HOHFELD'S DEBT TO SALMOND

Although it is well known that Hohfeld drew some of his ideas for his analysis of legal relations from a similar analysis worked out by Salmond, his debt to Salmond is generally underestimated. In particular it is commonly believed that it was Hohfeld who first introduced the concept of an immunity as a species of right and similarly that it was he who first considered the basic concepts of legal relations in terms of opposites and correlatives.[1] However, there is evidence that the credit for both these innovations should properly go to Salmond.

The development of the analysis of legal relations can be stated shortly.[2] Bentham, if not the first, was certainly one of the first to distinguish between a strict right (which he termed "a vested or established right") with a correlative duty ("correspondent obligation") from a second kind of right without a correlative duty (which he termed a "naked kind of right" and which today would be called a liberty or privilege).[3] Austin also distinguished between these two species of rights; a strict right he called simply a "legal right" or a "right strictly so called" and the second kind of right he termed a "Civil, Political or Legal Liberty".[4] Both writers emphasised the

1 See JULIUS STONE, LEGAL SYSTEMS AND LAWYERS' REASONINGS, 143, 147; R. W. M. DIAS, JURISPRUDENCE (3rd ed.), 249. Even the learned editor of the current edition of Salmond's JURISPRUDENCE gives Hohfeld the credit for the introduction of the concept of an immunity (see 12th ed., 255n.). Roscoe Pound, whilst acknowledging that Salmond introduced the concept of an immunity, nonetheless implies that Hohfeld first constructed the scheme of opposites and correlatives; see *Fifty Years of Jurisprudence,* (1937) 50 HARV. L.R. 557, 572 (the relevant part of this article is also contained in his JURISPRUDENCE, Vol. iv, Ch. 21, sec. 4), and n.b. the observations in n. 19 below.

2 And see JULIUS STONE, op. cit. n. 1 above at 140-143; R. W. M. DIAS, loc. cit. n. 1 above; ROSCOE POUND, op. cit. n. 1 above at 571-572.

3 PANNOMIAL FRAGMENTS (c. 1831), Ch. 3 (THE WORKS OF JEREMY BENTHAM, Vol. iii, 217-218); and see also Part II of his INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1782), published sub nom. THE LIMITS OF JURISPRUDENCE DEFINED, Ch. 2, esp. at 59, where this "naked kind of right" is identified with liberty.

4 See THE PROVINCE OF JURISPRUDENCE DETERMINED (Intro. H. L. A. Hart), 158-159, 268-271; LECTURES ON JURISPRUDENCE (3rd ed.), 255, 366-367, 816-817. And see also the note in W. JETHRO BROWN, THE AUSTINIAN THEORY OF LAW, 180-181n. Austin's lectures were written in the late 1820s.

correlation between a strict right and a duty[5] but they did not identify a specific correlative concept for a liberty; indeed, although one may today read into their writings an awareness of the concept of a "no-right" as the correlative of a liberty, for both Bentham and Austin a liberty was strictly an extra-legal state which was not dependent on a relationship for its existence and so did not necessarily require a correlative as did a strict right. By the end of the nineteenth century a small group of German Pandectists and one American jurist had gone further in the analysis of the term "right" and distinguished what we today know as a power.[6] However, the importance of this kind of right seems not to have been immediately recognised and like the concept of a liberty its correlative was not specifically identified. So by the turn of the century the general term "right" was known to comprehend three species of rights, namely, (strict) rights with correlative duties, liberties, and powers.

In 1902 John W. Salmond published the first edition of his "Jurisprudence" and in it he analysed the general term "right" for the first time into four species of rights; these were (strict) rights, liberties, powers, and a new concept, immunities.[7] He also identified the correlative concept of each of these species of rights and these he termed respectively duties, liabilities, liabilities in a second sense,[8] and disabilities. He explained all these concepts in his analysis both in terms of their correlatives and in terms of what he referred to as "absences".

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5 JEREMY BENTHAM, PANNOMIAL FRAGMENTS, loc. cit. n. 3 above, LIMITS, 55n.; JOHN AUSTIN, PROVINCE, 158, LECTURES, 290-291, 354, 407. Note, however, that for Austin at least, some duties could be absolute; see PROVINCE, 298n., LECTURES, 413.

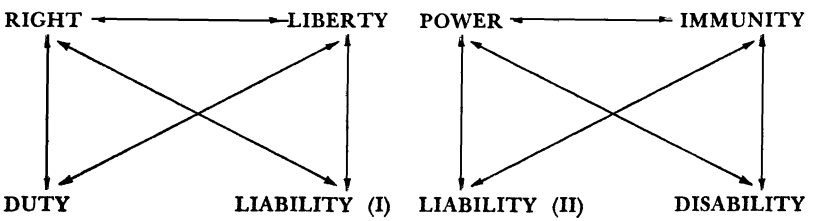
6 See B. J. H. WINDSCHIED, LEHRBUCH DES PANDEKTENRECHTS (1862), Vol. i, sec. 37; A. THON, RECHTSNORM UND SUBJECTIVES RECHT (1878), Cap. 5; E. R. BIERLING, ZUR KRITIK DER JURISTISCHEN GRUNDBEGRIFFE (1883), Vol. ii, 49-73; HENRY T. TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW (1884), Ch. 6, secs. 1-5. Cf. Bentham's use of the term "power" in PRINCIPLES, Ch. 18, sec. 1, xxvn. (WORKS, Vol. i, 105n.), LIMITS, Ch. 2.

7 Salmond does not clearly identify the sources of his ideas and so this assertion that it was he who first identified the concept of an immunity is based solely on the fact that the writer can find no mention of such a species of right before 1902.

8 Salmond's use of the term "liability" to indicate both the correlative of a liberty and the correlative of a power is confusing. It should, however, be emphasised that for Salmond this term comprehended two distinct concepts; see especially his JURISPRUDENCE (1st ed.), 236 (in later editions the distinction is less clear). Note that one of Salmond's examples of a liability correlative to a liberty to be found in all his own editions, that of a defaulting tenant to have his goods seized for rent, is clearly an example of a liability correlative to a power.

How Salmond came to identify the new species of right and the three new correlatives can only be conjectured, though from his analysis one may suppose that he noticed the relationship between a right and a duty, and a duty and a liberty (that is, the fact that a duty is the correlative of a right and the class-compliment of a liberty) and thereby arrived at the concept of a "liability" as the correlative of a liberty and the class-compliment of a right. He doubtless then saw the relationship between a power and a right (that is, that a power is a "right" to change a right) and from this worked out the correlative of a power, namely a "liability" in the second sense. It would then be an easy task to discover the appropriate pair of class-compliments of a power and its correlative.

Using only the information expressly presented by Salmond in his "Jurisprudence",[9] his analysis may be set out as follows:



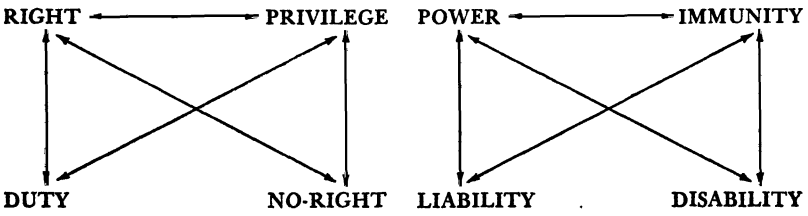
The vertical arrows indicate correlative concepts and the diagonal arrows indicate what Salmond described as "absences" in oneself, by which he meant that the concepts in question were mutually exclusive in oneself in any given relationship. Salmond also noted that a strict right is a legal benefit derived from the absence of a liberty in other persons and, similarly, that an immunity is the benefit derived from an absence of a power in other persons. Had he set out his analysis as it is portrayed above he might well have noted the corresponding relationship between the concepts on the bottom line as later editors of his work have done.[10]

Compare with the above scheme depicting Salmond's analysis of legal relations the following scheme representing the analysis that

[9] I.e., in his 1st ed., secs. 74-78 and summary to Chapter 10.

[10] See the 12th ed. at 232, where horizontal arrows on both the top and bottom lines indicate what are termed "contradictories of correlatives". The term used by R. W. M. DIAS, "jural contradictories" (op. cit. n. 1 above at 251), is less cumbersome, though this term is used in the later editions of Salmond's JURISPRUDENCE to indicate the concepts joined by the diagonal arrows, which for Dias are termed "jural opposites". Clearly there is a case for a rationalisation of terms.

Wesley Newcomb Hohfeld presented in 1913 in his celebrated article, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning".[11] Like the scheme set out above, this scheme also uses only the information provided by the author himself:



The vertical arrows again indicate correlative concepts, and the diagonal arrows indicate what Hohfeld termed "opposites".[12] Hohfeld did not use a special term to indicate the relationship between the concepts joined by the horizontal arrows, though he did note this relationship very briefly.[13]

The similarity between these two schemes is so strong that there can be little doubt that Hohfeld drew all his basic ideas concerning legal relationships and the concepts that such relationships involve from Salmond.[14] Certainly, so far as is known no legal writer other than Salmond had produced such an analysis, or even a similar analysis, before Hohfeld published his article,[15] and we do know that Hohfeld was aware of Salmond's analysis for he obliquely refers to it in one of the footnotes to "Some Fundamental Legal Conceptions . . .".[16] This is not to deny that Hohfeld worked on and sub-

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11 23 Yale L.J. 16, reprinted with the continuation article ((1917) 27 Yale L.J. 710) sub nom. FUNDAMENTAL LEGAL CONCEPTIONS.

12 The term "opposites" has provoked much criticism, e.g., by ROSCOE POUND, loc. cit. n. 1 above, who suggests as an alternative the term "contrasts"; JULIUS STONE, op. cit. n. 1 above at 139, who suggests "class-compliments"; and Max Radin, *A Restatement of Hohfeld,* ((1938) 51 Harv. L.R. 1141, 1148) and Glanville Williams, *The Concept of the Legal Liberty,* ((1956) 56 Col. L.R. 1129, 1135) who suggest "contradictories". Salmond, as has been seen, used the term "absences" in oneself.

13 (1913) 23 Yale L.R. 16, 55; FUNDAMENTAL LEGAL CONCEPTIONS, 60.

14 It is particularly interesting to note that Hohfeld failed to indicate the relationship between the terms on the bottom line of the scheme, as Salmond also had failed to do.

15 Although Henry T. Terry is often referred to as a precursor of Hohfeld, his analysis of the term "right" (loc. cit. n. 6 above) does not appear to have directly influenced Hohfeld in his analysis.

16 n. 59.

stantially developed Salmond's ideas, but it does now appear true to state that in essence Hohfeld's analysis is Salmond's analysis.

The principle alterations made by Hohfeld to Salmond's analysis are two-fold. First, as is apparent from a comparison of the above schemes and their explanation, Hohfeld replaced some of Salmond's terms by others which he considered to be more appropriate. Thus, he replaced Salmond's "liberty" and "liability" (*qua* the correlative of a liberty) by the terms "privilege"[17] and "no-right"[18] respectively, and he introduced the term "opposites" to take the place of Salmond's somewhat cumbersome references to "absences" in oneself. The second change made by Hohfeld concerns the presentation of the analysis. In his "Jurisprudence" Salmond first discussed the four species of rights in separate sections and then discussed their correlatives quite shortly in one concluding section; Hohfeld, on the other hand, examined each species of right in terms of its opposite and correlative in accordance with the scheme of opposites and correlatives that he had set out at the beginning of his analysis.[19]

Why, then, has Hohfeld's debt to Salmond not been fully recognised? There are probably two reasons for this. First, Hohfeld did not acknowledge in his article the sources of his ideas concerning his analysis and so there is no obvious indication of those who had influenced him in his work. Second, commentors on the development of the analysis of the general term "right" appear not to have compared Hohfeld's analysis of legal relations with Salmond's analysis as it is presented in the *first* edition of his "Jurisprudence".[20] For some reason that remains unexplained, Salmond omitted the section on the concept of an immunity[21] from the second edition of his work and from

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17 N.b. Hohfeld's discussion of the appropriateness of the term "privilege" vis-a-vis "liberty" at (1913) 23 Yale L.J. 16, 38-43; FUNDAMENTAL LEGAL CONCEPTIONS, 44-49. See also the discussion on the same subject by GLANVILLE WILLIAMS, op. cit. n. 12 above at 1131-1135.

18 For a criticism of this term, see JULIUS STONE, op. cit. n. 1 above at 158-159. But see also, Max Radin, op. cit. n. 12 above at 1150-1151; GLANVILLE WILLIAMS, op. cit. n. 12 above at 1139.

19 (1913) 23 Yale L.J. 16, 30; FUNDAMENTAL LEGAL CONCEPTIONS, 36. Quaere Pound's statement that Hohfeld in his article 'constructed an elaborate scheme of opposites and correlatives based on Hegelian logic' (op. cit. n. 1 above at 572, and see also 575). Hohfeld's scheme of opposites and correlatives is clearly taken from Salmond (though set out in a more orderly arrangement by Hohfeld) and is certainly not Hegelian.

20 Thus Julius Stone refers to the 3rd ed. of Salmond's JURISPRUDENCE (op. cit. n. 1 above at 142), and R. W. M. Dias refers to the 7th ed. (loc. cit. n. 1 above).

21 I.e., sec. 77 of the 1st ed.

all five subsequent editions that he himself edited. He did, however, briefly refer to this concept in a footnote[22] and he retained its correlative, a disability, in the text to indicate the absence of a power, but nonetheless, in these later editions of his work Salmond's appreciation of the concept of an immunity is not obvious.

Although the purpose of this article is to show the strong similarity between Hohfeld's analysis of legal relations and that which had already been presented by Salmond, this should not be allowed to detract in any way from Hohfeld's important contribution to jurisprudence. If his analysis was not wholly original, the use he made of it undoubtedly was, for whereas Salmond's analysis appears as little more than an academic exercise of theoretical interest only,[23] Hohfeld constructed his analysis for use as a tool. As Cook pertinently points out: 'one might read his [Salmond's] *Torts* through and never realize that any such analysis as that found in the *Jurisprudence* had ever been made',[24] but Hohfeld, on the other hand, deliberately set out to present a 'sufficiently comprehensive and discriminating analysis of jural relations in general' as would 'aid in the understanding . . . of practical, every-day problems of the law'.[25] And this he did with such success that neither the criticisms of his analysis by such authorities as Radin[26] or Pound[27] nor the subsequent developments of his ideas by jurists such as Goble[28] or Kocourek[29] have displaced him from his position of pre-eminence among analytical jurisprudents. If it is to Salmond that we owe the basic analysis, it is to Hohfeld that we owe our awareness of its practical use.

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22 See, e.g., 2nd ed., 194, n. 2.

23 N.b. the observations by Walter Wheeler Cook, *Hohfeld's Contribution to the Science of Law,* (1919) 28 Yale L.J. 721, 724, 729 (reprinted in FUNDAMENTAL LEGAL CONCEPTIONS, 6, 11-12), and by Hohfeld, (1913) 23 Yale L.J. n. 59.

24 Op. cit. n. 23 above at 729; FUNDAMENTAL LEGAL CONCEPTIONS, 11.

25 Wesley Newcomb Hohfeld, (1913) 23 Yale L.J. 16, 19-20; FUNDAMENTAL LEGAL CONCEPTIONS, 26.

26 Op. cit. n. 12 above.

27 Op. cit. n. 1 above.

28 See George W. Goble, *A Redefinition of Basic Legal Terms,* (1935) 35 Col. L.R. 535.

29 See ALBERT KOCOUREK, JURAL RELATIONS.