

Georg Wilhelm Friedrich Hegel, “The Constitution of Germany,” unpublished manuscript (1800–1802)

Abstract

Like his precursor Immanuel Kant, Georg Wilhelm Friedrich Hegel (1770–1831) bequeathed a rich and complex legacy to modern German intellectual and political history. Of his mature philosophy, it can be said that he historicized Enlightenment reason, while replacing the rational individual with Herderian cultures as the crucial subject of history. It was the state, he argued, that endowed cultures, and the individuals within them, with “objectivized” morality and a freedom appropriate to their historical development. In the historical process, human beings, acting through cultures and states, realized the fullness of their own freedom, which was also the realization of the Divine Idea itself. In this text, left unpublished during Hegel’s lifetime, its author – a young professor much gripped by the spectacle of the French Revolution and its cataclysmic effects in Germany – pronounces the Holy Roman Empire devoid of life and spirit, and conjures up a “German Theseus” who might, acting with sword in hand (as Napoleon was doing at the time), unify Germany under a strong central government. Yet, in view of the Germans’ sense of freedom, the liberal principle of representation would also require satisfaction. Later in the nineteenth century, it was Bismarck who seemingly played Theseus’s role. In this essay, however, Hegel sharply criticizes Prussia’s failure to champion broad German interests.

Source

“The Constitution of Germany”

Germany is no longer a state. The older constitutional lawyers who, in treating German constitutional law, had tried to fix a concept of the German constitution could not agree, until the more recent ones gave up the attempt. [...] There is no longer any argument about which concept of a constitution the German one belongs to. What cannot be understood, does not exist. If Germany were to be a state, this dissolution would have to be called anarchy, but parts of it have reconstituted themselves as states which retain in memory of a former bond a semblance of association. [...]

The health of a state manifests itself generally not in the quietness of peace but in the commotion of war. Peace is a state of enjoyment and activity in isolation, when the government is a wise paternalism, which demands from the subjects only what is customary. In war, the strength of the cohesion of all with the whole is demonstrated, how much the state can demand of them and how much that is worth which all may be willing to do for it out of their own initiative and sentiment. Thus Germany has experienced in its war with the French Republic how it is no longer a state [...] the tangible results of this war are the loss of some of the most beautiful German regions and several millions of its inhabitants [*the French had annexed the left bank of the Rhine in the Treaty of Luneville, 1802*], a great burden of debt ... and several states losing their quality as states. [...]

But he who would try to learn what happens in Germany merely by studying constitutional law would greatly err. For the dissolution of a state is to be recognized primarily by everything going differently than the laws provide. [...] Because of these notions, the Germans appear so insincere; they appear not to admit anything to be what it is; [...] they remain loyal to their concepts, to law and the laws, but events do not correspond to them. [...] The notion which includes the others is that Germany is still a state because it once was a state and the forms remain from which life has fled.

The organization of this body which is called the German political constitution was formed under very different living conditions than afterwards or now prevail. The justice and the violence, the wisdom and the courage of past times, the honor and the blood, the well-being and the needs of long-dead generations and of their mores and conditions are expressed in the forms of this body politic. The passage of time and the configurations which have developed have severed the destiny of that age and the present one. The structure wherein that destiny dwelt is no longer supported by the destiny of the present generation; it stands [...] isolated from the spirit of the world. If those laws have lost their old life, the present vital concerns have not known how to shape themselves into laws [...] the whole is dissolved, the state no longer exists.

This form of German constitutional law ...

This form of German constitutional law is profoundly linked to what has made the Germans most famous, namely their sense of freedom. This instinct of freedom has prevented the Germans, after each other European nation has subjected itself to the rule of a common political authority [*gemeinschaftliche Staatsgewalt*] from doing the same. The obstinacy of the German character has not yielded to the point where the separate parts would sacrifice their particular interests for the whole society, where all would be united in one general body and where freedom might be achieved in common with free subjection to the supreme political authority.

[...] The supreme political authority was originally, among European nations, a general power of which each had a kind of free and personal share. The Germans have refused to transform this free personal share which was dependent upon arbitrary force into the free share, not dependent upon arbitrary force which consists of the general enforcement of laws. Their condition even lately is that of a state of arbitrariness, not contrary, but without law.

The later situation follows from the earlier one where the nation, without being a state, constituted a people. During that time of the old German freedom, the individual depended upon himself in life and activity. He had his honor and his fortune, depending upon himself, not upon a class. [...] He belonged to the whole as a result of mores, religion, an invisible living spirit and a few major interests. For the rest, he did not allow himself to be restricted by the whole.

[...]

From this self-centered activity, which alone was called freedom, spheres of power [over] others formed according to accident and force of character, without regard to any general interest and little restricted by what one calls political authority [*Staatsgewalt*]; such authority hardly existed as a check to the individual.

The parts of general political authority were attached to a manifold of mutually exclusive properties, real estates which were distributed without rhyme or reason and were independent of the state. This manifold property formed no system of rights, but a collection without principle. [...]

Political power and privilege are not governmental offices which are calculated in relation to the organization of the whole, the contributions and duties of the individual are not determined in relation to the needs of the whole, but each member of the political hierarchy, each princely house, each estate, each town, each guild, etc., everyone who has right or duties in relation to the state, has himself acquired them. The state has in view of this reduction of its power nothing else to do but to confirm that its power has been torn away. If thus the state loses all authority and yet the possessions of the parts depend upon its power, these possessions necessarily must become very unstable, since they have no other support, which is equal to zero.

The principles of German public law can therefore not be deduced from the concept of the state or from

that of a specific constitution, like that of a monarchy. German constitutional law is not a science according to principles, but a collection of the most diverse public rights acquired like private ones. Legislative, judicial, ecclesiastical, military powers are intermingled, divided and conjoined in the most irregular way and in the most varied amounts, just as if they were private property.

By resolutions of the diets, peace treaties, electoral agreements, family contracts, judicial decisions, etc., the political property of each member of the German body politic is most carefully determined. The most insignificant detail, such as titles, order of precedence in walking and sitting, color of furniture have consumed years of work. [...] The German Reich is like the Reich of nature in its productions, unfathomable in big things, inexhaustible in small matters. It is this side of the situation which fills the insiders acquainted with these infinite details of right and privilege with that awe in face of the venerableness of the German body politic and with that admiration for such a system of the most elaborate justice.

This sort of justice maintains every part as separate from the state, and hence the necessary demands of the state upon its members are in complete conflict. A state demands a general center, a monarch and representatives [Stände] in which the several powers, such as foreign relations, war, finances, are united. Such a center must also possess the necessary power for directing [such matters], to enforce its decisions and to maintain the several parts in subjection.

[...] The German political structure on the other hand is nothing but the sum of the rights and privileges which the several parts have taken from the whole. [...]

For the legal system of the German state there is perhaps no more suitable inscription than:

Fiat justitia, pereat Germania!

It is if not a reasonable still in a sense a noble trait of German character that the law as such, whatever its basis and consequences, is sacred for the German. If Germany, as seems probable, perishes as an individual, independent state, and if the German nation likewise, it is some consolation to discover the awe in face of the law among the destructive spirits.

The view we have just sketched of the political situation and the constitutional law of Germany would hold, if Germany is looked upon as a state; her political situation would have to be considered a legal anarchy. [...] However, if one looks upon Germany not as a united political whole, but as a number of independent and essentially sovereign states, matters make more sense. If one objects that Germany is a "Reich," a body politic, it is subject to one common head of the Reich, it still is one Reich association, the answer is that an inquiry which tries to comprehend has no concern with such titles.

[Hegel gives further illustrations of the manner in which formal law tries to escape from the obvious conclusions by verbal tricks and playing upon the word Reich, as if that were a solution.]

Scientifically and historically speaking, such terms ought to be avoided since they mean nothing. [...] In view of the obstinacy of German character and its insistence upon its own will, it may be the best means, though, to find some general term which satisfies both parties and which leaves both in possession of what they want.

If the Germans have deluded themselves for centuries with such general terms, scientific reflection must determine the concept of the state and the extent of power required for it. It will then appear that Germany cannot really be called a state.

Concept of the State

A group of human beings can only call itself a state, if it joined together for the common defense of the entirety of its property. It is a matter of course, yet it is necessary to remark that such a union has not only the intention of defending itself, but that it also does in fact defend itself, regardless of what might be its power or success, by really fighting back. For no one will be able to deny that Germany is united for its defense by laws and words. Property and its defense through political union are matters which relate entirely to reality. [...]

To repeat, so that a multitude form a state, it is necessary that it establish a common defense and political authority. It is irrelevant what may be the [...] particular constitution [...] We must distinguish that which is necessary so that a multitude be a state and a common power, and that which is merely a particular form of this power. [...]

This distinction has a very important aspect for the inner peace of states, the security of governments and the freedom of peoples. For if the general political authority demands of the individual only what is necessary, and limits itself to those tasks which ensure that it receives this essential share, it can let the living freedom and the initiative of the citizens alone and grant it a wide scope in which to play. As a result political authority which is concentrated in the government as its center will not be looked upon with suspicion by the individual. [...]

In regard to particular civil law and judicial administration the sameness of laws and of judicial practice would not make a state out of Europe, any more than would the sameness of weights, measures or coins, nor would their difference destroy the unity of the state. If the concept of the state did not show that the more detailed determination of legal relations among individuals does not touch the state's political power, the example of virtually all European states would demonstrate it; for the most powerful of the true states have very divergent laws. France had, before the revolution, such a manifold law that besides the Roman law which was in force in many provinces, there prevailed also Burgundian, Breton, etc., law and nearly every province, even every town had its special customary law; a French writer rightly remarked that a man traveling in France was changing his laws as often as his post horses.

It is also outside the concept of the state how much either particular estates or individual citizens participate in lawmaking, what is the nature of the courts, whether the office of judge is inherited or appointed by the highest authority or chosen by the citizens. [...]

Equally independent of the state and however diversified may be the administration as such, the magistrates' institution, the privileges of towns and professions—all these matters are only relatively important for the state.

In all European states, there is an inequality of contributions of the different classes, their rights and duties. [...] Inequalities of wealth lead to inequalities of contribution to the state's expenses and far from hindering the state, the modern states depend upon it. [...]

In our times a very loose connection, or in fact none at all, may be found in mores, education and language; the identity of these, which at one time was a central pillar of a people's cohesion, may now also be reckoned an accidental aspect; their divergence does not prevent a multitude from constituting a state. Rome or Athens and every small modern state could not exist, if the many languages which are current in the Russian Empire were spoken there; the same holds true, if the mores were as different as they are in that empire—or even as different as they now are in every capital of a large country. The diversity of language and of dialects

[...] the difference in mores and of education in the various classes [...] such heterogeneous elements [...] can now in modern states be managed and kept together by the art of political organization. [...]

Even in religion wherein the innermost of man expresses itself—which enables the citizens to have

confidence in and be sure of each other—I say even in this respect identity has been found unnecessary in modern states.

Just as the sameness of religion has not prevented wars among separate nations, so the lack of sameness of religion does not nowadays tear a state apart. Political authority has learned how to separate itself as pure constitutional law from religious authority and its law, and to acquire enough continuity to establish itself in such a way as no longer to need the church. The modern state has placed the church into the separation from itself which it originally had in the Roman state.

To be sure, political theories, which have in our time been put forward by self-appointed philosophers and humanitarians [*Menschheitsrechtlern*] and which have even been realized in vast political experiments, have subjected all that we have excluded from the immediate activity of the highest political authority, with the sole exception of language, mores and religion (admittedly the most important). All aspects of a nation's life are to be determined down to their most minute detail.

That the highest political authority must have the supervision, and prevent these various aspects from hindering the main action of the state is a matter of course. But it is a great advantage of the older states in Europe that they, after insuring what is necessary for the state, can leave plenty of room for the activity of the citizen in the fields of administration and adjudication, whether in regard to choosing the officials or in regard to current business and the handling of law and custom. It is in view of the size of present states not possible to realize the ideal according to which each free man should participate in the deliberation and determination of general public policy. Political authority must be concentrated, be it as government for the executing, or for the determination thereof. If this center of authority is made secure in itself by the respect of the peoples and is sanctified in the person of the monarch as unchangeable; a political authority can leave without fear or jealousy to the subordinate systems and corporate bodies a great part of the relations which are produced in a society. It can leave to them their maintenance according to law, and each class, city, village, community, etc., can enjoy the freedom of doing and executing what lies within its sphere.

In the new, partly developed theories it is the central prejudice that the state is a machine with a single spring which gives motion to the infinite remaining wheels. All institutions which constitute the nature of a society ought to stem from the highest political authority, to be regulated, commanded, supervised and directed.

The pedantic passion to determine everything in detail, the unfree jealousy which wants to order and administer everything oneself, this ignoble fussing over any self-activity of the citizens, even though it has no general relation to the state's authority, has been clothed in rational principles. Not a cent of ordinary expense which may be made for the poor in a country of 20 or 30 million ought to be spent without being commanded, controlled, inspected by the highest authority. Out of a concern for education, the appointment of every village teacher, the expenditure of every penny for a window glass in the school house, the appointment of every secretary or policeman, of every village judge is supposed to be the emanation of the highest political authority. In the whole state every bite should be taken from the soil which produced it to the mouth in a straight line which state and law and government have investigated, calculated, corrected and commanded.

This is not the place to develop more at length that the center of political authority, the government, should leave to the freedom of the citizens all that is not essential to its purpose, namely to organize and to maintain [the highest] authority and power which is necessary for external and internal security. Nothing should be more sacred [to a government] than to leave to the free action of the citizens all these matters and to protect it without regard to utility. For this freedom is sacred in itself.

[Hegel then proceeds to point out that in terms of utility, the local autonomy is supposed to create a

financial disadvantage for the central authorities, robbing them of revenue, and to interfere with uniformity, while on the other side it creates satisfaction and an aliveness in the community. He combats the first two arguments by remarking that the central authorities do forego expenses as well as revenues, and the second by commenting that regimentation kills not only initiative, but also morale. He then concludes:]

The difference is enormous between a situation where the political authority so arranges things that everything it can count on is in its hands, but where it cannot count on anything else, and the situation where it can count also upon the free loyalty, the self-confidence and the initiative of the people: an all-powerful, unconquerable spirit which that bureaucratic hierarchy would chase away, because it only stays alive where the highest political authority leaves as much as possible to the self-help of the citizens. By contrast in a modern state, such as the French Republic, where everything is regulated from above, where nothing that has a general aspect is left to the administration and execution of that part of the people who are interested, a dull, stupid life will result from the pedantic approach to ruling; but how, only the future can tell. But what kind of life and what barrenness prevails in another state so regimented, namely the Prussian, strikes anyone who enters the first village, or who observes its complete lack of scientific or artistic genius, or who does not judge its strength by the ephemeral energy which a singular genius has been able to force upon it for a while.

We therefore consider that people happy to which the state leaves much freedom in the subordinated, general activities, and that political authority infinitely strong which will be supported by the free and untrammelled spirit of its people.

It is clear that as a result of the ten years of struggle [resulting from the French Revolution] and the misery of a large part of Europe this much has been learned about basic concepts, that people have become resistant to blind cries of freedom. In this bloody game, the cloud of freedom has dissolved. [...] The noise about freedom will no longer have effect, anarchy has been distinguished from freedom, and the deep conviction has become settled that a firm government is essential to freedom, equally deeply however, that the people must participate in legislation and in the most important affairs of state. The people have a guarantee for the fact that the government will act according to law, and that it will participate in the most important matters touching the general interest—this guarantee is the organization of a body which represents it. [...]

Without such a representative body no freedom is any longer imaginable; all the vagueness and the emptiness of the shouting about freedom has been replaced by this provision. [...] It is a principle of public opinion, a part of common sense. Most German states have such a representation. [...]

This German freedom seeks protection for its interests from a state which rests upon this system [...] no war of Prussia can any longer be considered a German war for freedom by public opinion. The true, the persistent and now sharply defined interest in freedom can no longer find protection there.

The principle of the original German state which has spread from Germany over all of Europe was the principle of monarchy, a political power under a head for the conduct of general affairs, and with the participation of the people through representatives. The form has remained in the “Reichstag,” but the substance has vanished. In the long vacillation of Europe between barbarity and culture, the German state has not succeeded in transforming itself — [...] the state has dissolved. The Germans did not succeed in finding the mean between suppression and despotism—what they called universal monarchy—and complete dissolution.

[...] Even though all parts would gain, if Germany became one state, it should be remembered that such an event has never been the fruit of reflection, but only of force, even if it corresponded to the general development and the need were felt deeply and distinctly. The common multitude of the German people

together with their local estates must be gathered into one mass by the force of a conqueror, they must be forced to consider themselves as belonging to Germany.

Such a Theseus ought to have generosity and to give to the people whom he has created out of the little peoples a share in what concerns all. [...]

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