

RIGHTS AS ENTITLEMENTS AND RIGHTS AS CLAIMS*

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ABSTRACT – There are at least two different accounts on the meaning of “rights”. According to one of them, rights are relations between two terms: someone and a good; to the other, rights are relations between three terms: an individual, some person and an action or something. They are different, but they are not altogether incompatible. Following the rights as entitlements interpretation, rights are moral or legal entitlements, that is, moral or legal relations of persons to goods (of benefits granted to persons by a human law, moral or legal). As a kind of rights, human rights are seen as entitlements of persons or individuals to essential goods, of which it can be inferred claims against other persons or against governments and officials. Human rights talks are generally made in this way. But following the other, rights in a proper sense have to be interpreted as claims. In this paper, I’ll intend to present some arguments favoring the advantage of disclosing all the meaningful entitlement’s statements into explicit claim’s ones.

KEYWORDS – concepts of rights. Claim. Entitlements. Human rights. Perfect rights. Hohfeldian rights.

RESUMO – Há pelo menos dois registros diferentes sobre o significado de “direitos”. Segundo um deles, os direitos são relações entre dois termos: uma pessoa e um bem; para o outro, os direitos são relações entre três termos: um indivíduo, uma pessoa e uma ação ou algo. Os registros são diferentes, mas não são totalmente incompatíveis. De acordo com a interpretação de direitos como *entitlements*, trata-se de direitos morais ou legais, ou seja, as relações de ordem moral ou jurídica das pessoas com bens (de benefícios concedidos a pessoas por uma lei humana, moral ou legal). Como uma espécie de direitos, os direitos humanos são vistos como direitos (*entitlements*) das pessoas ou dos indivíduos a bens essenciais, dos quais podem-se inferir reivindicações (*claims*) contra outras pessoas ou contra governos e representantes. Falamos sobre direitos humanos geralmente desta forma. Mas de

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acordo com o outro registro, os direitos em sentido próprio têm que ser interpretados como *claims*. Neste artigo, pretendo apresentar alguns argumentos em favor da vantagem de expor todos os enunciados significativos dos direitos como *entitlements* em termos explícitos de *claims*.

PALAVRAS-CHAVE – Conceitos de direitos. *Claims*. Direitos humanos. Direitos perfeitos. Direitos hohfeldianos. *Entitlements*.

I

My primary purpose with this paper is to unveil some conceptual differences in the language of rights. I will claim that there are at least two plausible different conceptions of what a right means: rights as entitlements and rights as claims. In the second and third part of this paper I will disclose the conceptual differences of these two persuasive accounts. In the fourth part, I will present some arguments for a (partial) defense of the advantages of one of these approaches over the other. Notwithstanding, my contribution will be mainly semantical and only accidentally normative.

What are “rights”? Rights are usually understood as “legal relations”¹ (and here I refer to the kind of “legal relations” that the Brazilian legal doctrine, following specially the German scholars, designates as “subjective rights”). There are people who widen up the idea supporting the plausibility that rights express moral relations, besides from legal ones. However, “legal” or “moral”, would be rights relations between *whom* and about *what*? A very influent idea is one that takes rights as bonds or ties (be them natural or legally generated) between one individual and a property, from which it could be derived (secondarily) specific demands against certain persons, be them physical or juridical. Another persuasive idea is that of taking those “relations” as demands or claims of an individual *over* other persons, about something (an *action* or a state-of-affairs).

¹ To say that rights are legal relations may be misleading and somewhat misunderstanding. However, in the legal speech, it is common to deal with subjective rights as “relations” of a certain kind. We will see ahead how much inappropriate it is to take statements about rights as if they were expressing relations (in the strict logical sense, understood as a kind of predicate). Let’s take, for now, the term “relation” in a vague sense, somewhat inaccurate, without any commitment with what logics understand, in a more restricted way, as ‘relation’ (as relations between individuals and universals, as properties possessed or exhibited by individuals that can be translated and presented in a first order logical language as a n-place or a n-tuple predicate).

Thus, there are at least two different conceptions about what kind of legal (or moral) relations we call *rights*. I shall call the first *view of rights as entitlements* and the second *view of rights as claims*. The first considers rights as relations between someone and something (in case, a property); the second, on its turn, takes rights as “relations” between an individual (or someone) and other person (or between an individual and an undetermined person, or between an individual and a determined person²), or, more appropriately, as *demands* of someone *upon* (or *against*) another person *about* something. From these two, it could be said that the first is what we could call the “commonplace”, “mainstream” or “hegemonic”. It’s the view that better characterizes the present conception on manifestos and on common speech of most philosophers and social scientists, as well as human rights activists. Despite of that, it is the second view the one which better logically adapts to the moral and legal speech. It is possible to show that the first view is faulty (and probably fallacious) in case of not being interpretable on the logical patterns proposed by the second. Nevertheless, for reasons of room, I will have to leave its complete defense for another occasion. I’ll return in brevity on this comparison in the concluding section of this paper.

II

The idea that rights are entitlements holds intimate connections with the view that rights are benefits or edges. This view assumes that there are things of which ownership or bonds represent a property or value to its holder or bearer. If dry fruits are beneficial to people, thus the power of having them at disposal is also a benefit. Saying that someone has rights to “dried fruits” would mean saying that this person can have this good. Perhaps any kind of thing could, following this view, be the object of a right. But there would be certain things that would be beneficial in an *essential* sense. The power to dispose of these goods would be something essential, which is to say, *vital*. Not wanting to dispose of this good would be simply irrational.

² This difference marks the classical Latin distinction between a right *in rem* and a right *in personam*. The possibility of talking about rights *in rem*, that is, respecting a lawsuit not toward a particular person, but toward “all the world”, has made the possibility also of talking of rights not toward a definite person, but as rights applied to a property or a thing. The expression “in rem” comes from Latin, meaning “against (or about) a thing”. This misleading form of expression probably made the “linguistic” opportunity of talking in general in rights as a kind of legal entitlements to things or properties (period).

Let's assume something beneficial. The view of rights as entitlements is born from the following supposition. If ϕ is a good to S , it is rational that S might or could want ϕ . In other words, S must want ϕ (at least *prima facie*). In case of S not wishing or not wanting ϕ , and in case of it not being able of give us a reason, we'd say it's attitude relatively to ϕ is unintelligible and *prima facie* not reasonable.³ That is because it makes sense to say that, if ϕ is a good to S , then S has an interest (intelligible and justifiable) in or for ϕ .

Thus we explain and account for the possible and even for an actual or eventual interest of S for ϕ . Well, from that, yet it certainly doesn't follow any rights of S to ϕ . As "moral" or "legal relations", rights are normative "entities". The existence of a right should do for reasons or grounds for demanding something or for demanding someone doing or refraining from doing something. Rights, in effect, ground attributions concerning obligations. If someone has a right, then there is a reason (maybe enough) to claim (and perhaps, to legally demand) that something occurs (that imply submitting someone else to a related duty). Rights authorize claims or demands over someone else.⁴

Joseph Raz seems to me an advocate of a reasonable version of the view that I will call here as the view of rights as entitlements. According to Raz, assertions of rights are assertions that a certain interest of someone serves as a sufficient reason to assign someone else a derived duty. Following Raz, 'X has a right' if and only if: a) X can have or bear rights, and b) other things being equal, an aspect of X's well-being (his

³ "If ϕ is a good to S , then S ought to desire ϕ " means that, if S actually doesn't desire ϕ , or S has any strong and contrary reason, or there is something wrong in their behavior. For instance, if nourishing results in an action that is good for S (because eating is good for S), if S refuses to eat, then probably he has some other reason or a stronger motive for not doing this (e.g. being on a diet, or going on a hunger strike), or there is something wrong about his behavior (the Greeks would consider him crazy or an anarchist; the physicians, in their turn, probably would consider his conduct a symptom of some psychiatric disorder).

⁴ Some legal philosophers say that rights are "expectations" (positive, of "services", or negative, of "non-infringement") ascribed to someone by a moral or legal norm. Luigi Ferrajoli, for example, says that "subjective rights" are positive or negative expectations "ascribed to an actor by a legal norm" (FERRAJOLI, 2001, p. 1). I'm inclined to think that Ferrajoli's conception of rights is an entitlement view. But it depends on what we mean by an "expectation". If by "expectation" we mean something like a "claim", a demand of something directed to someone else, then Ferrajoli's conception would rather be classified as a claim view. My division between those two conceptions, the entitlement and the claim view, serves only to analytical purposes (that is, to formally semantical purposes). It is not a device for the classification of the actual theories of rights (since probably all of them are mixed pieces of theories).

interest) is a sufficient reason for holding some other person(s) to be under a duty (RAZ, J., 1986, p. 166).⁵

A theory of rights like that of Raz needs in effect a supplementary theory that shows why certain interest of *S*'s *prima facie* serves as (or could serve as) sufficient reason to claim or to attribute to someone else some correspondent duty. Of which also succeeds the distinction between two general kinds of rights or entitlements⁶: rights that are universal, and serve as reasons for anyone, under any political circumstances or juridical scheme, being justified in claiming or requiring something from someone; and non-universal rights, that is, rights that would express some contingent relations, and which enforcement would depends on agreement, convention, or a political or legal determined action.⁷

Let's see what kind of interest or "aspect of someone's welfare" could justify the imposition of moral or legal duties in a universal way. Let's consider the case of the well-known "right to life". If *life* is a good for *S*, then it follows his subjective interest upon it; however, if life is an essential good, that is, a good without which *S* could not, under any hypotheses, reach any other kind of good or try any kind or welfare, present or future, thus it would be claimed by the advocates of the view of rights as entitlements, *S* has a sufficient reason for claiming certain conduct of others, such as, of not restraining or hindering his fruition. Thus

⁵ Joseph Raz seems to me to be an advocate for the rights as entitlement view because his intention of making a definition of right as an antecedent or primary normative relation of someone and something, that serves for holding another one to some legal bind, a duty. With this strategy, Raz intend to offer a definition without implying the so called "rights-duty correlative conception", a conception that he thinks is logically flawed. But, as not every interest of *X*'s can count as a sufficient reason for holding another person to some duty or obligation, it's necessary to give an additional reason, one that can be able to show that a certain interest ϕ can be reasonably taken as a sufficient reason for claiming or demanding something from another(s). Without this additional reason or ground we cannot understand why this or that kind or aspect of other's well-being constitute a sufficient reason for claiming or even for enforcing the demand for something to someone else. As we will see, the claim conception of rights, as a semantical view, doesn't need this kind of substantive supplement.

⁶ This is the line usually taken by Kant philosophers or influenced by Kant views. Many utilitarians also follow the same line of argumentation. I think that some Aristotelians would suggest replacing the expression "that could be accepted in a universal or impartial way" for any statement that could be taken as an objective (and not merely subjective) of what Thomas Aquinas, for instance, understood as a "common good".

⁷ Recently, Luigi Ferrajoli has proposed a very ingenuous distinction between two classes of rights, *fundamental* and *property* rights. A right attributed to an universal class of persons, citizens or agents comprises the class of a fundamental right; property rights are "singular rights", since for each of them "there is a given titleholder (...) to the exclusion of everyone else" (FERRAJOLI, 2001, p. 11).

the conclusion that life is a good to which all are entitled, and that living is a good that justifies submitting others to corresponding obligations. I personally think that this is what most human right activists intend to say when they claim that we have a *right to life*, and that life is a good, for instance, of which protection we owe to each other.

In fact, one of the statements raised by the advocates of the rights as entitlements' view is that human rights would be goods of this kind, in other words, essential goods to any possibility of human realization, common or individual. They're goods that not only could not be denied to us, but also should be guaranteed and promoted. In this case, if life is a human right, then I not only *can*, that is, have a permission or a power to enjoy it; life is something that is, in some or another way, owed to me by the others. We'd have, thus, not only the power to live, but also the power to attribute corresponding obligations over the others, such as the obligation of not threatening my life and, according to some, maybe even the obligation to guarantee it, specially in situations of threat or scarcity. Hence the view of some that every *necessary* means to enjoy the good is equally an essential good.⁸ In this way, if health, for instance,

⁸ This follows from the notion of necessary goods, or of essential or basic needs. Given that we all have the same needs for the simple fact that we are all humans, it follows that there are goods that are equally desired by every one. These goods can be equally *claimed* and *owed* by all of us to all and anyone else: we demand and owe to each of us these goods *equally*. This is a subjacent idea to the rights as entitlement view: all human beings have the same (essential) rights to the goods that we universally recognize as human necessities. Bernard Williams, in the classic "The idea of equality" (WILLIAMS, 2005, p. 106-7), published by Williams originally in 1962 (in fact, one of the most influent articles in political philosophy of the last century) has gone even more far. Suppose we agree that certain good ϕ is a necessary good for two different persons, *A* and *B*. But, *B*, contrary to *A*, doesn't dispose of the necessary means for obtaining ϕ . Suppose that this mean would be "money" (\$). Here we have an inequality: *A* has \$ for obtaining ϕ ; *B*, doesn't. Yet as \$ is a necessary condition for *B* having the necessary good ϕ , it follows that if we owe ϕ to *B*, we owe equally \$ (nevertheless the same doesn't follow considering the case of *A*). This is what many intellectuals calls *equity* (and others use the word *fairness*), meaning with this a principle whose source would be in Aristotle, that is, the principle that we must treat the equals, equally, but the unequals, unequally. But, there is a difference between the *necessary* means for granting a right in a determinate context and the means that only promote the attainment of some good (in the sense that *B* probably would attain the good if he would attain also the mean); even than, and more relevant than this, there is also a difference between the conclusion that something is a necessary mean to the attainment of an essential good, and the argument that, because this, we have a right to this mean. Yet a right to some good can be a human right because it is a right to an essential good in whatever context; but the rights of human beings to the contextually necessary means can operationally differ, without loss to the idea of equality. Than the right to a *good-mean* in some country can be a human right and without being in another. Following this idea, some human rights are contextually sensitive.

is acknowledged as necessary condition to enjoying the *life-good*, then health is equally a good to which I'm necessarily entitled. Each one of us would be committed to promote it, not only for ourselves, but also for every one else.

According to many philosophers, moral rights are justified by moral principles; legal rights would be, on the other hand, justified by some legal principle or legal rule. In general, human rights are understood as *moral* rights. There certainly are some who will deny the existence of such rights (positivistic theories in Law deny the existence or the intelligibility of purely moral rights). But, let's consider for now the thesis that human rights are legal rights (or if you please "subjective legal rights"). In this case, a human right will only be a legal right if there is any legal principle (or a law) that declares it (otherwise, it will be just an aspiration or pretension to a legal right).⁹

As we've seen, according to this view, a human right is an expectation, or a pretension, or an aspiration, *morally* justified to an *essential* good (therefore, a pretension that should be legally attended – or legally guarded – and not merely a pretension that can or *could* simply be legally attended – that is to say, a pretension whose attention, guarding or enforcement depends on the sovereign's will, or, in more modern terms, of the "general will"). Let's review the right of life case. All of us aspire to enjoy this good; however, as life is an essential good, if someone is prevented from enjoying it, or if life is from him taken, withdrawn,

⁹ Notice that for a jusnaturalist there is no problem in existing so many rights justified by natural Law and rights justified by positive Law. A moral right legally not declared is an aspiration to a *legal* right, but it is not obviously an aspiration to a *moral* right: *it is* a moral right. For the jusnaturalists, moral rights have the same face value as legal rights (and an infringement of a moral right doesn't leave in this sense of being an infringement of a right). For the positivists, however, since there is not "natural" or "moral" rights, to talk in "moral rights" is *only* to talk of aspirations to legal rights. Positivists that defend the intelligibility of the human rights discourse sustain that rights only became actual in the moment that these were politically recognized. For these theorists, the human rights talk of "universal" rights is a discourse for the international sphere of rights (and it supposes an actual and cogent international juridical sphere of Law). Bobbio suppose having found in the multiple international declarations promulgated after the creation on the United Nations (BOBBIO, 2004) the ground for the existence of these actual international rights. For Bobbio, "the problem of the foundation of human rights only had it present solution in de Universal Declaration of the Human Rights of December 10th of 1948" (p. 48). Of course, a positivist who disagrees about the legal efficacy of this international document will not agree with this "activist" assertion of Bobbio, and this coherently will make him refuse the efficacy of these manifestos outside the domain of the territory of the countries that positively incorporated them.

extinguished or even significantly threatened, this would be committing a grave violence, a felony against this person.

Well, this would be true even in the case of there not being a law that declares the right to life as a positive right. Entitlements to essential goods are justified by moral reason, not legal (or, if we please, legal reasons only justify them contingently or historically). In any case, every advocate for the view of rights as entitlements that acknowledges the split between moral rights and legal rights need, thus, to burden itself from the following problem: whereas a moral right represents a moral demand or claim of each one against others, and a legal right, a demand or claim protected by law (its objective and sufficient reason is established by law, not morality), it is necessary to justify the thesis that every moral right should be enforced by law, in other words, that they must be turned into legal rights. That is how the advocated for the rights as entitlements view justify the need for transformation or realization of moral rights into legal rights: if a transformation of a moral universal right into a legal right is a necessary condition for the actualization of the moral right itself, or for making the moral right effective, then it follows that we have equally moral rights to its actualization or realization.¹⁰ Here we have a politic right (or a right to a politics), or, in other words, we have a moral reason for the enforcement of a moral principle by Law. In fact, it is by Law that we obtain legal duties, which infringement would authorize or legitimate the use of force.

All things considered, if some good is essential, then every and any necessary means for its protection and promotion is equally essential. The logic spreads itself, in this way, to all the goods considered essential: if my life depends on a minimum offer of food, then my right to these food is morally justified (the same could be said of water, air, and even about the environment, considering that a harmed environment endangers the life of human beings). If my moral right to life and to a minimum offer of food supplies can only be in case if the government guarantees them to myself, from this then it follows my moral right to the legal right that the government guarantees these food supplies. From which stems the so-called positive social rights, morally demanded against the governments. Then, if my moral rights could only be realized under the condition of existing also legal rights enforcing and supporting them, from this follows my moral right to the transformation of these rights

¹⁰ On the “enforcement”, “transformation” or “actualization” of a moral vision in a legal right (*the legal enforcement of morality*), see the classical *The Harry Camp Lectures at Stanford University* de Herbert Hart, de 1962, entitled “Law, liberty and morality” (HART, 1963).

into *legal* ones.¹¹ In that way underlie not only the so called “negative” rights, but also the “positive” ones. In order to protect life, it is argued that the others are prohibited of doing certain things, but it is also argued that these, the community, or the government that represents them have positive duties to which one of us. Thus we have grounded a series of “positive” rights (or of a “second generation”), as well as the right to health and to public security, the social rights to dignified habitation and to work. Summarizing, for grounding some right as a *human* right, all you need to do is to recognize an essential human right, and then stem other rights understood as means, positive or negative, however, equally necessary.

III

For now, I think I said enough about the view of rights as entitlements. Let's take a look at the view of rights as *claims*.

According to this other view, when someone says ‘I have the right to Φ ’, he is not stating a relation between him and something (Φ), and that from such affirmation follows, be it possibly or necessarily, the supposedly justified affirmation that others possess certain correspondent duties. He is *claiming*, demanding, requiring Φ of someone else. Thus, while

¹¹ By the way, the idea that we have a right to the transformation of a moral view (or a moral right) into a legal right, since the Law is an efficient mean (or at least is this what is pretended) for its “guarantee”, is being reproduced also in the positivistic idea that the legal system is a system of guarantees of fundamental rights (in the legal sense). This is what we can infer from the works of authors like Luigi Ferrajoli (1999). Ferrajoli doesn't depart from moral rights, but from legal and fundamental rights, defined as “all that subjective rights that correspond universally to ‘all’ human beings with the status of persons, of citizens or persons with the capacity to act” (FERRAJOLI, 1999, p. 37). Nevertheless it seem clear that this conception goes beyond the positivistic account of the complete separation of legal rights from moral ones, and it seem also clear in Ferrajoli's definition that the justification for the existence of these “fundamental rights” resides in a extra juridical moral reason, to wit, the universally character of “humanity” and the morally supposed status of agency that all human beings would have in common. Then, even positivists that follow an entitlement conception of human rights don't preclude moral suppositions in their rights' approach: they suppose that there are moral and extra juridical reasons that claim for primary (laws that establish proper duties on other persons or officials) and secondary guarantees (legal mechanisms like the right to a legal action) for the so called “fundamental rights”, by the creation of proper legal instruments. A legal arrangement without proper guarantees is, in Ferrajoli's terms, a deficient system, a system with “gaps” (primary and secondary gaps). These gaps are reasons for a legislative production. But they are not proper “legal” reasons. Since only what is positive law commands accomplishment, the existence of a legal gap is something we “can only lament” and (by political ways) call on the legislator to fulfil his duty (what kind of duty? Legal or moral?) “to make up for it” (FERRAJOLI, 2001, p. 26-7).

in the view of rights as entitlements, rights primarily express relations between two terms (a subject *bearer* of the right and *something* – in the case, a *good*), in the view of rights as *claims*, rights primarily express (maybe inappropriately¹²) “relations” between *three* terms (the claimant, the person charged or entrusted with some duty, and something – the claim-content). In this view, every time a right is pronounced it is being asserted (or claimed) a kind of normative relation between at least two people (or between an individual¹³ and at least one person) about something (a state-of-affairs, or a determined action).¹⁴

¹² Thomson (1990, p. 41, note 5) understands that it is better to think in “rights” not as relation of a tuple of three terms, preferring the use of modal operators for usual propositions, which permits to express better some entailment relations between ascription of rights.

¹³ I say ‘individual’ and not ‘person’ for not precluding the possibility that entities that we don’t consider persons (like animals for example) can support demands for rights. On this possibility, see the famous paper of Joel Feinberg (1974).

¹⁴ Here we can make a reference to the known criticism of Benjamin Constant to Immanuel Kant on the problem of the supposed duty of not to make a lie. For Constant, “a duty is what corresponds in some being to what in another corresponds to his right” (“Qu’est-ce qu’un devoir? L’idée de devoir est inséparable de celle de droits: un devoir est ce qui, dans un être, correspond aux droits d’un autre. Là où il n’y a pas de droits, il n’y a pas de devoir” – See the Chapter VIII of *Des réactions politiques* of Benjamin Constant – In the web: http://classiques.uqac.ca/classiques/constant_benjamin/des_reactions_politiques/reactions_politiques.pdf). It can be argued that Bentham claimed for something similar in his hard criticism of the language of the Rights of Man of the French Declaration, when he said that “all rights are made at the expense of liberty” and where there is a right there is also a bearer of a correlated duty. “No right without a correspondent obligation”, said him also (BENTHAM, 2005, p. 503). But Bentham’s view can be interpreted in another way, as the claim that duties imply claims, but not the otherwise (that is, that there only be a right bearer if there would be a duty-bearer, since the right-bearer is the beneficiary of this duty). Nietzsche, not surprisingly, in some passages, said something that remembers a claim conception. In the aphorism 339 of the *Daybreak*, Nietzsche had a reference to the rights of others as that to which our duties consist (NIETZSCHE, 1997, p. 163). Hayek, a libertarian, was pretty much explicit in this way: “Nobody has a right to a particular state of affairs unless it is the duty of someone to secure it” (HAYEK, 1976, p. 102). This was what Joel Feinberg envisages when he talked about the “logical correlativity” between duties and claims (FEINBERG, 1973, p. 62-4). However, Feinberg correctly remarked that there is a sense of “duty” that is not correlated with a right. But for Feinberg “etymologically, the word is associated with actions that are *due* to someone else”; then, duties not correlated with rights assigns to a “new and generalized sense of the word” (p. 63) – that sense I marked above as the “entitlement conception”. Raz points equivocally to this broad concept of a duty non correlated to a claim in this criticism of the correlativity thesis – in a defense, then, for an entitlement view of rights in general. Recently, on the other hand, the vision of rights as claims (in defense of the correlativity thesis) was systematically designed and explicitly developed by Judith Jarvis Thomson, in *The realm of rights* (THOMSON, 1990).

I think this was the view originally semantically explored, in an analytical vein, by Wesley Newcomb Hohfeld.¹⁵ In 1913, in two articles simultaneously published in the *Yale Law Review* and entitled *Fundamental conceptions as applied in judicial reasoning*, Hohfeld complained that the North-American and English jurists have employed the word 'right' systematically in a confusing way. Intentionally trying to clarify the word's usage, Hohfeld identified and distinguished eight distinct concepts (ideas or thoughts) expressed by the word 'right', concepts that he judged "fundamental" for expressing "basic jurisdictional relations" existing in any legal system or of government. To Hohfeld, these jurisdictional relations were *sui generis*, which would hamper formal strict definitions.¹⁶ To make them explicit, he presented them in a scheme of "opposites" and "correlatives". Thus, the following relations (that I shall call *hohfeldians*, following a common designation in literature) represent the *opposites*:

1. Right/no-right;
2. Privilege/Duty;
3. Power/Disability;
4. Immunity/Liability.

Whereas the following relations express *correlatives*:

1. Right/Duty;
2. Privilege/No-right;
3. Power/Liability;
4. Immunity/Disability.

A *right* is the correlative of a *duty*. This is what Hohfeld *calls a right in a strict sense*. In order to avoid ambiguities, Hohfeld suggested the term *claim* (or *claim-right*) to indicate a right in a strict sense. *Claim* is

¹⁵ The "claim conception" of right, nevertheless, comes from the Natural Law tradition. Hugo Grotius has made reference to this conception in his *De Jure Belli ac Pacis* (1625). In the first Chapter of the Book I, in the paragraph V of that work, Grotius described various senses for the term 'right', including the sense of *claim*, that is, "The Faculty of demanding what is due, and to this answers the Obligation of rendering what is owing" (GROTIUS, 2005). In a clearer form, that was also the view of Gershom Carmichael. In his *Supplements and Observations upon Samuel Pufendorf's on the Duty of Man and Citizen according to the Law of Nature*, of 1724, in a explicit reference to Grotius (and his view that Law is "a decree by which a superior obliges one who is subject to him to conform his actions to the superior's prescript"), Carmichael noted also that "Rights and obligations go hand in hand and are correlative, since it is their special property to be imposed and cancelled together, the same law which gives someone a right which is valid against others, also by that very fact imposes on those others the corresponding obligation" (CARMICHAEL, 2002). Notwithstanding, the natural law modern tradition is certainly ambiguous in employing both conceptions of right here deployed.

¹⁶ Hohfeld has employed the expression '*legal relations*' to cover a range of relations called "rights" by lawyers, jurists and magistrates (See: HOHFELD, 2003, p. 296).

a demand,¹⁷ a requirement, or an exigency *against* someone: if I have a right in a strict sense, then I have an exigency of something relatively to someone, and this someone else has, in a correlated sense, a special obligation relatively to me. The term employed by Hohfeld is *duty*. It should be noticed that this is not the same “duty” that some moral philosophers understand as the expression of a moral imperative,¹⁸ neither of the “duty” that expresses the final conclusion of a practical reasoning – that which *must* be done (*ought* to be done) all things (or circumstances) considered.¹⁹

Judith Jarvis Thomson has made an elegant usage and clarification of Hohfeld's ideas with the following statements (THOMSON, 1990, p. 37-60). According to her, what Hohfeld was trying to say was that allegations of *rights* (that is, rights in a strict sense) are statements in the following general form:

X has a right against Y that *p*,

where ‘*p*’ can be replaced by any sentence or proposition you like. This assertion amounts (that is, has strictly the *same reference*, however, not properly the *same sense*) to:

Y is under a duty toward X, namely the duty that Y discharges if and only if *p*.

In other words, while *p* is not the case, lingers the exigency or the claim of X and the duty of Y. If I have a right in a strict sense relatively to someone, this exigency, allegation, expectation, demand, request or, simple, this claim, is only respected or satisfied while or when it would be the case that *p* (that means, when or while *p* is true). Thomson says that “every claim is a right that an entity has against an entity”. I prefer to put this in another way: every right (in the strict sense of right) is a claim that an entity has against another entity of a distinct kind – namely,

¹⁷ In German, the Word ‘*anspruch*’ has the same meaning.

¹⁸ See my “Razões para agir (ou como Lewis Carroll nos ajudou a entender *também* os raciocínios práticos)” – published in *Veritas*, 52 (2007), p. 91-108. Bernard Williams has made this distinction in a broadly sense in the paper ‘Ought and moral obligation’, published in *Moral luck* (1981).

¹⁹ Kant has made popular the view that moral rules are categorical imperatives. Richard Hare is another of those that sustained the thesis that moral duties express imperatives (HARE, 1952). My point is that *duties* are not properly conclusions of practical reasons. Nevertheless, duties are or can be reasons or premises in practical reasonings. An alternative way of saying this is the remark that *duties* are not *practical oughts*.

a person (I will not pay attention here for this very slightly modification of Thomson's statement, nevertheless I think it is of great importance in some controversies on the problem of who are the possible bearers of rights of any kinds and who are the possible bearer of the correlative duties).

Well, Thomson symbolizes these two affirmations this way:

$$C_{x,y}p$$

as an abbreviation of 'X has a right (in a strict sense) that p against Y', and

$$D_{y,x}p$$

as an abbreviation to 'Y is under a duty of p toward X' (or 'Y is submitted to a duty relatively to X, that is, the duty that Y discharges if and only if p').

The hohfeldian thesis of rights and duties being *correlatives* would have formal expression in Thomson's statement that 'C_{x,y}p is equivalent to D_{y,x}p'. Symbolically:

$$C_{x,y}p \Phi D_{y,x}p.$$

Let's see an example. If I have a right relatively to John of 'Not being assaulted', that implies that John has a duty towards me that the state-of-affairs represented by 'not being assaulted', or by 'Marco not being assaulted by John', be the case. Therefore, if I am not and neither am being assaulted by John, then the sentence 'Marco was not (and is not being) assaulted by John' is true. In that case, my right relatively to John is satisfied, and it can equally be said that John is exonerated (or keeps on being exonerated) or is discharged from his duty. Obviously, in this case, I cannot *complain* (in terms as much legal as "moral") of John (at least while this condition or state-of-affairs persists), and this is because my claim or exigency was satisfied. That is to say: my right was respected. In other words, John fulfilled his duties towards me.

One of the confusions in the uses of the word 'right' is in the ambiguity in denoting, sometimes, a *right* (in a strict sense), sometimes, a *privilege*, or a *permission*.²⁰ However, permission is the opposite of a duty and is the correlative of a 'no-right'. A person has a permission every time it is

²⁰ Hohfeld used *privilege*. But I prefer '*permission*', since to have a privilege is to have a special or exclusive permission.

not true that she has any duty of something being (or not being) the case. Or, in an equivalent meaning, every time it is not true that someone has, relatively to her, any claim that something is (or is not) the case.

Saying, therefore, that 'John has the permission to assault Marco' is the same as saying that 'John is not under the duty of not assaulting Marco', and equally the same as saying that 'Marco has no right over John of not being assaulted' (that means the claim or exigency of Marco's over 'not being assaulted by John' is false; or, if we'd rather, 'Marco doesn't have a claim of not being assaulted by John' is true). Thomson symbolizes these notions with the following schemes:

$$P_{x,y}p,$$

which means '*X* has as regards *Y* a permission of letting be the case that *p*', or, as I prefer, '*X* has a permission over *Y* that *p*', being that 'having a permission', in this case, that it is untrue that *X* has some duty toward *Y* that *p* is not the case, that is to say:

$$\text{Not}-(D_{x,y}\text{Not-}p),$$

of which results the affirmation that ' $P_{x,y}p$ ' is equivalent to ' $\text{Not}-(D_{x,y}\text{Not-}p)$ ', or, symbolically:

$$P_{x,y}p \diamond \text{Not}-(D_{x,y}\text{Not-}p).^{21}$$

Let us imagine an example. All of us agree that, in case John tries to assault me, I have the permission of *defending myself* (it is thought, then, that I have the permission of reacting against the assault, occasionally employing means capable of being harmful to my aggressor). Hence, in those circumstances, it is false that John would have any claim against me that I don't defend myself (even by occasionally aggressive or injurious means). Nevertheless, even though I have the permission of reacting proportionally to an occasional assault of John's, that does not imply any right in the strict sense on his behalf (this means, it cannot be deduced, from the fact that I have this permission, that John is subdued to another

²¹ In modal logics, the operator \diamond ('it is possible that') is defined as equivalent as $\neg\Box\neg$ ('not-necessarily-not'). The hohfeldian expressions, read as modal formulae, are in accordance with the rules of the usual systems of modal logic. Like the operator (deontic) '*permission*' and (alethic) '*possibility*' are analogous, and the modal operator \diamond can be defined in terms of its dual operator \Box , the operator P can also be defined in terms of its dual operator D . By this we can obtain: $P_{x,y}p \leftrightarrow \neg D_{x,y}\neg p$. See Brian Chellas (1980).

duty relatively to me besides the duty of not assaulting me; that is to say, it cannot, for instance, be inferred that John has the duty of *letting himself be assaulted* by me).

Let's suppose that John is effectively threatening to assault me. Well, anybody would agree that, in this case, I have the "right" to defend myself. But what means here to have the "right to defend oneself"? If the "right to self-defense" would mean a claim (an exigency against someone else), then not only it would be true that I have the permission to react to the occasional assault of John's, but also that John would have the correlative duty of letting himself be assaulted by me (that is, my right to react to John's assault would be equivalent to an alleged John's duty, toward me, that is, the duty of let me aggressively react – notice that, this way, John would only be discharged of his duty towards me in case I effectively react to his assault – and I suppose you would agree that, even if it would be possible, it would not be reasonable). Actually, this would be an absurd. It is altogether unconceivable why my aggressor would suddenly be under the obligation of letting himself be assaulted in case of aggressing me. His obligation was that of *not aggressing me*, but it is not by the fact of having infringed it that I became capable of generate in my aggressor the obligation of being aggressed or of letting himself be aggressed by me. It seems clear, therefore, that my "right" does not properly correspond to a claim of mine over John, but that, given the fact of his aggression, I've stopped being under the obligation of not aggressing him. In fact, our common sense sustains that, in front of an aggression, I have the *permission* of reacting. Alternatively, it means that, in the case of an aggression, I stop being under the duty of not assaulting my aggressor. That is what we want to say when we affirm that people who are assaulted have the "right" to react to the assault. Notice also that, from my permission, it does not follow any correlative duty of John's. I mean, even if I have the permission of reacting to John's aggression, it is false that John is under the duty of letting himself be aggressed by me (or even by someone else), or that he has any correlative duty of not defending himself.²²

Permissions do not imply claims and we cannot infer any claims from any permission (THOMSON, 1990, p. 51ss). In other words, from a mere permission, does not follow any right.²³ Therefore, if *X* has the permission

²² It is not without reason that the war is a consequence of an indiscriminate aggression. See Thomson (1990) for some speculations on the difference of the concepts of Hobbes and Locke concerning the moral situation before the civil state in *The realm of rights*.

²³ From this, Thomson deploys the important difference of a mere *privilege* and the *claim* of non interference.

over *Y* that *p*, from this it does not follow any right or any correlative duty.²⁴ The inverse, however, is true: if *X* has a right over *Y* that *p*, then *Y* has a duty towards *X* that *p* and, necessarily, *Y* has equally the permission that *p* is the case. Therefore, if I have the right of not being assaulted by John, John has the correlative duty of not assaulting me, and also the permission of not assaulting me – which could seem rather trivial.

For the time being, it is enough on ‘claims’ and ‘permissions’. How about powers and immunities? The term ‘power’, by the way, has multiple meanings. The use, however, that Hohfeld has made of this word was specific. According to Hohfeld, to have a *power* is to have the ability or the capability to make other person have or not have certain “rights” (to Hohfeld, the correlative of a power is a *liability*). Then there is the concept of *immunity*. To Hohfeld, alleging immunity equals to say that one does not have or stopped to have any power relatively to another. This implies saying that if I have a power relatively to John, then John is under a modification of his condition or position regarding his “rights” in general (rights in a strict sense, permissions, powers or immunities) in reason or effect of an action of mine’s. Saying, on the other hand, that John has immunity relatively to me is saying that I don’t have any power of changing his moral or legal condition, or status, by an action of mine.

Thomson also adds the “rights” that she called *cluster-rights*. A right is composite if it’s a right that includes or contains other rights. Paradigmatic examples are: the right to property, the right to life and the right to freedom.

Being the right to property a typical example of a *composite right*, what do we want to say when we claim it? Well, having the right to property is to have not only rights in a strict sense (the right, for example, that someone keeps distance of what is mine), but it is equally to have permissions and, specially, *powers*. To have property over something includes the power of transmitting this composite right to another, or even of transmitting only a *permission of usage*. Having the right to life, on its behalf, comprehend a group of permissions (as the trivial or puerile permission of keep on living), as well as, and *especially*, the right in a strict sense that others do not threaten my life or my physical integrity.²⁵

²⁴ Consider the problem of the right of conducting and using lethal guns (supposing for self defense). The permission of reacting to an aggression doesn’t imply any right like the claim or even a permission of having guns. The right to self defense is not the same as the privilege of having guns for self defense.

²⁵ See my point in the paper “O direito de morrer” [The right to die] (AZEVEDO, 2008), published in *Fenomenologia hoje III* (organized by Ricardo Timm de Souza and Nythamar Fernandes de Oliveira).

IV

There is an advantage in taking human rights (or even fundamental rights in Ferrajoli's sense) necessarily as *claims* and not only as *entitlements*. Claims suppose an actual carrier of the correlative duty. Those correlative duties are, to use an expression employed by Kant, *perfect rights*. However, understood only as entitlements, rights could convey claims, but not necessarily. Thus the group of divergences toward the real meaning of statements comprised in manifestos, traditionally written on the vague language of rights as entitlements (which Joel Feinberg called rights "in a sense of manifesto").

In the approaches of rights as entitlements, the attribution of rights to someone does not depend on the actual correlative attribution of some duty to another. See, for example, Ferrajoli's approach. For Ferrajoli, it is perfectly possible to suppose a legal system with some fundamental right properly enacted without the proper enactment of its corresponding duty (that he called its primary guarantee). In the case of Raz's theory, since rights are only sufficient (but not necessary) reasons to attribute a duty to another, the eventually attributed duty's content is not necessarily the same content of the alleged right; it is not immediately clear, therefore, which is the right's propositional content, neither who is its eventually related duty's bearer. This obviously permits to the possible duty bearer the advantage of being able to interpret at his own gusto the duty's content that could, in thesis, satisfy the right in question. To say that X has a right to health, for example, can be, in Raz's definition, a sufficient reason for submitting someone else to some duty. Would this duty a specific one, or a vague and general one? Would the alleged duty bearer a definite person, a type of person, or the government? This is imprecise and vague. This circumstance allows the eventually duty bearer to evade himself from the allegation of which is responsible of the duty that comes from the right, a duty that one doesn't is, however, not recognizing *prima facie*. Well, insofar as rights are used exactly to protect someone's interests of the eventual power of the stronger, this results in flagrant disadvantages to the defense of rights.

But this fragility does not occur if the human and/or fundamental rights are interpreted strictly as (meaning or necessarily involving) claims. Yet for each claim there is always and necessarily a determined duty of which its bearer (being him determined *in personam* or *collectively*) cannot evade (not at least without a reason). Therefore, when rights are to be described as entitlements (as what is done in the human rights speeches), a reasonable rule is to take the language of claim as more basic or primitive, ruling that every right as an entitlement should

be interpreted somehow (even in part) as an actual claim, under the penalty of, on the contrary, reducing itself to mere rhetoric, maybe not properly mischievous (such as Bentham judged), but, to the purpose of it's advocates, something even worse: just a mere naïve form of words.

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