LOGIC AND LAW IN HEGEL*

The topic of this paper "Logic and Law in Hegel," is one to which Hegel himself gives us an explicit invitation in his *Philosophie des Rechts*. In the Preface and in paragraph two of the Introduction to this work, he says that the method or scientific procedure he will follow has been expounded in his logic; he further says that his logical method will simply be presupposed and not commented upon in any detail. It will be the main purpose of this paper to comment upon the basic structural correlations between Hegel's concepts of logic and law.

The *Philosophie des Rechts* is divided into three parts: "Abstract Law," "Morality" and "Ethical Life." Hegel's *Science of Logic* is likewise divided into three parts: "Being," "Essence" and "Concept." Our basic clue to the correlation between logic and law in Hegel is to be had through a consideration of the way in which the triad Being/Essence/Concept throws light upon the triad Abstract Law/Morality/Ethical Life.

I must quickly add that there is, according to Hegel, nothing unique about the correlation of logic and *law*. Hegel's *Philosophie des Rechts*, which, following a recent article by Knox, I translate *Philosophy of Law*, is simply another name that Hegel used for his "Philosophy of Objective Spirit." This is the title by which Hegel designated one of the six major parts of his philosophy of nature and spirit (i.e., his "Realphilosophie") and we may presume that he meant a parallel correlation to obtain between his logic and each of these six parts of his system.

Nevertheless, the topic of the present paper is restricted to logic and law in Hegel. If we can arrive at a strategy that shows promise of illuminating the correlation logic and law I shall be more than satisfied. A fully satisfactory interpretation of the correlation between Hegel's logic and *any* of the six major parts of his *Realphilosophie* has yet to be formulated. (Oddly, so it seems to me, much of the effort amongst Hegel scholars in recent years has been devoted to the discovery of such a correlation between Hegel's logic—in one version or another—and his *Phenomenology of Spirit*. I say this is odd because Hegel nowhere gives an unambiguous invitation to seek this correlation, an invitation that might be compared with those I am proposing to heed in the Preface and in the Introduction to his *Philosophy of Law*.)

Let these remarks suffice as an attempt to motivate the present inquiry in terms of Hegel's intentions and the present state of Hegel scholarship. In any case my primary interest is in Hegel as a systematic philosopher. Systematic philosophy is currently rather out of fashion. One of the reasons for this is that systematic philosophy tends to be identified with metaphysics and metaphysics is under a general ban. I shall not attempt to lift that ban. But I do wish to disentangle systematic philosophy from the metaphysical bramble. And I believe that our topic, Logic and Law in Hegel, might be useful in this regard.

There are few areas of philosophical thought today in which metaphysical elements have been so clearly isolated and so thoroughly eliminated as in the philosophy of law. This has largely been the result of the work of Hegel's younger contemporary, John Austin. Since the publication of his *The Province of Jurisprudence Determined* in 1832 (one year after Hegel's death), and with the subsequent works of Hans Kelsen and H.L.A. Hart, legal theory has reached an unprecedented level of clarity and precision. It is now

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safe to say that the philosophy shaped by these writers, generally known as "legal positivism," has been adopted by most of the major authors and teachers of legal theory today (in the English speaking world, at any rate).

I would like to exploit this situation of thought in order to make a plausible case for a non-metaphysical reading of Hegel's systematic philosophy in general and of his philosophy of law in particular. Thus my strategy in this paper will be to begin with (1) a general and perhaps oversimplified statement of legal positivism. This will be followed by (2) a consideration of the concept of a posit in Hegel's *Phenomenology* and *Logic*. In a final section I will outline (3) the logical structure of Hegel's *Philosophy of Law*; here I will take special pains to show how a logical analysis of Hegel's *Philosophy of Law* gives prominence to a cardinal tenet that is shared by Hegel and Legal Positivism: the separation of legality from morality.

I. Legal Positivism

The theory that I shall now sketch under the name legal positivism may not correspond in all particulars with the teachings of all philosophers who have called themselves positivists, but in most formulations the theory is simple—Hart has called Austin's version "breathtakingly simple"—and I can only hope that my sketch will share that virtue. To make my sketch as simple as possible, I will begin by stating what I take to be five distinguishing theses of positivism. I will then give some interpretative comments and arguments in support of these theses.

(1) A law is an order or a command *by* human beings and addressed *to* human beings.

(2) The human beings who speak in the imperative voice, and thus posit laws, do so because they have been, prior to their legal utterances, acknowledged as lawgivers or authorized so to speak. These speakers are the sovereign.

(3) In any problematical case the question "is X a law?" can be answered by the test of provenance: "If X was the command of the sovereign then X is a law."

(4) There is no necessary connection between legality and morality, between law as it is and law as it ought to be.

(5) Laws are *formal* rules that govern behavior in an organized society; most of these rules are directives or prohibitions and most behavior in everyday life is not covered by laws. Thus "the liberty of subjects is the silence of the laws."

Perhaps the best characterization of the theory described by these theses is that it constitutes a systematic rejection of the theory known as "natural law." This is admittedly to put the issue polemically, but legal positivism itself has tended to get its central arguments formulated within polemical contexts. That is why many of the arguments in support of legal positivism are at the same time arguments against natural law. Let us accordingly consider each of the stated theses in the polemical framework of a debate with natural law.

(1) There is, of course, a place in any natural law theory for the notion of law as a human command. The difference between natural law and positivism consists in the way each theory understands the difference between human commands that *are* and human commands that *are not* valid or legitimate laws. For natural law theory, a command or posit laid down by men will be valid if and only if it can be shown to correspond to some pre-existent structure that is ingredient in reality. A valid positive law is therefore one that depends upon a structure that is independent of the law itself. I believe we can say that natural law requires these structures to be independent in one (or more) of four ways:

(a) cosmologically or

(b) theologically or

(c) psychologically or

(d) practically.

It will be immediately evident that the first three ways represent the classic trichotomy of metaphysica specialis, the specific fields of metaphysics. According to these ways a human law may be determined valid if it can be grounded in (a) some permanent feature of the world order, (b) some dimension of the divine intellect or will or (c) some invariant aspect of the human mind. The fourth way, legitimation by reference to human practice, is not always recognized as an operation characteristic of natural law reasoning. Nevertheless, I believe that it is, despite demurrers of its contemporary practitioners. To make this point as clearly and succinctly as possible, I will cite what is no doubt the locus classicus of this doctrine, Book Five of Aristotle's *Nicomachean Ethics* (at 1134b24-33):

> Now some people think that everything exists only by convention, since whatever is by nature is unchangeable and has the same force everywhere—as, for example, fire burns both here and in Persia—whereas they see that notions of what is just change. But this is not the correct view…[for] among us there are things which, though naturally just, are nevertheless changeable, as are all things human. Yet in spite of that, there are some things that are just by nature and others not by nature.

This mode of reasoning has recently undergone a startling revival in the hands of post-Wittgensteinian action theorists in England and America and amongst the practitioners of the hermeneutic art in many corners of Europe and elsewhere. Within legal theory it is perhaps most elegantly represented by Ronald Dworkin, who concludes his "attack on positivism"[1] with a call for a theory that will be "truer to the complexity and sophistication of our own practices."[2]

What each of the four ways of natural law has in common with the others, and what separates each from legal positivism, is the insistence that there are, in the real world, structures in terms of which positive laws are valid or invalid. Knowledge of these structures is held to be, on principle, available to everyone. That is why critics of natural law, from Hobbes to Kelsen, have said that natural law is an

[1] Dworkin, *Taking Rights Seriously*, 1977, p. 22.

[2] Dworkin, *ibid*., p. 45.

"anarchic order."[3] If the law itself is only valid by virtue of conformity to structures knowable independent of the law, then the determination of what valid law is is, on principle, in the hands of each and every interpreter of these structures. And surely that *is* the formula of anarchism.

This state of affairs leads to a consideration of the second thesis of positivism, the thesis concerning sovereignty. Positivism holds that a law is a command, but it is not said to be the command of just anyone, or even of anyone capable of exercising coercion over another (the "gunman situation" discussed in Hart). Law is rather the command of the sovereign. As Kelsen as well as Hart have shown, positivism was made vulnerable by Austin's characterization of the sovereign as the one to whom obedience was "habitually" shown in any organized society. But it is possible to understand how we *identify* the sovereign without departure from the formal and rule-governed character of legal positivist reasoning. Kelsen does so by distinguishing between the ordinary norms (laws) that govern first-order behavior and the "higher" or constitutional norm that governs the behavior of those who exercise sovereign authority. Hart draws a similar distinction between rules of two different logical kinds: primary rules that lay down prohibitions and directives to our behavior and secondary rules that stipulate how the sovereign is to be identified and by what procedures the primary rules may be enacted, recognized, amended or rescinded.

These recent revisions of positivist theory go a considerable distance toward answering some of the most serious criticisms that have been directed against it. Still, there are some remaining difficulties in regard to the concept of legitimate sovereignty. Positivism's recourse to the notions of a basic norm or of secondary rules is not made without paying a price. Whereas Austin simply appealed to the fact that there is a sovereign authority in any organized society, Kelsen and Hart must resort to hypothetical reasoning to account for the establishment of a basic norm or for the acceptance of a legal system embodying secondary as well as primary rules. Although I will not attempt a demonstration, this seems to point their theories in the direction of a notion that was much earlier devastated by Hegel's critique: the Hobbesian notion of a social contract within a hypothetical state of nature. But whatever the fate of *that* argument, it seems clear to me that no help can be awaited from the direction of natural law. The open question is whether a logical, as opposed to a metaphysical, solution to this problem might be available. If the parallelism I have suggested between positivist and Hegelian legal theory can be sustained, and a metaphysical reading of Hegel avoided, then perhaps a clue to solving this problem might be had.

The remaining theses of positivism will not require extensive comment. As to (3), the test of provenance in answer to the question "is X a law?", it is the virtue of positivism that it gives the simplest possible definition of what law is—to see the law we need not see double. If one understands promulgation to be an essential feature of sovereign positing, then a law is known *as* the law because it *is* the law in virtue of its being made known (promulgated) *as* the law. Or: we know the law by simple analysis.

As to the fourth thesis, on legality and morality, there is a remarkable agreement between the leading exponents of natural law and positivism concerning the point at issue. Alexander d'Entrèves, in his book, *Natural Law*, writes: "Perhaps the best description of natural law is that it provides a name for the point

[3] Kelsen, *General Theory of Law and State*, 1945, p. 393.

of intersection between law and morals."[4] Hart, too, accepts this description as a definition of natural law.[5] But whereas d'Entrèves affirms the existence of such a point, Hart denies it. What neither provide is a very clear distinction between the concepts of legality and morality. Yet these are precisely the topics that Hegel, using the most elementary principles of his logic, distinguished in the first two parts of his *Philosophy of Law*. Here, too, it seems reasonable to suggest that positivism, which has consistently insisted upon the difference between legality and morality, could benefit by considering the most thoroughgoing and systematic articulation of this difference.

Finally, as to thesis five, positivism has an avowedly narrower view of what constitutes a law than natural law theory. The narrowness of this conception has recently come under attack by Dworkin, who criticizes positivism because it makes law into a "system of rules."[6] But despite—and also because of—Dworkin's arguments that we be more generous in granting admission to the domain we theoretically recognize as law (he urges recognition of 'principles' and 'practices' as well as rules), it is hard to see how the result would be anything but an overpopulation of our theoretical domain—a fundamental problem of natural law in its more obviously metaphysical guises.

It seems to me that the prime virtues of legal positivism become most evident when we remember that it is a *theory* and that some of the requisites of good theory are logical simplicity, precision and clarity. The various forms of natural law theory claim to be more *adequate* to the facts of our legal experience, but the appeal to experience is, in any case, a dangerous piece of theoretical reasoning. Perhaps it might even be argued that positivism itself is excessively dependent upon experience in at least one respect. The respect I have in mind—not an insignificant one surely—is its concept of a posit.

II. The Concept of a Posit in Hegel

Legal positivism is not to be understood as the application of a more general theory called positivism to a more specific subject matter, in this case law and legal obligation. In the first place legal positivism does not share in the conceptual perplexities or antinomies to which positivism as a moral or an epistemological theory has given rise. (Hart has shown, to my satisfaction at least, that there is no necessary connection between positivism as a legal and positivism as a moral theory.)[7] Secondly, and more importantly, there does not seem to have been any more general theory of positing that was used in the formulation of legal positivism, or of any other positivist theory. In short, the concept of a posit has been simply presupposed or, if you like, preposited. For John Austin it seems clear that the conceptual paradigm for legal positing was drawn from the notion of moral laws as God's commands. In any case we know that he did subscribe to the notion of God as the one who determines the fundamental principles of morality and that it was morality in this sense that he contrasted with legality. One principle for distinguishing between morality and legality was that the first involved divine posits whereas posits in the

[4] d'Entrèves, *Natural Law*, 1951, p. 116.

[5] Hart, "Legal Positivism and the Separation of Law and Morals," *Harvard Law Review*, LXXXI (1958), p. 598.

[6] Dworkin, *op. cit.*, pp. 14ff.

[7] Hart, *op. cit*.

second were all taken to be human. But it is clear that such reflections are not guided by anything like a pure theory or a logic of positing.

Granted that legal positivism does not have the concept of a posit as a primitive concept, two questions naturally arise. (1) Is the concept of a posit thinkable as a primitive concept? In other words, is a *logic* of positing possible? and (2) Would the availability of such a logic make any significant difference to legal theory? It is the first of these questions that I will focus upon in the present section of this paper. I will consider the second question in my last section. My general aim will be to indicate that a logic of positing is possible and that this logic would make a difference in legal theory.

Let us first consider some of the requisites for a logic of positing. As already indicated, the first of these is that the logical discourse use the concept of a posit as a truly primitive concept. By this I mean that the concept not depend for its intelligibility upon a presupposed or preposited conception of a positor. That is why no theory that takes God the creator as the paradigmatic positor could make any claim to the concept of a posit as primitive. For in this case the concept would be parasitical upon a horizon of intelligibility pre-informed by a determinate theology. By parity of reasoning the concept of a posit would also be non-primitive if a posit were thought on the model of human decisions. Although the human will has traditionally been regarded as the definitive locus of arbitrariness, it is, one might say, insufficiently 'arbitrary' for a logic of positing. Hence even Fichte's notion of a positing ego is too overdetermined (überbestimmt) for a logic of pure positing.

The only logic (of which I am aware) that purports to expound the concept of a posit as a primitive concept is Hegel's logic. The concept of a posit is the basic doctrine of the second part of that logic, the logic of essence. Since I cannot pretend to give anything like a full scale interpretation of Hegel's logic, please allow me to reconstruct, in an admittedly oversimplified way, the strategy of Hegel's logic with special reference to the concept of a posit.

It has been suggested that Hegel's logic is his ontology and that Hegel's basic question is "Why should there be something rather than nothing?" This might seem a plausible interpretation in light of the fact that Hegel does begin his logic with a consideration of being and nothing. Still I think that the question is a misleading clue to the argument of Hegel's logic. As a less misleading clue, I would like to propose the following question: "What is determinacy?" or the question: "How is determinacy thinkable?" To this question Hegel gives I believe, three basic and interconnected answers. If we may stipulate x as a symbol for the indeterminate, then Hegel's three answers to the question of determinacy might take the following forms: (1) x is determinate as a contrast, (2) x is determinate as determined, and (3) x is determinate as an individual. I should like to propose that we consider these as the respective themes of the three main parts of Hegel's *Science of Logic*, the doctrines of Being, Essence and Concept. With the hope of making their teachings clearer, I suggest that we call these:

(1) the logic of contrastive determinacy,

(2) the logic of determination, and

(3) the logic of determinate individuality.

It will be evident that the concept of a posit, as something determined, will find its place within the logic of determination. But just as I have argued that the concept of a pure posit cannot presuppose a determinate positor, it will also be evident that this logic as a whole may not begin with any determinate idea (Vorstellung). For the sake of emphasis, I should like to repeat this phrase. As a result of fifteen years of rethinking the problem of a beginning in Hegel's *Science of Logic*, I can think of no phrase that more accurately captures the requirement for the beginning of a logic whose basic question is: What is determinacy? This phrase, once again, is: "logic may not begin with any determinate idea."

It is, of course, a natural idea, in modern philosophy at least, that theoretical inquiry must begin with a preliminary examination of our ways of knowing. That is presumably why so much philosophy tends to reduce all questions to an epistemological question. In any case, Hegel regarded this natural idea (natürliche Vorstellung) as the most basic conceptual framework presupposed or pre-posited in modern philosophy. Since the idea had become virtually second nature to modern philosophy, Hegel knew that it would be difficult to eliminate. But if, on the other hand, he had (as I believe he did) a conception of a systematic philosophy that must begin without any determinate idea, it will be plausible to consider that he would formulate a manual of exercises designed to uproot this deep-set idea and habit of thought. It is as such a manual of exercises that we can, I believe, best read his first published book, *The Phenomenology of Spirit*. Its final objective is to *absolve* that natural idea mentioned in the opening sentence of the 'Introduction' to the *Phenomenology*. The stage of final absolution from the natural idea Hegel calls "absolute knowing" ("Das absolute Wissen"). At this stage, the subject of the *Phenomenology*, consciousness, may be said to discover that *all* of its principles for validating knowledge are what they are because they are posits of consciousness itself. It thus knows that there are no principles independent of its experience that might serve to validate its knowledge. The state of absolute knowledge is accordingly the state in which consciousness as consciousness may be said to be absolved from any claim to know any determinate idea whatsoever. Therewith the "natural idea" is eliminated. That, in briefest outline, is why Hegel's *Phenomenology* may be read as an introduction to his *Science of Logic*. To begin, this logic requires the absence of any determinate idea with a claim to conceptual significance. The *Phenomenology* brings about that state of affairs by an analysis of consciousness as an epistemic positor.

The logic then proceeds to generate the elementary categories of thought. In one respect, Hegelian logic proceeds in a manner that is akin to legal positivism. To consider a category as a category, or law as law, without any reference to a putatively legitimating structure in the real world, both Hegelian logic and legal positivism must be liberated from metaphysics. For positivism this is the aim of polemics against natural law; for logic this is achieved by a critique of the natural idea, the definitive structure of consciousness within the *Phenomenology*. In another sense, however, the method of legal positivism remains phenomenological—at least in Hegel's use of the word. For positivism, having eliminated any necessary connection between laws and nature, still takes laws to be the determinations of a positor whose logical place in positivist theory is left obscure. It is, on the other hand, the explicit theoretical task of Hegel's logic to make all aspects of determinacy conceptually transparent.

As already indicated, this logic begins, not with an account of determinacies as determined but with determinacy as determinate within a situation of contrast. The logic of contrastive determinacy begins with a consideration of the indeterminate, the theoretical result of the *Phenomenology*. Upon

consideration, the indeterminate exhibits itself in the categoreal forms of being and nothing. As pure thought forms, being and nothing are both without qualification; they are both indeterminate. Yet they are thought as different. Hence the first contrast in Hegel's logic of contrastive determinacy, a contrast through which the very concept of determinacy may be thought to arise.

The logic of contrastive determinacy is a study of all the elementary forms in which an otherwise indeterminate x may be thought determinate by virtue of, and solely by virtue of, its standing in contrast with something other than it, say, y. In this logic, to be x is therefore to be non-y. The whole logic of contrastive determinacy is a spelling out of the ways in which determinacy can be thought, not by reference to determinate structures in reality (this is the formula of metaphysics), but by contrast with other determinacies in question, say, y. It will be clear that in this logic no determinacy can be thought as independent of any other. But neither can they be said to stand in a relation of dependency. They are what they are in and through their otherness; there is here no difference of logical order whereby any determinacy could be thought independent of or dependent upon another.

This logic is said to give a complete account of the categories of contrastive determinacy because the first contrast is generated out of the indeterminate and because the sequence of the categories generated leads immanently to a way of thinking determinacy that is not contrastive.

The second way of thinking determinacy is the logic of determination, the logic in terms of which an x is thought determinate by virtue of its being determined or posited by its other. The distinguishing characteristic of this logic is differentiation into two logical orders. It is, we may say, a two-tiered logic. In some respects it bears a resemblance to the ordinary logical distinction between a meta-language and an object language. The one order refers to the other. And it is by virtue of this reference that the referents are said to be what they are. In other words, their determinacy is said to derive exclusively from their being determined or posited.

Hegel calls this way of thinking determinacy the logic of essence. The term essence designates the logical order which is superordinated to the order of posited determinacies just because the determinacies in question *are* thought *as* posits or determinations. This logic is thus said to provide the conceptual framework for our thinking relations such as that between essence and appearance or between cause and effect. The critical point, however, here and elsewhere in Hegel's logic, is that the categories or structures of thought generated are not thought by abstraction from, say, cause and effect relations in the real world. The contention is rather that we make sense of relations in the real world by a thinking that is structured by categories generable independently of any reference to reality. This is another way of saying that the logic is wholly non-metaphysical. Just as legal positivism treats laws as what they are solely in virtue of their being posits, so the logic of determination treats determinate thought structures as what they are solely in virtue of their being determined. But Hegel's is a *pure* theory of positing because it considers nothing but the ways by which any x can be thought to be what it is exclusively in terms of its being posited, established or determined. Here nothing is presupposed about the determinor that does not pertain to its logical role as a determinor of x, and nothing can be thought about x that is not accountable in terms of its being determined. Hence there can be no talk about God or about human agents, about divine or human commands, as the primitive forms of posits when posits are

conceived logically. Such talk would presuppose or posit pre-logically a determinacy of the positor that, ex hypothesi, could not be accounted for by the logic of determination alone.

The third way of thinking determinacy in Hegel's logic is what I have called the logic of determinate individuality. In this sphere the specific topic is the conceptual framework in which we think of any x as an individual (ein Einzelnes). Although it is thoroughly misleading to think of the first two parts of the logic as anything like a 'thesis' and an 'antithesis,' there is an important sense in which the logic of determinant individuality constitutes a synthesis of the previous two spheres. Neither contrast nor determination provide frameworks for thinking anything determinate as a determinate individual. Each accounts only for the conceptual resources in terms of which we think "moments" (Momente) or logical aspects of the determinant individual. Nevertheless, these moments are *the* moments of individuality. Specifically thought as moments, as they are thought in the logic of determinate individuality, they are called the moments of universality and particularity (das Allgemeine und das Besondere). Thought as determinate by virtue of contrast alone, an x is ultimately thought to be at one with that by contrast with which it was thought a determinate x. It comes to be thought as a universal. I shall illustrate this by the case of legal persons in the following section. On the other hand, if x is thought as determinate by virtue of determination alone, then it is ultimately thought in terms of its bare positivity, a determination without any logical connection with any other. It comes to be thought as a bare particular. In the next section I shall draw on Hegel's theory of the moral subject for an illustration of this.

The main lesson of the logics of contrast and determination, a lesson drawn in the logic of individuality, is that they are each necessary but insufficient conditions for the thought of a determinate individual. Each must be thought as a necessary moment of thinking individuality, but both must be thought together if individuality is to be comprehended. I shall illustrate this in the next section by reference to Hegel's argument that legal persons and moral subjects are only thinkable as individuals when they are thought as family members, participants in civil society and citizens of a state.

III. The Logical Structure of Hegel's Philosophy of Law

In this section my primary aim will be to show how a positive law in civil society is determinate by virtue of its being posited. Or, to quote Hegel, in civil society, "the only law which is obligatory is posited law."[8] It will also be seen, however, that a posited law is obligatory because the posit gives individuating determinacy to the otherwise merely abstract and universal principles of legality.

To make this argument clear it will be necessary to locate its factors within the logical structure of Hegel's Philosophy of Law. As I indicated at the beginning, the formal structure of Hegel's Philosophy of Law does not differ from the formal structure of any of the other five major parts of his "Realphilosophie." Each of these is a consideration of structures in the domain external to logic (die Äusserlichkeit) and in each case the real structure is an illustration of a formal logical structure. It is never the case that the structures may be said to be derived or abstracted from reality. That, once again, would be metaphysics.

What is distinctive about the philosophy of law is that it concerns the specific domain of human selves in the state of plurality or as interacting with one another. This is, of course, the same domain that is

[8] *Rph* § 212.

treated by philosophers of history. To forestall a possible misunderstanding of my interpretation I wish to stress that Hegel's philosophy of law is totally alien from any philosophy of history. The guiding framework for his analysis is an a-temporal logic, and no essentially chronological model of development.

The three main parts of the Philosophy of Law correspond, respectively, to the logics of contrast, of determination and of individuality. These are the parts entitled Abstract Law, Morality and Ethical Life. As in the case of logic per se, the first two spheres exhibit themselves as moments, each of which, taken by itself, is aporetic; but both, when articulated *as moments* and thought in the conceptual framework of the third sphere, show themselves to be necessary moments.

In the first of these spheres, Abstract Law or Legality, the factor whose determinacy is under discussion is called the person. The first thing that must be said about persons is that they are determinate or actual persons only in so far as they stand in a situation of contrast with other persons. That is to say, the logic by which they have their determinacy is the logic of contrast. As contrastive factors in a domain external to the logical system, however, the contrast cannot be regarded as a purely logical one. It must be mediated. The factor which is said to mediate the contrast between persons is called property. The contrast of persons mediated by property is called recognition. Thus it is Hegel's most elementary teaching about persons that they are what they are by standing in a contrastive relationship to other persons, by being recognized. The sphere of legality is accordingly the sphere of recognition (Anerkanntsein), and the safest generalization about Hegel's concept of legality is that it is the structure of reciprocal recognition.

Perhaps the most important feature of Hegel's treatment of legality in terms of his logic of contrastive determinacy is that this treatment, by virtue of the logic alone, requires that persons be considered determinate exclusively in and through their contrast with other persons. The logic would be inapplicable to any legal situation in which a 'person' were considered first with reference to some determinate status—slave or free, male or female, white or black. That means that Hegel's legal theory would not be pertinent to any legal system that did not acknowledge the principle of personal equality. And note that this aspect of the theory has nothing to do with Hegel's moral attitude on the question of equality; it follows from his logic alone. Moreover, as far as the logic of the theory is concerned, it must be regarded as a pure contingency that a situation in Europe had arisen in which the equality of persons *was* acknowledged as a principle. Here again we see that a reading of logic *and* law in Hegel rules out any recourse to a philosophy of history.

Hegel's presentation of abstract legality is divided into three sections: property, which we have already touched upon, contract and wrong. It is in the second of these that the principle of contrast via recognition is made most evident. For a contract is, in the most basic sense, an exchange of property and property is any aspect of a determinate personality that is susceptible of exchange. The contract, then, is that operation by which the contrast, and hence the determinacy, of persons is most intelligible. To engage in a contractual exchange of property is to engage in a process of recognition.

This process is described in two stages: the stipulation and the performance. In the first, the quantitative equality of the properties to be exchanged is posited and the formal character of the actual exchange is anticipated. In the performance some of the determinate factors which had defined the two (or more) persons are transferred one to the other and the fluidity of personal determinacy via contrastive

recognition is once again affirmed. For the basic legal right of persons in this theory is not the right to any determinate thing or kind of things (e.g., not even to such 'basics' as food, clothing or shelter). The self as person is not the self in need (this is a topic of civil society). The legal right of persons is the right to be determinate, the right to stand in determinate contrast with other persons or, in short, the right to be recognized.

The third subsection of Abstract Legality is wrong. The possibility of wrong derives in the first instance from the distinction between stipulation and performance in contract. The specific contrast stipulated formally and the contrast as actualized in the performance may be out of agreement with one another. If this happens accidentally it is called a tort or a non-malicious wrong; if by design it is called fraud. In either case it is not an eventuality against which there are any protective resources in the sphere of abstract legality. Or, as Hegel put the matter: "abstract legality is always at the mercy of wrong." As we shall see, this is one of the main reasons for a system of positive law.

In its most extreme form wrong is crime. Here a person is denied his personality. The entire structure of reciprocal recognition, the legal form of contrastive determinacy, is simply negated. The perpetrator of such an act, the criminal, thereby loses his or her determinate place in the structure of legal contrast; in other words, the criminal act is a sacrifice of personality.

Still, the criminal as criminal is not without his or her rights. These are not legal rights, for legality is at the service of personality alone. But to be a person is to be something *universal*, it is to be in a mode of determinacy which, when carried to its limit, eliminates the determinacy of the selves in question; the criminal act is an act of determination in a sphere of contrastive determinacy. It is wrong because it involves a conflict of spheres; it is right because the sphere of legality, like its counterpart in pure logic, can only have the significance of being a moment of a larger whole.

The sphere within which the self-determination of the self is the proper way of determinacy is the sphere of morality. This self is the moral subject. In morality the subject is what it is by virtue of its own posits. These posits also take the form of acts in the face of others. But when we consider action as moral action, i.e., in terms of the logic of determination, then its social dimension is only accountable by way of the agent's subjective meaning. Thus Hegel's concept of moral action is precisely parallel to Max Weber's definition of social action. According to Weber:

> Action is "social" insofar as its subjective meaning takes into account the behavior of others and is thereby oriented in its course.[9]

The moral subject is essentially an agent. By its acts it is what it is. But even more essentially the moral subject determines the objective principles by which its acts are validated. At the first stage of moral reasoning this simply amounts to drawing a line between what the subject does willy nilly and what it acknowledges to have done 'on purpose.' The subject accepts responsibility for what, by its own determination, it has done 'on purpose.' At the second stage of moral reasoning the subject takes responsibility for determining its intentions in such a way that its actions will be objectively valid. But still it is the subject alone which can determine the validity of its own intentions. In the third stage of morality

[9] Max Weber, *Economy and Society*, Ch. I, 1968, p. 4.

the final implications of its logic of determination are put on display. What is here determined or posited is not merely the action, its purpose and its objective intention, but also the principle(s) by which *all* moral validation can be thought. This extreme form of moral subjectivity, which Hegel calls 'conscience,' is obliged, by the logic of moral discourse, to determine 'the good.' At every previous stage the determinations or posits of the subject were made with some reference to a putatively objective framework, e.g., a natural law. But at this stage the logic of moral self-determination requires that the objective framework itself be posited. When *this* is made a subjective posit, there is no longer any moral basis for the subject's claim to a distinction between subjectivity and objectivity. As an ultimate moral posit, the good is no more logically necessary than evil.

Thus on Hegel's account neither legality nor morality can be regarded as complete frameworks for a comprehension of selves in the situation of plurality. But both are necessary moments and any adequate theory will have to incorporate their respective logics.

Under the title "Ethical Life" (Sittlichkeit) Hegel claims to have formulated such an adequate theory. The point of this theory is not to deny the significance of legality and morality. Indeed, the concept of Ethical Life would make no sense in abstraction from the two previous moments of Hegel's *Philosophy of Law*, just as his logic of determinate individuality makes no sense in abstraction from the logics of contrast and determination.

Ethical Life is itself divided into three stages: the family, civil society and the state. It is, I believe, the fundamental teaching of Hegel's philosophy of law that a determinately individual self is first thinkable as a member of *each* of these three spheres of life in plurality. In my concluding remarks I should like to focus upon the second of these, civil society, partly because the concept of civil society represents Hegel's most original and distinctive contribution to legal theory and more importantly because it is within the sphere of civil society that Hegel expounds his theory of positive law.

What differentiates the self conceived in Ethical Life from the selves of legality and morality is that it is determinate not merely by contrast with others or by self-determination but also *as* an individual. Every ethical self is something irreducibly determinate in virtue of its membership in the three orders. In the family member this irreducible determinacy is *love of others*, in the member of civil society it is *self-interest* and in the citizen it is *loyalty* (to a particular institution that preserves and protects the universal principles of the whole constitutional order presented in the *Philosophy of Law*).

From a logical point of view the distinctive feature of the family is that each member is what it is by virtue of its contrast with the others, but the domain of this contrast does not, as in the case of legality, have a *universal* extent. The family is a limited and *particular* sphere structured by the logic of contrast, whose extent is, when conceived purely logically, universal. That is the basic logical clue to the determinate individuality of the family.

Civil society, on the other hand, is the sphere in which each member is actuated by its own interest and *determines* for itself what this interest shall be. Hence each member is in the first instance a *particular*. But in modern civil society, whose logical structure and determinate existence Hegel was the first to discover, the domain in which particular interests are posited and acted upon involves practical reference

to others, and in principle to all others. That is why the extent of civil society is said to be *universal*. The member of civil society (the bourgeois) is accordingly a determinate individual by virtue of this synthesis of universality and particularity.

I will conclude by commenting upon the specific form assumed by the synthesis of universality and particularity in the first two stages of civil society. About the first, the 'System of Needs,' I will simply say that Hegel gives logical form to the notion of a self-regulating market which was formulated by Smith, Say and Ricardo. By pursuing his *particular* economic self-interest, the individual, in concert with others, inadvertently posits a systematic structure (the market) whose reach is (in principle, at least) *universal.*

In the second sphere of civil society, the administration of justice (die Rechtspflege), the structure of legality which arose inadvertently in the economic sphere, is explicitly posited. The form of this positing, like the form of self-determination in morality, is structured in accordance with the logic of determination. But the form which is posited is the form of abstract legality, the form which is structured in accordance with the logic of contrastive determinacy. When we consider the logical *particularity* of the act of positing and the logical *universality* of the posit itself (the law), which are brought together in Hegel's concept of a positive law, we are, I believe, in a position to consider the fundamental difference of this legal theory from natural law, on the one hand, and legal positivism on the other.

First, as to natural law, we have seen that its leading contemporary advocate (d'Entrèves) and critic (Hart) agree "that it provides a name for the point of intersection between law and morals." Through our consideration of the logic of morality presented by Hegel we can also see that the kind of moral reasoning used in natural law is a logic of determination that is not yet thoroughgoing, that has not been thought to its limit. For the morality of natural law still purports to discover its principle of objective validity as a structure in the real world. That is the clue to its metaphysical character.

Legal positivism, on the other hand, may now be considered as the form of legal reasoning that does carry the logic of determination to its conceptual limit. Thus it is not morality in the sense of natural law but rather morality *in extremis*, a morality in which the principles of objective validity are themselves taken to be subjective posits. This feature of legal positivism is acknowledged most explicitly in Kelsen's doctrine of the essentially arbitrary 'basic norm' ('Grundnorm'), but I believe that it is also implicit in Hart's problem of accounting for the "acceptance" of a legal system that incorporates secondary as well as primary rules.

Positive law in Hegel is legality given determinate individuality in the form of a posit which refers to the material embodiment of legality in the economic life of civil society. Law is thus a *particular* posit that refers to a structure which is implicitly, but only implicitly, *universal*. As such it may not refer to the domain of particularity per se, that is, to the domain of morality. In Hegel's theory positive law is excluded on principle from any "intersection" with morals (see *Rph* § 213). Individual legal positivists may well *intend* that their theory exclude the legislation of morals; in the absence of principles for such an exclusion, that intention has an oddly moral character.

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