

Explaining or Guiding Legal System: Hohfeld's Approach of Rights

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Abstract: *In the early twentieth century, an American jurist, Wesley Newcomb Hohfeld, proposed an analytical scheme of jural relations. He put forward four pairs of basic legal elements to justify the nature of the entire legal relations in reality, which however incurs a large number of criticisms from various perspectives in academic literatures. This essay will analyse and respond certain main criticisms on the basis of appropriate interpretation of Hohfeld's framework and explore one of primary flaws of his theory.*

Keywords: *Hohfeld; analytical platform; criticism; response; failure of guiding*

1. Introduction

In the early twentieth century, Wesley Newcomb Hohfeld, an American jurist, proposed an analytical scheme of jural relations. In order to justify the nature of legal relations, Hohfeld specified four pairs of fundamental legal elements, namely claim-right (duty), privilege (no-right), power (liability) and immunity (disability).

Over the last century, the growth of analytical jurisprudence has been positively influenced by Hohfeld's methodology. On the other hand, Hohfeld's analysis, however, attracts plentiful criticisms from the fellow jurists, one of which is whether Hohfeld's approach could explain the entire legal system and to what extent his arguments remain relevant and applicable.

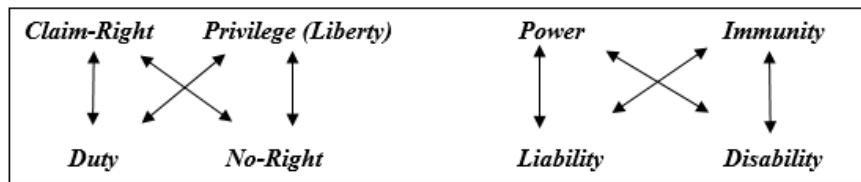
Although Hohfeld's approach incurs various criticisms, the entire legal system could still be approximately explained by his analysis. The main flaw, however, is that Hohfeld fails to provide guidance, not an explanation, of jural relations. This essay will explore this position in three parts. Part II will brief the overview of Hohfeld's approach. Part III will reveal certain main criticisms and correspondingly respond to these concerns by proper interpretations. Part IV will criticise Hohfeld's theory on the failure of guiding the legal practice.

2. Background

2.1 Overview of Approach of Rights

Hohfeld laid down different jural relations in four pairs of 'opposites' and 'correlatives' and confined the ambit of each phrase, in an effort to assist in understanding the nature and resolution of daily and practical legal issues.^[1] The following table modified by Glanville Williams might reflect his perceptions more accurately:^[2]

The vertical arrows refer to jural correlatives, which means 'two legal positions that entail each other'.^[3] By contrast, the diagonal arrows point out jural opposites; that is 'two legal positions that deny each other'. For instance, if A has the claim-right to get repaid based on a contract, then A manifestly lacks such no-right and B has the corresponding contractual duty to reimburse A. The same logic also applies to other elements.



2.2 Preliminary Observations

As a result of Hohfeld's unique approach, the following three preliminary observations are helpful to avoid reader's misunderstanding and reorient their expectations.

First, Hohfeld's main contributions are to provide an analytical 'method' or 'platform' based on legal practices. Such 'platform' is composed of the above four pairs of fundamental elements. By elucidating the precise interpretation of each element, the substantive legal contents are stripped and the complicated jural relations could be explained. Therefore, Hohfeld's approach is merely regarded as a formal tool to explain jural relations; nevertheless, it offers little or no guidance in a particular substantive field, like torts and contracts.

Secondly, Hohfeld believed that 'privilege' is not bound to be secured by the 'right'.^[4] In particular, privileges refer to permissions to conduct in a certain manner 'without being responsible for the damage towards others who, simultaneously, are not in a position to call in the authorities to prevent such action'.^[5] For example, A owns the bread and allows X to eat the bread without guaranteeing no interference.^[6] Put differently, when X is eating the bread and suddenly A manages to rob the dish from X, X has no claim against A over the food. Therefore, Hohfeld firmly distinguished the 'claim-rights' and 'privileges' and no logical connection exists between them.

Thirdly, what Hohfeld concerns is restricted to the legal examination only, excluding the discussion of politics (and morality) issues.^[7] His main objective is to identify and address common issues in legal practices, not to investigate philosophical or ethical considerations about the law. Consequently, some issues transcending this narrow legal examination are not explored by Hohfeld, such as the extent to which the morality and politics should be considered when enacting a legislation.

3. Criticism and Response to Hohfeld's Approach

The fellow scholars mainly criticised Hohfeld's approach on the failure to explain certain legal issues in this part. However, these criticisms partially misinterpret Hohfeld's analysis. As discussed in Part II, his analysis established an analytical platform in nature, aiding to clarify complex legal relations. Therefore, from the 'explanation' perspective, Hohfeld's approach could reconcile with these criticisms.

3.1 Property Law

The Hohfeld's property framework comes under fire for failing to explain the doctrine of *numerus clausus* and the 'in rem' feature of proprietary rights. However, appropriate interpretation can answer these concerns.

3.1.1 Numerus Clausus Doctrine

A proprietary jural relation may represent a bundle of Hohfeld's basic elements, namely a liberty to dispose of the land, a claim-right for legal remedies for anyone's trespass, an immunity from other interferences and a power to grant a licence to someone.^[8] Theoretically, the contractual jural relation probably renders the proprietary rights indefinite or even arbitrary; nevertheless, the court recognises only limited kinds of right legally characterised as 'property' according to the *numerus clausus* principle.

However, those above criticisms could be rebutted by the Newman's interpretations of the Hohfeld's framework.^[9] A 'bundle of rights' approach does not necessarily mean the bundle is limitless. As an analytical platform, Hohfeld never insists that any limitation imposed on such bundle of proprietary rights is unacceptable and unlawful. A sophisticated bundle of rights never infers an arbitrary scope of rights, which thereby conforms with the *numerus clausus* principle universally recognised by the court.

3.1.2 In Rem Feature

The Hohfeld's analysis highlighted the relationships between two parties.^[10] In this sense, this

analysis overlooks the role of proprietary rights whose ‘*in rem*’ characteristic can exclude the world. Specifically, Hohfeld may not explain a practical situation. A, as an owner of a piece of land, has the right to exclude any third party(X) from entering and X assumes the duty not to trespass the land. However, in this case, A still needs to fulfil the duty to exclude X by fencing up or locking the door, which means the duty is transferred from X to A. Thus, it conflicts with Hohfeld’s fundamental argument that someone other than the title holder bears the corresponding duty.

Rather, Hohfeld analysis accords with the ‘paucital’ characteristic of proprietary right in essence. Newman construes the ‘paucital’ characteristic as having: firstly, claim-rights to access legal remedies if adversely interfered by others; secondly, liberties to grant and revoke licences conferring certain proprietary interests upon others; thirdly, powers to change the jural relations with others; and fourthly, immunities from excessively alter the jural relations. Accordingly, the ‘right’ to exclude the world could be construed as privileges to impede the access of others, coupled with the claim-rights for legal remedies if someone breaches. As to the circumstance mentioned above where the duty seems to be transferred, A indeed has the liberty (not duty) to exclude X and instead, if X trespasses onto A’s land, a claim-right for judicial remedy is available for A. Thus, Hohfeld is in a position to explain the proprietary jural relations based on the proper interpretation of his scheme.

3.2 Criminal Law

Hohfeld’s analysis incurs the criticism of the failure to explain some occasions in criminal law where only the duty arises without the claim-right.^[11] Hohfeld argues that claim-rights and duties must exist together as correlatives. To illustrate, the judge owns a duty to judge whether the accused is guilty in a trial. However, it makes little sense that the accused has the claim-right to require the judge to trial his offence.

However, an accurate understanding of the judge’s role may support Hohfeld to strongly refute this criticism. Traditionally, the judge served as a spectator.^[12] In light of this, the judge does not engage in the real jural relations, but the real participants are the accused and the victim. Hence, the victim has the claim-right to revenge the accused by the court through the exercise of judicial power. By the court order, the accused bears the duty to pay any fines or accept other penalties.

The modern role is that a judge bears a fiduciary duty to the general public, not the accused.^[13] The court is required to maintain the public confidence in the integrity of the justice. Without a justified response to the accused’s alleged offences, the public confidence would be largely undermined. In this sense, the public in nature has the claim-right to judge the accused; whereas, the court just fulfils no more than its fiduciary role. Therefore, even if there is no victim, the court, as a fiduciary on behalf of the public, can still exercise the claim-right to evaluate the offender.

3.3 Freedom of Speech

Glanville Williams criticised Hohfeld’s framework in terms of the freedom of speech given that no correlative duty exists. In a person-person relationship, if A has the freedom of speech, B cannot be considered as owing duties to listen to or assist A’s saying. Even if B does not keep quiet at that precise moment, A still cannot pursue the legal remedies concerning B’s disturbance. Here, the only probable duty might be that B cannot to gag A. However, such duty could be better regarded as a part of the duty that not to interfere A’ life. Thus, the non-gaging duty is not logically associated with the freedom of speech.

Further, in a person-government relationship, Ronald Dworkin criticised that the government had no duty to respect a person’s freedom of speech.^[14] Assuming that A’s freedom of speech is impinged by the state regulation, and A genuinely believes such regulation is wrong or illegal, the issue is whether A has the claim-right to break the law or to require the court to read down related legislation or executive actions. Notwithstanding an affirmative answer is accepted in theory, the government rarely respects this kind of interferences with a in practice. In the UK or Australia, for instance, the doctrine of the principle of legality and parliamentary sovereignty discourages the court from judicial review on such interferences.^[15] Even in the US with a Bill of Rights, an unlimited scope of judicial review is also prohibited. Therefore, no correlative duty appears to respect the freedom of speech.

The concern of having no correlative obligation, however, would be fully justified by the accurate construction of Hohfeld's analysis. Theoretically speaking, the duty to safeguard freedom of speech is better interpreted as a ‘supererogatory obligation’, not a general duty.^[16] The supererogatory obligation

refers to an ethical obligation more than necessary but not legally required to be done, which is distinctive from a legal duty under the Hohfeld's framework. As a consequence, there is no rationale to discuss a definition which falls beyond the scope of what Hohfeld analysed.

On the assumption within the scope of Hohfeld's framework, the freedom of speech would rather be interpreted as a 'liberty' than a 'claim-right'. As discussed in Part II, there is no necessary connection between them and no duty ought to align with the liberty. Accordingly, others never owe the duty to listen to A's liberty of speech, and the government is not subject to the duty of respecting A's freedom of speech. Hence, both the person-person and person-government relationships could be approximately explained by Hohfeld's analysis.

Furthermore, even if the freedom of speech is interpreted as a claim-right, this does not pose a challenge to Hohfeld's analysis yet. Regarding the person-person perspective, the freedom of speech is not construed as a pure claim-right, but a mixture of the liberty to deliver the speech, and the claim-right of legal remedies when the freedom is unreasonably threatened by someone. Regarding the person-government perspective, acknowledging A's interference as a claim does not rule out the existence of a government's claim-right of interference.^[17] The following issue is which interference prevails. To address such issue, the moral and policy standards would be considered undoubtedly, which transcends Hohfeld's framework.

4. Explanation or Guidance

While Hohfeld provided an analytical platform to explain various jurial relations in different legal areas, an explanation is not identical to the guidance. Hohfeld explained what the law is, but not what the law ought to be, which means the Parliament might not enact a legislation by what he analysed. In this respect, Hohfeld's approach may be flawed in that it is incapable of guiding legal practice.

On one side, Hohfeld does not provide a guideline stipulating what the law demands. Generally, a law reveals some conditions of conferring rights on, and depriving the rights of, people, and the results of granting rights to individuals. Obviously, Hohfeld's analysis fails to identify and forecast these conditions and results. With respects to the property law, Hohfeld's analysis cannot elaborate on what is the specific scope of the bundle of proprietary rights. More importantly, Hohfeld left the blank on how to combat the priority issue. For example, if the vendor sold a villa to purchaser A, and subsequently registered this house to another *bona fide* purchaser B in secret, Hohfeld cannot guide us who can obtain the proprietary title successfully. A similar example could also be noticed in criminal law, like the incapacity of identifying the definition of reasonableness.

On the other side, a law would more or less reflect the political factors and moral values. Concerning the protection of freedom of speech, the crucial issue is whether the citizen's interference or the government's interference overrides. In order to answer this question, political and moral considerations are inevitable contributory factors. Instead, Hohfeld omitted from informing us of to what extent the balance can be struck between these considerations. In practice, governmental interferences are frequently positioned on the top priority, which gives rise to the detrimental impingement on the citizen's freedom of speech. However, Hohfeld's approach cannot justify whether this practice is consistent with what the law ought to be.

In practice, joint claiming two kinds of claim-rights may trigger some dilemma which Hohfeld fails to resolve. For example, a practical challenge may involve how to address a conflict between upholding the freedom of speech and respecting the freedom of privacy. The protection of both freedoms is frequently interrelated but to some extent cannot be reconciled.^[18] Excessive attentions paid to the freedom of speech may naturally offend someone's privacy, while exorbitant protections for the freedom of privacy may inevitably entail restrictions on the freedom of speech. For example, privacy claims on some websites are used without justification to prohibit the dissemination of individual information, in order to limit reporting on matters due to the public interest and to avoid public scrutiny, which reasonably or unreasonably results in restricting 'individual's freedom of speech. Thus, Hohfeld's approach lacks in guidance on the way to tackle this conflict.

5. Conclusion

Hohfeld's contributions can be briefly described as a creation in the form of an analytical platform. Despite the fact that Hohfeld's platform attracts various criticisms on certain aspects of property law,

criminal law and freedom of speech, Hohfeld's analysis is still able to explain different jural relations resulted from the entire legal system via the accurate understanding and proper interpretation. However, an explanation of the whole judicial relations does not result in a guidance on what those relations ought to be exhibited and dealt with by the law, since Hohfeld took into account of neither reasonable and necessary requirements of a law nor relevant political and moral factors. Despite such minor deficiency, Hohfeld's scheme still plays a significant role in progressing the public and academic understanding of jural relations both in theory and practice.

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