WHAT DOES IT MEAN TO SAY SOMEONE HAS A LEGAL RIGHT?

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1 Introduction

What does it mean to say someone has a legal right? At one level the answer is a variety of things can be meant. Hence, lawyers always have to be careful what is meant on a given occasion. At this level we are noting the different legal incidents, or sets of legal incidents, that may constitute a right on different occasions. However, it would be odd if there were not at least patterns connecting these different cases: for that the term 'right' is used for a variety of things by accident seems implausible. Governed by this thought, legal theory in the last thirty years or so has been much concerned with whether there is an underlying unity behind the variety.[1]

We should expect patterns, but it is not clear that we should expect uniformity. Words are constantly being adapted to new uses, so that even within the same sense of a word there can be variations on a theme as the word is applied in new contexts. In the case of legal rights, as we shall see, we have to contend with a great deal of variety, more than most theorists have recognised. It is not only that the legal incidents that constitute a right differ; the ideas that attach themselves to legal rights differ as we move from one context to another. A particularly important difference turns out to be whether the right is a private right or attaches to a public office or body. At the end of this article I shall proffer a definition, but it is a loose definition in that the underlying idea it identifies operates differently in these two different contexts. It might just as well be seen as tracking the etymology of the term, as uncovering a unifying principle.

I shall start by defining some relevant terms, and stating some broad assumptions. I shall then discuss the variety of legal incidents that may constitute a right. Finally, I shall consider whether order lies behind our usage.

2 Definitions and Assumptions

2.1 Definitions

The following definitions should all be taken as relative to a given system of law.

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1 For notable contributions see, David Lyons, 'Rights, Claimants and Beneficiaries' (1969) 6 Am Phil Q 173; H L A Hart, 'Bentham on Legal Rights' in A W B Simpson, ed, *Oxford Essays in Jurisprudence (2nd series)* (1973, Clarendon Press, Oxford) 171; D N MacCormick, 'Rights in Legislation' in P Hacker and J Raz, eds, *Essays in Honour of H L A Hart* (1977, Clarendon Press, Oxford) 189; D N MacCormick, 'Rights, Claims and Remedies' (1982) 1 Law and Philosophy 337; Joseph Raz, 'On The Nature of Rights' (1984) 93 Mind 194.

I define a *legal duty* as an act or abstention to which the law attaches a particular reason for observance: that of respect for the law.[2] When compliance with a given rule is understood *merely* as the condition of securing certain further legal effects, or avoiding certain legal effects, then, subject to an aberrant possibility to be mentioned below, the relevant compliance is not a legal duty.

Legal duties may fall upon citizens, or officials other than judges, or upon judges. When they fall upon citizens and officials other than judges the breach of a duty is a legal wrong, and will normally be subject either to punishment or a civil order designed to remedy the wrong. Threatened breach may also attract legal consequences. These responses to the wrong do not just follow: they are thought appropriate because the wrongdoer has not observed the behaviour that the legal system requires, or has threatened not to do so. These responses to breach, or threatened breach, of duty may provide reasons for compliance with duty additional to that of respect for the law: nevertheless, it characterises legal duty that such reasons are not the only reason for compliance that the legal system purports to provide.

Of course, it might occur that a legal order was sufficiently decadent that these responses by the system *were* understood as the only reason provided by it for respect for legal duty. This is the aberrant possibility mentioned above. In such a case we might mean by legal duty just that these particular responses were intended to result from breach, or threatened breach. Then there would need to be some mark of the specific breaches of legal rules to which these responses were to attach, other than, as is normal, that respect for the law was intended to be a reason for observing them.

When legal duties fall upon judges, breach of duty does not attract the consequences that apply to citizens, unless the breach is deliberate. Inadvertent breach of duty at most makes a judge's decision appealable. Nevertheless, the system expects judges to observe the legal duties they are under as judges, out of respect for the law. Indeed, this reason for compliance is particularly clear in the case of judges, because of the specific obligation to uphold the system that they have undertaken in becoming judges.

I define a *legal liberty* as the absence of a legal duty. Since there are two forms of legal duty that may apply to any act — a duty to do it, or a duty to abstain from it — there are two types of liberty that may apply to any act. The absence of a duty to do A is a liberty not to do A; the absence of a duty not to do A is a liberty to do A. (This usage broadly follows that proposed by Glanville Williams.)[3]

I define a *legal power* as an ability to bring about a legal change intentionally. (This is the definition given by Salmond.)[4] Legal changes include any changes

[2] Strictly, this is a 'reason-generator', rather than a specific reason: it will generate reasons of different weight depending on the historical circumstances and on the content of the particular duty.

[3] 'The Concept of a Legal Liberty' in R S Summers, ed, *Essays in Legal Philosophy* (Blackwell, Oxford, 1968) 121.

[4] See *Jurisprudence* (7th ed, 1924, Steven & Haynes, London - the last edition prepared by Salmond) 248. For argument that this is the best definition of a 'power' for analytical purposes see my paper 'The Concept of a Legal Power' (1984) 11 NZULR 149, 149-158.

in the realm of legal effects. They thus include changes in the existence of duties or liberties, or changes in the conditions under which duties or liberties will come into being. They also include the creation or removal of powers. When the legal change a power can bring about is the creation or removal of another power that power itself may be to create or remove some power, but some change other than the creation or removal of a power must be in prospect or we have a meaningless series of abilities to change, abilities to change, .., none of which are abilities to change anything at all.

Sometimes a person who exercises a power may, in doing so, determine, perhaps within some range, the form of a more particular duty or liberty that results from the exercise of the power. That is done, for example, by parties who enter into a contract. Their collective exercise of the power to create a contract not only brings into being various duties, and sometimes liberties, it also determines the form that these new duties or liberties take. When duties of a new form are created in cases such as this, the process is possible because before the power is exercised a general duty exists to do as shall be determined by the power-holder(s) (in the example, the pre-existing duty is the general duty to observe contracts), and the power-holder then creates a more specific duty that falls within this general duty (in the example, the specific duties are those created by the particular contract). An ability to determine the form of the liberties that result from the exercise of a power can be analysed in the same way.

I define a *legal immunity* as that which a person has when another does not have, or others do not have, the legal power to alter his legal position in a certain respect. (This usage broadly follows that of Hohfeld.)[5]

2.2 *Assumptions*

As I have argued in detail in an earlier paper,[6] it follows from the definition of a legal power that the legal material that confers a power must provide for the legal change that an exercise of the power will bring about. When the power is merely the ability to alter the incidence or form of legal duties in some way the legal material that confers the power must also provide for the relevant duty or liberty. In such cases the concept of a power is derivative from that of duty: powers arise merely because of the conditions under which duties apply, or cease to apply, or receive more determinate form.

Although the concept of a power always depends on something else more basic, I do not think that all powers in a legal system depend solely on the conditions under which duties apply. There are forms of status that can be conferred by legal rules the significance of which is not wholly exhausted by the legal consequences that follow from them. I have in mind forms of status like that of being married to a particular other person, or being the (adopted) child of another. Such a status carries legal consequences, but these consequences do not exhaust its significance: it also has a complex pattern of social consequences outside of the law. As a result the legal power to create this status allows a mix of legal and social consequences to be brought into being. This point is of some

[5] W N Hohfeld, *Fundamental Legal Conceptions* ed W W Cook, (1923, Yale University Press, New Haven), 60.

[6] 'The Concept of a Legal Power' (1984) 11 NZULR 149.

importance for understanding the full role of the law; but it will not damage the present discussion to adopt, as I shall, the simplifying assumption that all legal powers arise from the conditions under which duties apply. Since liberties arise from the absence of duties, and immunities from the absence of powers, on this assumption, all the terms defined above are derivative from that of duty.

Up to this point we have been preparing the ground for further discussion. Now comes a point of importance about rights themselves. This is that the concept of a legal right is logically dependent on that of legal duty in a way that is not true in reverse. The sense in which this is so is that unless the statement that a person has a right can be translated into a statement that some persons possess or lack, or will under some circumstances possess or lack, duties, then the statement is meaningless. Rights-talk under these circumstances would be pointless chatter. The same is not true of duties: talk of duties can make perfectly good sense without talk of rights. One proof of this is that a legal system that contained only a specification of legal duties, and did not possess the concept of a legal right, would be comprehensible; but a legal system that contained only a specification of rights, and did not contain the concept of legal duty (or some other concept such as 'obligation' or 'responsibility' that did service for it), would not be comprehensible.

The point just made is compatible with it also being true that some particular legal rights are logically prior to the particular duties or liberties that follow from them. Of course, it might be the case that the ground of every particular duty was a particular right; but in law, at least, that is plainly not the case. The duty to pay taxes, the duty not to breach the peace, the duty not to be gratuitously cruel to animals, are all duties that can not sensibly be seen as grounded in legal rights.

3 The Variety of Legal Rights

3.1 The Variety Illustrated

The following list of legal incidents, or sets of legal incidents, that may constitute a legal right in different cases is not necessarily exhaustive, but it will give a clear sense of the variety of our usage.

(i) A claim right: that which one person has when another (or others) owes him a duty.

Simple examples are the right to repayment of a debt, the right to receive moneys due under a trust, the right not to be assaulted, the right not to be libelled. This is the form of right that Hohfeld thought to be the only correct use of the term. Just what it is that one person has when another owes him a duty is something we will consider below.

(ii) A liberty.

An example is the right of fair comment on a matter of public interest.The right in this case seems to be a bare liberty not supported by any duty on others, such as a duty to listen, or a duty not to prevent a person making fair comment. Of course, certain forms of interference, such as gagging a

speaker, will be prevented by the general law; but other forms of interference, such as refusing to accept a letter to the editor, will be lawful.

(iii) A liberty, plus a duty on others not to interfere with the liberty.

Examples are a right to enter public land, a private right of way, and the right of a chief fire officer to enter land believed to contain a fire hazard. A right of way, to take that example, may be comprised simply of a liberty for the holder, his invitees, and etc, to pass and repass across a certain piece of land in defined ways, together with a duty on those who have possession of the dominant tenement not to interfere or block this passage. In other cases, depending on what is expressed or implied in the grant, it may include a duty on the person with the relevant power as holder of an estate in the land to use that power to prevent interference by third parties. It is worth noting that when we speak of a duty not to interfere in such cases this is not the exact tenor of the duty, since some forms of interference — such as hailing a person as they are about to pass across the land — are legitimate: but there *is* a duty to refrain from interference that goes beyond the general duties of the law not to assault others or deprive them of their life or freedom, duties which protect most liberties to some extent.

(iv) A liberty, plus a duty on others to facilitate the exercise of that liberty.

An example is the right to be heard in court. This is composed of a liberty to speak, plus a duty on the judge to listen.

(v) A power, plus a liberty to exercise that power.

One example is a right of appeal. This is composed of a power to affect the officers of the relevant court in various ways by lodging appeal papers, together with a liberty against the other party to the proceedings to exercise that power. Other examples are the right of a court to govern its own procedure, the right of the New Zealand parliament to make laws, and the right of a state legislature within a federal system to make laws on a matter within its jurisdiction. The right of arrest possessed by a constable, to take another case, is a power to put the arrested person under a duty to accompany him, together with a liberty to exercise this power; but it also includes the liberty to use reasonable force if the arrest is resisted.

(vi) An immunity.

An example from private law is the right of an employee not to be summarily dismissed without good cause, where this takes the form of sustaining the employment in the face of an illegitimate dismissal. Where the dismissal is valid, but the employer becomes liable to damages, the position is different. The right-holder does not then have an immunity from dismissal, but has instead the benefit of a conditional duty on the employer to pay damages in the event of a wrongful dismissal.

(vii) A generative right.[7]

Here the right is the starting point for an often complex piece of reasoning about what is needed to secure the end which the right states. The right-

[7] The idea that rights may be generative of legal incidents in an open ended way has been expressed by a number of people using a variety of different terminology. See, *inter alia*, Lon Fuller, *The Morality of Law* (1964, Yale UP, New Haven) 134; Ronald

holder is to be protected by the recognition of such legal incidents as prove needed from time to time, and do not unreasonably infringe other relevant values, and are appropriate within the general structures of the law, or particular parts of it, to secure to her the advantage or special position that the right identifies. Constitutional rights may be of this sort. A constitutionally protected right to freedom of worship, for example, is usually protected by at least a liberty to worship and an immunity against this liberty being removed by the government. It may be constituted by these two things if that was the intent. But if it is genuinely a generative right it may also need to be protected by other incidents, such as a duty on government officials to protect freedom of worship.

If we want to express a generative right in the language of duty we can do so. The specification will need to be that such persons have such duties, liberties, powers, and immunities, as are needed, while appropriately protecting other relevant values, to secure the right within the (relevant) established structures of the law.

3.2 *Claim Rights*

Two of these cases now need further comment. The first of these is claim rights.

A claim right is what one person has when another owes them a duty. But what is it exactly that the right-holder has? In what does this 'owing' relationship consist?

One possibility is that the right is the ability to obtain a remedy for breach or threatened breach of the duty. In that case, as Hart has pointed out,[8] it is a species of power. Specifically, it is a power, by issuing proceedings and proving one's case, to change the legal position of a judge. In the simple case when the duty is under the civil law, and the remedy is not discretionary, it is a power to put the judge under a duty to make a legal order in one's favour.

This is possibly the way in which Hohfeld understood a claim right, since he treats someone as having a right only if they can obtain a remedy to 'vindicate' it.[9] Further, what characterises a right as legal or equitable, according to him, is whether it can be vindicated by a remedy in law or equity.[10] However, use of the word 'vindicated' also suggests that the right is something distinct from the ability to obtain a remedy, which merely supports it. And, in Hohfeld's view, a remedy to enforce a secondary duty to pay compensation, which arises out of breach of a primary duty, will nevertheless vindicate the primary duty. Perhaps Hohfeld's understanding was that being able to obtain a remedy is a necessary

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Dworkin, *Taking Rights Seriously* (1977, Duckworth & Co, London) 93; John Finnis, *Natural Law and Natural Rights* (1980, Clarendon Press, Oxford) 201; Neil MacCormick, 'Rights in Legislation' supra n1, 200 ff; Joseph Raz, 'On The Nature of Rights' supra n1, 199-200.

8 'Bentham on Legal Rights' supra n1, 192.

9 W N Hohfeld, *Fundamental Legal Conceptions* ed W W Cook, (1923, Yale University Press, New Haven) 102ff & 131ff.

10 Ibid, 101.

condition of referring to a claim right, but that the right itself is something distinct from the ability to obtain the remedy.

If a claim right *is* distinct from the ability to obtain a remedy the only plausible candidate for the right is the benefit that the existence of the duty was intended to create. Then, possessing a claim right is standing in a certain relationship to the purpose of a rule that creates a duty, or, rather, a certain type of rule that creates a duty (since not all duties are correlated with rights). So it is not a term like 'duty', 'liberty', and 'power', needed to express the content of the law, but a concept of a different order. Further, it will be a contingent matter whether a 'right', understood in this way, carries any legal consequences. For example, it might do so in the civil law, but not in the criminal law. Of course, we might stipulate that we should only speak of a legal right to the observance of a duty when having the benefit of the existence of the duty does carry some legal consequences. Then we will need to settle whether the legal consequences need to be uniquely possessed by the right-holder. Does a person have a right under the criminal law not to be assaulted, or not to be robbed, just because she, along with anyone else in the community, can take a private prosecution against the wrong-doer? Presumably, we would want to stipulate that the relevant consequences be unique to the right-holder.

This restriction seems already to be respected in use of the term legal right; although not, I think, as part of the meaning of the term, rather as an understanding about when it is useful to employ it. Let us test the point. In many instances the intent of the criminal law is to provide protections for individuals separately. Do we find it wrong to speak of rights in such cases: of legal rights, for example, not to be murdered, or not to be assaulted, or not to be robbed, that are secured by the criminal law? I think this does not stand out as wrong usage; but we certainly can wonder whether there is any point in talking of legal rights in such cases.

I consider that the second understanding of a claim right canvassed here is the correct one. I shall return to this topic in the last section of the article; but here we might usefully note two points as relevant data. The first is that it is natural to think of the ability to obtain a remedy as 'vindicating' the right, rather than as constituting it. The second is that, as noted above, it does not seem wrong to speak of a right not to be murdered, robbed, or assaulted, under the criminal law, although it does lack a clear point.

3.3 Generative Rights

The second case needing discussion is generative rights.

3.3.1 Not all Rights are Generative

Enthusiasm for the point that rights can be generative has led some theorists to claim that all rights are generative.[11] Rights, it is claimed, are inherently ends to be protected by the recognition of such legal incidents as prove necessary. When they seem to be equivalent to a finite set of legal incidents this is because

[11] See, eg, Joseph Raz, 'On The Nature of Rights' supra n1, 200.

under normal circumstances only these incidents are needed to protect them. But allow unusual circumstances and more incidents may prove necessary.

It is true that not only grand constitutional rights, but more humble rights, may be generative. Lon Fuller, who was possibly the first person to note the generative capacity of some rights, used the humble example of the right of a trustee to reimbursement from the trust estate for legitimate expenses met out of his own pocket. This he pointed out, we might think of as a power and liberty in the trustee to transfer funds to his personal ownership. But he then asks us to suppose that the instrument creating the trust gives the beneficiary a power to transfer the trust estate to himself on becoming of full age, and that he does so before the trustee has been able to reimburse himself for proper expenses. Then the right of the trustee gives rise to a duty in the beneficiary to reimburse the trustee.[12]

Although more rights may be generative than appears at first glance, I think it is a mistake to believe that all are. A carefully drafted right of way that specifies exactly the liberties of the holder of the dominant tenement and the duties of the holder of the servient tenement surely confers a right, even although it would be inappropriate for the court to start adding additional legal incidents to protect the position of the holder of the dominant tenement beyond those specified in the instrument.

Consider, also, the right to be represented by counsel conferred by the United States Constitution. This, we are told, was originally granted to reverse the old common law rule that a person charged with a felony was not allowed to be represented by counsel.[13] It was originally understood as conferring just a liberty for counsel to be present and play the role that the party herself might otherwise have played. From this, together with general principles of the law, there then followed a duty on the judge to listen to counsel, and a duty on others not to interfere: as, for example, by preventing counsel being heard. During the twentieth century this right was used as the basis for establishing a duty, first on federal courts,[14] and then on state courts,[15] to appoint counsel to represent a poor defendant charged with a serious criminal charge who wished to be represented by counsel but could not afford to be. Breach of the duty would result in the invalidity of any resulting conviction. Effectively, this compelled the federal and state governments to establish legal aid schemes. Those who took these steps may, in a general way, have served the broad value that influenced those who approved the constitutional provision — to make legal representation possible. But if the original intent was to confer just a liberty to have counsel present, then we miss an historical insight if we say that no matter what the founders intended, by using the term 'right' they authorised the subsequent development.

If whenever we referred to specific legal incidents as a right we were in danger of having the court add new legal incidents to protect the right-holder then it

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12 Fuller, *The Morality of Law*, supra n 7, 134.

13 See Cooley's *Constitutional Limitations* (7th ed, 1903) 477. The right is in Amendment 6.

14 *Johnson v Zerbst* 304 US 458 (1938).

15 *Gideon v Wainwright* 372 US 335 (1963).

would be safest not to employ the term 'right'. Surely the legal incidents that constitute a right must depend on what was meant in each case?

As a caution we might note that not every legal incident that is recognised because a right exists is generated by that right. It is very common in the law for legal rules or principles to specify that the presence of one legal incident is the condition for the recognition of another. The person who has a duty to look after a child may, for example, be the person who has a duty to ensure the child attends school, or the power to register the child with school authorities. In the same way the presence of a legal right may justify the recognition of some further legal incident.

In discussing the generative capacity of rights, Neil MacCormick uses as an example the right of children under Scottish law to inherit the estate of a parent who dies intestate.[16] Obviously this right is supported, or perhaps partly constituted by, the duty of an executor, when appointed, to distribute the estate to the children; but MacCormick notes that when the question of appointment of an executor is raised a person who has beneficial rights to the estate is normally *on that ground* to be preferred to other parties, at least if the estate is solvent. So one of the children may, because of her right to a share in the estate, have a resulting right to be preferred as an executor. MacCormick treats this as a legal incident generated by the original right. To me it seems not to be. If this were really a way of protecting the right to inherit then all the children should have a right to be appointed as joint executors. Instead, the position seems to be that under general principles of law those with a right in an estate have, naturally enough, a right to ensure that *someone* is appointed executor, and that, other things being equal, a preference is to be given in the appointment to someone who has, or appears to have, an interest in the estate being wound up efficiently. The (putative) right of the children is relevant to the preference in appointment, but it seems wrong to say the preference is generated in order to secure the right.

3.3.2 The Context within which Generative Rights are Protected

Even when rights are intended to be generative, plainly we should not secure the right at all costs, regardless of competing values. Further, those who create such rights can do so without legitimising just anything at all that might support the right, because they can take for granted established structures of the law. They expect the legal incidents recognised to operate within those structures. Consequently, the recognition of incidents should not do violence to the general patterns of the law. In general, at least, the legal incidents allowed to support a right should be of appropriate general types already recognised by the law, and their effect should then be governed and determined by such general rules and principles of the law as apply to incidents of those types. Often, of course, those who create such rights expect the rights to operate only within some part of the law: to be supported by the civil law, for example, and not by the criminal law, or to be supported by public law remedies, or to have a procedural role only.

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[16] 'Rights in Legislation' supra n1, 200.

I can illustrate the relevance of established structures of the law by briefly considering *Simpson v Attorney-General (Baigent's Case)*.[17] In that case the New Zealand Court of Appeal held that an action in damages lay against the Crown for an infringement by a police officer of section 21 of the New Zealand Bill of Rights Act 1990, which states: 'Everyone has the right to be secure against unreasonable search or seizure'. Section 3 of the New Zealand Bill of Rights Act states that the Act applies only to acts done by 'the legislative, executive, or judicial branches of government' or by 'any person or body in the performance of any public function, power, or duty' conferred or imposed by law. The Act does not state what is the effect of breach by any of these parties of the rights it creates. The finding of the Court that I am interested in is that when an employee, or, possibly, any person or body performing a public function, power, or duty, infringes a right conferred by the Act, an action for damages lies against the Crown, not as a party vicariously liable, but as a primary party.

It is, I think, reasonable to conclude that the rights set out in the New Zealand Bill of Rights Act were intended to generate duties falling on those whose acts are governed by the Bill. If that were not so the only effects of the rights contained in the Bill would be that under section 6 these rights might affect the interpretation of statutes, and under section 7 the Attorney General should call to the attention of the House of Representatives any provision in a bill presented to the House that infringes them. That understanding is, at the least, hard to reconcile with section 3, which provides that the Bill applies to the 'acts' of various parties; and the role it gives to the Bill as a whole is so limited that it seems unlikely it was all Parliament intended. In any event, for the purpose of the present discussion I am willing to assume that the Act generates duties falling on those whose acts it governs.

Under ordinary principles of law breach of such duties will give relevant causes of action to those harmed. In particular, since the duties are patently intended to secure individual rights, on general principles an action for the tort of breach of statutory duty should be available for harm caused to those whose rights are infringed. Under section 6(1) of the Crown Proceedings Act 1950, if a tort is committed by an employee of the Crown, the Crown is vicariously liable, unless it has, in the relevant case, a particular statutory protection against vicarious liability. (The scope of various limited statutory protections of the Crown against vicarious liability that were potentially relevant was canvassed in the case.) Such statutory protections could not be taken as abrogated by the Bill of Rights Act, as the Act specifically states that no court shall hold any statutory provision to be repealed or revoked by the Act.[18]

Let us examine the structure of this reasoning. In it the rights set out in the Act are taken to generate normal duties of civil law. (It seems unlikely the rights were intended to generate duties enforceable in the criminal law.) The remaining consequences follow from the application to those duties of existing rules and principles of law. In short, the process of generating legal incidents from the rights operates within normal structures of law.

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17 [1994] 3 NZLR 667.

18 New Zealand Bill of Rights Act 1990, s4.

The same cannot be said of the generation by the Court from the rights in the Act of a duty on the Crown to pay damages as a primary party whenever an employee, or, as it perhaps is, any person or body, infringes the Act in the performance of a public function, power, or duty. This duty is *sui generis*, as the Court seems to have acknowledged. Not only that, but in creating it the Court ignored general patterns of the law. Normally, one party is not liable in law for the wrongs of another. The principles of vicarious liability, agency, partnership, and so on, under which one party may be liable for the wrongs of another, are exceptions to an important general understanding: each party is liable only for his own actions. The Court's decision by-passes the principle of vicarious liability, but the Court does not explain what then is the nexus between the Crown and the police officer that justifies the imposition of the duty. Is it suggested that, in the circumstances, the police officer was the *alter ego* of the Crown? If so, why was this not discussed, and the case-law examined?[19] In fact, this does not seem to have been the basis of the Court's finding.

My point is not that the legal incident recognised cannot help protect the rights laid down. Of course, it may do so. But the existence of a generative right does not justify the recognition of *any* legal incident that may in some way support the right. If Parliament intended that the rights in the New Zealand Bill of Rights Act should be generative, they surely expected them to operate within established structures of the law. Parliament had consciously declined to include a general remedies provision within the statute.[20] That Parliament intended to authorise any process of generation that would legitimise the creation of the legal incident the Court recognised, seems, with due respect to the Court, inconceivable.

4 Is there Unity Behind the Variety?

As is well known there are currently two broad types of theory in the literature that attempt to show there is unity, or at least some order, behind the surface variety apparent in our talk about legal rights. The first is the choice theory, principally developed by Hart, which argues that the underlying idea behind at least many legal rights is that they are freedoms of choice that the law either protects or makes possible. The other is the benefit theory, under which to have a right is to enjoy the type of benefit that it was the purpose of a law to create. I shall consider here the form of the benefit theory that I consider most successful, that developed by Neil MacCormick. Along, I suspect, with many who have read their competing accounts,[21] I find MacCormick's theory more satisfactory than Hart's. However, MacCormick's theory runs into some problems with cases he does not consider. I shall, therefore, develop my own account by explaining

[19] The leading case directly on point is *The Truculent* [1952] P 1. See also P Hogg, *Liability of the Crown* (2nd ed 1989, Law Book Co, Sydney) 12.

[20] See the account given by Hardie Boys J in *Baigent's Case* at 698. This is one of many points that distinguishes the case from *Maharaj v Attorney-General of Trinidad and Tobago* [1979] AC 385, which the Court relied on. In that case s 6(1) of the Constitution specifically provided that a person alleging an infringement of the rights conferred by it might apply to the High Court for 'redress'. The Privy Council also held that the action in question was an action of the state.

[21] Substantial extracts from the two accounts are reprinted in Davies and Holdcroft, *Jurisprudence: Texts and Commentary* (1991, Butterworths, London) 249-266.

the strengths of MacCormick's theory, and then considering these troubling cases. I shall start with a brief consideration of Hart's theory, since there are points of value to be learnt both from the theory and from criticisms that can be made of it.

4.1 Hart's Theory

Let us start with Hart's treatment of claim rights. Hart points out that if to have a claim right is merely to have the benefit of the existence of a duty the presence of a right does not necessarily have any particular interest to the lawyer. We have already noted this in relation to the criminal law. Hart suggests that when lawyers take account of claim rights, as they do in the civil law, they are interested in something different. In a standard case in the civil law the person who has a claim right is given by the law a significant measure of control over the relevant duty. In the terminology established earlier in this article, this includes:

(1) A power to waive or extinguish the duty;
(2) A power to waive or extinguish any secondary duty to pay compensation, or otherwise make reparation, that arises out of breach of the original duty;
(3) A power to enforce either of these duties through such processes as the law allows;
(4) A liberty to exercise or not exercise any of these powers.

In other cases where lawyers speak of a right to another's performance, there may be less control, but some element of control is still involved. Thus, in the case of rights to welfare, there is no power to waive the duty: but there is usually a power to convert a conditional duty of an official to pay the allowance into an unconditional duty, by seeking the allowance, as well as some method by which the claimant can enforce the duty.

Hart now links claim rights to other cases in which a right consists of a power. In each type of case the law secures a choice to a party by allowing the power and leaving freedom to exercise it. Finally, he links both of these cases to liberty rights. For a liberty to be called a right Hart considers two conditions are normally needed.[22] Firstly, the liberty must be bilateral, not unilateral: that is it must be a liberty to do or not do an act, not just one of these liberties. Secondly, the liberty must be protected by the law, if not by a strictly related duty not to interfere with the exercise of the liberty, at least by restraints on the grosser forms of interference, such as assaulting, robbing or imprisoning another. So, in this case also, the law protects an individual's freedom of choice. The only difference between this case and the other two is that in this case the law protects freedom to do some physical act; whereas in the other two cases it secures a person's

[22] For the exception see 'Bentham on Legal Rights' supra n1, 182. I shall not discuss it here.

[23] I do not mention his discussion of fundamental human rights (ibid 200), as these seem to be moral rights that may be protected by the law, rather than legal rights.

ability to perform acts of exercising a power, 'acts in the law', as Hart calls them, by conferring the relevant power.

Hart does not consider that his theory will explain all talk of legal rights: he leaves immunity rights to be explained on a different basis.[23]

MacCormick makes two criticisms of this theory that I wish to note. The first is that if protection of choice is the essential feature of a right, then the removal of choice should make us less inclined to speak of a right; but this is not so.[24] To make this point, MacCormick first notes that Hart ought to be able to include immunities within his theory when such immunities can be waived: for then the sort of control that Hart thinks essential is present. But that leads to results that are counter-intuitive when the law removes, or does not allow, power to waive an immunity, in order to strengthen a right. MacCormick contrasts the immunity against having one's property removed without one's consent, and the immunity against having one's status changed to that of a slave.[25] The first can be waived: one can confer an authority on an agent to sell the property without seeking further consent. But the second cannot. A person cannot give another the legal power to make them a slave. Yet the second seems just as much a right as the first. Further, we are not less inclined to call the immunity against being made a slave a right because it cannot be waived. Rather, the lack of a power of waiver strengthens the right.

The same point can be made about the lack of an ability to waive a duty that one is owed. As MacCormick points out, the right not to be seriously assaulted is no less a right than the right not to be assaulted in trivial ways, although the second can be waived, while the first can not.[26]

MacCormick's second criticism is that the incidents of a claim right noted by Hart seem to follow *because* the right-holder has the advantage it was the purpose of the relevant law to create, rather than to constitute the right. If a right is an advantage of this type then to say there is a right to the observance of a duty by another indicates, in MacCormick's words:

> ... a reason why people aggrieved by breaches of certain duties should be empowered to take various measures and actions at law to secure remedies therefor, and why they should be permitted, at least when there are no strong countervailing reasons of policy, to waive other people's duties in this respect. If I'm allowed to be the best judge of my own good, and if such laws (being right-conferring) are aimed at securing what's good for me, why should I not be allowed to have a say over their operation when only my own protection is at stake.[27]

To these criticisms might be added the simple criticism that possessing the sort of control Hart points to appears to be neither a sufficient, nor a necessary, condition for having a right.

It is not a sufficient condition because there are cases where a significant measure of the requisite control exists, but we do not speak of a right. One case

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24 MacCormick, 'Rights in Legislation' supra n1, 195-199.
25 Ibid, 195-196.
26 Ibid, 197.
27 Ibid, 204.

is where the power to prosecute a criminal offence is given exclusively to a public official such as the Attorney-General or a public prosecutor. Admittedly, there is not here the power to waive the duty, but there is the exclusive power to enforce it. Yet we do not speak of the relevant duty as being owed to the official, or as correlating with a right in the official, the reason being, obviously enough, that the duty was not created for the benefit of the official.

It is not a necessary condition because it is possible to envisage cases where no measure of the relevant control exists, but talk of rights nevertheless makes sense. Suppose in a certain city public authorities are bound to supply each householder with a supply of fresh water, the intention being to confer a particular advantage on each householder, and not just to improve the quality of the housing stock. Suppose that for public health reasons householders also have a duty to receive such a supply, and that for administrative reasons enforcement of the duty to supply the water is left to a public official — say, the Supervisor of Local Authorities. Then, householders would have no measure of legal control over the duty. But if a group of householders were to complain that the dilatoriness of a particular public authority was depriving them of their legal rights, then this would seem to make perfectly good sense. Their particular position would certainly give their complaint a status politically that the complaint of someone not affected would not have.

4.2 MacCormick's theory

MacCormick's own theory, if I may be incautious enough to formulate a definition from his discussion, is that a legal right is a position (1) normally advantageous, (2) that it is the purpose of a legal rule or rules to secure,[28] (3) to individuals separately and not as part of a collectivity. Brief comment is needed on each element of the definition.

Firstly, the position secured by a right need not prove beneficial in each case. Someone may, for instance, receive a sum of money due to them in payment of a debt, only to find that this leads to their being mugged and robbed. MacCormick stresses that the thing secured to someone as a right is a thing normally advantageous. The important point here seems to be that is conceived as an advantage when we contemplate the purpose of the law.

Secondly, a legal right must be secured by a legal rule or rules. Someone might argue that a legal right can be secured by principles or other types of legal material than rules, but nothing should be allowed to hang on that. MacCormick's account can easily be adjusted to accommodate the point. It surely is clear that at a minimum a legal right exists only if there is legal material that by a proper process of legal reasoning yields the right. As a separate point, MacCormick recognises that the rules that create rights may be generative, but he seems not to think this is essential.

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[28] In the summary of his view given at ibid, 204-205 MacCormick does not specify that it must be the purpose of the relevant rule or rules to confer the benefit; he says only that they must in fact do so. But I take the requirement that this be the purpose of the relevant rule or rules as being implicit in his argument. It is certainly a necessary element of a plausible definition.

Thirdly, legal rights are advantages secured to individuals separately. Since MacCormick also thinks that the rules that create or protect rights deal with classes of persons it might seem puzzling how such rules can secure individual advantages.

We can see how the process works if we take first the simple case of claim rights. Sometimes when the law creates a duty the situation will be such that whenever the duty applies to a particular person, and we contemplate its observance or non-observance in a particular case, there will be some other person who will necessarily be affected in a certain way by the observance or non-observance. Suppose you are one of those who have a duty not to assault anyone else. Suppose we contemplate your observance of this duty in a particular case: then there will be another person — the person, your assault upon whom is contemplated — who will necessarily be affected in a certain way if you observe the duty — or, of course, if you do not. So this law, while dealing with classes of persons, nevertheless secures individual advantages in particular cases. Other types of laws that deal with classes of persons can secure individual advantages in a similar way. We should note, however, that when a right is a liberty the person who gets the relevant advantage in a particular case will simply be the person who possesses the liberty.

If we now undertake a review we can see how much of the data assembled so far can be accounted for by MacCormick's theory. Firstly, it explains why some duties are thought to be correlated with rights, and why, in the civil law, where parties are generally left to look after their own interests, these (claim) rights normally generate the legal incidents that Hart noted. It also explains why we are inclined to say that the remedy that right-holders under the civil law can obtain (assuming proof of breach) 'vindicates' the right, rather than 'constituting' it. It also explains why the exclusive ability to obtain a remedy can be present without the holder of it possessing a right, and why it is not entirely wrong to say that a legal right exists when no legal consequences at all follow from this, so long as the right type of benefit is held. Secondly, it explains why certain liberties are rights, and why we are disinclined to call bare liberties rights unless they are in some sense secured or protected by law. If they are protected by related duties of others not to interfere with the exercise of the liberty, or duties of others to facilitate its exercise, then the combination in question more clearly secures a right. Thirdly, it explains why it is that when powers and immunities are intentionally secured to individuals as advantages they are referred to as rights.

We might also observe that properly understood MacCormick's definition comes out the right way on a point that has troubled a number of theorists. When A makes a contract with B that B shall benefit C in a certain way, under ordinary principles of contract law, and in the absence of any special law giving C a power of enforcement,[29] we hold that A has the right that the duty be observed, not C. Since C gets the benefit of performance, this might seem to pose a difficulty for the benefit theory, as Hart thought that it did. But, in fact, if we think the point through carefully, the case poses no difficulty for MacCormick's definition. The relevant law applicable in this case is the law that makes contractual

[29] Such as the Contracts (Privity) Act 1982.

obligations binding. The benefit this law is intended to create is being able to receive a contractual promise that is so binding. In the case put it is A who has this benefit, not C. That is why we are inclined to say that A has the right rather than C. The law may, of course, choose to give an additional right to C, but that is a separate matter.

Carefully considered, MacCormick's definition can also handle two, apparently similar, cases that have caused me considerable difficulty. The first is a case in which there is not a right. MacCormick's definition excludes this case on two grounds, but the first of these seems purely accidental. The case is that which Hart reports as having troubled Ihering.[30] If I understand Ihering's problem correctly, it will be legitimate to modify his hypothetical slightly in order to make it easy later to eliminate the accidental ground. Let us suppose a law imposes a tariff on imported goods in order to secure an advantage for a local manufacturer of goods of the same type. It seems plain that we are not here inclined to say that the law confers a right on the manufacturer that the tariff be paid, even although the law appears intended to confer an advantage on the manufacturer. The first ground on which MacCormick's definition excludes this case is that the manufacturer is not *necessarily* affected in any way by the payment of the tariff. Of course, it is likely the manufacturer will benefit if the tariff is paid, but it is not inevitable: as economists point out, higher priced, imported, goods sometimes have a competitive advantage just on that account. And, whether the manufacturer benefits depends anyway on more mundane contingencies, such as whether the manufacturer remains in business. This is the ground of exclusion that seems to me merely accidental.

To eliminate it let us vary the facts to suppose that the tariff is to be paid directly to the internal manufacturer as a subsidy to produce competing goods, but hold everything else constant. So we shall not allow that the manufacturer has any power of enforcement. Further, let us continue to assume, as I take it was assumed in Ihering's example, that benefit to the internal manufacturer is not an end of the relevant law, but only a means to strengthen the internal economy. Let us also assume, as certainly ought to be the case, that those who framed the relevant law saw it as a ground for *regret* that, as it appeared to them, the only suitable means of securing the relevant end involved giving one citizen an otherwise arbitrary advantage over others. Here, it seems to me, we would still not say the internal manufacturer had a legal right to the payment. The objection to doing so is that the reason for the law makes it inappropriate for the manufacturer to claim that payment of the tariff is his due. Even if, for convenience, the manufacturer were given the power of enforcement, I think it would be inappropriate to say that the manufacturer had a right to receive the tariff.

It might seem that this case comes within MacCormick's definition. But, as I have formulated the definition, it does not. In the case, as put here, an advantage created by the relevant rule is intentionally conferred, in the sense that those who frame it know the rule will have this effect. But they do not want this effect. They tolerate it because they think this adverse aspect of what they are doing is

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[30] Hart, 'Bentham on Legal Rights' supra n 1, 189, n 75.

outweighed by its beneficial aspect. So it is not part of their *purpose* to create an advantage for the internal manufacturer. This is a known, but regretted, side-effect.

The second case is the 'mutual wills' doctrine in equity. Under that doctrine if two persons agree to make each other beneficiaries under their wills, on the basis that the estate of the survivor will be passed on to agreed third parties, and if the survivor, having inherited from the other, does not leave his estate as agreed, then the third parties have an action against the executors of the defaulting party. Equity's concern is not to secure a benefit to those who should have inherited, or to enforce a contract. It is to prevent the dishonesty that would be involved if a person was able to inherit under such an arrangement, and *then* not stick to its terms.[31] Consequently, conferring an enforceable benefit on those who should have inherited is simply a means towards preventing such dishonesty. In this case it seems natural to say that the third parties have a legal right that the executors transfer to them the relevant part of the estate. The distinction between this and the internal industry case is that although conferring an enforceable benefit is here merely a neutral means to securing a further end (ie a means not also wanted for its own sake), that an advantage is conferred is not an adverse aspect of what is done that needs to be outweighed by something else. So conferring an enforceable benefit is here a purpose of the rule — albeit a purpose that is wanted only as a means to something else.

4.3 A Problem

However, there are some legal rights that cannot be explained by the definition I have ascribed to MacCormick. These are rights that take the form of powers or liberties conferred on public officials or bodies. Take, as a simple case, a constable's right of arrest. This is not granted in order to confer an advantage on the constable. In the first place exercising the right can be a dangerous thing, so its possession is hardly an 'advantage' in the ordinary sense of the word. Secondly, a constable who saw it as an advantage would have a disturbingly wrong view of his or her role. The right is not conferred to advantage the constable; rather it is seen as something that it is appropriate to attach to the office of constable in order to further the common good. The right of a court to govern its own procedure, or the right of a parliament to make laws for the good government of a community, need to be understood in analogous ways.

To accommodate these rights of public officials or entities, we need to add to the notion of an intended advantage that of an authority judged to be an appropriate incident of an office or body.

If rights conferred on public offices or bodies are rights in the same sense as rights conferred on individuals there should be something in common to these

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[31] For clear discussion of the doctrine see the judgment of Dixon J in *Birmingham* v *Renfrew* (1937) 57 CLR 666 at 680.

[32] This thought is not new. In *Natural Rights Theories: Their Origin and Development* (1979, Cambridge UP, Cambridge) Richard Tuck argued that the idea of rights was grafted onto the older idea of property. He writes (at 3): ' .. already by the fourteenth century it was possible to argue that to have a right was to be the lord or *dominus* of one's relevant moral world, to possess *dominium*, that is to say, *property*.'

two things. It is not at all easy to find what that thing is: but in my view it is simply that each can be seen as a possession, akin to a property, conferred by the law on the party who holds it.[32]

To establish that this is the correct connection between these two ideas let me make a preliminary point. This is that even as it applies to private rights MacCormick's definition requires a qualification. In a modern setting, when the law intentionally confers an advantage on an individual we naturally think of that as something due to that person as part of their share in the mutual system of advantages and obligations that the law creates. That gives the person a special status to assert that their position should be respected. This understanding of the intent of the law is, I believe, necessary to our thinking of the advantage as a right. But natural as it nowadays is, this understanding of a law intentionally conferring an advantage on individuals separately, is not inevitable. To test this suppose a slave-owning society in which it is decided that slaves should have a measure of legal protection from ill-treatment by their owners. Let us suppose, however, that the slaves are not intended to have any particular status in the matter, the law is simply intended to put citizens under a particular duty. We need not imagine that the benefit to the slaves does not feature in the justification of the law, only that they are not envisaged as participants in the legal order. Then, I think, we would not say that this law creates a right, even although the advantage intentionally created for the slaves satisfies MacCormick's definition. Advantages of the sort MacCormick identifies are rights, it seems, only if they are intended to be held by those on whom they are conferred as their due: and hence as akin to possessions.

Once this is recognised in relation to private rights it can be seen that the idea of possessions also fits the rights of public officers and bodies. Here, also, the rights are possessions that the law confers. But the aspect of possessions that is important here is not advantage; it is exclusive control. These facilities are available uniquely to those on whom they are conferred.

The underlying principle then that leads us to call various things rights is that they are abstract positions created by the law that are analogous to pieces of property secured to individuals by the law. We understand this principle of our usage best if we see it as built on already existing patterns. Further, the way in which the analogy is understood differs between the two contexts of private rights and of rights of public officers or bodies: in the one case it is the advantage of possessing property that supports the analogy, and in the other case the control that it gives. If the thought should be that this is an untidy account, then my answer to this is simply that, at least as it seems to me, historically this is the way that our thought has run.

4.4 A Definition

Bringing these various point together let me proffer a definition:

A legal right is a position under the law that it was the purpose of a law or laws to create that can appropriately be understood as a possession held by the persons or bodies on whom it is conferred.