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Elements of the Philosophy of Right

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CAMBRIDGE UNIVERSITY PRESS
CAMBRIDGE
NEW YORK PORT CHESTER
MELBOURNE SYDNEY
Introduction

§ 1
The subject-matter of the philosophical science of right is the Idea of right— the concept of right and its actualization.1

Philosophy has to do with Ideas and therefore not with what are commonly described as mere concepts. On the contrary, it shows that the latter are one-sided and lacking in truth, and that it is the concept alone (not what is so often called by that name, but which is merely an abstract determination of the understanding) which has reality, and in such a way that it gives actuality to itself. Everything other than this actuality which is posited by the concept itself is transitory existence (Dasein), external contingency, opinion, appearance without essence, untruth, deception, etc. The shape which the concept assumes in its actualization, and which is essential for cognition of the concept itself, is different from its form of being purely as concept, and is the other essential moment of the Idea.

Addition (4). The concept and its existence (Existenz) are two aspects of the same thing, separate and united, like soul and body. The body is the same life as the soul, and yet the two can be said to lie outside one another. A soul without a body would not be a living thing, and vice versa. Thus the existence (Existenz) of the concept is its body, just as the latter obeys the soul which produced it. The buds have the tree within them and contain its entire strength, although they are not yet the tree itself. The tree corresponds entirely to the simple image of the bud. If the body does
not correspond to the soul, it is a wretched thing indeed. The unity of existence [Dasein] and the concept, of body and soul, is the Idea. It is not just a harmony, but a complete interpenetration. Nothing lives which is not in some way Idea. The Idea of right is freedom, and in order to be truly apprehended, it must be recognizable in its concept and in the concept's existence [Dasein].

§ 2

The science of right is a part of philosophy. It has therefore to develop the Idea, which is the reason within an object [Gegenstand], out of the concept; or what comes to the same thing, it must observe the proper immanent development of the thing [Sache] itself. As a part of philosophy, it has a determinate starting point, which is the result and truth of what preceded it, and what preceded it is the so-called proof of that result. Hence the concept of right, so far as its coming into being is concerned, falls outside the science of right; its deduction is presupposed here and is to be taken as given.1

Addition (G). Philosophy forms a circle.2 It has an initial or immediate point – for it must begin somewhere – a point which is not demonstrated and is not a result. But the starting point of philosophy is immediately relative, for it must appear at another end-point as a result. Philosophy is a sequence which is not suspended in mid-air; it does not begin immediately, but is rounded off within itself.

According to the formal, non-philosophical method of the sciences, the first thing which is sought and required, at least for the sake of external scientific form, is the definition. The positive science of right cannot be much concerned with this, however, since its chief aim is to state what is right and legal [Rechtet], i.e. what the particular legal determinations are. This is the reason for the warning: "omnis definitio in iure civili periculosa."3 And in fact, the more inconsistent and internally contradictory the determinations of a [system of] right are, the less possible it will be to make definitions within it; for definitions should contain universal determinations, but in the present context, these would immediately make the contradictory element – in this case, what is unjust [das Unrechtliche] – visible in all its nakedness. Thus, in Roman law [der römische Recht], for example, no definition of a human being would be possible, for the slave could not be subsumed under it; indeed, the status [Staat] of the slave does violence to that concept. The definitions of 'property' and 'proprietor' would seem equally hazardous in many situations. – But the deduction of the definition may perhaps be reached by means of etymology, or chiefly by abstraction from particular cases, so that it is ultimately based on the feelings and ideas [Vorstellungen] of human beings. The correctness of the definition is then made to depend on its agreement with prevailing ideas [Vorstellungen]. This method leaves out of account what is alone essential to science – with regard to content, the necessity of the thing [Sache] in and for itself (in this case, of right), and with regard to form, the nature of the concept. In philosophical cognition, on the other hand, the chief concern is the necessity of a concept, and the route by which it has become a result [is] its proof and deduction. Thus, given that its content is necessary for itself, the second step is to look around for what corresponds to it in our ideas [Vorstellungen] and language. But this concept as it is for itself in its truth may not only be different from our representative [Vorstellung] of it: the two must also differ in their form and shape. If, however, the representation is not also false in its content, the concept may well be shown to be contained in it and present in essence within it; that is, the representation may be raised to the form of the concept. But it is so far from being the measure and criterion of the concept which is necessary and true for itself that it must rather derive its truth from the concept, and recognize and correct itself with the help of the latter. – But if, on the other hand, the former manner of cognition with its formal definitions, inferences, proofs, and the like has now virtually disappeared, the other mode which has replaced it is a bad substitute: that is, Ideas in general, and hence also the Idea of right and its further determinations, are taken up and asserted in immediate fashion as acts of consciousness, and our natural or intensified feelings, our own heart and enthusiasm, are made the source of right.4 If this is the most convenient method of all, it is also the least philosophical – not to mention

1Translator's note: 'In civil law all definitions are dangerous.'

2Translator's note: 'In all definitions are hazardous.'

3Translator's note: 'In Roman law all definitions are dangerous.'

4Translator's note: 'In all definitions are hazardous.'
Philosophy of Right

here other aspects of this view, which has immediate
relevance [Beziehung] to action and not just to cognition.
Whereas the first – admittedly formal – method does at least
require the form of the concept in its definitions and the form
of necessary cognition in its proofs, the mode of immediate
consciousness and feeling makes the subjectivity, con-
tingency, and arbitrariness of knowledge into its principle. –
A familiarity with the nature of scientific procedure in phi-
losophy, as expounded in philosophical logic, is here
presupposed.

§ 3

Right is in general positive (a) through its form of having validity within
a [particular] state; and this legal authority is the principle which
underlies knowledge [Kenntnis] of right, i.e. the positive science of right.
(b) In terms of content, this right acquires a positive element (c)
through the particular national character of a people, its stage of histori-
cal development, and the whole context of relations governed by
natural necessity. (d) through the necessity whereby a system of legal
right must contain the application of the universal concept to the
particular and externally given characteristics of objects [Gegenstande]
and instances – an application which is no longer [a matter of] specu-
lative thought and the development of the concept, but [of] subsump-
tion by the understanding; (e) through the final determinations
required for making decisions in actuality.

If the feelings of the heart, [personal] inclinations, and
arbitrariness are set up in opposition to positive right and
laws, philosophy at least cannot recognize such authorities.
That force and tyranny may be an element in positive right is
contingent to the latter, and has nothing to do with its nature.
Later in this work (§§ 211–214), it will be shown at what
point right must become positive. The determinations which
will be discussed in that context are mentioned here only in
order to indicate the limits [Grenze] of philosophical right and
at the same time to rule out any possible idea [Verstehung], let
alone expectation, that its systematic development should give
rise to a positive code of laws such as is required by an actual

Introduction

state. – Natural law or philosophical right is different from
positive right, but it would be a grave misunderstanding to
distort this difference into an opposition or antagonism; on
the contrary, their relation is like that between Institutes and
Paedagog. – With regard to the historical element in positive
right (first referred to in § 3 above), Montesquieu stated the
true historical view, the genuinely philosophical viewpoint,
that legislation in general and its particular determinations
should not be considered in isolation and in the abstract, but
rather as a dependent moment within one totality, in the con-
text of all the other determinations which constitute the
character of a nation and age; within this context they gain
their genuine significance, and hence also their justification.

– To consider the emergence and development of determina-
tions of right as they appear in time is a purely historical task.
This task, like that of recognizing the logical consistency of
such determinations by comparing them with previously exist-
ing legal relations, is meritorious and praiseworthy within its
own sphere, and bears no relation to the philosophical
approach – unless, that is to say, development from historical
grounds is confused with development from the concept, and
the significance of historical explanation and justification is
extended to include a justification which is valid in and for
itself. This distinction, which is very important and should be
firmly borne in mind, is at the same time a very obvious one; a
determination of right may be shown to be entirely grounded in
and consistent with the prevailing circumstances and existing legal
institutions, yet it may be contrary to right [Unrecht] and
irrational in and for itself, like numerous determinations of
Roman civil law [Privatrecht] which followed quite consistently
from such institutions as Roman paternal authority and
Roman marriage. But even if the determinations of right are
rightful and rational, it is one thing to demonstrate that this is
so – and this cannot truly be done except by means of the
concept – and another to depict their historical emergence
and the circumstances, eventualities, needs, and incidents
which led to their introduction. This kind of demonstration
and (pragmatic) cognition in terms of proximate or remote
historical causes is often called 'explanation', or even more
commonly 'comprehension', in the belief [Méneaud] that this kind of historical demonstration is all or rather, the one essential thing that needs to be done in order to comprehend the law or a legal institution, whereas in fact the truly essential issue, the concept of the thing [Sache], has not even been mentioned. Similarly, we often hear talk of Roman or Germanic 'concepts of right', or of such 'concepts of right' as are defined in this or that legal code, although these codes contain no reference to concepts, but only to general determinations of right, propositions of the understanding, principles, laws, and the like. By disregarding the difference in question, it becomes possible to shift the point of view and to turn the request for a true justification into a justification by circumstances, a logical deduction from premises which may in themselves [für sich] be as valueless as the conclusions derived from them, etc.; in short, the relative is put in place of the absolute, and the external appearance in place of the nature of the thing [Sache] itself. When a historical justification confuses an origin in external factors with an origin in the concept, it unconsciously achieves the opposite of what it intends. If it can be shown that the origin of an institution was entirely expedient and necessary under the specific circumstances of the time, the requirements of the historical viewpoint are fulfilled. But if it is supposed to amount to a general justification of the thing itself, the result is precisely the opposite; for since the original circumstances are no longer present, the institution has thereby lost its meaning and its right [no exist].

Thus, for example, the monasteries are justified by an appeal to their services in cultivating and populating areas of wilderness and in preserving scholarship through instruction, copying of manuscripts, etc., and these services are regarded as the reason [Grund und Zweck [Grundzweck]] of their continued existence, what in fact follows from these past services is that, since the circumstances have now changed completely, the monasteries have, at least in this respect, become superfluous and inappropriate. Since it has now been shown that the historical significance of origins, along with their historical demonstration and exposition, belongs to a different sphere from the philosophical view of the same origins and of the concept of the thing, the two approaches can to that extent remain indifferent to one another. But since they do not always maintain such peaceful relations, even in scientific matters, I shall quote something relating to their mutual contact which appears in Herr [Gustav] Hugo's Textbook of the History of Roman Law [Lehrbuch der Geschichte des römischen Rechts, 1970], and which will also further elucidate their supposed mode of opposition. Herr Hugo points out in the passage in question (fifth edition [1886], § 53) that Cicero praises the Twelve Tables, while looking advance at the philosophers, whereas 'the philosopher Favorinus treats them just as many a great philosopher has subsequently treated positive right'. In the same context, Herr Hugo replies once and for all to such treatment with the explanation that 'Favorinus understood the Twelve Tables just as little as the philosophers have understood positive right'. As to the correction of the philosopher Favorinus by the jurist Sextus Cassicius in [Aulo] Gellius' Noctes Atticae, xx, i, it is primarily a statement of the true and lasting principle which must underlie the justification of anything whose impact is merely positive. *Nom invariae*, says Cassicius very aptly to Favorinus, *legum opportunitates et medulas pro temporum moribus et pro rerum publicarum generibus, ac pro utilitatem praeceptuum rationibus, proque statu, quibus medius est, ferrum, muniti ac ficti, neque uno statu consistente, quin, ut facies coeli et maris, sua rerum atque fiantur temperaturibus variatur. Quid saluberrimum visum est rogatione illa Stoico . . . quid utilius plebiscito Vocoaldo . . . quid tam necessarium existimatum est . . . quam lex Licinia . . . ? Omnia tamen hac abhinc et operta sunt civitatis opulentia . . . These laws are positive in so far as their significance and appropriateness are circumstantial and

*Translator's note: 'You know very well that the advantages and remedies afforded by the laws change and vary in accordance with the customs of the age and type of constitu- tions, with considerations of present advantage and of deficiencies to be remedied, and that they do not persist in a constant state. On the contrary, they are changed by the storms of chance and circumstance, just as storms change the face of the sea and sky. What could be more salutary than the legal proposal of Stoics . . . , what more useful than the popular decree of Vestal . . . , and what has been deemed necessary . . . as the Licinian law . . . ? And yet they have all been obliterated and discarded by the epidemics of the present state?*
their value is therefore entirely historical; they are accordingly of a transient nature. The wisdom of what legislators and governments have done for the circumstances of their time and laid down for the conditions under which they lived is a distinct issue [eine Sache für sich] which should be assessed by history, whose recognition of it will be all the more profound if such an assessment is supported by philosophical insights. I shall, however, cite an example of Caccilius’ further attempts to justify the Twelve Tables against Favorinus, because in so doing, he employs the eternally deceptive method of the understanding and its mode of ratification, namely by supplying a good reason (Ground) for a bad thing (Sache) and believing that the latter has thereby been justified. He mentions the abominable law which, after a specified interval had elapsed, gave the creditor the right to kill the debtor or to sell him into slavery, or even, if there were several creditors, to cut pieces off him and so divide him between them that, if anyone had cut off too much or too little, he should incur no consequent legal disadvantage (a clause which would have benefited Shakespeare’s Shylock in The Merchant of Venice and which he would most gratefully have accepted). In support of this law, Caccilius puts forward the good reason that it provided an additional guarantee of good faith and that, given the abominable nature of the law, it was never intended that it should be enforced. In his thoughtlessness, he not only fails to reflect that this latter provision [Beistimmung] frustrates the former intention, namely that the law should guarantee good faith, but also overlooks the fact that he himself cites an example immediately afterwards of how the law on false witness was rendered ineffectual by its excessive severity. — But it is not clear what Herr Hugo means when he says that Favorinus did not understand the law; any schoolboy is capable of understanding it, and Shylock would have understood better than anyone else the clause in question, which would have been of so much advantage to him: by ‘understanding’, Herr Hugo must have meant only that degree [Wissensgrad] of understanding which is satisfied

*Translator’s note: The text in the Sixtuscap edition of Hegius’ Werke xi reads Rodnuscharf (legal share). This is clearly an error for Rodnuscharf, the correct reading as in Wieg’s edition (VP II, 201).
The basis [Boden] of right is the realm of spirit in general and its precise location and point of departure is the will; the will is free, so that freedom constitutes its substance and dentity [Bestimmung] and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature.

Addition (I.G.). The freedom of the will can best be explained by reference to physical nature. For freedom is just as much a basic determination of the will as weight is a basic determination of bodies. If matter is described as heavy, one might think that this predicate is merely contingent; but this is not so, for nothing in matter is weightless. On the contrary, matter is weight itself. Heaviness constitutes the body and is the body. It is just the same with freedom and the will, for that which is free is the will. Will without freedom is an empty word, just as freedom is actual only as will or as subject. But as for the relation between the will and thought, the following remarks are necessary. Spirit is thought in general, and the human being is distinguished from the animal by thought. But it must not be imagined [sich vernichten] that a human being thinks on the one hand and wills on the other, and that he has thought in one pocket and volition in the other, for this would be an empty representation. The distinction between thought and will is simply that between theoretical and practical attitudes. But they are not two separate faculties; on the contrary, the will is a particular way of thinking — thinking translating itself into existence [Existenz], thinking as the drive to give itself existence. This distinction between thought and will can be expressed as follows. When I think of an object [Gegenstand], I make it into a thought and deprive it of its sensuous quality, I make it into something which is essentially and immediately mine. For it is only when I think that I am with myself [mit mir], and it is only by comprehending it that I can penetrate an object, it then no longer stands opposed to me, and I have deprived of it that quality of its own which it had for itself in opposition to me. Just as Adam says to Eve: 'You are flesh of my flesh and bone of my bone,' so does spirit say: 'This is spirit of my spirit, and its alien character has disappeared.' Every representation [Bestimmung] is a generalization, and this is inherent in thought. To generalize something means to think it. 'T' is thought and likewise the universal. When I say 'T,' I leave out of account every particularity such as my character, temperament, knowledge [Kenntnisse], and age. 'T' is totally empty; it is merely a point — simple, yet active in this simplicity. The colorful canvas of the world is before me; I stand opposed to it and in this [theoretical] attitude I overcome
[as above] its opposition and make its content my own. "I" is at home in the world when it knows it, and even more so when it has comprehended it. So much for the theoretical attitude. The practical attitude, on the other hand, begins with thought, with the "I" itself, and seems at first to be opposed to the world because it immediately sets up a separation. In so far as I am practical or active, i.e. in so far as I act, I determine myself, and to determine myself means precisely to posit a difference. But these differences which I posit are nevertheless also mine, the determinations apply to me, and the ends to which I am impelled belong to me. Now even if I let go of these determinations and differences, i.e. if I posit them in the so-called external world, they still remain mine: they are what I have done or made, and they bear the imprint of my mind [Geist]. This, then, is the distinction between theoretical and practical attitudes; the relationship between them must now be described. The theoretical is essentially contained within the practical; the idea [Vorstellung] that the two are separate must be rejected, for one cannot have a will without intelligence. On the contrary, the will contains the theoretical within itself. The will determines itself, and this determination is primarily of an inward nature, for what I will I represent to myself as my object [Gegenstand]. The animal acts by instinct, it is impelled by something inward and is therefore also practical; but it has no will, because it does not represent to itself what it desires. It is equally impossible to adopt a theoretical attitude or to think without a will, for in thinking we are necessarily active. The content of what is thought certainly takes on the form of being; but this being is something mediated, something posited by our activity. These distinct attitudes are therefore inseparable: they are one and the same thing, and both moments can be found in every activity, of thinking and willing alike.

With regard to the freedom of the will, we may recollect the older method of cognition. It simply presupposed the representation [Vorstellung] of the will and attempted to set up a definition of the will by extracting it from this representation; then, in the manner of the older empirical psychology, the so-called proof of the will's freedom was derived from the various feelings and phenomena [Erfahrungen und Erlebnissen] of ordinary consciousness, such as remorse, guilt, and the like, which could allegedly be explained only in terms of a free will. But it is more convenient simply to adhere to the notion that freedom is given as a fact of consciousness in which we must simply believe. The deduction that the will is free and of what the will and freedom are— as already remarked in § 2 above—

is possible only within the context of the whole of philosophy. The basic features of this premise are that spirit is initially intelligence and that the determinations through which it proceeds in its development, from feeling to representational thinking [Vorstellungen] to thought, are the way by which it produces itself as will—which, as practical spirit in general, is the proximate truth of intelligence. I have given an account of these matters in my Encyclopaedia of the Philosophical Science (Heidelberg, 1837), §§ 361–399, and hope to deal with them in greater detail on a future occasion. It is all the more necessary for me to contribute in this way to what I hope will be a more thorough cognition of the nature of spirit, because, as I pointed out in the Encyclopaedia (Remarks to § 367), it is hard to imagine that any philosophical science can be in so bad and neglected a condition as that doctrine of spirit which is usually called 'psychology.' And so for those elements [Momente] of the concept of the will which are mentioned in this and the following paragraphs of the Introduction and which result from the premise referred to above, it is possible to form an idea [Vorstellung] of them by consulting the self-consciousness of any individual. In the first place, anyone can discover in himself an ability to abstract from anything whatsoever, and likewise to determine himself, to posit any content in himself by his own agency; and he will likewise have examples of the further determinations [of the will] within his self-consciousness.

§ 5

The will contains (ο) the element of pure indeterminacy or of the 'I's pure reflection into itself, in which every limitation, every content, whether present immediately through nature, through needs, desires, and drives, or given and determined in some other way, is dissolved; this is the limitless infinity of absolute abstraction or universality, the pure thinking of oneself.

Those who regard thinking as a particular and distinct faculty, divorced from the will as an equally distinct faculty, and who in addition even consider that thinking is prejudicial to the will—