Positive Law in Hegel's *Philosophy of Right*

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POSITIVE LAW IN HEGEL'S

PHILOSOPHY OF RIGHT

This paper will examine Hegel's jurisprudence in his *Philosophy of Right*, particularly as it applies to positive law. To render the strictly legal elements of the work in the most straightforward way, I will abandon Hegel's own dialectical scheme of development in favor of a more traditional jurisprudential outline of topics. This approach has the danger of twisting Hegel into an Austin, but every attempt will be made to present a valid and textually verifiable interpretation of Hegel's *Philosophy of Right* which will harmonize with his masterfully complete and complex dialectic.

Hegel's systematic philosophy has been frequently called a "total philosophy" because of its attempt to engulf all human experience into its "grotesque and rocky melody." Therefore, any theoretical analysis of his mature *Philosophy of Right* needs to take into account that the text is only part of a much more comprehensive work. *Philosophy of Right* assumes familiarity with the concepts of "objective spirit" and "subjective spirit" as expounded in the *Logic*. This interweaving strengthens *Philosophy of Right* by grounding it in a rational system with powerful categories of

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1 I wish to thank David Bohn for his enlightening lectures and discussions on Hegel's phenomenology, which provided access to Hegel's otherwise impenetrable work. I would also like to thank Noel Reynolds for his help and encouragement in contemporary jurisprudence.

analysis. The disadvantage of the assuming nature of the text is that for the novitiate the development of theory is opaque. Nevertheless, armed with even a minimal understanding of Hegelian notions of universality, particularity, and immediacy, *Philosophy of Right* is a wonder of brevity, insight, and completeness.

*Philosophy of Right* is first and foremost a political philosophy which examines the progressive levels of human will in institutions. Although the text has no pretensions of being an historical treatment, it is clearly developmental. The three levels of human will are: (1) Abstract right—will is immediate, and right is only abstract or formal; (2) Morality—will is reflective or self-conscious, but morality or right is purely subjective; (3) Ethical life—will is self-conscious and becomes social, i.e., universal, right is also objectified, and freedom is actualized.

Ethical life itself has three separate stages of progression. The first stage is the family, wherein ethical life itself is immediate and unreflective. The

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4 One of the most concise and helpful introductions to the Hegelian concepts used in *Philosophy of Right* is T.M. Knox's "Translator's Forward," *Hegel's Philosophy of Right* (Oxford: Oxford University Press, 1967). See also Reyburn's *Hegel's Ethical Theory*. Scholars with serious interest in Hegel will want to look at the first part of Hegel's *Encyclopedia of the Philosophical Sciences*, usually referred to as his *Logic*.

5 Bernard Cullen, *Hegel’s Social and Political Thought* (Dublin: Gill and MacMillan, 1979), p. 73.
second stage is civil society. In civil society, ethical life is self-conscious, and individuals, which may refer to families as a body, recognize other individuals as important, and interaction results in the satisfaction and multiplication of needs. In broad terms, civil society is economic life which has a legal system and free association (Korporationen) to mitigate the excesses of the market. The final stage of development is the state, wherein all the component parts of civil society are subsumed and welded into unity, and the implicit universal ethical life of civil society is actualized without sacrificing subjective freedom. 6

Hegel’s primary discussion of positive law is not found in his treatment of the state, but in his development of civil society. Nevertheless, his ideal of the state does not preclude the existence of a legal system. Although the state is concerned with more than the security of individual life and property, which is the primary function of law for Hegel. 7 The laws of the subsumed civil society are nevertheless an important institution of the state. 8 Therefore, to extrapolate from Hegel’s development of positive law in civil society, a general Hegelian approach to positive law does not do violence to the fabric of the text.

Looking to the text, one of the great difficulties in interpretation is the confusion over the use of the German word Recht. Recht, usually translated as "right" by Knox, also carries with it a notion of law in

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6 Ibid.


8 Ibid., pp. 2, 99, 100.
a broad sense, although it is clearly distinguished from law in the particular sense, i.e., statute or sanction. I have interpreted Knox’s "right," when spoken of positively, to be synonymous with law.

**Hegelian Natural Law**

Fortunately, Hegel himself provides some crucial distinctions as the text begins. Hegel clearly distinguishes between the laws of nature and the laws of the land. The laws of nature are a form of law. They are eternally valid. Nevertheless, they are external to man; that is, man’s cognizance or ignorance of the laws of nature has no effect on their validity or operation. In brief, the laws of nature are those patterns of behavior in nature which are discoverable.9 The laws of the land, on the other hand are posited by man. They are not compulsive in the way the laws of nature are, "and their diversity at once draws attention to the fact that they are not absolute."10 Hegel sees in the laws of man a struggle between what is and what ought to be. The "need for studying the fundamentals of right" is a consequence of this struggle.11 So, Hegel immediately avoids the ambiguous use of the word law à la Montesquieu, a common criticism made of natural law theories.12

Nonetheless, Hegel is a natural law theorist. His

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9 Ibid., p. 115.

10 Ibid.

11 Ibid.

approach, however, differs radically from that used by Catholic natural law theorists. Indeed, there are passages which, taken from context, would even suggest the amoral analysis of a positivist. But such a reading would be a gross misinterpretation. Hegel’s system does have natural, a priori standards which the law must meet. However, although these standards are sufficient to deny the validity of positive law, there is never any suggestion that determination of legal validity is the purpose of natural law. Natural law is merely what is right "in the nature of things." Its standards are set by the demands of philosophical science.

Philosophical science is thinking dialectically, which is the ability to conceive of both the universal and the particular in concrete unity. This is a purely Hegelian notion which should not be confused with the traditional idea of formal or abstract reason or rationality. Philosophical science is as distinct from the formal or empirical study of positive law as it is from the abstraction of pure logic and reason. Under the rubric of philosophical science, law must be "shown to be wholly to the purpose and necessary to the time" in order to fulfill the demands of history. As the Zeitgeist is manifest differently, law must be further differentiated. This grounding of law in the Zeitgeist, however, does not necessarily suggest accom-

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13 Hegel, Philosophy of Right, p. 139.


15 Hegel, Philosophy of Right, pp. 1-7, 12.

16 Ibid., p. 11.
modation—it often suggests conservation since law "may have behind it the authority of tens of centuries." 17

It should be noted at this point that for Hegel, God is in history—indeed, God is the Zeitgeist. Although Hegel grounds his natural law theory in his God, there is a profound metaphysical difference between his natural law, discovered through dialectical thinking, and Roman Catholic natural law discovered by reason, because Hegel’s God is not an absolute atemporal being but a fundamentally temporal and historical spirit.

Since the natural standards of law are fundamentally historical, the criteria for judging the validity of positive law is quite lenient. For Hegel, positive law has validity if it has meaning in contemporary conditions. 18 Moreover, the distinction between positive and natural law is attenuated in Hegel.

Natural law, or law from the philosophical point of view, is distinct from positive law; but to pervert their difference into an opposition and a contradiction would be a gross misunderstanding. The relation between them is much more like that between the Institutes and Pandects. 19

Therefore, Hegel’s discussion of natural law can hardly be read as a criticism of positive law.

17 Ibid., p. 52.

18 Ibid., pp. 10-11.

19 Ibid., p. 10. The Institutes of Justinian was a brief textbook of law, and served as an introduction to the Pandects, the complete codex of Roman case law. They were not, however, as harmonious as Hegel would seem to suggest.
Positive Law

In fact, Hegel's *Philosophy of Right* is prefaced with an unrestrained attack on contemporary critics of law. Hegel characterizes the argument of Fries and others as purely subjective. Fries argues that if man were left to govern himself according to his subjective inclinations, a communal spirit of friendship would reign and people would dedicate themselves to service. This argument, says Hegel, "turns the rich inward articulation of ethical life, . . . which sets determinate limits to the different circles of public life and their rights [into] the broth of 'heart, friendship, and inspiration.'" This murky reasoning is, for Hegel, nothing but superficiality which demonstrates a "hatred of the law." 

Appreciation of law, on the other hand, is the trademark of reason. Justice and ethical life are only understood through thinking. Through thoughts, justice and ethical life receive rational form. However, this rational form is not merely the aggregate of everybody's first thought about the subject, but the careful and exact thinking of it. This rational form is law. Therefore, the conviction that unmitigated subjectivity represents utopia is not only opposed to law, but to reason itself.

This defense of law is not a defense of natural law, but of positive law, which is nothing more nor

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20 Ibid., p. 3.

21 Ibid.

22 Ibid., p. 4.

23 Ibid., pp. 1-7, 115.
less than abstract right posited by man and received as valid in a particular state. In other words, through legislation law takes on its positive form. This positive form, in turn, receives positive content as the laws are administered. The administration of justice brings greater particularity and differentiation to the law. For example, a law which prohibits theft is particularized as it is applied to plagiarism.

Hegel is quite clear about what the law is not. Law is not the function of "inclination, caprice, and the sentiments of the heart." Nor is law compatible with force and tyranny. Force and tyranny, says Hegel, are not part of a proper concept of law, and are merely accidental to it. Rather, positive law is useful in meeting man's needs. It serves an educational function by instructing individuals on how to conduct themselves within society. Most of all, the end of law is the well being and happiness of private individuals as well as the actualization of their subjective freedom.

Hegel cannot be read as an apologist for all positive law. Although he considers the increasingly de-

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24 Ibid., pp. 10, 115.
25 Ibid., p. 10.
26 Knox, p. 306n.
27 Hegel, Philosophy of Right, p. 10.
28 Ibid., p. 137.
29 Ibid., pp. 70-71.
terminate character of law, and the differentiation or particularity of law as ultimately favorable elements of his theory, he admits that these very characteristics open up the possibility for discrepancy between positive law and the principles of rightness.\textsuperscript{31} Also, the science of positive law, as detailed as men may make it, will never resolve all the questions about the rationality of law.\textsuperscript{32} Nevertheless, Hegel also says in order for a right to be valid it must be posited in law, it must be a legal right, susceptible to proof and recognition within the law.\textsuperscript{33}

Procedural Justice

Although \textit{Philosophy of Right} has a complex development of a natural law theory, justice within positive law is tied to notions of procedural fairness. Indeed, Hegel perceptively points out that an important area of law is directly related to the administration of justice and the state-law is not merely sanction.\textsuperscript{34} Positive law, to be valid, must be known and recognized by all members of civil society. It, in turn, must recognize property and contract in its administration of the laws.\textsuperscript{35} The denial of property, contract, or liberty is only valid after specified procedures of adjudica-

\begin{footnotesize}
\begin{enumerate}
\item Ibid., pp. 70-71.
\item Ibid., p. 46.
\item Ibid., p. 139.
\item Ibid., p. 71.
\item Ibid., p. 72.
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The concept of promulgation receives particular attention from Hegel. Promulgation cannot be divorced from the positing of law. In order for law to be posited, i.e. become positive, it must be made known.

Hence making a law is not to be represented as merely the expression of a rule of behaviour valid for everyone, though that is one moment in legislation; the more important moment, the inner essence of the matter, is knowledge of the content of the law in its determinate universality.

For Hegel, the positing of law is the moment in which abstract right becomes both determinate and universal. This implies not only that universal knowledge of the law is necessary to make it binding, but that to conceal the law is, by definition, tyrannical. Inasmuch as the outcome of a court of law has universal validity, judicial proceedings should be open to the public.

Hegel is so insistent on the idea of promulgation that he employs rather stirring language in favor of simplification and codification of the laws.

To hang the laws so high that no citizen could read them (as Dionysus the Tyrant did) is injustice of one and the same kind

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36 Ibid., p. 73.

37 Ibid., pp. 69-70.

38 Ibid., p. 70.

39 Ibid., p. 71.

40 Ibid., p. 73.
as to bury them in row upon row of learned tomes, collections of dissenting judgments and opinions, records of customs, etc., and in a dead language too, so that knowledge of the law is accessible only to those who have made law their professional study.41

Codification of law is considered "a great act of justice" because it makes the law more accessible to all people. Hegel realizes that this call for codification could contradict his theory that the determination of law is a continuing process. Nevertheless, he believes that a code of simple general laws, based on true principles, is a necessity.

Implicit in Hegel's discussion of publicity of the law is the idea of generality. Once law is legislated, it is valid for all.42 Administration of justice does not discriminate on the basis of religion or race--every man counts as a man by virtue of manhood alone.43 The only person exempt from the generality of law is the "personal majesty of the monarch," who is distinct from the executive in Hegel's constitution.44 The reason for this exemption is that the monarch embodies the constitution and is therefore not bound by its differentiations.

It should be noted that generality, or universality of law, implies more than just general application of the law, but an elevation of law to a general or universal level. This means that as law is posited through

41 Ibid., p. 71.
42 Ibid., p. 70.
43 Ibid., p. 69.
44 Ibid., p. 96.
legislation, then violation of that previously abstract right is no longer the mere violation of the property or contract of an individual, but a crime against civil society.\textsuperscript{45}

Although Hegel's scheme is concerned with the welfare of the poor, his concept of justice contains no notions of equality. Property, in Hegel's economy, is indispensable from individuality, and therefore it is treated with great deference. Since Hegel's scheme is differentiated and endlessly particularized, any sort of equal division of resources is unfathomable. "What and how much I possess," writes Hegel, "is a matter of indifference so far as rights are concerned."\textsuperscript{46}

\textbf{Judicial Reasoning}

As right is elevated from abstract immediacy to determinate universality in positive law, there arises a need for an institution to actualize posited right without the subjective feeling of private interest. This is the fundamental duty of public authority and the particular duty of the court of justice.\textsuperscript{47} As mentioned earlier, injury, under law, is no longer subjective, but universal, and therefore all injury or wrong must be settled in the court. In this way the law is reconciled objectively--the injury or crime which suspends the law is annulled (presumably through punishment), and law is restored.\textsuperscript{48}

\textsuperscript{45} Ibid., p. 72.

\textsuperscript{46} Ibid., p. 24.

\textsuperscript{47} Ibid., pp. 72-73.

\textsuperscript{48} Ibid., p. 73.
Hegel spells out clearly and carefully the way in which the court arrives at a judgement. He divides judgement into two parts: (1) ascertainment of the nature of the case and (2) subsumption of the case under law.\textsuperscript{49} The nature of the case is the indictment which instructs the judge on which laws are to be applied. The subsumption of the case under law means quite simply that only the general principle of law indicated by indictment can be applied. The judge is merely an organ of the law, and cannot act according to his own discretion.\textsuperscript{50} There are only two checks external to law which Hegel places on judicial discretion: publicity and knowledge. As we have mentioned previously, the universal applicability of judicial decisions makes public access the people’s only guarantee that proceedings are handled fairly, and public access is only an adequate check if people are able to understand the judicial process.\textsuperscript{51}

Hegel therefore places a heavy burden on the laws themselves to be adequate instruments of justice. Hegel claims that the concept of positive law sets a general limit within which there is room for contingent and arbitrary decisions. Law merely sets a maximum and a minimum for the judge to work within, and in good law, those limits are set well within the limits of

\textsuperscript{49} Ibid., pp. 73-74.

\textsuperscript{50} Ibid., p. 74.

\textsuperscript{51} Ibid.
justice. However, Hegel does not see the judicial process in mechanical terms, nor does he shut his eyes to the fact that in the administration of justice there are frequent clashes between laws, or the demand for further particularization of laws. Rather than avoid these hard cases by giving the judge "mere fiat" or discretion, Hegel's system offers an original and helpful way out of the hard case. The clash of laws invokes dialectical reasoning, and therefore, according to Hegel, it can be worked out objectively, rationally and legally, even when there may be no explicit solution in law.

Legal Obligation

Since a member of civil society lives within the law, he has a duty to acknowledge the decision of the court. Of course, Hegel has a natural law theory, and legal obligation could be grounded in the natural law. Yet it must be remembered that the grounding of natural law for Hegel is not abstract. Therefore, Hegel is extremely critical of arguments for non-compliance with law which rely on abstract thinking. These abstractions, according to the text, elevate subjectivity above the universal, which demonstrates no understanding of the dialectic. Even logically, there are real problems with reducing ethics to the realm of private conviction. The logical and dialectical extremes of these non-compliance arguments are the destruction of right and wrong, and the elevation of

52 Ibid., p. 71.
53 Ibid., pp. 137-38.
54 Ibid., p. 70.
intention to the highest ethical standard.\textsuperscript{55}

To have no obligation to law is the same as law having no authority. At such a level or moment, Hegel hypothesizes a Hobbesian war against all, since coercion is annulled only by coercion.\textsuperscript{56} At this level, any individual conviction would have veto power over convention.\textsuperscript{57} Hegel mentions at least three sources for the authority of law--God, the State, and history. In Hegel, however, these three concepts are so tightly interwoven that it would be fruitless, in this paper, to make distinctions. What is important, is that in \textit{Philosophy of Right} legal authority and obligation act as "the bond which gave men, with all their deeds and destiny coherence and subsistence."\textsuperscript{58} This would imply that law acts as an institution which coordinates the disparate elements of society. In any case, abstract or mere thinking is not sufficient to deny the validity of a reasonable concept of law, and the existing positive law should be reverenced.\textsuperscript{59}

\textbf{Freedom}

Perhaps the most compelling reason for legal and political obligation is that the state is the "articulation of the concept of freedom," and therefore we have some duty or obligation to the institutions of the

\textsuperscript{55} Ibid., pp. 49-54.

\textsuperscript{56} Ibid., p. 36.

\textsuperscript{57} Ibid., pp. 50-54.

\textsuperscript{58} Ibid., p. 115.

\textsuperscript{59} Ibid., p. 115.
state. However, this is counterintuitive to prevalent concepts of freedom which would characterize freedom only in its positive sense, or what Hegel calls arbitrariness. Hegel, however, is very critical of this absolutist view of freedom. His first criticism is that since human will is finite, choice itself will never allow will to escape its finitude. Hegel complains that too many theories of freedom divorce freedom from its objects and aims, and therefore, freedom is treated abstractly and formally rather than dialectically. If we look at the concrete aims of freedom, then limitations on caprice and impulse are actually viewed as liberation, or, in other terms, law and morality are "indispensably requisite" to the ideal of freedom. Because Hegel finds the origin, substance and goal of law in freedom, subjective freedom is only actualized within a system of law. In this way freedom is maintained without sacrificing objectivity. Indeed, the activity of the will is the dissolution of the contradiction between subjectivity and objectivity.

60 Ibid., pp. 57, 99, 107.
61 Ibid., p. 16.
62 Ibid.
64 Ibid.
65 Hegel, Philosophy of Right, p. 17.
66 Ibid., p. 18.
The Constitution of the State

The modern state is the institution which finally brings unity to the universal and the particular. In the place of the arbitrary will of the sovereign, there is a legal system which recognizes civil rights. Thus, freedom is actualized. However, there are important differences between the legal system of the civil society and the legal system of the state. In civil society, the legal system acts as the arbiter between and coordinator of individual interests. In the state, the law embodies the mind of a nation, so that there is not mere coordination and arbitration, but some defined purpose. Whereas man in civil society may have only considered himself a creature of the state were he an employee of the government, man in the state, by virtue of his manhood alone, is very conscious of being a member of the state.

Therefore, the state is not an externally constituted system. It must harmonize, in all ways, with the particular development of law and custom of a given nation. It is for this reason that Hegel is wary of mere constitution writing as the way to elevate society to the level of the state. He cites the notable failure of Napoleon's attempt to give the Spanish a rational constitution as an example of an external

67 Ibid., p. 142.

68 Ibid., p. 92.

69 Ibid., pp. 84-89, 97, 104.

70 Ibid., p. 145.
constitution which "is meaningless and valueless."\textsuperscript{71}

Although the state may give "fresh and extended determination"\textsuperscript{72} to the law of civil society, the constitution of the state is primarily intended to embody and strengthen the existing legal system. Contrary to some interpretations of Hegel, I find ample evidence to suggest that the consciously adopted ends of the state are the individual's interests. Therefore, the elements of procedural justice which exist in civil society are implicit in the law of the state.\textsuperscript{73} The state, however, is concerned with the political as well as the legal. Therefore, legal obligation is accompanied by political obligation or duty. Hegel does not address as well as he might the maintenance of fairness and freedom in a universalized political system with a strong sense of duty. We have already alluded to his repudiation of the concept of material equality.\textsuperscript{74} But there are other hints in \textit{Philosophy of Right} about how political power is restrained. For one thing, in a good state, individual duties to the state are proportionate to individual rights against the state.\textsuperscript{75} There are institutional controls on the misuse of state power. Among them, is an educated, non-partisan civil service. Another control is the size and prestige of the state;

\textsuperscript{71}ibid.

\textsuperscript{72}ibid., p. 99.

\textsuperscript{73}ibid., pp. 84-85.

\textsuperscript{74}ibid., p. 24. "\ldots all kinds of intellectual mediocrity stumble on it [equality] at once when they are confronted by the relation of unity to difference."

\textsuperscript{75}ibid., p. 83.
both through emulation and extension, the stability of the state is protected against ambition and faction. Yet none of these ideas is fully developed.

Conclusion

Philosophy of Right presents a complex and complete theory of law which grounds law and politics in the unfolding dialectic of history. However, Hegel does not ever satisfactorily distinguish the natural from the positive law. Moreover, he never gives us a firm foundation for legal authority, although there is a strong sense of legal obligation. These problems seem to be part and parcel of his over-arching metaphysical theory because Hegel does not appeal to an absolute or formal realm of authority, only to the unfolding spirit of history; justification is temporal. It is for this reason that Hegel has been derogatorily labeled as a defender of the status quo. Philosophy of Right is most instructive in its analyses of procedural justice, judicial reasoning, and freedom under law. Curiously, these analyses focus on the rule of positive law in society, albeit in relation to the further differentiation of the mind and will. Even in the state, law applies equally to all, even government officials (the noted and notable exception being the monarch). Furthermore, there are procedural rules to insure that the law is used only as an instrument of justice.

The importance of this implicit defense of the rule of law cannot be overestimated, primarily in the way in which it functions vis à vis the Marxist critique of law, which also employs a form of the dialectic, and the Critical Legal Studies movement, which claims some of its ascendancy from the continental tradition.

76 Ibid., pp. 98-99.
Inasmuch as there has been a great revival of Hegelian studies in continental philosophy, Hegel's discussion of positive law in *Philosophy of Right* may be a way of bridging several different schools of jurisprudence.

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REFERENCES


