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Constitution, Fundamental Rights, and Social Welfare in Hegel's *Philosophy of Right*

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It is the fate of texts concerned with legal and political philosophy that they tend, much more than other philosophical writings, to be read emphatically in the light of subsequent events and later experience. This is particularly clear in the case of the controversy that has surrounded Hegel's *Philosophy of Right* from the Young Hegelians through Marx and Haym up to the Anglophone critiques of Hegel's thought in the middle of the last century (Russell, Popper, Hook, etc.).[1] The question of whether Hegel's political philosophy properly belongs in the "liberal," the "Prussian-restorationist," or even the "totalitarian" tradition is one that has been constantly and repeatedly encouraged by the specific experiences of modern German history. Nor indeed is it an illegitimate question, as long as one is capable of distinguishing between Hegel's work in this field and the story of its influence, or its "effective history," capable of distinguishing between Hegel's general systematic conception and certain of his own historically conditioned views and remarks.

During the last few decades there has been a concerted effort to answer the question decisively above all by reference to previously unpublished student transcripts of Hegel's lectures. Yet the attempt to descry in these manuscripts a hitherto unknown "liberal" and "democratic" Hegel, who with the *Philosophy of Right* of 1820 effectively joined with the Prussian Restoration or accommodated himself to the spirit of the Karlsbad Decrees, is quite implausible.[2] For there are no really decisive differences between the principles elaborated in the *Philosophy of Right* or the laws and institutions described there and the perspective represented by his actual

lectures. But the lectures certainly show that the "restorationist" tone of the published *Philosophy of Right* is a largely superficial feature of that text. As far as the principles of the work are concerned, it is clear that Hegel is no "populist" romantic or devoted to the idea of "power" and "authority" as such and that he propounds no special "German Path" in the context of modern history. It is obvious, on the contrary, that he actually stands firmly within the modern European natural law tradition. And one can easily delineate the precise steps with which he advances on Hobbes, Locke, Rousseau, or Kant. Of course, there are also considerable differences between Hegel's position and the characteristic political philosophy of the Enlightenment or the first stirrings of parliamentary democracy in the Western European sense. These differences arise largely from his repudiation of social contract theory and of the general conception that he believed followed naturally from it: that of a legislative assembly based on general electoral procedures where individual and particular interests are represented and struggle continuously to attain ("contingent") majorities. Hegel is equally decisive in fundamentally rejecting the "checks and balances" conception of the division of powers under the overall primacy of the legislature.[3] Even when Hegel does consider the idea of an essentially reciprocal and interdependent relationship between the monarch, the government, and the prevailing view of the representative assembly, as in his Heidelberg writings of 1817–18,[4] the thought remains quite different, for systematic reasons, both from the classical doctrines concerning the division of powers and from the contemporary ideas concerning a "national assembly" that would be elected by all the citizens. In order to appreciate the significance of Hegel's social and political philosophy for his time, and in some respects even for our own, it is quite unnecessary to play off the lecture transcripts against Hegel's actual published writings of 1817 and 1820. One can and should see the lectures rather as providing a more detailed commentary on Hegel's social and political philosophy in general. Then it is possible to grasp Hegel's concept of a constitutional monarchy, based on the rule of law and a special version of the division of powers and involving elements of a welfare system and a self-organized representation of "estates," in a much more precise way. This does not render the debates concerning the ultimate significance of Hegel's political philosophy or its relation to specific traditions (from the theoretical or historical perspective) simply redundant. In what follows I should like to discuss the role of the constitution, of basic rights and of general welfare provisions within that overall conception. Hegel's claims about the constitution as an expression of "the spirit of the people" [*Volksgeist*], about the "higher

right" of the state in relation to the legal freedoms and actual welfare of the individual, have been misunderstood in many respects. These issues, too, now can be interpreted more precisely by reference to the newly available texts – interpreted with respect to their place in the history of ideas, to their capacity for resolving genuine problems, and to their possible limitations and deficiencies.[5]

I

The problem of the "constitution" was a central one for Hegel's social and political philosophy from the beginning to the very end of his career. Hegel's first sketches and publications concerning political philosophy all revolve around the issue of the constitution: his translation of and commentary on Cart's essay on the constitutional arrangements in Bern, his essay on the municipal constitution of Wurtemberg ("The Magistrates Should Be Elected by the People"), and the various drafts that make up the text now entitled "The Constitution of Germany." And Hegel's last published work (1831) also concerns itself directly with constitutional reform in the context of the English Reform Bill.[6] Since the middle of Hegel's Jena period, the issue of the "Constitution" (1805–6) and what he later calls the "inner constitution" of the state is the central theme of his systematic exposition of social and political philosophy. But his concept of the constitution is a very broad one that cannot be limited to the sphere of constitutional law (in either written or traditional form). Hegel's concept of the constitution embraces both the "inner structure" of the social and political "body" in general – a metaphor that Hegel, like Rousseau, Hobbes, and many other "forerunners," understands as a substantive and systematically significant analogy[7] – and its functions and processes insofar as they influence the existence and capacity for action of the body politic as a whole. The necessary organization of society, according to Hegel's view, into a specific number and types of estates based on profession – principally, agricultural workers, the commercial class, and the class of civil servants in the broad sense – forms just as much a part of the "constitution" as the executive power and the most important branches of administration (economic affairs, the military, the sphere of education).[8] It was only in his Heidelberg and Berlin periods that Hegel expressly distinguished the legally defined exercise of state power as the "political constitution" from the order of estates in the sphere of civil society and the related functions of internal administration and organization

(the "police" in the broad sense of the term then current). In the *Philosophy of Right* of 1820, this is even marked terminologically with the distinction between the "particular constitution" (the institutional organization of civil society and of "the state as conceived by the understanding"; *Rph* §265) and the "political constitution" (the legal organization of the powers of the state; *Rph* §267). But even this latter "organization," the "subsisting distinctions" involved in the legally established functions and spheres of executive power, represents only one aspect of the constitution – for the "process of the state's organic life" also must be considered here (*Rph* §271).

But how does the written constitution of a state and the decrees and changes that it enacts relate to the constitution in this very broad sense as the organized "process" of social and political functions in general? One can begin to answer this question by elucidating Hegel's Note to §273 in the *Philosophy of Right* in the light of §§134–37 in *RphW*'s transcript of Hegel's Heidelberg lectures on social and political philosophy. In both texts, Hegel discusses the question of "who should make the constitution" (*Rph* §439). This issue is of great significance to Hegel from both a historical and a theoretical point of view – even if his own response is largely to downplay this significance here. In his Heidelberg lectures, the issue is directly connected with Hegel's stance in the debate over constitutional reform in Wurtemberg (as expressed in Hegel's essay *The Proceedings of the Estates Assembly in the Kingdom of Württemberg* of 1817).[9] For what was at stake here – apart from the content of the constitution itself – was whether the constitution should be expressly established through a contract between the Estates and the King, through general consent to the King's own proposal for a constitution, or through direct imposition (or "Oktroi"), as in France in 1814. In terms of political philosophy, this had been a live and topical question at least since Hobbes, who had fused the social and governmental sides of the contract in one and rejected the idea of a collective subject of rights as a precondition for a valid constitutional contract. Hobbes's interpretation of the contract as a chain of reciprocal renunciations of right in favor of a "third" party expressly charged with establishing right proper is conceivable only in ideal terms, and cannot be conceptualized as actually "in time." It was Rousseau who struggled with this problem at greatest length – and as far as the history of theory is concerned, Hegel engages principally with Rousseau in this regard. Rousseau's attempted solution in the *Social Contract* was of course to distinguish between the extrapolitical role of the "architect of the constitution" (the *legislateur*) and the consent to the proposed constitution

on the part of the "sovereign power" that first constitutes itself precisely through this consent: the self-legislating people or the assembly of all full citizens. Through both of these acts the subsisting and valid legal will of the community, the *volonté générale*, acquires a temporal beginning in the context of a particular people. The "divine authority" of the architect of the constitution translates this will into a concrete social contract and the legislative assembly founded on the latter is henceforth regarded as "vox dei." In respect of this suggested solution, Hegel takes over the idea that the universal will, as the source of legal validity for concrete laws, can be neither "created" by nor "posited" within a people. The constitution must therefore be grasped as *causa sui*, as generating itself out of time. The temporal beginning for Hegel is thus neither the act of an original "architect" – except in the "heroic times" of antiquity – nor its acceptance through the people, but rather the historical development of an understanding of right and law within a people, that is, within the so-called spirit of the people. But for Hegel, too, this historical development now has reached a stage when the "habitually established" laws and rights – here Hegel follows Hume and Herder – must be proclaimed and codified explicitly in legal and constitutional texts. The French Revolution was a consequence of one-sided and, until 1814 at least, unsuccessful attempts to establish such codification.[10]

The decisive thing, therefore, is that such attempts at codification be understood not as an act of simple creation, but as a conscious formulation of a constitution of rights and laws that is already latent or implicit. *Who* it is that finds, declares, and realizes these formulations is then a secondary matter. In the *RphW* transcript Hegel puts it succinctly: "The constitution should be regarded rather as the foundation of a people's life in the spheres of right and ethics, existing in and for itself, and essentially not as something made and subjectively posited. Its absolute cause is the principle of the national spirit [*Volksgeist*] as it develops in history. The causes of the individual factors determining this development may be very diverse in shape. This historical element in the development itself gives the constitution the shape of a higher authority" (§134, 189; ET: 239).

The published text of the *Philosophy of Right* emphasizes this character of the constitution as *causa sui*, as something "divine," even more strongly, but also refers directly back to the original underlying problem that faces social and political philosophy here: who possibly can "make" the source of all rights itself rightfully binding? The question about any such "making" or original drawing up of the constitution presupposes

that "no constitution as yet exists, so that only an atomistic aggregate of individuals is present. How such an aggregate could arrive at a constitution, whether by its own devices or with outside help, through altruism, thought or force, would have to be left to it to decide, for the concept has nothing to do with a mere aggregate" (*Rph* §273). For Hegel, too, a people without a constitution cannot be regarded as a collective rightful "subject" – but then without any constitution whatsoever, that is, without any consciousness of rights and laws or at least of established ways of doing things, no people can possess an identity in the first place. Is the historical codification of constitutions thus simply to be abandoned to the contingency of chance – and thus also of "violent" – events?

First of all, it is necessary to distinguish between altering an already "existing" constitution and the proclamation of a new constitution. If the first is at issue, then "making merely signifies an alteration, and a constitution itself already and directly presupposes that such alteration can take place only in a properly constitutional way" (ibid.).[11] But Hegel does not envisage any particular procedure for doing this – and he is certainly a long way from endorsing Fichte's "Rousseauean" proposal for changing the constitution through the direct assemblies of the people.[12] Hegel does not deny that the right to undertake such alteration lies with the legislature, but he clearly regards this right as already actualized in the normal legislative process with the mutual cooperation of all three powers of the state.[13] The establishment of specifically convened occasions for deliberating on the constitution have no place within the framework of Hegel's social and political thought, since for him there is no "people" as such to be represented over and beyond its articulation in terms of the social estates. *What* is changed in any particular case arises therefore from the actual change in customs and practices insofar as the latter are "codifiable" in a rational fashion that corresponds to the principles of the constitution.

If there is *no* such already given and express constitution, then the historical development of the "national spirit" remains determinative. But this does not imply the irruption of irrationalism in Hegel's position, since there is no role here for mystical and mysterious "national characteristics" or "national destinies." The development of the national spirits in Hegel represents, as it were, various local histories of rights and constitutions that can be interpreted according to a universal and "world-historical" paradigm. This is so at least to the extent that national spirits can be said to shape and define their epochs and thus attain what Hegel calls a "world-historical status."[14]

Hegel's conception of world history as essentially a history of political constitutions is clearly based, as the Heidelberg lecture transcript reveals, on classical sources concerning the different forms of the state and the dynamic reinterpretation of these sources in terms of historical transformations of such social and political forms. But according to Hegel this history leads toward a certain "*telos*," one that reflects a completely articulated unity of the rational moments implicit in the traditionally defined forms of the state (monarchy, aristocracy, democracy). This *telos* is the constitutional monarchy. "The articulated development of the state into the form of constitutional monarchy is the achievement of our more recent world in which the Idea has attained the infinite form [appropriate to it]" (*Rph* §273). The "Idea" in Hegel's sense signifies, briefly formulated, the self-actualization of the conceptually necessary element of nature and history. The "infinite form" of the Idea is the unity between "objectively" rational forms of social life (laws and institutions) and the subjectively rational will. Constitutional monarchy may be said to assume this form when it involves an "organism" of different powers in the state and an ultimately decisive individual will (the monarch). The powers in question may be said to be organic and rational when each "functions" as a particular way of integrating the universal, the particular, and the singular will – as law, as deliberation concerning particular points of view, as final enactment [*Beschluss*]. Or expressed in the ontological terminology of Hegel's *Logic*, when they embody a syllogistic structure [*Schluss*].[15]

The development of such a constitution, then, is not a case of a "rational proposal" projected in advance, but rather an achievement that is the "work" of history: "The history of this true articulation of ethical life is the concern of universal world history" (*Rph* §436). In the published text of the *Philosophy of Right*, Hegel presented universal world history as the conclusion of his social and political philosophy and as the "ultimate" determining power behind all the developments of right and political power. In the Heidelberg lectures world history is still directly related to the question of establishing a constitution in the first place, and thus even more clearly related to the history of the various forms of the state, as formulated most influentially by Polybius in antiquity and reformulated above all by Machiavelli (in the *Discorsi*) and Rousseau in the modern age.[16] It is this general approach that still underlies the history of state and society as outlined in the second part of Rousseau's *Second Discourse*. In his Heidelberg lectures on the philosophy of right, Hegel interprets the various historical forms of the state, presented concretely in terms of historical "epochs" or "realms," as a development that leads from a "natural

form of the state" [*Naturstaat*] through to one that essentially embodies the "freedom of the will" (*RphW* §135; ET: 242ff.). "The patriarchal and oriental system, further the aristocratic and finally the democratic system mark the transition from a purely natural principle based on the intuition of the naturally divine to the principle of will, namely, the principle of the spiritually divine" (ibid.).[17] But "democracy" is not yet the ultimate *telos* – for with a further "reverse" movement we now pass from classical democracy through the feudalism of the "Germanic" world to the system of constitutional monarchy. And it is here that the "rationally divine" moment, the constitution based on the freedom of the will, and the "naturally divine" moment, the monarch who is elevated by birth above the conflicts of particular wills, are both united in an "organic" system (*RphW*, 194; ET: 243ff.). In the first phase of this development, "physical" and "spiritual" authority gradually drift apart – we pass from the "divine" race of heroes and theocratic kings to the "democratic" principle of the *polis* "where each individual beholds his freedom" (*RphW*, 194; ET: 243). But this "intuition" of freedom is still entirely "holistic" in character, and the individual finds his "identity" only in the *polis* and its ends: "Particularity of purposes does not enter into play in democracy here, but rather the state as a whole; to the extent that customs in a democracy cease to be virtuous, freedom is lost." Hegel here appeals, as he also does later in the *Philosophy of Right*, to the intrinsic connection between democracy and (patriotic) virtue as described by Montesquieu. The liberation of particularity, not merely of a greater consciousness and explicit pursuit of private ends and purposes, but also, and above all, of subjective reflection as the ultimate criterion of truth in fundamental questions of social and political life (in religion, morality, and philosophy) is the real "work" and achievement of the "modern" Christian-European epoch. Particularity can be liberated rationally and at the same time moderated within a legally organized social order only in the context of a certain kind of state. This state will involve the institutions of private property and civil law, a civil society and a structure of social estates, an organic division of powers and an independent monarch who will act and ultimately decide matters in the "spirit of the constitution."

What if such a constitution, once established in custom, has now become explicitly conscious of itself, has been codified by the "educated class" (*RphW*, 190; ET: 240), and has been realized effectively "by contractual means or by force" (ibid., 192; ET: 242)? How can one ever introduce any change to it if "the constitution as a whole" stands upon "an absolute foundation of immutability" (ibid., 191; ET: 241)?

According to Hegel's Heidelberg lectures, "single provisions" can be changed, but not "the whole that is gradually evolving." If the constitution is ultimately identical with the "spirit of the people," that is, with the customary forms of law and right and the consciousness of a politically united people concerning those forms, then "the people cannot suddenly change the whole consciousness of its spirit" (ibid.). Instead of this, Hegel speaks of the "rejuvenation of the constitution" and is obviously thinking, as in the *Philosophy of Right*, of a change "in accordance with the constitution" accomplished along the legislative path. But what is "eternal" in a constitution, and what can "age" here? What is still changeable in institutions that represent the "*telos*" of history? And what would the criteria for such changes be like?

II

In his 1817 essay *Proceedings of the Estates Assembly in the Kingdom of Wurtemberg*, Hegel mentions the "permanent regulators that must underlie any revision or extension of the already existing [constitutional] arrangements, if either should prove necessary" (*TW* 4: 492; ET: 271). These are the "General provisions relative to the constitution of the kingdom and the rights and duties of the King's subjects" (ibid. 491; ET: 270).[18] Referring directly to the constitution proposed by the King, Hegel cites the fundamental rights of equality before the law, of equal opportunity and access to government posts or official positions (though this is restricted to the three Christian denominations in the state), of proportionally equal contributions to public charges and taxes, of the freedom to emigrate, of freedom to choose one's own profession or occupation and the appropriate means of education or training for the latter (ibid.). He compares these fundamental rights with the "*droits de l'homme et du citoyen*" as proclaimed by the French Revolution and claims in this connection: "It is an infinitely more important step forward when intelligent thought has advanced to the knowledge of the simple bases of political institutions and learned how to express them in *simple* propositions like an *elementary catechism*" (ibid. 492; ET: 270).

Hegel's praise for this conception of fundamental rights, however, is not without reservations. In his view, it is crucial that such rights are not interpreted as traditionally handed down rights intrinsically prior to the state proper, rights agreed contractually between the traditional estates and the future head of state. For, according to Hegel, that implies that

private or civil law would constitute the foundation of the state, that all right and law would then become an object of constant negotiation of independent groups and interests, that the old system of feudal right and traditional privilege once more would be allowed to return. Hegel had fundamentally and steadfastly opposed this idea since his very earliest writings on social and political questions – above all, in the *Essay on the German Constitution* (1799–1802) – and appealed instead to the modern conception of rational law [*Vernunftrecht*]. It is not merely in the context of constitutional practice, but also with regard to the theory of law and the state as such, that Hegel rejects any separation between the specifically rational demand for fundamental rights and for an open domain of public law in general. For Hegel, the fundamental rights are therefore intrinsically and conceptually inseparable from the "executive powers of the universal will" of the state – here, too, we must recognize the relation of mutual implication and thus of reciprocal presupposition that characterizes Hegel's logic of reflection. As far as constitutional law is concerned, this means that the fundamental rights, as "organic determinations of the constitution," cannot be separated in principle from the "actual laws" that prevail, and that the former must be more precisely determined, concretized, and given "positive" form through the latter, and therefore through the legislative process itself (*TW* 4: 493; ET: 271f.).

It is quite impossible to argue that Hegel had abandoned this position by the time he published the *Philosophy of Right* in 1820. One should not allow oneself to be deceived in this respect either by his polemics against the populist and sentimental-religious political philosophy of Fries and Schleiermacher, as he interpreted it, or by the sharply "loyalist" tone of his language (something that was equally evident in the essay *Proceedings of the Estates Assembly*). In his vigorous polemic against von Haller's attempted restoration of the *lex naturalis*, which implied the justification of "natural" social and political hierarchies on the basis of the supposed will of God, Hegel was also defending what he called "national freedoms" or "the juridical and constitutional laws of nations" (*Rph* §258, footnote; ET: 280). For Hegel, these are based not on insignificant original claims or ancient documents, but rather on the living customs "that have had an effect on every garment the individual wears and every morsel of bread he eats, and whose effects are daily and hourly present in everything" (ibid.). But quite apart from their embeddedness in the everyday customary behavior to which Hegel – like Hume – accords such importance, the fundamental rights in question also find their systematic

place within the *Philosophy of Right*. They are to be found in the domain of "abstract right" (the freedom of personality, of property, and of contract), but also in the domain of "morality" (freedom of conscience) and "civil society" (freedom to pursue a self-chosen occupation and publicly accountable procedures in the "administration of law").[19] But are they still the "regulators" of the constitution and of legislation, and can the political institutions of the state still be "subsumed" under these fundamental principles (cf. *TW* 4: 493; ET: 271)?

In this section of my chapter and the following one I should like first to examine the extent to which Hegel's *Philosophy of Right* succeeds in giving concrete form to these fundamental rights or makes them the genuine foundation of the institutions presented in that text. Only then, in Section IV, will we be in a position to discuss the protection of such fundamental rights as possible counterrights against the state. It is not so much in the first regard (i.e., concretizing fundamental rights in the state), but much rather in the second that Hegel's *Philosophy of Right* undoubtedly reveals its deficiencies.

Hegel's conception of "abstract right" resolves the problem of understanding rights not as "external" but as essentially "internal" to the state while still recognizing their truly "fundamental" character. Hegel builds on Kant's method of treating civil law as an unconditionally valid form of rational law, but one that is regarded only "provisionally" in relation to a condition of public legislation, so that the establishment of such a condition itself remains a categorical imperative. But because of the way in which Hegel links civil and constitutional law, he goes further than Kant here. In Hegel's terminology, the legal right involved in property, personality, and contract is "abstract" in a twofold sense. In the first place, it is abstract because it is only "one-sided," merely one sector within a "holistic" overall system of rights, institutions, duties, and claims that go beyond those that strictly can be demanded and enforced (i.e., "ethical" duties and claims). It presupposes institutions for its own realization – not only through legal coercion, but also through economic and financial provision – and also can be limited by these institutions, above all by the state's own "capacity for action."

It is also "abstract" in another sense, because the universality, particularity, and singularity of the will are connected here only in an external and contingent fashion: a formally correct contract can frustrate both the "meaning" of right and the genuine claim of a free person. Without due consideration of the factors of intention and responsibility, of the immediate personal economic situation – the object of the "morality"

chapter[20] – and established concrete juridical practices ("customs"), but also without consideration of the judicial procedures, the competence of the judge (the "administration of justice"), and so on, civil law remains a system of regulations that can be applied unjustly and inappropriately.

On the basis of the "abstract" character of right in this sense, it is already obvious that the rights of the free person find their proper "realization" in the *Philosophy of Right* in its entirety. Hegel expressly wishes to distance himself from Kant's "abstract" notion of rational law precisely by incorporating the institutional – but also the economic – conditions of a stable and noncontingent realization of the rights of freedom into the very "meaning," or, in specifically Hegelian terms, into the "concept" of right. He claims therefore to derive the moral conditions (responsibility, conscience), the social conditions (family, occupation), and the economic conditions (welfare, security) immanently from the concept of right itself. As Hegel says in §8 of the Heidelberg lecture transcript: "Right expresses in general a relationship that is constituted through the freedom of the will and its realization[. . . .] The realization of freedom has necessary stages. And to study this process is the aim of our science" (*RphW*, 10; ET: 56).

To secure the economic and social conditions of right or of freedom in general is certainly the task of the political institutions and those of the Estates that make up "the constitution in the particular sense." To that extent, the elementary rights of the person remain "regulatory" for the constitution and express the purpose of the state itself. But as we already saw at the beginning, Hegel distinguishes the "political constitution" from this "constitution in the particular sense" and subordinates the latter to the former. But the fundamental rights we have discussed are obviously not the principles of the political constitution itself. With regard to what principles, then, would any potential revisions of the political constitution be carried out? Before attempting to answer this question, I should like to discuss the significance of social arrangements and "welfare" provisions within Hegel's *Philosophy of Right*.

III

The significance of securing the social and economic welfare in relation to the rights of citizens was certainly no new theme in Hegel's time. A general problem already widely discussed in the social and political philosophy of the eighteenth century was how the equality of all citizens before the

law and the strictly universal character of laws could be combined with the economic inequality of property-owners and the particular character of measures aimed at sharing and distributing social goods more fairly. Rousseau, above all, who elevated the "*volonté générale*" into the sole principle of right and subjected the laws as "acts" of this will to very strict formal, substantive, and procedural criteria of universality, discussed and examined this particular problem in some detail.[21] In his radical "critique of the modern age," as developed in the *Second Discourse*, Rousseau had already connected the classical theme of the rule of the wealthy with the social contract theory of the state. The social contract is "deceitful" insofar as it is the rich who profit from the legal protection of property, while the poor are harmed by this further sanction of what already has been unjustly acquired by others. Here contract, along with the legal rights associated with it, lead only to the concentration of power in the hands of the few, and finally of a tyrant who renounces the need for legal forms altogether.

In the "normative" theory presented in the *Social Contract*, Rousseau therefore expressly concluded that the distribution of property must already be "leveled out" before the establishment of the social contract. The harmony between the laws of freedom and the common interest – the "*volonté générale*" and the "*interêt commun*" – is possible only in a society that is not characterized by major differences in the ownership of property. In his *Sketch of a Constitution for Corsica*, Rousseau draws the appropriate economic consequences from this and recommends an autarchic society of small-holders and artisans that is as independent as possible from external trade. But the problem he fails to resolve concerns the legal and rightful establishment of such a society in the first place. Since laws must be strictly universal and binding on everyone in equal measure, economic redistribution *after* the social contract has been concluded is hardly feasible. A just situation in this respect therefore can obtain only in "societies with a leveled middle class" – or it is the task of the "*legislateur*," the architect of the constitution, the educator of the people, to ensure the appropriate distribution in the first place. But this cannot itself be achieved by legal or rightful means.

The German "Rousseauians" Kant and Fichte drew different conclusions from this dilemma. Kant regarded the "paternalism" of the "Ruler of the Land" as a form of despotism that was quite incompatible with the autonomy or at least the required "participation in legislation" of the citizens as "legal persons." In the first place, therefore, Kant dissolved the connection between right [*Recht*] and welfare [*Wohl*]. Right now is

concerned merely with equal freedom of action for all with respect to the possibility of acquiring and maintaining property. However, in his "General Remark" on constitutional law in *The Metaphysic of Morals* of 1796, Kant also made "redistribution" an object of legal right: "The universal will of the people has precisely united to form a society that should continue to maintain itself henceforth, and has to this end subjected itself to the executive power in order to maintain the members of this society who are incapable of maintaining their subsistence. In the name of the state, therefore, the government is justified in compelling those who do have this capacity to procure the means of subsistence for those who do not as far as the necessary conditions of nature are concerned" (AA VI: 326). For this purpose, Kant regarded "compulsory" contributions rather than public charitable organizations as the only legal form that is "appropriate to the right of the state" and one "from which no one who wishes to live can withdraw" (ibid.). I shall not discuss here whether or to what extent this physical maintenance of all citizens as the "purpose of the state" – over and beyond the establishment and maintenance of a public state of law – can be said to follow strictly from the principles of Kant's doctrine of right in general. But obviously, all Kant was ascribing to the state here is the task of securing a minimal level of existence to "the protected" within a law-governed community that, as is well known, does not include any voting rights to the citizens.

Fichte, on the other hand, connected the idea of right with the welfare of persons even more closely than Rousseau had done. For Fichte interpreted the right to property as a right to maintain oneself through the exercise of one's own labor. I shall not discuss here precisely how Fichte derives this thought from his concept of subjectivity in terms of spontaneous "self-positing." But it clearly follows from this concept of right that the law-governed community itself must guarantee to everyone the possibility of maintaining themselves through their own labor. This directly involves the state ownership of property with respect not only to the means of production, but also to the resulting products the marketing of which must be guaranteed through a planned and effectively realized system of exchange. Finally, a certain share in the results of excess production also "belongs" to the state, which the latter must use to ensure capacity for work generally or for maintaining those who cannot work through no fault of their own. "Absolute property," which stands at the free disposal of the citizens, is simply the remaining sum of products that have been exchanged for money with the state, together with the consumer goods thereby acquired (Fichte, SW III: 240). In his *Foundations of Natural Law*

of 1796–97 and his essay *The Closed Commercial State* of 1800, Fichte proceeded to "deduce" this "proto-socialist" conception of the state and the economy in all its detailed implications.

For his part, Hegel retains the connection between right and welfare as emphasized by Fichte and Rousseau. His own conception of "welfare" embraces not merely the "maintenance," but also the "happiness" (*Rph* §123) of the citizens as the "reflected" life plan of securing the maximum harmony with respect to the interests of the individual. Such a plan, and its attempted realization – the "pursuit of happiness" – is itself a rational form of a universalizable free will, is a "right" of the individual. Without this necessary connection between the will to right and what we could call the "will to welfare," the required acceptance of right in general is incompatible with the "total will" of the individual. Even when he is speaking of authentically political virtue, of loyalty to the state or "patriotism," Hegel declares that they depend on the settled consciousness of correspondence between the private pursuit of happiness and the existence of the state itself.

For Hegel, therefore, a whole series of social measures necessarily belongs to this right to welfare, but also to the claim to a noncontingent use of property rights. But Hegel does not support the Fichtean idea of a planned economy, because he believes that the development of personal abilities and the pursuit of the life plans of particular individuals is possible only in the context of the effectively private pursuit of interests, involving the free choice of profession or occupation and the private disposal over the means of production. The originally Christian, and subsequently the modern-bourgeois emancipation of private conscience, together with the private assessment and pursuit of what is "right for me personally" – what Hegel calls "the rights of particularity" – is not compatible with the state-planned and state-enforced correspondence of private and social self-maintenance through labor in the Fichtean sense. Hegel therefore regards the market of producers and products as a necessary element within a rational system of law. We must accept the attendant crises of consumption, the problem of overproduction and unemployment, and the process of "proletarianization." But Hegel also very clearly perceives the possibility already invoked by Rousseau in this connection, namely, the undermining of right through the formation and accentuation of class conflicts in society: those who no longer have anything further to lose will come to feel "indignation" instead of willingness to comply with the law – and those who can buy anything and everything for themselves will display only a corresponding arrogance.[22]

From this perspective, then, the significance of these institutions of social provision is clear: they are demanded by the concept of right itself, and thus are openly available to the individual as such, while at the same time securing the existence of the law-governed community of interests in general. For this purpose, Hegel develops a system of measures at the level of the family, of professional and occupational life, and of society as a whole (the "police" in Hegel's broad sense of the term), which are all intended to counter the crises involved in a market economy, to protect those affected by such crises while still preserving their own sense of maintaining themselves independently. For Hegel, such institutions even serve to replace on a higher plane – that of universally willed and actually effected measures not simply dependent on private dispositions – the moral duties of mutual benevolence, or, in Kantian terms, the duty of encouraging and supporting the "happiness of others." The solidarity of assistance that is not enforced by law but is essentially involved both in the family and in the "corporation" (the "second family" within civil society; *Rph* §252), as well as the state's "provision . . . for the protection and security of the mass of the populace in relation to particular purposes and interests" (§249), are supposed to unite considerations of right and welfare without recourse to a paternalistic conception of tutelary guardianship. But, of course, this also implies that there is no question here of claims that automatically can be demanded according to a judicial procedure. "Right" for Hegel does not necessarily mean a strictly enforceable claim on the part of the individual. Rather, he holds that there is a general claim for the state to implement appropriate "policies" with regard to trade, transport, communications, public health, conditions of labor, and so on, and the general administration of laws. But if the state can fulfill these claims only through its own "thoughtful policies," rather than through granting express rights in this respect, and if it must furthermore pursue other "higher" ends of state (namely, those of the "political constitution" in the strong sense), does this not imply that the person's rights to freedom and the social and political "realization" of these rights remain merely subordinate components of the constitution as a whole? My final considerations are concerned precisely with this question.

IV

The question of priority in this regard would seem to be resolved without ambiguity in §258 of the *Philosophy of Right*. Hegel claims that to make

"the security and the protection of property and of personal freedom" into the "ultimate purpose" of the state is to confuse and "conflate the state with civil society." The state for its part "has a quite different relationship to the individual; inasmuch as he is objective spirit, the individual himself possesses objectivity, truth, and ethical life only insofar as he is a member of the state. This unification [*Vereinigung*] as such is itself the true content and purpose, and it is the vocation [*Bestimmung*] of individuals to lead a universal life." One simply could translate this into terms drawn from the history of philosophy and Aristotle in particular: man as a rational being is essentially a political being and must therefore live in a community in which the rules have to be established and realized through shared deliberation, legislation, and decision (*krisis*). Or in terms drawn from Kant: as a being that is capable of exercising practical reason in the case of external conflicts necessarily arising from the shared occupation of a finite terrestrial space, man is unconditionally obligated to enter into a condition of public right and law. This would make it quite clear that Hegel is not just turning any or every kind of unity with the "state" into the final end and purpose of individual and social life. But why, then, does he emphasize, over against Kant and Rousseau, that "personal freedom" is not the ultimate purpose of the state and claim that the latter in its "substantial unity," possesses the "highest right over against the individuals"?

But this formulation, too, first must be read in its precise context. For the substantial unity referred to in the second sentence of §258 is actually described in the first as "*that* [emphasis added] of the substantial *will*" that the latter "possesses in the particular *self-consciousness* that has been raised to its universality." This unity of social institutions with the "proper" self-consciousness of individuals is the Idea of the state that is actualized, according to the following paragraph, in the constitution, in international law and in world history. And according to §257, three subjective and three objective moments belong intrinsically to this unity. Objectively speaking, in terms of "objective spirit," the state must be ethical, "transparent," and an expression of self-conscious will. That is to say, the state has to involve genuinely "functioning" social and juridical practices that must be properly transparent, that is, expressly codified and publicized. The state must also possess the appropriate organs for establishing and realizing shared rules and decisions, organs that should rest on "thought" (due counsel and consideration) and "knowledge" (professional expertise and knowledge of fundamental principles) rather than on essentially arbitrary decisions (in terms of oracles or "contingent" majorities). Subjectively speaking, regarded from the perspective of the

individual citizen, this unity equally must be a matter of living "custom" [*Sitte*], that is, a familiar form of life that regulates conduct and helps to avoid internal conflicts and that has effectively become like "flesh and blood" to the individuals involved. But it further must also be a matter of "self-consciousness," that is, something subjected to the critical reflection of each individual, and of "disposition," that is, something habitually based on shared insight and consensus. Hegel describes the habitual and largely unconscious preference for an expressly political rather than stateless form of life as that of "patriotic disposition." The latter consists precisely in the consciousness of the "ultimate purpose" of political life: "that the universal does not attain validity or fulfilment without the interest, cognition, and will of the particular, and that individuals do not live as private persons merely for these particular interests" (*Rph* §260). Hegel insists on his understanding of the classical concept of the "*politikon*" or of "*politeuein*."[23] In this view, a life led in the context of universal – and that means political – affairs, an active participation in the public "formation of the will," and a conscious contribution to the common welfare constitute the very "vocation" of man and serve to distinguish his properly "ethical" freedom from the literal "idiocy" of the purely private pursuit of particular interests. The autonomy of the individual presupposes that of an independent polity, and the "participation" of the mortal individual in an immortal and objective spirit is possible only in the context of a community of laws that itself persists through time. For Hegel, as for Rousseau, the *polis* itself thus comes to acquire the characteristic features of the "*civitas* dei."

Like Kant's idea of "the highest good," the "ultimate purpose" of the state in Hegel reveals two distinct moments that cannot, however, be separated from one another. The ultimate purpose in its complete form is simply the intrinsic connection between political unity and sovereignty, on the one hand, and the rights and universal interests of the citizens, on the other. But it is the first of these moments that takes priority here – and the rights of the citizens can be restricted temporarily for its sake.

But how far must the "Idea of the state" be realized in any actual existing state if the latter is to claim the "highest right" for itself in relation to the individual? Does this right belong, as Hobbes and many of his followers believed, to any structure of power that enforces the laws and overcomes the "private justice" of the "*status naturalis*," of potential or actual civil war? Or does it belong only to the state that essentially corresponds to that outlined in the *Philosophy of Right*? Hegel provides no precise and unambiguous answer to this question. And this presumably

is because history has already given us the answer: the contemporary European state, which has successfully emerged for Hegel through the process of world civilization itself, implicitly contains all the principal moments of the concept of the state as articulated in the *Philosophy of Right*. Certain "diseases," as when a partial power within the political community acquires a temporary independence of its own, must be acknowledged as a "worldly" possibility where the Idea of the state is inevitably connected with particular temporal, spatial, and historical – which is to say also contingent – conditions (cf. *Rph* §258 Addition). But how far can such restrictions on freedom go, how far and for how long may "personal freedoms" be suspended? Again Hegel provides us with no answer. We can certainly infer from the paragraph concerning the relationship between church and state (§270) that the state cannot be said to exist or to be "present" in the case of either theocracy or "despotism." For there we clearly lack "right, free customs, and organic development" – in effect a brief Hegelian formula for abstract right (of persons), self-chosen membership in particular social groups and forms of life, and a constitution with internally articulated powers.

The state to which – in particular circumstances – the rights and interests of individuals are subordinated is thus after all the same state the "purpose" of which is fundamentally constituted by the rights of the free person. But the state that serves *exclusively* for the protection of person and property remains, according to Hegel, entirely dependent on particular constellations of interests and thus, as in the case of Rousseau and Fichte, can be "terminated" by its members as a purely private contract.[24] In Hegel's view this ultimately leads back to the feudal form of the state. Hence the claim to the potential subordination of civil freedoms where the existence of the state is at issue (military service in the event of war) or in a state of general emergency remains essential. Hegel provides no indication of the appropriate limits here with respect to the inviolable and "essential core" of fundamental rights in this regard. Nor does he suggest any procedure for permanently securing such rights against potential abuse or violation on the part of the state. It is precisely here that the principal deficiency of Hegel's *Philosophy of Right* lies. Hegel's interpretation of the role of the Estates Assembly – "summoned at the behest of the monarch" – in the second chamber of the legislature is so limited that we cannot regard this as a remotely effective defense of fundamental rights.[25] Hegel showed no understanding whatsoever for the beginnings of the idea of a constitutional court – as in Fichte's projected "Ephorate," for example. As far as the "misuse of power on the part of the political authorities"

is concerned (*Rph* §295), Hegel clearly relies on the institutions of communal and professional self-government, the possibilities of appeal, the "legal constitution" (*Rph* §301), and the monarch (ibid.). This may well be appropriate for "everyday" cases of arbitrary procedures on the part of the authorities, but it is quite insufficient as far as institutional infringements of fundamental rights are concerned. Hegel does not develop the concept of the rights of personality from any perceived tension between personal right and the governing right of the state – from the thought, for example, that the protection of individual freedoms over against the state monopoly of power is part of the very "meaning" of human rights in general. Some of the typical rights to freedom that have emerged precisely from the experience of such conflict – the freedom of assembly or the protection accorded to personal and confidential correspondence, for example – either are not mentioned by Hegel at all or, as in the case of freedom of the press, are accepted only in a considerably restricted fashion (§318f.).[26] For Hegel's conception of a state in which individual rights constitute the purpose of the state and the individuals can take up the purposes of the state into their own will, this conflict remains a secondary issue. The protection of the individual in relation to the power of private persons and particular groups is essential, but protection in relation to the preponderant power of the state is not. It is here – along with his rejection of the supposedly "atomistic" model of electoral choice and political representation – that the decisive limits of Hegel's "liberal outlook" are most clearly revealed.

Notes

1. For the Anglophone debate in this respect, one should consult the still instructive collection of essays edited by Walter Kaufmann, *Hegel's Political Philosophy* (New York, 1970).
2. On Ilting's theory concerning the influence of official "censorship" on the *Philosophy of Right* (in the "Introduction" to vol. 1 of his edition of Hegel's lectures on political philosophy), cf. H.-C. Lucas and U. Rameil, "Furcht vor der Zensur? Zur Enstehungs- und Druckgeschichte von Hegels Grundlinien zur Philosophie des Rechts," in *Hegel-Studien* 15 (1980), pp. 63–93.
3. On Hegel's conception of the division of power, cf. Siep 1992, p. 240.
4. According to §140 of the *RphW* transcript, Hegel claimed: "The minister has to sign the sovereign's decision and is answerable for it" (*RphW*, 205; ET: *Hegel: Lectures on Natural Right and Political Science*, trans. J. M. Stewart and P. C. Hodgson (Berkeley, 1995), p. 256). Further in §156: "[. . .] the cabinet must essentially have the majority in an assembly, but the opposition

must necessarily be there as well" (*RphW*, 241; ET: 291). Hegel speaks of three necessary "parties" [*Parteien*]: the people, the government, and the aristocracy (ibid.). This clearly corresponds to the two chambers and the government itself (*RphW* 232; ET: 282). We find a very similar conception in Hegel's 1817 essay on the Wurtemberg Estates Assembly (*TW* IV: 476; ET: "Proceedings of the Estates Assembly in the Kingdom of Wurtemberg 1815–1816," in *Hegel's Political Writings*, trans. T. M. Knox (Oxford, 1964), p. 258). Except for the significance of the opposition, §313 of the *Philosophy of Right* also presents the relationship between the chambers and the government in a similar way (with the aristocracy as the arbitrator or "mediating moment"). And likewise according to the Heidelberg transcript, electoral rights belong to "local communities" and "associations" rather than to "individuals" (*RphW* §153, 234; ET: 285).

5. In this connection I cannot discuss the precise historical place that Hegel's thought occupies in European constitutional history or the "ultimate" systematic and philosophical grounding of his position in his philosophy of spirit and logical ontology. For the historical issues, cf. Lucas and Pöggeler (1986) and for the conceptual foundations, cf. Henrich and Horstmann (1982) and Jermann (1987).
6. For these texts in particular, cf. G. W. F. Hegel, *Politische Schriften*, afterword by J. Habermas (Frankfurt, 1966). The "Afterword" is translated under the title "On Hegel's Political Writings" in J. Habermas, *Theory and Practice*, trans. J. Viertel (London, 1974), ch. 5. For Hegel's concept of the constitution, cf. Grawert (1986) and Siep (1992), p. 275ff.
7. Cf. the way in which Rousseau draws a parallel between the various powers of the state and the brain, the nerves, and the circulation of the blood in the context of "political economy" (J. J. Rousseau 1989, vol. 1, p. 339). Hegel provides a precise "system-theoretical" interpretation of the same analogy in the context of his philosophy of nature (cf. Siep 1992, p. 259ff.).
8. For Hegel's concept of the constitution during his Jena period, cf. Kimmerle (1970).
9. On this issue, cf. Lucas and Pöggeler (1986, p. 200ff.).
10. In the Heidelberg transcript, Hegel treats the imposition of a constitution by Louis XVIII in 1814 as a successful conclusion to the previously "deficient" attempts at constitutional reform (*RphW*, 190; ET: 240f.). On this, cf. the contributions by G. Planty-Bonjour, J. D'Hondt, and E. Fleischmann in Lucas and Pöggeler (1986).
11. The concept of "presupposition" here also has the specific meaning that is developed in Hegel's "logic of essence": "posited" right, as rational right, implies its own already "presupposed" validity. It is not created but "discovered" (*WL* II, 15ff.).
12. In §273 of the *Philosophy of Right*, Hegel criticizes the Fichtean idea of an "Ephorate" that, according to Fichte's 1796 *Doctrine of Natural Law* (Part I) may indict and dismiss the government for violation of the law or the constitution. For Fichte, the final judgment in such a "conflict of organizations" within the state lies with the entire people or the "community": "What

the community decides is what becomes constitutional law" (Fichte, SW III: 173). On the other hand, Fichte tells us that changing the constitution requires "absolute unanimity" (III: 184). On this issue, cf. Baule (1989), p. 86.

13. On this, cf. Grawert (1986, p. 273f.).
14. As Hegel's brief outline of the philosophy of history at the end of the *Philosophy of Right* shows, the epochal developments of the spirits of the peoples (in terms of the "oriental," the Greek, the Roman, and the "Germanic," i.e., Christian-European, epochs) cannot be identified with those of "nations" in the modern sense of the word.
15. On this, cf. Ottmann (1982, p. 390), Wolff (1984), and Siep (1992, p. 263ff.).
16. Cf. Kersting (1988, p. 68).
17. Hegel's explicit emphasis on the "spiritually divine" or "rationally divine" element here at the expense of the "naturally divine" obviously reflects his direct critique of A. von Haller. On this, cf. Jaeschke (1986, p. 231).
18. On the following, cf. Dreier (1986, p. 67) and Lübbe-Wolff (1986). In what follows I have corrected my own earlier assessment (Siep 1982, p. 272ff.). For Hegel's essay on the Würtemberg Estates Assembly, cf. Jamme (1986).
19. Cf. Lübbe-Wolff (1986, p. 443) and H. Siedler (1989, p. 89ff.).
20. Cf. Hegel's justification of what he calls "the right of necessity" – "not as a favor but as a right" – in §127 of the part on "Intention and Welfare" in the *Philosophy of Right*.
21. In this part of the discussion I refer principally to the following works of Rousseau: *Discourse on Inequality*, *The Social Contract*, and the *Sketch of a Constitution for Corsica*.
22. Cf. *Rph* §241 and §244. The emergence of such a disaffected "rabble mentality" [*Gesinnung der Pöbelhaftigkeit*] and the entire socioeconomic problem associated with it is discussed more fully in another surviving transcript of Hegel's lectures: *Hegel: Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, ed. Dieter Henrich (Frankfurt am Main, 1983), p. 193ff. and 196 in particular.
23. Cf. Hegel's Jena essay *Über die wissenschaflichen Behandlungarten des Naturrechts* (*TW* II: 489) where the idea of "living in and with and for one's people, leading a universal life wholly devoted to the public interest" is still reserved, in a characteristically Platonic fashion, to "the estate of the courageous" and to that of the philosophers (ET: Hegel, *Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law*, trans. T. M. Knox (Philadelphia, 1975), p. 100).
24. For both thinkers this naturally would result in exclusion from membership in the existing community of the state – but Hegel himself also argues for the right to emigrate.
25. Cf. *Rph* §§301–13. In addition to the numerous restrictions concerning the summoning of the chambers, legislative initiatives, and the qualifications required of potential deputies, §313 demands the agreement to all resolutions by the chamber of the landed aristocracy. For a different assessment, cf. Lübbe-Wolff (1986, p. 446): through the Estates Assembly the second

estate is itself "placed in a position to oversee the realization and the protection of its freedoms."

26. R. Dreier claims that "Hegel's theory of morality occupies the place in his system where a theory of fundamental rights of the *status negativus* must be sought" (1981, p. 325). He rightly draws attention here to the positive "sublation" of morality within "ethical life." This also involves the right to pursue one's own "welfare" and the free exercise of personal conscience, which is protected from any direct "coercion" but not from the possibility of legal punishment.