2013

Student Submission: The Right to Religious Freedom & the Hohfeldian Analysis of Rights

Francois A. Fontaneau

University of Notre Dame Australia (Sydney), francois.fontaneau@hotmail.fr

Follow this and additional works at: https://researchonline.nd.edu.au/solidarity
ISSN: 1839-0366

COMMONWEALTH OF AUSTRALIA
Copyright Regulations 1969
WARNING

This material has been copied and communicated to you by or on behalf of the University of Notre Dame Australia pursuant to part VB of the Copyright Act 1969 (the Act).

The material in this communication may be subject to copyright under the Act. Any further copying or communication of this material by you may be the subject of copyright protection under the Act.

Do not remove this notice.

Recommended Citation
Available at: https://researchonline.nd.edu.au/solidarity/vol3/iss1/7

This Article is brought to you by ResearchOnline@ND. It has been accepted for inclusion in Solidarity: The Journal of Catholic Social Thought and Secular Ethics by an authorized administrator of ResearchOnline@ND. For more information, please contact researchonline@nd.edu.au.
Student Submission: The Right to Religious Freedom & the Hohfeldian Analysis of Rights

Abstract
The Hohfeldian analysis of right is an excellent analytical tool for the comprehension and the implementation of any type of rights. Its pragmatic approach made of a precise terminology and a solid logic leads us to identify, for a given right, the actual content of the right as well as the parties involved. The Hohfeldian three-term articulation of the human right that is the right to religious freedom expressed in Vatican II’s declaration Dignitatis Humanae, fulfils the function wanted by its author of providing clear thinking, in view of a correct understanding and a correct use. Translated into an Hohfeldian right, the right to religious liberty becomes a claim-right, held by any natural or legal person, not to be interfered with or coerced in the performance of religious activities, in private or in public, alone or in association. This claim-right is simultaneously held against any other human being, group or association; each of them bearing the correlative Hohfeldian duty. The Hohfeldian reasoning also leads to us to identify the particular relation that a government has with the right to religious liberty: a two-faceted relation composed firstly of the pure Hohfeldian duty not to interfere with or coerce (held by any natural or legal person), as well as a further duty of promotion and protection, proper to governments in relation to any human right.

Cover Page Footnote
Acknowledgment: The theme of this article has been suggested by Professor John M. Finnis from the University of Oxford, whom I would like to thank for providing a critic of the original essay upon which this article is based.

This article is available in Solidarity: The Journal of Catholic Social Thought and Secular Ethics: https://researchonline.nd.edu.au/solidarity/vol3/iss1/7
The Right to Religious Freedom & the Hohfeldian Analysis of Rights

Francois Fontaneau

This article discusses the Hohfeldian analysis of rights in relation to the right to religious freedom expressed in Vatican II’s declaration *Dignitatis Humanae* (*DH*). It will be argued that the Hohfeldian scheme of rights is a powerful analytical and rhetorical tool useful for the comprehension and implementation of any type of right, including a moral or human right such as the right to religious freedom. Indeed, the Hohfeldian three-term articulation of a right properly emphasises the relational aspect of justice and fulfils its goal of clarification by compelling us to identify, each time a right is expressed, who holds the right, who bears the correlative duty and what is its actual practical content. Beyond the identification of the parties, as well of the identification of the *act-description*, the Hohfeldian reasoning points out the particular relation that a government has with the right to religious freedom: a two-faceted relation which includes the pure Hohfeldian duty not to interfere or coerce, as well as an active aspect of protection and promotion. After a presentation of Hohfeld’s system and of the right to religious freedom, this article will describe and discuss the beneficial Hohfeldian articulation of the right to religious liberty, and the particular responsibility that a state-government has with that right.

Wesley Newcomb Hohfeld was an American legal theorist and a Professor of Law at Stanford University and Yale University, who suffered a premature death at the age of 39 in 1918. Hohfeld’s body of work is fully contained in a short series of remarkable articles published in different law reviews between 1909 and 1917. His famous article – *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* –, is a work of analytical jurisprudence (originally published in 1913) that is regarded as a major contribution to legal theory and legal culture. Hohfeld saw that a great number of mistakes and unnecessary complexities were caused by a general confusion surrounding key legal terms such as ‘rights’ and ‘duties’. It was therefore his ambition to provide law practitioners with a tool of analytical jurisprudence capable of

---

suppressing ‘ambiguities’ and ‘inadequacies’, in order to facilitate the clear understanding, and so the resolution of legal problems.\(^5\) If Hohfeld’s work was theoretical, its aim was certainly practical. Theoretical work was for him a means to an end, and in this case the end was the resolution of everyday legal problems: Hohfeld’s work was to contribute to the development of well functioning processes of law, necessary to the flourishing of human societies.\(^6\) Hohfeld was particularly concerned with the one word ‘right’ which was in his view continually and alternatively used to refer to what were in fact four distinct legal concepts; those four concepts, which will become the four Hohfeldian rights are: a right stricto sensu (also called a claim-right), a privilege (also called a liberty), a power and an immunity.\(^7\) The analytical tool crafted by Hohfeld captures those four distinct meanings of the one word ‘right’ within a ‘scheme of opposites and correlatives,’ which offers one correlative and one opposite for each of the four meanings.\(^8\)

\[\text{Jural Correlatives:}\]
\[
\begin{array}{cccc}
\text{Right} & \text{Privilege} & \text{Power} & \text{Immunity} \\
\text{Duty} & \text{No-right} & \text{Liability} & \text{Disability} \\
\end{array}
\]

\[\text{Jural Opposites:}\]
\[
\begin{array}{cccc}
\text{Right} & \text{Privilege} & \text{Power} & \text{Immunity} \\
\text{No-right} & \text{Duty} & \text{Disability} & \text{Liability} \\
\end{array}
\]

A claim-right (what Hohfeld has called a right stricto sensu), a liberty (what Hohfeld has called a privilege), a power and an immunity are all (Hohfeldian) rights. They are the four basic types of rights.\(^9\) It must be noted that in Hohfeld’s system, any legal relation involves two persons and two persons only, and within this relation only one activity of one of the two persons.\(^10\) As we can see on the first table, each of the four Hohfeldian rights has a correlative. This means that, for example, A’s claim-right that B should do x always correlates with B’s duty to do so; if B’s


\(^8\) Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’, p. 710.


duty to do x does not exist then A’s claim-right does not either.\(^{11}\) There are no Hohfeldian rights without correlatives: ‘claim [claim-right] and duty, like other pairs of correlative concepts, must go with one another because they describe two sides of one relationship.’\(^{12}\) Professor John Finnis has made the observation that any Hohfeldian legal relation contains two positions, each occupied by one person, and one description of conduct, which he calls an ‘act-description.’\(^{13}\) It follows that to state a Hohfeldian right is to state a three-term relation between person A, person B and an act-description.\(^{14}\) This clarification is viewed as increasing the sharpness of the Hohfeldian analysis.\(^{15}\) A further point made by John Finnis should also be noted: for person A to have a claim-right never results in A having to do or not to do x, but is rather always about person B doing or not doing x in relation to A, who is the claim-right’s bearer.\(^{16}\) A’s claim-right is therefore either, positively, a right to be given something or to be helped in some way by someone else, or negatively, a right not to be interfered with or treated in a certain way by someone else.\(^{17}\) Furthermore, John Finnis has argued that Hohfeld’s analytical system of rights produces the following six logical relations, in which A and B represent a natural or a legal person, and \(\phi\) an act-description:

1. A has a claim-right that B should \(\phi\), if and only if B has a duty to A to \(\phi\).
2. A has a claim-right that B should not \(\phi\), if and only if B has a duty to A not to \(\phi\).
3. B has a liberty (relative to A) to \(\phi\), if and only if A has no-claim-right (a no-right) that B should not \(\phi\).
4. B has a liberty (relative to A) not to \(\phi\), if and only if A has no-claim-right (a no-right) that B should \(\phi\).
5. A has a power (relative to B) to \(\phi\), if and only if B has a liability to have his or her legal position changed by A’s \(\phi\)-ing.
6. B has an immunity relative to A’s \(\phi\)-ing, if and only if A has a disability (a no-power) to change B’s legal position by \(\phi\)-ing.\(^{18}\)

Before looking at how the Hohfeldian scheme of rights can help us articulate the right to religious freedom, it should be observed that Hohfeld’s schema of rights seems to be particularly relevant if one takes the Thomist position that justice is about relationships between individuals: that justice is ‘the willingness to accord to the other his or her right \{ius suum\}, or

---


\(^{13}\) Ibid.

\(^{14}\) Finnis, Natural Law & Natural Rights, p. 199.


\(^{16}\) John M. Finnis, Philosophy of Law, Collected Essays: Volume IV, p. 378.

\(^{17}\) Finnis, Natural Law & Natural Rights, p. 200.

\(^{18}\) Ibid., p. 199.
synonymously, *what is his or hers {suum}*. In this understanding, a right is said to be a benefit, and advantage ‘secured for persons by rules regulating the relationship between those persons and other persons subject to those rules’. A right is a way of protecting an advantage that a person has, in justice, in relation to another.

The right to religious liberty expressed in Vatican II’s declaration on religious freedom, with which this article is concerned, is a natural right (or a human right as the contemporary idiom goes). A human right describes a universal moral principle prescribing how human beings should treat one another on the ground of their shared humanity; regardless of any other distinctions such as race or social status, and whether or not the particular right is sanctioned by positive law. It is therefore said that a human right is universal and inalienable. The right to religious freedom is grounded in the dignity of the human person, who is gifted with reason and free will, and who, as such, has authorship over his or her life. The right is equally and subsequently grounded in the human inclination (and moral duty) to seek and follow the truth, especially in matters religious – a religious truth which ‘cannot be imposed except by virtue of its own truth’.

The first question that we need to consider is whether or not the Hohfeldian scheme of rights is suitable for the articulation of a moral/human right. Wesley Hohfeld was originally concerned with private law while designing his system; however it has been argued that the powerful analytical and rhetorical tool that he crafted has the potential to be used in many other areas of study. His scheme of rights can articulate any type of right, and is particularly useful for rights which may appear abstract, but which nevertheless ought to be recognised by positive law, and so apply in practice.

---

21 As noted by Allen Thomas O’Rourke (O’Rourke, ‘Refuge From A Jurisprudence of Doubt: The Hohfeldian Analysis of Constitutional Law’, p. 152), we touch here on the philosophical question of what a right is. Two competing theories provide two different general definitions: there is on the one hand the ‘interest theory’, also called the ‘benefit theory’ which is briefly described in this article, and on the other hand, the ‘will theory’ or ‘choice theory’ that defends the position that a right exists for a person only when this person is able to demand or waive its enforcement.  
24 Second Vatican Council, *Dignitatis Humanae: Declaration on Human Freedom* (7 December 1965), section 1. As one seeks the truth in accordance with one’s conscience (being bound by it), one must be respected. One cannot be forced to act against one’s conscience and/or one’s religious beliefs. Furthermore, if the right to religious liberty is not ‘an implicit right to error’, the Catholic Church ‘recognises that whatever is good or true in other religions comes from God and is a reflection of his truth.’ (First quotation of this footnote: Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, p. 212. Second quotation: Catholic Church, *Compendium of the Catechism of the Catholic Church*, p. 64.)  
constitutional law, 26 while as early as 1925 John R. Commons argued that the Hohfeldian analytical framework was ‘just as applicable to the shop rules of an industrial concern, or to the ethical rules of a family or any of the many cultural concerns, as they are to the supreme political concern.’ 27 Finnis writes: ‘the logic that we uncover in legal uses of the term ‘a right’ and its cognates will be found largely applicable for an understanding of ‘moral’ rights-talk.’ 28 Wesley Hohfeld intended to craft an analytical tool able to provide clear thinking and so help us solve practical human problems linked to the use of the word ‘right’, 29 and by using this very tool to uncover the practical applications and implications of the right to religious liberty – a natural right –, we are indeed using his tool for what it was designed for.

The right to religious liberty, as it is expressed in Vatican II’s declaration on religious freedom, concerns ‘the free exercise of religion in society’ 30 and is described in the text as an ‘immunity from coercion’ 31 in religious matters. It is the right to be free from coercion by any individual, social group or human power, in the private or in the public practice of religion. 32 This practice covers a wide range of activities, ranging from the inner personal reflection about religious matters, to the practical consequential expression of this reflection in public and in association (within due limits such as the rights of others, public peace or public morality). 33 Dignitatis Humanae, and through it the Catholic Church, advocates for the constitutional recognition of the right to religious liberty which, as any fundamental human right, ought to be sanctioned in some ways by positive law, and translated into a civil right. 34 This is where the Hohfeldian analysis of rights comes into play, equipping us with a sharp and solid analytical tool that helps to translate the human right that is the right to religious liberty, into a legal right with all its practical applications and consequences. The Hohfeldian analysis guides us through this process of translation and discernment of practical implementation. Through this process, the Hohfeldian analysis sheds particular light on the right to religious liberty, thereby enhancing our understanding of it.

Articulated through the Hohfeldian framework, the right to religious liberty expressed in DH becomes a claim-right not to be interfered with or coerced in the performance of religious activities, in private or in public, alone or in association. This Hohfeldian claim-right is held by all human beings simultaneously against every other human being, group or association –

---

28 Finnis, Natural Law & Natural Rights, p. 198.
30 Second Vatican Council, Dignitatis Humanae, section 1.
31 Ibid.
32 Ibid., section 2.
including governments. Let us make clear that even though DH legitimately uses the word ‘immunity’ to describe the right, this right is not an Hohfeldian immunity, but indeed a Hohfeldian claim-right. This fact poses no logical contradiction. The Hohfeldian framework allows us to state the following deductions in relation to the right to religious liberty:

- A has a claim-right that B should not φ, if and only if B has a duty to A not to φ.
- A = one natural or legal person – any person.
- B = one natural or legal person – any person (e.g. state government).
- φ = interfere with/coerced in the performance of religious activities, in private or in public, alone or in association.

The duty correlating the claim-right to religious liberty is one borne by all natural or legal persons, not to interfere with or coerce another’s (anyone) religious activities, granted that those activities are being performed with respect to the rights of others, and with respect to public peace and public morality. This duty is the main preoccupation of the DH.35

Now that we have been able to identify who enjoys the claim-right to religious liberty, and who bears the correlative duty, the next question brought into view by the Hohfeldian analysis is the one of the act-description. When we say that, for example, Mitchell is not be interfered with in the performance of his religious activity by the government, what do we mean by religious activity? In other words, what is the content of this particular act-description? The answer has already been evoked but ought to be spelt out. It appears that two sub-levels can be found within the denomination religious activities. The first level is one’s inner reflection about transcendental realities: the personal quest for truth in religious matters.36 This element, remaining in the private sphere, might appear to be safe from being interfered with but nonetheless requires ‘psychological freedom’37 of which the existence is not always evident. Citizens of totalitarian states lack that freedom. On a different level, one could also argue that this freedom is not intact in over secularised societies in which religious truths and religious activities are increasingly viewed and denounced publically as irrational; regarded as no more rational than superstitions or child’s fables. If the right to religious liberty were to be sanctioned by positive law, it would be the legal responsibility of a government to ensure that an environment favourable to psychological freedom exists.

As a natural consequence of the first level (one’s inner reflection), the second level covers the external expressions of one’s belief, alone or in association, in private or in public, and is also the natural consequence of the social nature of man.38 Public and communal expressions of religious beliefs are intrinsic to the very concept of religion. As argued by Finnis, the term ‘religion’

36 Second Vatican Council, Dignitatis Humanae, section 3.
37 Ibid., section 2.
38 Ibid., section 3.
necessarily implies activities which go beyond the private and the individual level to reach an associative, social and public one. There is no such thing as a private religion.

The Hohfeldian analysis of rights fulfils its goal of clarification by allowing us to identify who enjoys the claim-right to religious liberty, and more importantly who bears the correlative duty. The Hohfeldian analysis also compels us to clearly identify the content of the act-description. As we saw, the human right to religious liberty is held by every single human being simultaneously against every other person, including legal person such as state governments. The fact that a state government bears such duty has specific consequences due to its great capacity to control and restrict human affairs. A government’s great power confers a proportionally great duty in relation to the right to religious liberty (and to any other human right): a government must actively ensure that it does not interfere with the rightful religious activities of its citizenry.

It shall now be suggested that in order to ensure that the right to religious liberty is respected, an active effort of public authorities is required. Even though a state government is, according to our Hohfeldian reasoning, asked not to interfere with or coerce, that is, not to act – to be passive, in reality, this passive dimension is only one aspect of the relationship that a government has with the right to religious liberty. Indeed, an active aspect of protection and promotion also exists, especially, one could argue, in a society whereby religion, or any transcendental reasoning and activities tend to be excluded from public life. It should be acknowledged here that secularism is not the eradication of religion from the public sphere but merely its retrenchment from a primary to a secondary political and social position; its subordination to other structures or ideologies.

A secular government is one that is independent from religion and which does not discriminate against its citizens on religious grounds. However, it is argued that a secular government is not concerned with the banning of religion from the public sphere. On the contrary, a liberal democracy benefits from the non-interference of its government with the religious practices of its citizenry. Furthermore, it is the role of a government to create an environment in which citizens can flourish through the enjoyment of their fundamental rights, and this is an active duty, especially when it comes to provide a framework for religious communities to exist (and coexist) in the public sphere in the various ways required. In other words, a government has a two-faceted relation to the right to religious liberty. The first one, passive, is the Hohfeldian duty not to interfere with or coerce (a duty which is held by natural or legal persons) and the second one, active and proper to governments, is the duty to protect and

39 Finnis, Religion & Public Reasons, p. 36.
42 Ibid.
promote. The right to religious liberty is a human right of which a government ought to accommodate the exercise.\textsuperscript{45}

To conclude, the Hohfeldian analysis of rights is a powerful analytical and rhetorical tool, useful for the implementation and the comprehension of any right. A moral or human right such as the right to religious liberty may appear to be abstract, but its translation into a Hohfeldian claim-right helps us to uncover its practical implications, as it compels us to identity who holds the right, who bears the correlative duty and what is its content. The Hohfeldian analysis would therefore be particularly useful in a process of a constitutional recognition of the right to religious liberty – a process called by the vows of the Catholic Church in \textit{Dignitatis Humanae}. We also saw that the three-term Hohfeldian articulation of a right, which necessarily involves a person A, a person B and an act-description, fits well with the Thomist concept of justice understood as a relation between persons aimed at giving each person his or her due.

Finally, the Hohfeldian reasoning shows us that the right to religious freedom is held by any moral or legal person against all other persons in the world, including and particularly by a person against his or her government, and this for two reasons. Firstly because a government has the means (great power) and the motives (control of the population) to heavily breach that right, and secondly, because a government has a responsibility to protect and promote any and all human rights. The content of the right to religious liberties covers two sub-levels: the first is one’s inner reflection and personal quest for transcendental truth, and the second is the external expression of one’s religious convictions, alone or in association, in private or in public. Passivity is not sufficient for a government to fulfil the full scope of its responsibility in relation to the right to religious liberty, of which the content’s two sub-levels – one’s inner reflection about religious truths and the external expression(s) of one’s religious convictions – require a government to fulfil its responsibility to provide a suitable environment.