# Towards an expressive approach to rights: revisiting Hart's theory of rights[1]

*Samuel I Tschorne*

## *Introduction*

Since the 1950s the importance of the language of rights in general and human rights in particular has grown at such an incredible pace that today it is perhaps the most prominent normative vocabulary in moral, political and legal discourses. Such an expansion has raised, however, many problems, driving it towards a critical situation in which there is a growing concern about the "devaluation" of "rights-talk". Some have become sceptical about even the existence of rights or the value of that vocabulary. Even if one is not tempted to go that far, it is certainly the case that to say that something constitutes a right, even a human right, is becoming nothing more than to say that it is something (an interest, a value, a principle, etc.) that merits consideration in practical reasoning and must be "balanced" with the other relevant considerations. Rights, in this sense, seem to have lost the special normative force and peremptory character that they used to carry in our normative discourses.

What, then, is the *value* of the language of rights? This paper intends to clear the way for an expressive approach according to which the main aim of the theory of rights is to give an account of what rights-talk distinctively enables us to express in our normative discourses (what is that which the vocabulary of rights helps us *say* or *convey* that could

[1] Announced title: "The language of rights: a guide for the perplexed".

not be said or conveyed as perspicuously using other normative terminology?). Such an expressive approach puts at the centre a question that most contemporary theories of rights –focused as they are on the questions of the object of rights (interest, choice, status?) and the subject of rights (adult humans, humans, superior mammals, animals, trees?)– simply ignore. Indeed, it might be the case that giving priority in the explanatory order to the question of the *expressive value* of the language of rights might well show that theories centred in those other questions are focused on false oppositions or only apparent dilemmas. In order to develop this expressive approach, in this paper I will recast from this methodological perspective Hart's theory of rights because all its central insights can be reframed as answers to its main question, viz. what is the distinctive expressive value of the terminology of rights?

Although one the less considered and studied parts of his otherwise widely discussed jurisprudential work, Hart's theory of rights is –as it will be argued– not only the best starting point for the expressive approach I want to put forward, but also it may well be considered the most powerful contemporary analytical theory of rights on offer. As noted by Jeremy Waldron, one of the distinctive notes of contemporary debates on the theory of rights springs from their high levels of precision and clarity, a trait that they gained during the 20th century due to analytical legal theorists whose work has profited both from "an atmosphere in philosophy congenial to analysis in general and preoccupied to the point of obsession with analytical rigour and precision" and the jurisprudential legacy of Jeremy Bentham and his followers[2]. Hart's theory of rights –as this paper will

[2] Jeremy Waldron, "Introduction," in *Theories of Rights*, ed. Jeremy Waldron (Oxford, New York: Oxford University Press, 1984), 2.

also try to substantiate– is perhaps the one that better illustrates both the strengths and limitations of 20th century analytical jurisprudence.

### *1. Conceptual analysis and the theory of rights*

Although under increasing criticism, conceptual analysis has undoubtedly been the most powerful methodological trend in Anglophone legal philosophy during the last 50 years. The dominance of this view on the "ways of jurisprudence" –i.e. the predominance of the conception that the problems of legal theory are (or can be fruitfully reframed as) about concepts– is to a great extent a legacy of Hart's contribution to the field. His work was for many years the visible testimony of how fruitful it was to think that inquiring into the meanings of legal words could help us further our understanding of legal phenomena.

At the time Hart made his main contributions to the field, in the middle of the 20th century, this way of practising jurisprudence was considerably misguided and was progressively becoming alienated from the questions that concerned legal scholars, practising lawyers and judges. Hart's outstanding contribution, in this sense, was the consequence of his efforts to reorientate analytical jurisprudence using for that purpose the tools provided by the philosophy of language of his 'own day'[3].

Already in his 1953 inaugural lecture Hart laid down the foundations for that revitalised approach to analytical jurisprudence, which his 1961 masterpiece *The Concept of Law* was going to make so influential. The general aim of his inaugural lecture was to put forward a general programme for analytical jurisprudence but, in passing, he made important contributions to the theory of rights. In what follows, Hart's approach to

[3] H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 1–6.

conceptual analysis will be discussed with a view to examine his first –short, albeit important– foray into rights theory, then I will examine the insights that can be obtained from the extension of this new perspective to moral rights (section 2) in order to prepare the way for the reconstruction of Hart's full blown account of legal rights (section 3).

The inaugural lecture's main thesis was that analytical legal philosophy was misguided because it understood its core questions (what is a law? what is a State? what is a legal duty? what is a legal right? etc.) as requests for definitions, and the problem is –as he saw so clearly– that in order to grasp these fundamental legal concepts we need *an explanation not a definition*. To give a definition as an answer to the animating questions of legal philosophy, Hart argued, is to misunderstand both what moved us to enquire into these basic legal concepts and the nature of legal language and legal concepts.

Offering a definition as an answer to such questions would be adequate if the inquirer were someone asking to be taught how to use a word or term because he does not know the common use of the word or term in question. But the problem is that the lawyer, judge or legal theorist who asks these questions, has already mastered the use of the relevant concept, i.e. he knows perfectly well when the concept is correctly applied and even knows when its application is problematic or contested. The problem is, in other words, that "we can know and yet not understand" and a definition does not help us to understand concepts that we already know how to use[4].

But how is it possible to know and yet not understand? Hart's answer is remarkably straightforward: we do not understand because our explanatory models or frameworks do not take into account important attributes or peculiarities (the

[4] "those who ask these questions are not asking to be taught how to use these words in the correct way. This they know and yet are still puzzled" (H. L. A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* [Oxford: Clarendon Press, 1983], 22).

"anomalies") that these legal concepts have. More precisely, Hart's answer is that the problem is in the attempt to apply to these legal concepts a model of explanation appropriate only for "ordinary" words. What is so puzzling about these legal concepts – and the concept of law itself– is that, on the one hand, each of these words is applied in so varied circumstances, to such a multiplicity of diverse cases, that it seems very unlikely for there to be a common principle guiding their use but, on the other, we nevertheless think that the application of the same word in these different situations is *not arbitrary*[5]. Put differently, although there might be no simple principle behind the application of a word or term to these diverse cases, we know that we are not facing *mere homonyms*, we know that we are applying the *same concept*. We must, therefore, liberate ourselves from

> "the mistaken belief (false not only of complex legal and political expressions like 'law', 'State', 'nation', but of instances of humbler ones like 'a game') that if a word is not a mere homonym then all the instances to which it is applied must possess either a single quality or a single set of qualities in common"[6].

But more importantly, Hart argued that these basic legal concepts were peculiar because they

> "do not have the straightforward connection with counterparts in the world of fact which most ordinary words have and to which we appeal in our definition of ordinary words. There is nothing which simply 'corresponds' to these legal words, and when we try to define them we find that the expressions we tender in our definition specifying kinds of persons, things, qualities, events, and processes, material or psychological, are never precisely the equivalent of these legal words, though often connected with them in some way"[7].

[5] "Sometimes, as with the word 'law' itself, one anomaly is that the range of cases to which it is applied has a diversity which baffles the initial attempt to extract any principle behind the application, yet we have the conviction that even here there is some principle and not an arbitrary convention underlying the surface differences; so that whereas it would be patently absurd to ask for elucidation of the principle in accordance with which different men are called Tom, it is not felt absurd to ask why, within municipal law, the immense variety of different types of rules are called law, nor why municipal law and international law, in spite of striking differences, are so called" Ibid.

[6] Ibid., 22 n 1.

[7] Ibid., 23.

As Hart himself would reformulate this point, these legal concepts do not "stand for" anything, they have an altogether different "function". Here, Hart made a crucial step: these legal concepts cannot be understood following a *designational paradigm*, that is, taking as a model the relationship between a name and what it is a name for[8]. But if not the semantic model inspired in the name/name-bearer relation, what model? Hart's main insight is that we should not follow a *representational* explanatory strategy, i.e. we should not ask what object (e.g. person, thing, event) the legal concept *stands for*. Instead we should follow a *functional* explanatory strategy and, thus, we should ask what *function* or *role* the legal concept has. As he explained, this is "an inquiry into the job done by such a word when the word was used in a legal system to do its standard task"[9].

The functional explanatory strategy proposed by Hart is characterised by one key methodological trait: it gives priority in the explanatory order to *sentences* over *concepts*. Hart argues emphatically –following Bentham's "fundamental insight"– that "we must never take these words alone, but consider whole sentences in which they play their characteristic role"[10]. To understand one of these legal concepts, in consequence, we must understand the role or function that it plays in sentences in which it is correctly used, i.e. how it contributes to the content of the sentences in which figures as a component. Moreover, in order to understand the sentences in which these legal concepts figure, we must understand the role or functions of the sentences themselves, viz. the role or function these sentences play in our legal *reasoning* or, to use Hart's terminology, in

[8] Robert B Brandom, *Articulating Reasons: An Introduction to Inferentialism* (Cambridge, Mass.: Harvard University Press, 2000), 159.

[9] H. L. A Hart, "Analytical Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodenheimer," *University of Pennsylvania Law Review* 105, Analytical Jurisprudence in Mid-twentieth Century (1957): 961.

[10] Hart, "Definition and Theory in Jurisprudence," 26.

our "legal calculations". A sentence in which one or more of these concepts is properly used (e.g. "*A* has right to *x*") is "the tail-end of a simple legal calculation: it records a result and may be well called a conclusion of law"[11]. As Hart himself summarized this axial idea, each one of these legal concepts "has meaning only as part of a sentence the function of which as a whole is to draw a conclusion of law from a specific kind of legal rule"[12].

This amounts to say that to grasp the content of sentences (and, thereby, of these concepts) we need to understand the role they play in legal reasoning. In other words, the content of legal concepts –and the sentences in which they figure as components– is *inferentially* articulated: concepts allow us to make a move in a language game (an appropriate inference) from a sentence or sentences (premises) to another sentence (conclusion). This means, as Hart stated clearly, that we must adopt a "two-fold explanation" as a method of elucidating the content of legal concepts: we have to take

> "a sentence in which the word… plays its characteristic role and explain it first by specifying the conditions under which the whole sentence is true, and secondly by showing how it is used in drawing a conclusion from the rules in a particular case"[13].

These legal concepts "intermediate" –they are the "*tertium quid*"– between the circumstances of application of a statement applying a rule to particular case and the affirmation of the legal consequences that follow from the application of the rule to the particular case: the role or function of these concepts is to allow us to make that inferential move[14].

[11] Ibid., 28.
[12] Ibid.
[13] Ibid., 33.
[14] Ibid., 40ff.

In his inaugural lecture Hart formulated this crucial insight too strongly. As he came to see afterwards, the distinction between the (varying) "force" and the (constant) "meaning" that J. L. Austin elaborated in his theory of speech acts implies that he should have not claimed that the statements in which concepts such as "rights", "corporation", and so on, figure *are* the conclusions of inferences from legal rules (because they might be used to *do* other things)[15]. But without any loss, Hart's insight can be reformulated liberating it from that mistake: it is necessary only to endorse an inferential semantics that provides a *functional explanatory strategy* for the content of concepts giving priority in the *explanatory order* to sentences. Indeed, it is not necessary to argue that every time that these sentences are uttered –and these concepts applied– they are used to put forward conclusions of law as inferences drawn by the speaker. Instead, what is crucial is the methodological commitment with a *top-down* semantic explanation, viz. that the sort of content that is expressed by whole sentences is prior to the sort of content expressed by subsentential expressions. The priority of sentences –or, more precisely, of the conceptual content expressed by whole sentences (viz. propositional content)– is explained, in turn, because they are the linguistic units that may play the role of premises and conclusions in reasoning[16]. Hart, in fact, remained committed to this semantic explanatory strategy and convinced of its importance[17].

[15] Hart, *Essays in Jurisprudence and Philosophy*, 2, 5.

[16] Brandom, *Articulating Reasons*, 12, 30.

[17] Thus, almost 30 years later, Hart praised Bentham's logical insights which contained: "many things of great speculative importance in them. Among these I should count his insistence on the pregnant truth 'that nothing less than the import of an entire proposition is sufficient for giving full expression to any most simple thought' with its important corollary that the meaning of single words are the result of 'abstraction and analysis' from sentential or propositional forms. This idea –that sentences not words are the unit of meaning– was not to appear again in philosophy for fifty years. It was then asserted by Frege and stressed in Wittgenstein's *Tractatus Logico-Philosophicus*. Bentham's main innovations as a philosopher are based on this insight; for he believed that the relation of language and so of thought to the world is radically misunderstood if we conceive of sentences as compounded out of words which simply

What are the consequences of all this for the theory of legal rights? The first observation that Hart makes –carrying out the analysis under this framework– is that the use of sentences such as

> "*A* has a right to be paid £10 by *B*… silently assumes a very special and very complicated setting, namely the existence of a legal system with all that this implies… But though this complex situation is assumed in the use of these statements of rights and duties they do not *state* that it exists"[18].

The use of such sentences not only has the background presupposition of (or the setting provided by) the existence of legal system but, more specifically, the "use of this statement has also a special connection with a particular rule of the system"[19]. It is crucial to remark that a sentence of the form "*A* has a right to…", however, "is not a statement *about* the rules", viz. such sentences do not *say* anything about rules. What is, then, this implicit connection between those statements and legal rules? As Hart explains, this "special connection":

> "would be made explicit if we asked 'Why has A this right?' For the appropriate answer could only consist of two things: first, the statement of some rule or rules of law (say those of Contract), under which given certain facts certain legal consequences follow; and secondly, a statement that these facts were here the case. But again it is important to see that one who says that 'A has a right' does not *state* the relevant rule of law; and that though, given certain facts, it is correct to say 'A has a right', one who says this does not state or describe those facts. He has done something different… he has drawn a conclusion from the relevant but unstated rule, and from the relevant but unstated facts of the case"[20].

More generally, such statements are "used to appeal to rules, to make claims, or give decisions under them"[21]. Thus, we use the rights vocabulary to *do* certain things

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name or stand for elements of reality and this as having meaning independently of sentential forms. Philosophy –and not only philosophy– has been perennially beset by the false idea that whenever a word has a meaning there must be some existent thing related to it in some simple uniform way appropriate to simple atoms of language" (H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* [Oxford: Clarendon Press, 1982], 10).

[18] Hart, "Definition and Theory in Jurisprudence," 27.

[19] Ibid., 28.

[20] Ibid.

[21] Ibid., 27.

with a specific type of rules (e.g. make a claim, point to a required action, evaluate or criticise an action and so on), although we do not *say* anything about that rules[22].

Now, of course, a further step necessary to have a complete account of legal rights is the specification of the "kind" or "type" of rule that underpins the appropriate use of the concept of rights. Hart provides a very straightforward explanation of this aspect: in order to say that someone posses a right there must be a rule that (i) imposes a duty on some other person such that if the duty bearer does not comply with the duty (ii) that act would count as a "violation of the right" against which (iii) the right holder may use certain "remedies" that are put at his disposal. Hart argued, thereby, that what is distinctive of legal rules "that confer rights" –esp. in contrast to rules that "only impose obligations"– is that the obligation to perform the duty depends on the choice of the right holder (or a person authorised to act on his or her behalf), i.e. that the right holder may decide to waive or simply not to enforce the duty[23].

The key role played by the element of "choice" granted to the right holder –in order to meaningfully say that he has "a right to"– within this account is corroborated by the fact that it is the "unifying element" that underpins the vocabulary of legal rights as a whole, explaining something that Hohfeld observed but left unexplained: why the concept of "right" is used not only to speak about "claims" but also to refer to "liberties", "powers" and "immunities"? Hart, in contrast to Hohfeld, argued that this wide or "generic" usage of the concept of rights rather than mere impropriety or loose thinking

[22] "The expression 'a right'… does not describe or stand for… anything… but has meaning only as part of a sentence the function of which as a whole is to draw a conclusion of law from specific kind of rule" (ibid., 28).

[23] "It is, I think, characteristic of those laws that confer rights (as distinguished from those that only impose obligations) that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorized to act on his behalf" (ibid., 35).

expressed the crucial link between "rights" and choice[24]. Later Hart himself summed up this remark:

> "the four cardinal distinctions drawn by Hohfeld (which are in effect merely four different uses of the expression 'a right' common in our language) can be elucidated by exhibiting how all of them center around a focal point, namely the notion of an individual's choice. Certain uses of the expression 'a right' indicate that the law is concerned to give effect in certain circumstances to an individual's choice, whereas others merely signify that in certain respects that choice is unimpeded"[25].

### *2. The concept of moral rights and the principle of individual liberty*

Although his 1953 lecture was utterly focused on "legal rights", the analytical framework therein developed could be extended to explain also "moral rights", as Hart, in fact, tried to do in an early article originally published in 1955 under the title "Are there any natural rights?"[26] Although Hart will explicitly distance himself from it later[27] and will show some sympathy for Bentham's scepticism towards the soundness of the idea of "moral rights" and rights-based political theories[28], it is important to discuss this paper because some of its main contentions will remain lasting tenets of Hart's thought on rights.

One of these contentions is that "rights" constitute a distinctive "fundamental concept" that cannot be reduced to or simply replaced by other normative concepts. Starting from an analogous point to one made in his inaugural lecture, Hart thought that we use the concept of "moral rights" to evaluate or criticise human actions according to a "moral code" (i.e. a set of moral rules). But, and this is of utmost importance, just as the

[24] Ibid., 35 n 15.
[25] Hart, "Analytical Jurisprudence in Mid-twentieth Century," 970.
[26] Reprinted as H. L. A. Hart, "Are There Any Natural Rights?," in *Theories of Rights*, ed. Jeremy Waldron (Oxford, New York: Oxford University Press, 1984), 77–90.
[27] He thought, moreover, that the paper's main contentions were not only mistaken, but that their mistakes were not illuminating enough to merit reprinting in his collection of essays on jurisprudence, vid. Hart, *Essays in Jurisprudence and Philosophy*, 17.
[28] Hart, *Essays on Bentham*, 14–7.

concept of legal rights was appropriately used only in relation to a particular kind of legal rule, the concept of "moral rights" can play its distinctive expressive role only in relation to a particular kind moral code. In his words:

> "it is important to remember that there may be codes of conduct quite properly termed moral codes (though we can of course say they are 'imperfect') which do not employ the notion of *a* right, and there is nothing contradictory or otherwise absurd in a code or morality consisting wholly of prescriptions or in a code which prescribed only what should be done for the realization of happiness or some ideal of personal perfection. Human actions in such systems would be evaluated or criticized as compliances with prescriptions, or as *good* or *bad*, *right* or *wrong*, *wise* or *foolish*, *fitting* or *unfitting*, but no one in such a system would have, exercise, or claim rights, or violate or infringe them"[29].

A more perspicuous way to put this would be to say that there are developed and consistent moral systems that could be described –without any loss– using other fundamental moral concepts (especially that of "duty" and "good/bad"). This might explain why the concept of rights is nowhere to be found, for example, in classical moral philosophy and in the works of matchless thinkers such as Aristotle and Plato. The reason for this is that "there is no place for a moral right unless the moral value of individual freedom is recognised"[30]. In other words, only in the case of moral codes that not "only prescribe what shall be done" but also contain "principles regulating the proper distribution of human freedom which alone make it morally legitimate for one human being to determine by his choice how another should act" the concept of "moral rights" exhibits its "specific force" and "cannot be replaced by other moral concepts"[31].

The concept of moral rights plays its distinctive role, thereby, only if it is deployed within the context of a moral code that articulates a proper distribution of spheres of individual liberty such that each individual has a sort of sovereignty or

[29] Hart, "Are There Any Natural Rights?," 78–9.
[30] Ibid., 78 n 4.
[31] Ibid., 79–83.

ownership over a segment of his moral world within which he should be free from all from morally unjustified interferences from others[32]. More precisely, the concept of moral rights enables us to *express* or to make explicit the normative articulation or elaboration of the principle of individual liberty (i.e. the equal right that all persons have to be free) and the specific types of moral grounds that may justify the interference with someone's liberty in accordance with that principle (viz. the special titles or claims according to which someone may interfere with another person's liberty). As reflected in the "two main types of situations" in which sentences of the form "have a right to" are used, the structure of a moral code that elaborates the principle of liberty can be made explicit by distinguishing between *general moral rights*, which are "asserted defensively" against an actual or anticipated unjustified interference with the liberty of the right-holder (e.g. "I have the right to say what I think", "what right do you have to prevent me from saying it?"), and by *special moral rights* that identify special transactions (e.g. "you promised me to…") or special relationships (v. gr. the relation of parent and child) between the parties that morally entitles or justifies one of them to interfere with the other's liberty. Hart summed up this crucial insight in the following passage:

[32] The whole semantic field composed by all the terms through which we *say* or *convey* what it is to have a right and what normative consequences follow from someone's having a right, is underpinned by a principle that grants to each person a sort of sovereignty over an area of social life. Indeed, only within moral systems that have built-in the principle of liberty an individual (1) may *posses* a right and, thereby, be *entitled* to determine by his choice how another person should act, (2) be *wronged* if this other person does not act accordingly, (3) *waive* the moral claim and *release* the other person from the relevant moral obligation. This is the only context in which we may say that a right *belong* to someone, whom a duty is *owed to*. All these expressions articulate the fundamental element of choice that is presupposed by the language of rights. This is why the mere existence of duties ("you ought to do…") and intended beneficiaries of the performance of such duties is not enough to give rise to the distinctive normative content of the idea of moral rights. As Hart argued: "Rights are typically conceived of as *possessed* or *owned by* or *belonging to* individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled; only when rules are conceived in this way can we speak of *rights* and *wrongs* as well as right and wrong actions" (ibid., 83).

> "unless it is recognised that interference with another's freedom requires a moral justification the notion of a right could have no place in morals; for to assert a right is to assert that there is such a justification. The characteristic function in moral discourse of those sentences in which the meaning of the expression 'a right' is to be found –'I have a right to…', 'You have no right to…', 'What right do you have to…'– is to bring to bear on interferences with another's freedom, or on claims to interfere, a type of moral evaluation or criticism specially appropriate to interference with freedom and characteristically different from the moral criticism of actions made with the use of expressions like 'right', 'wrong', 'good', and 'bad'. And this is only one of many different types of moral ground for saying 'You ought to…' or 'You ought not to…'. The use of the expression 'What right have you…?' shows this more clearly, perhaps, than the others; for we use it, just at the point where interference is actual or threatened, to call for the moral *title* of the person addressed to interfere; and we do this often without any suggestion at all that what he proposes to do is otherwise wrong and sometimes with the implication that the same interference on the part of another person would be unobjectable"[33].

The concept of moral rights, in consequence, plays its "characteristic function in a moral discourse" enabling us to articulate or render explicit the structure and content of moral systems that have built-in the principle that all persons are born equal and free, through the recognition of general moral rights that articulate the normative principle that "interference with another's freedom requires a moral justification" and special rights that articulate the qualified moral grounds ("special justifications") on which those inferences might be justified[34].

[33] Ibid., 88–9.

[34] Hart used "interference" to refer not only to coercion (which "includes, besides preventing a person from doing what he chooses, making his choice less eligible by threats) and restraint ("which includes any action designed to make the exercise of choice impossible and so includes killing or enslaving a person"), but also to "demanding that a person shall do or not do some action" which is a necessary – although not sufficient– condition of any justified exercise of coercion. Hart explicitly distinguished both coercion and restraint from *competition*, which does not constitute interference and, therefore, it is not excluded by the principle of individual liberty: "all men say have, consistently with the obligation to forbear from coercion, the *liberty* to satisfy if they can such at least of their desires as are not designed to coerce or injure others, even though in fact, owing to scarcity, one man's satisfaction causes another's frustration. In conditions of extreme scarcity this distinction between competition and coercion will be not worth drawing… freedom (the absence of coercion) can be *valueless* to those victims of unrestricted competition too poor to make use of it; so it will be pedantic to point to them that though starving they are free" (ibid., 77 n 2). Moreover, the so called liberty-rights (when "to have a right to" means that a person is "under no duty not to") is a "sense of 'right' needed to describe those areas of social life where competition is at least morally unobjectable" (ibid., 81). Of course, the main justification for coercive interference comes from the obligation to obey the law, which Hart explains in this paper through a principle of fairness

Hart made two very important remarks on this elaboration of the normative principle of equal individual liberty through the concept of moral rights. On the one hand, the moral justifications for interference in someone's liberty should be of a qualified or particular nature if the principle of individual liberty –and with it the concept of moral rights– is not to be "trivialized". Put differently, moral rights have to enjoy a particular normative force, "for unless there is some restriction inherent in the meaning of 'a right' on the type of moral justification for interference which can constitute a right, the principle could be made wholly vacuous"[35]. On the other hand, he argued that if one carefully examines the main types of moral justifications for interference with liberty of adult persons (thus leaving aside the relation parent-child) all are related to special transactions or relations (e.g. promises, consent, authorisation, submission to mutual restrictions under a reciprocity principle) that directly or indirectly appeal to the very same principle of individual liberty. In other terms, when we justify interferences via these special rights "we are in fact indirectly invoking as our justification the principle that all men have an equal right to be free"[36]. The core idea behind the concept of a moral right both general and special, therefore, is no other than the sovereignty or ownership that each has over his or her moral world in accordance with the principle of individual liberty.

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that engenders a "special right" correlative to the "political obligation", which is for him the important truth so confusedly expressed by the doctrine of the social contract (ibid., 85–7). This last idea, is the only one that Hart still considered to be of value later: "The only part of that article which seems to me still to merit some consideration is my invocation of what has since been called 'the principle of fair play' as one ground of political obligation" –Hart, *Essays in Jurisprudence and Philosophy*, 17; See also H. L. A. Hart, "Problems of the Philosophy of Law," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 118–9.

[35] Hart, "Are There Any Natural Rights?," 89.

[36] Ibid., 90.

### *3. The theory of legal rights: its core and its extension*

Hart will produce a third piece –originally published in 1962 but which will be retouched two decades later for his collection *Essays on Bentham* (1982)– which can be deemed to be the closest we have to a presentation of his fully fledged thinking on rights. In this article, as he did in his inaugural lecture, he fleshed out his own views via the exposition and criticism of Bentham's work, whose contribution to the matter he considered more "thought-provoking" than Hohfeld's (or indeed by "any other writer on the subject")[37].

The starting point of his last meditations on rights is an observation that is already familiar to us. Echoing Maine, Hart observes that a clear notion of legal rights –though it may seem to us "elementary"– "belongs distinctively to the modern world" and it cannot be found neither in the main works of classical political and moral philosophy nor in Roman law[38]. In contrast to his 1955 article, however, he did not address explicitly in this piece the question why the concept of rights is "distinctively modern". Following the trail left in this former paper, it might be argued that the reason for the distinctively modern character of the concepts of rights must be related to the central importance that the normative principle of individual liberty plays in modernity (both in its law and its morals). This might explain why (1) Hart insists –against Bentham's benefit theory– that the core or *general* part of a theory of legal rights must be built upon the central element choice, and (2) why he deems as key to understand even the peripheral or special parts of

[37] H. L. A. Hart, "Legal Rights," in *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 162.

[38] "It has moreover often been observed that the concept of a right, legal or moral, is not be found in the work of the Greek philosophers, and certainly there is no noun or noun phrase in Plato or Aristotle which is the equivalent of our expression 'a right', as distinct from the 'right action' or 'the right thing to do'. Jurists of stature have even held that lawyers of some sophisticated systems of law, including Roman Law, never achieved a clear concept of a legal right' (ibid., 163).

a theory of rights –which cannot be explained by a "pure" choice-theory– their "individualist" core. All this may come as no surprise, of course, because both his commitment to a choice based theory of rights and the postulated conceptual connection between the language of rights and the distinctively modern principle of individual liberty are traits of Hart's thought already familiar to us. What is novel and crucial, nevertheless, is the explanatory strategy that postulates the existence of a core or *general theory* of legal rights, which refers to the central or "paradigmatic" cases and that needs to be supplemented or extended in order to include non-core or special cases in which we also may speak meaningfully about rights.

What, then, is the core or general theory of legal rights? If Bentham thought that the notion of "legal right" was part of the subject matter of "universal expository jurisprudence"[39], Hart viewed, likewise, the theory of legal rights as one of the characteristic "definitional" or "analytical" problems of the philosophy of law. This general theory is, therefore, a part of an analytical theory of law whose primary aim is to clarify "the general framework of legal thought"[40]. The core of the theory of legal rights is, in this sense, specifically *juridical* because it is concerned with the elucidation of the structure of legal thinking, that is, it is a part of the analysis of the "conceptual schemes of classification, definition and division introduced by the academic study of the law for the purpose of exposition and teaching"[41].

The theory of rights is, in other words, a part of the analysis of the basic vocabulary –viz. the organising concepts and categories– that is used by lawyers, judges

[39] Ibid.

[40] H. L. A Hart, *The Concept of Law*, ed. Joseph Raz and Penelope A Bulloch (Oxford: Oxford University Press, 2012), v.

[41] Hart, "Problems of the Philosophy of Law," 88.

and jurists in the elaboration of that special kind of *legal knowledge* that emerges as a consequence of the professionalization of the administration of justice that legal systems of a certain complexity require:

> "since law in most societies soon reaches a very high degree of complexity, its administration requires the special training of judges and professional lawyers. This in turn has created the need for a specific form of legal science concerned with the systematic or dogmatic exposition of the law and is divided into distinct branches (such as crime, tort, and contract), and general classifications and organizing concepts are introduced to collect common elements in the situations and relationships created by the law (such as rights, duties, obligations, legal personality, ownership, and possession) or elements common to many separate legal rules (such as act and intention)"[42].

But what place does the concept of rights have within the full panoply of fundamental legal concepts? The concept of rights is one member of the class of legal concepts that we use to refer to individual legal positions, viz. the normative status of determined persons in relation to the rules of a legal system. In Hart's words, the concept of rights and those of "duty", "obligation", "powers", and so on, are

> "the basic organizing concepts in terms of which the contents of the law especially at its point of impact on individuals are customarily described by lawyers, whether practitioners, judges, or jurists, and, with less uniformity, by theorists of other disciplines interested in the law, and by ordinary citizens. Statements of legal obligation, rights, and powers state respectively what individuals legally must do or must refrain from doing, what legally they may do or are entitled to have others do or abstain from doing, and the ways in which they may with the assistance of the law change their own or others persons' legal positions in these respects. Since these are the basic ways in which the law in its distinctive way restricts human freedom of action or leaves it free, protects it from interference, or facilitates its exercise, legal obligation, rights and power are focal points of legal thought to the clarification of which any serious philosophy of law must address itself"[43].

All these concepts have as their distinctive role to specify the "point of impact on individuals" of the law, that is, these concepts express the diverse ways in which the law regulates the "freedom of action" of individuals. Within this class of concepts, the term

[42] Ibid.
[43] Hart, *Essays on Bentham*, 17.

"rights" –as Hohfeld noticed– refers in a "generic" sense to four different kinds of "advantageous" legal positions (claims, privileges, powers and immunities), although he viewed that "generic" usage as improper and misleading because such an "indiscriminate" way of speaking could easily end in misunderstandings and non-sequiturs and, therefore, proposed to restrict its use to one of these positions ("claims"). But for Hart –as for Bentham[44]– the theory of rights embrace all the three basic kinds of rights –liberties (or "liberty-rights"), claims ("rights correlative to obligation") and powers– which constitute the "paradigmatic" or central cases where the expression "have a right to" exhibits in its full measure its expressive potential.

At this point of the analysis a problem immediately emerges: what is the distinctive expressive role of this concept of rights? What can be *said* or *conveyed* using the concept of rights that cannot be said or conveyed using the other notions used to refer to individual legal positions? Or is it the case that the concept of rights is *expressively* nugatory in the sense that everything that can be said by using it can be expressed without loss using other concepts? This last question presents itself with particular intensity in relation to the concept of duty, as the two primary meanings of the expression "a right to" seem to be translatable into the language of duty: either as the absence of duty ("liberty-right") or as a duty owed to someone ("right correlative to obligation"). Indeed, if to say that someone has "a right to" means nothing but that he has "no duty to (not) to" or that he is the intended beneficiary of a duty

> "then 'a right' in this sense may be an unnecessary, and perhaps confusing, term in the description of the law; since all that can be said in a terminology of such rights can be and indeed is best said in the indispensable terminology of duty. So the benefit theory appears to make nothing more of rights than an alternative formulation of duties: yet nothing seems to be gained in significance or clarity

[44] Hart, "Legal Rights," 164.

> by translating, e.g. the statement that men are under a legal duty not to murder, assault, or steal from others into the statement that individuals have a right not to be murdered, assaulted, or stolen from, or by saying, when a man has been murdered, that his right not to be killed has been violated"[45].

The "terminology of duty" is, indeed, indispensable and fundamental for understanding and describing the law. As Hart himself remarked in *The Concept of Law*: "the most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory"[46]. This explains why "the situation in which an individual has a legal duty to do or to abstain from some action is the commonest and most fundamental of all legal phenomena"[47]. The concept of duty is, in consequence, more primitive than the concept of rights and this poses in question the expressive value of the latter notion: is the concept of right redundant or useless?

Hart answers this "charge of redundancy or uselessness" by arguing that in order to grasp the peculiar semantic content of the concept of rights and the specific role that it plays in legal discourses, we need to begin the analysis by focusing on the paradigmatic or central cases of legal rights in sense of "liberty-rights" and "rights correlative to obligation", viz. respectively what he calls "protected (bilateral) liberties" and "relative duties". In other words, if we are to understand what liberty-rights are, we must start by looking to protected (bilateral) liberties, and if we are to elucidate what rights correlative to obligation are, we need to give explanatory priority to relative duties. Only if we privilege in the explanatory order these cases –taking them as "paradigms" or models– we can reconstruct the gist of the expressive value of the concept of rights.

[45] Ibid., 182.
[46] Hart, *The Concept of Law*, 6.
[47] Hart, "Problems of the Philosophy of Law," 92.

Hart responds to the charge of redundancy or uselessness in the case of rights correlative to obligation by pointing out that this kind of rights exhibits its distinctive expressive role more clearly in certain areas or branches of the law than in others. One might think, in fact, that it is here –in the different expressive force that this sense of "rights" displays– where a clear cut division between criminal law and civil law is to be found: while the former is articulated by "absolute duties" (i.e. that are not owed to any individual in particular), rendering the concept of rights nugatory in that field, civil law is articulated by "relative duties" that are owed to particular individuals (because they protect their individuals interests), which the notion of rights is particularly well suited to describe. Although Hart did not think that this argument was entirely correct, because it rested in the mistaken assumption that the purpose of criminal law –and the duties that it establishes– is only to protect the general interests of the society and not individual interests[48], he certainly thought that this answer was well-oriented. He argued that there was, indeed, an important difference between most duties of the criminal law and those of the civil law which did not, however, rely in the different "interests" protected nor exclusively in the familiar contrast between their characteristic consequences in case of infringement (liability to punishment the former, and a liability to pay compensation the latter). The "crucial distinction", the one that explains why the concept of rights displays more expressive value in one branch rather than in the other, is to be found in

> "the special manner in which the civil law as distinct from the criminal law provides for individuals: it recognizes or gives them a place or *locus standi* in relation to the law quite different from that given by the criminal law. Instead of

[48] This way of conceiving the distinction between civil and criminal law is based "on the assumption, which seems dogmatic, if not plainly mistaken, that the purpose of criminal law is not to secure the separate interests of individuals but 'security and order', and that all its duties are really duties not to behave in certain ways which are prejudicial to the 'general interests of society'" (Hart, "Legal Rights," 183).

> utilitarian notions of benefit or intended benefit we need, if we are to reproduce this distinctive concern for the individual, a different idea. The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed"[49].

What makes the concept of rights particularly appropriate to describe the content of most private law duties is that it is the linguistic marker of the "unique sovereign position" that the right holder has in relation to the relevant duty, which in its "fullest measure" includes a series of legal powers over the correlative obligation: (1) to waive or extinguish the duty, (2) to leave it unenforced after breach or threatened breach and (3) to waive or extinguish the secondary obligation to pay compensation. Moreover, the identification of the cases in which an individual is treated by the law in this "special manner" in relation to a given duty, such that the law constitutes him or her as a "small-scale sovereign" over it, is particularly relevant for understanding and describing the law. Only when a person enjoys such a control over the performance and enforcement of another's duty it makes sense to say: (a) the right-holder can be said to *possess* or *own* a right, (b) such right can be *exercised*, (c) the correlative duty is *owed to* the right-holder and (d) a breach of the duty constitutes a *wrong* to him. Such characteristic ways of referring to situations in which a right is involved constitute clear "signs of the centrality of those powers to the conception of a legal right"[50]. This explains, in sum, why it is in the areas of law in which "relative duties" predominate, that the concept of rights displays so clearly its distinctive expressive role and is so valuable as a conceptual scheme in the exposition of the law: it marks out those cases in which individuals have a

[49] Ibid.
[50] Ibid., 184.

unique legal position or *locus standi* in relation to a legal duty that is articulated by a series of powers over the performance and enforcement of the latter. In Hart's words:

> "these legal powers (for such they are) over a correlative obligation are of great importance to lawyers: both laymen and lawyers will need, in Bentham's phrase, 'to be instructed' about them; and their exercise calls for the specific skills of the lawyer. They are therefore the a natural focus of legal attention… whenever an individual has this special control, as he has in most cases in the civil law but not over the duties of the criminal law, there is a contrast of importance to be marked and many jurists have done so by distinguishing the duties of the criminal law as 'absolute duties' from the 'relative' duties of the civil law"[51].

It is important to notice, nonetheless, that Hart did not restrict the notion of rights only to those "relative duties" in which an individual enjoyed that extensive "small-scale sovereignty" that is characteristic of most civil law duties. He considered, for example, that the concept of rights might appropriately be used also to describe the individual legal position of beneficiaries of those "social" or "welfare" benefits that have become ubiquitous in contemporary administrative law:

> "there are cases made prominent by the extension of the welfare functions of the state where officials of public bodies are under a legal duty to provide individuals if they satisfy certain conditions, with benefits which may take the form of money payments (e.g. public assistance, unemployment relief, farming subsidies) or supply of goods or services, e.g. medical care. In such cases it is perfectly common and natural to speak of individuals who have satisfied the prescribed conditions as being legally entitled to and having a right to such benefits"[52].

Yet, as Hart recognised, "it is commonly not the case that they have the kind of control over the official's duties which… is a defining feature of legal rights". What, nevertheless, makes the rights terminology appropriate in these cases is the presence of "two features that link them to the paradigm cases of rights correlative to obligations as these appear in the civil law". On the one hand, "the duty to supply the benefits are conditional upon their being demanded and the beneficiary of the duty is free to demand

[51] Ibid., 184–5.
[52] Ibid., 186.

it or not". On the other hand, if the duty is breached, the beneficiary that is affected "has a special *locus standi* so that on his application a court may make a peremptory or mandatory order or injunction directing the official body to carry out the duty or restraining its breach"[53]. It is this analogy to the paradigmatic case of relative duties of civil law that

> "explains why, though it is generally enough to describe the criminal law only in terms of duties, so to describe the law creating these public welfare duties would obscure important features. For the necessity that such beneficiaries, if they wish the duty to be performed must present demands, and the availability to them of means of enforcement, make their position under the law a focus for legal attention needing separate description from that of the duties beneficial to them"[54].

To the charge of redundancy or uselessness in the case of liberty-rights –which indicates the mere absence of obligation– Hart answered by arguing that in this case the concept of rights plays a meaningful expressive role, valuable for the understanding and exposition of the law, only when there is a protected bilateral liberty. Although some important theorists have considered of value to discuss wholly unprotected or "naked" liberties using the vocabulary of rights –e.g. the Hobbesian state of nature– only in the case of liberties that enjoy some kind of protection can be meaningfully said that someone has "a right"[55]. But, if this is the case, a question raises immediately: in what sense does the legal protection characteristic of liberty-rights differ from the kind of legal protection given to rights correlative to obligations? If there is no way in which such a difference can be drawn, the notion of liberty-rights has to be deemed unnecessary because it would either: (1) refer to the uninteresting case where there is a mere absence of obligation to do or refrain from doing something completely devoid of any protection

[53] Ibid.
[54] Ibid.
[55] "It is not at all clear that lawyers or anyone else would speak of a completely naked or unprotected liberty as a right, or that any useful purpose would be served if they did" (ibid., 173).

and "so negative a notion without positive correlate is not worth a lawyers attention"[56]; or (2) be equivalent to a protected right to do or to refrain from doing something that is only a particular instance of "rights correlative to obligations".

The difference between a protected liberty-right and a right correlative to obligation is that in the latter case the "right to do" a certain action is "protected by a strictly correlative obligation upon others not to interfere with it" while in the case of liberty-rights they are "protected only by a normally adequate perimeter of general obligations"[57]. It is only in those cases where there is a liberty and a "protective perimeter" that liberty-rights make their distinctive contribution to "the analysis of many legal phenomena including that of the economic competition"[58]. Put differently, in the case of liberty-rights, the expression "a right to" serves to mark out:

> "the important fact that where a man is left free by the law to do or not to do some particular action, the exercise of this liberty will always be protected by the law to some extent, even if there is no strictly correlative obligation upon others not to interfere with it. This is so because at least the cruder forms of interference, such as those involving physical assault or trespass, will be criminal or civil offences or both, and the duties or obligations not to engage in such modes of interference constitute a protective perimeter behind which liberties exist and may be exercised"[59].

The protective perimeter constituted by these general obligations provides a ring within which each individual may exercise his liberty and make his choice whether to do or not do an act. This implies that the paradigmatic case of liberty-rights is the one constituted by protected bilateral liberties. Thus, in contrast to Hohfeld and Bentham, it seemed clear to Hart

> "that a general extension to include all unilateral liberties would neither accord with usage nor be useful. In the ordinary case, where the law imposes general

[56] Ibid., 171.
[57] Ibid.
[58] Ibid.
[59] Ibid.

> obligations, e.g. to pay taxes, or to abstain from assault or trespass, it would be pointless or even confusing to describe those who had these obligations as having rights to pay taxes or to abstain from assault"[60].

Only in very specific contexts it makes sense to describe as *a right* a unilateral liberty to do something while at the same time having a duty to do it: "where individuals by way of exception to a general rule are not merely permitted but also legally required to do some act generally prohibited". This is the context in which "the query what right have you to do that?" plays its distinctive role of inviting "the person addressed to show that some act of his which is *prima facie* wrongful because generally prohibited is one which in the particular case is at liberty to do" (e.g. the case in which a police officer is asked to exhibit the relevant search warrant or an arrest order)[61].

Hart, moreover, thought to have found in the notion of "bilateral liberty" the reason why we tend to speak indistinctly about liberty-rights, rights correlative to obligations and powers as if they were all species of one unified concept or category. Developing a point that he already introduced in his inaugural lecture, he contended that Hohfeld was wrong in stating that this "generic" sense of "having a right to" was "unfortunate" because it did not amount to more than "loose" and "nebulous" usage which only promoted confused thinking. On the contrary, not only liberty-rights but also "powers" and "rights correlative to obligations" can be reconstructed as being –in essence– legally recognised bilateral liberties or "legally respected choices". This would impose a "pattern of order on a wide range of apparently disparate legal phenomena", showing that "in all three main kinds of rights the idea of bilateral liberty is present and the difference lies only in the kind of act which there is a liberty to do"[62]. A person has a

[60] Ibid., 174.
[61] Ibid.
[62] Ibid., 188.

power when "he is enabled by law to change the legal position of others, or of himself and others" such that he may intentionally by acts recognised by the law ("acts in the law") bring about certain "legal consequences", viz. vary the duties, rights, and other legal positions that others and he posses[63]. Hence, while liberty-rights are bilateral liberties to do or refrain from doing a "natural act in the sense that it is not endowed by the law with a special significance or legal effects" (e.g. doing a walk through the park, to look at my neighbour over the garden fence, and so on), in

> "the case of rights which are powers, such as the right to alienate property, the act which there is a bilateral liberty to do is an act-in-the-law, just in the sense that it is specifically recognised by the law as having legal effects in varying the legal position of various parties and as an appropriate means for varying it"[64].

From this perspective, rights correlative to obligation constitute "only a special case of legal power in which the right holder is at liberty to waive or extinguish or to enforce or leave unenforced another's obligation". This is how a choice theory of rights based on the idea of bilateral liberties can give an account of the common element that unifies the "paradigmatic" or central cases in which the rights terminology displays its full expressive potential in legal discourse: this theory shows, indeed, in all three types of paradigmatic cases, that

> "one who has a right has a choice respected by the law. On this view there would be one sense of legal right –a legally respected choice– though it would be one with different exemplifications, depending on the kind of act or act-in-the-law which there is liberty to do"[65].

It is precisely this unifying capacity the main reason why this account may be conceived as the "general theory of legal rights". This is the only account that renders explicit the *core idea* behind that which is distinctively expressed using the rights

[63] Ibid., 170.
[64] Ibid., 188.
[65] Ibid., 188–9.

terminology in legal discourses and this core idea is no other than "individual liberty". It is this theory that *makes explicit* that rights terminology is used to mark out the cases where the "special manner… in which the law provides for individuals" expresses the "distinctive concern for the individual" that is the normative substance articulated by this vocabulary and which cannot be expressed without loss using the language of duty. Here Hart argues, as he did in his 1955 article in relation to the concept of "moral rights", that rights-talk plays its distinctive expressive role in legal discourse in articulating the principle of individual liberty.

This general theory, nonetheless, "cannot be taken as exhausting the notion of a legal right" and needs to be extended or supplemented in order to cover two other contexts in which the language of rights can be meaningfully used. These other contexts, though they do not strictly conform to the general theory, can be considered as essentially exemplifying a similar expressive role: articulating a distinctive concern for the individual and his freedom. But in these two contexts, that normative substance is further elaborated in a different way, viz. that "special manner" which is marked out by the idea of *human* or *fundamental rights*.

The general theory of rights needs to be supplemented, in Hart's words, because

> "unless this is done no adequate account can be given of the deployment of the language of rights, in two main contexts, when certain freedoms and benefits are regarded as essential for the maintenance of the life, the security, the development, and the dignity of the individual. Such freedoms and benefits are recognized as rights in the constitutional law of many countries by Bills of Rights, which afford to the individual protection even against the processes of legislation. In countries such as our own, where the doctrine of legislative sovereignty is held to preclude limiting the powers of the legislature by Bills of Rights, they are, though given only the lesser measure of legal protection of the criminal law, thought and spoken of as legal rights by social theorists or critics

> of the law who are accustomed to view the law in a wider perspective than the lawyer concerned only with its day-to-day working"[66].

It is necessary to extend the theory of rights, therefore, in order to "accommodate" the whole semantic field that elaborates the idea of "fundamental" or "human" rights including both its deployment in legal discourses (in the context of constitutional law) and its use by social theorists or critics of the law who are not interested primarily in the understanding and exposition of the law, but in its evaluation and reform. Put differently, the theory of legal rights must be supplemented –going beyond its core– in order to give an account of the discourse of human rights and its two main contexts of deployment: constitutional law and criticism of the law.

The basic theories of rights –be they choice or interest based– are "designed primarily as accounts of the rights of citizen against citizen; that is of rights under the 'ordinary law'"[67]. The first extension of the theory of rights required by the discourse of human rights, thus, remains still within the limits of legal usage, but it analyses a particular branch of the legal system: while the general theory analyse the paradigmatic or central cases where the rights terminology is particularly valuable in the description of "ordinary law", this extension of rights theory applies to "constitutional law". More precisely, this first extension of the theory analyses the use of that vocabulary in the context of

> "fundamental rights which may be said to be against the legislature, limiting its power to make (or unmake) the ordinary law, where so to do would deny to individuals certain freedoms and benefits now regarded as essentials of human well-being, such as freedom of speech and of association, freedom from arbitrary arrest, security of life and person, education, and equality of treatment in certain respects"[68].

[66] Ibid., 189.
[67] Ibid., 190.
[68] Ibid.

In the context of constitutional law, the language of rights displays a special expressive role: the articulation of the limits that the respect to those "essentials of human well-being" that are singled out by the idea of human rights impose on the legislature in a constitutional system with a Bill of Rights. Particularly well-suited for such an expressive task is the notion of "immunity" which constitutes the fourth sense of "rights" identified by Hohfeld. In general, "to have an immunity" refers to the lack of power ("disability") that another has to affect the relevant legal position of a certain person (i.e. to vary his or her legal duties, liberty-rights, rights correlative to obligations or powers). In general, Hart tells us, it is neither necessary nor interesting to tag the changes that cannot be made by others in our legal positions, specially regarding advantageous changes (e.g. for no one has any interest to remark that "my neighbour has no power to exempt me from my duty to pay my income-tax")[69]. But, in certain areas of the law, and particularly in constitutional law, it matters a great deal to mark out what adverse legal changes in the position of individuals state officials cannot make. And it is precisely here that "immunity rights" have their place in our legal discourses: "to characterize distinctively the position of individuals protected from such adverse change by constitutional limitations"[70].

Finally, the other main context in which the rights-talk is deployed in the elaboration of the human rights discourse goes beyond legal usage and it is not related to the understanding or the exposition of the law, but to its evaluation and reform. Any account of legal rights must, nonetheless, consider this non-juridical usage of rights-talk because

[69] Ibid., 191.
[70] Ibid.

> "law is however too important a thing to leave to lawyers –even to constitutional lawyers; and the ways of thinking about rights common among serious critics of the law and social theorists must be accommodated even though they are different from and may not serve any of the specific purposes of the lawyers"[71].

In this context, the moral criticism of the law, rights-talk in general and the discourse of human rights in particular have also a distinctive role to play. The content and administration of the law can be criticised in many different ways and, correlatively, we may use many different criteria to evaluate the law[72]. The language of rights displays a distinctive expressive role when it is used by the "individualistic critic of the law" who criticises the law for falling short in the recognition and protection of "basic or fundamental individual needs"[73]. Thus, rights-talk continues to fulfil an essentially similar expressive task at the level of the moral criticism of the law: to help us articulate a distinctive concern and to demand a special manner of treating the individual. In conclusion, the discourse of human rights has not only a valuable expressive role to play in the legal discourse of constitutional law, but also in moral discourses about the law:

> "for there is a distinct form of the moral criticism of the law which, like the constitutional immunity rights already described, is inspired by regard for the needs of the individual for certain fundamental freedoms and protections or benefits"[74].

### *Conclusion: unfoulding the concept of rights*

Our discussion of Hart's conceptual analysis of rights has helped us to develop an expressive theory that poses as its primordial question: what is the distinctive expressive role of the vocabulary of rights in our normative discourses? We now know that we use

[71] Ibid., 192.
[72] For Hart's own view on this, vid. Hart, "Problems of the Philosophy of Law," 111–8.
[73] Hart, "Legal Rights," 193.
[74] Ibid., 192.

the concept of rights to refer to the *impact on individuals* of normative systems, i.e. it is one of those concepts that enable us to mark out the different positions that individuals bear in accordance with a given set of norms. Using the concept of rights, we *reason* our way from a normative system to characterise the positions of individuals, it enables us to articulate our legal thought by marking out patterns of normative consequences that norms bring about or imply for individuals. But, having said that, we saw that our fundamental question re-iterated itself in a different way: what is that which can be said or conveyed with the concept of rights that cannot be said or conveyed as perspicuously using other concepts that specify individual legal positions (esp. using the "fundamental" and "primitive" terminology of duties)? Hart gave two different although related answers to this question. He first attempted to answer it in relation to moral discourse and he told us that the concept of rights played its distinctive role only in relation to moral systems built upon the *principle of individual liberty*: i.e. to elaborate the content of moral systems that establish a distribution of individual spheres of liberty –within which each person enjoys a sort of moral sovereignty– and to articulate the *particular set of reasons* ("special rights") that might justify interventions into that spheres of liberty ("general rights").

After distancing himself from this first answer, he focused in legal discourse and argued that the concept of legal rights enables lawyers, judges and jurists to think and talk about a *specific kind* or *sort* of impact that certain legal rules have in individuals providing a "special manner" of treating them and expressing a "special concern" for them. Hart claimed, more precisely, that in all the paradigmatic cases (liberty-rights, rights correlative to obligation, powers) in which we meaningfully speak in terms of

rights we are marking out the presence of legally protected choices (bilateral liberties) of individuals. That essential connection between individual liberty and the concept of rights is preserved even in these other contexts where rights-talk goes beyond "ordinary law" (e.g. the rights-based constitutional review of legislation) or, even, legal discourse (viz. moral criticism of the law). In both contexts, the *human* rights discourse is used to articulate the limits of the legislative power set by the constitution to protect the fundamental interests of individuals (immunity-rights) or to criticise the law for its deficiencies in the protection of those fundamental individual interests.

The core thesis of a Hartian expressive theory of rights, then, is that the language of rights is that vocabulary which helps us articulate or elaborate the normative substance of a distinctive concern for individuals –that variously we may call the principle of liberty, the equal right to freedom, and so on– which deems as central their for capacity for agency: the concepts of rights and its whole associated terminology *refers to* or *signals the* presence of normatively protected spheres of individual choice, i. e. of segments of the social world that are under the small-scale sovereignty of each individual. An analysis of rights, in consequence, consists in giving an account of how in the different normative discourses (moral and legal) and within the different areas of those discourses –viz. the different branches of the legal system– the very same normative substance may nonetheless be elaborated or articulated in considerably different ways by using the vocabulary of rights.

Hart also pointed at a further crucial question. The vocabulary of rights can fully display its expressive role only when it is deployed to describe a special kind of legal system and a special of moral code, viz. the law and the morality of modern societies. Put

differently, the language of rights is *distinctively modern*, because that conceptual apparatus seems necessary to think and talk about legal and moral systems that are –in some sense to be elucidated– *specifically* modern. This leads to a third reformulation of the main question of an expressive theory of rights: What is it about modern societies that its law and its morals cannot be described perspicuously without using the vocabulary of rights? Put differently, why does the language of rights play such a prominent role in explaining and understanding modern law and modern moral consciousness?

We know from Hart's analysis that this has nothing to do with mere sophistication: highly advanced legal systems as Roman law and highly cultivated moral and political philosophies such as Plato's or Aristotle's were not prompted to formulate such conceptual toolkit. The normative substance that is articulated by the vocabulary of rights is, in other words, distinctively modern in a peculiar way that we need to explain if we are to understand why the discourse of rights has such a prominent place in contemporary normative discourses. To fully understand that which is distinctive of the language of rights we need, in other words, to further inquire into that which is distinctive of the law and morality of modern society. We might infer from Hart's analysis that the answer must be related to the special normative status that the individual holds in modern society, but he never really attempted to pursue this trace further enough.

The reason for this omission seems to be mainly methodological: Hart's view of conceptual analysis did not let him to properly address socio-historical questions and only a perspective enriched by historical and social-theoretic considerations might answer this third version of the main question of an expressive theory: what is it about *modern*

*society* that gives to the language of rights such an important place in its law and its morals?

The history of rights is a complex and convoluted one. From its time of splendour during the Enlightenment and classical liberal constitutionalism, the discourse of rights became seriously questioned during the 19th century. Only after the Second World War, we have been living in a new "age of rights". Even, Hart's theory has an implicit historical progression built-in. Starting with civil law rights, which legally articulate the private autonomy of citizen that triumphed with classical liberal constitutionalism, he expanded the purview of this theory to include, firstly, the rights to social benefits so distinctive of 20th century welfare states and, secondly, to the constitutional protection of rights (immunity rights). He even saw the need to include in an account of the language of rights its role in articulating "individualistic" moral criticism to the law.

Indeed, just as he elaborated his full-blown account of rights, he glimpsed the beginnings of a turning point in legal and political philosophy. He saw that after the renaissance of normative political theory, especially after John Rawls published his *A theory of justice* (1971), rights-based political theories will come to displace the up until then dominant utilitarian theories. Although Hart deemed these new political theories as "in spite of much brilliance still unconvincing", he concluded, nonetheless, that an adequate normative theory of rights was

> "urgently called for. During the last half century man's inhumanity to man has been such that the most basic and elementary freedoms and protections have been denied to innumerable men and women guilty, if of anything, only of claiming such freedoms and protections for themselves and others, and sometimes these have been denied to them on the specious pretence that this denial is demanded by the general welfare of a society. So the protection of a doctrine of basic human rights limiting what a state may do to its citizens seems to be precisely what the political problems of our age most urgently require, or

> at any rate they require this more urgently than a call to maximise general utility. And in fact the philosophical developments which I have sketched have been accompanied by a growth, recently accelerated, of an international human rights movement… I cannot here assess how much or how little the world has gained from the fact that… [the] pressure for the implementation of basic human rights has become increasingly a feature of international relations, conventions, and diplomacy. Nor can I assess here how often cynical lip service to the doctrine has been, and still is, accompanied by cynical disregard of its principles. There is however no doubt that the conception of basic human rights has deeply affected the style of diplomacy, the morality, and the political ideology of our time, even though thousands of innocent persons still imprisoned or oppressed have not yet felt its benefits. The doctrine of human rights has at least temporarily replaced the doctrine of maximizing utilitarianism as the prime philosophical inspiration of political and social reform. It remains to be seen whether it will have as much success as utilitarianism once had in changing the practices of governments for human good"[75].

Hart certainly discerned that what he saw as a "extension" or non-core subject of a theory of rights –the discourse on human rights– was going to become the centre of contemporary legal and political theory. This may impose an inversion in the explanatory order of explanation such that the discourse on human rights has to be postulated as expressing the deep normative foundations (the moral substance) that, in an ulterior step, are politically articulated as constitutional rights and, then, legally articulated as private rights, administrative law rights, and so on.

All these social, historical and normative considerations must be integrated into a theory of rights if we are to follow the expressive approach all the way to the third reformulation of its main question. But Hart's conception of the analysis of rights, that has carried us so far, must be transcended if we are to reconstruct the historical unfolding of the idea of rights: this would amount to a historical reconstruction of the (moral) learning process embodied in the contemporary discourse on human rights and its political and legal articulation. This expressive story, however, is for others to tell.

[75] H. L. A. Hart, "Utilitarianism and Natural Rights," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 196–7.