

HIERARCHIES OF FREEDOM - HEGEL'S LIBERALISM BETWEEN THE INDIVIDUAL AND THE STATE

THOMAS MEYER

Institut für Philosophie

Humboldt-Universität zu Berlin (Germany)

meyertho@hu-berlin.de

ABSTRACT

In this paper, I argue for a reading of Hegel's practical philosophy that focuses on his thesis of a hierarchy of freedom between the three spheres of right, abstract right, morality, and ethical life. This reading contributes to answering the question of how *liberal*/Hegel's philosophy of right is. I proceed in five steps. First, I introduce the main concepts of Hegel's philosophy of right and the hierarchy thesis. Second, I analyze the 'higher' right of morality against abstract right. Third, I show that in some respects abstract right is immune to this allegedly 'higher' right of morality. The second and third part help to introduce criteria that may distinguish between legitimate and illegitimate violations of rights. The fourth part deals with the allegedly 'higher' right of the state against all individual rights of abstract right and morality. Finally, I will think about what we can learn from Hegel for contemporary political issues.

KEYWORDS

Right, Conflict, Liberal, Individual, State.

Recently, all over the world more or less liberal states have restricted individual rights, in order to alleviate the Corona-pandemic. These restrictions also brought demonstrations and resistance with them. Protestors claim that the state abuses its power and is not justified in pursuing certain restrictions. What is at stake is whether restrictions of individual freedom, such as social distancing rules, mandatory mask-wearing, total lockdowns and so on, are justified. The enforcement of these restrictions demonstrate to say the least the power of a state with its police and military force and the legal system, especially criminal law in order to enforce the pandemic rules.

Hegel's political philosophy often has been taken to be rather conservative in terms of proclaiming the state's power over its citizens, although the text, the *Elements of the*

Philosophy of Right (1821)¹, also admits of more liberal readings. Interpretations range from liberal understandings some of which even try to see Hegel as a proponent of basic rights², up to claims that Hegel's practical philosophy prepared totalitarianism.³ The adequacy of these readings hinges on the question of how the relation between individuals and the state must be understood in Hegel. Hegel on the one hand defends individual rights three times in his philosophy of right: in abstract right, in morality, and in the second part of ethical life, the civil society.⁴ The state on the other hand is the third part of EL. So, the relation between individual rights and the state needs to be investigated. As I will propose in this paper the relation between the individual and the state in Hegel's PR, in turn, can be understood *only if* one makes explicit Hegel's thesis of all three spheres as standing in a hierarchical order. Therefore, in this paper I will argue that Hegel held the claim of a hierarchy between the three spheres of AR, M, and EL. And each higher sphere therefore dominates the lower one. In case of a conflict between two spheres the higher seems to trump the lower in all cases. If one considers that the state is the last part of the last sphere, EL, this implies that the state trumps all lower spheres of freedom. This is strong evidence for a more conservative and anti-liberal reading of Hegel.

However, there are obvious cases of conflict, even for Hegel, in which the lower sphere normatively trumps the higher one.⁵ This leads to the question of when which sphere trumps due to which criteria. Only with respect to such a criterion can Hegel's political philosophy be classified on the axis between conservative and liberal. Insofar as for two spheres of right sometimes the one and sometimes the other trumps, this suggests different hierarchies of freedom and supports a rather liberal reading of Hegel. For, it allows for restrictions of the state's power in favor of individual rights. This paper therefore contributes to the debate about how liberal Hegel's political philosophy can or must be interpreted by focusing on the particular claim of hierarchies of freedom.⁶

I proceed in five steps. *First*, I will introduce Hegel's Philosophy of Right and his hierarchy-thesis. *Second*, I argue that the hierarchy-thesis holds for cases of conflict between two spheres of right and that there are clear cases of conflict in which the higher sphere trumps the lower. I will show this with regard to the so called right of

¹ I will cite the Nisbet translation: G.W.F. Hegel, *Elements of the Philosophy of Right*. Edited by Allen W. Wood, translated by H.B. Nisbet. Cambridge 1991. I refer to the main text by PR + § + number and to the "Anmerkungen" by the addition of 'remark'.

² For a general liberal reading of Hegel see Rawls 2000; for a basic rights reading see Dreier 1981 and Lübbe-Wolff 1986.

³ Popper [1945] 1994.

⁴ From now on I will use AR for 'abstract right', M for 'morality' and EL for 'ethical life' all three being Hegel's technical terms.

⁵ Think of someone stealing someone else's property just for his own particular pleasure. I will discuss these cases in section 3.

⁶ As will become clear this paper also contributes in a more mediated sense to the question of what it means that AR and M are sublated in EL.

necessity (*Notrecht*) in states of emergency in the morality chapter. *Third*, I will show that there are, however, also cases in which the lower sphere trumps. This raises the question of why and when which sphere trumps the other. Those critical of Hegel's theory of the state read the hierarchy-thesis as claiming an absolute right of the state to trump in every case. Hegel's text doesn't warrant this view in my opinion. The *fourth* part then is devoted to the relation between the state and the individual and the question of how liberal Hegel's state can and must be understood. Here I argue for a strong reading of the morality chapter and that morality in its sublated form in ethical life is precisely that resource for liberal intuitions. The question then is whether one can generate criteria of when moral rights (rights being grounded in Hegel's morality) are being trumped by rights of the state legitimately, and when state's action must be restricted by moral rights. Even if Hegel does not really defend basic rights, his theory of morality on the one hand gives him strong normative resources for the very function basic rights play in our society. On the other hand, I think Hegel's idea of the state's rights against its citizens gains important insights critics of state power might oversee. The *fifth* and last step is to ask what we can learn from Hegel's theory.

Even though this paper is about Hegel and his *Philosophy of Right*, in what follows I will not claim that my reading is what the historical person Hegel would have claimed. My interest concerns how the text can be understood and to what one is committed in holding the view that is argued for in Hegel's text.⁷ If it necessarily commits one to anti-liberal positions that we nowadays at least intuitively deny or take to be implausible, then it would be much harder to argue for it.⁸ Interpretative in nature this paper is supposed to give a reconstruction of Hegel's position that allows for evaluation.

A last methodological remark is in order. I will use some analytical methods, especially definitions and standard forms of arguments in order to get a grip on Hegel's text and its argumentative structure. This method is supposed to enlighten Hegel's position.

⁷ In this sense, I call it 'Hegelian'. This term I will nevertheless use interchangeably with 'Hegel's'. To be clear, this paper is about Hegel's text and possible interpretations of it. I therefore use 'Hegelian' to refer to the political philosophy Hegel argues for in the PR in order to dissociate my reading from what the political opinions the historical person Hegel probably in fact had. This must not be confused with a contemporary approach concerning normative questions especially about the relation between the state and the individual.

⁸ This does not mean that I take intuitions to be the basis for philosophical explanation and justification. But, I definitely take intuitions to be an important piece of evidence for philosophical explanation and justification.

1. HEGEL'S PHILOSOPHY OF RIGHT AND THE HIERARCHY OF THE SPHERES⁹

The best thing to start with seems to be the subject-matter of Hegel's *Philosophy of Right*: "The subject-matter of the philosophical science of right is the Idea of right – the concept of right and its actualization."¹⁰

For our concern it suffices to understand the claim that "the idea" in general is divided into its concept and its actualization, as well as the idea of right in particular. That we not only can think about the concept of right but about right as a real world phenomenon is something we are familiar with. What is peculiar for Hegel is that the concept of right itself contributes to its actualization. It might be helpful to think about the real world phenomenon of right as being something that is made by human beings. The introduction entails more information about right itself. In § 29 it is characterized as follows: "*Right* is any existence [*Dasein*] in general which is the *existence* of the *free will*. Right is therefore in general freedom, as Idea."¹¹

For this reason, Hegel calls "the system of right [...] the realm of actualized freedom"¹². The main part of the introduction analyzes the concept of the free will (from natural will, *Willkürfreiheit*, to the in-and-for-itself free will). I will not go into details concerning the concept of the free will. For, concerning the question of this paper, the general structure of the philosophy of right, but also of Hegel's theory of the concept and its realizations are more important. Hegel's definition of "Right" in § 29 can be rephrased as follows:

Right : = Some *x* is right *if and only if* *x* is an existence of the free will.

The free will is defined by Hegel as "*the free will that wills the free will*"¹³. One condition for the free will therefore is that it has itself as its content of willing. That is, the content must not be something externally given on which the free will would depend on. If one considers that right has to be an existence of the free will and if one considers that right must be something socially, intersubjectively shared in form of some stable and valid rules, it becomes easier to understand what this concept of the free will might consist in. John Rawls interpreted Hegel's PR in his *Lectures on the History of Moral Philosophy* and he proposed to analyze Hegel's expression from § 27 via four conditions:

⁹ I argue for the reading of this chapter more extensively in Meyer 2020, Ch. 1.

¹⁰ PR § 1.

¹¹ PR § 29.

¹² PR § 4.

¹³ PR § 27.

First, that the free will wills a system of political and social institutions within which the free will can be free. Here institutions are understood as forms of life as lived by human beings.

Second, that the free will wills the ends of this system of political and social institutions, and it wills these ends as its own.

Third, that the free will is educated to the concept of itself as a free will by various public features of this system of institutions.

Fourth, that these various public features that thus educate the free will are themselves features that fully express the concept of a free will.¹⁴

For everything that fulfills these conditions and therefore fulfills the condition of something being an existence of the free will it is the case that it is 'right'. For Hegel there are different aspects of the free will that lead to different spheres of rights. Abstract Right, Morality and Ethical Life precisely are those spheres of right. And all three spheres together but also each sphere for itself constitute the “system of right” being “actualized freedom”. Before we look into more detail and analyze these spheres we have to have a look at a first formulation of the idea of a hierarchy between these three spheres:

[1] Right is something *utterly sacred*, for the simple reason that it is the existence [*Dasein*] of the absolute concept, of self-conscious freedom. – [2] But the *formalism* of right – and also of duty – arises out of the different stages in the development of the concept of freedom. In opposition to the more formal, i.e. *more abstract* and hence more limited kind of right, that sphere and stage of the spirit in which the spirit has determined and actualized within itself the further moments contained in its Idea possesses a higher right, for it is the *more concrete* sphere, richer within itself and more truly universal.¹⁵

First of all, in [1], we learn that for Hegel right is something sacred or let's say something very important, something of high value. The reason for this is that right is “the existence [...] of self-conscious freedom”. Here we already can see that Hegel would have denied an instrumentalist understanding of the legitimacy of right, for, right is not of value because it has some instrumental value for something additional valuable.¹⁶ Instead, it is itself of value. The existence of self-conscious freedom and right are identical.¹⁷

Hegel now in [2] introduces the “*formalism* of right”. There are different kinds of formalism of right dependent on “the different stages in the development of the concept of freedom”. Dependent on degrees of realization of freedom, Hegel

¹⁴ Rawls 2000, 349-350.

¹⁵ PR § 30. I use the numbers in brackets in order to refer to these sentences in my interpretation.

¹⁶ For such a contemporary non-instrumentalist understanding of the law see Harel 2014.

¹⁷ At least in this sense Hegel's account has something in common with Alon Harel's account in Harel 2014; cf. Brook's internalist understanding of Hegel's legal philosophy in Brooks 2018.

distinguishes a “more limited kind of right” from a “higher right”. The more abstract and formal a sphere of right the more limited is this sphere as a stage of freedom realization. Shaped in form of an argument it works as follows:

- (P1) Right in general is the existence of self-conscious freedom.
- (P2) The formalism of right depends on the development of the concept of freedom.
- (P3) More formal, i.e. more abstract right is more limited than less abstract right. A less abstract legal sphere is more concrete, richer in itself and more genuine in general.
- (C) Therefore, the more concrete legal sphere compared to the more abstract legal sphere constitutes a higher right.

Here Hegel introduces a first formulation for a hierarchy of freedom that grounds a hierarchy of rights. Even though Hegel’s talk of ‘lower’ and ‘higher’ is in need of further explication, the terms intuitively hint to what is meant by them. The higher seems to be of more importance, seems to be that sphere that trumps the lower one.

Hegel’s definition of right in [1] uses slightly different expressions in saying that right is the existence of the absolute concept – different from the definition in § 29. He uses this alternative expression to back the claim that right “is something *utterly sacred*”. This characterization holds for all spheres of right. But now, Hegel goes on to name deficiencies of the spheres. For our concern the introduction of the concept of “a higher right” is important. The degree of ‘highness’ depends on the degree of formalism of the respective sphere – the more formal the lower. There is a formalism of (abstract) right and there is a formalism of duty (i.e. morality). What is important now is, that a certain degree of formalism leads to a deficiency that allows for restrictions by a less formal sphere. What the formalism of AR and of M consists in will be investigated in the second and third part of this paper.

Before discussing possible conflicts between the different spheres of right some things need to be said concerning the talk of right and rights. Hegel is using the singular “Recht” (right) as well as the plural form “Rechte” or “ein Recht” (rights). Although Hegel is not that explicit about it I will in what follows only talk about rights individuals or collectives and institutions hold against each other. This will allow to formulate possible conflicts and make it easier to see where and why which right is trumping which one. A good start to analyze rights-talk is the Hohfeldian analysis of phrases like x has the right to Φ .¹⁸ Hohfeld distinguished between claim-rights, privileges, powers and immunities. Whereas a claim-right of A that B Φ s correlates with a duty of B to Φ ,

¹⁸ I rely on Alon Harel’s presentation of these distinctions in Harel 2015.

privileges only correlate with a duty of others not to hinder one from realizing the privilege. A power is the ability to change someone's normative position whereas an immunity consists in being a status that someone else does not have power to change. In what follows claim-rights and privileges will be of importance.

What then is a sphere of right in terms of rights? A sphere of right is constituted by being a bunch of rights that share the characterization to realize or help to realize a certain aspect of freedom.¹⁹

Each stage in the development of the Idea of freedom has its distinctive right, because it is the existence of freedom in one of its own determinations. When we speak of the opposition between morality or ethics and *right*, the right in question is merely the initial and formal right of abstract personality. Morality, ethics, and the interest of the state – each of these is a distinct variety of right, because each of them gives determinate shape and existence to *freedom*. They can come into *collision* only in so far as they are all in equal measure rights; if the moral point of view of the spirit were not also a right – i.e. freedom in one of its forms – it could not possibly come into collision with the right of personality or with any other right, because every right embodies the concept of freedom, the highest determination of spirit, in relation to which everything else is without substance. But a collision also contains this further moment: it imposes a limitation whereby one right is subordinated to another; only the right of the world spirit is absolute in an unlimited sense.²⁰

Each sphere of right – that is AR, M, and EL – is one determination of freedom. And therefore each distinct determination of freedom constitutes a distinct realm of rights. Hegel refers to the talk of an opposition between right and morality, in order to make clear that the term ‘right’ in opposition to ‘morality’ is not used in the broadest sense being an actualization of freedom. Instead, seen as opposed to the moral and the ethical the term ‘right’ only refers to what Hegel calls abstract right, that is only to one sphere of right. All spheres of right have one thing in common, they are a “determinate shape and existence to *freedom*”. And only due to this commonality can they collide with each other. A collision then makes the limits of a right explicit. Rights or spheres of right bear a relation of subordination to each other. Before we take a closer look at this relation of subordination and Hegel's solution to situations of a rights' collision we have to clarify what a collision of rights itself consists in. Let me propose the following characterization:

For at least two different agents *A* and *B*: two rights, say *A*'s right to Φ and *B*'s right to Ψ , collide with each other *iff* it necessarily is impossible that both rights

¹⁹ I won't go into detail of what constitutes an aspect. I take it to be plausible to bundle abstract right, morality and ethical life as Hegel does, as realizing different aspects of freedom.

²⁰ PR § 30 remark.

are at the same time actualized. A right is actualized *iff* the right-holder does or omits what he or she has a right to do.

To say a word concerning the abstractness of a sphere of rights. No matter whether there are more or less abstract spheres than AR, it seems to be clear what it means that it is abstract. Entailing the right to private property and the right of contracts AR abstracts from specific contents: the reasons why people have certain private property, or the reasons why they contract with each other, it abstracts from what people own, from the huge differences between what people own and what they agree upon in contracts. The aspect of freedom that is being actualized in AR is the very abstract aspect of us being persons having control over external things that are necessary means for our willing self-realization.

Suppose *A* has a right to private property. Now *A* is consuming different things from day to day. Suppose further *A* is driven to certain things each day, maybe cigarettes, and suppose *A* does not really want to smoke but cannot do anything against it. From the AR-perspective *A* is free, realizes an aspect of freedom. But *A* is not free to choose whether *A* wants to consume cigarettes in the first place. That is, there is at least another aspect in which *A* is not free, in which freedom is not actualized.

Jeremy Waldron has argued that whether rights can stay in conflict and these conflicts could be solved depends on the underlying theory of rights, especially on whether one is holding an interest or a will theory of rights.²¹ I won't say anything about such an underlying theory of rights. For, to understand Hegel's hierarchy-thesis it is not necessary to make Hegel's meta-understanding of what rights are explicit. Whether one is committed to a certain understanding of rights given the Hegelian theory of hierarchies of freedom I am arguing for, will not be answered in this paper.²²

2. SPHERES OF RIGHT IN CONFLICT - MORALITY TRUMPING ABSTRACT RIGHT

As a starting point, and to see more concretely how spheres of right can collide with each other, it is helpful to compare M with AR. What we know so far is that AR as well as M are an existence of freedom and thereby right. And, we know that M is a higher right relative to AR, for, it incorporates abstract right but additionally realizes new forms of freedom namely those of inner freedom. Hegel himself discusses a case of conflict between abstract right and morality the so-called state of emergency (*Notstand*). To see how cases of this type are an example of conflict we need to introduce the rights that

²¹ Waldron 1989.

²² For such an attempt of clarification for the morality chapter, see Meyer 2020, Ch. 6.

are in play. To be more precise we have to introduce examples of the rights in conflict because it is not the case that certain types of rights stay in conflict per se but always concrete rights of concrete right holders.

There is, *first*, the abstract right to private property: *A* owns a cabin in the mountains. That *A* has a right to this cabin as her property means that *A* can use the cabin as she likes and that *A* can exclude everyone else from using it. There might be a story how *A* became the owner of the cabin but let's assume that she rightly is the owner of the cabin. That the cabin is *A*'s private property implies that *B* for example is not entitled to use the cabin in any sense of use, lest *A* has permitted *B* to use it. And this holds for all other right holders *x* that are different from *A*.

There is, *second*, the moral right to pursue one's own ends: *B* has the right to do what supports *B*'s self-set ends, what is of value for *B*, what is in *B*'s interest. In Hegel's own words:

The fact that this moment of the *particularity* of the agent is contained and implemented in the action constitutes *subjective freedom* in its more concrete determination, i.e. the *right* of the *subject* to find its satisfaction in the action.²³

Understood as a claim-right this moral right implies others' duty to not hinder me from pursuing my satisfaction in my action. Now suppose *B*'s subjective end is to go hiking in the mountains alone. After a while *B* is caught in a thunderstorm. The only way for *B* to survive is to enter *A*'s cabin violently. On the one hand, *B* is pursuing her moral right of her own welfare (her survival). On the other hand, she violates *A*'s right to private property. In a situation of such kind, M trumps AR, that is, the collision of the two rights at play is solved by subordination of AR to M - this is just a consequence of Hegel's hierarchy-thesis. But, does this hierarchy hold for all cases of conflict between AR and M?

3. IMMUNITY OF ABSTRACT RIGHT AGAINST MORALITY

It definitely could seem that for all abstract rights *x* and moral rights *y*: if *x* and *y* stay in conflict, then *y* always trumps *x*. But, this obviously would lead to highly counterintuitive results. For, suppose *A* owns, say, a bicycle, and suppose further that *B*'s interest is to use *A*'s bicycle in order to satisfy *B*'s interests. Although *B* is not entitled to use the bicycle, *B* takes it and uses it. In a sense, *A* would hinder *B* from pursuing *B*'s own ends by not letting *B* use the bicycle. Insofar the moral right of particularity implies a duty to not hinder others in pursuing their ends, *A* would violate

²³ PR § 121.

a moral right of *B*, although this violation itself would be just an enforcement of *A*'s right to the bicycle as *A*'s private property. This example suggests an exclusive disjunction:

Either these conflicts are no real conflicts because *B* would not have the right to use *A*'s bicycle in the first place. Remember, that for Hegel a necessary condition for a collision of rights is, that they are really an existence of freedom.²⁴ This reading is supported by the following passage:

My particularity, however, like that of others, is only a right at all in so far as I am *free*. It cannot therefore assert itself in contradiction to this substantial basis on which it rests; and an intention to promote my welfare and that of others – and in the latter case in particular it is called a *moral intention* – cannot justify an *action which is wrong*.²⁵

Hegel first states a necessary condition for each one's right to particularity. Only if my particularity still represents me as free, do I have a right to realize this particularity. The reason why I might not even have a right to use others private property then is, that *qua* free willing being I am already bound to the rights of abstract right. Insofar the rights of M could be understood as “unless”-rights. That is, that AR is sublated in M could be understood as the claim that all moral rights actually are of the following form: Every subject *S* has the moral right *x*, unless *S* violates someone else's abstract right by actualizing *x*.

Or B has a right to use *A*'s bicycle in order to pursue his ends which are of higher dignity than *A*'s mere private property. In this case an additional reason needs to be adduced to block this right by *B*.

But here the question arises why M should trump AR although one is bound to the rules of AR even in M. On the one side, I seem to be bound to other's rights to their private property having the duty to not use it without allowance. Therefore, the first option seems to be the correct one. On the other side in some cases I am allowed to use other people's private property even without their allowance – the hiking example. This seems to lead to a dilemma: either I am *never* allowed to use other people's private property, even not in states of emergency, or I am *always* allowed to use other people's private property, even outside of emergency situations. Hegel's solution to this dilemma consists in introducing a criterion to distinguish between legitimate and

²⁴ “They can come into *collision* only in so far as they are all in equal measure rights; if the moral point of view of the spirit were not also a right – i.e. freedom in one of its forms – it could not possibly come into collision with the right of personality or with any other right, because every right embodies the concept of freedom, the highest determination of spirit, in relation to which everything else is without substance.” § 30 remark.

²⁵ PR § 126.

illegitimate violations of other people's private property rights. The legitimacy hinges on:

The *particularity* of the interests of the natural will, taken together as a simple *totality*, is personal existence [*Dasein*] as *life*. In *extreme danger* and in collision with the rightful property of someone else, this life may claim (not in equity, but as a right) a *right of necessity*, for the alternatives are an infinite injury [*Verletzung*] to existence with total loss of rights, and an injury only to an individual and limited existence of freedom, whereby right as such and the capacity for rights of the injured party, who has been injured only in *this* specific property, continue to be recognized.²⁶

Let's have a closer look at what exactly gives us the criterion: Hegel describes a certain situation of conflict. In states of necessity my whole life is in danger. It might be possible for me to save my life only by means of violating another person's right. *B* must burglar *A*'s cabin in order to survive. This contrasts with *A*'s single ownership of the cabin. This situation is made explicit in forms of two kinds of injury that need to be weighed against each other in situations of emergency:

Injury₁: "infinite injury [*Verletzung*] to existence with total loss of rights"

Injury₂: "injury only to an individual and limited existence of freedom"

Let's call this criterion the difference between totality and particularity. A right that protects a totality weighs more than a particular right that only protects a single thing or action. What is less explicit but might still be extracted from this passage is another criterion, namely that between life as an organized whole and something that is not such an organized whole.

Even if there is a solution of rights in conflict via this criterion, this does not imply that the right that is subordinated loses its status as being a right. Hegel is very explicit about this: "whereby right as such and the capacity for rights of the injured party, who has been injured only in *this* specific property, continue to be recognized."²⁷ In case of states of necessity this can imply that *B* must compensate *A* for caused damages for the cabin, even if *B* did nothing blameworthy.

So far, we have seen that *M* trumps *AR* given a conflict between both, although this holds only when the conflicting rights secure values of different importance. Now, in the remark to § 126 Hegel states a special hierarchy between *AR*, *M* and the state:

In addition, we must bear in mind the point of view from which right and welfare are being examined here – namely as formal right and the particular welfare of the individual [*des Einzelnen*]. The so-called *common weal* or *welfare* of the state, i.e. the right of the

²⁶ PR § 127.

²⁷ PR § 127.

actual and concrete spirit, is an altogether different sphere, in which formal right is just as much a subordinate moment as particular welfare and the happiness of the individual.²⁸

We learn that AR as well as M are subordinate to the state. This is just a logical implication of the general hierarchy thesis, for, if each earlier sphere (in order of the text) is subordinate to the later one and if AR and M are earlier stages than the state then it follows that they are subordinate spheres to the state. But interestingly Hegel adds characteristics of these spheres that hint at criteria for distinguishing legitimate and illegitimate restrictions of rights.

It is the formal and the particular that ground the possibility of restrictions of these spheres of right. Hegel goes on to remind us “that one of the commonest error of abstraction is to insist on private rights and private welfare *as valid in and for themselves* in opposition to the universality of the state.”²⁹

The contemporary Covid-restrictions do intervene into private rights as well as into private welfare. This shows at least that even today “private rights and private welfare” in fact are not “*valid in and for themselves* in opposition to the universality of the state.” Of course, this by itself does not legitimate the restrictions. But, the fact that we more or less accept these restrictions even today gives us reason to believe that it might be legitimate. Hegel himself definitely took it to be legitimate, for, otherwise it would not be an error to oppose the private to the public. Does this view then entail a conservative and illiberal understanding of the relation between the individual and the state?

4. THE ABSOLUTE RIGHT OF THE STATE AGAINST THE INDIVIDUAL - HOW LIBERAL IS HEGEL'S STATE?

In order to see how liberal Hegel's state must and can be seen we first have to have a look at those passages emphasizing the level of right of EL and the state especially. In § 128 Hegel states:

Such necessity [Not] reveals the finitude and hence the contingency of both right and welfare - of the abstract existence [Dasein] of freedom as distinct from the existence [Existenz] of the particular person, and of the sphere of the particular will as distinct from the universality of right. Their one-sided and ideal character is thereby posited, just as it was already determined for them in their concept. Right has already (see § 106) determined its existence [Dasein] as the particular will; and subjectivity, in its comprehensive particularity, is itself the existence [Dasein] of freedom (see § 127), just as it is in itself, as the infinite self-reference of the will, the universal aspect of freedom. The two moments in right and subjectivity, thus integrated so as to attain their truth and identity

²⁸ PR § 126, remark.

²⁹ PR § 126, remark.

- though initially still in a relative relation [Beziehung] to one another - are the good (as the fulfilled universal, determined in and for itself) and the conscience (as infinite and inwardly knowing [wissende] subjectivity which determines its content within itself).³⁰

Although Hegel is not explicitly talking about the state in this passage the introduction of the ‘good’ already hints at the sphere of EL, and especially at the state. AR as well as M are “one-sided” both focusing only on single aspects, AR on the abstract aspect of freedom, M on the particular will of a subject. Only the combination of both in EL is not abstract anymore, integrates both the universal and the particular element of freedom. This integration means that both are sublated in EL, that is, that they are not denied in the state. Therefore, AR as well as M are prima facie valid spheres of right even within the state. But what happens when a conflict between AR or M and EL arises? How is such a conflict to be solved?

Sometimes Hegel’s description of the state as being a substance with its citizens as accidents (Akzidenzien) is taken to be evidence for a conservative and illiberal understanding of the state. Besides the point, that one does not find a clear formulation in the text (except the additions by Hegel’s students), one must interpret the terms ‘substance’ and ‘accident’ exactly in Hegel’s meaning. In his *Logic of Essence* the relation between substance and accidents is introduced and understood as an absolute relation: that is, the substance cannot be something other than and external to its accidents.³¹ Again, Rawls gave a good formulation for how the substance-accidents-relation could be applied to the relation between the ethical and the individual:

Hegel’s view of freedom is that only a substance can be fully free, and that a rational social world is a substance. Moreover, individuals can attain the fullest freedom available to them, as opposed to the misguided autonomy of Kant’s ethics, only by becoming self-reflecting and endorsing accidents (as Hegel says) of a rational social world. The term “accidents” brings out that for Hegel, individuals cannot by themselves be substances, cannot be free on their own. Rather, they are accidents, as it were, of a substance - of a rational social world - and it is through *that* substance that they achieve their real freedom.³²

So understood we can apply the criteria³³ for solving rights in conflict we already found in the passages of M, that is:

Totality vs. Partiality/Singularity

Universal vs. Particular

³⁰ PR § 128.

³¹ For a very good analysis of this relation in the logic and its implications see Sandkaulen 2018.

³² Rawls 2000: 333-334.

³³ It is always the left-hand-side of the “vs.” that trumps.

Concrete vs. Abstract

Life as a self-organized whole vs. elements of a whole

Suppose again a situation of conflict now between an individual right and the right of the state. The Corona-pandemic restrictions are clear cases of such a conflict. As a restaurant owner I probably was forced to close my restaurant or I am forced to host much less people due to social distancing rules. I am obliged to wear a mask in stores and trains, I must stay in quarantine for two weeks given a positive testing and so on and so forth. To apply Hegel's terminology these restrictions can be redescribed as injuries. What are possible injuries on the other side then? The health system might collapse if too many people are in need of help in intensive care units. Too many people are going to die. Trust into politics might get lost.

In these cases, the criteria for solving rights in conflict could be applied in favor of the state's rights. For, a collapsing healthcare system has much stronger impacts on all individuals than the temporary restrictions of individual rights. Additionally, the functioning of the whole system is a higher right insofar as individual rights and freedom is dependent on the functioning of the whole system. That my individual private right to property is being actualized depends on whether the legal system can guarantee this right even in conflict. And my subjective moral right to welfare depends also on whether the system can afford goods and services necessary for my welfare.

What can be further added is that these restrictions are legitimate only as long as they really serve the alleged stabilization of an organized whole. Therefore, they are different from the conflicts between AR and M insofar as the state's rights concern temporary provisions and not only single actions as *B*'s entering *A*'s cabin. But, the subordinated right still holds the status of being a right even if it is restricted in favor of the state's right against the individual.³⁴ So, we must ask how illegitimate restrictions of individual rights by the state can be blocked. All cases where the use of state power against individual rights does not comply with the criteria are illegitimate. To give one example, already in M Hegel argues for the so called right of insight into the good. In the remark to § 132 Hegel says:

In this objective field, the right of insight applies to insight into *legality* or *illegality*, i.e. into what is *recognized* as right, and is confined to its primary meaning, namely *cognizance* [*Kenntnis*] in the sense of *familiarity* with what is legal and to that extent obligatory.³⁵

What is important for our concern is that the right of insight into legality or illegality itself very often is implemented into a criminal law system. That is, a state's power to

³⁴ Remember: "whereby right as such and the capacity for rights of the injured party, who has been injured only in *this* specific property, continue to be recognized." PR § 127.

³⁵ PR § 132 remark.

punish citizens for committed crimes and therefore its power to intervene into individual rights is itself restricted by the prohibition of retrospective legislation (*nulla poena sine lege*).

Suppose Hegel has good reasons for his theory of hierarchies of freedom. We still have to make a clear distinction between the general criterion and the question whether the criterion has been met in a certain situation. That is, it might be true that certain restrictions of individual rights (say, mandatory mask-wearing) are justified if they are necessary means to save a totality, the functioning of a whole system. But this does not imply that in a certain situation the antecedent condition is in fact met. This is an epistemic question that is closely linked to a normative problem that, from a Hegelian point of view, cannot be solved philosophically.

For additionally, epistemic disagreement concerning whether the conditions of a justified rights-restriction are met, might be a disguised normative disagreement. The normative fact this disagreement is about is something that cannot philosophically be met but is dependent on the socio-historical context and the certain political and legal culture of a state.

What did we achieve then? Traditionally one major problem for political philosophy consists in the relation between the state and the individual. How far is a state legitimately allowed to intervene into the individual's life plan? This question even in slightly different formulations already presupposes a lawlike relation between state and individual. For, it asks for *legitimate* intervention. But, an intervention only can be said legitimate or illegitimate if there already exists a form of right.³⁶ Hegel's non-instrumentalist understanding of right, instead of taking state and individual as being two parts of an already existing lawlike relation argues by showing that a system of right itself creates the realm of legitimate and illegitimate claims by individuals against each other, against the state and by the state against individuals. Legitimacy of intervention needs to rely on this understanding of right, from a Hegelian point of view.

To sum up: although Hegel argues for a hierarchy between AR, M and EL relative to the degree of freedom realization of each sphere, a higher sphere does not trump the lower one in cases of conflict without restriction. Only if what constitutes the very core of each sphere is at stake can this sphere legitimately trump the lower one. Otherwise, the lower sphere upholds its status as a sphere of *right*. This restriction also applies to the state. This part allows for liberal readings of Hegel's PR. At the same time conservative readings can rely on textual evidence as well, for, the state upholds its rights against the individual as well. This can explain why there have been such divergent interpretations of Hegel's PR.

³⁶ This is already implied in Hegel's 9th habilitation thesis: "*Status naturae non est injustus, et eam ob causam ex illo exeundum.*" (Neuser 1986, 76).

5. WHAT CAN WE LEARN FROM HEGEL?

Is there anything we can learn from Hegel, some insights concerning the relation between the state and the individual, that are of relevance even for us today? Of course, we cannot generate concrete norms out of Hegel's practical philosophy. Hegel was rather critical with seeing philosophy as an enterprise that prospectively argues for what *ought* to be done within a concrete society.³⁷ If there is something to learn from Hegel, it must have something to do with a better understanding of what is going on in the social, legal and political sphere of human interactions. I take his hierarchy thesis and the criteria to distinguish legitimate from illegitimate restrictions of individual rights to be insightful even for us today. If Hegel is right, the relation between the state and the individual is more intricate as we might think it is. Especially the fact that the state constitutes the sphere that allows for legitimate and illegitimate rights restrictions in the first place shows that state and individual cannot be understood as being in the same relation to each other as homeowner *A* and hiker *B* do. This however does not allow for arbitrary abuse of states power against its citizens. So, at least Hegel's position hints at some interesting points one must think about if it comes to criticize state interventions.³⁸

³⁷ May it suffice to remind of the passages in the foreword to the PR.

³⁸ I thank Esther Neuhann and two anonymous referees for helpful comments.

REFERENCES

Brooks 2017: Thom Brooks, "Hegel's Philosophy of Law", in: D. Moyar (Ed.), *The Oxford Handbook of Hegel*. Oxford 2017, 453-474.

Dreier 1981: Ralf Dreier, *Recht-Moral-Ideologie. Studien zur Rechtstheorie*. Frankfurt a.M. 1981.

Harel 2014: Alon Harel, *Why Law Matters*. Oxford 2014.

Harel 2005: Alon Harel, "Theories of Rights", in: Golding/Edmundson (Eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Malden, MA 2005, 191-206.

G.W.F. Hegel, *Elements of the Philosophy of Right*. Edited by Allen W. Wood, translated by H.B. Nisbet. Cambridge 1991.

Lübbe-Wolff 1986: Gertrude Lübbe-Wolff, „Über das Fehlen von Grundrechten in Hegels Rechtsphilosophie. Zugleich ein Beitrag zum Verständnis der historischen Grundlagen des Hegelschen Staatsbegriffs“, in: Hans-Christian Lucas/Otto Pöggeler (Eds.), *Hegels Rechtsphilosophie im Zusammenhang der europäischen Verfassungsgeschichte*. Stuttgart-Bad Cannstatt 1986, 421-446.

Meyer 2020: Thomas Meyer, Verantwortung und Verursachung. Eine moral- und rechtsphilosophische Studie zu Hegel. Hamburg: 2020.

Neuser 1986: *Georg Wilhelm Friedrich Hegel, Dissertatio Philosophica de Orbitis Planetarum/Philosophische Erörterung über die Planetenbahnen*. Übersetzt, eingeleitet und kommentiert von Wolfgang Neuser. Weinheim 1986.

Popper [1945] 1994: Karl R. Popper, *The Open Society and its Enemies*. New One-Volume Edition. Princeton/Oxford 1994.

Rawls 2000: John Rawls, *Lectures on the History of Moral Philosophy*. Edited by Barbara Herman. Harvard 2000.

Sandkaulen 2018: Birgit Sandkaulen, „Modus oder Monade. Wie wirklich ist das Individuum bei Hegel?“, in: Luca Illetterati/Francesca Menegoni (Hrsg.), *Wirklichkeit. Beiträge zu einem Schlüsselbegriff der Hegelschen Philosophie*. Frankfurt a.M. 2018, S. 173-176.

Siep 1992a: Ludwig Siep, „Was heißt ‚Aufhebung der Moralität in Sittlichkeit in Hegels Rechtsphilosophie‘“, in: Siep 1992, 217-239.

Siep 1992b: Ludwig Siep, „Verfassung, Grundrechte und soziales Wohl in Hegels Philosophie des Rechts“, in Siep 1992, 285-306.

Waldron 1989: Jeremy Waldron, „Rights in Conflict”, in: *Ethics* 99 (1989) 503-519.