

Concept of Licit Kindred

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Abstract

Law is an instrument created out of deliberate human action and not an incidental consequence of accidental happenings. It does not appear on its own and is not enforced automatically. Once it is established that positive law as we know it is conscious and deliberate product of human will, whether operating individually or collectively, there are two questions which confront us. The first one is as to the purpose of the law being created. What is the objective of the law? The second is concerning the modality by which the law will achieve its purpose. How is the law going to achieve its objective? This paper would be dealing with the concept of Jural Relations sinking its main focus on Hohfeldian Analysis.

1.1 INTRODUCTION

Since the initial publication in 1913, Hohfeld's analysis of jural relations has triggered a variety of debates and a great volume of literature. A lot of effort has been directed at dissecting his analysis. Even after a century of its publication and despite several doubts raised regarding the accuracy of his analysis, Hohfeld's propositions are as relevant today as they ever have been. His perceptive analysis of the material of law equips both the students and practitioners of law to understand and apply the law with greater clarity and more meaningful context. This assignment will focus on Hohfeld's analysis of power relations in a legal system in terms of its meaning and nuances. It will also address some of the criticisms directed at Hohfeld's theory and clarify the same.

A legal right must obtain not merely legal protection, but also legal recognition. It has been said that the legal material can be identified with reference to the use of the word 'law' by courts. The detailed rules so identified are distributed under various heads and new categories keep on emerging such as obligations, intellectual property and others. There are different ways of classifying the texture. There are:

- (1) Duties prescribing how people ought, or ought not, to behave with regard to others, who are said to have correlative claims or rights;
- (2) Liberties or freedoms to act and not to act;

- (3) Powers to alter existing legal situations
- (4) Immunities from having existing legal situation altered;
- (5) Location of legal relationships
- (6) Principles, doctrines and standards

1.2 PURPOSE OF LAW

Law is an instrument created out of deliberate human action and not an incidental consequence of accidental happenings. It does not appear on its own and is not enforced automatically. Once it is established that positive law as we know it is conscious and deliberate product of human will, whether operating individually or collectively, there are two questions which confront us. The first one is as to the purpose of the law being created. What is the objective of the law? The second is concerning the modality by which the law will achieve its purpose. How is the law going to achieve its objective?

The purposes/objectives of law may be varied and at times also contradictory.¹ The purpose of the law is inevitably connected with the subjectivities associated with the society in which law is supposed to be enforced. There is no uniform or ideal purpose towards which the content of different legal systems is oriented. The essence of a legal system lies in its capacity to be peculiar to the needs, requirements or wishes of the particular community which is to be governed by it or to the wisdom, whims and knowledge of those who are enacting the laws. However, there is always an underlying purpose behind the enactment of a law where it operates as an instrument for the attainment of the said purpose.

2.1 MECHANISM OF LEGAL RELATIONS

The modality with which law seeks to secure its objectives is mostly common across the variety of social and legal systems in which laws operate. Law secures its objectives primarily through the creation, extinction, regulation and enforcement of Jural/Legal relations.²

The simplest way to explain a legal relation would be describe it as a relation between two persons or set of persons determined by a rule of law.³

¹ Thomas Hobbes, *Leviathan* (Hachetel India 2010), John Locke, *Two Treaties of Government* (Twenty-first Printing Cambridge University Press 2010), Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Dover Publications 2007) Roscoe Pound, *The Spirit of the Common Law*, (Classic Reprint Forgotten Books 2012)

² There are declaratory provisions in laws which do not necessarily create legal relations. However even such provisions can be analysed in terms of the impact they have on existing or future legal relations

For example, let's consider an objective and then the legal relation through which law has sought to achieve the said objective;

The preamble to the Constitution of India provides that equality of opportunity as an avowed principle of the constitutional scheme.⁴ Thus, the Preamble, which serves as the vision statement of the framers of the constitution, establishes equality of opportunity as an objective which must be achieved through the constitution.

Article 16 (2) of the Indian Constitution provides;

“No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.”

Article 16 (2) creates a legal relation between citizens seeking an employment under the state on one hand and the appointing authority of the state on the other hand. The legal relation is created by vesting the citizens with an immunity against such discrimination and imposing on the appointing authority a disability [lack of power] to discriminate. Here ‘immunity’ and ‘disability’ are two constituents creating a legal relation which achieves the fundamental objective of the law to secure equality of opportunity to all its citizens. Once the legal relation has been created, if the terms of the legal relation are violated, the aggrieved party would have the recourse of the court to ensure that the terms so violated are honoured. Thus, if a citizen is discriminated on the grounds of his religion, such act of discrimination shall be stripped off its legal validity by the order of the courts.

Thus, law operates through such constituents to create legal relations which are enforceable in a court of law and the terms of the legal relations so created reflect the value orientation and policy of the law in terms of its objectives. Though ‘right’ and ‘duty’ are the most popular conceptions used to describe legal relations, it must be understood that they do not constitute the entire gamut of legal relations.

³ This explanation is based on the definition of jural relation proposed by Savigny; "a relation between person and persons determined by a rule of law. This determination by a rule of law consists in the assignment to the individual will of a province in which it is to rule independently of every foreign will" Cited in Albert Kocourek, 'Various Definitions of Jural Relation' Columbia Law Review (1920) 20 (4) 394

⁴ The Constitution of India 1950, Preamble; “WE THE PEOPLE OF INDIA, having solemnly resolved..... to secure to all its citizens.... equality of status and opportunity.”

3.1 HOHFELD'S SCHEME OF JURAL RELATIONS

Hohfeld's description of relations between various forms of legal entitlements reflects truths on features of legal rights. Hohfeld argued that the tendency to express all legal interest in terms of "rights" and "duties" resulted in confusion in the analysis of complex legal relations like trust, options, escrows, future interest, and corporate interest etc. in Hohfeld's own words:

One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems, frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties" and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate interests, etc.⁵

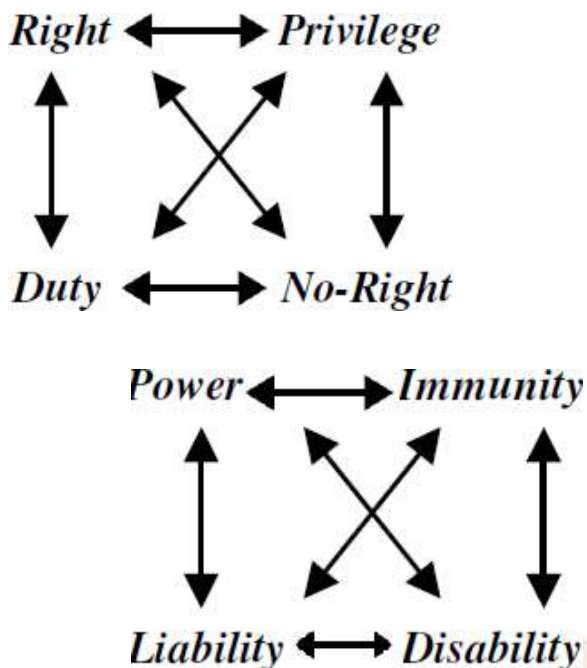
The prime reason for this confusion in his view was the inaccuracy of the terminology. Hohfeld observed that important legal terms, including "right" and "duty," had no agreed meaning and thereby caused muddled analysis.⁶ He notes that the term right was often used to denote several other distinct legal interests such as powers, privileges or immunities.⁷ The eight fundamental legal conceptions resulted from Hohfeld's dissatisfaction with the idea that all the Jural relations can be reduced to rights and duties.⁸ These concepts are duty, claim, liberty, no claim, power, liability, disability, and immunity. According to him fundamental legal conceptions are sui generis, which means that all the attempts aimed at creating a formal definition are not only dissatisfying but also useless. Hohfeld explained how these concepts logically related to one another through what he called "Correlatives" and "Opposites."

⁵ *Supra* .2

⁶ Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 239 (2002)

⁷ Arvind P. Datar, *Hohfeldian Analysis- Application of, by the Indian Judiciary: A lawyer's Perspective*, 18 SCC (weekly) (Dec. 21, 2012)

⁸ *Hohfeld's Scheme of Jural Relations* (Mar. 10, 2013). <http://www.pravri.hr/hr/savjetovanja/jurihohfelds.pdf>, 26/12/17



The vertical arrows couple jural correlatives, two legal positions that entail each other, whereas the diagonal arrows couple jural opposites, two legal positions that deny each other. The Horizontal arrows couple jural contradictories.⁹

Jural Correlatives

When one of these legal advantages or burdens concerning a particular subject matter, and arising from a particular transaction, is observed to inhere in one person, the correlative may be observed to inhere in some other person. The particular relation, In short comprises both correlatives.

Jural opposites [represented by constituents connected by the diagonal arrows]

Refer to the situation where the presence of one constituent in a particular factual context in X necessarily means that the jural opposite of such constituent cannot reside in X at the same time in relation to the same factual context.¹⁰ For example, if X has the power to make a will, he cannot at the same time have the

⁹ RWM DIAS, JURISPRUDENCE, 25 (5th ed. 1994)

¹⁰ A.K.W. Halpin, 'Hohfeld's Conceptions: From Eight to Two (1985) 44 (3) The Cambridge Law Journal 435; "Each fundamental legal conception may be contrasted with its opposite. The presence of the one indicates the absence of the other, with regard to a particular act or omission."

disability to make a will. It is possible that the element of disability is present in him in relation to another factual context [he has disability to imprison Y].

In the Indian context, an illustration can be borrowed from the Constitution of India. When The Constitution of India empowers¹¹ the Parliament of India to make laws regarding “Duties of customs including export duties”, it cannot at the same time be said that the Parliament does not have the power [has a disability] to make laws regarding “Duties of customs including export duties”. At the same time the Parliament does not have the power¹² [has a disability] to make laws regarding taxes on agricultural income [which is a separate factual context].

3.1.1 RIGHTS AND DUTIES

Rights (claim) and Duties Relation [‘You Ought’]

A right is a legal claim of one person that another person acts or omits to act in a certain way. The position of the other person is described by saying that he has a duty. According to him, the term “rights” is incorrectly used for denoting something that, in a certain case, might be a privilege, a power, or immunity, and not a right in the strictest. Hohfeld himself suggested the word “claim” as a substitute for “right”, but continued to use “right”.¹³ He pointed out that clue to right lies in duty, which is a prescriptive pattern of behavior. A claim is, therefore, simply a sign that some person ought to behave in a certain way.

Privileges (liberty) and No-Rights Relation [‘I May’]

Just as legal rights of one person are the benefits which he derives from legal duties imposed upon other person, so the legal liberties are the benefits which a person derives from the absence of legal duties imposed upon him. They are the various forms assumed by the interest which I have in doing as I please. They are the things which I may do without being prevented by the law. The sphere of my legal liberty is that sphere of activity within

¹¹ The Constitution of India 1950, Schedule 7 (List I) (Entry 83)

¹² The Constitution of India 1950, Schedule 7 (List I) (Entry 82)

¹³ A. K. W. Halpin, *Hohfeld's Conceptions: From Eight To Two*, 44 Cambridge L.J. 435 (1985)

which the law is content to leave me alone. Privileges may be accompanied with rights that impose duties on other people not to interfere. However, privileges can sometimes exist without the existence of a right.¹⁴

3.1.2 POWER-LIABILITY

Power denotes ability in a person to alter the existing legal condition, whether of oneself or of another, for better or for worse.¹⁵ "A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of an human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations. Examples of such are the following: the right to make a will or to alienate property; the power of sale vested in a mortgagee etc. The former are those which are vested in a person as an agent or an instrument of the functions of the state; they comprise the various forms of legislative, judicial and executive authority. The correlative of power is a liability. It is susceptibility to someone's exercising of a power. It is the position of one whose legal rights may be altered by the exercise of a power.

3.2 DISTINGUISHING POWER-LIABILITY FROM RIGHT-DUTY

Power is fundamentally different from a right as there is no corresponding duty which is created in another person as a consequence of one person being vested with power.¹⁶ Power only corresponds to a liability, which among other things might involve the possibility of a duty being created, but is not the same as having a duty. No such duty is created unless the power is exercised. Before the power is exercised, a duty is liable to be created,¹⁷ a possibility which will never mature if the power-holder refrains from the exercise of

¹⁴ Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 41 (1913).
<http://www.law.harvard.edu/faculty/cdonahue/courses/prop/mat/Hohfeld.pdf>

¹⁵ e.g. covenants in restraint of trade.

¹⁶ Dias explains the distinction in the following words; "... a claim is always a sign that some other person is required to conform to a pattern of conduct, a power is the ability to produce a certain result..... The power itself has no duty correlative to it." Dias (n 10) 34

¹⁷ Dias (n 10) 34; "If X deposits or lends a thing to Y, there is no duty in Y to restore it until X makes a demand. Before such demand is made, Y is under a liability to be placed under a duty. The demand itself is the exercise of a power."

power.¹⁸ Hohfeld explains this distinction by referring to the case of *Booth v. Commonwealth*. In this case the court had to consider a Virginia statute which provided the following;

"that all free white male persons who are twenty-one years of age and not over sixty, shall be liable to serve as jurors, except as hereinafter provided."

Hohfeld asserts that the provision only creates a liability to have a duty created which would arise only if the parties litigant and court officers in exercise of their powers have done the needful so that a specific duty upon a person to act as a juror has been created.

For example, the Parliament of India has the power to make laws regarding Duties of excise on tobacco and other goods manufactured or produced in India.¹⁹ As long as the Parliament in exercise of its power has not made a law by which excise duty is imposed on tobacco manufacturers, there is no duty on anybody to pay any excise duty. However all tobacco manufacturers have a liability to have a duty created wherein they will have to pay an excise duty.

RIGHT

POWER

B necessarily has a corresponding duty when A is vested with a Right.

When A has power, there is no corresponding duty vested in B. Power in A corresponds to a liability in B, which among other things like right and privilege, may also carry the possibility of a duty being created.

3.3 IMMUNITY - DIABILITY

¹⁸ Halpin (n 25); "Hohfeld uses power to capture a potential in one party to change the legal relations of another party, and in treating liability as capturing the correlative position of that other party, Hohfeld is clearly using liability to express a potential position rather than an existing obligation to provide a remedy."

¹⁹ The Constitution of India 1950, Schedule 7 (List I) (Entry 84)

The term “right” (generic term) is used in a fourth sense to mean immunity from the legal power of some other person. Just as a power is a legal ability to change legal relations, so immunity is an exemption from having a given relation changed by another.²⁰ Immunity is state of being safe from modifications of one’s entitlements by another. The correlative of immunity is disability. It is a lack or absence of power to change legal entitlements. For example, Diplomats are supposed to have diplomatic immunity. If they have committed a crime in their host country, they are immune against arrests and legal prosecution.

3.4 CRITICISM AND CLARIFICATIONS

Hohfeld’s analysis, like that of any other jurist, is not without criticism and dispute. There have been many issues raised and considerable literature devoted to locating flaws and inconsistencies in the theory of Hohfeld. As a general overview of the criticism on the overall theory of Hohfeld is not relevant here, our focus is primarily on the questions raised on the power-liability spectrum of Hohfeld. The most categorical remarks in this respect have been made by Halpin.

In order to appreciate his remarks on Hohfeld in relation to power-liability relations, it is essential to attend to two points Halpin makes to provide a platform for his remarks. First of all he attacks the concept of jural-opposites by emphasising that the idea of opposite is not a singular one.²¹ He contends that the same concept can have more than one opposite [opposite of *negation*, opposite of *extreme* and opposite of *alternative*] at the same time and thus the scheme of Hohfeld is inadequate in dealing with this complexity.

Then he dissects the conception of privilege as used by Hohfeld and contends two things;

1. The use of the term privilege by Hohfeld is not consistent wherein at times it has been used as an opposite of negation and on other occasions as an opposite of extreme.
2. Privilege is not a fundamental conception as it can be further broken down to other elements appearing in Hohfeld’s scheme.

²⁰ SALMOND, JURISPRUDENCE, 42 (12th ed., 2008)

²¹ Halpin (n 13); “Opposite is itself an ambiguous term. At the dining table, we make a distinction between the person sitting directly opposite another and the person sitting diagonally opposite him. If we turn from the diners to the food, the different uses of opposite can be further illustrated. The vegetables may be assessed as ‘fresh or stale.’ Or, with regard to a gourmet concern for eating vegetables picked on the same day, the option may be simply, ‘fresh or not fresh.’ Yet another possibility is to query whether the vegetables are ‘fresh or frozen.’”

His argument against the conception of power lies in his contention that power can be explained in terms of a privilege and it is thus not proper for it to be accorded the status of a fundamental conception.

He relies on the following example:

For example if B has already made an offer in contract to A, then A is said to have the power to impose a contractual obligation upon X, by posting a letter of acceptance. The action of A (posting the letter of acceptance) brings about the legal relation of B (being under a contractual obligation).

He contends that the power of A involves as a first constituent, a permission by law to do an act. In this case it is posting of the letter of acceptance. His contention is that such a permission amounts to a privilege. The second constituent, according to Halpin is the potential legal relation dependent upon the doing of the act.

He bases his conclusion that power is not an independent and fundamental concept primarily on this deduction.

However, the criticism is unfair as it is premised upon a misplaced understanding of the dynamics contemplated by Hohfeld. The question of whether a person has the permission to do an act or a compulsion to do an act is separate from the considerations involved in judging the nature of the act. Hohfeld never included the initial consideration of permission/compulsion in his conception of power. His conception of power is entirely based on the legal consequences inherent in the act. What Halpin refers to as the first constituent is never taken into consideration in deciding whether a person has power or not. It may be a concurrent constituent along with power but never a part of the connotation of power. This can be best understood by the fact that there are privileges to do an act which do not affect anybody's legal relations at all.²² The understanding of power does not involve any discussion on whether the person has the permission to do the act. The only concern is the nature of the act in question.

Another point raised by Halpin points to the supposed inadequacy of the bipartite power- liability relation discussed by Hohfeld.⁵⁷ He cites the following example to make his point:

Suppose A has the power to vest a legal estate in land in B. This involves a change in Bs legal relation not only with A, but also with X Y, Z, etc., since a legal estate in land gives B rights with correlative duties in these parties, as well as in A. If one were to set aside the relations with X, Y, Z, etc., A's power would be something

²² Singing in one's own house is an exercise of the freedom of expression without having any impact on any kind of legal relations.

less than a power to vest a legal estate in land in B: it would, at the best, be a power to give B a contractual right to the land, enforceable only in person against A himself.

He says that the act of A does not simply affect B but other persons as well.⁵⁸ In this regard, his contention is that the liability of B only represents a partial correlative of the power of A as the liability of others has to be considered to capture totality of the correlative spectrum.

This criticism, like the earlier one, misses the point being made by Hohfeld. When A has the power to affect the legal relations of B, it need not necessarily be the relations vis-a-vis A. When A has the power to create a right in B, the corresponding duty may be in any person or any number of persons as suggested in the above example. However, we have to consider that such duties are a consequence of the right being vested in B which, even though simultaneous, are not directly linked with A. They are not liable to the power of A in the same sense as B. For example, A cannot create a duty in X, Y or Z independent of B. A's influence on X, Y and Z is through his capacity to affect the legal relations of B by an act. Thus, even though, X, Y and Z are impacted by the act of A, the act in question is in relation to B alone. Thus there is no multitude of correlative of which B's liability is only a part. It is but obvious that when B's legal relations are impacted, it might include in its fold many persons connected to B by legal relations. That however, does not put all of them into the matrix of power-liability relationship between A and B.

4.1 CONCLUSION

The words commonly used to describe legal relations frequently convey multiple inconsistent meanings. The confusion that results from this inherent weakness in the language of the law has produced many attempts to reduce that language to terms that suggest a single idea. A most remarkable theory of reduction was expressed in Professor Hohfeld's formulation of a logical system of language based on fundamental legal conceptions. Hohfeld's theory was intended, to "aid in the understanding and solution to practical, everyday problems of the law". Hohfeld claimed to have identified the eight fundamental legal conceptions, and as such to have provided a technical apparatus for legal analysis: the atomic elements into which all legal material can be reduced. Those fundamental legal conceptions are sui generis, which means that all the attempts aimed at creating a formal definition are not only dissatisfying but also useless. The most satisfying approach is to lay down various jural relations in a scheme of "opposites" and "correlatives" and, then, to proceed with stating examples of their individual scope and application in concrete cases. Hohfeld did not only correct minor technical mistakes but he also offered a radical critique of previous concepts of legal rights and liberties.

The Hohfeld's analysis can be said to have rather little impact. This may be true, it has to be admitted however that the strength of the conclusion is undiminished. In the final analysis Professor Hohfeld's contribution to the

language of rights continues to be highly valued. Drawing public attention to the importance of appropriate terminology in rights cannot be ignored even if the conclusions as to what is or is not appropriate are not the same as he recommends.

Whole concept can be summarized as

❖ Law is a purposive instrument which does not exist without any objective.

Law operates primarily through the mechanism of 'legal relations' to achieve its objective.

- ❖ Hohfeld's scheme of Jural Correlatives and Jural Opposites presents a lucid and categorical understanding of the relational dynamics through which law operates.
- ❖ The Power-Liability relation is significantly different from Right-Duty relation.
- ❖ Power as a constituent does not operate in isolation and there is interplay of power with duty and privilege.
- ❖ Halpins' criticism of Hohfeld in relation to the concept of power is based on a misplaced understanding of the difference between the nature of an act and the process of taking a decision about doing the act.
- ❖ Hohfeld's analysis is a valuable tool for a better understanding of the law.

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