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RIGHTS: CONCEPTS AND CONTEXTS

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Rights: Concepts and Contexts

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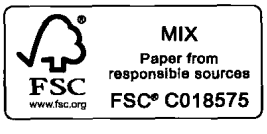

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Series Preface

Much of contemporary moral, political and legal discourse is conducted in terms of rights and increasingly in terms of human rights. Yet there is considerable disagreement about the nature of rights, their foundations and their practical implications and more concrete controversies as to the content, scope and force and particular rights. Consequently the discourse of rights calls for extensive analysis in its general meaning and significance, particularly in relation to the nature, location of content of the duties and responsibilities that correlate with rights. Equally important is the determination of the forms of argument that are appropriate to establish whether or not someone or some group has or has not a particular right, and what that might entail in practice.

This series brings together essays that exhibit careful analysis of the concept of rights and detailed knowledge of specific rights and the variety of systems of rights articulation, interpretation, protection and enforcement. Volumes deal with general philosophical and practical issues about different sorts of rights, taking account of international human rights, regional rights conventions and regimes, and domestic bills of rights, as well as the moral and political literature concerning the articulation and implementation of rights.

The volumes are intended to assist those engaged in scholarly research by making available the most important and enduring essays on particular topics. Essays are reproduced in full with the original pagination for ease of reference and citation.

The editors are selected for their eminence in the study of law, politics and philosophy. Each volume represents the editor's selection of the most seminal recent essays in English on an aspect of rights or on rights in a particular field. An introduction presents an overview of the issues in that particular area of rights together with comments on the background and significance of the selected essays.

TOM CAMPBELL
Series Editor
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Introduction

Since the sixteenth century, rights have played a pre-eminent role in Western moral and political culture. But the importance of rights has not been paralleled by a clear understanding of their nature. The essays gathered in this collection are recent contributions to the literature of rights and represent the main lines of the ongoing research on rights. They discuss a variety of historical and analytical issues related to both moral and legal rights. The purpose of our introductory remarks is to guide the reader in making a selection or establishing priorities.

Rights in Context

Many of the essays in this collection consider rights (and duties) in an abstract and analytical way, but the essays in Part I take a slightly different approach; they try to gain understanding by thinking about rights in the context of historical origin and political thought. If one does not believe that our moral and legal concepts (like 'rights' and 'duties') pick out a timeless and universal object from some Platonic realm of ideas, but believe, instead, that these concepts are the product of human thought and social interaction, then it is natural to inquire about how and why our concepts developed in the way in which they did. In some cases, contextual investigation can be in service of a critical or demystifying project. However, contextual investigations can also serve more neutral, analytical projects, seeking greater understanding of our moral and legal concepts.

For a long time, natural rights served, in Europe and the United States, the function of a universal moral standard to assess the way in which the laws of national states respected the human person. This assessment was often in the hands of ecclesiastical and secular authorities. The first two essays examine this context. Sean Coyle, in '"Protestant" Political Theory and the Significance of Rights' (Chapter 2), offers a novel take on the debate about the nature of rights between 'will theories' and 'interest theories'. Coyle argues that these different approaches can be seen as part of a larger debate about the connection between individual interests and the common good.[1] He shows the connection between the development of thinking about rights and important historic benchmarks, including the rules of ancient Roman law, the English writ system and common law method, the development of capitalism and the growth of the regulatory state. In the course of the analysis, Coyle also offers a subtle defence of the 'will theory' of rights against certain standard criticisms.

Morton Horwitz, in 'Natural Law and Natural Rights' (Chapter 1), offers an overview of how the rhetoric of rights in general, and 'natural rights' in particular, have developed in American law. One of the points raised in Horwitz's rich essay is that one can only understand

[1] Nigel Simmonds has offered a comparable analysis (for example, Simmonds, 1998, pp. 134–45), although the two accounts differ sharply in some details (see, for example, Coyle, this volume, p. 47, n. 60).

propositions about legal or natural rights with a comprehension of the background historical and political context in which such claims arose. 'In America, natural law/rights ideas entered into the everyday process of judicial interpretation in ways that their English counterparts would have denounced as judicial legislation' (p. 11).

After the Second World War, especially because of the horror caused by the Holocaust, and in a new world era in which religious institutions had lost a lot of their prior cultural and political influence, the United Nations and other international organizations developed the concept of human rights to replace the old concept of natural rights in its function as a moral universal standard. The other two essays in Part I explore rights in this new global context. Joseph Raz, in 'Human Rights in the Emerging World Order' (Chapter 3), considers how foundational ideas about the nature of rights implicate current thinking about human rights. According to Raz, one has a right when one has an interest strong enough to justify imposing duties on others to secure one's access to that interest.[2] Contrary to conventional thinking about human rights, Raz argues that these rights cannot be applicable to everyone who qualifies as a human being. He offers the following *reductio*: does it make sense to attribute a right to compulsory education to cavemen? Rights must always be understood in their social and institutional context. Thus, according to Raz, human rights are those that are universally applicable *now* to all human beings, and only those moral rights that are potentially subject to fair and reliable institutional enforcement.

Pablo Gilabert, in 'Humanist and Political Perspectives on Human Rights' (Chapter 4), enters the debate on whether human rights are best understood as interests citizens have within political communities against community institutions, or best understood as pre-political claims individuals have against other individuals based on their common humanity. Gilabert's novel view is that both perspectives are necessary for a proper understanding of human rights, at least as currently practised. A synthesis of the two views justifies the strong sense that these rights are universal, with the recognition that their enforcement occurs within a particular institutional structure (as Raz also emphasizes in Chapter 3).

Concepts of Rights

Many of the essays throughout this collection grapple, in different ways, with the analysis of the concept(s) of rights. There are two touchstones in analytical work on rights, and it is no coincidence that one or both appear in almost every essay in this volume. First is the ongoing debate between will (or choice) theories and interest (or benefit) theories of rights. Will theories focus on the way in which right-holders are, in H.L.A. Hart's terminology (Hart, 1982, p. 183), 'small-scale sovereigns' with control over the duties others owe them. Interest theories emphasize the way in which rights are occasions on which the interests of individuals or classes of individuals are sufficiently strong that they are, or should be, protected by duties imposed on others. The second touchstone is Wesley N. Hohfeld's work on rights (Hohfeld, 1913, 1917), in which he analysed the loose language of judicial references to rights into

[2] Raz's view on the nature of rights is discussed in greater detail in his other publications (for example, Raz, 1986, pp. 165–92; 1994, pp. 238–60).

the distinct concepts of claim-rights, liberties,[3] powers and immunities, each of which, he claimed, had correlates in the legal position of some identifiable second party (for example, if I have a claim-right, it is a claim-right against some identifiable X, who, in turn, has a duty to me).

The occasion for Hillel Steiner's essay, 'Are There *Still* Any Natural Rights?' (Chapter 5), was the mystery of why H.L.A. Hart came to reject his earlier, influential essay, 'Are There Any Natural Rights?' (Hart, 1955). Although Steiner reaches no conclusions on that question, the issue allows him to reconsider standard objections to the 'will' or 'choice' theory of law that Hart had developed in his earlier works. While Steiner concedes that the will or choice theory is not always consistent with ordinary usage (or ordinary *lawyers'* usage), this should not be seen as fatal to the theory. Steiner shows that this approach to rights, properly analysed, remains the superior alternative for explaining rights, even in cases like constitutional immunities where it had been thought that the will or choice theory fell short.

Horacio Spector, in 'Value Pluralism and the Two Concepts of Rights' (Chapter 6), examines the debate about the nature of rights in light of value incommensurability. Spector argues that the two main theories about the nature of rights in fact reflect two different 'value paradigms', with the will theory embedded in a paradigm of individual autonomy and the interest theory embedded in a paradigm of subjective interests. As such, the use of 'rights' can in fact mean two quite distinct things (what Spector calls the problem of 'semantic variation'). At the same time, as Spector points out, value incommensurability stands in the way of a coalescing back of the two concepts, which in turn makes the semantic fragmentation of rights discourse 'radical' (that is, ineliminable). Yet he claims that both understandings of rights share one core: that the existence of a right justifies coercion to enforce the corresponding duty.

Nigel Simmonds, in 'The Analytical Foundations of Justice' (Chapter 7), criticizes Hillel Steiner's efforts in *An Essay of Rights* (1994) to construct a theory of justice from analytical claims about the nature of rights. A basic problem, Simmonds argues, is that different conceptions of rights are possible, and the choice among them is inevitably grounded on views from wider political theory. Simmonds also raises hard questions about the arguments that Steiner has offered for preferring a choice or will theory to a benefit or interest theory.

Andrew Halpin, in 'Fundamental Legal Conceptions Reconsidered' (Chapter 8), raises a series of questions regarding Hohfeld's analysis of legal rights. Most prominently, Halpin would prefer a triangular model of analysis (conduct is required, conduct is prohibited, conduct is neither required nor prohibited) to Hohfeld's more traditional squares,[4] and he argues, as a connected matter, that, contrary to Hohfeld, liberty is not a fundamental legal conception. Halpin also uncovers the analytical problem with claiming, as many commentators do, that rights have priority over duties.

Brian Bix, in 'Ross and Olivecrona on Rights' (Chapter 9), considers the sceptical and critical perspectives on rights offered by the Scandinavian legal realists. Those theorists – most prominently Alf Ross and Karl Olivecrona – argued that there was nothing in the

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[3] Hohfeld in fact used the term 'privilege' for what modern writers call 'liberty'.

[4] Hohfeld had two squares: (1) claim-right, duty, liberty and no-right; and (2) power, liability, immunity and disability. Halpin claims that both Hohfeldian squares correspond to the classic Aristotelian square of opposition: (3) all are, all are not, some are and some are not.

world that 'legal rights' referred to, and thus this term (like other legal normative terms, such as 'obligation' and 'property') should be viewed doubtfully, as potentially being a mere nonsense term. The Scandinavian realists tried to salvage some usable meaning for legal terms. Ross's compromise was to see 'legal rights' as a short-hand, connecting a collection of factual predicates with a collection of remedial options. For Olivecrona, the compromise was to see 'rights' as signs, directing our behaviour, or like money, which (after the gold standard disappeared) has no reference in the world, but nonetheless eases daily social interactions.

In 'A Right to Do Wrong?' (Chapter 10), William A. Edmundson considers a famous paradox in moral philosophy: can one have a moral right to do something that is morally wrong? Edmundson shows how the answer to that question is tied up with the question of the basic nature of moral rights – whether moral rights are protected permissions (in which case it would make no sense to speak of a moral right to do something morally wrong) or whether moral rights are essentially protected choices (when a right to do wrong does make sense). A further analysis in the essay ties the debate about the right to do wrong to whether the function of rights is primarily the recognition of the moral worth of some action or entity, or whether the function of rights is primarily constraining reaction to some activity, in a context where the moral status of the activity may be uncertain or controversial.

Leif Wenar, in 'The Nature of Rights' (Chapter 11), argues for a theory of rights that combines elements of the will theory and the interest theory – giving, he argues, the benefits of both approaches while avoiding the well-known weaknesses of each.[5] Under Wenar's 'several functions theory' any 'Hohfeldian incident' is a right if it 'mark[s] exemption, discretion, or authorization, or entitle[s] [its] holders to protection, provision, or performance' (p. 236).

Matthew Kramer and Hillel Steiner, in 'Theories of Rights: Is There a Third Way?' (Chapter 12), reject the sort of hybrid theories of rights offered by Leif Wenar (Chapter 11) and Gopal Sreenivasan (2005).[6] They argue that while these theorists have offered some useful criticisms of established theories of rights (they particularly commend some of Sreenivasan's arguments against interest theories), their purported alternative approaches either do not constitute real alternatives or they lead to unattractive and counter-intuitive outcomes.

Bipolarity of Rights

The idea that rights and duties are correlative can be traced back to Adam Smith's *The Theory of Moral Sentiments* (1982; see also Spector, 2010). Adam Smith distinguished between 'one-party' and 'two-party' moral situations. His model of moral interaction is a bipolar one: there are two parties, an offender and a sufferer in the case of wrongs, and a benevolent agent and a beneficiary in the case of right actions. Rights are requirements predicated on moral interactions that essentially involve a second party. In a one-party moral situation rights claims are unintelligible, just as dyadic predicates are when asserted on one single subject. Rights properly belong to second-person moralities.[7] Normative bipolarity in this sense is a

[5] As does Sreenivasan (2005).

[6] For criticism of hybrid theories, see also Spector (2007), not included in this collection.

[7] For a discussion of the second-person stance in morality, see Darwall (2006).

necessary condition of rights. It can be speculated that bipolarity is essential to rights because all rights, even moral rights, have been modelled on the plaintiff–defendant relationship.[8]

Echoing Adam Smith, Michael Thompson (2004) differentiated between the 'monadic' character of moral notions, such as 'virtuous' and 'duty', and the 'bipolar' nature of concepts, such as 'justice' and 'rights'. This line of analysis is also followed by Stephen Darwall in 'Bipolar Obligation' (Chapter 13). Darwall elaborates on the connections between his notion of 'second-personal reasons' (Darwall, 2006) and directed duties – which he prefers to call 'bipolar obligations'. Such obligations are tied up with responsibility and blame: a duty is something it would be *wrong* not to do, not just something one has strong reasons to do.[9] Darwall's analysis here builds upon and extends ideas introduced by Peter Strawson (1962). In Chapter 13 Darwall shows that such bipolar obligations, though important for understanding moral obligation, are not analytically more fundamental than second-personal authority and second-personal reasons for action.

Margaret Gilbert, in 'Giving Claim-Rights Their Due' (Chapter 14), analyses the nature of a paradigmatic sort of claim-right, the kind associated with 'everyday agreements', but present in other contexts as well. She focuses on the fact that, in this case, the right-holder has the standing to demand, of the right's addressee, the action to which he has a right. She argues that joint commitment is a source of rights of this sort. Such a commitment gives the parties reason and standing to demand of one another actions that conform to it, and to rebuke one who fails to conform. Gilbert conjectures that joint commitment may be the only source of rights of the sort in question. In a concluding section, she explores the implications of this conjecture.

The next two essays by Van Duffel and Sreenivasan try to gain insights into the nature of rights by focusing on duties, emphasizing in particular the way in which some, but not all, duties are 'directed'. Siegfried Van Duffel, in 'The Nature of Rights Debate Rests on a Mistake' (Chapter 15), argues that a basic aspect of how we understand duties cannot be accounted for by either the will theory or the interest theory of rights. Most of our duties are 'directed' (sometimes this is called 'relative' or 'relational'); they are owed to particular persons. Neither of the main theories of rights can adequately distinguish directed duties from non-directed ones. From this starting-point Van Duffel goes on to show how the will theory and the interest theory describe two different kinds of rights – two different aspects of 'the realm of rights'. This echoes a point made in Spector's essay, discussed above.

Gopal Sreenivasan, in 'Duties and Their Direction' (Chapter 16), also focuses on the topic of directed duties. Initially, Sreenivasan contrasts duties, which are often (but not always) directed, with conclusions about what one ought to do, all things considered, which is not similarly 'directed'. In the course of his analysis, Sreenivasan shows how Hohfeldian rights and liberties differ in 'weight' and function from the deontological uses of those concepts – for example, the deontological view of claim-rights as trumps over, or side-constraints on, consequentialist reasoning. Finally, Sreenisavan shows how a hybrid of the will theory and the interest theory can explain the direction of a directed duty (as well as how a duty can be owed to someone in no position to exercise control over it).

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[8] The term 'bipolarity' was introduced in this context by Weinrib (1995, p. 122).

[9] Potentially, one could build this analysis into an argument against an interest theory of rights, although it is not clear that such an argument is in fact entailed by Darwall's position.

Rights and Reasons

It is a truism that moral rights are established by moral norms. Now moral norms can be *social norms* or *ideal norms*; either way rights are related to reasons. Part IV deals with the role of rights in practical reasoning. According to Alon Harel, the discourse of rights is a practical discourse, sorting out a particular kind of practical reasons. In 'What Demands are Rights? An Investigation into the Relation between Rights and Reasons' (Chapter 17), Harel says that rights may rely on *intrinsic* or *extrinsic* reasons. Intrinsic reasons are those that justify classifying a certain demand *as a right*. Extrinsic reasons are other reasons that can justify a demand, though not justifying it as a matter of right. Whereas extrinsic reasons function in a particularistic and variable fashion, intrinsic reasons generally operate in a uniform and acontextual manner.

Reasons supporting rights or deriving from them could be justificatory or motivational. Unlike legal rights, which cannot but be recognized by a positive legal system, it is sometimes suggested that, as a matter of fact, moral rights may lack social recognition. Thus 'independence' theorists maintain that rights do not presuppose social recognition.[10] Other authors contend that moral rights conceptually require social recognition. In fact, 'dependence' theorists hold that rights cannot perform their distinctive roles unless they are recognized by social norms.[11] On this view, non-recognized rights are not fully-fledged rights but only defective ones.

In 'Rights and Recognition' (Chapter 18), David Lyons defends an 'independence' view. He rejects the social recognition thesis (or *recognition thesis* for short), according to which rights, as a conceptual matter, require social recognition. The thesis has different implications with respect to moral and legal rights. Thus, the adscription of a *moral* right to X to P involves two separate claims: (1) there are moral grounds justifying P's enjoying X; and (2) P's right to X is recognized in P's community. In terms of legal rights, the recognition theorist holds that legal rights are not only established in existing statutes or other legal doctrines, but also that legal rights 'are generally recognized by courts and generally enforced by public officials' (p. 395). This is what Lyons calls 'the legal rights enforcement thesis' (the *enforcement thesis* for short), which he considers as generally mistaken, because systematic violations of rights can be found in various historical contexts. This was the case with the right not to be lynched, which did exist under US law, but was systematically violated under Jim Crow. Lyons considers two direct arguments in favour of the recognition thesis in relation to moral rights: (a) the political argument and (b) the epistemic argument (our label). The political argument maintains that the discourse of rights can be devalued by the proliferation of groundless moral rights claims, and the epistemic argument claims that epistemic accessibility of rights requires social recognition. Lyons rejects both arguments.

Gerald Gaus, in 'The Rights Recognition Thesis: Defending and Extending Green' (Chapter 19), presents two arguments in favour of the social recognition thesis. The first argument is from moral internalism. Like T.H. Green (1986), Gaus takes rights to be correlative with duties, and embraces moral internalism. According to moral internalism, duties exist in a certain society only if they are recognized by actual or rational agents in their practical deliberations. Both theses imply that someone has a right only if the correlative duty

[10] This position has been advocated by Wellman (1997, p. 123).

[11] This position has been advocated by Martin (1980, pp. 392–94).

commands actual or rational practical recognition. The second argument is that rights have the function of delegating moral authority among individuals. Now, for Green, *de jure* authority is not merely rightful authority, but also generally recognized authority. Therefore, rights can only delegate authority if they are generally recognized.

Conflicts of Rights

Under natural-law rationalism, particularly of the Kantian stripe, rights were thought to shape a normative structure that is coherent, and this feature of natural law rationalism passed over to our age. Even today, rights discourse is characterized as guided by the ideal of coherence or consistency (Waldron, 2000). But coherence in normative systems can be thought of in two different ways: *logical (formal)* and *practical (material)*. The standard definition of logical coherence is in terms of the absence of contradictory normative solutions to the same type of case (Alchourrón and Bulygin, 1971). To assert that a normative system is coherent in this sense it is not necessary to appeal to factual claims. By contrast, practical coherence means that the normative system does not require pairs of conducts that are not jointly *compossible*. The sense of compossibility involved here is physical, not logical, and can only be asserted by reference to factual claims.[12] Practical incoherence of rights is the main theme in this section. 'Absolutists' generally reject the possibility of conflicts (that is, practical inconsistency) of rights. For instance, Hillel Steiner, in his well-known book *An Essay on Rights* (1994), has defended absolutism by arguing that rights are compossible. He endorses the Kantian approach that sees practical consistency as logically required by the concept of rights. Other absolutists only hold that *some* rights are absolute, while admitting that many rights can be overridden.[13] In contrast, 'moderates' view all rights as *prima facie* rights, thus accepting the practical inconsistency of rights as a pervasive phenomenon of morality (Brandt, 1959, pp. 438–39). On the *prima facie* view of rights, rights can be outweighed by stronger rights or other weightier moral concerns. *Prima facie* theorists claim that when conflicts of rights occur, one-dimensional or multi-dimensional criteria are needed to weigh and balance the conflicting rights and remove the practical inconsistency.

In 'Conflicts between Rights' (Chapter 20), Christopher Heath Wellman discusses the cabin example, where a hiker needs to enter someone else's cabin in order to escape from a blizzard. It seems that the owner's negative right conflicts with the hiker's liberty right to enter the cabin. If rights are conceived of as absolute and general advantageous positions assigned to right-holders with respect to other parties, the conflict between these two rights cannot be resolved. Wellman then explores two different strategies to resolve the conflict: the *specificationist* view, followed by Joel Feinberg, which denies the generality of rights, and the *prima facie* view, which rejects the absoluteness of rights. According to the former, the cabin owner does not have a right against the hiker that he does not enter his cabin in the relevant circumstances; when properly specified, the owner's property rights exclude this incident. According to the latter, the owner has a non-absolute right that is overridden by the hiker's

[12] Yet it could be transformed into a logical sense if we accepted as axiom Kant's principle that 'ought' entails 'can'; see Williams (1973).

[13] See, for instance, Gewirth (1981).

right to violate others' private property rights when that is necessary in order to save his life. Wellman complements the specificationist view by acknowledging that the cabin owner has other advantageous positions: a compensation right once his property has been violated and a latent compensation right to be indemnified should his property be violated. These two rights do not require *prima facie* rights on the part of the owner; they can be merely conditioned on the existence of *prima facie* moral reasons against anyone's property being taken.

In 'American Balancing and German Proportionality: The Historical Origins' (Chapter 21), Moshe Cohen-Eliya and Iddo Porat trace the origins of the test of proportionality in German law and of the balancing test in the United States. They claim that, although the two tests do not have substantial analytical differences, they differ in their functions. Proportionality was introduced in nineteenth-century German administrative law against the background of legal formalism and a doctrine of natural rights in order to check the power of the Prussian state and transform it into a *Rechtsstaat.* By contrast, balancing was originated by German private law within the *Freirechtschule* and passed down to the anti-formalist movement in twentieth-century American law. Balancing tried to empower government to pursue social interests without the limits of natural rights, thus seeing rights as social interests and constitutional rights as standards rather than rules.

In 'Security and Liberty: The Image of Balance' (Chapter 22), Jeremy Waldron criticizes the view that we have to strike a new balance between civil liberties and security when the risks to security become graver or more imminent. He basically takes a stand on rights theory to reject the balancing test as a kind of consequentialist analysis, arguing that the rhetoric of balance is inappropriate when civil liberties are at stake. For Waldron, balancing (1) distorts the nature of civil liberties as individual rights that outweigh social benefits; (2) ignores that the effects of reducing liberty affect certain groups more than others; (3) fails to foresee deleterious effects of liberty reduction on the enhancement of government power; and (4) tends to exaggerate the importance of symbolic benefits as opposed to real benefits. While the latter two problems could be corrected by properly applied balancing, the former two problems are serious obstacles to unqualified balancing.

In Chapter 23, Aharon Barak, former Justice of the Supreme Court of Israel, discusses proportionality in 'Proportionality Stricto Sensu (Balancing)', Chapter 12 of his *Proportionality, Constitutional Rights and their Limitations* (2011). Barak argues that social importance is the fundamental criterion for assessing the costs and benefits involved in advancing public goals and limiting rights. Specifically, he claims that the judge or administrator must compare the marginal benefit of furthering the relevant public goal, assessed by its social importance, and the marginal cost of limiting the relevant human right, also assessed by its social importance. Barak acknowledges that balancing is a value-laden enterprise and distinguishes between the *basic balancing rule* and the *specific balancing rule.* Whereas the basic balancing rule identifies the relevant abstract variables and their ratios, the specific or contextual balancing rule attends to the particular circumstances of the case.

Robert Alexy explains, in 'The Weight Formula' (Chapter 24), his well-known algorithm for weighing and balancing fundamental rights, which utilizes numbers and mathematical operations. Suppose we have two rights: freedom of expression and the right to personality. Each of these rights is supported by a different principle: P_i and P_j. Under one simplified version, Alexy's Weight Formula is a quotient $W_{i,j}$ whose numerator results from the product

of numbers representing the intensity of the interference with the first principle, I_i, and its abstract weight, P_i, and whose denominator is the product of numbers representing the intensity of the interference with the second principle, I_j, and its abstract weight, P_j. When the magnitude of the quotient is greater than 1, P_i takes precedence over P_j; if $W_{i,j}$ is less than 1, P_j outweighs P_i, and there is a tie when $W_{i,j}$ is equal to 1. This formula is well known in Continental jurisprudential circles.

Alexy's algorithm is subjected to analytical scrutiny by Lars Lindahl, the Swedish deontic logician. In 'On Robert Alexy's Weight Formula for Weighing and Balancing' (Chapter 25), Lindahl analyses Alexy's theory in light of measurement theory. Lindahl's essay clarifies potential confusions arising from a naive reading of Alexy's mathematical formulas. Basically, Lindahl contends that Alexy's theory relies on a three-dimensional ordering of fundamental rights, rather than on a measurement of the weight of rights on a cardinal scale. Lindahl points out that, just like temperature, the weight of rights according to Alexy's formula is not measured on a ratio scale but on an interval scale. Therefore, statements to the effect that the right to human dignity, for instance, is *n* times more important than freedom of expression are meaningless. Lindahl concludes that the mathematical representation of Alexy's scale is misleading because the information 'encoded' in the quotients can be more clearly expressed in ordinal terms. For this purpose, Lindahl offers topological diagrams that dispense with numbers and allow the formulation of diagrammatical claims that 'decode' in ordinal terms the information contained in the mathematical statements.

Concluding Remarks

We hope that this collection, in all its richness and diversity, will help bring the debate on rights to a new era of analysis. In this new era, the logical structure that characterized the discourse of rights in its classical age should be reshaped to accommodate itself to a reality marked by rights that come too close to interests and needs to retain their distinctive point. If rights are to preserve their distinctive point in social constitutional democracies, they should maintain their ability to curb the abuse of social and political power and to prevent further generations of rights from just becoming new powers conferred on government.

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