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Honorable Mention

Analysis of Hohfeldian Conception of Liberty

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The conception of right is fundamental in realms of political, moral and legal philosophy. Although it is widely used, what is a right or what is the meaning of right is a problem which needs to be carefully dealt with. There is no doubt that an appropriate starting point to talk about rights is the remarkable analysis of legal rights in Wesley Newcomb Hohfeld's *Fundamental Legal Conceptions*. Hohfeld distinguished the conception of right into four sub-conceptions (which are right or claim, privilege or liberty, power and immunity), and defined them through their correlatives (i.e. duty, no-right or no-claim, liability, disability or no-power). In this way, he provided a useful method to turn the general, ambiguous notion of right into several distinctive, well-defined ideas. Many authors are inclined to reformulate Hohfeld's definitions and take them as their basis to investigate theories of rights.

The subject of the essay will be focused on the Hohfeldian conception of liberty-right (or privilege, in his own terminology). Liberty is very important and essential among various types of rights. It can hardly be imagined that we could have any rights if we were deprived of our liberty. Hohfeld's analysis of liberty could be seen as a theory of the definition of liberty, which is put forward to clarify the inner structure of liberty. That is, a liberty is defined by, or is equivalent to a no-right that has an opposite content. As duty also has certain logical relation to liberty, the other way to put the definition is that a liberty is merely the negation of the duty with opposite content. I would like to show that this definition is not manifestly true as it seems to be at the first sight. Hohfeld does not justify it. Some philosophers adopt this definition and develop a concept of half-liberty on the basis of it. Many philosophers take this definition as the only possible explanation of liberty in the Hohfeldian conceptual structure. I don't think there is sufficient reason to do so. In fact, there is a different analysis of liberty that well conform to our intuition of liberty as free choice without contradiction to the specified logical relations between Hohfeld's conceptions of rights and their correlatives. And it at least shows that the Hohfeldian definition is unfounded and by no means exclusive one. But before I defend the intuitive notion of liberty, it would be better to discuss and make clear the scheme of correlatives and opposites which gives us almost all the analytic instruments to clarify the "fundamental legal conceptions".

I Scheme of Correlatives and Opposites

The main achievement of Hohfeld's exploration to the nature of rights is his scheme of "jural correlatives" and "jural opposites".^[1] For him, all the essence and interrelations of fundamental legal conceptions consist in the scheme. In consideration of the liberty-debate, I would confine myself to the part containing only first-order conceptions.^[2] As indicated in the scheme, a claim is the invariable correlative of a duty and the invariable opposite of a no-claim; a liberty is the correlative of a no-claim and the opposite of a duty. What does Hohfeld mean by terms like "correlative" and "opposite"? He says,

If X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.^[3]

Right (or claim) and duty both indicate relations between two definite persons. A right can be said to represent a relation between X and Y that Y should stay off X's land. And a duty also represents a relation that Y should stay off X's land. The relations represented by a right and by its correlative duty are the same. That's the reason why Hohfeld takes one conception and its correlative as logically

equivalent to each other. As he claims, when talking about John Austin's particular use of the term "right", that

Such a delimitation of "right" clearly excludes "legal privilege"; for the correlative of the latter, or "the same notion" from a "different aspect", is, of course, "no-right" or "no-claim".^[4]

Like John Austin, Hohfeld believes that all fundamental conceptions indicate nothing but certain jural relations.^[5] And from different point of views, one relation could always be regarded as two different conceptions. From X's point of view, the relation that Y shall stay off X's land is a right residing in X; from Y's point of view, the same relation is a duty on Y. A relation connects a right on one person and a duty on another. Thus a right implies a duty representing the same certain relation, and vice versa. Thereby these two conceptions are correlative or logically equivalent to each other. But a right is not by all means correlative to any duty. X's right that Y shall not enter on X's land unquestionably is not correlative to Y's duty that he shall not cause harm to X. The right and duty that correlative to each other must be representing the relation constitute by them. Hohfeld calls his scheme of conceptions as scheme of relations. A right always relates to a duty, a liberty to a no-right, etc. I think this is the only foundation that a right can be taken as equivalent to a duty. Besides this, how could Hohfeld find any reason to justify the idea of "invariable correlative" or logical equivalent? It could not be justified just by observing the way people use the terms right and duty, especially when there are many cases of confused or loose or even proliferated use of these terms. If this is true, it is essential to all analyses of Hohfeldian conceptions, because it is on the idea of relation that all the logical connections of Hohfeldian conceptions are founded. Opposites are conceptions representing two relations that negate each other. That is why the opposite of a right is a no-right; and the opposite of a liberty is of course duty, since liberty is equivalent to no-right and duty equivalent to right.

Although many commentators agree that Hohfeldian conceptions are relational, it is not very clear what *relational* means. L. W. Sumner holds that "all of Hohfeld's conceptions are relations between two distinct parties."^[6] For Hohfeld, two parties are two determinate persons in whom the right and the duty reside. But relation is also construed as between "a person and an object", as Joseph Raz maintains.^[7] What he has in mind is rights *in rem*. He stresses that a holder of the right of that kind certainly has a relation to an object. I think the point is that relation does not mean any kind of connection. If someone has a right to a tangible property, it does not follow that he has a legal relation in the Hohfeldian sense. This is just because a property cannot be the holder of rights or bearer of duties. For instance, I have a right to my computer, but it doesn't mean that my computer has a duty to me to be used by me. If someone else shall not dominate the use of my computer, it doesn't imply that my computer has any liberty or immunity to other people. The bearer of rights or their correlatives can only be entities that can perform or refrain actions. Ultimately, the relation means a relation between a right and a duty, not necessarily requiring two distinctive parties. If I have a right to myself that I shall live a virtuous life, then I myself have a duty to live such a life. I don't see any reason that one particular party cannot be the right-holder and duty-bearer at the same time.

Hohfeld makes two assertions with respect to the *relation* thought of conceptions. One is that the relations are between a right-holder and a duty-bearer. Another is that only particular or definite person can be right-holder or duty-bearer. These two assertions are quite distinct from each other that one can accept the first and reject the second. Communities constituted by people, countries and some other organizations can also be holders of rights and bearers of duties. When we say that one country should not invade another country, no doubt that we are taking countries as duty-bears and right-holders. And there is no problem that one party would be collective and the other single person. All these entities as parties in which rights or duties reside won't affect the whole scheme of Hohfeldian conceptions and its inner structure. Concerning the first assertion, counterexamples can also be proposed. For example, a right *in rem* or a right to an object is non-relational. That means a right to an object has no correlative duty on any other parties, though other peripheral rights against other parties may always protect it.^[8] It seems that the first assertion should be rejected too. But if we confine our debate to relational right-conceptions, then the Hohfeldian scheme and Hohfeldian analysis are still very useful. No doubt many rights and liberties are relational, and for these rights and liberties, Hohfeld reveals the correlatives to them. Although his believe that every conception is relational in nature is not correct, his scheme might be well applicable to every relational

conceptions. In fact, I think the relational view is the foundation upon which the whole Hohfeldian conceptual structure is established. And I would like to regard the scheme of conceptions as the background to discuss in which way the relational liberty shall be defined.

II How to define liberty

Among the first-order conceptions, the pair of right and duty has comparatively clear meaning. There are positive rights, i.e. rights with positive content, such as an employer's right against his employee that the latter should work for him. There are also negative rights, rights with negative content, such as one person's right that another one should not enter on his land. In any of these cases, the content of a duty is the same with that of a right. But when analyzing the notion of liberty, there is some distinctive difference in Hohfeld's mind. He says,

...whereas X has a *right* or *claim* that Y, the other man, should stay off the land, he himself has the *privilege* of entering on the land; or, in equivalent words, X does not have a duty to stay off. The privilege of entering is the negation of a duty to stay off.

Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter.^[9]

The biggest difference between definitions of right and liberty seems to be that the content of a liberty is exactly opposite to that of its correlative. But what exactly is the content or tenor of a liberty? Since liberty is a relational conception, its content must mean a relation's content, and this relation is represented by the liberty. As has been shown, one relation is designated both by one conception and by its correlative. Therefore the correlative to the liberty, i.e. no-right, also takes the content of the relation to be its own content. That is to say, the content of a liberty must be the same as the content of a no-right. But why does Hohfeld regulate that the content of a no-right is contrary to that of a liberty? Hohfeld himself does not define liberty through its correlative as he does with regard to right. He gives the definition as " .the mere negation of a *duty*...having a content of tenor precisely *opposite* to that of the privilege in question."^[10] It seems to be his strong intuition that a liberty to do something is undoubtedly equivalent to a duty not to do that. But intuition is just intuition. How could his definition be justified without resorting to the relational essence of conceptions? If he does so, how could he demonstrate that a liberty to do and a no-right not to do represent and constitute the same relation? And what is the content of the relation? I don't think these are questions that can be slightly overlooked. For a liberty to do defined as the negation of a duty not to do is, in Hohfeld's view, consistent with a duty to do. That means one may have a liberty and a duty at the same time.

Thus, if, for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering.^[11]

One can be both at liberty to do something and obligated to do that. This is rather contrary to our normal intuition that liberty is free choice without any restriction. So, an intuition seems to be reasonable leads to a conclusion contradictory to our more common intuition.

Since liberty and duty are opposites, i.e. logical contradictories, the former could be defined by the negation of the latter. This seems to be out of question, and being at liberty normally refers to the state lacking duty. But the way that Hohfeld uses the negation of duty to define liberty is not unquestionable. If the right/duty relation and the relation represented by liberty negate each other, then liberty could be well defined just by the negation of duty, or by the lacking of duty. Why should we define liberty as negation of duty with opposite content? In order to define liberty, the negation of duty is adequate; but Hohfeld also negates the content of the duty, therefore he actually negates the duty twice. I call it *double negation*. If we only negate once, all the logical connections between Hohfeldian conceptions still remain. There is no need to negate a given duty twice.

The content of right or duty is directional.^[12] The content is either to do something or not to do something; that is the quality of restriction, whereas the content of liberty could be construed as negation of the directionality of a given duty. Negation of directionality means free choice between two opposite directional actions, and that is the essence of liberty. In which sense a liberty/no-right relation negates a right/duty relation? I think it is the annulment of the directionality of the latter. In this way, liberty is in essence non-directionality, opposite to duty or right, no matter what specific direction the duty or right has. Such a liberty is a liberty to do or not to do something. But ordinarily, we would often say a liberty to do something or a liberty not to do something. That may represent certain action that we prefer to choose, not necessarily the real logical quality of the liberty. Given a liberty to do something, if I choose not to do that, it would not violate anyone's right, since no one has a right that I shall do that. The liberty to do something implies the liberty not to do it, and vice versa. The content of a liberty could also be said to be certain action, just like the content of duty or right. But liberty ensures the free option on the subject; whether he chooses to do or forbears to do, there is no restriction on his choice. In other words, there is no directionality upon this certain action.

Sumner displays "the logical connections among first-order Hohfeldian normative relations. Where X and Y are persons and V is some act, the rows in the following matrix give correlatives and the columns (and diagonals) give opposites.

X has a liberty with respect to Y to V	Y has no claim against X that X not V
X has a duty to Y not to V	Y has a claim against X that X not V" ^[13]

It is possible for a liberty defined as free choice to be accommodated in such a diagram, and all logical connections of correlatives and opposites are unchanged. The alternative diagram is as follows,

X has a liberty with respect to Y V or not V	Y has no claim against X that X V or not V
X has a duty to Y V or X has a duty to Y not to V	Y has a claim against X that X V or Y has a claim against X that X not V

Where X has a liberty to V or not to V, Y has neither a claim that X V nor a claim that X not V. Here a no-claim that X V plus a no-claim that X not V is abbreviated to a no-claim that X V or not V. X's liberty to or not to V indicates his control over this action, whether he V or not V is independent of Y's control or claim. The opposite to X's liberty could be either X's duty to V or X's duty not to V. Where X has liberty with regard to V, he has no duty at all. A duty with any kind of content, negative or positive, would be contradictory to a liberty. In this table, the conception of liberty is still correlative to no-claim and opposite of duty. In spite of the new characterization of liberty, the connections and relational qualities of first-order conceptions are retained. It at least shows that Hohfeld's definition of liberty can be separated from his scheme of logical connections of conceptions. We can apply this scheme to right-analysis and insist a different notion of liberty at the same time. I have argued that Hohfeld's definition is unfounded or unjustified; even if there is adequate reason to accept his view, I hold that an alternative definition is feasible as well.

Why Hohfeld advocates liberty as being compatible with duty? When he takes liberty into consideration, it seems that he has been influenced by the directionality of right and duty. Duty and right must be directional; to say a duty to do or not to do something is nothing but nonsense. It may appear to him that liberty should be directional too. Manifestly a liberty to do is contradictory to a duty not to do; this ostensible connection might be taken as definition of liberty. Besides, if liberty were construed as free choice, then not only a duty not to do, but also a duty to do would be contradictories to such a liberty. Then the *single* connection between liberty and duty might be lost. Perhaps this definition of liberty on the basis of duty comes from Hohfeld's view that right/duty relation is the strictest one among all fundamental relations.^[14] Therefore, when analyzing liberty, the contents that right and duty have and the way in which they are defined might affect Hohfeld. He defines liberty through a directional duty and then makes liberty directional too. The

problem is why right/duty should be regarded as the relation in the strictest sense, why right or claim is stricter than liberty and other right-conceptions. Hohfeld himself doesn't provide any reason. The truth is that liberty is not less important than claim from both legal and moral point of view. We would say that one is deprived of his basic right if he could not enjoy unencumbered choice or act freely. For claim-right describes the way that other people should or should not do, it alone cannot capture the core notion of legal and moral rights. Only liberty ensures one's control over his action. The idea of personal control over one's action is the main idea belonging to liberty. Generally it runs counter to control or claim from others, which is equivalent to the person's duty. To take liberty as strict and fundamental as claim-right, first we would confirm the common idea of liberty as free choice. And its correlative is other person's no-claim that the liberty-holder shall V or not V. Secondly, the opposite relation, i.e. right/duty relation would be defined on the basis of this idea of liberty. The lacking of liberty or the negation of liberty is of course duty to others, no matter what content the duty has. Both a duty V and a duty not V are opposite to a liberty V or not V. Thus, upon this idea of liberty, a whole scheme of first-order conceptions can also be developed. There is nothing lost, but the general idea captured. Maybe Hohfeld values symmetries of the scheme, and to some extent, a liberty opposite to both positive and negative duties may seem to lack symmetry. Even if it is true, it cannot deny the legitimate analysis and definition of liberty as free choice.

III Fallacy of half liberty

Sumner accepts Hohfeld's definition of liberty and calls it half liberty. He writes,

Suppose that I have no duty either to attend the meeting or not to do so. I thus have two logically distinct Hohfeldian liberties. Call each of these a half liberty and their conjunction a full liberty. Then I have a half liberty to attend the meeting, a half liberty not to attend it, and a full liberty to attend it or not. In general I have a full liberty with respect to anything which I am neither obligated to do nor obligated not to do. Unlike half liberties, full liberties ensure a normatively unencumbered choice between options. [\[15\]](#)

A liberty to do is merely equivalent to the negation of the duty not to do. Such a liberty just ensures the liberty-holder's doing something; do not ensure his not doing something. If I haven't a duty not to do, I may just have a liberty to do, not a liberty to do or not to do. That's why Sumner calls it half liberty, for a liberty to do and a liberty not to do may not exist at the same time. And he regards these two half liberties as conjuncts of a full liberty. Then a full liberty is equivalent to the negation of the duty to do plus the negation of the duty not to do. But the fact is that we don't need to negate two duties to have a full liberty. In order to enjoy a full liberty, to negate one duty is enough. If I have a duty to do, then I don't have a duty not to do. It is impossible to be obligated to do and not to do the same thing. These two duties, therefore, cannot exist at the same time. Then if my duty not to do is negated or removed, then I must have a liberty to do; but as I still do not have a duty to do, I also have a liberty not to do. Thus I get a full liberty through the negation of a duty not to do. This shows that a full liberty is opposite to one determinate duty; the equivalent to the negation of such a duty is not a half liberty, but a full liberty. The logical connections between liberty and duty are not what Sumner thinks.

Let us suppose that the conception of half liberty is feasible. In the case that I have a duty to do, negation of the duty leads to a full liberty. That demonstrates that the negation of a duty to do, is not in fact equivalent to a half liberty not to do. A similar conclusion can be drawn in the case of a negative duty. The conception full liberty is certainly the opposite of a duty. If it is reasonable that full liberty and half liberty are distinctive from each other, then both of them are all opposites of a certain duty. Some philosophers accept the equivalence of the negation of duty and half liberty. As Rowan gives us,

“Specifically, X is said to have a privilege to perform a certain act if and only if X has no duty to refrain from performing that act.” [\[16\]](#)

The same thing is expressed in another way by John Finnis,

“B has a liberty (relative to A) to ϕ , if and only if A has no-claim-right (‘a no-right’) that B should not ϕ .” [\[17\]](#)

It seems that the regulation of liberty as half liberty at least needs to be modified because of the connection between full liberty and duty. The point is, if full liberty is also opposite of a certain duty, positive or negative, and if we give up the above definition of half liberty, then in which way we can define half liberty and how to show the logical distinctiveness of this concept. As full liberty can be well justified to be equivalent to the negation of a certain duty, there is no need and no sufficient reason to hold the idea of half liberty. In fact, such an idea is not only groundless but also redundant. Besides, as has been shown above, a duty to do implies a liberty to do, because a duty to do implies the lack of a duty not to do and the latter means a liberty to do. If this is true, under any circumstances people will always hold liberty. One will be at liberty to do what he is obligated to; and of course he will also be at liberty if he is not under obligation. It seems to be absurd that liberty exists everywhere. In general, we take liberty as an advantage, as an opposite of obligation that is disadvantage. But the idea of half liberty implied by duty destroys the distinction between liberty and obligation. And how could we make clear the notion of obligation? If we negate a half liberty to do, we will get a half liberty not to do, and vice versa; if we negate a full liberty, we will get a disjunction of two half liberties. Generally speaking, we will not be able to negate liberty.

Sumner thinks that “ this feature of liberties follows from the fact that they are simply deontic permissions”, I am at liberty to do whatever the rules permit me to do.^[18] But if I am permitted both to do and not to do a thing, I still do not have liberty in the sense that I myself have control over my action. Full liberty cannot be identified with liberty in common sense as free choice. It seems to him that one of the main reasons to maintain the conception of half liberty is that there are mandatory rights, which are burdens as well as benefits.^[19] He gives the instance of children’s right and duty to attend school. Such right may be regarded as claim-right, not liberty-right. As a claim, it is certainly compatible with duty. For only a no-claim can be the opposite of the same subject’s claim-right. Similarly, my right to chair the meeting may co-exist with my duty to do so, if the right is regarded as a power to chair the meeting. Because I may have a power and a duty at the same time, these two relations do not contradict each other. In all these cases, the so-called mandatory rights are not liberty-rights. We should be careful to deal with such rights. As Hohfeld endeavors to distinguish different conceptions of rights, it is of course necessary to make clear which right can be taken as liberty in the Hohfeldian sense. And even if a few instances of *mandatory liberty* can be found, I doubt whether they can support the reasonability of this concept. Since so many liberties are treasured as free choice and so many burdens cannot be looked upon as benefits, liberty-right as relational conception in Hohfeldian scheme should be construed as free choice. The definition Hohfeld himself gives concerning this concept may be just an arbitrary thesis that he has made.

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[1] Hohfeld, 1923, p. 36, p. 65.

[2] See Rowan, 1999, p. 23-24; Sumner, 1987, p. 29. Rowan writes: " .second order relations describe the ways in which the first-order relations may be facilitated. In other words, they provide the rules for manipulating the first-order relations." This must be an imprecise or loose explanation of conceptions other than first-order ones. Powers and immunities can also stipulate and extinguish legal relations with the contents of other powers and immunities. It would be more precise for the analysis of Hohfeldian scheme to characterize these two conceptions as higher-order conceptions.

[3] Hohfeld, 1923, p. 38.

[4] *Ibid.*, p. 99.

[5] Rowan says, "privileges also differs from claims in that they are not relational in nature", because a privilege is not correlative to a duty. (1999, p. 23) This is obviously wrong, for a no-right indicates the same relation as the liberty does.

[6] Sumner, 1987, p. 24.

[7] Raz, 1980, p. 180.

[8] Sumner proposes that a liberty to do something with respect to everyone is non-relational, for the reason that in this case "I have no duty to anyone not to do it." (1987, P. 26.) But if someone else imposes his claim on me that I shall not do it, then he certainly violates my liberty to do that. Equivalently, I do not have a duty to him not to do that. Thus it is clear that I do have a liberty/no-claim relation to everyone.

[9] Hohfeld, 1923, p. 39.

[10] *Ibid.*, p. 39.

[11] *Ibid.*, p. 39.

[12] Sumner, 1987, p. 25.

[13] Sumner, 1987, p. 27.

[14] Right or claim is "a right in the strictest sense". See Hohfeld, p. 36.

[15] Sumner, 1987, p. 27.

[16] Rowan, 1999, p. 22.

[17] Finnis, 1980, p. 199.

[18] sumner, 1987, p. 26.

[19] *Ibid.*, p. 34.