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RIGHTS

Etymologically connected to ‘the right’, which is concerned with correct action, the plural concept of rights developed in the modern period, primarily as the assertion of the individual’s right to private property. But the connection between rights (plural) and right (singular) is not simply etymological but also conceptual, for a particular right must necessarily be located in a wider scheme of rights. The focus of this entry is on the concept of rights rather on justifying particular schemes of rights. After analysing different kinds of rights – claims, privileges, powers, and immunities – the conceptual unity of those four forms is discussed. Two theories of what holds rights together dominate the conceptual debate: will theory and interest theory. On will theory to have a right is to be in a position to change your legal position vis-à-vis other rights-holders, while benefit theorists hold that having a right involves benefitting from other people acting in certain ways towards you. Although advanced as purely conceptual the two theories do have normative implications. For will theorists it is difficult to attribute rights to foetuses, animals, or very young children, although they may be protected in other ways. Benefit theorists are better able to accommodate such entities as right-holders, but at the price of conceptual clarity.

Hohfeld’s Analytical Scheme

In his book *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (first published 1923) American jurist Wesley Hohfeld argued that there are four forms of right (or rights), but eight ‘fundamental legal conceptions’. This is so because rights are relations, and there are two types of relationship: correlation and opposition. The jural opposite of a right is the legal position that is necessarily excluded by having a right, so one cannot, for example, have both a privilege and a duty with regard to the same action. The jural correlative is the legal position that is necessarily imposed upon another, such that if, for example, a person has a claim-right then somebody else – an

individual or a group – must have a duty. Although Hohfeld talked of eight conceptions, it is easier to think in terms of four rights – claims, privileges, powers, and immunities – each bearing two kinds of relationship, opposition and correlation:

Claims

The jural opposite of a claim is a no-claim and the jural correlative is a duty. To possess a claim is to stand in a position legitimately to demand something from another person (or persons). The other person is under a duty to perform the demanded action, and the clearest example is the creation of a claim-right as the result of a contract (in a contract we exercise powers in order to create claims: see below for a discussion of powers). If, for example, you buy an airline ticket, then you have entered into an agreement with the airline company that they will supply you with a seat on a specified flight, and you have a claim against them, such that were they to deny you that seat they will suffer a penalty. However, claims need not be the result of a contract – benefit theorists (discussed below) argue that children, for example, have claims even if they lack powers.

Privileges

The jural opposite of a privilege is a duty and the jural correlative is a no-claim. Privileges are sometimes referred to as liberties (and the correlative a ‘duty not to interfere’). But this is wrong. If you have a liberty to do X all that this means is that you are under no obligation not to do X, meaning you could be forced to do X. A world in which only ‘liberties’ existed would be one of pure conflict: a Hobbesian state of nature. A privilege, however, implies an area of life in which you are free to do something which is generally prohibited. The freedom to engage in sexual acts in private would be examples of privilege-rights, for these things are normally prohibited in public.

Powers

The jural opposite of a power is a disability and the jural correlative is a liability. A power is one's affirmative control over a given legal relation to another. To be that other is to stand in such a way as to be liable to have your legal position changed. The act of marriage, as a civil legal procedure, involves the (mutual) exercise of powers. The contracting parties, through their actions, alter their legal relationship to one another and also their relationship to those outside the contract. Nobody else can marry one of the parties unless powers of annulment are first used, and the parties gain taxation benefits and so alter their relationship to the state. Although Hohfeld did not make this clear, a power operates on a different level to a claim – this is because it is through the exercise of powers that many claim-rights are created and extinguished.

Immunities

The jural opposite of an immunity is a liability and the jural correlative is a disability. To possess an immunity is to be in a position to resist the powers of others. Immunities exist, most often, where there are different levels of legal authority, such as a legislative authority which creates and destroys rights, and a judicial authority that upholds a constitution. The immunities created in a constitution exist to insulate the individual from the powers of the legislature: an immunity disables the legislature from exercising powers. Immunities are often misleadingly referred to as 'fundamental liberties', but must, in fact, be immunities, since liberties are not intrinsically resistant to alteration as a result of legislative action.

Conflicts of Rights

Hohfeld's scheme was analytical, meaning that his aim was to break rights down into specific forms rather than provide a theory of how rights relate to one another. The latter is the focus of 'theories of rights', which will be discussed in the next section. As a preliminary to that discussion a few further concepts must be explored; these relate specifically to how rights are held and how conflicts between rights can be resolved.

Although claims correlate to duties it does not follow that all duties correlate to rights. It is possible to have a *duty-based system* – that is, one in which stress is laid on the performance of a duty. For example, it is difficult to couch the right to preserve natural resources in terms of rights. We may have duties to future – that is, not-yet-existing – generations, but those duties cannot correlate to the rights of ‘future individuals’ because our actions will determine who actually exists in the future. Many ecologists argue that the earth (Gaia) is of ultimate moral significance but it is problematic to conceptualise the earth as a right-holder and human beings as correlate duty-bearers.

Rights often presuppose conflict, because to have a right is to be advantaged in relation to another person; but they are also the means by which conflicts are resolved. A system of rights should therefore be *compossible* – that is, there should be rules whereby conflicts of rights are settled. For example, if person A has a right to property x then person B cannot have a right to the same property. If both A and B have legal title to the same property then as each exercises the property right so each violates the right of the other. Although compossibility is easy to grasp in relation to rights to physical space it is more problematic when less tangible goods are involved, such as speech or assembly. Certainly, speech requires apportioning time, for not everybody can speak at once and assembly is only possible if people do not assemble in the same place at the same time. However, the media’s right to report on the activities of a politician and that politician’s right to have his reputation protected generates a conflict that is not easily resolved through the idea of compossibility. There is here a conflict between different kinds of rights rather than between the exercise of the same right by different individuals.

To resolve the conflict between different kinds of rights and also between rights and other political principles rights may need to be *overridden*. To override a right is not to *violate* it. The former is a justified setting aside of a right, whereas the latter is a failure to fulfil the correlative act. In popular

debate it is often said that ‘no rights are absolute’. The assertion that the right to free speech is absolute is often met with the retort that nobody should be allowed to shout ‘fire!’ in a crowded theatre. The implication being that the right to free speech can be overridden by considerations of security. However, while correct, too often this is a rhetorical move, rather than a reasoned response. To resolve the conflict between free speech and security requires moving to another level (or second order), whereby the value of free speech is weighed against other considerations. It is significant that whilst Article 19 of the Universal Declaration of Human Rights asserts without qualification that everyone has a right to freedom of opinion and expression the corresponding Article 10 of the European Convention on Human Rights sets out a range of limitations on free speech. Although the Convention draws its inspiration from the Declaration it is a legally enforceable code and thus requires recourse to mechanisms for overriding particular rights.

An *absolute right* is a right that can never be overridden. It is often asserted that torture should be absolutely prohibited, and it is significant that Article 3 of the European Convention does indeed prohibit torture without qualification. Absoluteness should not be confused with *universality*: a right can be universal but not absolute. There is a logical sense of ‘universal’ which roughly equates to the claim that like cases should be treated alike: if two people are identical in all relevant respects they should be treated in the same way. The more colloquial sense of ‘universal’ in relation to rights is that all humans have attributes that make them equally worthy of respect regardless of citizenship. It is possible to assert that there are universal rights – human rights – but none of the rights is absolute, meaning that every right can be overridden. What universality would demand is that any overriding of a right is applied consistently. Finally, a right may be *inalienable*. A right is inalienable if the right-holder cannot ‘extinguish’ – ‘make alien’ – the right. Selling yourself into slavery would be a case of alienation.

Theories of Rights

Hohfeld's study was analytical: he wanted to lay out the different forms of rights. He was not interested in explaining the underlying connections between them (he thought claims were 'rights proper', but did not justify this). But political theorists are keen to go beyond analysis and explain how the forms come to be 'bundled' together. Take the 'right to private property'. Everybody possesses a power to acquire property, and in exercising that power a person comes to acquire a claim in a particular piece of property, while in excluding others from the use of that property one enjoys a privilege. If the 'right to private property' is enshrined in a constitution then you also have an immunity. So the right to private property is in fact a bundle of different kinds of Hohfeldian rights.

A theory of rights attempts to reconstruct rights into a system by finding some 'core concept' that can unify the four Hohfeldian rights. The traditional candidates for this core concept are benefit and will, the former associated with Jeremy Bentham and the latter with Herbert Hart (Hart is credited with identifying Bentham as the progenitor of benefit theory). Benefit theory states that to have a right is to benefit from the performance of an enforced duty, or on revised versions, to be intended to benefit. Will theory states that having a right involves being in a position to control the performance of a duty. Expressed in a less dry way, benefit theory takes rights to be the way interests are protected, which is why some theorists prefer the term 'interest theory'. The right-holder need not be in a position to assert his/her/its rights. This suggests that non-human animals, foetuses and very young children could have rights, because while they have interests they need not exercise the rights that are intended to protect those interests. The rights could be exercised on their behalf by their parents or the state; in situations where the parents are the potential violators of their children's rights the state will exercise those rights against the parents. Will theory, on the other hand, stresses agency: rights are things we use to control our lives. Consequently, a will theorist

would be much more restrictive about who can have rights. It would be too simplistic to associate benefit/interest theory with the political left, and will theory with the political right, but it is the case that those on the left who want to express egalitarian principles in the language of rights will tend to stress interests rather than agency.

Will theory is criticised on the grounds that its conception of what it means to exercise a right is implausible: the theory seems to require that to have a right one must be in a position to release the correlative duty-holder from the performance of his or her duty. But even mature adults have rights over which they do not have this kind of control vis-à-vis the duty-bearer. This may, however, rest on a faulty interpretation of the theory. On will theory some Hohfeldian rights are first-order and others second-order: people exercise second-order *powers* in order to create first-order *claims*. For example, in most liberal democracies all adults, with some exceptions, have the power to marry and they cannot alienate that right. In getting married two people mutually exercise their powers to enter into a contract and in the process create claims. People who choose not marry retain their powers but create no claims. What, according to will theory, excludes animals and foetuses from this scheme is their inability to exercise powers. This does not mean that we lack duties towards animals and foetuses, but simply that those duties do not correlate to rights.

Even if the distinction between first-order claims and second-order powers is accepted it may be argued that there are many claim-rights that are not created through the exercise of powers and which cannot be conceptualised as powers. The right to free speech is neither a power nor a product of the exercise of powers and this is likewise the case with many of the rights set out in the American Bill of Rights, the Universal Declaration of Human Rights, and the European Convention on Human Rights. One way around this problem is to distinguish between benefiting from powers and exercising powers. Hillel Steiner suggests that citizens are the third party beneficiaries of criminal law duties, and the right-bearers (more accurately, power-bearers) are state officials. The

difficulty with this argument is that it does not explain the reality of a constitutional state in which the state is – in Hohfeldian language – disabled, meaning that citizens are immune from have their legal position changed.

Will theory has received sharper criticism than benefit theory in part because it is an easier target. By narrowing the scope of rights – who can have rights and how they are exercised – the theory opens itself up to challenge by reference to intuitively plausible counter-examples of the holding and exercising of rights that do not fit the model of power-created claims. But benefit theory suffers from the converse weakness that it is too broad. Defining rights too widely empties them of any interest. It is likely that any mature legal and political system will be constituted by a plurality of types of principle and we need to delineate these different principles and show where they conflict or how they might operate together.

Collective Rights, Welfare Rights and Future Generations

Although there are important normative debates about collective rights (state sovereignty, the right to national self-determination, cultural rights), welfare rights (right to development), and the rights of future generations (intergenerational justice, preservation of resources), there are also some conceptual issues common to all three. Specifically, there are difficulties involved in identifying the appropriate right bearer and the good to which the right-holder has an entitlement; and the duty which supposedly correlates to the right is frequently indeterminate. Indeterminacy is a problem because ‘ought implies can’: if you ought to act in a certain way – whether that ‘ought’ is legal or moral – then it must be possible so to act. If you do not know what is required of you then you cannot have a duty.

Collective Rights

Rights can be attributed to collective entities, such as firms or states, as well as individual human beings. In principle, there is no conceptual problem involved in the idea of collective rights. If the right-holder and that to which it has a right can be identified then collectives can have rights. In domestic law there are publicly limited companies and these are termed ‘artificial persons’, and in international law there exist states. Difficulties arise when the right-holder or the good which the right protects cannot be identified. The demand for national self-determination is often problematic because the precise territory of the putative state is unclear and there are competing groups claiming to speak for that ‘state’.

It is also difficult to claim a right to goods that cannot be individuated. If we assume the truth of man-made global warming then all humanity (all states) will benefit from reductions in carbon emissions – call this good a ‘clean environment’ – but those who continue to emit will still benefit, such that a clean environment cannot be individuated. A clean environment is therefore a ‘public good’, in the sense of a good the enjoyment of which cannot be restricted to those who pay for it. What is possible is to create an internationally enforceable system of permits held by states to emit carbon; such a ‘right to pollute’ implies that a state also has an individuated share in a clean environment.

The requirements for a collective right to exist – identifiable right-holder and individuated good – has implications for debates over multiculturalism. Against the charge that a commitment to cultural diversity implies that ‘cultures’ have rights over their members Will Kymlicka maintains that ‘rights to cultural membership’ are held by individual human beings against the majority culture. Muslims should not be forced by Muslim ‘authorities’ to observe religious practices but rather individual Muslims have rights against the non-Muslim majority to practice their religion and for

society to be organised in a way that such practice is facilitated so long as it does not carry an unreasonable cost to the majority. But this implies that cultural goods – analogously to a clean environment – can be individuated in the appropriate way. Maybe individual Muslims benefit from the maintenance of Muslim practice even when they choose not to be observant, such that they are free-riding on the observance of others. This suggests that the Muslim community rather than individual Muslims are the bearers of a right to cultural membership. It should be stressed that this is not an argument for multiculturalism but purely a conceptual point about the nature of rights.

Welfare Rights

The idea of a ‘right to welfare’ raises conceptual problems parallel to collective rights: it must be possible to identify the appropriate right-holder and for the duty-bearer to know when the duty has been fulfilled. In 1969 the United Nations proclaimed the Declaration on Social Progress and Development, which sets out principles and objectives for international development. Defenders of the right to development maintain that there are socio-economic conditions to the traditional so-called ‘negative rights’, such as the right to free speech, freedom of religion, association, marriage and so on. To assess the conceptual coherence of this claim we need to locate the holder of the right to development and the correlative duty-bearer. It could be that a *state*, or a *community*, possesses the right to a certain level of resources, or that an *individual* has the right. If the individual holds the right (in Hohfeld’s language: claim), then who has the corresponding duty: that individual’s own state, or rich states, or the international community? If states have the right to development then that would imply that the only relevant issue of wealth distribution is between states, whereas if individuals have the right then the distribution of wealth within a particular state is morally relevant. The 1969 UN Declaration is opaque on these points. It defines development as a comprehensive economic, social, cultural and political process aimed at the constant improvement of the well-being of the entire population, which would imply that the right-holder is the state, but it also asserts that

individuals should benefit: development requires the active, free and meaningful participation of the citizens of a particular community.

The right to development raises a number of further conceptual problems. First, a set of rights must constitute a coherent scheme. The requirements of development may well result in the setting aside of certain fundamental ‘negative’ rights; for example, a society which wishes to control urban growth may seek to control freedom of movement, choice of occupation and the decision to have children. This may appear to be a normative question about the relative weighting of rights, but it is conceptual in that no mechanisms are suggested for resolving conflicts of rights. Second, a right to development must be actionable, meaning that a remedy can be obtained when a person complains that his or her rights have been violated and the duty-bearer must be able to determine when the duty has been fulfilled. Although in principle it is possible to draw up a set of material needs is not easy to conceive of development as an individuated good. Development may be a good but it is not one best advanced by use of the language of rights. It is significant that many societies have ratified laws on asylum, and largely respect those laws, but those same societies make it clear that they do not accept economic migrants.

Rights of Future Generations

By ‘future generations’ is meant not-yet-existing people. Although some ecologists argue that the case for preserving resources and avoiding further degradation of the planet is a duty owed to ‘posterity’ that cannot be correlated to any rights, many environmentalists would maintain that we have duties correlating to the rights of future generations. This argument raises similar conceptual problems to welfare rights but in a more radical form. What we do today will affect not only the life prospects of future generations but whether they exist at all.

There is a consensus that population growth is a threat to the quality of life of future generations, and the present generation has a duty to see to it that such growth is checked. But it is difficult to establish to whom that duty is owed. Imagine we have a fixed level of resources, and in future World 1 there are five billion people, while in future World 2 there are twenty billion people. Average (per capita) resources will be higher in World 1 and its inhabitants are, therefore, better off than the inhabitants of World 2. Does the present generation have a rights-correlated duty to bring about World 1? The problem is that one consequence of bringing about World 1 is that a large number of people will not exist. The duties of the present generation could correlate to the rights of the five billion people in World 1 and the duty is fulfilled by not bringing into existence the extra fifteen billion people of World 2, but it is impossible to identify those five billion. The alternative is to say that the fifteen billion have a right not be brought into existence, presumably because life in World 2 would be intolerable. This suggests that non-existing (never-to-exist) people can have rights. Certainly, there have been legal cases involving children who have taken legal action for having been born, thus implying that one can have a right not to be brought into existence. However, these actions have been motivated by parents acting on behalf of severely disabled children against medical authorities who are alleged to have been negligent, with the aim of winning damages.

Right and Rights

It was argued at the beginning of this entry that there is an etymological connection between the 'singular' right and the 'plural' rights. Etymology does not settle conceptual issues, because of the genetic fallacy. However, the discussion of compossibility, with the attendant need on occasion to balance and limit rights suggest that rights form a system, such that there is a connection of right and rights. The relationship between right and rights is important because it may not be possible to express all ethical-political relationships in the language of rights. The problem of defining a right

to development or the rights of future generations was illustrative of the limitations of ‘rights-talk’. To do the right thing is not identical to respecting a person’s rights.

Natural law theorist John Finnis has argued for an intimate connection between right and rights. The plural rights, he argues, results from asserting the requirements of justice from the point of view of the person(s) who benefit(s) from that relationship. Surveying the development of the concept of right from its classical antecedent *jus*, Finnis notes that for Thomas Aquinas *jus* meant ‘the fair’ or ‘fairness’. Relationships of justice – who is owed what – are secondary. By 1610 the Spanish Jesuit writer Francisco Suarez has reversed the priority and defines *jus* in terms of a moral power which each person possesses, and this way of thinking about justice is developed later by Hugo Grotius: *jus* is essentially something a person has – it is a power. There is a development of rights from right. For Finnis, this takes what he regards as a damaging turn in the work of Hobbes, who argues that a person has rights in the state of nature – that is, a situation in which there is no state, or political authority: since nobody is compelled to do anything each is free. The state for Hobbes is the rational outcome of the exercise of these ‘natural rights’. But since nobody has any duties in the state of nature – for example, nobody is under a duty not to kill you – then we could, Finnis suggests, just as well say that there are no rights outside the state.

While Finnis accepts the post-Thomist pluralisation of rights he argues that the Hobbesian tradition loses sight of the connection between right and rights. The justification of *human* rights depends upon understanding that connection. The limitations on the rights contained in the European Convention on Human Rights are significant: they demonstrate that rights derive their validity from an underlying structure of ‘right’. But for Finnis others’ rights do not constitute the only limits: there is also reference in the Convention to morality, public morality, public health, and public order. These considerations cannot be reduced to the effects on *identifiable* individuals, but are diffuse common benefits. A scheme of human rights, such as the Convention is a way of sketching

a common good, which is a umbrella term for the various aspects of individual well-being in a community. What the reference to rights contributes to this sketch is simply a pointed expression of what is implicit in the term 'common good', namely that *each* and everyone's well-being, in each of its basic aspects, must be considered and favoured at all times by those responsible for co-ordinating the common life.

Finnis's argument has implications for human rights. The catalogue of rights set out in the Universal Declaration only makes sense within a specific cultural and legal context. This is not a rejection of universal human rights, for states can choose to bind themselves to such rights and in so doing can acquire or maintain membership in the international community of states. For Finnis human rights are the name we give to the legal protection of goods which he maintains all cultures (implicitly) value: life, knowledge, 'play', aesthetic experience, practical reasonableness, sociability, religion (or equivalent secular beliefs about the meaning of life). We do not have to accept this aspect of Finnis's theory to recognise the significance of his broader conceptual point about the connection between right and rights: rights form a system, such that alongside a catalogue of rights we need secondary rules for settling conflicts between rights. Furthermore, the package of rights is just one principle among several and doing right incorporates more than respecting another person's rights.

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Further Readings and References

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Cross-references

Civil Rights

Common good

Hart, H.L.A.

Human Rights

natural rights

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