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HEGEL ON PROPERTY AND RECOGNITION*

Renato CRISTI

RÉSUMÉ : L'État, répète Hegel, n'est « d'aucune façon un contrat, et son essence substantielle ne consiste pas à assurer inconditionnellement la protection et la sécurité de la vie et de la propriété des individus ». Un État instrumental, dont la seule fonction serait la protection de la propriété privée, serait contractuellement lié à la société civile. Cette situation affaiblirait l'État considérablement, car elle le priverait de l'autonomie, de l'indépendance et de la neutralité dont il a besoin pour protéger effectivement la propriété.

SUMMARY : The state, Hegel reiterates, "is by no means a contract, and its substantial essence does not consist unconditionaly in the protection and safeguarding of the lives and property of individuals as such." An instrumental state whose sole function were the protection of private property would be contractually bound to civil society. This would weaken it considerably for this would deplete the autonomy, independence and neutrality required to protect property effectively.

Contemporary readers of Hegel typically characterize his conception of property as social. This relativization of property, which justifies subjecting it to higher regulation by civil society and the state, follows from the fact that property is not constituted by individuals acting on their own, but by individuals who recognize each other. Original occupation, a possessive relationship between an individual and a thing, is not sufficient ground for constituting property. Absent is the recognition by others and their consent to the duties imposed by property claims. What this view assumes is summarized by Waldron's apt phrase : "property relations do not exist between persons and objects ; they exist between persons and other persons."[1] Waldron follows Plamenatz, who writes that in Hegel's view "[t]o make a claim is not to give vent to an appetite [...]. It is to make a moral gesture understood by

* For comments and discussion of earlier versions of this paper I thank Leo Groarke, Douglas Moggach, Jan Narveson, Howard Williams and David Resnick.

1. Jeremy WALDRON, *The Right to Private Property* (Oxford : Clarendon, 1988), p. 267.

others capable of making them, a gesture that has a meaning only between persons who recognize one another as persons."[2] This same view inspires Avineri when he argues that "not an individualistic but a social premise is at the root of Hegel's concept of property, and property will never be able to achieve an independent stature in his system [...]. Property always remains premised on social consensus, on consciousness, not on the mere fact of possession."[3]

In this essay I argue that this social conception does not fully capture Hegel's view on property. He does propound such a view in his early political works, where he always ties property to recognition. But in his *Philosophy of Right* this conception is amended when dealing with property as an abstract right. The notion of abstract and immediate property dispenses with recognition and bears all the marks of a possessive individualist conception. As Hegel's argument develops, this individualist concept of property is joined by a social concept mediated by the recognition of others. This takes place within abstract right when the argument moves from property to contract. Contractual property involves recognition by others. But this relativization of property is not meant to weaken individual appropriation. On the contrary, Hegel intends its reinforcement. Individual property is duly safeguarded only when social property re-emerges within civil society and a legal system contributes the required institutional context. Ultimately, a strong state is the best protection for property when it is defined in possessive individualist terms.

I

In the *Philosophy of Right*, there are three indications that mark Hegel's individualist conception of property : his rejection of Kant's reduction of real to personal rights, his identification of possession and property, and the relegation of recognition to the sphere of contract.

1. Hegel rejects Kant's distinction between real and personal rights,[4] which corresponds to the distinction made in Roman law between *iura in rem* and *iura in personam* and to Hart's distinction between general and special rights.[5] According to Hegel, "personality alone confers a right to things, and consequently [...] personal right is in essence a real right [...]. This real right is the right of personality as such" (§40).[6] Hegel reduces personal to real rights because he considers an abstract

2. John PLAMENATZ, "History as the Realization of Freedom," in *Hegel's Political Philosophy. Problems and Perspectives*, Z.A. Pelczynski, ed. (Cambridge : Cambridge University Press, 1971), p. 40-41.

3. Shlomo AVINERI, *Hegel's Theory of the Modern State* (Cambridge : Cambridge University Press, 1972), p. 88-89.

4. Immanuel KANT, *Metaphysik der Sitten* (Hamburg : Meiner, 1966), p. 70.

5. H.L.A. HART, "Are There Any Natural Rights ?," in *Theories of Right*, Jeremy Waldron, ed. (Oxford : Oxford University Press, 1989), p. 77-90. Compare with my article "Waldron on Special Rights *in rem*," *Dialogue*, 33 (1994), p. 183-189.

6. Compare with G.W.F. HEGEL, *Elements of the Philosophy of Right*, Allen W. Wood, ed., translated by H.B. Nisbet (Cambridge : Cambridge University Press, 1991). I have taken the liberty to modify Nisbet's translation in a few places.

and immediate notion of property, one that is not mediated by the recognition implied by contract. A real right requires no mediation. It is constituted by the immediate possessive relation between a person and a thing. Other persons are not involved in this abstract relation. The thing that is taken into possession is owned by nobody. Pufendorf's negative system of ownership is the condition that allows the constitution of this individualist concept of property. By contrast, Kant reduces real to personal rights. Personal rights, Hegel admits, are "rights that arise out of a contract" (§40). They presuppose an original situation where all things belong to everyone. For Kant, "the right to a thing is the right to the private use of a thing. With respect to that thing I gave a community of possession (original or established) with all other individuals.[7] In order to claim the property over any one thing, agreements have to be reached that extinguish the existing property rights claimed by other persons and identify the portion to be appropriated. Here contracts precede property. "Strictly speaking, there is no (direct) right to a thing. What we call right is what we hold against a person who shares with all others (in civil society) a community of possession."[8]

According to Hegel, property as an abstract right can only be conceived as a *ius in rem*. Contrary to Kant, for whom an individual that existed alone in the world would not be able to own anything, Hegel thinks that such individual may, without previous agreement, come to own things. Property precedes any agreement of any kind, a clear indication that Hegel operates here with an *in rem*, i.e. pre-social, pre-contractual concept of property.[9]

2. The most visible sign of Hegel's individualist concept of property is the argument that collapses the classical distinction between possession and property.[10] He thus moves away from his earlier political writings where he maintains that distinction.[11] Avineri, for instance, interprets Hegel's views in the *Realphilosophie II* (1805-1806) as supporting a "trans-subjective" and "non-individual" conception of property. He writes : "property pertains to the person as recognized by others, it can never be an intrinsic quality of the individual prior to his recognition by others. While possession relates to the individual, property relates to society ; since possession becomes property through the other's recognition of it as such, property is a

7. KANT, *op. cit.*, p. 70.

8. *Ibid.*, p. 72.

9. Hegel refers to Heineccius who defined *ius in rem* as the "*facultas homini in rem competens, sine respectu ad certam personam.*" HEINECCIUS, *Elementa Juris Civilis* (Leipzig : Beer, 1729), §332.

10. Compare with W.W. BUCKLAND and A.D. MCNAIR, *Roman Law & Common Law. A Comparison in Outline* (Cambridge : Cambridge University Press, 1936), p. 58ff. ; Max KASER, *Ergentum und Besitz im alteren römischen Recht* (Köln-Graz : Böhlau Verlag, 1956), p. 6ff.

11. In the Hegel's *Realphilosophie II*, the distinction between possession and property presupposes the distinction between a state of nature and a state of right and duty. When individuals are seen within a state of nature their relation to the world is a purely possessive one and, as Hegel asserts, "this possession is still not property" (G.W.F. HEGEL, *Realphilosophie II, Jenaer Realphilosophie*, J. Hoffmeister, ed. (Hamburg : Meiner, 1967), p. 206). Hegel adds : "[...] taking possession also means the exclusion of a third party" (p. 207). Recognition allows possession to attain a juridical status. Possession when "recognized by another, becomes my property" (p. 207).

social attribute".[12] Avineri is not aware that Hegel collapses this distinction in his *Philosophy of Right* in order to make room for an individualist concept of property. I will summarily retrace the steps of Hegel's argument.

Hegel introduces the distinction between possession and property in §45. But the terms of this distinction are defined in a manner that ensures the collapse of possession into the logical space defined by property.

> To have external power over something constitutes *possession*, just as the particular circumstance that I make something my own out of natural need, drive, and arbitrary will is the particular interest of possession. But the circumstance that I, as free will, am an object to myself in what I possess and only become for the first time an actual will by this means constitutes the genuine and rightful element in possession, the determination of *property* (§45).

Possession, defined as "external power," does not constitute a right. As an expression of our natural will possession is a matter of fact devoid of prescriptive value. By contrast, property involves a rightful or lawful relation of the will to the thing. Our external power over a thing ceases to be merely possessive and becomes property. The sphere of right lies beyond that of natural or arbitrary will. Hegel adopts the traditional distinction between possession and property, which defines possession as a mere factual or physical taking a thing, and property as legally recognized possession.

Hegel's next step undermines this traditional distinction at the level of abstract right. Possession, which should serve as the point of departure for the process that leads to rightful appropriation, is unable to retain logical priority over property. Possession manifests the arbitrary, subjective will of an individual and property expresses our own free will. But why is it possible for 'free will', and not for 'subjective will', to appropriate a thing rightfully ? Since it is inconceivable that the thing itself, which is pure externality by definition, may oppose a kind of measured resistance to the advances of the human will, arbitrary or free, why is property not constituted immediately ? Why does its realization need an intermediate possessive stage ? What this indicates is that in the absence of objective limitations, there is nothing to prevent the will from fully appropriating the thing. But this leaves no logical space for a possessive stage constituted prior to property. Just as the subjective will collapses into the free will, so possession collapses into property.

After the collapse of the logical priority of possession over property, Hegel turns to the question of its temporal priority. His argument shows that appropriation follows first occupancy immediately so that the possibility of a transition from possession to property is cancelled. Hegel addresses the issue of first occupancy in the following terms :

> That a thing belongs to the person who happens to be the first to take possession of it, is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of another (§50).

12. AVINERI, *op. cit.*, p. 88-89.

In the first place, since the first occupant finds no objective limitations in the thing itself, he is not required to stay for an unspecified period of time suspended in the stage of mere possession. When a second person steps forward and claims that same thing, she will discover that the first occupant is *already* its proprietor. When did his appropriation first take place ? When did the first occupant or possessor of a thing assert full proprietorship ? Since there are non conditions imposed by the thing itself and no "accompanying genius to protect it from external attacks,"[13] no objective grounds exist for a waiting period at the end of which his property would take effect. Even when the time stretching between his first possessive apprehension, i.e. the time when he was a mere possessor, and the claim raised by her were to be decreased *ad infinitum*, she would never be able to catch him in the stage of possession. At no time may the first possessor be seen as mere possessor. Appropriation takes effect immediately, leaving no room for a purely possessive stage. In the second place, if the second person were to take effective possession of the property of the first person, she would not maintain a merely possessive relation in regards to it. The thing can serve as the term of only one relationship, the property relationship. Taking possession of that thing immediately extinguishes the proprietary rights of the first person and institutes those of the second. Between property and non-property there can be no intermediate stage. Possession is unable to assert a temporal space of its own. The temporal distinction between possession and property collapses in favour of property. Property is possession, i.e. an immediate relation between a person and a thing.

3. The definition of property as an abstract and immediate right cancels the possibility of mediation. This precipitates the collapse of the distinction between property and possession and property is reduced to the monological possessive relation between a person and a thing. No other person is required to witness the constitution of this individualist possessive linkage. Hegel's analysis of the three moments of abstract right in §40 is most instructive in this respect. The first moment explicitly assumes the identity possession and property. Property is thus defined as "the freedom of an individual person who relates only to himself" (§40). This leaves no room for recognition in the configuration of pre-contractual property. Recognition shows up when the argument advances to the sphere of contract, the second moment of abstract right. Contract allows the formation of a "common (*gemeinsamen*) will" for it makes it possible for an individual proprietor to relate "himself to another person" (§40). The formation of this common will is what allows the mediation of property through mutual personal recognition. Property is not anymore defined by the monological relation between a person and a thing ; it is a social event constituted by the recognition of others. The reinstatement of the distinction between possession and property signals the introduction of this new conception of property. In §78,

13. KANT, *op. cit.*, p. 71. I am aware that Kant uses this image to prove a different point. In accordance with his reduction of real to personal rights, Kant maintains that a real right does not involve a direct relation between a person and a thing. The external thing, when not in the hands of its possessor, does not retain of itself an obligation to its first possessor. This is so because my right does not reside in the thing as a protective genius. Of itself it cannot resist the possessive advances of a third party.

Hegel declares that someone who intends to acquire property by means of a contract need not take the thing thus acquired into immediate possession. Possession is defined as a purely "external" circumstance that does not alter the "substantive" aspects involved in property (§78).

II

Hegel's individualist concept of property loses it abstraction and immediacy when he introduces recognition. Hegel does so in the paragraph that marks the transition from property to contract.

> This relation of will to will is the true distinctive ground in which freedom has its existence. This mediation whereby I no longer own property by means of a thing and my subjective will, but also by means of another will, and hence within the context of a common (*gemeinsamen*) will, constitutes the sphere of contract (§71).

I become a proprietor and my will attains exclusive right to possess, use, enjoy or dispose of a thing, when I am recognized as such by another party. I am a proprietor in the presence of the will of another person. I own property not as an abstract will, but as a will mediated by the recognition of others. In the pre-contractual stage, property was constituted solely by the relation of my subjective will to a thing. The transition to contractual property makes recognition an essential moment, for "contract presupposes that the contracting parties recognize each other as persons and owners of property" (§71).

Despite the social aspect involved in contract, the contractual relation itself remains abstract. It is ruled by arbitrary will and the agreements that it yields constitute a merely common will.

> The identical will which comes into existence through the contract is only a will posited by the contracting parties, hence only a common (*gemeinsamer*) will, not a will that is universal in and of itself (§75).

Hegel contrasts the common will attained by means of contract with the universal absolute will that sustains institutions like the family and the state. He strongly denounces the intrusion of abstract property and contract into the state. This wrests the state of is autonomy and reduces it to a purely instrumental role, a view shared by both feudalism and social contract liberalism. To transfer the determinations of property and contract to the political sphere brings down the state to the level of civil society.

In view of this poverty of contract, many have overlooked the social context that contractual recognition provides to property. It is held that only when Hegel ascends to the standpoint of *Sittlichkeit*, possessive individualist property is rightfully transcended and social property attained. Stillman, for instance, believes that the "major institutions of ethical life are rooted in community, impose obligations, and so overcome the atomism and individualism of property and contract."[14] This is

14. Peter STILLMAN, "Property, Contract and Ethical Life in Hegel's *Philosophy of Right*," in *Hegel and Legal Theory*, D. Cornell, M. Rosenfeld & D.G. Carlson, eds (New York : Routledge, 1991), p. 208.

only partly true. When Hegel examines the notion of property within the confines of civil society, contract is said to actualize property. But now contract itself is mediated by a legal system, which is again part of the political (i.e. state) mediations introduced by Hegel in civil society.

> Just as right *in itself* becomes law in civil society, so too does my individual right, whose existence was previously *immediate* and *abstract*, acquire new significance when its existence is recognized as part of the existing universal will and knowledge. Acquisitions of property and transactions relating to it must therefore be undertaken and expressed in the *form* which that existence gives to them. Property is accordingly based on contract and on those formalities which make it capable of proof and valid before the law (§217).

In the remark to the same paragraph, Hegel adds :

> The original, i.e. immediate, modes of acquisition and titles (see §54ff.) are in fact abandoned in civil society, and occur only as individual accidents or limited moments.

Hegel retrieves the notion of property as an abstract right to compare it with the social significance it acquires in civil society. Individualist property "whose existence was previously immediate and abstract" is now recognized as existing within a concrete institutional context. Property was initially socialized by the mediation of contract. But contract, viewed abstractly, is only sustained by a *common will*. The absence, at that stage, of a *universal will* means that legal claims are "multiple and mutually external." Multiple exclusive claims on any particular thing naturally result in a "collision of rights" (§84). Since the merely common will of the contracting parties is unable to adjudicate these collisions, this leads to the rule of vengeful justice dispensed by individuals randomly. This inference from abstract freedom is Hegel's version of the state of nature. By contrast, the legal system that is put in place within civil society expresses an "existing universal will." This means that the modes of appropriation that seemed early on to be in accordance with right are now abandoned in civil society, even though they may reappear in exceptional circumstances. It also means that we have moved away from the state of nature. Hegel recognizes that in the system of needs "the remnants of a state of nature" are retained (§200). This is due to the fact that the system of needs contains the "universality of freedom, but only abstractly and hence as the right of property" (§208). For Hegel this means that property is now fully socialized for it is protected by a universal will.

III

The dual conception of property held by Hegel in his *Philosophy of Right* betrays a duality of aims. In order to override egalitarian aspirations and redistributive claims by the state, Hegel prioritizes and entrenches an individualist concept of property. At the same time, he observes that the legal protection of private property requires its socialization. A social concept of property first emerges within the sphere of abstract tight. Then, the establishment of a protective legal system within civil society introduces a political factor that moves us even further away from the meager socialization provided by abstract contract. Finally, with Hegel's state we reach the

apex of this process of socialization. But the effectiveness of the state as a protective agency cannot be guaranteed if its sole function is the protection of property. To avoid turning it into an instrument in the service of sovereign property owners, Hegel reinforces the state's autonomy and underscores its priority with respect to civil society.

Hegel is fully aware of the dangers involved in the socialization of property. A social concept of property and the concomitant distinction between possession and property clear the way for thinkers like Rousseau and Fichte whose aim is the relativization of private ownership. Hegel is particularly concerned about Fichte's proto-socialist proposals. In his *Grundlage des Naturrechts*, Fichte distinguishes between possession and property and defines the latter as a social institution grounded on the reciprocal recognition of individuals. "When an individual is posited in relation to others, his possession becomes rightful only insofar as he is recognized by others. In this manner, he attains for the first time external *common* legitimation, common to him and the parties that recognize him. Thus possession becomes property for the first time."[15] Mediated by recognition, property acquires a social function and ceases to be an absolute right. This means that an individual is justified in holding a certain amount of property "on condition that all citizens can make a living on their own ; it becomes their property. Obviously, this must be determined by the power of the state."[16] Hegel intends to ward proprietors from Fichte's Jacobinism by prioritizing individualist property both logically and temporally. Possibly as a response to Fichte, Kant granted property rights to individuals within the state of nature, but he defined them as provisional and not peremptory rights.[17] This was not a suitable defense of private property for it left it exposed to communal consent and supervision. A liberal individualist conception of property can only survive as an entrenched absolute right. This is what Hegel attempts to do in his exposition on pre-contractual property in the *Philosophy of Right.*

Hegel is aware of the fact that the establishment of a protective legal system implies the socialization of property. The figure of contract, its first socialization, is inadequate as a protective devise. Due to its abstract nature, the contractual recognition that transmutes individual into social property is a bare gesture that lacks institutional backing. The restoration of any infringement of contractual property is guided by vengeful justice (§102). This proves to be an inherently unstable procedure that shares the inadequacy of the executive justice allowed by Locke to natural individuals. Individual property is duly safeguarded only when social property re-emerges within civil society and a legal system contributes the required institutional context, geared specifically, as Hegel acknowledges, to "the protection of property" (§188 & 208). But the protection of property must be understood in its most liberal sense. It cannot involve redistribution by taxation or any other egalitarian interven-

15. Johann FICHTE, *Grundlage des Naturrechts*, in *Sämmtliche Werke*, III (Berlin : Veit und Comp, 1845), p. 130.

16. *Ibid.*, p. 213.

17. I discuss Hegel's reaction to Fichte and Kant in my essay "Hegel on Possession and Property," *Canadian Journal of Political and Social Theory*, 2 (1978), p. 111-124.

tion, for this is contrary to the principle of civil society which requires that the livelihood of the needy be mediated by work (§245). Hegel's social concept of property does not leave private property exposed to socialist expropriation. On the contrary, it is proposed as a way to expedite the protective role assigned to the state and the judicial institutions it strongly supports. Hegel's individualist concept of property does not exclude but on the contrary demands the supremacy of the state over the individual. At times Hegel reads like a Prussian Locke.

Contrary to Locke, however, Hegel places judicial institutions within the confines of civil society and distinguishes sharply between civil society and the state. He does so in order to avoid the impression that the "sole function [of the state] is to protect and secure the life, property and the arbitrary will of everyone," for this would mean that "the state is merely an arrangement dictated by necessity" (§270). The state, Hegel reiterates, "is by no means a contract, and its substantial essence does not consist unconditionally in the protection and safeguarding of the lives and property of individuals as such" (§100). An instrumental state whose sole function were the protection of private property would be contractually bound to civil society. This would weaken it considerably for this would deplete the autonomy, independence and neutrality required to protect property effectively. Hegel's affirmation of a strong state, one which rises above civil society, is the condition that sustains the possibility of possessive individualist property. This socialization of property goes hand in hand with an assertion of absolute individualist property. It is not at all inconsistent on the part of Hegel to affirm jointly both conceptions of property. It is not inconsistent either for him to affirm that only "a state which is strong [...] can adopt a more liberal attitude [...]" (§270), for only a state which strongly affirms social property can safeguard individual property defined absolutely.