

THE FOUNDATIONS OF A THEORY OF RIGHTS*

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I.

The word which occurs most frequently in legal speech is *right*, and yet it proves on investigation to be elusive in its meaning.

Why is right contrasted with law in English, while *Recht* stands both for right and for law in German, *jus* in Latin, *Droit* in French, *Pravo* in Slavonic languages? Obviously the nations of Continental Europe laid stress in their terminology—on the unity of legal order—on the fact that it is constituted and directed by the general authority of the Commonwealth. On the other hand the English-speaking nations distinguish in terms between two aspects of the juridical arrangement—between the public settlement of law and the consciousness of right derived in the last instance from the convictions of individual men. This dual aspect cannot, of course, be ignored by continental systems either, and it appears in them in the shape of distinguishing adjectives—objectives—subjectives *Recht*, “*droit objectif—droit subjectif*” etc. We might say in English: law is right taken objectively, from the point of view of society, right is the personal conviction of men as to what is due. Right is commonly understood as what a man considers to be right from his personal point of view, while law is right as laid down by a power which is above the parties, whose task is to arbitrate between the various claims and to harmonize them as a whole.

The elements of a right are necessarily three. To begin with, in order that the right should exist it must be *claimed*. As it is subjective in its essence it must originate in a striving of the subject—in other words, the subject must assert something as his right. The subject may be an individual or a State, because though the State has greater means of waging its claims, it stands on a par with any other subject as regards the statement and assertion of right.

Claims are made every day in all directions; some of them give rise to natural obligations and moral rights. A man who has conferred a benefaction on another person, even if he has no kind of written and valid acknowledgment in return, naturally supposes that he has a claim on the gratitude or on reciprocal services of the obligee.

In order that such a moral claim should become juridical, it must pass through a second stage, the stage of a *declaration of right*. Such a declaration is the recognition by organized society that the claim is justified from the public point of view. As a rule, such justification enables the person whose claim has been juridically recognized to bring an action

* The present article approaches the subject from a point of view which differs from that taken up by the late Prof. Hohfeld in his well-known essay on the classification of Rights and Duties. My aim is to examine the connection between the juridical concept of right and the background of individual claims and social interests.

and to seek satisfaction in practice. As an illustration I will refer to a case from the domain of public law in which the State and a citizen were ranged against each other as parties. It occurred in 1911—*Dyson v. Attorney-General*.¹ It arose from the legislation carried through on the initiative of Mr. Lloyd George when Chancellor of the Exchequer for the taxation of landed estates. In 1910 an Act was passed concerning the modes and effects of valuation and transfer of landed property with a view of estimating the "unearned increment" in the value of estates produced by social conditions, e. g. by the opening of a railway line or the attraction of a centre of industry or trade.² On the strength of this Act measures had to be taken to ascertain the different values of estates, and the Treasury issued a number of forms of enquiry which occupiers of land had to answer under threat of penalties. One of the land owners to whom form IV was sent, Mr. Dyson, refused to fill in the form and to give the required answers and, as he was threatened with prosecution under the Act, he applied to the Chancery Division of the High Court for a declaration of right,³ maintaining that the Act did not contain the authorization for a number of the questions set down in the form and that, therefore, the issue of the form was *ultra vires*. When the case was discussed in the Court of Appeal the Attorney General pleaded that Dyson had no standing against the Crown in this case except by way of petition of right, on account of the prerogative of the Crown. I will refer to some of the remarks which were made by a very prominent Judge, Lord Justice Farwell, in giving his decision against the Crown:⁴

"It has been settled law for centuries that in a case where the estate of the Crown is directly affected, the only course of proceeding is by petition of Right . . . but when the interests of the Crown are only indirectly affected, the Courts of Equity could and did make declarations and orders which did affect the Crown." "It has not, since the Commonwealth at any rate, been the practice of the Crown to attempt to defeat the rights of its subjects by virtue of the great inconvenience would be created by giving rise to actions of this kind disputing certain demands of the Treasury because the greatest convenience to be considered is the convenience of the citizen who claims to be protected against any form of injustice, and the small inconvenience that certain orders of the Treasury, or other executive department, may be barred and rescinded is small indeed and need not be taken into consideration."

The third element of right is *enforcement* and this has to be distinguished from the pure declaration, because sometimes rights appear in an imperfect form. They may be declared and recognized and yet they may be insufficiently guaranteed and therefore ineffective in prac-

¹ 1 K. B. 410.

² (1910) 10 Ed. VII and 1 Geo. V, c. 8.

³ *The Statutory rules of 1883* (order 25, r. 5) admit expressly the validity of "declaratory" judgments: The element of a declaration of right is contained in a wider sense in every judgment in so far as the claim of a party is declared to be in conformity with a rule.

⁴ *Dyson v. Attorney General, supra* at p. 421.

tical application. It is by no means uncommon that claims are regarded by courts of justice as being justified but unenforceable. Recently, a pronouncement in that sense was made by Mr. Justice Hill in a case for the restitution of conjugal rights;⁵ he said that the position of the judge in such cases is unsatisfactory: he has to declare a right, his declaration requires a restitution of conjugal rights, but what means are there to enforce his decrees? "It is the law, and it can be made, but it cannot be enforced. In 99 per cent of the orders for restitution of conjugal rights one knows that they won't be obeyed. But still, the law says the orders can be made."⁶

Ihering, a jurist of great genius, put forward a theory which has won a great deal of approbation, namely the theory that what is really effected by law is not recognition of rights in the sense of an admission of power or as manifestation of the will, but a protection of interests. He lays stress on the fact that law delimitates the rights for the sake of the protection of interests even when the latter are not sustained by conscious will. For instance, infants are protected in their interests by law, and so are the insane. An infant may be protected in the womb of its mother, because the State holds that certain continuous inheritable interests have to be kept up in an orderly way in the line of organic succession. The *insane* person again cannot legally exert his own will, and nevertheless, his rights of property and succession are protected. He is subject to a certain régime of supervision and guardianship, which is meant to protect his interests. Ihering's theory has been taken up with approval by the socialists, because they discard the notion that right originates in individual will and derive it mainly from the conflicts of interests of social groups and classes on one side, from the action of society on the other. From the juridical point of view, the whole controversy seems to be based on a *misunderstanding* and as a matter of fact, Ihering can be confuted from his own writings. In his little book on "The Struggle for Right,"⁷ he lays stress on the private effort, on the necessity for each personality to assert its claims to juridical power. In other words, subjective assertion is one of the principal forces making for right. It is not enough to speak of interests, one has to look for the *personal factor* which is necessary for any effective assertion of this kind, and, unless this personal factor is active, interests may be dormant or suppressed for centuries. They get to be recognized in consequence of personal efforts directed by will. The exceptional protection afforded to infants or to the insane is not difficult to explain: if you want to rear a plant you must take care of its seed; the deficient and infirm are supported by society because human feeling refuses to draw a sharp demarcation line between them and the healthy and has to guard against the misuse of normal advantages. Besides the factor of the will is not absent in these cases—only it is the will of a juridical

⁵ See dictum of Mr. Justice Hill in *Bury v. Bury* (1923, Prob.) *London Times* of February 8.

⁶ *Ibid.*

⁷ *Der Kampf Unsers Rechts* (1st ed. 1872).

person, namely of the State, which has to step in. The situation may be likened to that which arises in consequence of a trust: the trustee acts for the beneficiary.

Claims may be urged by single individuals or by groups, but the essential point is that they start with the actions of parties. In other words, interests are the material basis on which the will and the claim are exerted. The common will of the State raises the incipient or incomplete claims of private persons to the level of recognized right.

The importance of the subjective or personal element in the establishment of rights and the formation of law is made particularly clear if we consider the historical experience of societies. Take any one of the fundamental legal doctrines—property, succession, crime—you will find that its development starts from *one-sided assertions* which are eventually compromised and harmonized by law. The primitive form of appropriation is the setting up of *defence* in regard to certain objects—food, cattle, clothing, a dwelling or a field—against *outsiders*, whose relation to these things seems not justified, is regarded as an encroachment or an intrusion and provokes resistance of the person aggrieved. The original protection against violence consisted in the resolute self-defence of the person attacked and of his kinsmen. In the case of homicide it was for the relatives to take up the feud and to obtain vengeance or compensation. The public authority intervenes at a later stage in order to substitute arbitration, compromise, adjudication for the conflict of subjective wills and forces, each striving for right from its personal point of view. If we wanted to give up the notion of a subjective origin of claims of right, we should have to get rid of the ideas of self-help and of the struggle for right. In our own days women have asserted their claims to property and political rights in a struggle with positive law.

The existence of the element of subjective right has nevertheless been rejected by two schools of thought, which direct their onslaught from two opposite sides, but join on the field of battle. From one side come the partizans of force, those for whom might is the foundation of all right—the schools of Hobbes, of Austin, of Gunglowitz: they do not recognize individual rights because individual man is in their view an atom when compared with Leviathan, with the Sovereign wielding an overwhelming authority over an obedient community. From the opposite side—in connection with groups seeking independence of the State—the followers of Duguit and of the Syndicalists also deny the existence of subjective right. We need not re-open the question as to the meaning of sovereignty, but it is necessary to examine some of the arguments levelled against the doctrine of subjective right.

Duguit, for instance, lays down the following propositions:⁸

“The conception of subjective right is nothing but a metaphysical hypothesis. Whatever definition is provided for it, it must inevitably be reduced to an extension of the human will, a power appertaining to

⁸ 1 *Traité de Droit Constitutionnelle* (2d ed. 1921) 65.

certain wills and not conceded to others. An obligatory rule creating rights for the benefit of one person, entitled to claim certain obligations, can only proceed from a superior power."

It would be impossible to follow Duguit in all the ramifications of his analysis, which, though it is constantly interspersed with contemptuous references to the metaphysical treatment of the subject by his predecessors, is itself conducted on scholastic lines. Abstractions are inevitable not only in legal constructions, but in any kind of reasoning. The problem is to use abstractions without losing touch with the concrete realities which support them, and Duguit is not exempt from this obligation. We may well ask: what is to be put in the place of the combination or co-ordination of subjective rights by State's authority? The co-ordination of conflicting forces by the recognition of social solidarity? "Social solidarity" is an impressive word, but is it a juridical term? Does it carry the notion of a set of rules formulated and enforced as the one obligatory law? Is it not rather the reflection of shifting opinions, variously related and combined in public intercourse? We are confronted again by the essential duality of social life—its manifestations as a fluid atmosphere of convictions and strivings on one hand, and on the other, its manifestation as a definite juridical organization, capable of laying down rules and enforcing their execution. In both spheres the ultimate and irreducible atom is presented by the individual and his will. The problem consists in estimating the proper relations between this personal element and the requirements of the society and of the legal State.

II.

In view of the importance of the subjective aspect in the formulation and attainment of rights we are led to inquire whether certain fundamental rights and claims ought not to be treated as inherent in nature of a free man and citizen. Such rights would have to be distinguished from another group, namely those produced by legal arrangement.

In the teaching of the so-called law of nature it was evident that such a distinction should be established and the XVIII Century closed with declarations amounting to the recognition of a fundamental truth, namely of the existence of imprescriptible natural rights. The most famous pronouncement of this kind is, of course, supplied by the revolutionary Constitutions of France.

The first Article of the declaration of 1791 runs:⁹

"Men are born and remain free and equal in (their) rights.
Social distinctions can only be based on common utility."

These Declarations have been criticized on the ground that in their very general and abstract form they can have no practical application, as their substantive value entirely depends on those limitations in law which, after all, have to be admitted as necessary. Professor Dicey, in his

⁹ Duguit et Monnier, *Constitutions et les Principales Lois Politiques de La France Depuis 1789* (3d ed. 1915) Textes, p. 1.

"Introduction to the Law of the Constitution," has made a brilliant analysis of the contrast presented in this respect by the French Declarations and the treatment similar questions have in England.¹⁰ There was no formal declaration of Rights in English law, apart from Magna Carta¹¹ with its historical interpretation, and yet we have the Habeas Corpus rules, which provide in specific terms of Statutes 31 Charles II, c. 2, and 56 George III, c. 100, remedies in the case of infringements of individual freedom: such infringements can be redressed by application to tribunals, in a concrete form. It may be admitted that Dicey points to a weak side in French law. Repeated Declarations have not always enabled French Constitutions to guarantee individual liberty during the Revolution or in the course of the different régimes which immediately followed the Revolution. It cannot be denied that in France too great a latitude was conceded to administrative action in practice. This tendency has, however, checked to a great extent under the sway of the Third Republic due to a consistent policy directed toward the enforcements of strict legality. But, of course it would be very wrong to suppose that English Law does not recognize the essential doctrine which lies at the basis of the Declarations. It expresses these essential principles in a different form, but it does recognize them. In fact the contrast between French abstract statements of law and English positive rules may be greatly exaggerated. In order to prove this, I should like to draw attention to two kinds of considerations—to the fact that in the domain of English and American Law, there have been pronouncements of the same kind as the French Declarations, and secondly, is that in cases actually decided in the English Courts there have been occasions when judges referred to principles which might as well stand in a declaration of Right and form part of a systematic statement as to fundamental rights. As to the first approach of the argument, it is sufficient to say that the French declarations of Right, considered historically, are only the last consequences of a movement which is pre-eminently English and American. Undoubtedly the French declarations were amply justified by the various misdeeds of the French *ancien régime* and the statements of grievances and claims drawn up in the so-called *cahiers* presented to the *États Généraux* in 1789 contained various demands for the solemn recognition of rights.¹² But the channels of such a recognition had been indicated by the Bills of Right of the American Colonies rising to the dignity of States.

It has often been urged from the time of Burke that in their movement of liberation Americans applied ideas of right which may be regarded as the inheritance of Common Law. This is undoubtedly one of the historical roots of their freedom. But we ought not minimize the influ-

¹⁰ (6th ed. 1902) *passim*.

¹¹ I Stubbs, *Select Charters Illustrative of English Constitutional History* (8th ed. 1900) p. 296.

¹² See Beudant, *Le Droit individuel et l'Etat* (1891) 134.

ence of another factor of the appeals to human nature itself, which are a characteristic manifestation of the political thought of the XVII and XVIII Centuries. A striking expression of this factor of development is presented for instance, by the polemics of James Otis¹³ against the oppressive policy of the British Government in taxing the Colonies without their consent. He wrote:—

“Nor do the rights of British colonists rest on a charter from the Crown. Old Magna Carta was not the beginning of all things: nor did it rise on the borders of chaos out of the unformed mass. A time may come when Parliament may declare every American charter void, but the natural, inherent, and inseparable rights of the colonists as men and as citizens would remain, and, whatever become of charters, can never be abolished till the general conflagration.”¹⁴

The Bill of Rights preceding the Constitution of Virginia of 1776 is particularly interesting because Lafayette in his speech to the constituent Assembly in France actually referred to it.¹⁵ We read in its first clause:¹⁶

“That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

The Declaration of Massachusetts of 1780 is almost identical in principle, although more detailed.¹⁷

But I want to call your attention, as laying stress on another and most important principle, to Article 5 of the Bill of Rights of New Hampshire:¹⁸

“Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason: and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship.”

The emphasis laid on freedom of conscience is characteristic, as this principle did undoubtedly exert a decisive influence in the course of the great moral revolt which forced the colonists to abandon their home

¹³ See Jellinek, *Le Declaration Des Droits* (1902) 18 REVUE DU DROIT PUBLIC, 385. The American and English antecedents of the declarations of right are presented very fully and clearly in this article: I can do no better than to follow the Austro-German jurist as to this point.

¹⁴ James Otis, *The Rights of the British Colonies Asserted and Proved* (3d ed. 1766); 1 Almon, *A Collection of Most Interesting American Tracts* (1766) No. 2.

¹⁵ *II Memoires Correspondence, etc. de LaFayette* (1838) 305.

¹⁶ 2 Poore, *American Charters and Constitutions* (2d ed. 1878) 1908.

¹⁷ 1 *ibid.* at p. 957.

¹⁸ 2 *ibid.* at p. 1281.

in England and eventually gave them the strength to form new commonwealths.

It would be superfluous to refer to the well-known rules of the actual Constitution of the United States or to its XIVth Amendment, which re-stated in a specific form the 39th clause of the Great Charter.¹⁹ I will merely say that the well-known controversies as to the application of the due process of law clause and the conflicting decisions of the Courts in its regard are a notable illustration of the necessity of supplementing any general pronouncement of this kind by considerations derived from the varying circumstances in the midst of which the general principle has to be put into action.

In any case, it is of great importance to ascertain that there are claims of right which flow naturally from the conception of human personality as a free agent and as entitled in normal circumstances to certain legal guarantees of the realization of welfare. We may affirm that historically the determined assertion of these claims was conditioned not only by abstract rationalistic thought, but also by the desperate struggle for freedom of conscience against State absolutism in the domain of religion.

The early Puritans of the XVIth Century were already appealing to the imprescriptible rights of man against their persecutors in Church and State. According to the summing up of an Anglican divine the Puritans with whom he had to deal held that,

“ . . . by natural birth all men are equally and alike born to like propriety, liberty and freedom; and as we are delivered of God by the hand of nature into this world, every one with a natural innate freedom, and propriety, even so are we to live, every one equally and alike to enjoy his birthright and privilege.”²⁰

History teaches us clearly in this case that we have to deal in social life with a conflict of principles, each of which is necessary to human development, but neither of which is entitled to claim absolute superiority over the other. The principle of liberty carried to the extreme produces anarchy; even so State power, suppressing all individual freedom, produces a condition of things, the outcome of which may be emigration, separation, revolution. There is a core of truth in the doctrine of imprescriptible and unalienable rights, and as for the necessity of State law, it is illustrated by every-day experience. A compromise has to be effected and the juridical problem consists in settling how far the line of compromise has to be drawn to the Right or to the Left. The solution of the problem depends on wisdom and equity rather than on rigid rules.

Now let us take up the other side of the inquiry—how are such principles treated and in what way are they applied in concrete cases? There are cases in which conflicts arise in the ordinary administration

¹⁹ I Stubbs, *op. cit. supra* note II, at p. 300.

²⁰ Thomas Edwards, *Gangraena* I CLARKE PAPERS (Firth ed. 1891) LXII.

of justice which turn on principles declared to be of unalterable right, even apart from reference to chapter and verse, or the authority of precedent. In *Arlidge v. Local Government Board*²¹ the Court of Appeal (Vaughan Williams, L. J. and Buckley, L. J.) held that the Board had in their examination of the case infringed the principles of natural justice, and although the House of Lords reversed this decision, it did so on technical grounds and without questioning the existence of such principles.²² In *Scott née Morgan and another v. Scott*,²³ proceedings in an action for nullity of marriage were conducted *in camera*, in accordance with a well established custom that certain cases demanding the production of evidence of an indecent kind may by leave of the court be tried *in camera*. When the case was decided in favor of the plaintiff, Mrs. Scott's solicitor drew up an account of the proceedings and circulated it among certain persons connected with the parties. The other side brought an action and accused Mrs. Scott of having broken the secrecy of the proceedings and of having thereby committed contempt of court. This view was accepted and the case decided in favor of the plaintiff by the Probate Division²⁴ and by the Court of Appeal. Yet in the House of Lords the decision was reversed on the strength of the fundamental principle of public trial. The reasons for such a decision were best expressed in the judgment of Lord Shaw, who said among other things:²⁵

" . . . The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what occurred in Court.

"This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism.

"What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."

Another case arose in 1920 and was tried in a Division of the King's Bench by Justices Darling, Avory and Sankey;²⁶ it bore on the extent to which ministerial orders made under the Defence of the Realm Act can modify or abrogate fundamental rights of English citizens. The facts of the case were as follows:—In 1919 the plaintiff, Chester, brought an action against the defendant, Bateson, in order to recover possession of a house occupied by Bateson after the expiration of the term of a lease. When the defendant refused to quit and the landlord

²¹ [1914] 1 K. B. 160.

²² *Local Government Board v. Arlidge* [1915, H. L.] A. C. 120.

²³ (1913, H. L. [1913] A. C. 417.

²⁴ [1912] P. 241.

²⁵ *Scott v. Scott*, *supra* note 23, at p. 476.

²⁶ *Chester v. Bateson* [1920] 1 K. B. 829.

brought his action before the county magistrates, they refused to interfere because there was an order of the Minister of Munitions which forbade any kind of ejection of persons connected with the fabrication of munitions. The trial was resumed in the King's Bench. The war was at an end, but the regulation still stood, therefore the Court had to decide whether the regulation made by the Minister of Munitions was *ultra vires* or not. The Divisional Court held that the order of the Minister was illegal and invalid as to the point at issue. One of the reasons for the decision was that the Minister had threatened any person bringing an action for ejection without his leave with terms of imprisonment and a fine. This amounted to a deprivation of English citizens of their right of access to Courts for the purposes of obtaining justice.

Mr. Justice Avory said:²⁷

"This appeal raises a question as to the legal validity of that portion of the second clause of Defence of the Realm Regulations which provides, 'whilst the order remains in force no person shall without the consent of the Minister of Munitions take or cause to be taken any proceedings,' etc. The effect is that if any person without the previous consent of the Minister of Munitions commences proceedings in any of the King's Courts of Justice, of the kind prohibited, he is guilty of a criminal offence and liable to six months' imprisonment or a fine of £100, or both, and the only question for decision is whether this portion of the regulation is *ultra vires* the statute under which it purports to be made."²⁸ The Court decided it was *ultra vires*. "The purpose in view when the regulation was made—namely, to prevent the disturbance of munition workers in their dwellings—may without doubt be said to be reasonable, and a regulation designed to prevent such disturbance, providing that no order for ejection should be made except under conditions prescribed, would probably be held to be *intra vires* the statute. But the objection which is made to the regulation as it stands is that it "deprives the King's subjects of their right of access to the Courts of Justice, and renders them liable to punishment if they have the temerity to ask for justice in any of the King's Courts."

The problem of rights of man and of the citizen is not settled simply by a criticism of the declarations of Rights. They may be too abstract and general; nevertheless the admission that in civilized and well-ordered States the individual is a quantity to be safeguarded and treated with proper respect—this admission involves a number of consequences as to freedom of movement, freedom of opinion, freedom in choice of occupation, freedom of petition and judicial action, etc., which have their roots in self-consciousness of the individual and not merely in arrangements of Law by the State.

As a general conclusion it may be said that the will of the State is not the one factor building up Right and Law in human society. There is a second factor of equal importance—the consciousness of man as to their rights. In practice Law appears as a shifting compromise between these two factors.

²⁷ *Ibid.* at p. 835.

²⁸ Defence of the Realm Consolidation Act (1915) 5 Geo. V, c. 8.