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Morale, etica, religione tra filosofia classica tedesca e pensiero contemporaneo Studi in onore di Francesca Menegoni

Moral, Ethik, Religion
zwischen klassischer deutscher Philosophie
und gegenwärtigem Denken.
Studien zu Ehren von Francesca Menegoni

Morality, Ethics, Religion
between Classical German Philosophy
and Contemporary Thought.
Studies in Honor of Francesca Menegoni

a cura di /edited by / herausgegeben von
L. Illetterati, A Manchisi, M. Quante, A. Esposito, B. Santini

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a cura di Luca Illetterati, Armando Manchisi, Michael Quante,
Alessandro Esposito e Barbara Santini

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Action and Imputation between Morality and Ethical Life: Hegel

Giulia Battistoni

Università degli Studi di Verona

This paper deals with Hegel's action theory starting from Francesca Menegoni's fruitful studies in the field of Hegel's *Philosophy of Right*. In the last decade, this part of Hegel's philosophy has proved its relevance to the concepts of action, responsibility, and imputation both in the moral and in the legal fields. After defining Hegel's concept of *Handlung* as intentional action starting from Menegoni's understanding of it, this paper shows that Hegel's action theory actually accounts for imputation of some forms of unintentional agency too. This is because the evaluation of an action is not limited to the moral perspective, which is on the contrary sublated in Ethical Life. At this point, I will explain which kind of sublation this is and in which sense Ethical Life preserves features both of the moral and of the juridical perspectives from Morality and Abstract Right. I will also explain what the consequences of this are for the evaluation of an action: the last part of the paper deals, therefore, with the administration of justice and the legal process in Ethical Life.

Introduction

In recent years, in Italy and abroad, a branch of studies has developed on Hegel's theory of action as presented in the *Philosophy of Right* that has proved to be especially relevant in the moral and juridical fields[1].

[1] Francesca Menegoni has recently underlined that interest in Hegel's *Elements of the Philosophy of Right* has changed over the years according to the dominant historical

Francesca Menegoni was one of the first to deal with Hegel's moral philosophy[2]; on her analysis, human agency is a fundamental theme which is debated through the whole *Philosophy of Spirit*[3]. Over the last decade, her work in the '80s and '90s has proven to be foresightful, given the birth of a lively discussion among moral philosophers and philosophers of right on themes like action, imputation and responsibility. Within this debate, Hegel is considered, on the one side, as offering a theory of action and imputation which still is relevant; on the other side, he is seen as the forerunner of certain types of juridical responsibility, which developed in law only later[4]. Moreover, philosophers of law take Hegel to be the father of the concept of action in criminal law[5], as well as the founder of a theory of punishment based on retribution.

Starting from Menegoni's fruitful studies in this field, in which Hegel's theory of action is normally understood as a theory of *intentional agency*, my contribution aims to open a new perspective, namely that

climate, bringing attention to some aspects of Hegel's practical philosophy rather than others, but proving the constant interest in Hegel's *Philosophy of Right*. See F. Menegoni, *Die Herausforderung der hegelschen Rechtsphilosophie*, in *Freiheit. Stuttgarter Hegel-Kongress 2011*, hrsg. von G. Hindrichs und A. Honneth, Frankfurt am Main, Klostermann, 2013, 583-588. Menegoni herself takes a clear position in this direction when she chooses, in her last book on the life and works of the philosopher of Stuttgart, to end her discussion of Hegel's works with the *Elements of the Philosophy of Right*, as if it were the part of Hegel's system which, in the current historical moment, must be the last, in order to be the first to think about. See her *Hegel*, Brescia, Morcelliana, 2018.

[2] See, on this issue, F. Menegoni, *Moralità e morale in Hegel*, Padova, Liviana Editrice, 1982.

[3] See, on this issue, her volume on *Subject and structure of agency in Hegel: Soggetto e struttura dell'agire in Hegel*, Trento, Verifiche. 1993.

[4] See the essays in the collective volumes *Hegel on Action*, ed. by A. Laitinen and C. Sandis, Basingstone-New York, Palgrave MacMillan, 2010; *Hegels Erben? Strafrechtliche Hegelianer vom 19. bis zum 21. Jahrhundert*, hrsg. von M. Kubiciel, M. Pawlik, K. Seelmann, Tübingen, Mohr Siebeck, 2017; and *Fondamenti per un agire responsabile. Riflessioni a partire dalla filosofia classica tedesc*a, ed. by G. Battistoni, Milano, FrancoAngeli, 2020. See the following rich monographs as well: B. Caspers, *„Schuld" im Kontext der Handlungslehre Hegels*, «Hegel-Studien», Beiheft 58, Hamburg, Meiner, 2012; C. Yeomans, *Freedom and reflection. Hegel and the Logic of Action*, Oxford, Oxford University Press, 2012; M. Alznauer, *Hegel's Theory of Responsibility*, Cambridge, Cambridge University Press, 2015; M. Quante, *Spirit's Actuality*, Paderborn, Mentis-Brill, 2018; K. Vieweg, *La «logica» della libertà. Perché la filosofia del diritto di Hegel è ancora attuale*, Pisa, ETS, 2017. In his recent volume on *Pragmatistic Anthropology*, Michael Quante interprets Hegel's *Philosophy of Right* as a «cognitivist ascriptivism» and as a reconstruction of our social praxis of ascription of responsibility. See M. Quante, *Antropologia pragmatista. Padova lectures*, ed. by A. Manchisi, Padova, Padova University Press, 2020.

[5] See G. Radbruch, *Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem*, Berlin, J. Guttentag, 1903, p. 101.

Hegel's action theory also accounts for the imputation of responsibility for some kinds of unintentional actions. I will show that Ethical Life, as Hegel understands it, represents not only the overcoming of the preceding moments, in which objective spirit is articulated (Abstract Right and Morality), but also the preservation of the same moments, allowing for an evaluation of action which therefore remains at neither an external juridical level, nor at a mere moral, internal level. First of all, a terminological clarification is necessary, in order to determine what kind of activity, in Hegel's terms, will be considered in this article. The features of Ethical Life will then be defined in comparison to Morality and Abstract Right, in order to show, finally, that this level allows for a complete evaluation of the action and a right determination of punishment.

1. Hegel's concept of *Handlung*

As Menegoni has recognized, it is possible to make a terminological distinction, in Hegel's text, between two kinds of activities. The *Handlung* mostly refers to individual actions and finds its explication within objective spirit. In particular, the Morality chapter deals with intentional agency and its moral and juridical implications, according to Menegoni, and in Ethical Life, human action acquires a socio-political value through the recognition of the agent as a member of a family, a social class, a political and juridical body. The *Tätigkeiten* refer, in contrast, to activities and productions of absolute spirit, which manifests itself through art, religion and philosophy[6]. Menegoni finds the connection between the two kinds of activities, *Handlungen* and *Tätigkeiten*, in the fact that art-making, as well as religious meditation and the practice of philosophical thinking (and so the *Tätigkeiten*) exhibit the characteristics of intentional and voluntary agency, which they share with individual *Handlungen*.

This article deals with the concept of *Handlung*.

Beginning with the work of Michael Quante[7] and Francesca Menegoni, the Morality chapter in particular of Hegel's *Elements of the Philosophy of*

[6] See F. Menegoni, *Handlungen und Tätigkeiten in Hegels Philosophie des objektiven und des absoluten Geistes*, in *Objektiver und absoluter Geist nach Hegel. Kunst, Religion und Philosophie innerhalb und außerhalb von Gesellschaft und Geschichte*, hrsg. von T. Oehl und A. Kok, Leiden/Boston, Brill, 2018, pp. 123-141. On the distinction between individual agency (*Handlung*) and absolute activity (*absolute Tätigkeit*) see also N. De Federicis, *Moralità ed eticità nella filosofia politica di Hegel*, Napoli, Edizioni Scientifiche Italiane, 2001, p. 169.

[7] See M. Quante, *Hegels Begriff der Handlung*, Stuttgart, Frommann-Holzboog, 1993.

Right[8] has attracted the interest of researchers in the philosophy of action, not only in the moral but also in the juridical field; it is in exactly this section, indeed, that Hegel addresses issues like the accountability and the responsibility of the agent. In this context, the concept of *Handlung* is understood as «the concrete expression of the unity of what is internal and what is external»[9]. This concept has commonly been taken to refer to an action which happens with self-consciousness and self-determination, and which therefore is distinct from the concept of deed (*Tat*), understood as a modification which is introduced by the agent in the external world, regardless of the agent's perspective. The *Handlung* is identified, indeed, by the subjective right of knowledge (*Recht des Wissens*) and right of the will (*Recht des Willens*), which limit imputation only to that part of the deed which was known and willed for by the agent, i.e., his action[10]. These rights are an achievement of modernity and they also distinguish the modern conscience from the so-called heroic self-consciousness[11], according to Hegel.

Furthermore, Menegoni recognizes two arguments in Hegel's text, dealing with action. On the one hand, there is the description of the action, underlining its constitutive elements (1). The action is considered, at this level, as an event which is intentionally carried out and teleologically oriented; this argument corresponds to the German expression "an etwas schuld sein". On the other hand, there is the evaluation of the action, together with the determination of different levels of imputation, and the judgement on the juridical, moral and socio-political value of the action (2); this argument corresponds to the German expression "an etwas schuld haben"[12].

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[8] G.W.F. Hegel, *Naturrecht und Staatswissenschaft im Grundrisse. Grundlinien der Philosophie des Rechts*, in *Gesammelte Werke* (GW), Bd. 14,1; Bd. 14,2 (*Beilagen*); Bd. 14,3 (*Anhang*), hrsg. von K. Grotsch und E. Weisser-Lohmann, Hamburg, Meiner, 2009-2011 (English translation: *Elements of the Philosophy of Right*, ed. by A.W. Wood, trans. by H.B. Nisbet, Cambridge, Cambridge University Press, 2003, 1991[1]). Abbreviation: *PhR*. Abbreviation for Hegel's remarks (*Anmerkungen*): An. Abbreviation for the additions (*Zusätze*): Z. Abbreviation for Hegel's marginal notes (*Randbemerkungen*): GW, Bd. 14,2 and page number.

[9] See F. Menegoni, *Handlungen und Tätigkeiten*, p. 125.

[10] See *PhR*, § 117.

[11] This one is exemplified by Oedipus, who committed parricide and incest without knowing and wishing for it: however, the heroic self-consciousness is unable to distinguish between *Tat* and *Handlung*, and for this reason it considers itself as responsible for the entire deed, regardless of the right of knowledge and the right of the will. See *PhR*, § 118.

[12] The distinction between the two perspectives is absolutely fruitful. I think, however,

This distinction of perspectives might be further determined as follows: the description of the action (1) can consider the action as an event which is intentionally carried out and teleologically oriented, on the basis of its constitutive elements of the purpose, the intention and the conscience (1a), or it can consider the action as a modification which can be traced back to an individual provided with a will, but which is not necessarily carried out by him/her *intentionally*, leveraging the objectivity of the action itself and its rights (1b). This second view of action, which can be found in Hegel's text, would account for those acts that are originally not teleologically oriented and that can, nevertheless, be traced back to the agent from a descriptive perspective. Ascription of responsibility is a further step beyond the description of the action and the agent-action connection, and it actually concerns the evaluation of the action at a juridical, moral and socio-political level.

A further fruitful distinction made by Menegoni is that between the *Wirklichkeit der Handlung* and the *Wert der Handlung*. The actuality (*Wirklichkeit*) of the action includes the inner motivations of the agent: in order to be *wirklich*, action must include personal conviction, and it should be an expression of the conscience that chooses. Indeed, in the introductory paragraphs of the *Elements*, in which the moments and the realization of the concept of free will are analysed, Hegel underlines the importance of decision along two dimensions: the German expression *sich entschließen* (to decide) refers to the decision of the will to get out of its indeterminacy, while the German expression *etwas beschließen* (to resolve on something) refers to the determination of the content among the possible ones.

The evaluation of the action (*Wert*) also brings into play external motivations, which determine its objective value in the juridical, moral, social, or political field. This aspect is, I will argue, fundamental: Hegel's theory of action brings together both the subjective dimension – the intentions and convictions related to the agent's perspective – and the objective consideration of social and institutional relations. The

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that the sharp distinction between the expressions "an etwas schuld sein" and "an etwas schuld haben" may, in some cases, be misleading, since Hegel does not use them constantly and consistently, by maintaining for each of them the same meaning. This is due to the ambiguity of the concept of *Schuld* itself, which contains both the meaning of being the cause of a modification in the external world, and the meaning of having responsibility for it. The first perspective can be defined "descriptive and external" (a); the second one, based on the point of view of the agent, is merely subjective and moral (b).

normative dimension balances the pure subjectivity of inner motivations and plays an essential role in Hegel's foundation and acknowledgement of imputation of particular kinds of unintentional agency. This is what allows Hegel's theory of action to overcome the ethics of mere intention.

This move is realized in the consideration of ethical action (*sittliche Handlung*), characterized by the interweaving of individual motivations and decisions, on the one hand, and the juridical, social and cultural environment, on the other. At the level of Ethical Life, a double formative process is realized, as Menegoni underlines: a formative process of the individual to self-consciousness and self-realization, on the one hand, and a process of cooperation at a common task, on the other. Getting out of the subjective point of view and entering into the field of intersubjective relations, the internal motivations enter into actuality and the action itself becomes *wirklich* and objective.

Starting from these conceptual bases, I will show in the next section that the subjective and moral perspective reveals itself to be, at a certain point, necessarily defective, and it becomes clear that a judgement of the value of human agency cannot be uniquely based on what the agent declares to be his/her intentions and convictions. First of all, I will underline what characterizes Ethical Life, compared to both Abstract Right and Morality. I will then explain the sense in which some elements of these moments are "overcome" in Ethical Life while others are preserved, before turning to the implications of this ethical point of view for the evaluation and imputation of an action.

2. From Morality to Ethical Life: overcoming and preserving

Ethical Life represents the last moment of the objective spirit, i.e. its realization, and it assimilates the preceding levels, Abstract Right and Morality; it represents, at the same time, their development, thus presupposing them, and their foundation, their truth and concreteness. In the transition from *Moralität* to *Sittlichkeit*, in particular, the former is not negated: its one-sidedness is rather abandoned, so that subjectivity can fully realize itself in the ethical whole. Ethical Life exists, indeed, through individuals, who preserve their subjectivity. However, the action, which was previously considered from the moral point of view of the subject with his/her subjective guilt and imputability, is now also evaluated in

its concreteness, from the juridical standpoint. Although Ethical Life takes up elements from Abstract Right, one cannot claim that the two spheres coincide: the former rather represents concrete objectivity, which is expressed in familial, economic and political relationships[13]. The concepts of guilt and imputation (*Zurechnung*) are defined, at this level, with consideration and respect for not only the agent's interiority, the subjective rights of knowledge and of the will, but also for the objective side of action, which in Morality was overshadowed and which on the contrary predominated in Abstract Right. Ethical Life is hence characterized by a reconciliation between particularity and universality, subjectivity and objectivity[14].

In Ethical Life right is not abstract anymore; it becomes positive right, as law which is recognized by citizens. The latter preserves, at the same time, the subjective right to know what is illicit: this right was brought forward in the moral standpoint, and allows for the imputability of action as the responsibility of the agent[15]. Therefore, universality of right and moral subjectivity are aspects that cannot be disregarded and that play an important role in the evaluation of action at the ethical standpoint. Although here the point of view is different, there is a constant interweaving with the moral perspective, with the convictions and intentions of the agent, which contribute to determining not only his/her moral, but also juridical, imputability.

Compared to Morality, Ethical Life is characterized as «the identity – which is accordingly *concrete* – of the good and the subjective will, the truth of them both»[16]. While in Morality the good was introduced as an abstract concept, which lends itself to be filled up in its content by a subjectivity that might also become manipulative[17], in Ethical Life the concrete good is realized. The ethical, defined by Hegel as «a subjective

[13] For example, the fracture of unity brought about by the crime has a different meaning in Ethical Life compared to Abstract Right. In Ethical Life the right retribution is not revenge but punishment: this last restores the harmony of the parts and the unity.s interiority, the subjective rights of knowledge and of the will the evaluation and imputation of an action. its constitutive e

[14] Both «the Objective» and «the Subjective» reach here their true right, indeed. See G.W.F. Hegel, *Wintersemester 1822/23. Nachschrift Heinrich Gustav Hotho,* in GW 26,2 (*Vorlesungen über die Philosophie des Rechts*), hrsg. von K. Grotsch, Hamburg, Meiner, 2015, pp. 767-1044 (Abbreviation: *PhR 1822/23*), §§ 152-153, pp. 923-924.

[15] See *PhR,* § 132.

[16] *PhR*, § 141.

[17] See *PhR,* §§ 129-140.

disposition, but of that right which has being in itself»[18], realizes itself in a subject who in fact wants the right. Subjectivity becomes ethical because it no longer experiences its duties as something imposed. With this, the one-sidedness of Morality, connected to the fact that good *ought* to be realized and subjectivity *ought* to be good (the side of *Sollen*), is overcome.

Both Abstract Right and Morality turn out to be, therefore, incomplete: «Custom is what right and morality have not yet reached, namely spirit. For in right, particularity is not yet that of the concept, but only of the natural will. Similarly, from the point of view of morality, self-consciousness is not yet spiritual consciousness», as Eduard Gans puts it[19]. So neither the juridical standpoint of Abstract Right nor the standpoint of Morality can subsist by themselves: on the contrary, they exist as moments of the ethical whole in which spirit realizes itself, having the ethical as their ground[20]. They have been *aufgehoben*, but not only in the sense that their one-sidedness is *negated*, but also and above all in the sense that they are preserved as essential parts of the ethical whole[21].

In civil society, the moral perspective manifests itself in particular in the system of needs, in which the subjective interests of the individuals unfold[22]. The administration of justice (*Rechtspflege*), by contrast,

[18] *PhR*, § 141 An.

[19] *PhR*, § 151 Z.

[20] See G.W.F. Hegel, *Wintersemester 1819/20. Nachschrift Johann Rudolf Ringier mit Varianten aus der Nachschrift Anonymus (Bloomington) und Nachschrift Anonymus (Bloomington) mit Varianten aus der Nachschrift Johann Rudolf Ringier*, in GW, Bd. 26,1 (*Vorlesungen über die Philosophie des Rechts*), hrsg. von D. Felgenhauer, Hamburg, Meiner, 2013, pp. 331-590 (Abbreviation: *Nachschrift Ringier · Anonymus 1819/20*), p. 423.

[21] F. Menegoni claims: «Nella *Sittlichkeit* si attua l'innesto del nuovo nell'antico, mediante l'*Aufhebung* della *Moralität*, tolta in ciò che ha di formale, ma conservata per ciò che di vitale e di vivificante essa contiene» (*Moralità e morale in Hegel*, p. 270). In the ethical standpoint two rights are simultaneously present: the right of the substance and the right of the individual. See G.W.F. Hegel, *Wintersemester 1817/18. Nachschrift Peter Wannenmann*, in GW, Bd. 26,1, pp. 1-225 (Abbreviation: *Nachschrift Wannenmann*), § 69. As unity of the preceding moments, Ethical Life is their integration. The individual is here "at home" in the "Objective" and is not opposed to it anymore (contrary to what happened in the moral standpoint). See *Nachschrift Ringier · Anonymus 1819/20*, p. 423 f.

[22] Although Morality is strictly connected to the concepts of reflection and subjectivity and it shows its limits in the phenomenon of evil, it is also true that it has its right to exist and modern Ethical Life cannot disregard it. Although conscience contains in itself the root of evil, Hegel recognizes its importance and rights to the point of defining it an inviolable sanctuary (see *PhR*, § 137 An). See H. Ottmann, *Die Genealogie der Moral und ihr Verhältnis zur Sittlichkeit*, «Hegel-Studien», Beiheft 52, 2010, pp. 266-275, p. 286. On the meaning of evil in Hegel, see F. Menegoni, *Die Frage nach dem Ursprung des Bösen bei*

intervenes to regulate conflicts coming from particularisms, and represents, therefore, the realization of Right; at this level, however, it takes account both of the objectivity of the deed and of the subjectivity of the agent's intentions[23]. Again, Ethical Life cannot leave the moral standpoint behind[24].

At the same time, in Ethical Life «my will is posited as conforming the concept and its subjectivity is sublated», as one can read in Hegel's marginal notes on his exemplar of the *Elements*[25]. Although Ethical Life cannot leave the moral perspective behind, it is also true that Ethical Life is characterized by an objective content which rises above subjective opinions:

> α) The objective sphere of ethics, which takes the place of the abstract good, is substance made *concrete* by subjectivity as *infinite form.* It therefore posits *distinctions* within itself which are thus determined by the concept. These distinctions give the ethical a fixed *content* which is necessary for itself, and whose existence [*Bestehen*] is exalted above

Hegel, in *Subjektivität und Anerkennung*, hrsg. von B. Merker, G. Mohr und M. Quante, Paderborn, Mentis, 2004, pp. 228-242.

[23] See L. Siep, *Was heißt „Aufhebung der Moralität" in Sittlichkeit in Hegels Rechtsphilosophie?*, in Id., *Praktische Philosophie im Deutschen Idealismus*, Frankfurt am Main, Suhrkamp, 1992, pp. 217-239, p. 231. It should be noted that the kind of *Sittlichkeit* considered by Hegel as the culmination of objective spirit is ethical life of modern society, which strongly differs from the ancient ethical life, staged by Greek tragedies. In the latter, the ethical is immediately present in the individuals. In modern ethical life, on the contrary, individuals recognize themselves in institutions, although these one are something external to them. Moreover, while Greeks had not developed the depth of conscience yet, modern ethical life cannot disregard it. Therefore, Ethical Life cannot give up the subjective and moral perspective. According to Ottmann, the history of ethical life begins with the ancients, for whom an immediate unity of substance and subject is present; through the fracture of the first unity, a new unity between reflection and ethical life is reached. The fracture of the first unity is probably given by the development of reflection in Greek society itself, through Socrates, who could not be tolerated in that context. See H. Ottmann, *Die Genealogie der Moral*, p. 268 f. and A.S. Walton, *Hegel: individual agency and social context*, in *Hegel's Philosophy of Action*, ed. by L.S. Stepelevich and D. Lamb, Atlantic Highlands (NJ), Humanities Press, 1983, pp. 75-92.

[24] As Menegoni claims, «morality is necessary so that the juridical and ethical determinations – laws and institutions – do not remain something formal or external, but they are recognized in the inner conscience of the subject» (*Moralità e morale in Hegel*, p. 246. My translation). Particularity is essential, as Hotho's notes make clear: «Die Individuen sind besondere an und für sich selbst und gegeneinander. Diese ganze Seite der Besonderheit, dieses alles ist die Seite der Verwirklichung des Sittlichen. Die sittliche Substantialität muß existieren, und existirt in der Besonderheit des Subjects» (*PhR 1822/23*, § 154, p. 924).

[25] See GW, Bd. 14.2, p. 705.

> subjective opinions and preferences: they are *laws and institutions which have being in and for themselves*[26].

Ethical Life cannot remain at the mercy of subjectivity, indeed, and rather rises above it; in addition to this, through institutions and laws, right does not remain abstract, but it gains concreteness and recognition from every citizen. In fact, laws are not alien to the individuals: they represent, on the contrary, the individual's own essence, in which he/she finds his/her self-awareness[27]. Precisely at this level, true conscience, as Menegoni claims,

> exists therefore from the point of view of the unity of subjective knowledge and the objective system of principles and established duties; it is a unity that can realize itself only in Ethical Life, where freedom exists in its concept as much as in its actual realization, it is conscious possession of a self-conscious subject and realizes itself through his/her activity in the objective context of customs and laws in force in the community of which he/she is part[28].

My analysis shows that subjectivity, together with its rights, acquires a double meaning, with reference to the ethical: considered in its absolutization and one-sidedness, as opposed to ethical substantiality, subjectivity is overcome; but considered as an essential element for the existence of the concept of freedom, subjectivity is «the absolute form and existent actuality» of the ethical[29]. In this way, the ethical does not remain something abstract, but it finds its concretization in the individuals, who, in turn, find their own truth in the ethical:

> The *right of individuals* to their *subjective determination to freedom* is fulfilled in so far as they belong to ethical actuality; for their *certainty* of their own freedom has its *truth* in such objectivity, and it is in the ethical realm that they *actually* possess *their own* essence and their *inner*

[26] *PhR*, § 144.
[27] See *PhR*, § 147.
[28] F. Menegoni, *Moralità e morale in Hegel*, pp. 250-251. My translation. The "true conscience" is opposed to the "formal conscience" which characterizes Morality, according to Hegel, as a mere certainty of itself, in absence of an objective content: at the moral standpoint the good remains, as already mentioned, an abstract concept whose content completely depends on the moral subject.
[29] *PhR*, § 152. And again: «Subjectivity, which is the ground in which the concept of freedom has its existence [*Existenz*] (see § 106), and which, at the level of morality, is still distinct from this its own concept, is, in the ethical realm, that [mode of] existence of the concept which is adequate to it» (*PhR*, § 152 An).

universality (§ 147)[30].

Individuals maintain their right to particularity within the ethical substance[31]: at this level, «a human being has rights in so far as he has duties, and duties in so far as he has rights»[32]. Ethical duties bind the will of the individual, but they do not correspond to the moral *Sollen*. They represent, on the contrary, the overcoming of it, and in a certain sense its concretization: «the individual stands in relation with them [the *Pflichten*] as with their own substantial element»[33].

At this level, lastly, the relationship among a community of individuals is realized («Verhæltniss vieler Individuen»)[34]: they are considered as concrete subjects, who stand not only in abstract relation to one another, as it happened in Abstract Right, and are evaluated not only from the standpoint of their interiority, as in Morality. In their mutual relations, individuals are still moral subjects; however, they are not closed in on themselves, but rather are in unity with others, as members of an ethical whole.

In this framework, it is in the context of the administration of justice that it is possible to identify a reconciliation of perspectives, with reference to the evaluation of the action. The court of law and the decision of the judge reconcile the universal aspect of right, which has become positive as law, with particularity, which is present not only in the convictions of the criminal in relation to his/her action, but also in those of the judge in relation to the criminal action, as I will discuss in the following section[35]. The judge's decision comes, indeed, from his/her subjective opinion and from his/her conscience. Despite this, he/she must

[30] *PhR*, § 153.

[31] «The right of individuals to their *particularity* is likewise contained in ethical substantiality, for particularity is the mode of outward appearance in which the ethical exists». *PhR*, § 154.

[32] *PhR*, § 155. As Hegel notes: «Pflichten sind bindende Beziehungen, Verhæltnisse zur substantiellen Sittlichkeit – aber diese ist mein Wesen, hat durch mich selbst Daseyn – Ihr Daseyn, d.i. ihr Recht, dass ich sie, ihr Daseyn, respectire, meine Pflicht – ist auch mein Recht, es ist das Daseyn meiner Freiheit» (GW, Bd. 14.2, p. 725).

[33] See M. Alessio, *Azione ed eticità in Hegel. Saggio sulla filosofia del diritto*, Milano, Guerini e Associati, 1996, p. 56. My translation.

[34] GW, Bd. 14.2, p. 703.

[35] With reference to the application of laws, Alessio claims: «It must be initially kept in mind, in this regard, that two are the conceptual determinations that intervene: universality of right, which is upstream of its own being posited as law, and particularity to which and with which right has to be applied» (M. Alessio, *Azione ed eticità in Hegel*, p. 138. My translation).

comply with universality and the validity of law, being the representative and the higher authority of the court of law, which is that institution in which the individual has the right and the duty to appear[36]. In the juridical judgement both perspectives of Abstract Right and Morality are, therefore, preserved and reconciled, thus allowing for an evaluation of the action which is not limited to the mere external perspective or to the mere subjective, inner, moral one. With this, as I will show, Hegel's theory of action also takes account of some kinds of unintentional agency.

2.1. The knowledge of what is illicit as the basis of imputation

Punitive justice, which is realized in civil society, is the overcoming of vindictive justice, which is defective and subjective[37]. The rights of knowledge and of the will of the moral subject (*Recht des Wissens, Recht des Willens*) are now the preconditions of the administration of justice. This is realized, indeed, only if right is wished for by the particular will, by the individual, and known as such — only if it is *universally recognized*[38]: as I have already mentioned, and is anticipated in Morality, the individual must be aware of the licit or illicit nature of his/her action, so that this one can be imputed to him/her. That is, at the level of Ethical Life, the individual must know what is permitted or forbidden by law; he/she must know the laws. This knowledge is an essential criterion for determining the culpability of the agent and his/her imputability, as well as being a right and at the same time a duty of the agent[39].

The law should therefore be made knowable for every citizen. The fact that right has become positive right in the form of knowable laws has consequences for the judgement of imputation, too: only illicit actions

[36] See *PhR*, § 221.

[37] It is a progress from a mere act of external force to a more reflective and conscious action. See M. Alessio, *Azione ed eticità in Hegel*, p. 134.

[38] See *PhR*, § 209.

[39] This aspect is anticipated in the §§ 132 and 137 of Morality: each element of the action (*Handlung*) corresponds to a right of the subjective will, which contrasts with another right, the so called right of the objectivity. This last demands from the agent, as rational being, that he knows the universal nature and the value of his/her action, which in the socio-juridical context corresponds to the knowledge of what is licit or illicit according to the laws in force. I explored and analysed these aspects in *The Normative Function of the Right of Objectivity in Hegel's Theory of Imputation*, in *Concepts of Normativity: Kant or Hegel?*, ed. by C.H. Krijnen, *Critical Studies in German Idealism*, Vol. 24, Leiden-Boston, Brill, 2019, pp. 141-156; and Wissen und Wollen*: il fondamento dell'imputazione della responsabilità in G.W.F. Hegel*, in *Fondamenti per un agire responsabile*, pp. 103-122.

which are determined as such by law, and only what is known to be illicit, can be imputed to the agent[40]. For this reason, the knowability and publicity of law are conditions of imputation: it is the right of the subjective will that the agent *should be able* to know laws[41]. This right represents at the same time a duty of the individual: in fact, the ignorance of the universal cannot be a reason to excuse the agent. As Hegel claims in § 132 of Morality:

> It is said that the criminal, at the moment of his action, must have a *clear representation* [*sich…müsse vorgestellt haben*] of its wrongfulness and culpability before he can be made responsible for it as a crime. This requirement, which appears to uphold his right of moral subjectivity, in fact denies his inherent nature as an intelligent being […][42].

There is a kind of ignorance, the ignorance of the particular circumstances of an act, which exonerates the agent from responsibility for his/her action, and a different kind of ignorance that, on the contrary, makes the guilt even worse. This is the Aristotelian distinction between "acting by ignorance" and "acting in ignorance", which is appreciated by Hegel and mentioned in a note to § 140 of Morality.

In this sense, I think, Hegel recognizes imputation of some kinds of seemingly unintentional actions: they are unintentional at least from the point of view of the agent. This perspective is taken into account considering the actual damage which has been brought about in the external world, the value of the action in the socio-juridical system, and the fact that the agent could and should have known it; these aspects cannot be denied by the agent, and they rather claim a right against him/her, thus balancing the rights of the subjective will. This becomes clear, again, already within the Morality chapter, where Hegel recognizes the agent's responsibility for damages which he did not direct cause and which however can be imputed to him/her, thus anticipating a form of objective responsibility, which was later theorized in the German law and

[40] See G.W.F. Hegel, *Wintersemester 1824/25. Nachschrift Karl Gustav Julius von Griesheim,* in GW 26,3 (*Vorlesungen über die Philosophie des Rechts*), hrsg. von K. Grotsch, Hamburg, Meiner, 2015, pp. 1047-1486 (Abbreviation: *PhR 1824/25*), p. 1346: «Zugerechnet kann nur das werden, was als Gesetz bestimmt ist, was als Gesetz gewußt wird».

[41] «In der Zurechnungsfähigkeit liegt das Moment daß dem Individuum die Gesetze bekannt gemacht sein müssen, es muß sie kennen und erkennen können» (*PhR 1824/25*, p. 1349). However, the inner adherence to law cannot be verified.

[42] *PhR*, § 132 An.

of which Hegel might be the forerunner[43].

In Hegel's marginal notes to his copy of the *Elements*, with reference to the last paragraphs of Morality, he writes: «Right of the subjective will, that it knows [weiss], has known [gewusst hat] – could have known, [hat wissen können] – that something is good or not good – licit or not licit etc.»[44]. However, Hegel recognizes that «here is left completely indeterminate what kind of knowledge [Wissen] this is»: it is a knowledge, indeed, which is determined only at the level of Ethical Life.

And it is precisely in the context of the administration of justice that right is posited and universally acknowledged, wished for, and known, and so it achieves exterior existence and objective actuality: «The objective actuality of right consists partly in its being present to the consciousness and being in some way *known*, and partly in its possessing the power of actuality, in having *validity* and hence also in becoming *known as universally valid*»[45].

The right as law (*Gesetz*) represents, therefore, the reconciliation between the particular and the universal, allowing for the application of the universal of right to the particular case[46]; it is, moreover, binding[47]. The obligatoriness of laws is connected, again, to the necessity that they be made universally known[48]: if laws were not knowable and public, how could the individual know what goes against them? How could one action be imputed to him/her as an illicit act, without he/she even being conscious of that and knowing that? For this reason, the knowledge of

[43] See *PhR*, § 116 e B. Caspers, *„Schuld" im Kontext der Handlungslehre Hegels*, p. 192 (f. 31).
[44] GW, Bd. 14.2, p. 647. My translation.
[45] *PhR*, § 210. This is a right of the conscience and of the subjective will, too. Hotho claims: «Die Bekanntschaft also mit den Gesetzen und die Möglichkeit derselben fordert das Recht des subjectiven Willens» (*PhR 1822/23*, § 215, p. 976). And again: «Die Gesetze sollen mir bekannt sein, also das Erlaubte und Verbotene. Daß mein Bewußtsein übereinstimmt, nicht sich unterscheidet vom Gesetz, diese Einigkeit soll vorhanden sein. Dieß ist das Recht des subjectiven Bewußtseins» (*PhR 1822/23*, § 225, p. 986).li è mostrato, tituisce, ancora oggi, un terreno molto fertileere approfondite, rientrano in a e morale, non si attribuirebbe co
[46] «Indem das Gesetz das Allgemeine ist, das auf die besonderen Fälle angewendet werden soll, so ist hier zugleich ein doppeltes mit einander im Verhältniß, das Allgemeine und das Besondere» (*Nachschrift Ringier · Anonymus 1819/20*, p. 478). In the law two moments are present, indeed: that of universality and that of particularity.
[47] However, positive right may also not correspond to right *in itself*, as the manifestation of freedom; in some societies and in some historical epochs, for example, slavery was permitted by law, although it violates the freedom of human being.
[48] See *PhR*, § 215.

the illicit nature of the action by the agent who commits it, together with the necessity for laws to be made known, are a fundamental right of the subjective will which is preserved and realized at the level of Ethical Life. It would therefore be an injustice, according to Hegel, to hide the laws from the citizens or even to write them in a language incomprehensible to them: issues concerning right should not be comprehensible only to the order of jurists[49].

Now, I have emphasized that Ethical Life is the ground of the relations between different individuals. At this level, therefore, the category of recognition (*Anerkennung*) is essential, as it already was in Abstract Right (although in a formal way). Indeed, the freedom of the individual and his/her rights become concrete in mutual recognition[50]. For this reason, civil society must intervene against the illicit action which damages the condition of its existence: since civil society develops through the relationship between autonomous individuals, in order for the contractual, juridical, working relationships to exist, there must be *mutual recognition*. This recognition is negated by crime, and for this reason it must be re-established; the administration of justice allows, therefore, not only for the realization of right but, more generally, for life and recognition in society at all[51]. The last part of this essay will focus on the determination of punishment, with particular attention to the role which the subjective and moral elements play therein.

2.2. The subjective component in determining punishment

In Abstract Right, Hegel interprets punishment as a right of the criminal that honours his/her rational nature. Within Ethical Life, punishment becomes the means of restoring the infringed right, to the benefit of the criminal himself/herself, allowing for a reconciliation of the individual with him/herself and with the law. But how is punishment

[49] «Right is concerned with freedom, the worthiest and most sacred possession of man, and man must know about it if it is to have binding force for him» (*PhR*, § 215 Z).

[50] On the role of recognition, as a fundamental factor in the definition of the moral quality of the action, according to Hegel, see F. Menegoni, *Action Between Convinction and Recognition in Hegel's Critique of the Moral Worldviews*, in *Hegel on action*, pp. 244-259; and Ead., *Fondamenti per un agire responsabile: la dialettica tra convinzione e riconoscimento nella «Fenomenologia dello spirito»* di Hegel, in *Fondamenti per un agire responsabile*, pp. 123-138.

[51] Rizzi underlines that punishment allows to re-establish recognition, as the ground of right, and to restore the criminal's honour, letting him reenter the juridical community. See L. Rizzi, *Eticità e stato in Hegel*, Milano, Mursia, 1993.

actually determined?

If right represents the universal which must be valid as opposed to «*particular volitions and opinions*»[52], and if right must be known and applied to the individual case, whose task is it to do so? Hegel answers to this question as follows: «This *cognition* and *actualization* of right in the particular case, without the subjective feeling [*Empfindung*] of *particular* interest, is the responsibility of a public authority [*Macht*], namely the *court of law*»[53]. Indeed, it is precisely this institution that allows for the transition from an illicit form of retribution, i.e. revenge, to the licit form of punishment, because the court of law does not serve a particular interest, in contrast to the injured party in revenge: the execution of justice now effects its own reconciliation both in the objective and in the subjective sense[54].

And it is precisely a subject, the judge, who is entitled to make the final decision in the determination of the criminal's punishment. Although the judge determines punishment at his/her discretion, nevertheless he/she represents the universal will and he/she must make a reasoned judgement, considering the collected evidence and the depositions of the witnesses and of the criminal him/herself[55]. However, one cannot claim that the judge's activity is merely mechanical: he/she is present with his/her mind and subjectivity in it in order to resolve legal conflicts. The accidentality and the subjectivity of the decision are, therefore, not only accepted but also, as far as it is possible, regulated through law itself, which determines a *maximum* and a *minimum* within which the judge, through his/her knowledge of law and the examination of the specific

[52] *PhR*, § 219.

[53] *PhR*, § 219. The court of law, therefore, could be considered as the personification of the universal. See R.-A. Baermann, *Sittlichkeit und Verbrechen bei Hegel*, Frankfurt am Main, Peter D. Lang, 1980, p. 107.

[54] see *PhR*, § 220. See *Nachschrift Wannenmann*, § 112. Hotho explains the transition from revenge to punishment as follows: «Nimmt aber die Allgemeinheit die Rache auf sich, so fällt die Zufälligkeit fort, denn das Allgemeine hat nur den Zweck des Allgemeinen das Recht vor sich, und so verwandelt sich die Rache in die Form der Strafe, und so ist das Recht mit sich selbst objectiv versöhnt, und diese Versöhnung ist objectiv verwirklicht, denn das strafende Recht existirt nicht in der Zufälligkeit der Persönlichkeit» (*PhR 1822/23*, § 220, p. 982). When universality takes revenge upon itself, accidentality falls and right is reconciled with itself in an objective way and it realizes itself.

[55] Therefore, the judged is distinguished from the avenger: «Der Richter ist nicht der Rächer, Rache ist auch Ausübung der Gerechtigkeit, aber verknüpft mit Interessen, Empfindungen, partikulairen Interessen, so daß davon die Ausübung der Gerechtigkeit abhängt, willkürlich ist und ungerecht werden kann» (*PhR 1824/25*, pp. 1357-1358).

case, has a certain freedom of choice[56].

In his/her activity of determining punishment, therefore, the judge keeps two moments together: an unavoidable subjectivity and the attempt to make an objective decision. For the one moment, what is required is «a knowledge [*Erkenntnis*] of the nature of the case in its *immediate individuality* [*Einzelheit*] – e.g. whether a contract etc. has been made, whether an offence has been committed and who the culprit is»[57]: it is the consideration of the objective guilt together with the objective imputability of the criminal (with the consideration of the produced damage). For the other moment, what is required in addition is the consideration «in *criminal* law, whether the *substantial*, criminal character of the deed was determined by premeditation (see Remarks to § 119)»[58]: in criminal law the interiority of the criminal, i.e. his/her motives and intentions, must therefore be considered, together with his/her subjective imputability.

As a result, the moment of subjectivity is included in various circumstances: in the evaluation of the specific case, considering the interiority of the agent, his/her point of view in the committed action, and with them the subjective guilt and imputation; and in the act of judgement itself, which does not occur mechanically but rather implies the subjectivity of the judge and his/her conviction. Indeed, Hegel claims:

> The essential factor in categorizing an action is the subjective moment of the agent's insight and intention (see Part Two above); besides, proof is concerned not with objects [*Gegenstände*] of reason or abstract objects of the understanding, but only with details, circumstances, and objects of sensuous intuition and subjective certainty, so that it does not involve any absolutely objective determination. For these reasons, the ultimate factors in such a decision are *subjective conviction* and conscience (*animi sententia*); and in the case of the proof, which rests on the statements and affirmations of others, its ultimate (though subjective) guarantee is the *oath*[59].

The oath has its roots in the conscience, and therefore there is a risk that the individual makes false statements in front of the judge in the court of law. However, loyalty has to be presumed in the declaration, because the oath is the attempt to make objective something which is

[56] See *PhR*, § 214
[57] *PhR*, § 225.
[58] *PhR*, § 225.
[59] *PhR*, § 227.

originally subjective, i.e. the interiority of the subject, his/her conviction regarding his/her action; it allows the judge to hear the testimony of single individuals, presupposing that they are saying the truth and developing, as a consequence, his/her own convictions about the act[60]. In the evaluation of the action, at this level, and in the determination of punishment, the subjective moment is so recognized; it is not negated, but rather preserved, trying to avoid its inner contradictions[61]. As a result, some aspects of the moral standpoint are still present in the «dispensation of justice, as the application of the law to the *individual case*»[62]. Furthermore, the decision of the judge must not differ from the conscience of the criminal: this is his/her right[63].

In the same way, objectivity is present at several points: in the fact, for one, that the subsumption of the specific case under the universality of law by the judge is never a mere result of his/her arbitrariness, because the particular case has first to be prepared to be subsumed under the universal of law[64]; for another, not only is the criminal's interiority but also his/her objective guilt evaluated. In fact, the former might be deceptive, since it is inaccessible, while the exteriority of the action is clear and comprehensible to everybody. It is also true that, in the context of civil society, the substantial unity between particularity and universality has not yet been achieved; we have here only a unity between the subjective particularity of the single case and the universality in itself of Abstract Right[65]. It is a preliminary unity at a level which reiterates the particularistic features of Morality. However, it is possible

[60] In the *Nachschrift Wannenmann* the oath is treated as the attempt to give a certain objectivity to subjectivity: through the oath, the subject reports what he/she knows. See *Nachscrift Wannenmann*, § 110. The problem of the connection between subjectivity and the objective truth, which is something interior and cannot be investigated, remains; and for this reason, a man could also make false statements and be the only one to be aware of this.

[61] For this reason, there is only a subjective certainty about a determinate act, precisely because there is no mathematical demonstration: «The aim here is to attain *certainty*, not truth in the higher sense, which is invariably eternal in character. This certainty is subjective conviction or conscience […]» (*PhR*, § 227 Z).

[62] *PhR*, § 225.

[63] This seems to be complicated, unless the criminal confesses his/her guilt: in this case the judgement would not represent something alien to the criminal.

[64] See *PhR*, § 226.

[65] As Alessio underlines, in the sphere of administration of justice the moment of particularity coincides with the single case, while the universal manifests itself in the meaning of Abstract Right. See M. Alessio, *Azione ed eticità in Hegel*, p. 142.

to understand this context as one of mediation and conciliation, allowing for an evaluation of the action which takes account of all its constitutive elements, as I have attempted to demonstrate.

On the one hand, the criminal's action can be objectively imputed to him/her because it can be traced back, directly or indirectly, to him/her; but a juridical imputation only limited to this exterior and descriptive aspect of the action, defining punishment on this basis, would still be inadequate. The punishment would probably be more severe than it should be, as in the cases of revenge or the self-punishment of the heroic self-consciousness, in which the hero takes upon him/herself the guilt for the entire deed and, as a result, he/she punishes him/herself for it (as in the case of Oedipus). On the other hand, action could be imputed to the criminal on the basis of his/her interiority, his/her motives and intentions, of his/her subjective conception of his/her responsibility. In this case too, however, a judgement only based on this perspective would be defective, because the interiority of an individual is inaccessible; his/her intentions can differ from the realized deed, the objectivity of which cannot be disregarded. Moreover, conscience has always the capability to deceive itself and the others. If punishment were based exclusively on the moral point of view of the agent, it would be probably absent or excessively reduced.

For these reasons, the court of law and the judge are the appropriate institutions to reconcile both aspects of the action, the subjective and the objective, through a determination of punishment which represents, in Hegel's view, at the same time a double reconciliation. From the objective point of view, it is a reconciliation of the injured universal, that is of the law with itself, allowing it to be restored in its validity. From the subjective point of view, punishment reconciles universality of right with the right of the particular will of the criminal, who recognizes law as the universal and punishment as fulfilment of justice, that he/she injured. Punishment manifests itself, therefore as «That des Seinigen», a deed which is proper to him/her[66]. As a result, punishment is not suffered as an alien fate against the criminal, but nearly as a necessary consequence of his/her action. And the individual must be aware and responsible for the necessary consequences of his/her action, as is clear from §§ 118-119 of Morality.

[66] See *PhR*, § 220.

The consideration of the agent's intention is preserved in Ethical Life too, because the individual must have wanted and known what he did. And yet, Hegel emphasizes:

> *legal imputation* [*die gerichtliche Zurechnung*] must not stop at what the individual considers to be in conformity with his reason or otherwise, or at his subjective insight into rightness or wrongness, good or evil, or at what he may require in order to satisfy his conviction. In this objective field, the right of insight applies to insight into *legality* or *illegality*, i.e. into what is *recognized* as right, and is confined to its primary meaning, namely *cognizance* [*Kenntnis*] in the sense of *familiarity* with what is legal and to that extent obligatory. Through the public nature of the laws and the universality of customs, the state takes away from the right of insight its formal aspect and that contingency which this right still has for the subject within the current viewpoint [of morality][67].

The «current viewpoint» is the moral standpoint, the limits of which Hegel recognizes, even while admitting the necessity of preserving some of its fundamental aspects. As I have shown, the subjective element of the action manifests itself also in the moment of determination of punishment, without becoming its absolute measure; the objectivity of the action, i.e. its nature and its value in the external, socio-political context, has its own right against the agent too and must be recognized. In this way, Hegel's action theory takes account of those actions, which the agent, according to his private and moral perspective, would not ascribe to him/herself as his/her responsibility and which he/she does not consider intentional, although in the juridical and socio-political context he/she is held responsible for them[68].

Concluding remarks

As Rizzi recognizes, the determination of punishment must satisfy the Hegelian right of the subjective will through two conditions of knowledge: 1. knowledge of the act that guarantees a definite ascription of the deed for an adequate imputation of the crime; 2. the right of the

[67] *PhR*, § 132 An. I changed the translation of «Zurechnung» from *responsibility* into *imputation* and the translation of «dermalige Standpunkte» from *prevailing viewpoint* to *current viewpoint*. "Dermalig" is an outdated adjective that meant "jetzig", i.e. *current*.

[68] These kinds of actions, the full examination of which is outside the scope of this article, refer to the juridical concepts of *dolus indirectus* and *culpa*, which were largely debated at that time.

criminal to recognize as illicit what is imputed to him/her[69]. The first condition refers to the retrospective reconstruction of the occurred action in order to understand whether it can be attributed to the agent. There is, however, a misalignment between the knowledge of what the external deed is and the actual intention of the agent[70], a gap which poses a (probably insurmountable) obstacle in the search for the perfect correspondence between objective and subjective side of the action; for this reason, objective and subjective guilt and imputability still remains two perspectives of the evaluation of the action that do not coincide completely. Even so, they do complement each other: as Menegoni claims, the objective side of the juridical reality and the subjective side of the will are unified, and man finds himself in the ethical institutions that he produced[71], including exactly the organs and figures that deal with the administration of justice. If the trial's task is, as Stefano Fuselli puts it, to realize the universality of right, posited as law, in the horizon of particularity[72], then one has to admit that this can happen only taking all perspectives of evaluation of the action into account – imputability both in the objective and in the subjective sense – otherwise an actual realization of right and the determination of a balanced punishment, which reconciles the particular wills with one another and with right itself, would not be possible[73]. From this discussion, it is evident that Hegel's theory of action and imputation is still today a fertile ground for study[74].

[69] See L. Rizzi, *Eticità e stato in Hegel*, p. 129-130.
[70] See L. Rizzi, *Eticità e stato in Hegel*, p. 130.
[71] See F. Menegoni, *Moralità e morale in Hegel*, p. 248.
[72] See S. Fuselli, *Processo, pena e mediazione nella filosofia del diritto di Hegel*, Padova, Cedam, 2001, p. 77.
[73] Fuselli thinks that punishment brings to the *Aufhebung* both of the will codified as right and of the will of the criminal, in order to find a higher unity: they are both in themselves one-sided. See S. Fuselli, *Processo, pena e mediazione*, pp. 107 f.
[74] For the linguistic revision of this essay, I thank Taylor Kloha.