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STRUCTURE OR SENTIMENT?

HABERMAS, HEGEL, AND THE CONDITIONS OF SOLIDARITY

Andrew Buchwalter

Jürgen Habermas prefaces his recently published philosophy of law, *Faktizität und Geltung*,[1] by announcing that he will make virtually no reference to Hegel. This acknowledgement is curious, for while Habermas in fact makes scarcely any reference to Hegel, his projects reaffirms many components of Hegel's approach to legal and political theory. Like Hegel, Habermas seeks to fashion a philosophy of right, or law, that surmounts the oppositions of empirical and normative considerations—of reason and reality, philosophical right and positive law, facticity and validity. Like Hegel, he presents right as a principle that cuts across spheres of economic-administrative and political-communicative forms of rationality. Like Hegel, he regards law as a principle—indeed the distinctly modern principle—of societal cohesion and institutionalized public rationality. Like Hegel, Habermas advances an account of solidarity that not only does not ignore modern complexity but builds upon it. And like Hegel, he fashions a concept of law that seeks to surmount many of the dichotomies that traditionally have plagued legal and political theory: e.g., private liberty and public autonomy, liberal constitutionalism and civic self-organization, liberalism and communitarianism, formal governmental institutions and informal sphere of political will-formation, representative and popular notions of political participation.

For his part, Habermas adduces several reasons for not according Hegel greater attention.[2] Most important is his contention that Hegel's *Philosophy of Right*, like the practical philosophy of his predecessors, rests on the assumptions of a philosophy of consciousness or philosophy of the subject, assumptions that do justice neither to the requirements of a comprehensive theory of law nor the realities of modern social life.[3] Commitment to a philosophy of the subject cedes primacy either to the individual legal subject or a state-social macro-subject, a state of affairs which eliminates the possibility of reconciling public and private autonomy, the liberty of the ancients and the liberty of the moderns. Similarly, a philosophy of the subject entails commitment to a view of public life centered in political-state organization, a state of affairs that cannot accommodate a notion of sovereignty that does justice to the diverse forms of social integration characteristic of a differentiated social world. Finally, a philosophy of the subject lays special emphasis on the virtuous sentiment of citizens in accounting for solidarity and social cohesion, a state of affairs that likewise ill accords with the realities of modern life.

Thus to accommodate the requirements of a normative legal philosophy under contemporary conditions, Habermas turns to a discourse-theoretic approach to law, one that scrutinizes the phenomenon of law, not from the standpoint of the individual or communal subject, but in terms of the underlying rules and procedures governing communication and public deliberation. This "retreat into the discursive structure of public communication"[4] is significant because it furnishes a framework that can accommodate an internal relationship of public and private autonomy. Moreover, it allows for a decentered concept of sovereignty, one that does not require identifying the public will with a collective social subject.[5] And by adverting to the integrating power of the "subjectless," "anonymous," or "impersonal" structures that govern the process of deliberation, Habermas' theory accommodates a conception of solidarity and social cohesion that does not overtax the capacity of citizens for public engagement.[6] All these exemplify Habermas' break with the philosophy of consciousness, a break that has rendered unnecessary elaborate consideration of a theory like Hegel's which, whatever its merits, remains hopelessly ensnared by the philosophy of subjectivity.

In what follows I question Habermas' reception (or lack thereof) of Hegel's philosophy of law. My aim, however, is not to dispute Haber-

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mas' general characterization of Hegel as a philosopher of the subject, even if he too closely identifies Hegel with the tradition of the philosophy of consciousness flowing from Descartes to Fichte. Nor is it to defend in toto Hegel's philosophy of subjectivity, particularly as it pertains to metaphysical and epistemological issues.[7] I argue instead that Hegel's attention to the subject not only does not have consequences identified by Habermas but that in many respects furnishes tool to achieve, more effectively than may Habermas himself, goals shared equally by the two thinkers. I defend this admittedly broad thesis by focusing on one issue, Habermas' idea of social integration, particularly as it takes the form of solidarity. Following Hegel, I argue that solidarity cannot be achieved via anonymous, impersonal or subjectless procedures or structures but must have recourse to forms of subjective sentiment (*Gesinnungen*)—attitudes, orientations, and motivations that give procedures and structures their meaning and validity. Correlatively, I suggest that, while Habermas distinguishes legal-political from socio-cultural theory, the discourse theory of law from the communicative theory of society,[8] a Hegelian approach rightly insists on their interconnection.

This essay thus has a threefold objective: It seeks to demonstrate the need for a more complete reception on the part of discourse theory of Hegel's philosophy of law; to indicate the continuing value of the concept of subjectivity for legal-political theory; and to reaffirm the continuing value of a dialectical approach to practical philosophy, one that, unlike a dialogical approach, recognizes that procedures and institutions must be addressed not *intentione recta*, but in relation to the forms of subjective sentiment they presuppose.

* * * *

Hegel's account of the role of sentiment in legal theory is traceable to Montesquieu, whose *De l'esprit des lois* identified the social and cultural presuppositions of formal legal and political theory.[9] In the *Philosophy of Right*, Hegel develops Montesquieu's insight along several different tracks.[10] Most important for present purposes is his view of the dependence of a genuine political order on the virtue and public sentiment of its citizens. In asserting this dependence, Hegel, to be sure, does not embrace the republicanism of Rousseau, for whom civic virtue alone is said to forge the bonds of solidarity.[11] His point is rather that the legal-procedural institutions necessary for a modern political order cannot properly function unless they are supplemented by attitudes that evince commitment to uphold and sustain those institutions. This is a central aspect of Hegel's account of the relationship of abstract right and morality to ethical life (*Sittlichkeit*): "The sphere of right and that of morality cannot exist independently; they must have the ethical (*das Sittliche*) as their support and foundation."[12] While asserting the indispensability of general principles of right and duty for a modern political order, Hegel maintains that those principles must be embedded within a public culture characterized by a general willingness on the part of citizens to accept and defend public norms. Without being thus situated general principles are easily manipulated for ends inimical to the public goals they are assumed to serve. Thus in the section on "Abstract Right" Hegel demonstrates how, in the absence of a commitment to such values as agreement, impartiality, and truthfulness, individuals will commonly enter into contracts which they have no intention of honoring and which they may breach when it is in their interest to do so. Similarly, if legal conventions must be supplemented by a sense of moral duty, duties themselves, in the absence of a corresponding commitment to the value of accepting and honoring obligations, can likewise be manipulated for private advantage. This of course is central to Hegel's discussion of the hypocrisy characteristic of individuals who cloak their conduct in the garb of principles in order to pursue ends that are only too self-serving. In his method of presentation, Hegel considers ethical life only after having first examined right and morality. However, his substantive position, as he often notes, is that principles of right and morality have neither meaning nor reality unless situated in an public culture in which individuals exhibit an antecedent commitment to those principles.[13]

As regards Habermas, Hegel's thesis can be stated by considering, in necessarily schematic fashion, their respective treatments of the concept of positive law. In *Faktizität und Geltung* Habermas claims uniqueness for his account of positive law, and, while there is much that is genuinely unique to his theory, it is on many points in significant agreement with that of Hegel.[14] Both hold

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that positive, coercive law plays a central role in any account of valid law. Both develop a theory of positive law in the context of a theory of modernity. Both, that is, claim not only that positive, coercive law emerged with modern, commercial societies, but that it must be invoked once the traditional metaphysical and religious foundations of legal authority had lost their credibility and binding force. In addition, both advance a conception of positive law that is opposed to accounts associated with legal positivism. In particular, both maintain that the validity of coercive law lies neither in the power of an authority to issue commands nor in its authority to enforce compliance. Not unlike H. L. A. Hart, both assert that positive law can successfully command obedience only if it can be rationally accepted by those subject to its authority. The validity of positive law lies not in force but in possible respect for the law. In Habermas' language, positive law claims not only validity (*Geltung*) but legitimacy (*Gültigkeit*) as well. For Hegel, the validity of law is linked to a principle of *Anerkanntsein*,[15] where law is valid only to the extent that those subject to its force can recognize it validity. Finally, both appeal to broader public considerations to account for the legitimacy and acceptability of law. For Habermas this takes the form of an account of the dependence of positive law on a theory of democracy, one in which all those subject to the force of the law ("the addressees of law") can understand themselves as authors of law.[16] For Hegel, the public dimension is of a more mediated character: legitimate law is rooted in a system of justice (*Rechtsplege*) and a structure of public authority (*Polizei*) committed to the common good.[17] Whatever the differences, both assert that the legitimacy of positive law is bound to some notion of public autonomy.

These similarities notwithstanding, the differences between the two positions are striking. The basic difference concerns the degree to which positive law itself can serve as a basis for a society's commitment to such values as individual freedom and human autonomy. For Habermas there is, at least conceptually, an internal connection between positive law and such values.[18] This follows from his view of the relationship between the rule of law and democratic will-formation, which itself rests on a commitment to liberty and mutual recognition. For Hegel, however, the relationship between law, at least positive law, and these other values is at best contingent. Indeed, given the roots of positive law in modern commercial societies—where the common good is achieved, if it is achieved at all, not directly but as an incidental by-product of individuals pursuing private ends—positive law for Hegel is compatible with growing injustice, social inequity, and what, generally, he calls a *Verlust der Sittlichkeit*. Hegel's *Philosophy of Right* does include institutions of public welfare designed to counteract the injustices associated with an economic construal of positive law. Yet he also notes that these legally sanctioned forms of state intervention into social relations can be counterproductive, as they tend to undermine the very liberties and forms of individual dignity they are intended to protect. In a welfare system, "the needy might be given subsistence directly, not by means of their work, and this would violate the principle of civil society and the feeling of individual independence and self-respect in its individual members."[19] In this regard, Hegel's theory of positive law leads to the forms of legal regulation or juridification (*Verrechtlichung*) that Habermas so astutely analyzed in *The Theory of Communicative Action*,[20] yet seems unwilling to address in his present theory.[21] Whether expressed in market relations or state interventionism, coercive law for Hegel remains in the grip of a dichotomy of universal and particular, public and private, that undermines its pledge to freedom, equality, and mutual recognition.[22]

Thus while Hegel may share Habermas' commitment to the rationality of a system of positive law, he also recognizes that the salutary values associated with such a system cannot be assured via the resources of positive law itself. Instead, positive law, like abstract right and formal morality, must be embedded in a public culture characterized by a commitment on the part of citizens to the principles implied by the rule of law. This is the point of his at once celebrated and infamous supersession of civil society in state. At issue is not the denial of the legal institutions of civil society but rather the accommodation of the attitudes and sentiments needed to sustain those institutions. In the ethical community (*das sittliche Universum*) that defines Hegel's theory of the state, individuals attend to the ends of public life not coincidentally, as in civil society, but directly and deliberately. In this way they are able to defend and nurture those principles of law that are

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rendered pathological when law is autonomized in the form of markets or the "external" welfare state. The state, Hegel writes, "is the sole precondition of the attainment of particular ends and welfare."[23] For Hegel, the principle of justice implied by civil society is dependent upon a political culture committed to justice as a good. The procedural model of justice entailed by positive law rests on the civic republicanism of an ethical community.[24]

It may seem that we have done Habermas' position a disservice. While he fashions an account of law that is decidedly proceduralist rather than republican, his is a capacious conception of proceduralism, one that does not ignore the ethical considerations that Hegel claims are essential for sustaining positive law and liberal proceduralism. Indeed, he asserts that, via the deliberative politics that conditions its legitimacy, a valid system of positive law is "internally connected" to a lifeworld that "it meets halfway" (*entgegenkommen*), a political culture characterized by commitment to the values associated with the rule of law.[25] In this respect Habermas asserts that law depends on what, following Albrecht Wellmer, he calls a "democratic Sittlichkeit":[26]

> The democratic procedure of lawmaking relies on citizens making use of their communicative and participatory rights also with an orientation toward the common good, an attitude that can indeed be politically called for but not legally compelled. . . . Law can be preserved as legitimate only if enfranchised citizens switch from the role of private legal subjects and take the perspective of participants who are engaged in the process of reaching understanding about the rules for their life in common. To this extent constitutional democracy depends on the motivations of a population accustomed to liberty, motivations that cannot be generated by administrative measures. This explains why, in the proceduralist paradigm of law, the structures of a vibrant civil society and an unsubverted political public sphere bear a good portion of the normative expectations.[27]

Nonetheless, Habermas' position remains distinct from Hegel's. However much he may wish to situate law within a political culture, he does not follow Hegel in holding that such a culture itself conditions the validity of law. On the contrary, Habermas defines the validity of law in a formal-pragmatic manner, through "the rules of discourse and forms of argumentation that borrow their normative content from the validity basis of action oriented to reaching understanding."[28] He makes this point when distinguishing his discourse-theoretic proceduralism from what he takes to be the republicanism of legal scholar Frank Michelman. A "discourse-theoretic interpretation insists on the fact that democratic will formation does not draw its legitimizing force from a previous convergence of settled ethical convictions but from the communicative presuppositions that allow the better argument to come to play in the process of deliberation."[29] Here we disregard the question of whether Michelman's position or that of republicanism generally entails commitment to "a previous convergence of settled ethical convictions." It is the case, though, that in Hegel's republicanism law depends for its validity on public sentiment, and not, as Habermas claims, on "the institutionalization of the appropriate procedures and conditions of communication."[30] While Hegel certainly would not dispute the need for such institutionalization, he would say that the normative content of those procedures and conditions ultimately rests with a culture prepared to sustain them. By contrast, Habermas asserts "in the final analysis this normative content arises from the structure of linguistic communication and the communicative mode of sociation."

In this regard it seems altogether appropriate that to the extent that Habermas does incorporate an account of public virtue in his theory of law, he does so via the procedural structures themselves. Following Elster, he asserts that in a properly proceduralized order "values of truthfulness, wisdom, reason, justice and other kinds of exceptional moral qualities can be congealed or sedimented in the actual practice of institutions."[31] In this way Habermas demarcates his view from that of Hegel, who maintains that virtue and ethical life generally are not a consequence but enabling condition of a properly functioning procedural order. Hegel, to be sure, also acknowledges the extent to which virtue can be a matter of structure.[32] This is evident on many occasions, notably in his account of civil society, where institutional structures turn self-seeking "into a contribution to the satisfaction of the needs of everyone else."[33] As we have seen, however, the connection between virtue and structure is for Hegel largely contingent, and can, in the absence of corresponding attitudes and commitments, easily

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undermine the integrative claims made on behalf of institutional structures. According to Charles Taylor, proceduralism—including that of Habermas—holds that "we need structure which, in invisible-hand fashion, behind the backs of the subjects and independent of the forms of motivation, will lead their actions towards certain patterns that preserve freedom."[34] This confidence in procedures—one also infusing Kant's conviction that a just social order is establishable even by a race of devils—is precisely what Hegel disputes.

ENDNOTES

1. Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt: Suhrkamp, 1992) [hereafter FG].
2. While Hegel relied on a concept of philosophy able to elucidate, by relying on its own resources, the totality of social life, Habermas opts for a methodical pluralism committed to reconstructing knowledge generated by the various human sciences, including jurisprudence, legal sociology, legal history, moral and social theory. Similarly, while Habermas shares with Hegel a determination to construe the legal-social domain in terms of different logics of normative inquiry—for Hegel, legal, moral, and ethical; for Habermas, legal, moral, ethical, and pragmatic, Habermas cedes to each an independent validity and necessity, while Hegel specifies a supreme discourse to which the others are subordinate. That Habermas may himself chose hierarchy over compatibility and opt for a primary discourse has been suggested by Gunther Teubner, "De collisione discursuum," *Frankfurter Rundschau* (November 11, 1992): B7.
3. In addition, it can be noted that while Hegel relied on a concept of philosophy able to elucidate, by relying on its own resources, the totality of social life, Habermas opts for a methodical pluralism committed to reconstructing knowledge generated by the various human sciences, including jurisprudence, legal sociology, legal history, moral and social theory. Similarly, while Habermas shares with Hegel a determination to construe the legal-social domain in terms of different logics of normative inquiry—for Hegel, legal, moral, and ethical; for Habermas, legal, moral, ethical, and pragmatic, Habermas cedes to each an independent validity and necessity, while Hegel specifies a supreme discourse to which the others are subordinate. That Habermas may himself chose hierarchy over compatibility and opt for a primary discourse has been suggested by Gunther Teubner, "De collisione discursuum," B7.
4. FG, p. 228.
5. FG, pp. 170, 362.6. FG, pp. 170, 626. Habermas accentuates this "structuralist" dimension to his conception of popular sovereignty in his "Reply to Symposium Participants," *Cardozo Law Review* 17/4–5 (March 1996): 1477–1557.
7. For a perceptive and persuasive critique of Habermas' rejection of the paradigm of subjectivity focusing on epistemological and metaphysical issues, see Peter Dews, "Modernity, Self-Consciousness and the Scope of Philosophy: Jürgen Habermas and Dieter Henrich in Debate," in *The Limits of Disenchantment* (London: Verso, 1995), pp. 169–93.
8. FG, p. 527.
9. G. W. F. Hegel, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1993) [hereafter PR], §3. Unless otherwise noted I use this version of the English translation.
10. For instance, he follows Montesquieu in maintaining that in the legal structures of any particular society can never be understood in a purely autonomous or self-contained manner but always must be related to the communal values and traditions which give those structures meaning and effectiveness (PR §3). In addition, the nature and very meaning of a legitimate legal-political order and indeed a genuine state—"a sittliche Universum" (ibid., p. 21)—rests on the balanced relation between formal institutions and the sentiment of individuals—a sentiment based on a individual's appreciation of the congruence between his interests and those of the formal political order (ibid., §268).
11. Here I follow Habermas' characterization of Rousseau, one that may well be one-sided and even something of a caricature. For a more balanced assessment, see Ingeborg Maus, "Liberties and Popular Sovereignty. On Jürgen Habermas' Reconstruction of the System of Rights," *Cardozo Law Review* 17/4-5 (March 1996): 825–82.
12. PR §141Z.
13. *Encyclopaedia of the Philosophical Sciences* III (Oxford: Clarendon, 1971) [hereafter Enc.] §408.
14. Hegel's concept of positive law, *Recht als Gesetz*, is found principally in PR §§ 209–29.
15. Enc. §484.

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16. As he writes, there is "no legitimate law without democratic law making by citizens in common who, as free and equal, are entitled to participate in the process." See "Reconciliation through the Public Use of Reason: Remarks on John Rawls' Political Liberalism," *Journal of Philosophy* 92 (March 1995): 130.

17. See Wilhelm R. Beyer, "Norm-Probleme in Hegels Rechtsphilosophie," *Archiv für Rechts- und Sozialphilosophie* 56 (1964): 561–80.

18. "On the Internal Relation between Law and Democracy," *European Journal of Philosophy* 3 (April 1995): 12-20.

19. PR §245 Here I employ the translation by Knox (Oxford: Clarendon Press, 1967). See Raymond Plant, "Hegel on Identity and Legitimation," in Z. A. Pelczynski, ed., *The State and Civil Society* (Cambridge: Cambridge University Press, 1984), p. 240.

20. Jürgen Habermas, *Theory of Communicative Action*, vol. 2 (Boston: Beacon Press, 1987), p. 387.

21. In this regard it is perhaps telling that, more so than other contemporary democratic theorists (e.g., Ingeborg Maus), Habermas grants a larger role to the judiciary in preserving and nurturing deliberative democracy. See FG, p. 340.

22. To be sure, Habermas is aware no less than Hegel of the pathologies that can result when law is subordinated to the exigencies of markets and/or states. Indeed, his discourse theory of law is conceived precisely as an effort to fashion an alternative to paradigms associated with bourgeois and welfare state paradigms of law, neither of which can do justice to the public autonomy central to a democratic approach to legal theory. Still, the differences significant, since for Hegel the limitations of positive law stem not from its economic or statist construal but from the structure of positive, coercive law itself. Because positive law does not address matter of sentiment, because it is governed by a formality or lawlikeness (*Gesetzmäßigkeit*) designed only to regulate external behavior (PR §212), it can accommodate and even foster conduct inimical to solidarity.

23. PR §261Z.

24. Charles Taylor has argued along these lines. See "Hegel's Ambiguous Legacy for Modern Liberalism," *Cardozo Law Review* 10/5-6 (19XX): 857–70; and "Cross-Purposes: The Liberal-Communitarian Debate," in Nancy L. Rosenblum. ed., *Liberalism and the Moral Life* (Cambridge: Harvard University Press, 1989), pp. 159–82.

25. FG, p. 366.

26. "Bedingungen einer demokratischen Kultur," in Micha Brumlik and Hauke Brunkhorst, eds., *Gemeinschaft und Gerechtigkeit* (Frankfurt: Fischer, 1993), pp. 173–96. Richard J. Bernstein has argued similarly from a Dewyean perspective: "The Retrieval of the Democratic Ethos," *Cardozo Law Review* 17/4-5 (March 1996): 1127–46.

27. "Postscript to Faktizität und Geltung," *Philosophy and Social Criticism* 20 (19XX): 147. He makes a similar point when positively citing Ulrich Preuss' characterization of a democratic society: "Such society has an interest in the good quality of enfranchised citizens: in their being informed, in their capacity to reflect and to consider the consequences of their political relevant decisions, in their will to formulate and assert their interests in view of the interest of the co-citizens as well as future generations" (FG, p. 504). See also FG, p. 434 and "Citizenship and National Identity: Some Reflections on the Future of Europe," *Praxis International* 12 (April 1992): 6f.

28. FG, p. 360.

29. FG, p. 339.

30. FG, p. 362.

31. FG, p. 414.

32. "Postscript," p. 148.

33. PR §199. He makes a similar point in discussing how formal rules governing professional service render unnecessary appeal to the explicit virtue of civil servants. See Carl K. Y. Shaw, "Hegel's Theory of Modern Bureaucracy," *American Political Science Review* 86 (June 1992): 381–89.

34. Taylor, "Hegel's Ambiguous Legacy for Modern Liberalism," p. 863. See also his "Die Motive einer Verfahrensethik," in Wolfgang Kuhlmann ed., *Moralität und Sittlichkeit* (Frankfurt: Suhrkamp, 1986), pp. 101–35.

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