

Private law and ethical life

Honneth on legal freedom and its pathologies

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1 Introduction

To understand our society as just means to see it, according to Axel Honneth in *Das Recht der Freiheit*,¹ as an embodiment of what Hegel would call the 'objective spirit.' The normative beliefs of its members about the purposes and goals of their collaborations have settled in its institutions, its practises and its customs. In its fibres lies a common orientation towards supporting ideals and values. Shared values not only impose 'from above' which social measures or developments are conceivable, but also emerge 'from below,' through a basis of institutionalized education goals. These values are *a priori*, so to speak, to our understanding of society: they not only give direction to our interpretation of society as fair and just, but first clear the path for our possible conceptions of justice. According to Honneth, the most common values of our society are the facets of a particular notion of freedom that he names social freedom. For this freedom the institutions in social reality that express it are thought of not as an addition to said freedom but as a medium and condition for its realization.² As with friendship, where both friends can be said to find themselves, willing exactly that what the other wills, in sharing in a common will, the 'relational institutions' in social reality where social freedom is realized do not merely regulate intersubjective action. Rather, Honneth argues, their underlying norms constitute action that can only be executed by the participating subjects jointly or cooperatively.³ Honneth argues that individual freedom needs expression in social reality in and through these relational institutions in order to be lived and experienced as freedom. In turn, our institutions, such as marriage, the family and the market, can only be properly understood with the aid of this 'social' conception of freedom. The framework offered by legal freedom, the sphere of modern law, is not suitable to this end.

In this article I will discuss and criticize what I perceive to be a crucial aspect of Honneth's project for legal philosophy: his views on the disruptive, even 'parasitic' role of legal freedom in our society and its relation of dependence to the sphere of social freedom. With Honneth I take as evident that our contemporary societies are marked in various areas by a 'juridification' that fundamentally permeates and can even disturb social spheres that were previously thought free of this trait. This manifests itself in different areas in different ways. In 1998 the

1 Axel Honneth, *Das Recht der Freiheit* (Berlin: Suhrkamp, 2011).

2 Ibid., 81.

3 Ibid., 223-25.

Dutch Minister of Interior Affairs wrote that the process of juridification shows a certain oscillation whereby a new equilibrium is continually sought.⁴ As an example, in the area of family law, divorce laws were considerably simplified following a wave of divorces. The Minister writes that this was followed by another form of juridification: an increase in cohabitation contracts and an increase in parental access arrangements, which have been extended to legal parents, birth parents and others who fulfil parental roles. Another, more current example of such a pendulum movement can be found in the financial sector. This sector has expanded since the 1990s in the absence of legal constraints. At the same time it made room for a completely different form of juridification: the legal structuring and marketing of complex financial products and transactions. This has not only made the financial crisis of recent years possible but has also continued to feed its internal dynamic. The pendulum has continued to swing towards increasing political and social demands for more, or in any case better, regulation and supervision of the financial sector.⁵ One can understand these kinds of social development as social derailments and Honneth offers helpful insights in *Das Recht der Freiheit* for understanding them as the social effects of an incorrect understanding of freedom that centres on the idea that freedom consists first and foremost in the exercise of individual rights.

In section 2 I argue, however, that Honneth fails to fully appreciate in *Das Recht der Freiheit* Hegel's fundamental insight in the *Grundlinien der Philosophie des Rechts*⁶ into the positive role of the institution of legal freedom – of abstract right and its expression in positive law – for freedom in social reality. In Honneth's attempt to reactualize Hegel's discourse on the realization of freedom for our time, he risks mistranslating Hegel's discourse of 'right,' which I will recall in section 2.2, by denying the sphere of legal relations a constitutive role for 'true' freedom. In section 3 I argue that Honneth's turn away from legal freedom brings its own problems for his theory of social freedom. Whereas Honneth is clear in defending a certain reading of Hegel's philosophy of right on which to build his theory of social freedom, his approach lacks the same clarity when it comes to empirical evidence. Honneth is forced to admit that he has great difficulties in providing empirical support for what he names the 'pathologies of legal freedom': the social effects that occur when individuals misunderstand the legal freedom accorded to them. Without such support it is less clear whether Honneth's theory can still offer helpful insights into the proper place of legal freedom in our society. In sections 4 and 5 I conclude with some remarks on recovering the internal bond between private law and ethical life.

4 Letter of the Minister of Interior Affairs to the States-General of the Netherlands, 21 December 1998, 11.

5 See for instance Onno Ruding, *De Kredietcrisis 2007-2009; Oorzaken en Lessen*, Nordemann lecture 2009, which can be consulted via <http://www.nordemannlezing.nl/2009.html> (last accessed 16 May 2013).

6 Georg W.F. Hegel, *Outlines of the Philosophy of Right*, translated by T.M. Knox. Revised, edited and introduced by Stephen Houlgate (Oxford: Oxford University Press, 2008), to which I will refer in this article with 'Grundlinien' and also 'PR'.

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2 Understanding social freedom: Honneth's take on Hegel's Philosophy of Right

2.1 *Negative Freedom, Reflexive Freedom and Social Freedom*

Throughout his development of the concept and understanding of 'social freedom' in *Das Recht der Freiheit* Honneth explicitly pushes back against the tendency to develop the foundations of a theory of justice on the basis of legal concepts alone. For Honneth, a just society is a society that embodies social freedom. He does not deny that in our present time we cannot imagine that the idea of legal freedom would not be part of the institutional fabric of our societies.⁷ Indeed, Honneth writes that legal freedom provides individuals with an important possibility to withdraw from existing social obligations into their own private spaces. He says that legal freedom provides a 'protective wall' behind which the individual can freely consider his or her own goals and wishes.⁸ Furthermore, it ensures the private autonomy of individuals, whose health and safety, economic interests, right to compensation, right to education and information are protected by law.⁹ Honneth argues, however, that the law begets a form of individual freedom the conditions of existence of which it cannot itself either produce or sustain.¹⁰ In the legal sphere of action, a 'negative freedom' is expressed according to which a person has the right to think what she wants, to abstain from commitment and to do as she pleases without external constraints or coercion, as long as she does not infringe upon the same rights of her fellow citizens. This will, however, not suffice for the realization of true justice. According to Honneth, we have to resist the tendency to qualify all social relations as legal relations, as relations that should be regulated by the legal system. Even justice itself must not be understood in legal terms alone.

An action is nowadays considered to be 'free' if it can be understood as an expression of one's own choice, regardless of the specific content of the choice and the desire it satisfies.¹¹ This intuitive understanding of freedom as 'negative freedom' has implications, Honneth argues, for the concept of justice that has been developed on its basis. The principles of a just order that would express this concept of freedom can only express the value of this freedom by keeping the scope for personal decisions as wide as possible. Yet, conversely, this conception of justice also has to concern itself with justifying limitations on individual freedom in order to permit the peaceful coexistence of all individual subjects.¹² In other words, under-

7 The idea of moral freedom also forms part of the institutional fabric of modern societies, according to Honneth. See *Das Recht der Freiheit*, 190. A more complete overview of Honneth's theory of social freedom would also take into account his important ideas about moral (or reflexive) freedom, but that would exceed this article's constraints.

8 Honneth, *Das Recht der Freiheit*, 145.

9 *Ibid.*, 391.

10 *Ibid.*, 156.

11 *Ibid.*, 44 onwards. The tendency to want to interpret our social environment in terms of negative freedom rests on an intuition of modern thought that Honneth traces back to the religious civil wars of the 16th and 17th centuries. *Ibid.*, 58.

12 *Ibid.*, 55.

standing freedom as negative freedom results in a conception of justice that, paradoxically, has to focus on the restriction of the same freedom that it wishes to preserve. According to Honneth this reveals an internal tension in the concept of justice based on negative freedom and points, moreover, to a deficiency in the thinking of negative freedom itself. A purely negative freedom does not allow us to understand citizens as authors and innovators of their own legal principles, Honneth writes. For this, we require an additional, 'higher' conceptual point of view in the individual's striving for freedom which allows to ascribe to him an interest in the cooperation with others.¹³

Negative freedom is already deficient in that it stops short of the actual threshold of individual self-determination, Honneth argues.¹⁴ Crossing this threshold means to enter into another sphere of freedom, a freedom that contains an element of self-determination. Restrictions that for negative freedom only act externally on the freedom of the individual are, in this concept of 'reflexive freedom,' internalized and thought as moments of willing itself. The individual's self-relation is given centre stage: a subject is free when it can relate to itself in such a manner that it can let its actions be guided solely by objectives that it has set itself. Honneth argues that neither negative nor reflexive freedom, however, identifies the social conditions which first enable the exercise of these freedoms as components of freedom itself. This comes into view only when the chances of realization of freedom in social reality also become explicitly thematized. This institutional broadening of the concept of freedom feeds into a third, social understanding of freedom.¹⁵ Honneth puts this third conception of freedom as 'social freedom' at the heart of his theory of justice. He develops it in close dialogue with Hegel's philosophy of right and Hegel's idea of freedom that is central to the *Grundlinien*.

Hegel did not only set out to disclose in social reality the social conditions that enable the realization of self-given goals, but also wanted that the structure of reflexive freedom be objectively reflected in social reality. Social reality should meet the individual striving for freedom and should, in a certain way, also 'want' what the individual reflectively sets out to achieve. This strong ontological demand is only met, Honneth argues, when other subjects are part of that social reality with goals that match the goals of the first subject: goals that are such that the other subjects want the first subject to do precisely that which the first subject has set as a goal for him or herself.¹⁶ Honneth argues that for Hegel the acquisition of true freedom is preceded by a process in which subjects learn to form such potentially complementary wishes or goals. When subjects have acquired such goals, through education, they can then have the experience through corresponding relations of mutual recognition that they remain 'by

13 Ibid., 55-56.

14 Ibid., 56-57.

15 Ibid., 78-80.

16 Ibid., 91.

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themselves in objectivity.¹⁷ Honneth puts this experience of ‘remaining by oneself even in objectivity’ at the core of his conception of social freedom in *Das Recht der Freiheit*. It is indebted to what he calls the paradigmatic pattern in Hegel for experiencing true freedom, which is friendship. In this respect the crucial passage for Honneth in the *Grundlinien* is the following:

‘Freedom in this sense, however, we already possess in the form of feeling – in friendship and love, for instance. Here we are not inherently one-sided; we restrict ourselves gladly in relating ourselves to another, but in this restriction know ourselves as ourselves. In this determinacy a human being should not feel himself determined; on the contrary, by treating the other as other he first arrives at the feeling of his own selfhood. Thus freedom lies neither in indeterminacy nor in determinacy; it is both of these at once.’¹⁸

Social freedom is concerned with a freedom that comprises an uncoerced interplay between the individual and his intersubjective environment. The individual experiences this environment as an expansion of his personality. This environment meets, so to speak, the individual’s own objectives and, indeed, first makes them possible.¹⁹

Honneth writes that Hegel is concerned with those institutions in which relations of mutual recognition are expressed and which facilitate a long-lasting form of mutual realization of individual goals.²⁰ Both to recognize these goals and to identify these institutions require methods that Honneth captures under the name ‘normative reconstruction.’ Using as a guiding line what sensible subjects could rationally want, those goals are distilled out of historically-given social relations that subjects actually strive for, where possible in close approximation to the conceptual ideal.²¹ At the same time, and as part of the same process, these social institutions are analysed and criticized in such a way that they show the

17 Ibid., 92.

18 Hegel, *Outlines of the Philosophy of Right*, addition to par. 7.

19 Honneth, *Das Recht der Freiheit*, 113-14.

20 Ibid., 101.

21 Ibid., 106-107.

extent to which they embody lasting expressions of intersubjective freedom.²² For Honneth, to recognize *this* freedom means to open up a perspective on what Hegel named 'ethical life' in the *Grundlinien*: the concept of freedom developed into the existing world.²³ For Honneth is principally concerned with the 'right of freedom,' with *Das Recht der Freiheit*.

2.2 Hegel and the Expression of Right in Law

It is important to remember that when Hegel uses the concept of 'right' in the *Grundlinien* he is not only referring to its use in what we nowadays, in ordinary speech, would understand to be the sphere of modern law: those social spheres where subjects amongst themselves or in their relations with the state have legal rights and obligations as these are created or supported by private contract or public codes and as these can be enforced with the aid and protection of the state. The 'right' to which Hegel is referring can be expressed in such positive law, such as public statutes, rules and regulations that can be consulted by all, but 'right' also has a rational basis quite apart from this particular form of expression.²⁴ Furthermore, Hegel's concept of 'right' is not limited to the rational basis of positive law. Hegel uses the term in an even broader fashion: 'right' is a unifying term under which Hegel brings together his thoughts on 'abstract right,' 'morality' and 'ethical life.' In this understanding, Hegel uses 'right' to refer to objective freedom in its full scope and, thus, in the broadest sense to freedom that is both understood and realized. All embodiments of freedom in their various moments, indeed

22 The call for a just society is answered by Honneth in *Das Recht der Freiheit* by proposing a theory of social freedom that wants to offer insight, in close dialogue with actual social phenomena, not only into a reasonable understanding of society, but also into reason itself as it is embodied in society. As Honneth has written in *Pathologies of Reason*, the point of Critical Theory is 'to see individual self-actualization as tied to the assumption that there is a common practice, one that can only be the result of an actualization of reason.' The goal of striving towards cooperative contexts lies for Honneth, as a member of the Frankfurt School with its tradition of Critical Theory, beyond the striving itself; instead it lies in increasing this social rationality as such. See Axel Honneth, *Pathologies of Reason* (New York: Columbia University Press, 2009), 28. In *The Pathologies of Individual Freedom* Honneth argues that 'Hegel can talk in systematic fashion about the negative effects of false concepts of self in social reality only if he assumes that there is a rational structure underlying our social practices that is not indifferent to misinterpretations.' We cannot violate this rationality that permeates social reality without consequences for our relation with ourselves. Axel Honneth, *The Pathologies of Individual Freedom; Hegel's Social Theory* (Princeton/Oxford: Princeton University Press, 2010), 30-31.

The rationality at stake here is not an instrumental rationality such as the rationality which permeates the sphere of negative freedom, and is used in modern law for its classifying, controlling and intervening tasks. Nor is Honneth speaking of a practical reason such as the reason that plays a role in our moral deliberations and according to which we can formulate universal rules that can serve as a mirror for our actions but that, according to Honneth, cannot itself bring to life rules that we should actually follow. Honneth is concerned with what perhaps can be called an *aesthetic* rationality: a creative reason that is embodied in relations of friendship and love and that can be traced with the aid of the arts and literature, which indirectly show us what is wrong in our societies.

23 Hegel, *Outlines of the Philosophy of Right*, par. 142.

24 See Allen Wood in *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990), 94.

any 'existence at all which is the existence [Dasein] of the free will,' this is what 'right' is, according to Hegel.²⁵

The *Grundlinien* opens with Hegel's famous account of the realization of the freedom of the will in three moments, which in turn find their expression in the tripartite structure of the *Grundlinien* with its chapters on 'abstract right,' 'morality' and 'ethical life.' These three moments are also recognized in Honneth's distinction between negative freedom, reflexive freedom and social freedom, which I discussed in section 2.1. In the *Grundlinien* the realization of the free will is thought by Hegel as a process, an activity, even a struggle: an active self-determination of thought, a process of purification in which the inequality between what the will factually is and what the will is in essence, is systematically abolished, taken up and transformed.²⁶ 'Personality' is a central concept in this realization and discussed by Hegel in the chapter on 'abstract right.' 'Personality' forms the basis of the system of abstract right²⁷ and involves for Hegel the capacity to be the bearer of legally recognized rights or, more generally, the capacity for rights. The becoming of a person, somebody with rights vis-à-vis other persons, is an *act*, a struggling out of unfreedom and a literal grasping of the essence of freedom.²⁸

Personality implies that as *this* person, despite external restrictions and determinations by impulses, desires and external facts, I am nonetheless simply and solely self-relation. I can abstract from all restrictions and know myself as something that is universal and free.²⁹ This pure self-relation is for Hegel not only an expression of a purely negative freedom, but also has a positive side. This I call the positive moment that is internal to the sphere of abstract right: the moment when a freedom that was firstly a purely negative freedom becomes connected to a positive conception of freedom that is expressed in the sphere of ethical life. The sphere of abstract right must be exceeded, as Ludwig Heyde writes in this respect, in more concrete legal forms that more adequately embody freedom.³⁰ This does not mean, however, that abstract right loses its validity. As Heyde argues, concrete legal forms can never contradict the principle of personality, the 'imperative of right' to which Hegel points to 'Be a person and respect others as persons.'³¹ Hegel's philosophy of right as expressed in the chapter of the *Grundlinien* on 'ethical life' is placed in the perspective of this command.³²

25 Hegel, *Outlines of the Philosophy of Right*, par. 29.

26 See Ludwig Heyde, *De verwerkelijking van de vrijheid. Een inleiding in Hegels rechtsfilosofie* (Assen/ Maastricht & Leuven: Van Gorcum & Universitaire Pers Leuven, 1987), 79ff, 86ff.

27 Hegel, *Outlines of the Philosophy of Right*, par. 36.

28 Heyde, *De verwerkelijking van de vrijheid*, 105-106.

29 Hegel, *Outlines of the Philosophy of Right*, par. 35.

30 Heyde, *De verwerkelijking van de vrijheid*, 104. Heyde also points to a positive moment in abstract right: where abstract right ends in injustice and must end therein because of its conceptual structure, a positive moment reveals itself: '(...) in that it appears that the generality of abstract right is partly false, because it does not take in the particular but excludes it. In injustice the particular will that claims its rights manifests itself.' *Ibid.*, 118.

31 Hegel, *Outlines of the Philosophy of Right*, par. 36.

32 See also *ibid.*, 149 and the Addition that speak of individuals acquiring their substantial, affirmative freedom in duty.

In Hegel's system of right the 'person' steps into the world in civil society. In this ethical sphere the principle of right is expressed in 'positive right' – in law – and becomes effective.³³ What is right in itself, Hegel states in paragraph 211 PR, becomes law when it is posited [*gesetzt*] in its objective existence.³⁴ That is, when it is made determinate for consciousness by thinking and thus made known as 'what is right and valid,' something with universal application. Positive right, or law, can therefore also in a generic fashion be described as a thinking that determines itself, expresses itself and makes itself known to all. This breakthrough of right into social reality as law is understood by Hegel as a crucial step in the unfolding of freedom wherein the contingencies of feeling and opinion vanish (addition to 211 PR).³⁵ Individual right, whose existence has hitherto been immediate and abstract, now acquires the significance of being recognized, Hegel writes in paragraph 217 PR.³⁶ This stepping out, this effectuating of right, implies a social dimension, as Heyde remarks: it constitutes a mutual recognition of individuals. This social dimension in turn facilitates a *Bildung* that is formative for thought and that, Heyde argues, allows for the actual recognition of abstract principles of right in positive law.³⁷ These relations of recognition presuppose more than just the option of withdrawal that is offered by a purely negative freedom. Rather, they presuppose that these relations are embedded in the fullness of ethical life. Law is right posited as what it is in itself, Hegel writes. Right in itself passes over in civil society into law.³⁸ Here, abstract right and the negative freedom expressed in abstract right find an internal connection to positive freedom in Hegel's system.

Subjects in the ethical sphere are always already 'persons' for Hegel: self-conscious subjects that have legal capacity to act and therefore capacity to bear rights that are recognized in law. The relations between these subjects when expressed through property law and through contract are embedded in ethical life as expressed in civil society. Hegel writes that contract presupposes that the parties entering into it recognize each other as persons and property owners.³⁹ The sphere of contract is made up of a mediation of wills, of a relation of 'will to will,' which for Hegel forms the 'true and proper ground' in which freedom has existence.⁴⁰ In this sphere of contract, my property is held not merely by means of a thing and my subjective will, but by means of another person's will as well: I hold it in virtue of my participation in a 'common will.'⁴¹ Participation in a 'common will' occurs through the institutions of the social world and these include institu-

33 See also Heyde, *De verwerkelijking van de vrijheid*, 185, where Heyde writes on the 'principles of abstract right' that become effective in civil society.

34 Hegel, *Outlines of the Philosophy of Right*, par. 211.

35 *Ibid.*, addition to par. 211.

36 *Ibid.*, par. 217.

37 Heyde, *De verwerkelijking van de vrijheid*, 186-87.

38 Hegel, *Outlines of the Philosophy of Right*, par. 217 and the addition to par. 217.

39 *Ibid.*, par. 71.

40 *Ibid.*

41 *Ibid.*

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tions expressed in positive law. Indeed, for Hegel, such participation guides the proper direction of the will towards true freedom.

According to Alan Patten in *Hegel's Idea of Freedom*, Hegel claims that two or more individuals can recognize each other as free and rational agents only through specific institutions and practices in which they participate. Patten points out that even in a community of mutually recognizing free agents, such as Hegel's sphere of 'universal self-consciousness,' this need for recognition to be mediated still arises.⁴² An individual can make itself worthy of recognition, and can and must attract the recognition of others by showing itself to be a rational being. This it can do in various ways such as obeying the law, entering into, honouring and executing contracts or showing love for a partner. These are all institutional means by which recognition is expressed and in this sense mediated.⁴³

Honneth decidedly moves away from an understanding of abstract right and its expression in the sphere of positive law as a fundamental part of the institutions of ethical life. In Honneth's reading in *Das Recht der Freiheit*, Hegel allows negative freedom as expressed in the sphere of abstract right a role on the 'flanks' of the ordered system of ethical institutions. Here it gives individuals the right to legitimately turn away from the demands of these institutions, but it is not to function as a source of, or springboard for, new institutional social settings.⁴⁴ As I will discuss in section 2.3, Honneth transforms Hegel's mutual recognition of persons that signals true freedom, into an understanding of social freedom that by definition excludes the freedom expressed in the legal sphere.

2.3 Honneth's Turn in Thinking Freedom

One reason for Hegel to distinguish in the *Grundlinien* between 'abstract right' and 'morality' next to 'ethical life,' is to read in the first two spheres an expression and reflection of the negative and reflexive model of freedom, respectively.⁴⁵ Honneth writes in *The Pathologies of Individual Freedom* that this is not, however, the only reason for this classification. He argues that Hegel also uses these distinctions to show the 'adequate place,' the 'proper place' and even the 'constitutive significance' of these limited models of freedom for what Honneth here names 'all the communicative forms of freedom.' According to Honneth, Hegel's negative and reflexive models of freedom contain 'some constitutive prerequisites' for individual participation in the communicative sphere.⁴⁶ Hegel attempted to show their proper place 'a contrario' by pointing to the pathological effects that, by necessity, result in 'relations of individuals to themselves' when one of the two unilateral, incomplete concepts of freedom is separated from its social context and taken as exclusively normative.⁴⁷ These pathologies can be under-

42 Alan Patten, *Hegel's Idea of Freedom* (Oxford: Oxford University Press, 2005), 130-32.

43 Ibid., 132.

44 Honneth, *Das Recht der Freiheit*, 110.

45 Honneth, *The Pathologies of Individual Freedom*, 21.

46 Ibid., 21-23.

47 Ibid., 30.

stood as empirical indications that the boundaries of legitimacy have been exceeded. Dislocations can be identified in such cases not only in the practical relations of individuals to themselves – for which Hegel uses terms such as anxiety, vacuity and burden and for which Honneth uses the common designation of ‘suffering from indeterminacy’ – but also in social life itself. This calls for a therapy not only at the individual level but also for a social therapy in the form of a normative reconstructive critique.⁴⁸ According to Honneth, society would liberate itself of its suffering when this therapy would bring it to the understanding of the right place of legal and also moral freedom.

In *The Pathologies of Individual Freedom*, Honneth still argues that Hegel’s normative point of reference for the various communicative spheres of society is freedom understood as individual self-realization. The role of the modern legal system is derived by Hegel from the conditions that make this individual self-realization possible.⁴⁹ Hegel’s formal right is to be understood as an intersubjective institution, as a sphere of mutual recognition, one in which subjects are involved with only a minimal part of their personality. What finds its expression in positive law, Honneth writes, is nothing more than the negative side of the individual freedom of the will. The individual is given the possibility to consider a multitude of possible actions without having to commit to any one particular action. Subjects stand in only a strategic relation to each other.⁵⁰ The value of formal or abstract right for individual self-realization, says Honneth, is the possibility that it offers subjects to withdraw from all concrete social obligations and roles in order to insist on their own ‘indeterminacy’ and openness. The concept of ‘indeterminacy’ – which Honneth also uses to qualify a suffering from the consequences of a misuse of legal freedom, as I indicated in the preceding paragraph – is used here to qualify a use of legal freedom which *does* have ethical value.⁵¹ The function and at the same time the boundaries of abstract right consist in this

48 Ibid., 23-24, 45.

49 Ibid., 27. See also Christoph Menke, ‘Das Nichtanerkehbare. Oder warum das moderne Recht keine Sphäre der Anerkennung ist,’ in *Sozialphilosophie und Kritik*, ed. Rainer Forst, Martin Hartmann, Rahel Jaeggi, & Martin Saar (Frankfurt/Main: Suhrkamp, 2009), 100. Menke defends the thesis that whereas Honneth still equals legal freedom to the moral autonomy of the subject in *The Struggle for Recognition*, the perspective shifts in *The Pathologies of Individual Freedom*: freedom understood as individual self-realization becomes the moral point of reference and the task of the legal sphere of freedom should be related to the conditions of existence of this reference point.

Menke’s thesis that Honneth equals legal freedom to the moral autonomy of the subject in *The Struggle for Recognition* is, however, debatable. In my view, it can equally be argued that Honneth is concerned here with the subject’s awareness that he has the capacity to reason and judge like others, a position that does not need to include the moral point of view. In *Das Recht der Freiheit* Honneth explicitly connects the increasing of self-respect to the capacity of the subject to abstract from his own moral and ethical convictions and to distinguish with respect to himself and other legal participants between surface and background, between expressions of action that are allowed and underlying intentions. Here it also concerns a *Differenzierungsleistung*, in other words a capacity for distinctions and judgment. See Honneth, *Das Recht der Freiheit*, 150-51.

50 Honneth, *The Pathologies of Individual Freedom*, 33-34, 36.

51 See Menke, ‘Das Nichtanerkehbare’, 106.

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understanding of Hegel's philosophy of right, in the pure awareness of being a bearer of rights and in the sustained awareness of a 'legitimate individualism' within the sphere of ethical life.⁵²

In *Das Recht der Freiheit*, however, Honneth's social therapy for the pathologies of legal freedom turns into a discounting of Hegel's fundamental insight into the positive role of the institution of legal freedom – of abstract right and its expression in positive law – for freedom in social reality. Honneth fails to fully appreciate Hegel's insight into the positive moment internal to the sphere of abstract right, the moment when a freedom that was firstly a purely negative freedom becomes connected to a positive conception of freedom that is expressed in the sphere of ethical life. The Hegelian edifice of ethical life translates for Honneth in *Das Recht der Freiheit* into nothing less than a reversal of the relationship between social organization and procedure that must ensure legitimacy. He now argues that Hegel must first sketch the social structures that can guarantee the freedom of the subject, before the free subject can subsequently be recruited by procedures that guard the legitimacy of that social order.⁵³ This does not mean that Hegel denies these procedures their role in drafting a theory of justice. But, Honneth now argues, their function is not one of grounding justice – not one of *Begründung*⁵⁴ –, but rather one of acting as custodian for the possibility for individuals to withdraw from social relations of recognition in the ethical sphere should the situation or need arise and to examine the legitimacy of given social institutions. According to Honneth, Hegel's institution of legal freedom that affords this negative freedom, is expressly not understood by Hegel as an institution that is part of ethical life.

In his attempt in *Das Recht der Freiheit* to reactualize for our time Hegel's discourse on the realization of freedom, Honneth in my view risks mistranslating Hegel's discourse of 'right' by denying the sphere of legal relations a constitutive role for 'true' freedom. Honneth argues that the law begets a form of individual freedom the conditions of existence of which it cannot itself produce nor sustain. Legal freedom becomes for Honneth a freedom that cannot transcend its mere

52 Honneth, *The Pathologies of Individual Freedom*, 35-36.

53 Honneth, *Das Recht der Freiheit*, 108-10.

54 *Ibid.*, 109.

intersubjective plane, 'einer letztlich nur intersubjektiv zu verstehenden Freiheit.'⁵⁵

According to Honneth the sphere of legal action is characterized by the kind of norms that require neither moral consent nor ethical agreement, but only strategic and goal-rational acceptance that can – if necessary – be enforced by the state.⁵⁶ In this sphere the negative concept of freedom anchors itself in social reality and a legitimate option for individuals to withdraw from communicative relations with others is thereby opened up in social reality.⁵⁷ But also a tension shows itself, according to Honneth, in that the modern egalitarian legal order must be split into two spheres that guarantee freedom: a private sphere, in which subjects are the addressees of positive rights, and a public sphere, in which they should, at the same time, understand themselves collectively as the author of such positive rights.⁵⁸ Rather than seeing the legal person as a bridge crossing this divide towards social freedom, Honneth argues that this split runs right through the heart of the legal person. The legal person, Honneth writes, is on the one hand afforded the freedom to withdraw into her private sphere, but is, on the other hand, in the political realm, offered political rights of participation in democratic will-formation. In the category of political rights, the legal relation points towards the sphere of social freedom, but it does not allow the legal person to partake in the sphere of social freedom. The legal person cannot cross this crucial threshold that Honneth puts in place. Indeed, for Honneth, the freedom expressed in the legal sphere comes to lead a *parasitic*⁵⁹ existence in our contem-

55 Ibid., 147, 156. See also footnote 76. In *The Struggle for Recognition* we can already find a clue as to what Honneth means by 'einer letztlich nur intersubjektiv zu verstehenden Freiheit.' The form of recognition that can be found in relationships of love between for instance mother and child – which for Honneth in *Das Recht der Freiheit* is the model of relationships where social freedom can come to life – represents not so much an intersubjective state as a 'communicative arc': 'To this extent, the form of recognition found in love, which Hegel had described as "being oneself in another" represents not an intersubjective state so much as a communicative arc suspended between the experience of being able to be alone and the experience of being merged: "ego-relatedness" and symbiosis here represent mutually required counterweights that, taken together, make it possible for each to be at home in the other.' Honneth also refers here to research on pathological deviations in love relations, such as masochism and sadism. Here, the mutuality of the intersubjectively supported communicative arc would be destroyed by the fact that one of the subjects involved is no longer capable of freeing himself from either the state of egocentric independence or that of symbiotic dependence. See Axel Honneth, *The Struggle for Recognition. The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 2004, 2005), 105-106.

56 Honneth, *Das Recht der Freiheit*, 130.

57 Ibid., 137.

58 In this second active and cooperative meaning the institution of modern law requires more, Honneth argues, than just a purposive-rational pursuit. Instead, it relies on a whole circle of democratic orientations, practices and attitudes. Without these the collective impulse to a common prescription of law would extinguish. In this respect the legal system, where it enables collective autonomy, can only appear, Honneth argues, where it concerns institutional spheres of social freedom, therefore in the realm of what Hegel calls 'ethical life.' See Honneth, *Das Recht der Freiheit*, 130-31.

59 Ibid., 221.

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porary society: it does not partake in, but rather thrives on a purely negative, interrupting relation to the ethical practices of subjects that interact socially in non-legal ways.⁶⁰

Honneth's turn away from legal freedom is decisive.⁶¹ For Honneth, history shows how little the actual state of affairs in the social institutions of marriage, friendship and the market have let themselves be influenced by political-legal measures. If the law had any function at all, it was often that of retrospectively legalising improvements that had already been gained through social struggles. The motor and the medium of historical processes of realization of institutionalized principles of freedom is, however, not in the first instance the law but are the social struggles for their adequate understanding, according to Honneth. This is also the reason, he argues, why it is theoretically wrong for contemporary theory of justice to orient itself almost exclusively towards the paradigm of the law.⁶²

This does not mean however that it is easy for those seeking justice to find this new orientation. It requires an ability to recognize in social reality those forms of interaction in which subjects must participate as a necessary condition for the realization of their own freedom.⁶³ As an example, Honneth writes that in the moral self-understanding of modern times it has been unclear from the beginning whether the display of market-mediated action should benefit the increase of negative freedom or strengthen social freedom within the economic sphere.⁶⁴ Before a normative reconstruction of action in the economic sphere can commence, first a path must be cleared, through 'idealizing,' towards a normative understanding of the historical development of the market that is not grounded in the idea of negative freedom but rather in an idea of communicative freedom.⁶⁵ The guiding thread should be a preceding consciousness of solidarity that pre-empts that participating subjects understand themselves as mere contractual partners.⁶⁶ When clearing this path, Honneth grants the law an important role in foreshadowing social freedom, especially through legal reforms that aim to ensure equal opportunities for all. In such legal reforms the development of underlying principles of solidarity find their expression and it can be a marker

60 Ibid., 144-46, 154, 156.

61 This turn is brought into further perspective when placed next to Frederick Neuhouser's interpretation of Hegel, whose account of Hegel's conception of social freedom consists in showing how social freedom plays an essential role in realizing the types of freedom appropriate to persons and moral subjects, as discussed in the two chapters preceding 'Ethical Life' in the *Grundlinien*. According to Neuhouser, one of the principal tasks of rational social institutions is to secure those conditions that make it possible for members to realize personal and moral freedom. Frederick Neuhouser, *Foundations of Hegel's Social Theory. Actualizing Freedom* (Cambridge: Harvard University Press, 2000), 22, 30.

62 Honneth, *Das Recht der Freiheit*, 613-14.

63 See, for instance, *ibid.*, 319-20, 329, 352, 357-58, 360.

64 *Ibid.*, 319-20.

65 *Ibid.*, 358.

66 *Ibid.*, 329.

of *Fehlentwicklungen* when despite long-lasting public pressure such reforms are not instituted.⁶⁷

However, rather than understanding the sphere of legal freedom – anywhere from the private law of contract and property to social and political rights – as still harbouring a constitutive anchor for social freedom, or as playing a mediating role for recognition in the ethical sphere, in the end, legal freedom is understood by Honneth in *Das Recht der Freiheit* only in a negative way. Legal freedom provides the possibility of a radical *Herauslösung* from all social obligations.⁶⁸ But, Honneth argues, at the bottom of legal freedom nothing grows: not even moral reflection can take root there. We must first ‘lay down again’ the role of legal person before we can enter any internal deliberations on the goals of our lives:

‘In keiner Weise stellt insofern die rechtliche Freiheit als solche schon eine Sphäre oder einen Ort der individuellen Selbstverwirklichung dar; es wird durch sie zwar die Möglichkeit gewährleistet, die eigenen Projekte und Bindungen zu suspendieren, zu hinterfragen oder zu beenden, nicht aber die Chance einer Realisierung von Gütern oder Zielen selbst eröffnet.’⁶⁹

In this movement of thought, social pathologies are referred by Honneth to the spheres of legal freedom, which by definition become social spheres into which suffering must withdraw, as well as sadness, loneliness, alienation and pain.

This turn away from legal freedom brings its own problems for Honneth’s theory of social freedom as he defends it in *Das Recht der Freiheit*. I will discuss this in the following part.

3 Pathologies and *Fehlentwicklungen*

In *The Struggle for Recognition* of 1992⁷⁰ Honneth argued that only social relations characterized by solidarity open a modus in which social interaction and competition for social esteem can take a form that is ‘free of pain,’ not tainted by experiences of denial and *Mißachtung*.⁷¹ Autonomy is here understood as an undistorted relation-to-self which requires, he argues, not only a basic self-confidence, but also self-respect and self-esteem. All of these sprout from social relations of mutual recognition whereby Honneth makes a distinction between three spheres of action in which the autonomy of persons increases in ever positive ways.⁷² Firstly, there are experiences of loving care in the family sphere, which already at a very young age lay a basis for self-confidence that later allows one to act independently in the social world. Secondly, there are legal relations, which develop in

67 Ibid., 358, 360.

68 Ibid., 152.

69 Ibid., 154-55.

70 Honneth, *The Struggle for Recognition*, esp. 92-130.

71 Ibid., 130-31.

72 Ibid., 94.

civil society. These contribute to self-respect as they provide individuals with the possibility to invoke their rights, thereby proving them with the symbolic means that, through their social effectiveness, show them that they are recognized as morally responsible persons, completely independent of their social position and their particular characteristics and abilities. They are recognized as persons who, just like others, have the capacity to reason and to judge, 'the qualities that make participation in discursive will-formation possible.'⁷³ Apart from and beyond that, there is a third relation of recognition which is a form of mutual social esteem: a solidarity at the level of society as a whole. This enables subjects to relate positively to their particular characteristics and abilities because they can see them as significant for practices that are shared at the level of the society as a whole.⁷⁴ Importantly, Honneth does not think this self-esteem as being separate and apart from the self-confidence and self-respect on which it rests. Rather, all three are constitutive of a modern subject's undistorted relation-to-self. Their violation through experiences of physical violence, denial of rights or denigration of ways of life, translates into a 'struggle for recognition.' These factual, emotional experiences keep our interest alive in the normative nucleus imbedded in social patterns of mutual recognition.⁷⁵

To think of social freedom as Honneth proposes in *Das Recht der Freiheit* is to cast a new light on this struggle for recognition. The recognition in the sphere of social freedom is not a mutual recognition of particular individuals, not a purely 'intersubjective recognition' but rather, as Christoph Menke has argued, the awareness that one's own wishes, goals and activities are special instances of wishes, goals and needs that are also wanted and willed by society as a whole.⁷⁶ True freedom thus becomes social freedom: the awareness and realization of this common will. This involves a *going-beyond* of the struggle for recognition which for Honneth as we have seen, means leaving behind the capacity of the legal person. The position taken up by subjects in the legal sphere of action, where they have learned to abstract themselves from their own moral and ethical convictions and to strategically direct themselves to a counterparty in agreement with current legal norms, does not reconcile with access to the world of intersubjective relations that constitutes the world of social freedom. Indeed, as Honneth now

73 Ibid., 120.

74 Ibid., 129.

75 Ibid., 117, 131, 138. Honneth argues that, in time, this struggle also leads to a broadening and refinement of the catalogue of subjective rights, which, next to the classic human rights, nowadays also embraces social rights and rights of political participation. In the societies of our time, one is respected not only for an abstract capacity to judge and to think about moral norms, but also because of the concrete human fact that one needs the social standard of living and the possibility to participate politically in order to enable each of us to actually exercise such capacities.

76 See for this Menke, 'Das Nichtanerkennbare.' Menke points to this shift in the meaning of 'recognition' in Honneth's thought since *The Struggle for Recognition*, where Honneth understands recognition (primarily) as intersubjective recognition. Honneth himself is not clear, in my view, when in *Das Recht der Freiheit* on p. 147 he refers to the sphere of legal freedom as a 'letzlich nur intersubjektiv zu verstehende Freiheit', but then describes, on p. 230, social freedom as an intersubjective freedom. See also footnote 55.

argues, this position and the indeterminacy that it entails prohibit such access altogether.⁷⁷

Norms of mutual recognition play a role in the spheres of legal freedom but in a different way than they do in the spheres of social freedom. Subjects can only withdraw to their state-protected private spaces when they have first granted each other a certain status, with reference to a shared norm, that entitles them to do so. In the legal spheres of action these norms 'regulate' the actions of the participating subjects in such a way that they are geared to one another intersubjectively and they guarantee each other a sphere of negative freedom. But the relationships that are thus 'regulated' by norms of mutual recognition do not by themselves serve as the basis for the realization of individual goals of action, Honneth writes.⁷⁸ In the social spheres in which social freedom is realized, on the other hand, the underlying norms 'constitute' an action that can only be executed by the participating subjects jointly or cooperatively. A rational use of these norms does not require that they refer to practices that are 'external' to their own institutional sphere of action.⁷⁹ In other words, the norms are themselves rational, embedded in a social reality in which subjects meet each other. The 'obligation' to be guided by the interest of the other within this institutional sphere of action thus becomes a voluntary step – a step that is self-willed – towards the realization of one's own freedom. Honneth identifies the institutional spheres of action in which this social freedom is realized with the term 'relational institutions.' His project in *Das Recht der Freiheit* is to uncover these relational institutions in the spheres of personal relations, the economic market and politics.⁸⁰

Social reality is marked, however, by deviations from the ideal patterns of relational institutions that sustain social freedom as Honneth understands it. For such deviations Honneth introduces the term *Fehlentwicklungen* in *Das Recht der Freiheit*. The difference between such *Fehlentwicklungen* and the 'social pathologies' I have already discussed is that in the first case we are not dealing with deviations that are generated or advanced by the respective system of action itself. Instead we are dealing with 'anomies,' Honneth explains, i.e., deviations of social freedom that have their origin outside of the constitutive rules of the relational institutions themselves. In the case of pathologies of legal freedom, however, we are dealing with social embodiments of a freedom that is incorrectly understood, with *Fehldeutungen* for which the legal or moral spheres of action also bear guilt: with *systeminduzierten Abweichungen*.⁸¹

In my view, however, this distinction between pathologies and *Fehlentwicklungen* is not without problems. How can we judge whether we are dealing with a pathological development or with a *Fehlentwicklung*? This is important, especially since

77 Honneth, *Das Recht der Freiheit*, 150-53.

78 Ibid., 223-25.

79 Ibid., 231.

80 Ibid., 223-24, 229.

81 Ibid., 230-31.

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for Honneth the distinction between pathologies and *Fehlentwicklungen* has more than mere theoretical significance. As I discussed in section 2.3, in Honneth's understanding of Hegel the transition to the sphere of 'ethical life' requires individuals to overcome their pathological attitudes through a therapeutical 'liberation' that at the same time is an acquiring of 'insight into the communicative conditions that form the prerequisite for all subjects equally to attain the realization of their autonomy.'⁸² Honneth argues that only when those involved realize that they have let themselves be steered by one-sided conceptions of freedom will they be able to recognize those forms of interaction in their own life worlds in which they should participate as a necessary condition for the realization of their own individual freedom.⁸³ It is therefore of crucial importance for the possibility of liberation from pathologies – and the advent of social freedom – that these pathologies can be demonstrated not only on a theoretical level but also factually in social reality when and where they occur.

In *The Struggle for Recognition* Honneth acknowledges the difficulty of empirically demonstrating the social effects of intersubjective legal action.⁸⁴ I have already discussed the crucial role that Honneth here attributes to having and being able to invoke rights for the development of self-respect. It is difficult, Honneth concedes, to underpin this thesis with empirical proof. The reason for this, he argues, is that self-respect is a phenomenon that only becomes a perceivable mass in a negative form, when groups of individuals suffer from a lack of self-respect. Even if and when there is such a group, one would need ways to point to this suffering. This can happen, for example, when such groups are willing to discuss their condition. An example given by Honneth is the US civil rights movement in the middle of the last century, which focused attention on the psychological importance of the recognition of legal rights for self-respect. Where the social effects of a lack of legal recognition are difficult to point to empirically, this can also be said to be the case for the empirical reading of the pathologies of legal freedom, i.e., the social effects that occur when individuals misunderstand the legal freedom accorded to them, cling to it and become stuck in indecisiveness and non-participation.

It is therefore perhaps not surprising but, in my view, nonetheless problematic that Honneth provides very few examples of a concrete pathology resulting from an absolutization of legal freedom. In *The Pathologies of Individual Freedom*, Honneth points in this respect to a passage in the addition to paragraph 37 PR where Hegel refers to the obstinacy of people who are only interested in their 'formal right.' He also refers to Hegel's resistance to viewing marriage as a purely contractual relation as an example of an insight that Hegel would formulate in the *Grundlinien*, namely that all those who articulate their needs and wishes in the categories of formal rights are no longer able to participate in social life and thus start to 'suffer from indeterminacy.'⁸⁵ Apart from this, however, *The Pathologies of Indi-*

82 Honneth, *The Pathologies of Individual Freedom*, 46.

83 Ibid., 46.

84 Honneth, *The Struggle for Recognition*, 120-21.

85 Honneth, *The Pathologies of Individual Freedom*, 35.

vidual Freedom fails to provide examples that shed light on what Honneth understands as 'pathologies' of legal freedom.

The theme of social pathologies is taken up again by Honneth in *Das Recht der Freiheit*. He speaks here about a social pathology 'each time when some or all members of a society for causes internal to that society are no longer capable of adequately understanding the practises and norms of its primary systems of actions and norms.'⁸⁶ Here it becomes clearer that, for Honneth, social pathologies express themselves not in the form of an atypical or deformed action of an individual, but at the level of segments of a society in which certain rigidities occur in relations that express themselves as hard-to-define moods of melancholy and lack of orientation.⁸⁷ The members of society involved do not suffer from a psychic illness, but under influences within that society have forgotten how to practice the normative grammar of a system of action with which they should be intuitively familiar.⁸⁸ These 'influences in society' turn out to be influences that are generated exclusively or at least partially by the systems of action of negative (and reflexive) freedom itself.⁸⁹ We are dealing here with *systeminduzierte Abweichungen*, with social derailments that are the effects of negative (and reflexive) freedom.⁹⁰ Its symptoms are, however, difficult to grasp. The diagnosis of pathology needs an instrument that is tuned into the interpretation of these types of moods. In *Das Recht der Freiheit* Honneth writes that the analytic instruments of social science fail us in this respect and it is our capacity to form aesthetic judgments that should help us instead.⁹¹ He writes that the analysis of aesthetical phenomena can, indirectly, show us the way towards mutual practices that can be understood as practices in which true freedom is realized:

'Insofern bildet den Königsweg einer Pathologiediagnose noch immer, wie schon zu Zeiten Hegels oder des jungen Lukacs, die Analyse von ästhetischen Zeugnissen, in denen solche Symptome indirekt zur Darstellung gelangen – Romane, Filme oder Kunstwerke enthalten weiterhin den Stoff, aus dem wir primär Erkenntnisse darüber gewinnen, ob und inwiefern sich in

86 Honneth, *Das Recht der Freiheit*, 157.

87 *Ibid.*, 158.

88 *Ibid.*, 157.

89 This article discusses Honneth's treatment of legal freedom in *Das Recht der Freiheit*. A more complete overview of his ideas would also take into account his important contribution to the thinking of moral (or reflexive) freedom. During a seminar on *Das Recht der Freiheit* held at the University of Amsterdam on 23 March 2012, Honneth remarked that in his view the 'proper role of morality in social reality' is 'to criticize existing practices. But not: that the moral law creates out of itself norms that we should follow. This would open up pathologies. This would be Kant misunderstanding himself.' See *Das Recht der Freiheit*, 173 onwards.

90 *Ibid.*, 230-31.

91 *Ibid.*, 158. See also in this respect *Pathologies of Reason*, 27-28, where Honneth discusses the idea of the rational universal of cooperative self-actualization, which all the members of the Frankfurt School share, and speaks in this context of the need to be able to cooperate on an equal basis, 'to interact aesthetically', and to reach agreements in a noncoerced manner,' for which a shared conviction is needed that justifies the neglect of individual interests.

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unserer Zeit Tendenzen einer höhenstufigen, einer reflexiven Deformation des Sozialverhaltens feststellen lassen.⁹²

Nevertheless, these considerations have not led Honneth to present convincing examples of pathologies of legal freedom. Nor in my view does Honneth offer clear leads in *Das Recht der Freiheit* for an empirical interpretation and distinction of social phenomena as pathologies, as *Fehlentwicklungen* or as expressions of social freedom in the specific meaning that Honneth gives to these concepts. This becomes evident when we look more closely at the two concrete examples of pathologies of legal freedom that Honneth gives in *Das Recht der Freiheit*.

In the first example Honneth highlights the tendency in cases of social conflict to insist on one's rights and duties to such an extent that the break in communication that underlies the conflict disappears into the background. In such cases, individual freedom is assimilated to and understood only as the sum of all available rights, turning these rights from means into ends in themselves. Subjects limit themselves so strongly to the consequences of purely private goals that they, in the end, only relate to one another as legal persons with a strategic mind-set and lose the connection to the communicative practices of their social lifeworlds.⁹³ The paradigmatic example of this sort of pathology outlined in *Das Recht der Freiheit* is a divorce where spouses come to see each other as legal-strategic opponents, and start acting in a calculated manner, always aware of the possible legal meaning and consequences of what they do and how they relate to one another. In doing so they turn from individuals into legal caricatures. Honneth finds an instance of the dynamic of such a pathology narrated in the plot of the classic film *Kramer vs. Kramer*.⁹⁴ However, this example does not provide a convincing illustration of the point that Honneth wants to make. No doubt, in divorce cases the actions of (former) spouses will have a certain legal-strategic undertone – or overtone – that they did not appear to have before, or perhaps not in such an explicit way. It is also true that in the process of a divorce the new ways in which former spouses come to relate (or not) to each other is deeply mediated by law. It can, however, be argued with right and reason that it is not only welcome but indeed the proper role of the legal system to offer such guidance and to provide direction, even to impose itself, its *Sprache des Rechts*,⁹⁵ in situations where former spouses may otherwise lose sight of each other's justified interests.

In these situations the latent dependency on shared understandings of the social institutions of both marriage and marriage dissolution, the latter being a process that often also follows customary social patterns, comes to the fore. The law is one of the important social institutions in which such shared understandings are expressed. To paraphrase Allen Patten, by appealing to these shared understandings, and thus by also appealing to the law, latent in the institutions of marriage

92 Honneth, *Das Recht der Freiheit*, 158.

93 Ibid., 160.

94 Ibid., 164–65.

95 Ibid., 167.

and its dissolution, it becomes possible to exchange reasons with those with whom we disagree with some hope of convergence, of restoration of recognition in communicative practices, where the former spouses had seemingly closed their eyes to each other.⁹⁶ This may of course turn on its head and result in further estrangement, even mockery in particular instances, but one gets the feeling that what is being mocked in *Kramer vs. Kramer* is the law itself, or worse, in Hegel's terms⁹⁷, the 'obstinacy' of the Kramers. Certainly, in individual cases partners may misunderstand their rights and cling to them, but it is far from clear why this needs to be understood as expressing an essential characteristic of the sphere of legal freedom as such, let alone one of its pathologies.

Of a more indirect nature, and even more elusive, is the second form of pathology of legal freedom outlined in *Das Recht der Freiheit*. Honneth argues that a pathology can be identified where the possibility to alleviate one's actions temporarily of intersubjective obligations is stripped of its temporality and becomes the sole reference point of self-understanding. In other words, where the framework of the law becomes an ideal for personal life. In these instances it is not the sum of possible actions that are allowed under the law, but the delay and interruption that communication usually requires that is taken as the whole of freedom.⁹⁸ Honneth writes that it is more difficult to obtain a perspective on this second form of pathology than he first case. However, he continues, in both cases the cause seems to lie in the inability of the actors involved to understand the scope of action that is opened up by the law in an appropriate way. The interruption in communication is misunderstood as a form of coordination of further interaction.⁹⁹ The second form of social pathology that thus arises expresses itself in a character that is marked by indecisiveness and going astray: the subjectivity of the individual guards itself from every binding decision and judgment.¹⁰⁰

As a concrete example of this second type of pathology Honneth cites the phenomenon that many people do not appear to have any profound convictions and indeed experience themselves as drifting about with no idea of what they want and no will of their own. Here Honneth seems to point to a mood that can be identified through an aesthetic analysis. But, as he himself immediately concedes, it is a big leap from identifying this phenomenon to the thesis that such disruptions in self-relation derive from a general misunderstanding of legal freedom. Honneth here loses grip on the diagnosis of pathology that is so crucial for his own theory, conceding:

'hier können wir uns in Ermangelung besserer Argumente nur mit Spekulationen behelfen, in denen unter Zuhilfenahme soziologischer Phantasie der

96 Patten, *Hegel's Idea of Freedom*, 202.

97 Hegel, *Outlines of the Philosophy of Right*, addition to par. 37.

98 Honneth, *Das Recht der Freiheit*, 169.

99 *Ibid.*, 160-61, 169.

100 *Ibid.*, 169.

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Versuch unternommen wird, für die umrissene Pathologie die möglichen Ursachen zu finden.¹⁰¹

It thus becomes clear that Honneth's distinction between pathologies and *Fehlentwicklungen* provides, at best, a highly speculative understanding of events in social reality. In my view, however, Honneth fails to give a convincing example of a social phenomenon that can be identified as a *pathology* of legal freedom in both *The Pathologies of Individual Freedom* and *Das Recht der Freiheit*. He fails, furthermore, to demonstrate through his examples why certain social phenomena that actually occur should be understood as pathologies rather than as *Fehlentwicklungen* or vice versa. This does not mean that the concept of pathologies and the distinction between pathologies and *Fehlentwicklungen* cannot serve their purpose for the concept of social freedom proposed in *Das Recht der Freiheit*. Regarding the diagnosis of pathologies of legal freedom, so crucial in Honneth's project, however, empirical support is hard to find. Without this support it also becomes less clear whether and when Honneth's social analysis can meet with social phenomena that approach or express social freedom. I believe that Honneth's new, generic category of *Fehlentwicklungen* only disguises that he risks losing sight of the proper place of legal freedom in our contemporary societies.

4 Private Law and Ethical Life

Honneth could and – given his ambition to construct a theory of justice that moves its orientation from legal to social freedom – should be clearer about the relation between legal freedom and social freedom. I argue that his theory suffers by denying that an internal, constitutive bond between the two exists. In *Das Recht der Freiheit* Honneth underplays the importance of an appropriate legal framework, not only for relationships of friendship, love and trust but for all communicative relations within the sphere of social freedom. He does this by insisting that the norms of mutual recognition that regulate the legal sphere of action are external to the institutional sphere of social freedom and by focussing predominantly on the negative effects of what he names the pathologies of legal freedom. In the path that Honneth lays out, legal freedom can fundamentally only contribute to a disintegration of patterns of communication that point towards social freedom, rather than provide the freedom for people to find each other again.

Arguably, all socially instituted forms of relationships in the ethical sphere depend to some extent on appropriate legal conditions to thrive, whether they are relationships explicitly recognized in law, such as marriage, or other types of relationship grounded in social custom. Honneth concedes as much in *The Pathologies of Individual Freedom* when he discusses marriage and other forms of personal relationships and criticizes Hegel for not making a sufficiently clear distinction between an ethical sphere that depends on appropriate legal conditions in order

101 Ibid., 170-71.

to flourish and an institution that owes its very existence to a contract sanctioned by the state.¹⁰² Marriage can be said to be a social institution with a clear legal connotation, explicitly expressed and recognized in law, without which something is felt to be 'lacking.' Though for other institutional social relations this legal explicitness is less obvious, familiar or even felt to be needed, the law can still play an important role in supporting the equal nature of trusting relationships.

An example of the interplay between law and trust is the doctor-patient relationship, which focuses on care and orients itself around trust, yet can be nonetheless understood as a legal relationship. This came to the fore in the early 1990s in the Netherlands, when the concept of the 'medical treatment agreement' was introduced into the Civil Code, a development to which I pointed in the legal journal *Ars Aequi* in 1994.¹⁰³ With this new concept came new statutory rules, which aimed to clarify and strengthen the legal position of the patient and which included obligations for patient and doctor to properly inform each other, the right of the patient to consent to their treatment and a duty of care for the doctor. The relationship between doctor and patient was thus legally recognized and shaped, more explicitly than before, as a particular kind of contractual relationship. More than before, doctor and patient had between them not only a relationship of care but also a contractual relationship that was specifically named in statute.

In 1994 I raised concerns that such explicit naming in private law could distort the relationship of trust between doctor and patient in the medical sphere and suggested that perhaps other ways of regulating the quality of care would be more appropriate. An early evaluation in 2000 of the new rules concerning the 'medical treatment agreement' by *Zorgonderzoek Nederland* has indicated, however, that these concerns have yet to materialize.¹⁰⁴ This research, conducted under the auspices of health law experts, concluded that this can be understood as a confirmation of the idea that these new norms were, to a great extent, a codification of rules, beliefs and practices which already existed before the entry into force of the new statutory rules and that they had broad support, in literature, in jurisprudence concerning health law and in the medical-professional sphere (as expressed in conduct rules, professional codes and other forms of self-regulation).¹⁰⁵ The researchers concluded that the evaluation indicates that the new statutory rules contribute to a strengthening of the legal position and legal certainty of the patient. The new rules offer the doctor-patient relationship a stable framework and also because of this they form an 'essential element in order to reach responsible care.'¹⁰⁶ Whereas another form of regulation would have been entirely con-

102 Honneth, *The Pathologies of Individual Freedom*, 72.

103 J.Ph. Broekhuizen & A. van Veen, *Een kwestie van vertrouwen*, (Translation: 'A matter of trust'), editorial, *Ars Aequi* 1994 (3), 135.

104 Report *Evaluatie Wet op de geneeskundige behandelingsovereenkomst*, *Zorgonderzoek Nederland* (ZON), 16 August 2002, which can be consulted via <http://www.zonmw.nl/nl/publicaties/detail/evaluatie-wet-op-de-geneeskundige-behandelingsovereenkomst/>

no_cache=1&cHash=f8bae1657aa8d54283f2525d02e8e6a0 (last accessed on 16 May 2013).

105 *Ibid.*, 29.

106 *Ibid.*, 30.

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ceivable, the researchers further concluded that the choice that has been made to opt for a named, reciprocal contract in private law, reflects the horizontal character of the relationship and that the strengthening of the legal position of the patient contributes to a balancing of this relationship of equality in practice. According to the researchers, the statutory arrangement of regulation through private law also better expresses the fact that the doctor-patient relationship requires trust and cooperation. They write that '[t]he independent position of the patient is emphasized in that the initiative to maintain his rights is primary put with himself.'¹⁰⁷

Whether all these conclusions are correct or understandable can certainly be debated. The research could be refuted by stating that a juridification of the doctor-patient relationship had clearly already commenced before the new rules were introduced and that such juridification is still a problem. Furthermore, in the research part of the evaluation the instrumental function of the new statutory rules is central – as an example, the behaviour that the new rules desire of doctors is compared to the way in which doctors perceive their own behaviour – without problematizing whether such an instrumental function is fundamentally reconcilable with the cooperative nature of the doctor-patient relationship.¹⁰⁸ Certainly, more research needs to be done before any definite conclusions can be reached on the effects of the introduction of the 'medical treatment agreement.' However, my point here is that the conclusions of this evaluation still suggest that a further translation into private law of shared understandings of social practices does not necessarily lead to a distortion of the social relations in which these norms play their role.¹⁰⁹ Indeed, it can be understood as supporting and even strengthening the communicative nature of those social relations. The law and the freedom expressed in the legal sphere can work both ways and the question then (again) becomes what is proper to regulate in more detail and how, and what is not.

It can therefore be debated whether the diagnosis of legal freedom in *Das Recht der Freiheit* is helpful for the social therapy that Honneth hopes for. I believe, moreover, that it can be argued that what presents itself in this understanding of legal freedom is itself a perfect expression of the derailments of legal freedom in our contemporary societies. That is, it mistakenly understands the excesses of juridification in our time as essential characteristics of legal freedom per se.

107 Ibid., 32.

108 Ibid., 385.

109 The Report contains support for Honneth's ideas as well. As an example – although it is not entirely clear in this respect –, the Report indicates on p. 370 that a substantial part of the problems between doctors and patients is caused by rebuff: patients do not feel that they are taken seriously by the doctor about their particular health issue. Although these problems 'do not belong to the new Act,' the researchers write, 'they are nonetheless defined by the respondents' as a bottleneck of the Act. It is striking, according to the researchers, that as solution to these bottlenecks people more often chose to change doctors than restore the relationship of trust with the doctor involved. This has not so much to do with the fact that the problem is not considered serious enough by the respondent as with the expectation that a follow-up procedure would not bring sufficient remedy. Ibid., 370, also 373.

We can trace this *Fehldeutung* of legal freedom when we look at the financial sector and at the causes of the financial and economic crises that have taken place in our societies in recent years. This sector is another example of a sphere in social reality where proper public regulation was more absent than present until recently. Arguably, the recent crises were at least partly facilitated by the complexity and opacity of complex financial products and transactions, ranging from mortgage loans which were sold by the loaning banks to anonymous investors as part of so called 'securitization transactions,' to derivative contracts that made risk itself a financial instrument fit for investment. In these types of transactions and products, facilitated by complex legal structures in private law, formal legal rights and obligations are taken out of their original social contexts and transferred from the original subjects to which they belonged to anonymous actors, investors and 'special purposes companies' that are active in the international capital markets. It is tempting to interpret these developments, or the economic crises to which these products and transactions have contributed, as further examples of pathological developments of legal freedom. Is this not an instance where rights are turned from means into ends in themselves? Is it not clear that the legal persons engaged in these practices do not have a connection to communicative practices of a social lifeworld where subjects find social freedom in mutual recognition? Is not what is happening here a far-reaching decoupling of formal rights and obligations from the subjects that had the original interest in agreeing upon these rights and obligations, in other words an unbundling of private law and what Hegel called ethical life?

Yet, is this not exactly what Honneth fails to appreciate, even denies by definition as a possibility: that the proper place of legal freedom is at the heart of ethical life? There is no reason internal to legal freedom that denies its return and, indeed, to understand true freedom without an awareness of the legal freedom that underlines it would be an unreasonable demand. I understand Honneth's turn away from legal freedom as therefore demanding a response from within legal freedom itself. The answer to our current crises is, in my view, not only one of more or less public regulation of the private sphere, although in recent years the pendulum of juridification has in regards of the financial sector certainly and understandably swung towards (a demand for) more public regulation and less complexity and opacity in the private legal sphere. The answer is also to be found by looking again for the internal bond between the spheres of private law and ethical life. To remember this bond would allow for an understanding of the sphere of legal freedom as a social institution in which not only a negative form of freedom is expressed, but also a positive freedom is grounded that allows legal relations of recognition to take their proper place in the institutional fabric of ethical life.

5 Positive Freedom in Private Law

In reactualizing Hegel's discourse of 'right,' Honneth accepts and preserves the need for an interplay of law and politics in the public domain to keep alive the institutions of ethical life and a 'culture of freedom.'¹¹⁰ Nevertheless, Honneth argues in *Das Recht der Freiheit* that the law is fundamentally inadequate for truly establishing or re-establishing communication. The law cannot heal *Fehlentwicklungen*. Honneth comes to understand legal freedom as a freedom that lives off social freedom. It is no longer a constitutive part of the structure of social institutions in which true freedom can be experienced. Modern law is allowed a role in the legal protection it offers, for example to consumers who are protected in their personal and economic rights.¹¹¹ However, if the social conditions for consumers to meet each other on equal terms are lacking and if social inequalities are so extreme that market participants cannot put themselves in each other's positions, the law can only provide a minimal contribution towards strengthening the negotiation position of the consumer.¹¹² At best, legal freedom provides us with room for thought, a legitimate time-out from social obligations. It cannot, however, prepare us for new 'visions of the good.'¹¹³ At the heart of the law lies a tragic, disruptive trait, which drives subjects away from social freedom and into their private spheres.

Paradoxically, Honneth's turn away from legal freedom in *Das Recht der Freiheit* reminds us of the crucial role of positive law in the texture of what Hegel named ethical life, in particular in the sphere of civil society. It reminds us that Hegel, as I have argued in section 2.2, thought internal to the sphere of abstract right a moment at which a freedom that was first a purely negative freedom becomes connected to a positive conception of freedom that is expressed in the sphere of ethical life. In social reality, the law is certainly vulnerable to abuse and, indeed, derailment, especially in its private form. Hegel could not have imagined the forms in which and the extent to which this occurs in the present day. However, the initiatives by national and international rule-giving and supervisory institutions in recent years addressing transactions, products and parties active in the financial sector, for example, can be understood not only as corrective legal reforms aimed at restricting private law's aberrations, but also, and perhaps more fundamentally, as calls to reaffirm private law's openness for ethical life and its freedom-constitutive role. Honneth's contribution to legal philosophy in *Das Recht der Freiheit* is to provide a deeper understanding of the importance of this project and it also urges private law to think this openness from within. As I have argued in this article, to understand legal freedom only in a role as a parasite on true freedom, or 'social freedom' in Honneth's understanding, risks losing sight of the rightful place of legal freedom in our societies.

110 Honneth, *Das Recht der Freiheit*, 115.

111 *Ibid.*, 391.

112 Honneth points in several places in *Das Recht der Freiheit* to the limited possibilities of the law. See, for instance, 349, 352, 360, 391, 409, 613-14.

113 *Ibid.*, 153.