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# Hegel's *Antigone*: The Birth of the Constitution from the Spirit of Tragedy

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**Abstract:** Sophocles' *Antigone* has been studied intensely for more than two thousand years, but it was especially Hegel's allegorical use of this tragedy in several of his works (first and foremost the *Phenomenology of Spirit*) that added yet another fascinating facet to its possible reading: the birth of the legal order and therewith a constitutional system from the conflict between two normative orders. In this contribution, I interpret the dialectic structure of *Antigone* in a manner in which each normative position – both *Antigone's* and *Creon's* – are equally justified and thereby antithetic in the ethical world of the Greek polis. It is therefore only by transcending this tragic conflict between the human and the divine orders that we can transform necessary externalities ('fate') into a process of a legal status which eventually allows individuals to become the authors of the law itself and thus to guarantee their freedom. I denote this reading of Hegel's *Antigone* as 'symmetrical', since it accepts both positions – *Antigone's* divine law and *Creon's* human law – as equal and makes freedom and justice only possible through the law. This means that an 'asymmetrical' reading, giving prevalence to either position (for instance, found in Goethe or Habermas) and localizing freedom and justice beyond the law, can never effectively result in a legal status that would allow individual persons to become legal persons. My principal argument consequently is that only a symmetrical view of this normative conflict can justifiably be regarded as making a constitutional order possible in the first place. It is feasible only in a dynamic-genealogical fashion (ie, by constantly generating this order through conflict and the transcending of this conflict through mutual recognition) that concurrently also respects individuals as particular individuals, not just as formal equals among equals, by allowing them to realize their personalities and to find themselves through the arts, science, and philosophy. This is more than a merely formal or negative constitution which recognizes every person as equal and free, but disregards their particularities; this is a material and positive constitution that can guarantee both equality and self-actualization. Such a constitutional order guarantees an identity of universal laws and individuality, and accordingly

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offers individuals a solution to the conflicting ethical orders of the ancient polis in which they would otherwise remain trapped.

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## 1 Hegel's Symmetry

For more than two thousand years, Sophocles' tragedy *Antigone* has not only been discussed philologically, but also equally intensively at the triple intersection of literature, law and philosophy – which is probably due to the range of themes it contains, first and foremost the conflict between two normative orders and the aporia of law and justice.<sup>1</sup> Hegel's philosophical reading of tragedy and his influence on its further scholarly treatment is often cited as comparable to Aristotle's engagement with it;<sup>2</sup> although it needs to be added that Hegel enriches this discussion – especially with and through *Antigone* – by the very aspect that will also be the focus of this paper: the role of law and its birth in the form of a hypothetical first positive-legal constitution from the tragic conflict between two normative orders.

Hegel was fascinated by the tragedy of *Antigone* throughout his life, having already translated the text as a student,<sup>3</sup> praising it in his later *Lectures on Aesthetics* as the 'most magnificent and satisfying work of art of this kind',<sup>4</sup> and admiring the character of Antigone herself as 'that noblest of figures that ever appeared on Earth'.<sup>5</sup> Captivated by this conflict within the ethical substance, Antigone also appears, among others, in his *Lectures on the Philosophy of Religion*<sup>6</sup> and the *Elements of the Philosophy of Right*<sup>7</sup> as the tragic heroine torn between inevitably colliding norms. Hegel's most detailed examination of this tragedy and

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1 See especially Richard A Posner, *Law & Literature* (3rd edn, Harvard University Press 2009) xi; David A Reidy, 'Antigone, Hegel & the Law: An Essay' (1995) 19 *Legal Studies Forum* 239, 239.

2 See eg, Julian Young, *The Philosophy of Tragedy* (Cambridge University Press 2013) 110; Walter Kaufmann, *Tragedy and Philosophy* (Princeton University Press 1968) 200.

3 See Klaus Vieweg, *Hegel: Der Philosoph der Freiheit* (CH Beck 2019) 44 and 51; Jürgen Kaube, *Hegels Welt* (Rowohlt 2020) 78.

4 Sir Thomas Malcolm Knox (ed and tr), *Hegel's Aesthetics. Lectures on Fine Art, Vol II* (Oxford University Press 1975) 1218.

5 G W F Hegel, *Lectures on the History of Philosophy. Greek Philosophy to Plato. Vol 1* (E S Haldane tr, University of Nebraska Press 1995) 441.

6 G W F Hegel, *Lectures on the Philosophy of Religion. One-Volume Edition: The Lectures of 1827* (Peter C Hodgson ed, Oxford University Press 2006) 353–354.

7 G W F Hegel, *Elements of the Philosophy of Right* (Allen W Wood ed, Cambridge University Press 1991) § 166.

the reconciliation of the conflicts raging in it by the eventual establishment the legal status – or the beginning of a constitutional order – can nonetheless be found in the sections on the ethical order (*Sittlichkeit*) in his *Phenomenology of Spirit*. And since these very sections provide the structure that most legal philosophers follow in interpreting Hegel's thoughts on normative conflicts and the bringing about of a constitutional legal order,<sup>8</sup> I also follow this line of reasoning here in this paper – and with good reason, I think, as it offers a clear elucidation of the development and progress from the initial ethical order over its inherent conflicts to the birth of the legal order.

Interestingly, Hegel explicitly mentions *Antigone* only twice in these sections,<sup>9</sup> which raises the suspicion as to whether Hegel is even claiming to provide an interpretation of this ancient tragedy.<sup>10</sup> In fact, he is not at all concerned with a literary interpretation of the text, nor with a philosophical narrative or reconstruction of historical or mythological events. Rather, the recourse to *Antigone* as well as to other literary or historical examples in other chapters of the *Phenomenology of Spirit*<sup>11</sup> serves to illustrate how Hegel analyses concepts and how he conceives of the development of epistemic conceptions within the social-normative framework of human communities, namely through certain types and forms of practices.<sup>12</sup> In this vein, Hegel's *Antigone* is an allegory of the ancient *polis*, and of the demise of its ethical order and the subsequent transition to a legal status.<sup>13</sup>

The fact that Hegel does not offer a literary interpretation of *Antigone* has often been misunderstood, sometimes even to the extent that he was accused of deliberately distorting the text.<sup>14</sup> Yet for him, the sequence of the text stands for that dialectical structure in which every normative standpoint – both Antigone's and Creon's – is equal in the ethical order of the Greek *polis*, and thus antinomic. Only by overcoming this tragic conflict can we transform an ever-looming and inevitable external fate into a process leading to a legal status, which, through the autonomy

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**8** See Reidy (n 1) 239.

**9** G W F Hegel, *Hegel's Phenomenology of Spirit* (A V Miller ed and tr, Oxford University Press 1977) §§ 437 and 470.

**10** See, eg, the same arguments by Martin Donougho, 'The Woman in White: On the Reception of Hegel's *Antigone*' (1989) 21 *The Owl of Minerva* 65, 78; Georg W Bertram, *Hegels 'Phänomenologie des Geistes'. Ein systematischer Kommentar* (Reclam 2017) 177–178.

**11** For example, Hegel, *Phenomenology of Spirit* (n 9) § 320 (Lavater's Physiognomics), §§ 333 and 737 (Shakespeare's *Hamlet*), § 360 (Goethe's *Faust*), §§ 318 and 489 (Diderot's *Rameau's Nephew*) and § 808 (Schiller's *Friendship*).

**12** Bertram (n 10) 164–165; Kaube (n 3) 172.

**13** See Robert B Brandom, *A Spirit of Trust: A Reading of Hegel's Phenomenology* (Harvard University Press 2019) 477.

**14** See eg, Kaufmann (n 2) 200–203, who rejects these arguments by Hegel's opponents.

of individuals as legally recognized persons, enables them to become authors of the law and thereby secures their freedom.<sup>15</sup> I denote this particular reading of Hegel, which I would like to defend here as a contribution to this timeless topic, as symmetrical because it permits both positions – Antigone’s divine law and Creon’s law of the State – to exist as equal, and thereby makes possible autonomy, freedom, and justice through the law. My argument is that Hegel’s symmetrical view thus stands as the guarantor of the legal status, whereas the asymmetrical view, which is often raised against Hegel’s line of reasoning, puts the emphasis on either Antigone’s or Creon’s position by arguing for autonomy, freedom, and justice beyond the law. As I will demonstrate in this paper, this latter interpretation cannot live up to this claim and ultimately fails to deliver a legal status and a constitutional order. My essay is accordingly best seen as a critical examination of both readings, but with a clear preference for the symmetrical interpretation of Hegel, whilst an asymmetrical imbalance was most certainly not intended by him.

## 2 The Torn Ethical Order

The chapters examining the ethical order introduce the central part on spirit (*Geist*) in Hegel’s *Phenomenology of Spirit* and present a conception of knowledge that is constituted by the relevant practices established and exercised within a given community. In these chapters, Hegel uses the allegory of the ancient Greek *polis* in general and of *Antigone* in particular to paint a picture of a group of actors that break away from the concept of an impersonal and rigid reason and approach more dynamic, reflexive social practices, the so-called spirit.<sup>16</sup> He calls this knowledge congregated within and available to all individuals of the *polis* ‘the ethical life of a nation’<sup>17</sup> and the essence of the spirit the ‘ethical substance’.<sup>18</sup> This spirit then becomes active in the *polis*, passes through various normative conflicts, and ultimately rises to a higher level of knowledge by reconciling the tensions caused by these conflicts.<sup>19</sup> Let us now take a closer look at this ethical substance in order to better understand the emergence of the legal status through the development of knowledge.

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<sup>15</sup> Christoph Menke, *Tragödie im Sittlichen: Gerechtigkeit und Freiheit nach Hegel* (Suhrkamp 1996) 229.

<sup>16</sup> See Terry Pinkard, *Hegel’s Phenomenology: The Sociality of Reason* (Cambridge University Press 2008) 135.

<sup>17</sup> Hegel, *Phenomenology of Spirit* (n 9) § 441 (emphasis omitted).

<sup>18</sup> *Ibid.*, § 439.

<sup>19</sup> Hegel, *Elements of the Philosophy of Right* (n 7) § 343.

## 2.1 The Ethical Substance: Antithetical Reciprocities

Hegel considers substance, in the same way as Aristotle,<sup>20</sup> as the foundational or underlying entity of reality, but in this case as the reality of norms produced within the framework of a communal practice, or the unity of thinking and being by which all participants in this practice are bound as a community. More concretely, any action by an individual is shaped by the norms that society has created *in toto*, and the underlying substance is the reality of norms created by this action.<sup>21</sup> The ancient Greeks defined themselves as a people through this collectively established and collectively shared ethical substance, which we should therefore by no means misread as modern individualistic, yet somehow shared morality,<sup>22</sup> but rather regard as a communal ethos. '[T]he absolute ethical totality is nothing other than a people',<sup>23</sup> Hegel writes in an early essay on natural law, and thereby directly opposes Kant and Fichte<sup>24</sup> and their rigid opposition of law and individuality in surgically dividing the ethical order into law and morality.<sup>25</sup>

Hegel's ethical substance is also characterized by an inherent split of antithetical and concurrently reciprocal normative forces, but of a different kind, namely by the human law on the one hand and the divine law on the other.<sup>26</sup> And we find the contradictions of these two distinct types of laws vividly illustrated in *Antigone*: the human law is exemplified by Creon's decree to leave the body of Polyneices, Antigone's brother, unburied, since he had previously attacked the city of Thebes and was thus to be branded as a traitor;<sup>27</sup> the divine law, conversely, eternal and unwritten, commands Antigone to bury her brother as a family

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20 See Aristotle, 'Metaphysics' in Jonathan Barnes (ed and tr), *The Complete Works of Aristotle, Vol 2* (Oxford University Press 1984) 1029a ff.

21 Hegel, *Phenomenology of Spirit* (n 9) § 350. See also Bertram (n 10) 167.

22 See Pinkard (n 16) 138; Young (n 2) 111.

23 G W F Hegel, *Collected Works, Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law* (T M Knox tr, University of Pennsylvania Press 1975) 92 [449] (emphasis omitted).

24 See eg, Immanuel Kant, 'Metaphysics of Morals' in Mary J Gregor (ed and tr), *Immanuel Kant: Practical Philosophy* (Cambridge University Press 1996) AA 6:218-221; Johann Gottlieb Fichte, *Foundations of Natural Right* (Frederick Neuhouser ed, Cambridge University Press 2000) 10.

25 See Peter Szondi, *Versuch über das Tragische* (Insel-Verlag 1961) 20; Elisabeth Weisser-Lohmann, 'Gestalten nicht des Bewußtseins, sondern einer Welt – Überlegungen zum Geist-Kapitel der *Phänomenologie des Geistes*' in Dietmar Köhler and Otto Pöggeler (eds), *G W F Hegel: Phänomenologie des Geistes* (2nd edn, Akademie-Verlag 2006) 197.

26 See Hegel, *Phenomenology of Spirit* (n 9) §§ 446 et seq.

27 Sophocles, *Antigone* (Mark Griffith ed; Cambridge University Press 1999) verses 20–39 and 193–213.

member.<sup>28</sup> In his later *Lectures on Aesthetics*, however, Hegel will also consider Creon's command as giving effect to the divine law, because the Theban ruler thereby honours Zeus, another Olympic deity, as the personification of State power,<sup>29</sup> 'the political God' who was able 'to check the power of time [...] by creating a conscious ethical institution, ie by producing the state'.<sup>30</sup> What is particularly noteworthy at this point is that all of these norms (including Creon's decree) are unwritten in nature, which results in a considerable uncertainty as to how they are to be understood and applied.<sup>31</sup> At the same time, they are flexible, malleable, and developable, and represent relatively unconsolidated universal ethical values personified by the various gods of the Greek pantheon.<sup>32</sup> As Hegel himself has Antigone paraphrase, all these norms honouring a deity 'are not of yesterday, nor of today; no, they live eternally, and no one could say whence they came.'<sup>33</sup>

I will discuss this symmetrical interpretation in more detail below. For the time being, it is more important to note that we are dealing here with a collision of two normative orders: Antigone represents the divine law directly, while Creon represents it only indirectly, because he only gives effect to it through the human law.<sup>34</sup> Yet this collision not only means that it becomes impossible to apply both norms simultaneously in this concrete situation (ie, the divine command to bury your brother and the human command not to bury your brother), but it goes much deeper, because this collision is conceptually inherent in both normative orders in the shape of the principles of individuality and universality, through which norms can be realized and applied within a given community.<sup>35</sup>

By individuality, Hegel means a normative order tied to a particular historically contingent community; and therein, the spirit manifests itself as actual substance in a people and is, 'as actual consciousness, [...] the citizens of that nation'.<sup>36</sup> More specifically then, certain customs and traditions have a guiding function in that nation, since individuals are conscious of them and implement them on a daily basis.<sup>37</sup> This is, first and foremost, exemplified by the human law,

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28 Ibid, verses 69–77 and 450–459.

29 Knox, *Hegel's Aesthetics* (n 4) 1213; Sophocles (n 27) verses 184–188 and 353.

30 G W F Hegel, *Lectures on the Philosophy of World History. Introduction: Reason in History* (H B Nisbet tr, Cambridge University Press 1975) 145.

31 Young (n 2) 112.

32 See Knox, *Hegel's Aesthetics* (n 4) 302.

33 Hegel, *Lectures on the Philosophy of World History* (n 30) 94. See also Hegel, *Lectures on the History of Philosophy* (n 5) 386.

34 See also Pinkard (n 16) 138.

35 Hegel, *Phenomenology of Spirit* (n 9) § 446.

36 Ibid, § 447 (emphasis omitted).

37 Bertram (n 10) 168.

which, ‘in the form of universality [...] is the known law, and the prevailing custom’,<sup>38</sup> and encompasses a variety of individual legal provisions, but that stops short of being able to count as positive law in the contemporary sense yet.<sup>39</sup> In this scenario, norms can never be truly universal, for the norms of this specific human legal order only apply to those individuals who actually and contingently live in the community in question. The universality of the human law is therefore exactly delimited by the fact that some individuals do belong to a community and others do not.<sup>40</sup> Hegel contrasts the human law with the divine law ‘as actual universality’,<sup>41</sup> which applies to all individuals without the limitations just mentioned. This law primarily materializes in the family as a natural ethical consciousness that transcends historically contingent communities, because it is to be found exactly where families exist – that is, everywhere in the world. Accordingly, it is to be considered eternal and cannot be questioned or even challenged by human beings.<sup>42</sup>

Despite their antithetical characteristics, the human and divine law ultimately arise together and are mutually dependent as two sides of the same ethical substance. The duty to bury family members, as part of the divine law, depends on human law for its effective applicability, since without the latter, it remains ineffective and unimplemented; the human law, in turn, depends on the divine law and the family as the smallest common nucleus of any community, against which the State cannot effectively exist nor endure.<sup>43</sup>

## 2.2 The Tragedy of Individuality and the Possibility of Recognition

These intertwined antitheses cannot exist without contradictions – especially if we look again at the principles of universality and individuality,<sup>44</sup> whereby this

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38 Hegel, *Phenomenology of Spirit* (n 9) § 448 (emphasis omitted).

39 Reidy (n 1) 243.

40 Bertram (n 10) 169.

41 Hegel, *Phenomenology of Spirit* (n 9) § 449.

42 See *ibid.*, §§ 450–451. Socrates’ critical question of whether the sacred is loved by the gods because it is sacred, or whether it is sacred because it is loved by the gods in Plato, *Euthyphro* (John M Cooper ed, Hackett Publishing 1997) 6e-10a, thus arguably represents a more critical engagement with the divine law after the end of the archaic mythological age of Greece.

43 See Reidy (n 1) 243–44; Pinkard (n 16) 141; Paul Cobben, *Das Gesetz der multikulturellen Gesellschaft: Eine Aktualisierung von Hegels ‘Grundlinien der Philosophie des Rechts’* (Königshausen & Neumann 2002) 84.

44 See also Patrica J Mills, ‘Hegel’s Antigone’ (1986) 17 *The Owl of Minerva* 131–152.

dialectic slowly transforms into tragedy. The human law as a principle of universality (ie, applying universally to all those within its jurisdiction) turns out to be that of a problematic individuality, since it offers individuals no space to realize themselves within this normative order. Individuals are thus integrated into the normative contexts of a historically contingent community only insofar as they subordinate themselves to these contexts in their unyielding universality.<sup>45</sup> Hegel describes this ethical power of the State as ‘a force actively opposed to individual being-for-self’.<sup>46</sup> The divine law, conversely, as a principle of individuality, is problematic in terms of universality, because it does not allow for specific historically contingent particularities and regards individuals as belonging to the normative contexts of the family simply by virtue of their natural role (as being a daughter, son, mother, father, etc). The universal character of the divine law thus becomes a law of unrestricted individuality,<sup>47</sup> for – according to Hegel – ‘[t]he positive end peculiar to the family is the individual as such’.<sup>48</sup>

These two different normative orders or laws have nevertheless two things in common. First, the human and divine law are both characterized by universality and individuality: the human law claims universal application to all individuals, but can only achieve this contingently in individual *poleis*; the divine law, on the other hand, focuses on the single individual, but claims unconditional validity for all individuals in all *poleis*. And second, it is extremely problematic that both orders refuse to provide individuals sufficient space for personal development and recognition within the community.<sup>49</sup> As soon as each individual develops his or her ethical consciousness, he or she then identifies with either the human or divine law, at which, according to Hegel, this consciousness is formed along the dividing line of the sexes: the man maintains the State, either as a soldier or politician, and subordinates himself to the human law; the woman devotes herself to religion and the family, thus giving effect to the divine law.<sup>50</sup> The human law, however, recognizes individuals only when they comply with its norms. If they behave accordingly, they deserve recognition, although this can only ever be a conditional recognition, since it presupposes compliance with the norm. It can therefore never reach that unrestricted and unreserved level of universality that is inherent in the

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45 Bertram (n 10) 171.

46 Hegel, *Phenomenology of Spirit* (n 9) § 449.

47 Bertram (n 10) 171.

48 Hegel, *Phenomenology of Spirit* (n 9) § 450 (emphasis omitted).

49 See in particular Hegel, *Elements of the Philosophy of Right* (n 7) §§ 124, 138, 185, 260–261, and 299.

50 Hegel, *Phenomenology of Spirit* (n 9) §§ 367 et seq and 452–460; Hegel, *Elements of the Philosophy of Right* (n 7) § 166. See also Reidy (n 1) 244–245.



concept of recognition.<sup>51</sup> The divine law, in contrast, focuses on the relationship between living individuals and their dead ancestors who deserve unconditional recognition and thus must be buried in any case – regardless of how they shaped their lives as now ‘unreal impotent shadow[s]’,<sup>52</sup> ie, regardless of the flaws or virtues they may have had during their life-times. But even in this scenario, the actions of one individual remain unreflected in the other, as all actual achievements, but also misdeeds, remain meaningless for the individual status of the ancestor, which, after all exists only as a minimal condition *qua* the natural-biological property of family membership. Under such normative conditions, no individual can ever excel within the community, realize self-awareness, and be recognized as an individual, for these contradictions, inherent in the ethical substance, constantly prevent the full and proper realization of recognition.<sup>53</sup>

For Hegel, recognition represents an essential conflict-solving factor in the social world; especially since it is only through the mutual interaction of two or more actors, one’s own recognition in the other, and the final mutual acceptance of the independence and freedom of the other that each individual can develop self-awareness within the community and thus potentially resolve collisions – including those between two normative orders.<sup>54</sup> This does not automatically mark the start of a tragedy, since although individuals are not recognized as such in the *polis* and this non-recognition may result in a conflict, this need not happen necessarily. As long as the ethical substance is a ‘peaceful equilibrium of all the parts’,<sup>55</sup> ‘a world unsullied by any internal dissension’,<sup>56</sup> conflict does not need to break out openly. Hegel locates this ethical harmony in the community of the Greek *polis*, which – without its inhabitants being aware of it – is exactly divided into two normative systems that recognize each other symmetrically:<sup>57</sup> the *polis* itself and the family; the human and the divine law; man and woman; husband and wife. Yet the symmetrically and mutually recognizing entities in question are not the individuals, but the *polis* on the one hand and the family on the other. Contradictions and tensions within the ethical substance do not become apparent as long as these

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51 Bertram (n 10) 172–173.

52 Hegel, *Phenomenology of Spirit* (n 9) § 451.

53 Pinkard (n 16) 141–142; Bertram (n 10) 173–174.

54 Hegel, *Phenomenology of Spirit* (n 9) §§ 178–185. See also Martin Sticker, ‘Hegel’s Critique of the Philosophy of Recognition’ (2015) 49 *Hegel-Studien* 89, 91–93.

55 Hegel, *Phenomenology of Spirit* (n 9) § 462.

56 *Ibid.*, § 463.

57 On symmetry as an ideal and recognition as a critical principle of practical and social philosophy, see Axel Honneth, *Kampf um Anerkennung: Zur moralischen Grammatik sozialer Konflikte* (Suhrkamp 2003) 64–65.

two systems coexist peacefully and individuals do not try to enter and subsequently disturb the sphere of the respective other normative system.<sup>58</sup>

Hegel is often wrongly accused of trying to defend the balanced pre-conflictual ethical substance as the ideal of a harmonious State against more modern (ie republican-democratic) societies.<sup>59</sup> But there are two crucial exonerating counter-arguments against this accusation: first, Hegel does not deny other pre-modern societies that lack such symmetrical recognition as in the Greek *polis* their Statehood;<sup>60</sup> and second – and even though Hegel follows, from a contemporary perspective, an extremely problematic sex-based allocation of roles within the community, assigning women the private sphere (family and religion), thus completely excluding them from the public sphere (politics) reserved for men<sup>61</sup> – he nevertheless considers the natural order of the sexes and the ethical order based on it as a deficit. He argues that the ethical substance collapses because of these premises based on an allegedly natural order of the sexes<sup>62</sup> as soon as an exceptional character like Antigone enters the stage and demands recognition as an individual. Without this failing of the already divided ethical *polis* and the start of an open conflict, the formation of the modern constitutional State and the realization of the legal status would be impossible. After all, only a tragic conflict and its eventual resolution bring about harmony<sup>63</sup> by giving birth to a constitution.

### 2.3 Conflict Ensues: *Hamartía* in Antigone and Creon

Hegel discusses Sophocles' *Antigone* as an illustrative example of how this ethical order of the *polis* eventually ruptures, and describes this event as 'tragedy within the ethical'<sup>64</sup> (*Tragödie im Sittlichen*), in which the identification of a nation with its

<sup>58</sup> See Brandom (n 13) 479–480; Sticker (n 54) 95.

<sup>59</sup> See, for example, Jean Hyppolite, *Genesis and Structure of Hegel's Phenomenology of Spirit* (Northwestern University Press 1975) 331; Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge University Press 1976). For an overview of the scholarly debate on this matter, see Armin von Bogdandy, 'Hegel and the Nation-State' (1991) 30 *Der Staat* 513, 514–515. Hegel was often accused of condoning the post-Napoleonic restoration in Europe particularly because of his often misunderstood dictum 'what is rational is actual; and what is actual is rational' in his *Elements of the Philosophy of Right* (n 7) 20 (preface).

<sup>60</sup> Hegel, *Elements of the Philosophy of Right* (n 7) § 355, discussing 'The Oriental Empire'.

<sup>61</sup> See *ibid.*, §§ 164–166; Kaube (n 3) 340–344; Tina Chanter, 'Does Antigone Stand or Fall in Relation to Hegel's Master-Slave Dialectic? A Response to Derrida's *Glas*' (2016) 39 *Paragraph* 202–219.

<sup>62</sup> Bertram (n 10) 176.

<sup>63</sup> See Knox, *Hegel's Aesthetics* (n 4) 1217.

<sup>64</sup> Hegel, *Natural Law* (n 23) 104 (459).

ethical order comes to an end.<sup>65</sup> Again, I should emphasize that he thereby offers neither a philological interpretation nor a historical reconstruction of this ancient tragedy in philosophical guise. Hegel does not mean to say that Thebes had to fall; his concern is rather to demonstrate that the antithetical powers within the ethical order of the ancient Greek *polis* emerge overtly as soon as one individual acts in a way that affirms and reinforces one of the two normative orders actively and in opposition to the other. Every such affirmation inevitably violates the other order, results in a tragic element, and destroys – voluntarily or involuntarily – the ethical order by which the acting individual is bound.<sup>66</sup>

The fissuring of the ethical substance, already perforated at the breaking point of its inherent antitheses, then takes place through the interaction between Antigone and Creon who both embody their respective normative orders: the burial of family members, prescribed by divine law in Antigone; and the punishment of traitors, that is, the prohibition to bury them, commanded by human law, in Creon. In this respect, they represent not only a violation of the other's normative order, but also different normative sources, with both individuals owing duties to their own normative order as well as to the other.<sup>67</sup> The fundamental problem is that these two interacting individuals are so attached to their respective orders that they cannot distance themselves from the norms to which they belong. In the contradiction of these opposed Absolutes, however, ethical consciousness 'knows what it has to do, and has already decided whether to belong to the divine or the human law'.<sup>68</sup>

Hegel describes the ensuing confrontation in terms of the concept of recognition and how it fails to materialize in asymmetry, respectively. Creon and Antigone feel so attached to their own normative orders that they cannot recognize the conflict between them. And this incapacity to distance themselves from their normative orders as well as to recognize the very existence of a conflict as a mere 'collision of duties'<sup>69</sup> in the first place means that they can never successfully resolve it as long as they lack such recognition. According to Hegel, a mere collision is a contradiction of normative orders in which the parties involved are not conscious of this contradiction and fail to reflect it, whereas in a genuine conflict the parties are aware of this contradiction and relate to it. This does of course not mean that openly accepting the existence of a conflict necessarily and always

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<sup>65</sup> See Weisser-Lohmann (n 25) 197.

<sup>66</sup> Bertram (n 10) 177.

<sup>67</sup> Ewa Nowak-Juchacz, 'Modern Morality in Hegel: Antigone and Socrates' (1999) 1 Hegel-Jahrbuch 121, 121; Brandom (n 13) 481.

<sup>68</sup> Hegel, *Phenomenology of Spirit* (n 9) § 465.

<sup>69</sup> *Ibid.*

results in its resolution; it simply means that discounting it from the outset makes any resolution impossible. And to accept that one is involved in a conflict requires a party to self-distance themselves from their position and to reflect on the conflict, which is not the case with either Creon or Antigone.<sup>70</sup> Both attempt to ‘to force [the respective other] into subjection to the law’ to which they belong, because they ‘see right only on [their own] side and wrong on the other’.<sup>71</sup>

In other words, as long as the two parties to the collision try to enforce their own normative order on the other without reflecting what this collision is and entails, there is only asymmetrical recognition: Creon and Antigone do interact with each other; they also see themselves conditionally in the other by affecting them through their actions; but they do not accept the independence and freedom of the other. By burying her brother Polyneices against Creon’s will, Antigone demonstrates that only the normative order to which she belongs is legitimate, binding, and authoritative for her, and it is exactly this ignoring of Creon’s independence that constitutes her guilt. Creon, in turn, disregards the fact that the normative order guiding him is not the only legitimate order, and ignores the command of the divine law to bury family members. He responds to Antigone’s abrogation of his independence with a death sentence, thereby abrogating hers. The collision could only be resolved by turning it into a conflict, that is, by conceding that there is not only one single normative order demanding full compliance.<sup>72</sup> For Hegel, the essence of the tragedy therefore lies in both parties regarding their respective normative order to be completely legitimate, while rejecting the other as entirely illegitimate.<sup>73</sup> This unwillingness to accept the other creates an antinomy, as both are equally in the right, but also equally in the wrong, thus incurring guilt which, as a normative collision, requires resolution and reconciliation.<sup>74</sup>

The root of this guilt is, according to Hegel, that the parties involved have ‘forgotten all the one-sidedness’,<sup>75</sup> or ἁμαρτία (*hamartía*) (although Hegel never uses this Aristotelian term).<sup>76</sup> Literally, *hamartía* can only be translated inadequately, perhaps best as ‘failure’, ‘fault’, ‘error of judgment’, ‘guilt’, or ‘sin’.<sup>77</sup>

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70 Bertram (n 10) 179.

71 Hegel, *Phenomenology of Spirit* (n 9) § 466.

72 Sticker (n 54) 95–96.

73 See Knox, *Hegel’s Aesthetics* (n 4) 1212–1213.

74 Reidy (n 1) 245 and 247.

75 Hegel, *Phenomenology of Spirit* (n 9) § 467.

76 See Aristotle, ‘Poetics’ in Jonathan Barnes (ed and tr), *The Complete Works of Aristotle, Vol 2* (Oxford University Press 1984) 1453a1 ff.

77 See Henry George Liddell and Robert Scott, *Greek-English Lexicon* (9th edn, Oxford University Press 1996) entry ‘ἁμαρτία’.

which suggests the need for a somewhat more complex interpretation in the light of Aristotle's *mesotes*-doctrine, or the ideal middle state between two extremes.<sup>78</sup> In this vein, one-sidedness is an excess of virtue that marks both Antigone and Creon as too fanatical in their unquestioning devotion to the family and the State, respectively, and exposes both to the charge of epistemological hubris.<sup>79</sup> Hegel's interpretation of *hamartía* as one-sidedness and the failure of symmetrical recognition thus represents a fascinating refinement of this ancient concept,<sup>80</sup> as it now takes on the meaning of a personal attitude that accepts exclusively only one's own normative order, conviction, and practice as all there is. And this charge of hubris can be brought against both Creon and Antigone, as Antigone's actions are not purely emancipatory in character (as they have often been interpreted<sup>81</sup>), but structurally bound to her normative order in the same way as Creon's are bound to his. If we now consider the ethical substance, as also mentioned at the beginning, as a conception of knowledge, then this means that there can be no knowledge of one oneself *qua* the other, if all knowledge remains within the bounds of its own normative context. Those who belong to different normative orders cannot mutually recognize each other if they only remain within their own and never come together within the framework of one single order.<sup>82</sup> For Antigone, recognition comes too late, only shortly before her death, when she submits, as Socrates did, to the human law by which she is also bound,<sup>83</sup> and admits, in Hegel's translation and interpretation, that '[b]ecause we suffer, we acknowledge we have erred'.<sup>84</sup> Creon, too, recognizes his mistake only after his entire family, his wife and son, have perished.<sup>85</sup> Fate ultimately punishes them both and brings about the end of the ethical community of the *polis*, based equally on the human and divine law.

At this point, however, the question arises as to how mutual recognition can be successfully established within the community in order to resolve and reconcile

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**78** See Aristotle, 'Nicomachean Ethics' in Jonathan Barnes (ed and tr), *The Complete Works of Aristotle*, Vol 2, 1106a 14 ff.

**79** Young (n 2) 37. See also T C W Stinton, 'Hamartia in Aristotle and Greek Tragedy' (1975) 25 *The Classical Quarterly* 221, 223.

**80** Kaufmann (n 2) 208.

**81** See eg, the interpretation by Jocelyn B Hoy, 'Hegel, Antigone, and Feminist Critique: The Spirit of Ancient Greece' in Kenneth R Westphal (ed), *The Blackwell Guide to Hegel's Phenomenology of Spirit* (Wiley-Blackwell 2009) 172–189; Kimberly Hutchings, *Hegel and Feminist Philosophy* (Blackwell 2003) 80–111; Patricia Jagentowicz Mills, 'Hegel's Antigone' in Patricia Jagentowicz Mills (ed), *Feminist Interpretations of G W F Hegel* (Penn State University Press 1996) 58–88.

**82** Bertram (n 10) 180–184.

**83** See Hegel, *Lectures on the History of Philosophy* (n 5) 441.

**84** Hegel, *Phenomenology of Spirit* (n 9) § 470. See also Sophocles (n 27) verse 926.

**85** Sophocles (n 27) verses 1261–1346.

this collision between two equally balanced powers, and what forms of practices must be created to overcome the dichotomic one-sidedness of the ethical substance.<sup>86</sup> According to Hegel, we can find the answer to this question of normative heterogeneity<sup>87</sup> only in full symmetrical recognition and the legal status of a constitutional legal order, which I would now like to explain in more detail and on the basis of the so-called symmetry thesis mentioned at the beginning of this paper.

### 3 Reconciliation in the Legal Status

Hegel concludes the first *Geist* chapter of the *Phenomenology of Spirit* on the ethical order with a comparatively short section on the legal status (or *Rechtszustand*, in the original German), which consequently requires further elucidation. Exactly because the arguments in this section are so succinct, these few pages should not be underestimated, as they represent the key to understanding the concept of symmetrical recognition and the first step on the path toward reconciling conflicting normative orders. Furthermore, it should also be noted that for Hegel, modern positive law and especially the constitutional legal order of the State have a double origin which prove enormously significant for the resolution of these normative conflicts: the first origin lies in the concurrent claim to universality (by the human law) and individuality (by the divine law); and the second is to be found in its procedural execution, which means that individual persons become the very authors of the law and thus truly autonomous by constantly resolving such normative conflicts.<sup>88</sup> I will now assess these points in-depth, both to defend the symmetrical interpretation of Hegel and to reject its asymmetrical manifestation.

#### 3.1 Legal Personality as Emancipation and the Loss of Reality

If we read the very first paragraphs of this section in conjunction with the last paragraphs of the *Elements of the Philosophy of Right*,<sup>89</sup> it becomes evident that Hegel bases his philosophical concept of the legal status emerging from tragedy on the historical transition of polities from the communitarian-ethical Greek *polis* to the individualist-atomist Roman Republic and its abstract positive-legal

<sup>86</sup> See Dieter Bremer, 'Der Begriff des Schicksals bei Hegel und seine griechischen Ursprünge' (1989) 35 *Antike und Abendland* 24, 33.

<sup>87</sup> See also Robert Pippin, *Hegel's Idealism: The Satisfactions of Self-Consciousness* (Cambridge University Press 1989) 170: '[...] Spirit's fundamental practical problem [is] mutual recognition.'

<sup>88</sup> Menke (n 15) 202–203.

<sup>89</sup> See, in particular, Hegel, *Elements of the Philosophy of Right* (n 7) §§ 356–357.

system.<sup>90</sup> We should of course not misunderstand Hegel here as an aspiring historian, but rather consider these paragraphs as exemplifying specific milestones in the development of practices that give effect to the concept of recognition within human legal-political communities. And we should view these practices as *legal* practices and hence as essential to the emergence of individuals as *legal* entities, or *legal persons*.<sup>91</sup> The most intriguing facet in this context is that Hegel analyzes this development of the legal status from two different viewpoints, namely from a phenomenological internal and a genealogical external perspective, respectively, tracing the first as an ideology of law and quite explicitly, the second as a critique of this ideology, yet only implicitly.<sup>92</sup> I discuss the first perspective and its problems here, the second then in Section 3 below.

The origin of this first perspective is the definition of the law as a state of ‘equality, in which all count the same, ie, as persons’.<sup>93</sup> This regard for all persons as equal is the basic principle of the legal status and denotes a form of formal justice before any further legal or moral distinction. Furthermore, the quantitative reference to ‘all’ means that the equality within the legal status is no longer limited to a particular nation with common values, such as the ethical order, but that it includes all persons; and the qualitative reference to ‘same’ means that the equality of the legal status no longer refers to individuals *qua* members of a nation, as the ethical order does, but to individuals as any persons.<sup>94</sup> Individuals as legal persons thus emancipate themselves from the normative context of a community, because they are now recognized as persons in principle and independently from this community. The contradiction characterizing the ethical substance is therefore removed and the legal person can claim knowledge from their status of being recognized.<sup>95</sup>

However, even this conception of knowledge within the legal status is riddled with antitheses. Although this condition is able to overcome the antitheses of the ethical substance, the ‘reality of the ethical Spirit is lost’<sup>96</sup> in the ‘abstract universality’<sup>97</sup> and the ‘formalism of legal right’,<sup>98</sup> and leaves individuals behind as mere abstract, uprooted, and indeterminate entities. For Hegel, ‘right is that which remains indifferent to [individuality]’,<sup>99</sup> because here, the State does not exist for

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90 Hegel, *Phenomenology of Spirit* (n 9) §§ 477–478. See also Weisser-Lohmann (n 25) 200.

91 Bertram (n 10) 185.

92 Menke (n 15) 204.

93 Hegel, *Phenomenology of Spirit* (n 9) § 477 (emphasis omitted).

94 Menke (n 15) 205.

95 Bertram (n 10) 185–186; Hegel, *Phenomenology of Spirit* (n 9) §§ 477–479.

96 Hegel, *Phenomenology of Spirit* (n 9) § 750.

97 *Ibid.*, § 478.

98 *Ibid.*, § 480.

99 Hegel, *Elements of the Philosophy of Right* (n 7) § 49.

the sake of its citizens, but merely uses them as instruments to maintain itself.<sup>100</sup> This loss of reality turns individuals into mere abstracts, as equals among equals, making them incapable of developing concrete consciousness of themselves and others. It is crucial to note, nonetheless, that Hegel does not criticize the abstract concept of the person as a legal person (that is, the disregarding of all ethical values), but its abstract presupposition and opposition to individuals,<sup>101</sup> as such ideology of law that takes personhood as an indubitable datum for granted, does not give effect to the law, but rather dissolves it. Personhood is not a pre-existing *brutum factum*, but only the result of the process of recognizing an individual as a person.<sup>102</sup> The law, however, ignores this at its own risk, because if it destroys the consciousness that it is itself dependent on a preceding recognition process, it also destroys itself – and that outcome can, in no way, be beneficial for a community of individuals and the overcoming of the torn ethical substance.

### 3.2 Asymmetric Inadequacies

One way to address this problem is to interpret one of the two normative orders in a asymmetrical fashion prior to the emergence of the legal status. In order to do so, we would have to view the recognition process as rendering one of the two elements of justice (ie, either the human or the divine law) absolute and deriving the concept of law from only one of them.<sup>103</sup>

The first possible approach follows Antigone and is to be understood as a critique of the law. Goethe, for instance, considers Antigone's actions as completely rational, while he regards Creon's deeds as driven by a hatred of the dead, amounting to a crime against the State, and not as a virtue grounded in pursuing the *raison d'État*.<sup>104</sup> According to this asymmetrical interpretation, Creon does not represent power as an ethical force, but only for its own sake:<sup>105</sup> he is only concerned with exercising and consolidating his power beyond any moral or legal considerations. Antigone, conversely, is motivated by the love for her brother to the extent that she also accepts her own death for his illegal burial.<sup>106</sup> It seems that

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**100** See Hegel, *Lectures on the Philosophy of World History* (n 30) 94–95.

**101** See *ibid*, 95.

**102** Menke (n 15) 208–209.

**103** See *ibid*, 216.

**104** See Johann Peter Eckermann, *Gespräche mit Goethe in den letzten Jahren seines Lebens* (Holzinger 2018) 485–498 [28 March and 1 April 1827]. See also Bernhard Zimmermann, *Die griechische Tragödie* (Kröner 2018) 92–93.

**105** See Sophocles (n 27) verses 211–124, 738, and 1104.

**106** *Ibid*, verses 97 and 459–464.



both motives – Creon’s quest for power and Antigone’s fatal *philadelphía* – can only be located *beyond* the law, as either preceding or transcending it. The essential difference between the two is, however that Creon’s motive, the hunger for power, can never be seen as a legitimate moral claim, whereas Antigone’s unconditional love can very well be accepted as such.<sup>107</sup> As a consequence, if one follows this particular approach, the justice of individuality is sufficient and does not require any transformation by a conflict with universality in order to bring about the legal status of a constitutional State.

The second approach, on the other hand, follows Creon and yet another alternative view of how the law emerges. Jürgen Habermas offers such an interpretation by describing the transformation of less complex human communities, such as the ancient Greek *polis*, into a more complex system, like the modern legal status, as a special case of the general process of how the environment in which we live is progressively rationalized.<sup>108</sup> The pivotal point therein is, above all, that the human law is able to conceive of abstractions, namely through the principle of universality, which strictly distinguishes between ethical-moral and legal questions of justice and underscores how differently both react to disturbances in the normative understanding within a given community: norms of individuality derived from the divine law seek to establish concordance between the parties to a conflict by reconstructing the unity of their values, whilst norms of universality originating in the human law do so by considering all individuals equally. The transformation of the universality of the human law into the legal status is consequently a process that yields a net gain in rationality and overcomes the naturalized ethical order.<sup>109</sup> According to this approach, no conflict is necessary either out of which the legal status can emerge. On the contrary, the legal status sprouts entirely from the root of universality under its own evolutionary logic.

### 3.3 Only Symmetry Guarantees Reconciliation

The main problem of both models of asymmetrical interpretation remains, however, their one-sidedness (which Hegel criticized as problematic to begin with), because neither can explain the emergence of the legal status as a progressive development of the ethical substance nor prevent the loss of reality therein. The solution to this problem is to be found in the second Hegelian perspective, the

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<sup>107</sup> See eg, Martha C Nussbaum, *The Fragility of Goodness* (Cambridge University Press 2001) 67; Reidy (n 1) 252.

<sup>108</sup> Jürgen Habermas, *Erläuterungen zur Diskursethik* (Suhrkamp 1991) 45.

<sup>109</sup> *Ibid.*, 34–39.

abovementioned genealogical view, which conceives of the legal status as the type of public justice that arises from the resolution of the tragic conflict.<sup>110</sup> In this scenario, justice does not arise outside or beyond the law, but only through the law and the tragic conflict between two equivalent positions.

Sophocles' tragedy celebrates Antigone as its heroine because it is her compassion and devotion that moves the audience and allows the spectators to understand her situation better than Creon's. Yet having said that, she also remains blind in her unwavering love and incapable of recognizing the other, that is Creon. In fact, Antigone does not stand for moral insight, but pure fanaticism when she thinks that she is obligated to bury her brother only because he is irreplaceable, while she could have another husband or children if they died.<sup>111</sup> Furthermore, Antigone shows to be entirely uncritical of the divine law when she proclaims that nobody knows where these laws come from. As eternal norms, they can only be determined in and for themselves, which leaves individuals unconscious of themselves.<sup>112</sup> Creon, conversely, may not possess Antigone's piety and commitment, and hence strike the audience as a vile tyrant, but it could also be argued that his morality is to be found in denying Polyneices, the assailant of his *polis*, any honour to set an example, a legal precedent, against any future aggressors.<sup>113</sup> And even if we judge Creon's motive of maintaining power at any cost as morally reprehensible, it is, perhaps, not only permissible, but even mandatory from the perspective of the divine law, for he thereby honours Zeus as the Olympic steward and preserver of the State.<sup>114</sup> From a dramaturgical point of view, Antigone nonetheless deserves special merit: even if we assume that neither she nor Creon are driven by an evil will, but simply their devotion to give effect to their particular normative order, they are both guilty of their *hamartía*, their one-sidedness. Yet it is Antigone who initiates the process of bringing the old ethical order to an end and thus establishing the legal status.

And it is exactly this genealogical process that generates reconciliation symmetrically through recognition and thereby avoids the loss of reality in the legal status. This can, however, only succeed when the basic principles of universality and individuality are united in a concept of justice through a process of abstraction in the law, which is in fact a dual abstraction (as already briefly mentioned above):

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**110** See Menke (n 15) 204.

**111** Sophocles (n 27) verses 905–912.

**112** Hegel, *Elements of the Philosophy of Right* (n 7) § 144.

**113** See Richard Clark Sterne, 'Endorsing Ethical Natural Law: A Reply to David A Reidy's "Antigone, Hegel & The Law"' (1995) 19 *Legal Studies Forum* 263, 267.

**114** Sophocles (n 27) verses 184 and 353–354; Knox, *Hegel's Aesthetics* (n 4) 1213. The same argument probably applies to Aeschylus' *Agamemnon*, who sacrifices his daughter for the good of the State, but cannot see beyond it in his *hamartía*; cf Nussbaum (n 107) 36–38.

first, public justice, or universality, becomes detached from the ethical order and consequently applies to all individuals, universally and independently of their ethical affiliation; it no longer exists in the ethical order of a particular nation, but among all persons. And second, singular justice, or individuality, is transcended, as every individual can now partake in this justice; it no longer considers its addressees<sup>115</sup> to be specific individuals, but equal persons.<sup>116</sup>

It is intriguing to note that Friedrich Hölderlin, Hegel's friend from his student days in Tübingen,<sup>117</sup> also writes in his 1804 *Anmerkungen zur Antigone* (*Notes on the Antigone*) that it is the 'formal and anti-formal' balance between Creon and Antigone that makes possible a 'republican' State, ie, a constitution created in line with reason, and 'formalizes' individuals as persons, or legal entities. A complete 'reversal', that is, a revolution and absolutization of one perspective, can never succeed, as it leaves all individuals without any footing and only results in uncertainty.<sup>118</sup> His republican disposition (that is, his commitment to a constitutional legal order with the people as the sovereign and thus the legislator) also comes to the fore in his translations of the Greek poet Pindar, where he stresses that societal change can only succeed through the peaceful means of the law.<sup>119</sup> Hölderlin's words are thus not only strikingly similar to Hegel's in terms of content, but also conclude with the astute political analysis that only the dialectical resolution of the conflict and the equal recognition of all parties to it – not the violent suppression or even killing of the opponent – can generate a rational legal status such as a constitutionally organized legal system.

A genealogical view of the law therefore means all the more that the legal status can only develop and be maintained by emerging or being brought into existence constantly and continuously – in a way similar as to how the actual meaning of a constitution is constantly and continuously elaborated by, for instance, a constitutional court or supreme court with the powers of constitutional review, by resolving legal disputes.<sup>120</sup> This occurs by way of the tragic conflict

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**115** See also Jacques Derrida, 'Force of Law. The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge 1992) 1991, 36.

**116** Menke (n 15) 210–215.

**117** On the 'philosophical community' between Hölderlin and Hegel, see also Christoph Jamme, *'Ein ungelehrtes Buch': Die philosophische Gemeinschaft zwischen Hölderlin und Hegel in Frankfurt 1797–1800* (Meiner 2016).

**118** Friedrich Hölderlin, *Essays and Letters* (Charlie Louth and Jeremy Adler eds, Penguin 2009) 331–332.

**119** See Michael Franz, '... und anderes denk in anderer Zeit...': Hölderlins letzte Gedanken zu Recht und Politik in den 'Pindarfragmenten' (J B Metzler 2020) 2 (Hölderlin's translation of *Von der Ruhe*) and 54–74.

**120** Young (n 2) 119.

between and unceasing integration of the two dimensions of justice, universality and individuality, into the abstraction of the law, which then eventually allows to solve the problem of the loss of reality, because persons, as legal subjects and addressees, are then not mere passive objects that are being recognized, but more importantly, active authors that recognize and are recognized in return.<sup>121</sup> Hegel considers this the crucial step that transforms the power of heteronomous fate into justice,<sup>122</sup> permitting the autonomous and law-creating person to take its place.<sup>123</sup> The loss of reality in the phenomenological interpretation of the legal status is hence overcome by human autonomy whose principal purpose it is to aggravate as well as to resolve incessantly tragic conflicts in order to secure the law and the mutual recognition of individuals as equal persons.<sup>124</sup> Only thereby, human freedom in a legal status is possible and adversities ('fate') beyond our power, negatively affecting our lives at any time, are subjected to a certain degree of (legal) control.<sup>125</sup> There is no fate but what we make for ourselves through the law.

This means that only Hegel's symmetrical interpretation of *Antigone* can guarantee the legal status, whereas any asymmetrical absolutization of either universality or individuality must fail in this endeavour. And this is exactly, according to Hegel, where the normative collision in *Antigone*, through a symmetrical conflict, becomes a constitution that articulates how the power of the State is distributed and organized. 'The constitution is existent justice as the realization of freedom in the development of all its rational provisions.'<sup>126</sup> This means that justice exists in the modern State as a constitution<sup>127</sup> and becomes the legitimate legal framework within which conflicts and their resolution can be managed in a conscious and rational manner, and as the result of political decisions and agreements.<sup>128</sup> As a conclusion to my analysis, I would like to summarize this point in a slightly modified quote by Derrida, namely that although it is evident that not all law is just, no justice can begin without the law.<sup>129</sup>

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121 Menke (n 15) 228.

122 Hegel, *Phenomenology of Spirit* (n 9) §§ 372–373.

123 Ibid, §§ 477–479.

124 Menke (n 15) 229.

125 See also Nussbaum (n 107) 1–21.

126 G W F Hegel, *Enzyklopädie der philosophischen Wissenschaften im Grundrisse* (Meiner 1992) 509 (Paul Gragl tr).

127 See Alberto L Siani, "'Unvollkommene Gerechtigkeit': Hegel, Antigone und die Menschenrechte" in Thomas Oehl and Arthur Kok (eds), *Objektiver und absoluter Geist nach Hegel: Kunst, Religion und Philosophie innerhalb und außerhalb von Gesellschaft und Geschichte* (Brill 2018) 203.

128 Ibid, 204.

129 Jacques Derrida, *Die Schrift und die Differenz* (Suhrkamp 1972) 162.

## 4 The Merit of *Antigone*

*Antigone* and its interpretation by Hegel may be the products of past and therefore different times, but the lessons we can draw from them remain timeless and of extreme value to our age of conflict. I would therefore like to conclude this contribution with some references to the current debate, and once again underline the added value of tragic conflicts between different normative orders. Their tragic element, or tragedy in general, also as theatrical performance, vividly shows us that we, as finite beings, are transient and fragile, but also that our communal living-together, before and in a legal status (ie a constitutional legal order), can, at times, be cumbersome.<sup>130</sup>

Especially when we think of the contemporary disputes whether and where killed terrorists should be buried, the core problem of *Antigone* proves to be still extraordinarily relevant – although, and most interestingly, with completely reversed roles for the involved normative orders and a human-made, positive-legal obligation to bury the dead on the one hand, and a religiously or morally motivated refusal not to bury a murderer next to faithful believers or one's family members, on the other. In the same way as the recognition of the position of another person can contribute to the resolution of a conflict, we should bear in mind that is also possible and necessary in the current political climate, where individuals, groups, and parties, often think exclusively in terms of friend or foe,<sup>131</sup> and the bridges of peaceful communication are needlessly burned. Hegel clearly shows us that we must constantly work on symmetrical recognition and the procedural-dynamic, and not static, legal status in order to bring it about and maintain it. He writes that the 'essence of the state is ethical life' which 'consists in the unity of the universal and the subjective will'.<sup>132</sup> What he means by that is that our individuality, our thoughts, purposes, and plans, are certainly important as they give expression to our consciousness; but that this individuality, after all, must also conform to the universality of all wills in the State and its laws – above all its most fundamental laws in the shape of the constitution. The individual will should be recognized and respected as best as possible, but in itself, it has no authority, and can gain such only through the State and its law. Only in a constitutional legal order, freedom becomes objective and available to everyone, because only the will that 'obeys the law is free: for it obeys itself and is self-sufficient and therefore free'.<sup>133</sup>

**130** See Simon Critchley, *Tragedy, the Greeks, and Us* (Profile Books 2019) 3.

**131** See the famous dictum by Carl Schmitt, *Der Begriff des Politischen* (Duncker & Humblot 1932) 51, and its renaissance in current populism, eg Jan-Werner Müller, *Was ist Populismus?* (Suhrkamp 2016) 130–131.

**132** Hegel, *Lectures on the Philosophy of World History* (n 30) 95.

**133** *Ibid.*, 97.

Metaphorically speaking, the legal status is a fountain that, should the water pressure ever stop, runs dry; our task is to keep the water flowing continuously, which usually requires hard work. But it is the same with the dialectical resolution of normative conflicts through symmetrical recognition and the emergence of the legal status. It is certainly easier to retreat to one's own position and deny recognition to the other, but this only perpetuates this collision and never transforms it into a resolvable conflict. Only through the hard procedural work of symmetrical recognition can we overcome collisions, transform them into conflicts, and actualize our own personality as autonomous legal persons in the legal status under a constitution guaranteeing our freedom. Hegel's interpretation of *Antigone* thus boils down to an interestingly modern pluralistic understanding of the constitution, both in its erstwhile creation of resolving conflicts between equal parties and its continuing maintenance through recognition. In this version of constitutional law, the *pouvoir constituant* never disappears and remains actively involved in safeguarding its own freedom and autonomy at all times.