HOHFELD'S THEORY OF FUNDAMENTAL LEGAL CONCEPTS: A NO-REVISION

Leopold W. Rosdorff

1) *Introduction:*

Hohfeld's system of fundamental legal concepts ([1]) has been subject to much criticism of both a destructive and a constructive nature. The interesting paper by Frederick B. Fitch: "A revision of Hohfeld's theory of legal concepts" is of the latter kind ([2]). Fitch gives the following abridgement of Hohfeld's theory:

"Hohfeld has proposed that the legal relationship of *duty*, *privilege*, *right* and *no-right* are so related among themselves that the following equivalences hold, where for each duty D the corresponding privilege, right and no-right are respectively P, R, and N:

"X has duty D relatively to Y if and only if X does not have privilege P relatively to Y.

"Y has right R relatively to X if and only if Y does not have no-right N relatively to X.

"X has duty D relatively to Y if and only if Y has right R relatively to X.

"Y has no-right N relatively to X and only if X has privilege P relatively to Y.

"Thus a duty and the corresponding privileges are viewed as two-termed relations that are contradictories of each other, and similarly a right and the corresponding no-right are viewed as two-termed relations that are contradictories of each other. Furthermore a duty and the corresponding right are converses of each other, while a no-right and the corresponding privilege are converses of each other. Hohfeld actually speaks of "opposites" instead of contradictories, and of "correlatives" instead of converses. Hohfeld's account of these concepts may therefore be summarized by the following table":

	Opposites	*Opposites*
Correlatives	Duty	Right
Correlatives	Privilege	No-right

The revision suggested in Fitch's paper is based on the idea of replacing Hohfeld's concept of 'privilege' as contradictory (Hohfeld would say 'opposite') to 'duty' by that 'privilege-not', which to Fitch is similar to 'exemption'. Similarly Fitch adds some terms of his own invention to those of Hohfeld, by putting 'no' before them, or 'not' after them, or both. The concepts obtained in this way are described as having interrelationships in squares of opposition of almost similar nature to those in traditional logic. Lastly Fitch develops a more elaborate formalism embracing all concepts by his own modification of Hohfeld's terms, claiming to disclose the greater part of society's legal and ethical structure.

This claim made by Fitch, and also made by Hohfeld earlier, of course raises the interest of those who have to deal with fundamental legal problems. It therefore seems important to consider whether Fitch's theory is consistent with the notions developed in theories of law.

Fitch describes his basic ideas for a revision of Hohfeld's theory as follows:

"For example, X has the duty D of paying Y a dollar if and only if X does not have the privilege P of not paying Y a dollar. Similarly, Y has the right R against X that X pay him a dollar if and only if X has the duty D to pay Y a dollar. Notice, however, that if D is the duty of paying a dollar, then the corresponding privilege P is the privilege of not paying a dollar, rather than the privilege of paying a dollar. Let us refer to the latter privilege as P'. Then it is seen that the privilege P', which involves the negation of a concept in D, is indeed the contradictory of D, while the privilege P', which involves the same concept as that in D, is not the contradictory of D but rather is implied by D. In other words, if X bears to Y the duty D to pay Y a dollar, then surely X has the privilege P' of paying Y a dollar but does not have the privilege P of not paying a dollar. Thus Hohfeld succeeds in treating privileges as the contradictory of duty but only introducing an element of negation into the particular privilege that corresponds to a given duty. If this element is not introduced, the concept of privilege is seen to be implied by the concept of duty instead of contradicted by it."

2) *Concepts of Privilege in Fitch and Hohfeld.*

Privilege has been described by Hohfeld ([3]) as "the mere negation of duty". He adds that this duty should have 'a con-

tent or tenor precisely *opposite* to that of the privilege in question'. As a simple example Hohfeld wrote: "... if *A* has not contracted with *B* to perform certain work for the latter, *A*'s privilege of *not* doing so is the very negation of a duty of *doing* so". This notion of privilege corresponds to what Fitch calls privilege-not or exemption.

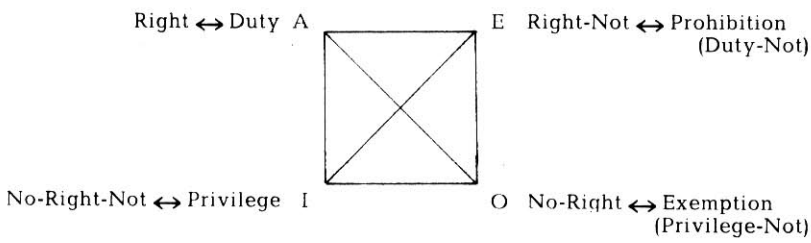
Another example of privilege given by Hohfeld is the famous shrimp-salad story (4). It runs as follows:

> "*A, B, C,* and *D,* being the owners of the salad, might say to X: 'Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you.' In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast the dish that X couldn't eat the contents, no right of X would have been violated.
>
> "Perhaps the essential character and importance of the distinction can be shown by a slight variation of the facts. Suppose that X, being already the legal owner of the salad, contracts with Y that he (X) will never eat this particular food. With A, B, C, D and others no such contract has been made. One of the relations now existing between X and Y is as a consequence, fundamentally different from the relation between X and A. As regards Y, X has no privilege of eating the salad; but as regards either A or any of the others, X has such a privilege. It is to be observed incidentally that X's right that Y should not eat the food persists even though X's own privilege of doing so has been extinguished."

Here we find an exposition of privilege *of doing,* which is a negation of a *duty not to do.* This notion of privilege corresponds to what Fitch calls privilege P', making it contradictory to a duty-not, or prohibition.

Simultaneous occurance of both privilege and privilege-not, or exemption, would be possible according to Fitch's treatment of these as subcontraries. Fitch realizes this treatment by putting them in a square of opposition "very much like the square of opposition of the A-, I-, E-, and O-propositions of traditional logic". The converse concepts of no-right-not and no-right are put in a converse square of opposition.

Using Fitch's devices we can make a similar square of opposition in which we treat the concepts and their converses as inseparable jural relations in the sense of Hohfeld's system. We then get a scheme of this kind (1):



If in this square of opposition the subcontrary relations No-Right-Not ↔ Privilege and No-Right ↔ Exemption exist simultaneously in the same persons with respect to the same legal performance, there is both an absence of duty and an absence of prohibition ,or duty-not, in the person who has both a privilege and a privilege-not, or exemption. In other words: *absence of duty* can be described as equivalent to either a *privilege-not* or *a privilege-not and a privilege together; absence of a duty not* can be defined as equivalent to either *privilege or a privilege and a privilege-not together; absence of both a duty and a duty-not* can be formulated as equivalent to *a simultaneous privilege-not and privilege.*

That such situations may occur can be deduced from the examples given earlier.

In the shrimp-salad example we can see for X, as well as his *privilege* to eat the salad, a *privilege-not* to eat it. In the example where A has not contrated to perform certain work for B, we can see that A's *privilege-not* to do his work may be accompanied by a *privilege* for A to do the work.

In both cases privilege and privilege-not are negations of respectively duty-not and duty; in these instances they have the property of simultaneous existence. The person in whom both a privilege and a privilege-not are invested has a freedom of choice between doing and not doing; the person in whom the converse concepts are invested has neither a right to ask for performance nor a right to ask for non-performance.

A rather frequently occurring instance of such a freedom of choice concerns ownership. If A owns Blackacre he is ab-

solutely free in respect of B, C, or D to sell it or not to B, C or D or anybody else. Other examples can be found in conceptions of 'fundamental human rights' such as freedom of speech and right of association. It seems reasonable to define such a conception as a privilege in the broader sense, its converse being no right whatsoever.

A privilege, in the strict sense elaborated by Fitch, lacks such a freedom of choice. Its only meaning is that of absence of the concept of duty-not or prohibition. Absence of a prohibition, or duty not to perform, is however implied already in the very concept of duty itself: if A has a duty to do Q to B he has no duty not to do Q to B.

Similarly the notion of exemption or privilege-not does not mean anything but absence of duty. Absence of duty is implied by the concept of duty-not or prohibition: if A has a prohibition or duty not to do Q to B he has no duty to do Q to B.

A privilege in the strict sense of Fitch is therefore always accompanied by either a duty or an exemption. If somebody has such a privilege to pay a dollar he has either a duty to pay a dollar or a privilege in the broader sense to pay a dollar or not. Similarly, an exemption is always accompanied by either a prohibition or a privilege. If somebody has an exemtion from paying a dollar he either has a prohibition to pay a dollar or a privilege in the broader sense to pay a dollar or not. The notion of privilege in the strict sense, and the notion of exemption, seem therefore not entirely suitable for the representation of fundamental legal concepts: if they occur, they represent either one or other of two concepts which to Fitch are fundamental (duty, prohibition), or they represent the very absence of both these concepts simultaneously. There is obviously no reason why the notion of privilege should be a better device for the concept of duty than the notion of duty itself.

Similar statements might be made in relation to the notion of exemption or privilege-not in so far as this concerns the concept of prohibition or duty-not.

If these statements are correct, then both the notion of pri-

vilege in the strict sense and the notion of exemption seem only suitable to express, each in turn, the simultaneous absence of both a duty and a duty not, or prohibition; this simultaneous absence was defined as a privilege in the broader sense. Clearly, however, there is no reason why a privilege in the broader sense should be represented by two different notions. These only have a similar meaning in relation to the representation of this conception, but not to its contents.

A privilege in the broader sense is nothing but a device to indicate that someone, with respect to a certain performance, has neither a duty to carry this performance out, nor a duty not to do so. It therefore represents the situation that this person has not any duty at all with respect to that performance.

Fitch regards the notion of duty to do and duty not to do as contraries. Instead of "duty not to do", however, we can write he words "duty to do not" without changing the meaning of that concept. Both duty to do, and duty not to do, clearly appear to us now as the two only members of one and the same class, that of *duty to do or not to do.* If both its members are absent, the class is absent too. A privilege in the broader sense can therefore be described as *absence of duty to do or not to do* and its converse as *no right to do or not to do.*

Both the notion of privilege in the broader sense, and that of privilege in the strict sense, correspond with Hohfeld's definition of the "mere negation of duty", this duty having a "content or tenor precisely *opposite* to that of the privilege in question" ([5]). Privilege in the broader sense however is exactly what Hohfeld had in mind. Hohfeld stated, in giving an example illustrating the notion of privilege:

"*Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law to regulate his own mode of carrying them on according to his own discretion ([6]).

The broader notion of privilege has always remained a basic concept in later developments of the Hohfeldian system ([7]). Moreover, it was this notion of privilege that was introduced into the American law-restatement. Privilege has been described there as:

"... that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances, does not subject him thereto.

A legal freedom on the part of one person against another to do a given act or a legal freedom not to do a given act" (8).

Privilege in the broader sense was one of the eight legal concepts which Hohfeld considered fundamental. Reduction of such a concept to smaller units he therefore supposed to be impossible. It has been shown above that the treatment of these concepts as class-concepts does not destroy this assumption, and even supports it.

3) *Premises in squares of legal opposition.*

Some remarks will now follow relative to squares of opposition very much like those of the A-, I-, E- and O-propositions of traditional logic. Fitch says about the use of such squares, referring to a device developed, among others, by Saul A. Kripke ('A completeness theorem in modal logic, *Journal of Symbolic Logic*, vol. 24 (1959), pp. 1-14), that the analogy with the square of opposition of traditional logic can be further reinforced by writing "the four propositions, «*X* has a duty to do *F* to *Y*», «*X* has a privilege to do *F* to *Y*», «*X* has a prohibition against doing *F* to *Y*», and «*X* has an exemption from doing *F* to *Y*», respectively in the forms of *A*-, *I*-, *E*- and *O*-propositions of traditional logic. This is done by assuming that in addition to the actual universe or world there are various «legally possible» worlds in which nothing illegal is the case. To say that something is legally necessary is then taken to mean that it is in fact true in all legally possible worlds, and to say that something is legally possible is to say that it is true in at least one legally possible world. The proposition that asserts that *X* has a duty to do *F* to *Y* can then be expressed as the following *A*-proposition: «All legally possible worlds are such that *X* does *F* to *Y* in each of these worlds». Similarly the proposition that asserts that *X* has a privilege to do *F* to *Y* can be expressed as the following *I*-proposition: «Some legally possible world is such that *X* does *F* to *Y* in that world». Similarly for prohibition and exemption and the corresponding *E*- and *O*-propositions. A similar treatment can of course also be applied to the four converse relations of right, no-right-not, right-not, and no-right."

The premise in this reasoning concerning the existence, in addition to the actual universe, of various "legally possible" worlds, or universes in which nothing illegal is the case, is certainly not in accordance with juridical reality.

Firstly, "legally possible" worlds can only exist as inoperative images and, secondly, they do not need any system for correction of illegal acts because nothing illegal is the case there. Moreover, the actual world is already overcrowded with too many, and too widely differing, legal systems. Because now the system of Hohfeld has, amongst other things, been developed as a device for translating various legal systems into each other's terms, it seems reasonable to proceed on the basis of the opportunities which the Hohfeldian system itself offers as a "legally possible" universe — something illegal might be the case in this universe, but such an occurance is not relevant in the present context.

4) *Hohfeld's eight fundamental concepts in one square of opposition.*

So far as the eight concepts of the Hohfeld-system are concerned, Hohfeld was of the opinion that with respect to the same performance (B's performance F to A) all legal relations between A and B are either relations of the type Right ↔ Duty, the type No Right ↔ Privilege, the type Power ↔ Liability, or the type Disability ↔ Immunity.

The four fundamental Hohfeldian relations themselves can be formulated as follows:

(A) *Right ↔ Duty: A* has a legal expectation that *B* shall do *F* to *A*, and *B* must do *F* to *A*.

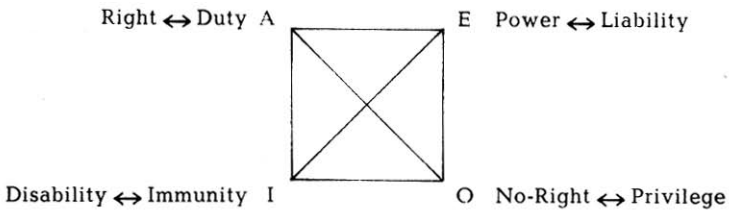
(E) *Power ↔ Liability: A* may voluntarily create a new legal relation affecting *B* with respect to performance *F*, and *B* is subject to a new legal relation created by a voluntary act of *A*, with respect to performance *F*.

(O) *No Right ↔ Privilege:* A has no legal expectation that B shall do *F* to *A*, and *B* must not do *F* to *A*.

(I) *Disability ↔ Immunity: A* cannot create by his own act

a legal relation affecting *B* with respect to performance *F*, and *B* is not subject to *A*'s attempt to create a new legal relation affecting *B* with respect to performance *F*.

Basing ourselves on the broader notion of privilege defended above, we can put the four fundamental Hohfeldian relations in a square of opposition (2) as follows:



The A-proposition may be formulated here as: 'All legal relations with respect to performance *F* between *A* and *B* are Right ↔ Duty relations; the E-proposition is then: 'All legal relations between *A* and *B* with respect to performance *F* are Power ↔ Liability relations'. The I-proposition may read: "At least one legal relation with respect to performance *F* is a Disability ↔ Immunity relation". The O-proposition is then: "At least one legal relation with respect to performance *F* is a No-Right ↔ Privilege relation". Existence of a Right ↔ Duty relation means that between the same persons with respect to the same performance there is also a superimplied Disability ↔ Immunity relation, and that both a contrary Power ↔ Liability relation and a contradictory No-Right ↔ Privilege relation are absent. Similarly, the Power ↔ Liability relation superimplies a No-Right ↔ Privilege relation, a contrary Right ↔ Duty relation and a contradictory Disability ↔ Immunity relation being absent. The existence of a Disability ↔ Immunity relation means that there also exists either a Right ↔ Duty relation or a No-Right ↔ Privilege relation, a Power ↔ Liability relation being absent in any case. Existence of a No-Right ↔ Privilege relation means that there also exists either a Power ↔ Liability relation or a Disability ↔ Immunity rela-

tion, a Right ↔ Duty relation being absent in any case. The subcontrary Disability ↔ Immunity and No-Right ↔ Privilege relations occur simultaneously if both Right ↔ Duty and Power ↔ Liability relations are lacking.

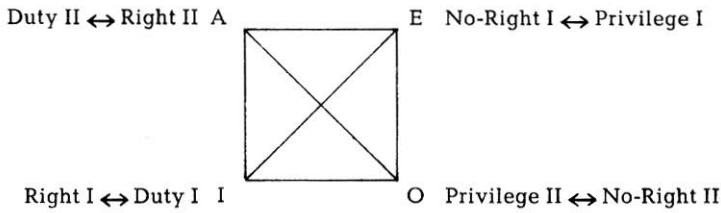
So, for example, it is *B*'s privilege to perform *any* act in relation to *A* with respect to a given matter. As long as *B* does not make an offer to *A* to perform a *certain* act with respect to this matter, he has an immunity against any endeavour made by or on behalf of *A* to become subject to a liability or a duty against *A*. When, however, *B* makes such an offer, he enters into a liability against *A* to perform the duty which he offered as soon as *A* exercises his power to accept the offer. As long as *A* does not accept the offer, *B* still has the same privilege or absence of duty against *A* which he possessed before he (*B*) made the offer. As soon as *A* exercises his power by accepting the offer, *B*'s privilege is lost and his liability is transformed into a duty. *B*'s duty against *A* superimplies a new immunity against any endeavour from *A* to create for *B* either the same duty, or a liability which might be transformed into the same duty. When *B*'s duty against *A* comes to an end, the Right ↔ Duty relation between *A* and *B* is indeed lost but *B* retains his immunity against endeavours from *A*'s side to im- the same duty, and he obtains again a privilege to do or not to do against A the same act as that to which his duty obliged him.

5) *Nullities and exceptions represented in squares of opposition by means of Hohfeldian concepts.*

The problem tackled by Fitch, however remains; a solution is not provided in the literature on Hohfeld. Fitch's great merit is, that he is conscious that situations occur in which a given person has a legal opportunity not to fulfill a duty which that person would have to perform if that opportunity did not occur and that such situations might be represented by placing Hohfeldian terms in a square of opposition. An answer toward this problem is tried out in the following lines.

A legal opportunity not to fulfill a duty may be due to three different causes: the duty can be void; the duty can be annihilable; the duty can subsist but be made ineffective. If a duty is declared void it is supposed never to have existed; in case of annihilation the duty exists until the moment of annihilation; annihilation is reached in court by a succesful appeal to an *exceptio peremptoria;* ineffectiveness springs from a successful appeal to an *exceptio dilatoria* or an *exceptio declinatoria.*

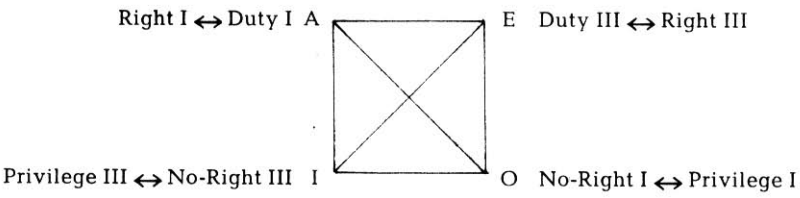
These positions of voidness, annihibility and ineffective subsistence can be represented in the following square of opposition (3):



The Right I ↔ Duty I relation is the relation in which the claimant sues the defendant; the Duty II ↔ Right II relation is put forward by the defendant as a demurrer which should make the first relation ineffective; this demurrer may be either an *exceptio dilatoria* or an *exceptio declinatoria.* The demurrer in question (Duty II ↔ Right II, superimplies the Right I ↔ Duty I relation because it cannot exist if this relation (Right I ↔ Duty I) does not, and it might or might not exist if the latter relation does. If the bringing forward of such a demurrer is unsuccessful, then the simultaneous existence of the Privilege II ↔ No Right II relation with the Right I ↔ Duty I relation represents this unsuccesful occurance. A succesful use of such demurrer is represented by the simultaneous existence of both a Right I ↔ Duty I relation and a relation Duty II ↔ Right II.

An appeal on the grounds of voidness can be made by invoking the No Right ↔ Privilege I relation. If such an appeal is succesful then the Right I ↔ Duty I relation is supposed never to have existed. An appeal to annihibility, by means of an

exceptio peremptoria, is included in this device only in so far as its ultimate result is concerned, viz. nullification of the Right I ↔ Duty I relation after a certain period of existence. This result is superimplied by the demurrer itself, as can be seen in the following square of opposition (4):



In this square the demurrer (Duty III ↔ Right III) is placed as a contrariety to the Right I ↔ Duty I relation. If the demurrer is succesful then the subsistence of the Right I ↔ Duty I relation becomes impossible and this relation is transformed by the process of annihilation into a No-Right I ↔ Privilege I relation. In other words: the *exceptio peremptoria* superimplies the denial of the claim and the claim superimplies this demurrer's denial (Privilege III ↔ No-Right III).

Notice that in each of the last two squares of opposition two kinds of performances play a role between A and B, in contrast with the situation in square (2) where the A-, I-, E-, and O-propositions are all represented with respect to performance F. In these last two squares only contradictory propositions refer to relations concerning identical performances; the contrary and subcontrary propositions however express jural relations between A and B of which the performances are different. The formulation of propositions in these squares therefore requires some modification in the terms used, for example that which follows.

In both our last squares of opposition the jural relations are provided with a Roman numeral corresponding to a certain performance. So in the Right I ↔ Duty I relation the numeral I refers to performance I, the Privilege II ↔ No-Right II relation refers to performance II, etc.

In our last square of opposition (4) we might now formulate the A-proposition as: «All legal relations between A and B are *Right I ↔ Duty I relations*". This means that these relations are Right ↔ Duty relations *with respect to performance I*. Similar references to the performance will be understood to be included in the other propositions.

The E-proposition then reads: "All legal relations between A and B are *Duty III ↔ Right III relations*." The I-proposition can be: "At least one legal relation between A and B is a *Privilege III ↔ No-Right III relation*" and the O-proposition may be: "At least one legal relation between A and B is *a No Right I ↔ Privilege I relation*". Similar propositions can be formulated with respect to the third square of opposition.

The squares of opposition (2), (3) and (4) might be useful devices in legal analysis and legal education; a preliminary training in manipulating squares of opposition in traditional logic is an exercise which is not too difficult for the average law-student and the time spent on it might be a good investment.

State University of Utrecht Leopold W. Rosdorff

NOTES

(1) Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, Yale University Press, New Haven (Conn.), 1920. Reprinted 1964.

(2) Frederic B. Fitch, A Revision of Hohfeld's Theory of Legal Concepts, *Logique et Analyse*, vol. 39-40 (1967), pp. 269-276. Quotations from pp. 269-272.

(3) Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (1964), p. 39.

(4) Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (1964), p. 41.

(5) Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (1964), p. 39.

(6) Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (1964), p. 47.

(7) Ch. Arthur L. Corbin, Legal Analyses and Terminology, *Yale Law Journal* XXIX (1919-1920), pp. 163 ff.; Max Radin, A Restatement of Hohfeld, *Harvard Law Review* LI (1937-1938), 7, pp. 1141 ff.; E. Adamson Hoebel,

The Law of Primitive Man, Cambridge (Mass.), 1964, pp. 46 ff. Similarly the following commentaries: Roscoe POUND, Fifty Years of Jurisprudence, I, *Harvard Law Review* L (1937), 4, p. 575; Julius STONE, *The Province and Function of Law*, Cambridge, 1950 p. 122; Manfred MORITZ, *Hohfeld's System der juridischen Grundbegriffe*, Lund 1960, pp. 55, 56.

(8) RESTATEMENT IN THE COURTS, Permanent Edition, *Glossary of words and phrases defined in the Restatement,* American Law Institute Publishers, St. Paul, Minnesota, 1957.