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Hegel's Understanding of Damage Reparation

Luka Burazin[1]

1. Paragraph 98 of Hegel's Philosophy of Right

At the beginning let me quote paragraph 98, the only paragraph in which Hegel expressly discusses damage reparation:

»Infringement, confined merely to external reality or possession of some kind, is detriment or damage to property or wealth. The cancellation of the infringement, where the latter has caused damage, is civil satisfaction in the form of compensation (damage reparation), in so far as any compensation is possible.

Note. – In so far as the damage amounts to destruction and is altogether irreparable, satisfaction must take the form not of a particular object but of the universal quality, namely value«.[2]

It follows from paragraph 98 that damage reparation is the cancellation of the infringement confined to external reality or possession of some kind. However, in order for one to be able to fully elucidate Hegel's understanding of damage reparation, paragraph 98 should be interpreted systemically in the context of his idea of abstract right and his understanding of crimes.

2. Arguments from the systemic interpretation

Paragraph 98 is part of the chapter entitled *Coercion and Crime*, which itself is part of a wider chapter entitled *Wrong*.

From the fact that paragraph 98 forms part of the chapter *Coercion and Crime*, one can deduce the following four statements:

a) As Hegel subsumed private delicts under the category of crimes, one can assume that he understood private delicts or torts as being a kind of wrong belonging to public rather than private law.

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[2] G.W.F. Hegel, Grundlinien der Philosophie des Rechts, Frankfurt am Main, 1976, p. 186.

According to Gans, Hegel's exclusion of delicts from the philosophy of law was deliberate and reflected his opinion that the category of delicts was inherently irrational.[3] »[F]or Hegel public or state authority was the only legitimate source for sanctions for wrongful conduct, and he reclassified delicts as a subpart of public law rather than private law. (Hegel believed his judgment was supported by the omission of separate category of delicts from the Prussian Civil Code)«.[4]

b) From Hegel's connection of crime and coercion, or more specifically, of infringement or damage and compensation as the antithesis and synthesis, one can conclude that wrongdoing is a necessary precondition for imposing a second coercion, i.e. the negation of negation or cancellation of a wrong.

According to Hegel, this *second* coercion is »not only conditionally right but necessary« only in so far as it »cancels an initial coercion«[5] (i.e. the crime) which in itself is »contrary to right«[6].

c) A tort, being a kind of crime, is a violation or infringement of an abstract right of the injured party, i.e. it is a negation of both the injured party's particular will and the injured party's abstract right as a right. »True wrong«, says Hegel, »is crime, by which, as it seems to me, neither a right by itself nor [a right] is respected and by which both the objective and subjective side is injured«.[7]

It can, therefore, be concluded that for Hegel the basis of a wrongdoer's liability is an infringement of the injured party's abstract right and not primarily a breach of some pre-existing duty by the wrongdoer.

d) As interpretations of Hegelian theory of punishment often draw on the chapter *Coercion and Crime*, one can ascribe to compensation as a form of cancellation of a wrong or punishment functions that interpreters connect with Hegel's notion of punishment.

3. Legal nature and functions of damage reparation in Hegel's *Philosophy of Right*

As follows from paragraph 98, damage reparation (compensation) is a form of cancellation of a wrong, i.e. a form of *punis-*

[3] M.H. Hoffheimer, Eduard Gans and the Hegelian philosophy of law, Dordrecht, 1995, p. 30.
[4] Ibid. Also compare O.K. Flechtheim, Hegels Strafrechtstheorie, Berlin, 1975, p. 54.
[5] G.W.F. Hegel, Grundlinien der Philosophie des Rechts, par. 93, p. 179.
[6] Ibid., par. 92.
[7] See ibid., par. 90, p. 178.

hment for an infringement of an abstract right (*ex* paragraph 97 and addition)[8]. Therefore, we can label Hegel's understanding of damage reparation, viewed from the angle of its legal nature, as a sanction-based understanding.

But what about the main functions of damage reparation? According to Gans, »Hegel understood damages as the private recovery for a *wrong*, and he considered the core value supporting such a recovery to be retribution rather than compensation«.[9]

Since according to Hegel damage reparation is a form of punishment, it presumably also takes on the main functions of punishment. In the relevant secondary literature on Hegel's penal theory one can recognise three functions that are most often linked with his notion of punishment: retribution, specific deterrence and general deterrence.[10]

However, the retributive and deterrent function of damage reparation can easily be discarded on the basis of the full compensation principle and the relevance of fault for assessing damages. Regardless of the degree of one's fault, full compensation should be paid to the injured party, i.e. the amount of compensation required to return the injured party to the state of affairs he would have been in had he not been injured.[11] In addition, disincentive is in no way »proportioned to the gravity or otherwise of the carelessness involved in any particular case« of damage causation.[12]

On the contrary, one should not neglect Hegel's idea of the restoration of rights and its potential to be a free-standing function of »punishment«, especially when it comes to cases of damage causation. D. Knowles, for example, states the restoration of rights argument in the following way: »Rights are not properly recognized (actualized) as valid claims, binding on others, unless their violation is met with punishment wherever possible«.[13] Further, he adds, »citizens accept the validity of the goal of the restoration of rights, not because this is a valuable social function of punishment, but because it is necessary for the protection of the rights

[8] See ibid., par. 97, pp. 185 f.
[9] M.H. Hoffheimer, Eduard Gans and the Hegelian Philosophy of Law, p. 30. Hoffheimer's original sentence reads: »Hegel understood delicts or torts as the private recovery for a wrong«. However, since this concerns the »private recovery for a wrong«, it seems that instead of the words »delicts or torts« (civil-law delicts) the word »damages« (damage reparation) should have been used.
[10] J.–C. Merle, German Idealism and the Concept of Punishment, New York, 2009, pp. 107-145.
[11] On the full compensation principle, see P. Cane, The Anatomy of Tort Law, Oxford, 1997, pp. 107-112.
[12] See N. MacCormick, Legal Right and Social Democracy, Oxford, 1982, p. 216.
[13] D. Knowles, Hegel and the Philosophy of Right, London, New York, 2002, p. 147.

which they themselves claim. So the state *must* punish criminals if it is to serve the purpose of protecting rights«.[14] Therefore, if understood as a sort of protection or preservation of a person's abstract right and a way of ensuring its enforceability, the restoration of rights argument represents a sound claim about the main function of damage reparation. Moreover, it represents a foundation of Hegel's understanding of the obligatoriness of private law »for Hegel expressly affirmed that private law has obligatory force only inasmuch as it actualizes abstract right«.[15]

In addition to the restoration of rights function, there is yet another function that could be derived from Hegel's *Philosophy of Right* and which is attributable to Hegel's notion of damage reparation, namely, restitution. »First of all«, says Hegel, »nullity of the damage caused – no *rightly* evil – Something external annihilated, for my need – This annihilation to annihilate again – is damage reparation, me being in my previous state, my ownership«.[16] It follows, therefore, that the restitutive function could thus be understood in the usual way as the process of returning an injured party to the state he would have been in had he not been injured. It should, however, be noted that this function is already implied by the restoration of rights function. For if the restoration of rights function is to serve the purpose of the protection of rights, it should also use the mechanism of restitution, at least with respect to cases of *ex post* protection, i.e. protection against the existence of a state caused by the infringement of an abstract right. In such cases, one has to restore the injured party to the state prior to the injury, which indirectly also represents an act of protection of the infringed abstract right. Therefore, it seems that for Hegel restitution is just a second-ordered function at the service of the restoration of rights function as the main function of damage reparation.

4. Legal nature and functions of damage reparation from the standpoint of general legal theory and philosophy of law

There are two strands of thought regarding the legal nature of damage reparation in contemporary legal theory and philosophy

[14] Ibid., p. 156.
[15] E. Weinrib, »Right and Advantage in Private Law«, in: Cardozo Law Review, 10 (1989), p. 1309.
[16] G.W.F. Hegel, Grundlinien der Philosophie des Rechts, par. 98, p. 186.

of law: the so-called sanction-based and the so-called duty-based understanding.

The sanction-based understanding perceives damage reparation as a (private law) sanction for wrongful conduct.[17] This understanding, which prevails in the contemporary legal theory and philosophy of law, has its source in the Roman law of delict[18] and is greatly inspired by the writings of natural law authors such as Grotius and Pufendorf.[19] However, it should be noted that the sanction-based understanding of the legal nature of damage reparation does not provide a coherent theoretical explanation of tort law as it fails to justify the correlative bond that ties the two parties to a tort-law relationship together.[20] Namely, since it regards damage reparation only as a sanction, this understanding can be labelled delinquent-oriented rather than all-parties-encompassing.

The so-called duty-based understanding perceives damage reparation as a duty that arises for the wrongdoer on account of him having caused damage to another.[21] One should, of course, bear in mind that a duty of repair at the same time also represents an essential element of the tort-law relationship in which it is necessary and inseparably linked with the correlative legal right of repair. Thus viewed, in contrast to the sanction-based understanding, damage reparation reflects its simultaneous orientation towards both parties to a tort-law relationship, which is in accordance with correlativity as an essential feature of the legal

[17] For an example of the so-called sanction-based understanding of damage reparation, see P. Cane, Responsibility in Law and Morality, Oxford, Portland, 2002, pp. 43 f., P. Cane, The Anatomy of Tort Law, pp. 96-122, E. Bucher, Das subjektive Recht als Normsetzungsbefugnis, Tübingen, 1965, pp. 110-113 and H. Roland, L. Boyer, Introduction au droit, Paris, 2002, pp. 35 f. For a different view on private-law sanction in the case of damage causation, see L. Burazin, Towards a New Theoretical Concept of Sanction and Legal Responsibility in the Case of Causing Damage, pp. 1-6, available at SSRN: http://ssrn.com/abstract=1137672 and L. Burazin, »Sredstva ovrhe kao vrsta građanskopravne sankcije (sa stajališta opće teorije i filozofije prava)« [Means of Execution as a Kind of Civil Law Sanction (From the Standpoint of the General Theory and Philosophy of Law)], in: Collected Papers of Zagreb Law Faculty, 57 (2007), pp. 821-845, available at SSRN: http://ssrn.com/abstract=1123187.

[18] See N. Jansen, »Duties and Rights in Negligence: A Comparative and Historical Perspective on the European Law of Extracontractual Liability«, in: Oxford Journal of Legal Studies, 24 (2004), pp. 447-450.

[19] See H. Grotius, De jure belli ac pacis libri tres, Amstelaedami, 1720, pp. 462-470 (Djbap 2,17) and S. Pufendorf, De jure naturae et gentium libri octo, Volume One, Buffalo, New York, 1995, pp. 212-224 (Djn 3,1).

[20] On the role of coherence in understanding the tort-law relationship, see E.J. Weinrib, The Idea of Private Law, Cambridge (Massachusetts), London, 1995, pp. 29-46.

[21] For an example of the so-called duty-based understanding of damage reparation, see H. Kelsen, Čista teorija prava [The Pure Theory of Law], 2nd, completely revised and extended edition, Beograd, 2000 (originally published in 1960), pp. 106 f. and N. MacCormick, Legal Right and Social Democracy, pp. 212-231.

relationship between the wrongdoer and the injured party.[22] As a legal duty, damage reparation is oriented to the wrongdoer as it represents an order to the wrongdoer to repair the damage he caused to the injured party. As a legal right, it is oriented to the injured party, empowering him to demand that the wrongdoer repair the damage caused.

As regards the main functions these two different understandings of the legal nature of damage reparation attribute to the phenomenon of damage reparation, one can recognise a high degree of harmony between them. Both understandings emphasise three essential functions that damage reparation ought to fulfil: the restitutive function (i.e. bringing an injured party to the state of affairs he would have been in had he not been injured), the protective function (i.e. protecting the injured party's primary legal rights) and the achievement of corrective justice (i.e. restoring the balance between the injured party and the wrongdoer that was disturbed by the act of causing damage).

Finally, it should be noted that the duty-based understanding of the legal nature of damage reparation, as opposed to the so-called sanction-based understanding, is also in accordance with the orientation of the main functions attributed to damage reparation. While the two-sided orientation is clearly expressed in the way the corrective function of damage reparation operates (achieving a balance between *both* parties to a tort-law relationship), the two-sided orientation of the restitutive and the protective function, which functions *prima facie* encompass only one party to a tort-law relationship (i.e. the injured party), manifests itself in the way these functions are activated. The restitutive function grasps at the injured party through his legal right to demand that the wrongdoer put him in the state of affairs in which he would have been had the damage not been done. On the other hand, it grasps at the wrongdoer through his legal duty to bring the injured party into the described state of affairs.[23] Likewise, since a legal duty and a

[22] On correlativity as an essential feature of private-law relationships, see E.J. Weinrib, The Idea of Private Law, pp. 114-144, E.J. Weinrib, »Correlativity, Personality, and the Emerging Consensus on Corrective Justice«, in: Theoretical Inquiries in Law, 2 (2001), pp. 10-13 and P. Cane, »Corrective Justice and Correlativity in Private Law«, in: Oxford Journal of Legal Studies, 16 (1996), pp. 471-488.

[23] For an opposing view see Weinrib who claims that the compensatory (restitutive) function is directed solely at the injured party. Since, according to Weinrib, the said function is a justifying element for only one party to the damage reparation relationship (i.e. the injured party), it is frequently, says Weinrib, complemented by the deterrent function as the second justifying element that includes the second party to the said relationship (i.e. the wrongdoer). However, according to Weinrib, this leads to incoherence of the theoretical explanation of the legal relationship of damage reparation since

legal right are the constituent elements of a tort-law relationship, the two-sided orientation also manifests itself in the case of the protective function of damage reparation.

Therefore, it should be concluded that the duty-based understanding of the legal nature of damage reparation provides a coherent jurisprudential explanation of the connection between the legal nature and the main functions of damage reparation, i.e. an explanation that has one integrated justification which simultaneously encompasses both parties to a tort-law relationship.

5. Can Hegel contribute to a new jurisprudential explanation of contemporary tort law?

In contemporary tort-law theory one increasingly perceives the need for a new jurisprudential explanation of the basis on which the wrongdoer is to be made liable to repair the damage he caused.[24] The wrongfulness of the wrongdoer's conduct (i.e. his violation of some pre-established legal duty) as the basis justifying the imposition of the duty of repair is being replaced by the infringement of the injured party's legal rights. Thus, the perspective of damage reparation shifts from the wrongdoer's position (damage reparation as a reaction to the wrongdoer's wrongful conduct) to the injured party's position (damage reparation as a means of correcting an infringement of the injured party's legal rights).[25] Moreover, this shift of perspective is a precondition for reconciling the victim-oriented perspective of the basis of liability with the predominant view on restitution (compensation) as one of the main functions of damage reparation which is also victim-oriented.

In the light of the above tendencies, Hegel's view according to which the basis of liability is an infringement of an abstract right could be regarded as a useful and illuminating theoretical tool.

As regards Hegel's understanding of the legal nature of damage reparation, one can conclude that, since it is a sanction-based

these functions are »independent of each other« and »do not coalesce into a single integrated justification«. See E.J. Weinrib, The Idea of Private Law, p. 38.

[24] See N. Jansen, Die Struktur des Haftungsrechts – Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadenersatz, Tübingen, 2003 and R. Stevens, Torts and Rights, New York, 2009.

[25] See N. Jansen, »The development of legal doctrine in Europe«, in: The development and making of legal doctrine, N. Jansen (ed.), New York, 2010, pp. 21-23.

understanding, it does not contribute to a coherent jurisprudential explanation of the phenomenon of damage reparation, all the more so since it fails to justify correlativity as an essential feature of modern tort-law relationships.

Finally, as regards the main functions Hegel attributes to punishment and thus also to damage reparation, one can discard the retributive and deterrent function as not in accordance with the main features of damage reparation, such as the full compensation principle or irrelevance of the degree of fault for assessing damages. However, one should give weight to the restoration of rights as a free-standing function of damage reparation, understood as a sort of protection or preservation of a person's abstract right and a way of ensuring its enforceability, which function is in line with the duty-based view on the legal nature of damage reparation and tendencies in contemporary tort-law theory.