, Kant

The hypothesis I wish to explore here is that Hegel's philosophy, and in particular his doctrine of objective spirit, provides an appropriate basis for current philosophy of normativity; that is to say, for philosophy of law, moral philosophy, social and political philosophy, as well as for the philosophy of action. The main argument is that with the broad concept of ethicicity (*Sittlichkeit*) Hegel came up with a way of reducing the various modes of practical rationality to a fundamental and unitary structure, without erasing the specific bonds they establish between norms and actions. If a separation of law and morality is a characteristic feature of the contemporary understanding of normativity – this is the position commonly attributed to legal positivism – then the way in which Hegel conceives practical rationality, as a complex assemblage of subjective normative expectations and objective networks of institutionalized norms, might well open up a productive perspective for overcoming such a separation. Yet the Hegelian perspective does not entail denying the differentiation of normative systems, a key characteristic of modernity. The Hegelian theory of objective spirit recognizes the specificity of moral and legal normativity whilst grasping them as "abstract" and non-autonomous components of a fundamental "ethical" structure.

Of ("abstract") law and rights

At first sight it may seem odd to look for Hegel's contemporary relevance in the domain of law, since he does not seem to prize law and its "abstraction". Nevertheless there are two reasons for this choice. First of all, Hegel's attitude towards what he called abstract law (that is, civil law) is far more nuanced than is often believed: despite the fact

that the word “abstract” generally has negative connotations in his work, the “abstraction” of legal determinations plays a positive role in the construction of the doctrine of objective spirit. Law’s “formalism” is powerful because it guarantees a real universality for legal norms and principles.¹This can be verified with the example of juridical personhood, which constitutes in Hegel’s eyes the first fundamental objectification of freedom, freedom being the foundational determination of spirit in so far as it is opposed to nature.²

Subsequently, and this is my second reason, abstract/civil law plays an important role in the structuring of *Sittlichkeit* because in a certain manner it makes up the infrastructure of what Hegel, giving an old term a new meaning, calls civil or *bourgeois* society (*bürgerliche Gesellschaft*). Despite being “the system of ethicity, lost in its extremes”³ due to the tensions that run through it, civil society can be described in ethical terms. Such a “ethicization” is possible thanks to the “unconscious necessity” of the market, to the political regulation of social tensions (which Hegel, in obsolete terminology, terms the “police”), and last but not least to the legal framing of social action. Note that such ethicization of civil society would require a hard battle against the incivility and conflict concealed within it, since it contains “the remnants of the state of nature”.⁴ Hegel notes that within what he calls the system of needs, that is, the system of production and exchange regulated by the market, “law becomes externally necessary as a protection for particular interests”, as a safety net given the abuses of economic competition. In this manner, “even if its source is the concept, law comes into existence only because it is useful in relation to needs.”⁵This apparently “materialist” approach to law leads to the following conclusion with regard to the relationship between law and the market:

Only after human beings have invented numerous needs for themselves, and the acquisition of these needs has become entwined with their satisfaction, is it possible for laws to be made.⁶

1 See on this point. Kervégan 2008, p. 59-66.

2 *PM*, § 502, p.248. Hegel, *Enzyklopädie der philosophischen Wissenschaften*, 1986, p. 311: “The real fact is that the whole law and its every article are based on free personality alone — on self-determination or autonomy, which is the very contrary of determination by nature.”

3 *EPR*, § 184, p.221 (*RPh*, p. 184).

4 *EPR*, §200, p.234 (*RPh*, p. 354).

5 *EPR*, §209 Addition, p.240, modified (*RPh*, p. 361).

6 *Ibid.*, (*ibid.*).

Civil/abstract law’s capacity to be something “universally recognized, known and willed”⁷ is thus certainly insufficient but it is a necessary condition of modern ethicity. It constitutes the objective basis of human rights, understood as the rights of the social individual (which Hegel names, in line with Rousseau and Kant, the ‘bourgeois’). The Hegelian theory of legally “constituted”⁸ civil society can be described as a critical or dialectical theory of what will be later termed the *state of law* (*Rechtsstaat*) The following hypothesis can thus be advanced: for Hegel, “the state of law” is not yet a State in the full (political) sense of the term, but rather a legal constituted civil society. For Hegel, as for Marx later, human rights are the rights of the *bourgeois* rather than those of the *citizen*, as indicated in the Remark after §190 of the *Elements*.⁹What is lacking from civil society – a merely “external” State¹⁰ – in order to be a genuine State is the strictly political dimension of “*union* as such”,¹¹ of living together, which thanks to a combination of subjective and objective elements makes the (political) State “the actuality of the ethical idea”.¹² As such the Hegelian conception of the political clearly has no relation to the contemporary notion of a bureaucratic apparatus that overlooks (or overburdens) society. Nor does it have anything to do with community understood in legal terms alone: the Hegelian state would not exist if it were not sustained by its citizens’ subjective *ethos*, by what Hegel calls their “political disposition”.¹³ On the one hand we need to recognize the role played by the law in the constitution of ethicity; and on the other hand we need to recognize the impossibility of a solely legal definition of the political bond.

It is the case that Hegel’s contribution to the understanding of “abstract” law and its social realization has not received much attention. In contrast to Kant, who no doubt correctly is placed alongside Locke as the precursor of the theme of the state of law, and whose efforts at distinguishing legal normativity from moral normativity (in Kant’s

7 *EPR*, §209, p.240 (*RPh*, p. 360).

8 See *EPR*, § 157, P. 198 (*RPh*, p. 306), where it is a question of the “legal constitution” (*Rechtsverfassung*) of civil society.

9 See *EPR*, § 190, p. 228, modified (*RPh*, p. 348): “In law the object is the *person*; at the level of morality, it is the *subject*, in the family, the *family-member*, and in civil society in general, the *citizen* (in the sense of *bourgeois*).”

10 *PM* §523, p. 257 (*Enzyklopädie*, § 523, p. 321).

11 *EPR*, § 258, p.276 (*RPh*, p. 399).

12 *EPR*, § 257, p.275 (*RPh*, p. 398).

13 See *EPR*, § 268, p.288 (*RPh*, p. 413-14).

terminology, law and ethics) still arouse much interest today,¹⁴ Hegel has always been suspected of being a defender of power-State (*Machtstaat*), and as an adversary of the rule of law. Whether this suspicion is justified or not makes no difference. Apart from a few exceptions, amongst whom Jeremy Waldron should be mentioned, Hegel is rarely cited never mind discussed in current research in the philosophy of law.¹⁵ If we take the most influential works in this field in the twentieth century, Kelsen's *Pure Theory of Law*, and Herbert Hart's *Concept of Law*, Hegel is named only once in the first and not at all in the second. In the *Oxford Handbook of Jurisprudence and Philosophy of Law*, Hegel is named six times, much less than Ronald Dworkin or Herbert Hart, and far less than other classic authors such as Aristotle, Bentham, Hobbes, Hume, Kant and Plato. We can go some way to explaining this phenomenon: for the most part contemporary philosophy of law is of English-speaking provenance, and the philosophical tradition to which it belongs is generally that of empiricism and utilitarianism rather than German idealism. In such a tradition Hegel is viewed with suspicion if not completely ignored. However I am convinced that the philosophy of law could benefit considerably from the Hegelian approach. Evidently it is not a question of repeating word for word Hegel's concepts and solutions: for one, certain presuppositions of Hegel's logic and metaphysics have become incomprehensible in the era of "post-metaphysical thought".¹⁶ Nor is it my intention to defend the richness of 'post-metaphysical' readings of Hegel: I have tried to do that elsewhere.¹⁷ But I do consider that the philosophy of law, and more generally normative philosophy, would make significant gains if Hegelian analyses were properly taken into account. This is the case, for example, when it comes to the question of rights.

If I had had to translate *Grundlinien der Philosophie des Rechts* into English rather than French, I would have probably translated *Philosophie des Rechts* by "philosophy of law", and not by "philosophy of right", as in the existing English translations (that of Knox, revised by Houlgate, and that of Nisbet-Wood). Hegel repeatedly attempts to dismiss a 'subjective' understanding of law that could give rise to a moral if not moralizing interpretation of the law; much like Kant and Fichte Hegel wishes to forearm himself against such an interpretation. In paragraph §29 of *Elements*, law is defined as follows:

14 See Höffe 1999; Kersting 2004; Korsgaard 1996; O'Neill 1989 & 2013; Timmons (Ed.) 2004.

15 See Waldron 1988. In his discussion of the concept of private property, Waldron takes Hegelian arguments for and against into consideration, and at length.

16 See Habermas 1994 & 2012.

17 See Kervégan 2008, p. 7-15; Kervégan 2012, p. 283-309.

Right [law?] is any existence [*Dasein*] in general which is the existence of the *free will*. Right [law?] is therefore in general freedom, as Idea.¹⁸

At first sight this definition seems to run along the lines of a 'subjective' interpretation since it makes a reference to 'free will'. However, the rest of this paragraph disqualifies such an interpretation by indicating that the will that constitutes the "substantial basis" of law is not the "will of the single person" but "rational will which has being in itself and for itself".¹⁹ Thus the concept of will which is the basis for the objective system of law is not that of subjective will, but that of a "free substantial will", or that of an "objective will".²⁰ This concept of law as objective will leads to the thesis of the inseparability of subjective rights and objective law: the actualization of each person's legal capacity, that is their legal freedom, takes place according to universally obligatory legal norms.

The result of this examination of the two significations of the word 'law', the subjective (right) and the objective (law), is that the relation between rights and the duties instituted by the legal norms should not be understood as one of *reciprocity* but rather as *identity*: "duty and right coincide".²¹ However, this identity of right and obligation cannot be directly established in the domain of abstract/civil law, but only on the basis of a supra-legal standpoint, that of ethicity (*Sittlichkeit*). It then becomes evident that human beings "[have] rights in so far as [they] have duties, and duties in so far as [they have] rights".²² In civil law there is a primacy of duties, thus of objective norms, over rights. At first sight, this thesis seems paradoxical with regard to the common theory that assigns an original and foundational character to rights. But Hegel considers that the very structure of abstract/civil law implies a logical priority of *duty*, and not of *right*. This can be explained in the following way: from the point of view of a *description* of the manner in which legal relationships appear to those at concern, "the law" signifies first of all a series of duties and restrictions to which the rights of persons are subordinate; hence the representation according to which rights and duties would be placed somehow opposite each other:

In the phenomenal range right and duty are *correlata*, at least in the

18 *EPR*, § 29, p.58 (*RPh*, p. 80).

19 *EPR*, § 29, p.58 (*RPh*, p. 80-81).

20 *PM*, § 486, p.242 (*Enzyklopädie*, p. 304).

21 *EPR*, §155, p.197 (*RPh*, p. 304).

22 *Ibid.*, (*ibid.*).

sense that to a right on my part corresponds a duty in someone else.²³

In other words, the civil law relationship, in its basic configuration, corresponds to what has been described since Hohfeld by the term claim-right.²⁴ However, for Hegel, this is *only* valid from the perspective of a phenomenology of legal consciousness. Besides, we should note that the eviction (or at least relativization) of the model of reciprocity is confirmed in contemporary systems theory. Niklas Luhmann, for example, explains that the modern promotion of rights corresponds to a replacement of the traditional symmetrical model of reciprocity, which came from Roman law, with an asymmetrical model of complementarity.²⁵ However we should also note that Hegel does not speak of complementarity as Luhmann does, but of *identity*; and this is because he does not deal with the problem of rights and duties from the standpoint of legal (“abstract”) rationality alone, but from the standpoint of the “supra-legal” rationality of ethicity.

If adopt the latter standpoint, we have to account – following Hegel’s suggestion – for the fact that *one and the same* legal situation must be simultaneously described in terms of duties and rights: it is no longer a case of reciprocity or complementarity, but of a genuine *identity* of right and duty. The same thing that appears to me as a duty is, objectively speaking, my ‘right’, at least if one understands by this word not only that for which I am qualified, or that which I can claim from another, but in a general manner that which is owing to me, “my due”, including responsibilities, even a punishment. For example, when I am the owner of something, not only do I have a right of *usus* and *abusus* over it, but I also have a duty to confirm that formal legal property by my effective usage of the thing. Furthermore, this expanded conception of a right as a legal situation which is owed to a person – a conception in agreement with the Roman concept of *jus* – that even the sentence imposed on a criminal is “*his* right”.²⁶ The punishment is what is due to the criminal; that is, it is the latter’s “right” in so far as it confirms the autonomy of the subject of law, its responsibility with regard to its acts, and even reestablishes its dignity by “reconciling” it with its own free personality as well as with the objective legal order. It is well known that Hegel draws a controversial conclusion from this argument – a justification of capital punishment. Besides this, what we should retain from this original approach to right

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²³ *PM*, § 486, p.242 (*Enzyklopädie*, p. 304).

²⁴ See Hohfeld 1964, p. 36-38.

²⁵ See Luhmann 1981, p. 364-365. Also see Luhmann 1991, p. 483, and Luhmann 2004. And especially Luhmann 1993.

²⁶ *EPR*, § 100, p.126 (*RPh*, p. 190).

is that the latter is not only a freedom from *x* or a freedom to *y*, but an assemblage of positive and negative determinations, of rights and duties.

However under close examination the correspondence between right and duty turns out not to have the same meaning in the different spheres of objective spirit. In the first two spheres, especially that of abstract/civil law, there reigns “an appearance of diversity” of rights and duties.²⁷ Hegel thus shares the common opinion that given my right to own something there is a corresponding duty on the part of others to respect its inviolability. But for Hegel this correspondence holds solely at a descriptive level and within the limits of civil law and its kind of normativity. Indeed, “according to the concept”, “my right” contains a duty *for myself*: in legal exchanges with others I must fulfill the conditions which are those of personality in general – at base, this is a very Lockean thesis. Then, within the sphere of morality, there can be a discord between the right claimed by subjectivity (its “purpose” or “intention” in Hegel’s terms) and the Good as objective norm to which action in general must be submitted. On the other hand, within the ethical sphere “these two parts have reached their truth, their absolute unity”, despite a continuing “appearance of diversity” between the two.²⁸ This is why ethical subjects (the “citizens”, *Bürger*, who are also “bourgeois”) have indissociable rights and duties: by fulfilling the duties that correspond to their legal and social position, they endow their claims with objective validity, thus turning them into *rights*.

However, Hegel’s main thesis, the “absolute identity of duty and of right”,²⁹ does not entail that the rights and duties inherent in a particular legal situation are identical in their content, although their functional correlation does proceed from one and the same legal relationship. Let’s take an example: within the family children have duties (to obey their parents) and rights (to receive an education); these duties and rights do not have the same content but they correspond. The same occurs with the citizen: the duty of paying taxes corresponds to the right to receive certain services. In fact, it is especially in “the realms of civil law and morality” that egalitarian formalism reigns.³⁰ Formally any legal person, any moral subject, has rights and duties which correspond to duties and rights on the part of other persons. But ethical kind of relationships bring about their institutional differentiation. The rights and duties of

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²⁷ *PM*, §486, p.243(*Enzyklopädie*, p. 304).

²⁸ *Ibid.*, p.242-3 (*Enzyklopädie*, p. 304).

²⁹ *EPR*, § 261, p.284 (*RPh*, p. 408).

³⁰ *Ibid.*, (*ibid.*).

the member of the family, of the “bourgeois” and of the citizen are not identical; but in each of these cases their institutional position defines the pertinent right and duties. Moreover it is important, and Hegel emphasizes this point, that every legal situation, including that of the citizen, not only implies duties but also rights:

In the process of fulfilling his duty, the individual must somehow attain his own interest and satisfaction or settle his own account, and from his situation within the state, a right must accrue to him whereby the universal cause becomes *his own particular* cause. Particular interests should certainly not be set aside, let alone suppressed; on the contrary, they should be harmonized with the universal, so that they both themselves and the universal are preserved.³¹

It would thus be quite correct to see in Hegel a precursor of the doctrine of “subjective public rights” as developed at the end of the 19th century by the jurist Georg Jellinek.

To summarize: the phenomenological *reciprocity* of rights and duties (to A’s duty corresponds B’s right) masks a conceptual *correlation* (A’s subjective rights are bound to A’s duties), which can itself be interpreted as a fundamental *identity*. This identity of right and duty is only fully manifest when the formalism of legal and moral relations is surmounted by the normatively guided relations of social subjects and socio-political institutions. However, this correlation itself presupposes the liberty of the modern legal person, without which there can be neither duties nor rights: “there is a single principle for both duty and right, namely the personal freedom of human beings”.³² Hence the modern conviction, which Hegel adopts: “he who has no rights has no duties and vice versa”.³³ But Hegel provides a non-trivial basis for this conviction: only an ethical and institutional approach can conceive the correlation of rights and duties as a consequence of one and the same relation. A natural law approach to the law, including “subjective rights”, is not capable of such a conception. In my view this approach could make a productive contribution to the contemporary theory of rights, which generally depends on a model of simple reciprocity.

Legal and moral normativity: from Kant to Hegel and beyond

The question of the relation between legal and ethical norms is under debate today just as it was in the time of Hegel. And here again it seems to me that the Hegelian position is worthy of attention.

31 *EPR*, § 261, p.284-5 (*RPh*, p. 409).

32 *Ibid.*, p.284.

33 *PM*, §486, p.243 (*Enzyklopädie*, p. 304).

In contemporary philosophy responses to this question come in two opposite orientations. On the one hand, it is claimed that legal norms require a (direct or indirect) moral justification, since the ultimate principles to which these norms are subordinated are moral. I shall term this the “subordination thesis”, a thesis whose representatives include Lon Fuller, Joel Feinberg, Ronald Dworkin and Jürgen Habermas (at least in the 1986 Tanner lectures).³⁴ On the other hand, we have philosophers who defend the “separation thesis”, which is often based on a variant of legal positivism. The latter argue that legal normativity should be conceived independently of moral norms presumed to be universal; such a presumption is quite risky in an era characterized by a “polytheism of values” (Max Weber). Law must be held apart from moral controversies and possess its own principles. However there are two variations of this separation thesis. The ‘hard positivism’ professed by Kelsen or Joseph Raz (contemporary scholarship also speaks of ‘exclusive positivism’, ‘incorporationism’, etc.) pleads for a strict separation of the legal and moral spheres, whereas Hart’s or Jules Coleman’s ‘soft positivism’ (also called ‘inclusive’ or ‘normative positivism’) allows for the existence of a certain overlap between the two spheres.³⁵ In Hart this leads to the theory that a certain number of “moral truisms” are inevitably presumed by any positive legal system; and within the framework of a soft and non-dogmatic positivism this leads him to allow the existence of a “minimal content of natural law”.³⁶

Such questions were equally present in classical German philosophy. In the post-revolutionary period, and in part in reaction to the overt moralism of the French Jacobins’ politics, Kant and Fichte for example insisted on the necessity of maintaining a strict distinction between ethical and legal normativity: “the philosophical doctrine of law”, writes Fichte in 1796, is not “a chapter of morality”, but “a distinct and autonomous science”.³⁷ For his part, in the first Appendix to “Perpetual Peace” Kant asserts that “true politics can therefore not take a step without having already paid homage to morals”, but in the second Appendix he qualifies this statement adding that it is a matter of morals “as doctrine of law”, that is, morals considered as a common genre of

34 See Fuller 1964; Feinberg 1978; Habermas 1992 and 1998.

35 All of these labels are used in various contributions to the volume edited by Coleman 2001. See in particular Raz, Coleman, Leiter, Perry and Waldron’s articles. See also A. Marmor (“Exclusive legal positivism”) and K. E. Himma’s articles (“Inclusive legal positivism”) in J. Coleman & S. Shapiro (eds) 2002, p. 104f. et 125f.

36 Hart 1994, p.193.

37 Fichte 1991, p.10.

which law and ethics are the two species.³⁸ One should note that in Kant as in Fichte's work the strict distinction of moral and legal normativity is founded on a "strong" and unitary theory of practical reason. Apart from rare exceptions (such as J. Raz, who is however a representative of 'hard positivism'), such a strong justification is missing in the work of most of the contemporary representatives of legal positivism. This is precisely what makes the position of 'exclusive legal positivism' weaker than that of Fichte or Kant since the statement "legal validity is exhausted by reference to the conventional sources of law"³⁹ is only valid if one has also advanced at least the hypothesis that law as a social convention possesses a minimum of rationality. Of course, Kant explained that even a population of devils would need laws; though of course this supposes that they are rational devils.... Yet such a hypothesis would no doubt presuppose an entire theory of institutional rationality and perhaps (here I come back to Hegel) a theory of objective spirit.

In Hegel, the problem of the relation between legal and moral normativity is framed in a different manner than in Kant and Fichte. He too considers that a strict distinction should be established between morality and law. But the justification he gives for this position is quite original. In Kant the difference between law and ethics (in Hegel's terms: morals) lies in legal norms defining external duties whilst ethical/moral norms define "ends that are also duties".⁴⁰ Consequently the distinction between law and ethics does not concern the content of norms but rather the "kind of obligation".⁴¹ But then a problem arises: how can one simultaneously affirm the unity of practical reason and the strict distinction between legal and ethical normativity without making law and ethics into domains that are materially differentiated (i.e. at the level of the content of the norms they each contain). Kant is quite aware that a material differentiation of law and ethics is unsatisfactory; moreover there are many cases in which the two types of norms overlap. He also abandons the ancient but weak distinction between *forum externum* et *forum internum*. He then meets with difficulties that are summed up in the following phrase:

Ethical lawgiving...is that which *cannot* be external; legal legislation is that which can *also* be external.⁴²

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38 Kant 1991, p.125, p.127 (*Zum ewigen Frieden*, p. 347, 350).

39 Marmor 2002, p.104.

40 Kant 1991, p. 514 (*Metaphysik der Sitten*, p. 511).

41 Ibid, p. 385 (*Metaphysik der Sitten*, p. 326)

42 Ibid, p. 384 (*Metaphysik der Sitten*, p. 326).

In a similar way the idea that law prescribes rules for actions whilst ethics prescribes the maxims (the subjective projects) of actions is unsatisfactory, just as the distinction between the more or less "wide" or "narrow" nature of the two kinds of obligation.⁴³ In the end Kant's recourse to *lex permissiva* to pinpoint the specificity of legal with regard to ethical lawgiving is not very clear.⁴⁴ It even awakens lawgiving suspicion that the entire Kantian reconstruction of the law (at least of civil law) has as its sole and unique goal the justification of the existing *de facto* distribution of what is mine and thine, as clearly suggested by the well-known formula of his *Doctrine of Law*: "Happy is he who is in possession (*Beati possidentes!*)"⁴⁵

In my opinion these difficulties are due to the fact that Kant should have revised the theory of rational normativity presented in the *Groundwork of the Metaphysics of Morals* and the *Critique of Practical Reason* in order to justify the recognition of the equal dignity of law and ethics that occurs in the later texts, especially in *The Metaphysics of Morals*.⁴⁶ The conception of practical reason laid out in the first two works is of course harmonious with the presentation of *ethical* normativity (or in Hegel's terms, of morality) but not with that of *legal* normativity, such as the latter is presented in the *Doctrine of Law*. Kant should have explicitly reworked this conception so as to justify the elevation of "simple legality" to the same level as morality in the *Metaphysics of Morals*. Moreover it can be shown that in this last work the distinction between legality and morality acquires a different signification to the one it has in the *Critique of Practical Reason*: from that point onwards legality is no longer said to be an inferior, extra-moral, kind of normativity. In other words, the recognition that there is also a legal categorical imperative should have entailed an explicit revision of the theory of moral normativity presented in the *Critique of Practical Reason*. Such a revision would have led to an expanded theory of normativity which would have founded in a unified manner morality (ethics) and the doctrine of law without neglecting the specificities of either.

Hegel constructs precisely such an expanded theory when he conceives of the articulation of law and morality on the basis of a broad theory of *ethical* rationality. (Here I open a terminological parenthesis: from this point onwards, 'ethics' and 'ethical' must be understood in

.....
43 Ibid, p. 521 (*Metaphysik der Sitten*, p. 520)

44 Ibid., p. 406 (*Metaphysik der Sitten*, p. 354)

45 Ibid., p. 410 (*Metaphysik der Sitten*, p. 367).

46 This argument is developed in Chapters 2 and 3 of Kervégan 2015.

a strictly Hegelian and non-Kantian sense. In Kant's work, the word 'ethicity' (*Sittlichkeit*) has roughly the same meaning as the term *Moralität* in Hegel. In the latter's work, the terms morality and ethicity are strictly distinguished and placed in a hierarchy. Ethicity in Hegel's sense does not have any equivalent, in his eyes, in Kant's philosophy. Hegel declares that the practical principles of Kantian philosophy "render the point of view of *ethics* impossible and in fact expressly [infringe] and [destroy] it".⁴⁷ However one could argue that the Hegelian theory of *Sittlichkeit* plays a role analogous to that of the Kantian metaphysics of morals as a "system of principles" of practical reason,⁴⁸ given that it covers the entire range of normativity, including the domains of those legal and moral norms which are "actualized" within it. End of parenthesis.)

What is the basis in Hegel for both the kinship *and* the difference of legal and moral normativity? The difference is based on the fact that moral norms (the "Good") defining and limiting the *subject's* sphere of liberty,⁴⁹ whilst legal norms *stricto sensu* (abstract/civil law) organize the *person's* sphere of liberty and his/her actions,⁵⁰ without restricting that liberty – in contrast to Kant.⁵¹ This is not a purely verbal distinction. The law is the normative framework for trade between persons, and their liberty is incarnated and sometimes reified in external goods and things, as shown in the example of property. Legal normativity has thus nothing to do with "subjectivity" and its maxims and attitudes; it only concerns the materiality of acts that can be legally determined. For their part, moral norms (which are summed up in the idea of the Good) define the subject's legitimate field of action; and for this reason the subject is "*the series of its actions*".⁵² In contrast to the law here it is clearly impossible to dismiss the pertinence of subjectivity: on the contrary, in the moral sphere subjectivity is "ground... [of] freedom", and as such the "moral point of view" expresses "the right of the subjective will" to "self-determination" (to autonomy).⁵³

Despite this difference (between the legal person and the moral subject), there is a certain parallel to be found in the *development* of law and morality within Hegel's reconstruction. In Hegel's description

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47 *EPR*, § 33, p.63 (*RPh*, p. 88).

48 Kant 1999, p. 370 (*Metaphysik der Sitten*, p. 319).

49 *EPD*, § 105, p.135 (*RPh*, p. 203).

50 *EPD*, § 35, p.67-8 (*RPh*, p. 93).

51 See *EPD*, § 29, p. 58 (*RPh*, p. 80-1).

52 *EPD*, § 124, p. 151 (*RPh*, p. 233).

53 *EPD*, § 106-107, p. 135-6 (*RPh*, p. 204-205).

the development of civil law leads to the introduction of subjectivity within the legal sphere, a sphere which is initially understood in a purely objective manner. This occurs through the figure of the subjectivity of the criminal, who in one manner or another must be reconciled with itself through the punishment that s/he incurs. Hegel writes, "the *action* of the criminal involves...the *individual's volition*. In so far as the punishment which this entails is seen as embodying *the criminal's own right*, the criminal is *honoured* as a rational being."⁵⁴ Let's leave aside what, from a contemporary standpoint, is morally shocking about this justification of punishment, and focus on the structural signification. Punishment leads the criminal to reappropriate his or her subjectivity, whilst his or her act, as a material refusal of the law, annihilates that subjectivity or condemns it to alienation. The logic of abstract law thus leads to the emergence of *subjectivity* within objective spirit. Reciprocally, morality is the terrain of a process of *objectification* whereby the subject is required to recognize the "objectivity that is in and for itself" of moral norms and submits to them. The intersection of these two processes – the subjectification of abstract law and the objectification of abstract morality – is none other than *Sittlichkeit*, which thus turns out to be the keystone of the Hegelian theory of normativity.

Consequently, between legal and ethical normativity there is no subordination but parity. Given that both one and the other are "stages of the development of the concept of freedom", each possesses "its distinctive right", and "the realm of actualized freedom", that is to say, *Sittlichkeit*, needs these two incomplete modalities of the normative structuring of social action so as not to remain an empty requirement.⁵⁵ What is common to both law and morality is the *abstraction* of the kind of actualization of freedom that they respectively guarantee, at least inasmuch as they are understood as separate, if not potentially opposed, forms of normativity. In the end, their abstraction is due to the fact that moral and legal norms not containing their principle of efficacy within themselves. According to Hegel the actualization of the law is not a legal but a social question: it is solely inside a living civil society and thanks to social exchange that law receives "the power of actuality" and is in this manner liberated from its intrinsic abstraction; an abstraction reflected in the separation of the person and its "external sphere of freedom" (i.e. its property).⁵⁶ For their part, the errors (to be perpetually feared) and contradictions of "the right of the subjective will", which in itself is fully

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54 *EPD*, § 100, p. 126 (*RPh*, p. 191).

55 *EPR*, §30, §4, p.59, p. 35 (*RPh*, *W* 7, p. 83, p.46).

56 *EPR*, § 210, §41, p.240, p. 73 (*RPh*, p. 361, p.102).

justified, lead to the replacement of “formal [moral] conscience” by the “true [moral] conscience” of the ethical individual, who is both *bourgeois* and citizen.⁵⁷ In short, law and morality have the common property of being abstract normative expressions of that freedom which only becomes effective, concrete freedom as *ethical* freedom (that is to say, according to the structures of the doctrine of ethicicity, as familial, social and political freedom).

Ethicicity as the basis of a dynamic normativity

The richness of the Hegelian concept of ethicicity is often underlined, in particular by Axel Honneth in his recent contribution to a theory of ‘democratic ethicicity’.⁵⁸ According to Honneth the value of Hegel’s contribution lies, amongst other things, in the fact that he does not provide an abstractly normative theory of justice, such as that of Rawls for example; rather his theory is one that constantly concerned with the conditions of efficacy of legal, moral, social and political norms. Honneth considers (and quite rightly, in my opinion) that after Hegel the question formulated by Rousseau and Kant of rational self-determination and of the “autonomous” normative moral order that it generates can only satisfyingly be posed within the framework of institutionalized ethico-political configurations. As such ethicicity becomes the condition of normativity and not the reverse. For my part I wish to underline two aspects of the Hegelian theory of *Sittlichkeit* that could enrich the contemporary theory of normativity, and in particular the philosophy of law.

Ethicicity, such as Hegel conceives it, is a complex of objective structures (institutions) and subjective attitudes (dispositions, *ethos*), of social being and of individual and collective conscience. (In the context of this article I can only briefly mention the rich discussion provoked by the idea of collective intentionality or the existence of We-Intentions, from Hegel, Durkheim to Margaret Gilbert, Raimo Tuomela, Philip Pettit and Ronald Searle).⁵⁹ Hegelian ethicicity is thus a social reality that is both subjective and objective:

Ethicicity is the *Idea of freedom* as the living good which has its knowledge and volition in self-consciousness, and its actuality

57 *EPR*, § 132, §137, p.158, 164 (*RPh*, p.245, p.256).

58 See Honneth 2014.

59 Apart from Hegel, who lies at the source of this kind of enquiry, and Durkheim, who pursued it (Durkheim 2010, chap. V ; Durkheim 2013a, I. III, chap. II; Durkheim 2014, chap. I; Durkheim 2013b), see especially in the contemporary literature: Gilbert 1989, 1996, 2014. Pettit 1996, 2004; Pettit & List 2011; Schmid 2009, 2012; Searle 1995, 2010; Tuomela & Miller 1988; Tuomela 2005, 2007.

through self-conscious action. Similarly, it is in ethical being that self-consciousness has its motivating end and a foundation which has being in and for itself. Ethicity is accordingly the *concept of freedom which has become the existing [vorhandenen] world and the nature of self-consciousness*.⁶⁰

Just like the Good in the sphere of morality, *Sittlichkeit* brings together classes of norms to which individual action is submitted. But here in contrast to what happens in the sphere of morality, there is no distortion between the objectivity of the norm and the subjectivity of the agent. The Good (here the ethical norm) is now “the living Good” because, in a manner of speaking, it configures or in-forms subjectivity, such that individual action is in a kind of pre-established harmony with that norm.⁶¹ Reciprocally, the ethical “self-consciousness” of the “citizen-bourgeois” is the touchstone for the efficacy of ethico-socio-political norms, which are only valid when they can be consciously approved of and applied by the individuals and groups in question. Hegelian *Sittlichkeit* is thus quite different to any “process without a subject”: it only gains objectivity, it only participates in the construction of objective spirit, if its norms are consciously put to work in individual and collective action. One could consider Bourdieu’s concept of *habitus* as a kind of actualization of Hegelian *Sittlichkeit*. Indeed, Bourdieu attempts to combat both the “subjectivist” and the “objectivist” visions of the social world with his use of this concept. Like Hegel, Bourdieu conceives of social practice as a “system of structured and structuring attitudes which are constituted within and by practice and which are always orientated towards practice”.⁶² Moreover Bourdieu’s definition of *habitus* could be quite easily used to characterize what Hegel names in general “the ethical disposition”, and then in a more precise manner “the political disposition”.⁶³ Habitus, Bourdieu writes, are

Systems of lasting and transposable dispositions, structured structures that are predisposed to function as structuring structures; that is to say, as principles that generate and organize practices and representations which can be objectively adapted to their goal without necessarily supposing a conscious vision of objectives nor a purposeful

60 *EPR*, § 142, p.189 (*RPh*, p. 292).

61 Ibid., *ibid.*

62 Bourdieu 1980, p. 87.

63 See various occurrences of these expressions: *EPR*, §137, §141, §207, §268, p. 165, 186, 238, 288-9 (*RPh*, p. 256, p.287 , p.359, p.413-414)

mastery of the operations necessary to attain such ends.⁶⁴

Just like “practice” in Bourdieu’s work, Hegelian *Sittlichkeit* throws into question the division of the subjective and the objective that organizes our spontaneous perception of the social world.

Now for the second aspect of the Hegelian concept of ethicity, its *institutional* character. Institutional thinking has a bad reputation, in particular amongst those who lay claim to the “critical” dimension of theoretical work. It is all the more suspect in that some of its chief adherents, from Carl Schmitt to Arnold Gehlen, became mired in muddy waters... I believe, however, that there is a productive usage to be made of the institutionalist problematic: Hegel offers a good example. It is often wrongly believed that institutions stifle the creativity and spontaneity of individuals and groups. Hegel helps us to combat this prejudice. First of all it is an illusion to believe that an individual on his or her own, coming up with his or her own rules for action, would be “freer” than an individual whose action is framed by an adequate institution. On the contrary, the former is more likely to be prey to “blind necessity”, such as that of the system of needs (the market economy), whose logic, if not framed by institutions, prohibits individuals from “rising above” such necessity towards an authentic social and political liberty.⁶⁵ It is only thanks to social and political institutions (which, moreover, must be constantly transformed) that individuals and social groups are capable of escaping the “blind necessity” of social reproduction. It should also be noted that the usual understanding of institutions is too narrow. By institution what is often understood is what Maurice Hauriou, the great French representative of institutionalism, called “institution-persons”, those that can be personified in one manner or another; that is, social or political institutions that Hauriou groups under the term corporative institutions.⁶⁶ But apart from these personified institutions (which are precisely “moral persons”), there are also what Hauriou names “institution-things”, and these play a major role in the structuring of social action, inasmuch as the latter takes place in a universe of “institutional facts”, as John Searle puts it.⁶⁷ I think one can argue that Hauriou’s institution-things or Searle’s institutional facts coincide with what Hegel, after Aristotle, named the “second nature” of socialized individuals; it is the “all-

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64 Bourdieu 1980, p. 88.

65 PM, § 532, p.262 (*Enzyklopädie*, p. 328).

66 See Hauriou 1925, pp. 96-97.

67 See Searle 2010.

pervading soul, significance and actuality of individual existence.”⁶⁸ Such “small” institutions, acting on our practices and our representations without our awareness (think of language, but also of the mass of social habits that we inherit), not only make social interaction possible, but they also contribute in a decisive manner to social *change* because they help individuals and groups distinguish between stable and unstable social intuitions and collective beliefs. Of course, Hegel did not explicitly make such a claim, and it is quite probable that he had a conservative perspective on the ethical work of institutions. However the conceptual construction that establishes his doctrine of objective spirit proposes productive orientations to any philosophy paying attention to the movement of society.

Translation: Oliver Feltham

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68 *EPR*, § 151, p.195 (*RPh*, p. 301).

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