

# **Keine Frau muss müssen? Hegel in the Time of MeToo**

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**Abstract:** A bundle of public movements under the common denomination MeToo has redirected public attention to the banality of sexual violence, especially against women. While the lack of enthusiasm on the political right was predictable, the reserved reception in some parts of the progressive left came as a surprise. After trying to offer a couple of reasons for such a response, the article proposes to return to Hegel, in particular to his conception of marriage as an ethical unity and his theory of action, in order to think about sexual autonomy. By taking a closer look at the legal regulation of sexual relations, the notion of consent and the problem of responsibility in sexual action, the article aims to assess some leftist concerns and formulate broadly Hegelian solutions relevant to the current situation.

**Keywords:** MeToo, sexual violence, love, marriage, ethical life, theory of action, Hegel

The MeToo movement, which rose to prominence with a series of public denunciations of powerful men sexually assaulting women, made a profound impact on public consciousness. The wave of shock was amplified by the fact that this old story takes place on a regular basis not on the margins of some third-world country, but in the very centre of our society, among the rich and glamorous. If it happens there, it must be happening everywhere. In spite of all the advances brought about by modified laws on sexual violence, which increasingly rely on affirmative consent, not to mention the infamous Title IX procedures on American campuses, and in spite of the public presence of feminist discourse, it turns out that women are still all too often considered freely available or given indecent proposals they cannot refuse. How to explain this tenacity?

The conservative public reacted to MeToo reluctantly, with a combination of complacency and disdain. Indeed, within the intellectual collective whose political leader can publicly boast that he can grab any pussy he wants, and get away with it, it was only to be expected that the “freedom to bother” would be defended. To some surprise, however, the progressive left also responded ambiguously, to say the least. The criticism took various shapes. Some warned against a “carceral feminism” that relies too heavily on regulative and punitive measures, forgetting in the process that the “zero tolerance” strategy was originally designed by right-wing politicians. For others, the MeToo movement tends to infantilize women. Treating them as inherently weak, so the argument goes, it denies them the capacity of free agency and confines them to a state of permanent minority. There are also those who emphasize that sexuality is not the field of justice, or that MeToo introduces a paradigm shift in the relation between the sexes. If rape was once considered “an all too frequent exception” to the generally accepted standard of conduct, with MeToo it

has become the rule itself, it is argued, inscribed in “the very structure of the sexual act”. Talking about the logical consequence such a stance allegedly leads to, Milner alludes to the Scandinavian countries, specifically Sweden, where “in the absence of a document signed by both parties, all types of sexual action should be considered as attempted rape”.<sup>1</sup>

In this perplexing situation where both the conservative right and a large part of the progressive left seem to consider MeToo too prudish, too punitive and ultimately dangerous, I propose we turn to Hegel to help us out. The suggestion is bound to appear suspicious, I admit. Hegel attracted a justified critique precisely for his treatment of women as he, for instance, excluded them from the public realm or compared them to plants. However, while I would not go so far as to call him a “feminist”,<sup>2</sup> I believe that both his theory of action and his conception of marriage as an independent collective unity offer a highly promising conceptual frame for evaluating the merits of “the philosophy of MeToo” and the problem of sexual violence in general.<sup>3</sup> In what follows, I will therefore try to formulate a broadly Hegelian assessment of three significant concerns raised on the left. In each instance, we will see an alternative emerge which roughly corresponds to the opposition between Kant and Hegel; and we will also be able to see, I hope, that two hundred years after the *Philosophy of Right* was published, Hegel is an author of urgent relevance.

But before turning to the question of how Hegel could possibly help us grapple with the issue of sexual violence, let me first make two general observations. Contrary to the impression of structural change, the concerns raised against the philosophy of MeToo turn out to be rather traditional. With one important exception to be mentioned at the end, most of them have already been used and re-used in cultural and legal environments where the victim had to show earnest physical resistance and even resistance “to the utmost” to prove that she was really unwilling. Reviewing the history of anti-rape jurisdiction, Schulhofer comments that in the *seventeenth* century “courts were obsessed with the idea that a woman might fabricate an accusation of rape”.<sup>4</sup> As for the problem of agency, there was a widespread conviction that women were somehow responsible for being sexually assaulted long before Camille Paglia or Katie Roiphe urged

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1 Milner 2019, p. 71. – I would like to thank Jamila Mascot, who read the first draft of the paper, for her valuable comments.

2 But see Vuillerod 2020.

3 To avoid misunderstanding, I would like to note that in the paper I consider MeToo primarily as a name for a conception of the sexual relation, that is to say, as a “philosophy” in the sense of Milner. The political strategy of the MeToo movement, its very particular use of new social media for naming and shaming, will be largely left outside of consideration. This is not to deny the obvious political hazards that such a strategy implies. It must be admitted, however, that it succeeded where other strategies had failed, that is, in bringing public attention to the persistence of sexual violence, especially against women.

4 Schulhofer 1998, p. 18.

them to “assume responsibility”. This is not to deny that the very same argument that used to be patently wrong may become true at some point because the world it refers to has changed in between. However, the very fact that it is an old argument must make us pause for a moment and consider the possibility that it might just be what it appears. And if this is the case, we must ask why it continues to be used.

The second observation pertains to a strange confusion that can be traced back to the nineteen-seventies as left progressive thought started to dissociate itself from Marxism. *On a toujours raison de se révolter*, the new subversive slogan professed. But instead of binding reason and revolution, the ensuing general antiauthoritarian stance led to intellectual voluntarism and self-righteous moralization. If revolt is indeed always just and justified, then one can feel vindicated by the simple fact of protesting, there is no need for reason anymore. And if revolt is always just, then the forces of order must always be unjust. As a result, in the progressive intellectual environment an instinctive rejection of any state or legal intervention developed that relied on the idea of a grassroots community wherein individuals support each other in sincere benevolence. Let us note that Hegel mocked the notion of “*living societies, steadfastly united by the sacred bond of friendship*”,<sup>5</sup> because he had already learned the bitter lesson of where such naïve enthusiasm leads to.

Both the intellectual voluntarism and the state hatred of the new progressive thought of the nineteen-seventies duly manifested themselves in the field of sexuality, one of the major contested areas of the time. To illustrate the point, we can take the example of Foucault. In the first volume of his *History of Sexuality*, in a place of strategic importance, Foucault relates the story of Jouy,<sup>6</sup> a somewhat simple-minded farmhand from the village of Lapcourt, who, one day in 1867, “obtained a few caresses from a little girl” who played with him “the familiar game called ‘curdled milk’”. For Foucault, this event of an alert child masturbating an imperceptive adult was basically harmless, as it was a common practice and usually no one seemed to bother. This time, however, the girl’s parents reported it to the local mayor, thus setting in motion the entire medico-carceral apparatus, which led to a thorough medical investigation of this poor halfwit; in the end, while he was “acquitted of any crime”, he was nevertheless shut away in a psychiatric institution for the rest of his days. In Foucault’s view, the significant thing about this story was “the pettiness of it all”, the fact that “this everyday occurrence in the life of village sexuality, these inconsequential bucolic pleasures” could become “the object of judicial action and careful clinical examination”, which even produced a duly published scientific report.

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5 Hegel 1991, p. 15.

6 See Foucault 1978, pp. 31–32.

Some feminists protested. Instead of siding with Jouy, Foucault should have shown more sympathy for the young Sophie Adam, as the girl was called. “Whose point of view is silently assumed,” Linda Martín Alcoff asked, when one determines that a sexual episode with a little girl was “a petty and trivial event”?<sup>7</sup> The problem, however, is not only that of empathy. For when one reads the original fourteen-page report, readily available on the internet, the emerging story assumes quite different traits. Sophie was eleven; the incriminating event that triggered it all referred not to masturbation but to (remunerated) sexual intercourse; since sex with children under the age of thirteen was at the time prohibited, statutory rape was clearly committed; however, instead of being sent to jail, which he feared the most, Jouy was, upon medical examination, found mentally too weak to be judged and was accorded the right of hospital assistance.

A simple check of the original report proves, I believe, that Foucault tampered with the evidence to such a degree that the entire story presented in the *History of Sexuality* must be considered a fabrication. Yet Foucault is no minor author and the case in question is not a marginal one – together with the “anonymous Englishman”, this “poor Lorraine peasant” was cited as a cardinal example in support of Foucault’s main thesis on the proliferation of discourse on sexuality in modern societies. I would therefore suggest that the significant thing about *this* story is that it could be taken at face value for so long in a certain intellectual environment, without anyone bothering to dwell on the presence of child sexual abuse.<sup>8</sup> And this is not so much about Foucault’s intellectual honesty as it is indicative that the progressive left, or “left”, may have some problems with sexuality we need to talk about.

## I

In traditional gender role distributions, both in society and in sexual relations, man was considered the active and woman the passive party. It was him who was supposed to take initiative in competing for her favours, with almost any means being considered legitimate, whereas she was

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7 Alcoff 1996, p. 108.

8 Since Foucault presented the example of Jouy in more detail in his lectures on “anormals”, some feminists did raise the question of the little girl. Even then, however, they were reluctant to acknowledge that sexual abuse of a child took place. Shelly Tremain writes that while “neither Foucault’s text nor the reports of medical and psychiatric experts actually stated whether Adam was seven years of age or fourteen years of age”, the exchange of money might indicate that “Jouy gave Adam remuneration for her instruction”, presumably on matters sexual, or even that “she had exploited his gentle nature and vulnerability” (Tremain 2013, p. 7). Disturbingly, the reference to Adam’s age shows that Tremain, while advancing a rather daring reading, did *not* bother to read the original report. After finishing the paper, I must add, I did come across a recent book by Chloë Taylor titled *Foucault, Feminism and Sex Crimes*, where the original report is duly presented and translated in its integrity.

expected to defend herself until the final (and exclusive) submission. The traditional jurisdiction on sexual violence basically reflected this scenario. For a long time, the law stipulated that only a woman could be raped, and that she had to have resisted to the utmost to prove that the crime of rape had been committed at all. In the absence of physical marks of resistance, it was generally assumed that she, in one way or another, *eventually consented*.<sup>9</sup>

The progress of mores naturally affected the common conception of sexual relations and considerably moved the red lines. It is now increasingly admitted that not only physical but also other kinds of violence, and not only the actual use of violence but the mere threat of it, can be considered violent enough to warrant the existence of rape. In addition, men have now gained parity in that they too may count as victims of sexual violence. Yet despite all this progress, the basic scenario has remained unchanged: in the prevailing view of the law, sexual activity continues to be regarded along the lines of conquest and the victim is usually still obliged to fight back in order for the aggression to count as aggression at all.

To bring an end to this situation – and to avoid weird complications in administering the law provoked by well-intended provisions that either stretch the notion of violence or define the sexual act as inherently violent – the logical solution would be to protect sexual integrity *for its own sake*. This is what the idea of *sexual autonomy* stands for. According to this view, every person should enjoy the freedom to decide “whether and when to engage in sexual relations”,<sup>10</sup> a freedom that includes both the liberty to take part in all sexual activities one finds desirable and the right not to be coerced to do anything of a sexual nature against one’s will. In its legal implementation, this autonomy is of course bound to raise tough questions. The sphere of my freedom ends where the sphere of your freedom begins, so determining the fine line separating the two will always be a problem. Similarly, my decision can be an expression of my autonomy only when certain conditions are met, so identifying the boundary between free choice and coerced consent will always be a challenge. The matter is further complicated by the fact that in sexual relations one may not know what one wants and often acts not as an independent subject but precisely as a dependent one. But no matter how important these technical difficulties may be, they cannot change the fundamental premise that laws on sexual violence should be designed in a way to enhance and protect the sexual autonomy of every person.

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9 Juridical history abounds in crafted formulations that give us an idea of what the reality of sexual relations looked like. In an 1880 Milwaukee rape case, in which the victim, bound and threatened at gunpoint, fought until exhaustion, the court concluded that submission “no matter how reluctantly yielded, removes from the action an essential element of the crime of rape” (see Schulhofer 1998, p. 19).

10 Schulhofer 1998, p. 99.

This is now the new consensus, I believe. It has manifested itself in legal modifications along the “only yes means yes” model, adopted in several countries. The MeToo movement only added a sense of urgency to the issue, revealing how common the reality of sexual abuse still is, especially for women.<sup>11</sup> It may therefore come as a surprise that a strain of feminist authors opposes the idea of affirmative consent and MeToo on the ground that they deny agency to women. Commenting on the new rules of conduct enacted on campuses, Roiphe accused their advocates of “promoting the view of women as weak-willed, alabaster bodies, whose virtues must be protected from the cunning encroachment of the outside world”.<sup>12</sup>

Yet whatever the motives, it is interesting to note that this kind of reasoning is put forward only in the case of sexual autonomy. In fact, the idea that one must physically defend one’s property in order to prove that a theft has been committed at all used to be the basic assumption of the common law on theft in the Middle Ages. Today, however, property enjoys comprehensive legal protection regardless of what its owner might have done. Whenever it is utilized or taken away without the owner’s explicit consent, the law is expected to interfere to restore the property and punish the wrongdoer. In this case, no one protests that such owners are overprotected or that they are thus being patronized, treated as weak-willed subjects with no capacity to act. In the case of robbery, victims may even be advised *not* to resist in order to avoid additional harm, and if the owner’s consent regarding the property is obtained by resorting to deception, threat, extortion, fraud and the like, the transaction is declared null and void. The comparison may be prolonged almost indefinitely: it may happen that no threat has been uttered and that the coercive nature of the transactions is deduced solely from the pattern effectively observed, but we will still see – approvingly, I presume – the law step in to protect the owner’s autonomy. Why, then, should women be obliged to assert their sexual autonomy on their own?

A similar lesson can be drawn from a comparison to class relations. To stress the systematic nature of women’s inequality under male domination, their position is often thought in reference to the working class under capitalism. The parallel is frequently mobilized to reject the validity of consent obtained under such conditions, as the formal equality only helps to promote the structural discrimination. Yet in the case of capitalism, we would hardly expect the workers to reject the relevance

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11 That women have reclaimed centre stage precisely now as the legal ideology is starting to become gender neutral may seem like a paradox. Yet there is nothing unusual here: the battle for emancipation has always been fought at a concrete level and for very particular goals. The fact is that women continue to be the predominant victims of sexual violence. The struggle against it, while inherently universal, is therefore bound to assume the standpoint of women.

12 Roiphe 1993, p. 67.

of the legal provisions enhancing their position against capital and to claim instead that they should confront the capitalists individually, assert their agency in face-to-face relations and assume responsibility in the event of unwanted results. Quite the contrary, the working class has always been proud of the gains inscribed in the laws, for instance concerning working time, job conditions, minimal wages, trade unions and the like. And instead of complaining how such legal protective measures diminished their agency, they have always considered them as important achievements of their collective struggle, as marks of their *political power*. The parallel may not be complete. However, it is hard to see where such a pronounced difference in the case of sexual relations should come from. Why aren't legal provisions that protect the sexual autonomy of every person, including every female person, rather seen as means that improve agency?

Yet women are treated differently. In the case of sexual relations, we suddenly seem to become stubborn Kantians who claim that moral obligations command categorically, whatever the obstacles that may impede their execution. You can, because you should! If this is so, however, we should recall that it was precisely for such a sublime account of agency that Hegel criticised Kant's morality as devoid of reality and stressed the decisive role of objective circumstances. For Hegel, the just deed is not something suspended in the air, in the realm of pure reason, but must find its grounds in the present conditions and must ultimately grow out of the normativity embedded in common institutions and ordinary practice. The proper ethical disposition manifests itself, Hegel claims, in "a volition which has become *habitual*".<sup>13</sup> And while laws are for him essentially expressions of the existing ethical life, they can also shape it in return, so that the question of jurisdiction is far from irrelevant. Hegel loved to cite the episode of a Pythagorean who, when asked by a father about the best way to educate his son in ethical matters, proverbially replied: "Make him the *citizen of a state with good laws*".<sup>14</sup>

To see what Hegel's position on the legal regulation of sexual violence might be, we may rely on his conception of the family and conceive of a sexual relation as a provisional, temporarily limited marriage. True, for Hegel, the family constituted a sphere of "immediate" substantiality governed by the "feeling of love" that generally falls outside the sphere of law. In his view, "this unit takes on the *legal form* only when the family begins to dissolve".<sup>15</sup> However, as family members

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13 Hegel 1991, § 268, p. 288. The relevant ethical disposition can be illustrated by Hegel's conception of patriotism. While it is usually understood only as "a willingness to perform extraordinary sacrifices and actions," for Hegel, it rather manifests itself "in the normal conditions and circumstances of life" (Hegel 1991, § 268R, pp. 288–289).

14 Hegel 1991, § 153R, p. 196.

15 Hegel 1991, § 159, p. 200.

are supposed to be immersed in this substantial unity and consequently have no safeguards against it, and since the family as a *natural* unity must eventually dissolve, the law maintains its hold even within the family and protects the interests of its individual, especially weaker, members against the family as a unit. In Hegel's view, all family members have the legal right to participate in family resources, while children, for instance, have the right to be raised and educated accordingly, up to the point where state institutions may step in and enforce this right. It is precisely because individual members have given up their independence that the law must protect them.

If we apply the above model to a sexual relation as a provisional marriage, we can assume that here, too, much space would be accorded to the immediacy of feeling. However, since in this case the aspect of eventual dissolution is only more pronounced, the law would have to defend a person's capacity to leave the encounter intact and engage in new relations. This is not the place to go into details. But if patriarchy is not a word devoid of reference in our society, legal provisions should take into account the inequality it names.<sup>16</sup> And while the mere existence of a power differential does not contradict sexual autonomy, quite the contrary, in situations where the difference is produced by the institutional framework that holds people together, the question of such a contradiction may become pertinent again. Since, in Hegel's view, "marriage arises out of the *free surrender*" of two infinite personalities,<sup>17</sup> these personalities must come from circles that are independent of each other, or else the surrender cannot be free. This is part of Hegel's argument for the prohibition of incest. In this sense, some institutionally constrained relationships may well be considered incestuous as well, for instance between student and professor.

Hegel once derided the notion that in court proceedings the judge had to be impartial. Quite the contrary, the judge must stand on the side of truth and justice. Similarly, the law always takes a side. In the traditional legislation on sexual violence, when it was tacitly assumed, along the lines of Lessing and Schiller, that *keine Frau muss müssen*, the law basically created an environment where sexual violence could happen unchecked. It is time that here, too, the law takes the side of justice.

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<sup>16</sup> It is far from irrelevant what the conceptual status of the present inequality of the sexes is, i.e., whether it is rooted in the very fabric of our societies, as is the case of the proletariat under capitalism, or whether it is "merely" a sedimentation of a long history of male domination based on some contingent fact. Milner, for instance, derives the structural contradiction from the fact that in (pro-creative) intercourse, the woman is penetrated by the man (see Milner 2019, p. 80). This is probably nonsense.

<sup>17</sup> Hegel 1991, § 168, p. 207.

The model of affirmative consent, propagated under the slogan “yes means yes”, has been met with reservation from parts of the progressive left. Quite apart from the question what exactly consent in sexual things means, in what form it should be given and under what conditions it may be considered valid, criticism was often directed against its very mentioning. By introducing the idea of consent, so the argument goes, sexual relations are treated along the model of *contracts*, with all the implications of economic, juridic and governmental arrangements that are inappropriate in intimate relations. In this respect, too, the argument is nothing new. At a public tribune in 1978, Foucault exclaimed that “consent is a contractual notion”,<sup>18</sup> while Hocquenghem was more precise: “This notion of consent is a trap, in any case. What is sure is that a legal form of intersexual consent is nonsense. No one signs a contract before making love.”

Nonsense or not, some philosophers did want sexual intercourse to be preceded by a special contract, most famously Kant. For him, the conceptual problem is that in a sexual relation one person uses the other person’s body in order to procure sensual pleasure. That is, the other person is treated merely as a *means*, is made “into a thing”, which is a moral and juridical contradiction. “There is only one condition under which this is possible,” Kant concludes, “that while one person is acquired by the other *as if it were a thing*, the one that is acquired acquires the other in turn”.<sup>19</sup> Due to complete reciprocity enacted by the marriage contract, in this “union of two persons of different sexes for lifelong possession of each other’s sexual attributes”, both parties are treated as self-purpose at the same time and their personalities are restored.<sup>20</sup> It is only within marriage that the contradiction of sexual intercourse resolved.

For Kant, the clauses of a sexual contract were non-negotiable and incidentally implied a total and permanent availability for any sexual practice as long as it complied with the “natural use” of sexual attributes. But this is not the place to dwell on that. The reason why the example of Kant was mentioned at all is rather that his way of treating marriage and sexuality attracted general rejection already in his time. Hegel fiercely attacked Kant’s formulation of the marriage contract, calling it “disgraceful”.<sup>21</sup> But more importantly, in the case of marriage (and the state), he opposed the very notion of contract as “crude”,<sup>22</sup> insisting that

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18 Foucault 1988, p. 285.

19 Kant 1996, p. 427.

20 Kant 1996, p. 427.

21 Hegel 1991, § 75R, p. 105.

22 Hegel 1991, § 161A, p. 201.

as far as its essential basis is concerned “marriage is not a contractual relationship”.<sup>23</sup>

Why so? In Hegel’s view, a contract implies the standpoint of abstract right and is concluded when independent arbitrary wills happen to form a contingent volitional identity over what they own. Consequently, there are strict limits to what a contract can refer to: its object can only be “an *individual external* thing”<sup>24</sup> and it cannot give existence to anything new that is not reducible to the arbitrary wills. Marriage and the state, in particular, cannot be subsumed under the concept of contract. The transference of this form from the sphere of private property to the sphere of political and familial relationships, Hegel concludes, “has created the greatest confusion”.<sup>25</sup>

The confusion is partly intelligible, since there is indeed a contradiction involved in sexual relations, only that in Hegel’s view this contradiction does not derive from the fact that the other person is treated as a thing, but that there may be a thing within the free subject itself. Hegel assumes that this subject is *in love*. When in love, one *feels dependent* if one exists on one’s own and can gain knowledge of one’s independence precisely in the unity with another person. The subject in love can know itself to be independent only by renouncing its independence. “Love is therefore the most immense contradiction that the understanding cannot resolve”, Hegel notes; it demands to think of the subject as having its “self-conscious punctuality affirmed” and negated at the same time.

Hegel’s proposal to have this contradiction resolved is to think it within the sphere of spirit, in the form of an *ethical unity* that transcends sexualised subjects and even has its own grounding against them. Within this unity, one is no longer present “as an independent person but as a *member*”.<sup>26</sup> It is true that in the case of marriage, “the free consent of the persons concerned” remains “its objective origin”.<sup>27</sup> However, by deciding to marry, the persons in question do not affirm their particular independence, as is the case with a contract, but “consent to *constitute a single person* and to give up their natural and individual personalities” within this union. The precise point of marriage is, Hegel concludes, “to begin from the point of view of contract – i.e. that of individual personality as a self-sufficient unit – *in order to supersede it*”.<sup>28</sup>

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23 Hegel 1991, § 163R, p. 203.

24 Hegel 1991, § 75, p. 105.

25 Hegel 1991, § 75A, pp. 105–106.

26 Hegel 1991, § 158, p. 199.

27 Hegel 1991, § 162, p. 201.

28 Hegel 1991, § 163R, p. 203.

Evidently, Kant and Hegel give us very different understandings of consent with respect to marriage. It is therefore hard to see why one would want to identify consent with a Kantian contract – if not in order to *reject* the very idea of consent in sexual relations.<sup>29</sup> Hegel, on the other hand, provides us with conceptual tools to think about love and sexual relations in terms of *collective unity*. In his view, consent should be understood as readiness to participate in a common project, to form a collective unity whose members have renounced their right to figure as independent agents. But it is precisely because they have exposed themselves and rendered themselves vulnerable to such a degree by freely entering the ethical unity that this ethical unity is obliged to take care of them. This is the function of laws protecting the interests of individual members discussed above. However, something similar can also be said for the sexual relation considered as a provisional marriage. While Hegel himself saw an important difference between marriage and “concubinage”<sup>30</sup> and often derided Schlegel on this account,<sup>31</sup> a sexual relation could be conceptualized, I think, as a common project started by a “free consent of the persons concerned”, which is in a sense bigger than them and in which individual members can expose themselves knowing that this ethical unity, ultimately the state, will protect their integrity.

### III

The philosophy of MeToo attracts regular scorn for its pretension to regulate what is supposed to be a spontaneous, inventive, exciting relation between consenting adults. Sexuality used to be a place of individual liberation, which necessarily included contesting existing boundaries and finding something out about oneself, such criticism likes to remind us. Now, however, the new standards of conduct present it as

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<sup>29</sup>This was at least the case in Foucault’s and Hocquenghem’s public discussion mentioned above. They stressed how difficult it is to apply the idea of consent in the case of children or to determine the age barrier under which no legally valid consent can be given. However, they did this in order to *reject* the need for consent altogether. “In any case, an age barrier laid down by law does not have much sense. Again, the child must be trusted to say whether or not he was subjected to violence,” Foucault concluded (Foucault 1998, p. 284).

<sup>30</sup> See Hegel 1991, § 163A, p. 203.

<sup>31</sup> Against the argument that the marriage ceremony is a formality which could be dispensed with, Hegel consistently defended the “ethical” nature of sexual relations. The fact that this has become the prevailing practice in our society may seem to speak against Hegel’s conception. I think the opposite is the case. Since Hegel acknowledged that marriage, not dissolvable “in itself”, can eventually dissolve, he would probably also recognise the changed ethical reality and would employ the ethical nature of sexual relations in order to justify legal safeguards for all the persons involved in them. The argument that the state must be kept out of the bedroom is one, Hegel would add, “with which the seducers are not unfamiliar” (Hegel 1991, § 164, p. 205).

a source of permanent danger, bound to leave unhealable wounds if not applied in a controlled environment. As such, these standards not only protect us from sexual violence but want to set the norms of good sex. More than that, by effectively regulating enjoyment, they make us believe that bad sex is something we are entitled to feel wronged about. In conditions such as these, everyone runs the risk of waking up a rapist the morning after.

Such criticism often denounces the insecurity sexual activity is exposed to under the new rules of conduct. This is interesting because such reproaches are typically voiced by those who would otherwise celebrate the thrill of it – what is more exciting than taking the plunge without a safety net attached? It is also interesting because they lament something that in Hegel's view constitutes the very essence of action. To clarify, let us briefly consider Hegel's theory of action against the backdrop of Kant's theory of moral action as presented in his *Critique of Practical Reason*.

According to Kant's theory of morality, the right action must be done for the right reason, not only in accordance with duty but also out of duty. The additional requirement is needed to distinguish the deeds that merely happen to coincide with the moral obligation, and are therefore of no moral worth, from those that truly express the subject's agency. And since, for Kant, it is the respective feeling that ultimately establishes which maxim has been realised by a certain deed, the question of what has figured as its determining ground defines the deed itself. If it was effectively caused by the appropriate feeling, that is, by a moral feeling or respect, then the deed was morally good, otherwise it was morally neutral at best. According to Kant's implicit view on agency, the entire action thus turns out to be *ontologically closed* at the very moment of determining the will.

Whatever the reasons for such a view, it has the effect of *isolating the action* from the contingencies of the world. It is hardly a surprise that, for Kant, the will's goodness may remain intact even if it lacks the power to produce any effect at all or if, due to adverse circumstances, it eventually results in human suffering of epic proportions. It is equally predictable that, for Kant, other people's judgement is irrelevant for the moral worth of a deed, as they can only see its effects, which are of no consequence, but cannot see its maxim, which is the only thing that counts. Incidentally, something similar applies to the acting subject, since in Kant's view, she cannot *know* that *no* pathological inclination was involved in determining the deed under consideration. However, because she has exclusive access to the realm of her maxims, she still enjoys epistemological privilege in judging her deed. In line with the theory of action implied by Kant's morality, the deed thus effectively figures as a private entity that is internal to its agent and ontologically complete even before any empirical effect has taken place.

In Hegel, on the contrary, action can be described as essentially public and open. According to Hegel's view, an action is the subject's

attempt to transfer something that initially exists only internally, a purpose, into external actuality. The real purpose of the action is therefore to realise the purpose, to give the merely subjective purpose an objective existence. But if the true purpose is indeed the purpose actualised,<sup>32</sup> then the action cannot be considered complete in determining the will, but necessarily includes, in its very concept, the requirements of objectivity. Let us take a closer look.

As noted, Hegel recognised the formal subjectivity of action. For him, the description of an act must always start from the standpoint of the acting subject, as an attempt to realise the subject's intention. At the same time, however, the act is also an intervention in the world, an event which triggers a new chain of causes and effects, and just as in nature everything is connected to everything else, this event in one way or another affects every inch of the world. If we were to speak of guilt or responsibility in this sense, every acting subject would be responsible for the entire world, as she would have attached "the abstract predicate 'mine'"<sup>33</sup> to it. But this would be absurd. For Hegel, the subject can be held accountable solely for those consequences of the deed which were already present in its purpose. This is what the distinction between *Tat* and *Handlung*, between *deed* and *action*, refers to. In the ancient world, this distinction was unknown, Hegel reminds us, and so the tragic hero, Oedipus for instance, accepts responsibility for all the consequences of his deed, even though he certainly had no intention of killing his father or sleeping with his mother and would have been exculpated by any human tribunal. In this subjectification, Hegel goes even further than Kant, since he maintains that an action can happen only if the subject finds in it *something for herself*, if she recognises in it her particularity.<sup>34</sup>

But this is only one side of the concept of action, and what Hegel calls the right of subjectivity is opposed by an equally justified right of objectivity. An action touches the world at one individual point, upon which it becomes independent of the agent and takes a direction of its own. We have already seen that the effects produced enter the very concept of action. After all, the action's purpose was not to produce that singular change which can be, at the most rudimentary level, described as a bodily movement, say, a flick of the finger; on the contrary, it was intended to produce an effect that lies at the remote end of the causal chain (say, to turn on a light or to kill a man). The flick of the finger was merely a means to achieve this effect, which thus constitutes the true end

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32 "For the actuality of the purpose is the purpose of acting," notes Hegel in the *Phenomenology* (Hegel 2018, p. 272).

33 Hegel 1991, § 115, p. 143.

34 "The fact that this moment of the *particularity* of the agent is contained and implemented in the action constitutes *subjective freedom* in its more concrete determination, i.e. the *right* of the *subject* to find its *satisfaction* in the action" (Hegel 1991, § 121, p. 149).

of the action. In this sense, the causal chain, including the laws of nature by which it unfolds, is equally inseparable from the concept of action.<sup>35</sup> Hegel calls this end the immanent soul of the action that brings it to its completion.

The inclusion of consequences, however, opens up a gap in the concept of action. The chain of causes and effects is held together by an order that escapes the subject's control. In part, this is the very condition of an action's possibility. But this heterogeneity, the fact that the world is governed by laws alien to the acting subject and that at any moment a myriad of incidents might derail the causal chain, also releases the possibility, and therefore the necessity, that the outcome will not correspond to what the subject originally intended. "The stone belongs to the devil when it leaves the hand that threw it"<sup>36</sup> According to Hegel, every action is a step into the void, whose exit is fundamentally uncertain. "To act therefore means *to submit oneself to this law*",<sup>37</sup> Hegel concludes.

Even with the inclusion of empirical consequences, however, the action cannot yet be considered completed, it also demands "a *positive* reference to the will of others".<sup>38</sup> To see why this is so, we must consider that as a realisation of purpose the action is inherently universal. Kant inferred from this that external observers, unable to see the agent's maxim, cannot judge his action. In Kant's case, the agent thus retained interpretative sovereignty and was in a position to insist, for instance, that whatever the consequences or the general view, his action was good. But if this is so, Hegel now argues in contrast, the action *remains purely subjective*. If the purpose of an action is indeed that the purpose should acquire an objective existence, one that is independent of the subject, and if the purpose is inherently universal, inscribed in the space of reason, this objectivity can only be achieved if the purpose is acknowledged by others, if it is an intersubjectively recognised purpose. An action has a positive relation to the will of others, because the world inhabited by others is the only place where action, as inherently universal, can acquire objectivity. It is actual only as recognised.<sup>39</sup> It is essentially public.

The inclusion of this new objectivity, the objectivity of intersubjective recognition, in part protects the action from the

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35 "In so far as the consequences are the proper *immanent* shape of the action, they manifest only its nature and are nothing other than the action itself; for this reason, the action cannot repudiate or disregard them" (Hegel 1991, § 118R, p. 145).

36 Hegel 1991, § 119A, p. 148.

37 Hegel 1991, § 118R, p.145.

38 Hegel 1991, § 112, p. 139.

39 "Hence, the doing is only the translation of its singular content into the *objective* element within which it is universal and is recognized, and it is just this, that the content is recognized, which makes the deed into an actuality" (Hegel 2018, p. 370).

first objectivity, as its true nature can no longer be inferred from its consequences alone. At the same time, however, this new objectivity only accentuates the prospect of incongruence between the subjective and the objective existence of purpose. In ordinary circumstances and in small actions, the discrepancy may be trivial. But when it becomes significant, to the extent that the subject cannot recognise herself in the consequences of her action and cannot agree with the judgements that others have made, a serious conceptual problem arises as to what the action is.

It is important to note that, in principle, the answer is open-ended. In the event of such an interpretative conflict, both sides, the subjective and the objective, have their right. On the one hand, the action must be considered essentially subjective, as an attempt to realise the purpose of the subject, who must be able to see herself in it – this is *the right of subjectivity*. But on the other hand, the acting subject cannot be unaccountable for the consequences of her action, since they are immanent to the action; for Hegel, this applies at least to those effects which, as a rational subject, the subject could, and therefore *should* have taken into consideration – this is *the right of objectivity*. Where exactly the line runs in a particular case is impossible to tell in advance. At a general level, however, two observations can be made.

Even if one stubbornly insists on one's interpretation, and formally one has every right to do so, it is clear that in the event of such a discrepancy, the action has failed in the view of the very agent. He has clearly failed to provide an objective existence for his purpose, failed to actualise his subjectivity as intended. But, as already indicated, the action was nevertheless successful in another sense, because whatever its effective results, it did succeed in saying something, namely something about the subject himself. "*What the subject is, is the series of its actions,*" Hegel maintained.<sup>40</sup> In this sense, as an expressive action, the *action cannot fail*. And since for Hegel the action constitutes the truth of the subject's intention, it is also a reality check for the subject herself, as even she cannot know what she is until she has brought herself to actuality by action.<sup>41</sup> Let us say that, for Hegel, subjective intention is merely a provisional notion the subject has of herself, while it is only in the attempt of its actualisation that she makes evident what she really is. Thus, for example, if a person thinks of himself as a great artist but produces nothing, or at least nothing of any worth, we may reasonably conclude that his self-conception is false. Or if he points out some awkward thing, adding immediately that he had no intention of hurting us,

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40 Hegel 1991, § 124, p. 151.

41 "What it is *in itself*, it (sc. consciousness) therefore knows on the basis of its own actuality. Hence, the individual cannot know what *he is* prior to having brought himself to actuality through action" (Hegel 2018, p. 230).

that he did it precisely out of affection, we will sometimes be justified in saying, especially when it is systematically repeated, that hurting us *is* what he *intended* to do.

As already mentioned, such an inference may be valid for the acting subject himself, since he, too, may find himself in a situation where he is forced to admit that regardless of his initial ideas about his intentions, he said what he did out of envy, for instance. In short, since the subject has no insight into his true intentions, or rather, since the truth of intentions is determined in retrospect by intersubjective recognition, in such cases, which are always possible, we can speak of bringing about the past, of a *retroactive determination of the subject's intention*. Only the action can tell us, in its effects and the judgement of others, what the subject really intended to do. It may of course happen that the subject will not recognise himself in the interpretation offered to him. Again, therein lies the right of subjectivity, which Hegel finds inviolable. But it is obvious that in this event, the subject would do so to his own disadvantage, since by insisting on his interpretation he would condemn himself to being a failed subject, without objectivity and truth, a subject who has failed in his own eyes.

As we have seen, Hegel retained the formal primacy of subjectivity inaugurated by Kant. But with a modified theory of action, the ethical implications are quite different. If for Kant the worth of an action was in principle something given, and one only needed to establish what had figured as the determining ground of the will, for Hegel the action continues to unfold beyond the moment of action and is completed only by intersubjective recognition. And whereas in Kant the agent is wholly constituted before the action and shielded from its effects, in Hegel the action is the place where the subject's identity is established.

A lesson to be drawn with regard to the norms of sexual conduct is that yes, it may happen that one crosses a line one did not realise was there. If the action is inherently risky and open, every sexual deed contains the possibility of turning out to be assault or rape. This must be acknowledged, I think, especially if we do not want to be rapists ourselves. Exactly where the line runs and whether a sexual act is rape, ultimately depends on the valid norms and intersubjective recognition, which, in the event of a collision of interpretations, is usually obtained in the forum dedicated to conflict resolution in modern societies, that is, in a court of law.

It would be wrong, I think, both politically *and speculatively*, to defend a (Kantian) theory of sexual action which fundamentally protects the agents from the consequences of their actions. It is interesting to note that in this respect the state legal system can show more speculative invention than the "subtle" criticism voiced in the name of the alleged greater good. In Sweden, the country that recently adopted the "only yes means yes" model, the judiciary practice introduced a new category of sexual offence called "negligent rape" – a rape committed

out of negligence, so to speak, without the perpetrator wanting or maybe even knowing it (but where he or she should have known it: the right of objectivity).

## IV

As is always the case with social innovations, the introduction of the principle of affirmative consent and new standards of sexual conduct bring along new risks. Because they widen the range of legal regulation and facilitate the application of punitive sanctions, it is easy to predict that they will be used with increased ease and severity against those who are already marginalised. “Zero tolerance” is an abstract notion, Hegel would say. Not only is it bound to get in conflict with social reality but it also blurs distinctions in degrees of violence, which may lead to a banalisation of extremes and general hypocrisy. A special case are rules enacted on American campuses. With their ambiguous legal status and lowered standards of procedure that rely on a “preponderance of evidence”, they lend themselves too readily to any sort of arbitrariness. It is a paradox, critics accuse, that freedom of speech is threatened precisely at universities.

These are important issues, and they should be treated seriously – in particular if we want to defend the cause of sexual autonomy. This is not always obvious, though.<sup>42</sup> When a prominent leftist thinker claims that Trump and MeToo are two sides of the same coin, this affirmation is theoretically either trivial or absurd, and politically it is useless at best. In cases like this, the disturbing question should be why, then, it is uttered at all.

But instead of trying to answer it, let me close by making one final reference to the case of Sweden, where the effects of the modified laws on sexual violence can be observed. The first thing to note is that the fears were obviously exaggerated: even in Sweden, no one is required to sign a contract before making love. And second, statistics show that following the introduction of the principle of positive consent, rape conviction rates rose by about 75%. The rise was a surprise, and it was in part explained by an increased number of cases reported and in part by the fact that under the

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<sup>42</sup> Laura Kipnis, the author of *Unwanted Advances*, commented in *The Guardian* on the story of a film critic who, on the eve of Bertolucci's death, posted “Even grief is better with butter”, accompanied by a still of Maria Schneider and Marlon Brando from *Last Tango in Paris*. The incident took a predictable turn: although the post was promptly deleted, or so the story goes, there was a public outcry that called for firing the critic, which happened the day after. The fact that a man “lost his job”, which he had held for sixteen years, because he made a “stupid” “joke” on his “private” Facebook account raises a series of troubling questions, Kipnis comments. Still, it seems rather strange to assume that Facebook is *not* a public medium, to try to erect a barrier between the private and the public in an industry that lives on selling its public image, to overlook that the job lost was not a regular one and that the man in question continued to write for *The New York Times*, or, finally, to pretend that a *competent* film critic could ignore the fact that Schneider repeatedly complained about how she felt sexually abused during the shooting of *that* particular scene.

new definition of rape it was easier to obtain a conviction, including for negligent rape. However, to put this number in perspective: while in 2017 about 3.9% of reported cases ended with a conviction, in 2019 this number rose to roughly 5.6%!

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