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THOMAS NYS

WHICH JUSTICE, WHOSE PATHOLOGY?

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‘Everything is what it is: liberty is liberty, not equality or fairness or *justice* or culture, or human happiness or a quiet conscience.’

– Isaiah Berlin (2002a: 172)

Axel Honneth’s *Das Recht der Freiheit* is an important book. It has tremendous depth and richness and therefore allows the reader to think about freedom and justice in a nuanced and stratified way. Although impossible to summarize in a nutshell, it explains that these notions are, as I would call it, ‘seriously social’. The realization of freedom or justice is based upon, and therefore requires, genuine intersubjective recognition, status-ascription, and a shared value orientation.

In this regard, Honneth offers an innovating critique of negative or ‘legal’ freedom and, for the purpose of this brief comment, I took it upon myself to provide some critical remarks concerning this part. This proved to be quite difficult because, for a long time, this seemed to me to be one of the

most convincing claims of the book. In Honneth’s analysis, it is clear that negative freedom is ‘not enough’, that it is insufficient, that it is only about possible freedom and should therefore be compensated or even overcome by social freedom. Now, although there is very much in these claims that I find convincing, I want to tease out some potential worries by pitting them against a classical proponent of negative freedom. Isaiah Berlin, as is well-known, was not a big fan of Hegel and therefore seems to be the ideal candidate with which to confront a contemporary revival of the Hegelian approach.

Throughout his famous essay Berlin makes a variety of interrelated claims, some of which directly challenge the account given by Honneth. First, freedom, although extremely important, is not the supreme value. Secondly, as such, it can conflict with all kinds of other values, and should sometimes be sacrificed for the sake of these values. Thirdly, to deny this potential conflict is dangerous because it turns freedom into an exercise concept: to be free is then equated with some definitive conception of the good life. Fourthly, and more specifically, freedom – although it bears certain resemblances to these concepts – should not be equated with ‘recognition’, with a ‘sense of belonging’, or the obtaining of a certain identity.<sup>1</sup>

The first claim challenges Honneth’s outlook which conceives of freedom as the supreme modern value, the second questions Honneth’s rather strong equivocation of freedom and justice. This raises very general worries: does an analysis of freedom really get to the bottom of issues about justice? Aren’t we talking about two, no doubt interrelated, but different concepts? Of course, the Hegelian assumption about the manifestation of freedom in ethical life makes it the ‘be all and end all’ of practical philosophy, but when re-reading Berlin one begins to wonder who has the burden of proof here.

This general worry also takes a more concrete form when we turn to the chapters about legal freedom for, again, the term ‘legal freedom’ seems to cover up a diversity of values. Shouldn’t we make a distinction between rights (and duties, of course) that have to do with freedom, and those that are about economic equality, or cultural recognition? Why insist that

these matters are all about freedom? Now this may very well be a verbal quibble, but Berlin also suspects a certain danger.

This brings us to the third and fourth challenge. Most importantly, Berlin agrees with Honneth that negative freedom (or its positive alternative, for that matter) is indeed ‘not enough’, that is, not enough for any good or decent society. And he also agrees that the need for recognition is quintessential. What he rejects, however, is the idea of a monist package deal in which all that is good is subsumed under the banner of freedom (or justice). The danger is the following: ‘What is true of the confusion of the two freedoms, or of identifying freedom with its conditions, holds in even greater measure of the stretching of the word “freedom” to include an amalgam of other desirable things – equality, justice, happiness, love, creation and other ends that men seek for their own sakes. The confusion is not merely theoretical error. Those who are obsessed by the truth that negative freedom is worth little without sufficient conditions for its active exercise, or without the satisfaction of other human aspirations, are liable to minimise its importance, to deny it the very title of freedom, to transfer it to something that they regard as more precious, and finally to forget that without it human life, both social and individual, withers away.’ (Berlin 2002a: 50).

This is a serious accusation and it is of course absurd to claim that Honneth would support the Totalitarian Menace that Berlin was so worried about. Nevertheless, the danger that is indicated here resonates with a problem that Honneth himself is keen to avoid. That problem is the following: if there is a struggle for (or a dialectic of) recognition, and if recognition is a prerequisite (or even a constituent) for freedom, then it seems that history consolidates *only* the freedom of the victors (Berlin 2002b: 90). Hegel, as such, becomes the apologist, or so it seems, of the status quo; of the idea that what is should be, i.e., the manifestation or expression of human freedom. A similar hiccup might be suspected on the part of Honneth’s theory: if freedom is only truly *realized* or incarnated in institutions, then this would lift the existing institutions beyond the pale of criticism and leave us the job of merely tracing or observing the transition or ‘becoming’ of freedom through historical struggles.<sup>2</sup>

But this is not Honneth’s tack. More precisely, in order to retain a critical potential (and revive Critical Theory’s objective), Honneth refers to the notion of a ‘social pathology’. He defines this phenomenon as follows: ‘We can speak of a “social pathology” in the context of social theory whenever we are dealing with societal developments that lead to a significant impairment of the rational capacities of the members of that society that enable them to participate in essential forms of social cooperation. Whenever, due to societal causes, some or all members of society are no longer in a position to properly understand the meaning of these practices and norms, we can speak of a “social pathology”.’ (Honneth 2011: 157). In the realm of legal freedom, for example, the pathology consists in this kind of freedom becoming the sole reference point, thereby usurping or penetrating the other spheres of justice/freedom. Honneth refers to this phenomenon as a process of ‘juridification’ (*Verrechtlichung*; Honneth 2011: 162).

Now, although I understand this critique, I have a distinct and eerie feeling that a certain Berlinian danger lurks beneath the surface. Because whose pathology are we talking about? Is it the individual that *suffers* the disease? Or is the pathology diagnosed by a more competent physician who somehow infers the illness from certain ‘symptoms’, maybe even without the ‘sick’ individual being aware that something is amiss? Is it indeed *society* that suffers, on behalf and *in lieu* of its members that claim to be doing okay? Take, for instance, Honneth’s example of *Kramer vs. Kramer* that serves to illustrate a particular pathology. In his discussion, Honneth observes how a right to divorce has led to the phenomenon of ‘juridification’, a situation in which members of society (i.e., the Kramers) come to see themselves solely as rights-bearers, i.e., as opponents making juridical claims against each other.

Although I understand that such situations are regrettable, and although I acknowledge the phenomenon of juridification, I fail to see how this could be criticized from the perspective of liberty. For one thing, the ‘penetration’ of the legal sphere into family life is not necessarily to be deplored from Honneth’s own perspective on freedom. In *Kampf um Anerkennung*, he mentions the dynamics of expansion, inclusion and universalization *within* the legal sphere and interprets it as moral progress, as an increase of freedom and a way to emancipation (Honneth

1996: 118). Likewise, the right to divorce could easily be interpreted as the upshot of a struggle for emancipation, and as a way to address issues of ‘justice within the family’ (see also Honneth 2004: 362). But now, with the notion of ‘social pathology’ at hand, it becomes clear that there might also be a negative side to this development. And again, I agree. It is a pity that people cannot settle their marital disputes by engaging in communicative action, and that they no longer ‘talk’ but rather ‘sue’. But how does this pertain to the freedom of the people involved? How do the Kramers suffer from a social pathology and not just from a broken marriage? This seems to presuppose a form of false consciousness: that they are so much in the grip of legal discourse that they fail to understand the ‘proper’ meaning of these practices and institutions, even to the extent that their ‘rational capacities’ are called into doubt, so much so that this process of juridification leads to a distorted self-understanding. Such language tends to trigger my Berlinian alarm bells, for it was of course Berlin who warned forcefully against theories of freedom that claimed to know our True Self, and the way to its liberation...

In fact, this harks back to an issue in *Kampf um Anerkennung*. Here, freedom was to be understood in terms of a healthy relationship-to-self, which required appropriate recognition for that self (or its status) in different spheres. Now there is a psychological and a socio-ontological interpretation of what exactly such a relationship consists in. On the first interpretation, the litmus-test is whether the individual indeed has – in a psychological, empirical sense – sufficient self-trust, self-esteem, and self-respect. It is obvious that, on this reading, people may indeed suffer from disrespect. On the socio-ontological reading, however, freedom is constituted, not in terms of a psychological effect, but by the appropriate institutions enabling this relationship-to-self. Therefore, one’s freedom *consists*, for example, in being acknowledged, by law, to be a rights-bearer, even if one is unaware of this fact, or does not ‘feel’ the psychological impact thereof. Neither of these two interpretations is particularly appealing. Either we end up psychologising freedom (see Fraser’s remarks in Fraser/Honneth 2003: 201-211), or else we are in danger of fetishizing it (or at least mistake necessary conditions for sufficient ones).<sup>3</sup>

The notion of ‘social pathology’ seems to give a further critical hook to

Honneth’s theory. I wonder how both these accounts, the one from *Kampf um Anerkennung* and the other from *Das Recht der Freiheit*, are related, but more importantly, I wonder how the latter account would answer a fundamental question which I’d like to raise in closing. That fundamental question is: who is the judge of one’s (lack of) freedom? Where do we look to answer this question? This is a question, of course, that is central to Critical Theory in the left-Hegelian tradition: it is the question of ‘transcendence in immanence’, the ‘normative surplus’, the identification of the ‘pre-political source of social conflict’, and so on. It is a difficult, yet central, question that relates directly to the methodology of the book (see Celikates 2012). My concern here, however, is focused on the ‘pathology’ in terms of legal freedom. I sometimes have the impression that, whereas in *Kampf um Anerkennung* there is still a link to individual ‘suffering’, the felt experience of unfreedom and injustice, in the new book this link – with the later Hegel as a source of inspiration – is either severed or severely loosened and the question of freedom/justice is being lifted to the super-individual sphere where the level of oxygen is so low that it becomes difficult for ‘real’ people to discern either freedom or justice.

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<sup>3</sup> For an interesting view that, instead of avoiding this dilemma, Honneth should indeed 'psychologize' his account, or perhaps just stick with it, see Pilapil 2011.

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<sup>1</sup> See Berlin 2002: 204: '[I]t is not with individual liberty, in either the "negative" or the "positive" sense of the word, that this desire for status and recognition can easily be identified. It is something no less profoundly needed and passionately fought for by human beings – it is something akin to, but not itself, freedom; although it entails negative freedom for the entire group, it is more closely related to solidarity, fraternity, mutual understanding, need for association on equal terms, all of which are sometimes – but misleadingly – called social freedom.'

<sup>2</sup> Think also of Nancy Fraser's criticism that there is no way to distinguish between 'justified' and 'unjustified' struggles for recognition (Fraser in Fraser/Honneth 2003: 227). Or is it just up to history to decide?