

**POWER AND INTERNATIONAL LAW:  
HOHFELD TO THE RESCUE?**

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**Abstract**

There can be little doubt that power and international law are deeply interconnected. The nature of the connection is however somewhat elusive. Hohfeld's account represents a tool with which to 'open up' our understanding of power in legal relationships at the global level. If the interconnections between powers, rights, privileges and immunities can be unpacked, and international legal norms 'unbundled' into their Hohfeldian components, then not just a vocabulary but also perhaps a grammar of public international law may emerge.

I INTRODUCTION

There can be little doubt that power and international law are deeply interconnected. The nature of the connection is however somewhat elusive. To a significant extent international law has in the past hundred years defined itself by *bracketing* power relations – by establishing its jurisdiction in what one might call a 'territory of norms.'<sup>1</sup> Emphasising the

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<sup>1</sup> Those varieties of international legal theory that do discuss power indeed tend to be those most closely aligned with or convergent with international relations theory, namely varieties of international law that would be classed as 'realist' or 'policy oriented.' In international law this is often referred to as the 'New Haven' School.

diplomatic origins of international law would be consistent with such a view: reciprocal expectations of conduct, and the whole panoply of ‘recognition’ as an element of international statehood,<sup>2</sup> represent ways of setting power dynamics at a distance. The same might generally be said of any kind of legal system; it is not necessary to adopt a triumphalist or evolutionary narrative of ‘law as progress’ to recognise that litigation represents a departure from blood-feuds and ordeal by combat.<sup>3</sup> Law as culture, or law as rhetoric,<sup>4</sup> one might say. In any event geopolitics and other varieties of global inequalities of ‘muscle’ are the province of other members of the academy. International relations and political studies are, it might be said, among the contemporary disciplines properly focused on power relationships at the international level; international law has other fish to fry.

To the extent that law in general, or international law in particular, is thought of as a norm-focused or a values-focused discipline, power is therefore at arm’s length. Yet considerations of power, perhaps poorly articulated, are rarely far from the conceptual surface. It takes a theorist of the extreme rigour of a Kelsen<sup>5</sup> to analyse international norms without ‘backsliding’ into *realpolitik*. A values focus in contemporary theorisation

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<sup>2</sup> James Crawford, *The Creation of States in International Law* (2<sup>nd</sup> ed, 2006) 19.

<sup>3</sup> John R. Morss, ‘Shadow of a Gunman? Legal Obligations, Wizards and the Persistence of Evil Systems,’ (2010) 23/2 *Ratio Juris* 274; John R. Morss, ‘Evil Regimes of Law: Challenges for Legal Theory and for International Law,’ (2009) 13 *University of Western Sydney Law Review* 137.

<sup>4</sup> Connections between rhetoric and law go back at least to Cicero; Richard Tuck, *Natural Rights Theories: Their origin and development* (1979) 33.

<sup>5</sup> Jochen Von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010).

in international law, such as in the work of Allen Buchanan<sup>6</sup> or in the ‘fiduciary’ approach to peremptory norms in international law,<sup>7</sup> adopts implicit understandings of power relationships in the international domain without subjecting those understandings to detailed scrutiny. It is probably the case that in all eras, relationships between power and international law are important and are worthy of investigation. In different eras the relationships may well be different, reflecting historical change in disciplinary development as well as many other factors. In our time the context includes globalisation, the hegemony of the USA, the environmental crisis and the United Nations system as we currently know it. Some comments on historical matters can be offered before an attempt is made to demonstrate the value of Hohfeld’s account of legal interrelationships to the analysis of these questions in our own times. The history of rights theories provides an illuminating insight into these issues.

## II RIGHTS, POWER AND INTERNATIONAL LAW

The history of rights theories crosses the boundaries of political theory, of legal theory and of philosophy (and indeed of theology) among other disciplines. Early developments in modern international law – from the times of Grotius, to take a familiar chronological benchmark – took place within the context of debates over the relative legitimacy of various forms of government, from monarchical to republican. Key to these debates was the question of the limits or conditionality (if any) of sovereignty: when

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<sup>6</sup> Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004); Allen Buchanan, ‘Human Rights and the Legitimacy of the International Legal Order’, (2008) 14 *Legal Theory* 39, 45.

<sup>7</sup> Evan Criddle and Evan Fox Decent, ‘A Fiduciary Theory of *Jus Cogens*,’ (2009) 34 *Yale Journal of International Law* 331.

may a population resist or overthrow a ruler, or defy the commands of a representative sovereign institution such as a parliament? Executive power came under scrutiny; some very radical voices were raised, for example those of the Levellers of England in the mid-seventeenth century.<sup>8</sup> Grotius himself was deeply interested in these questions. He treated the dispute between the Dutch East India Company (supported by the state) and Portugal over alleged piracy, as a matter of access to the high seas, and approached it through an analysis of property rights. What kind of property, with what kinds of communality of use or of exclusivity, could be held in the seas by seafaring princes? What norms therefore govern the conduct of competing nations?

Grotius' argument was published in 1609 as *Mare Liberum*, proposing what might now be thought of as a 'free trade' approach.<sup>9</sup> The most significant 'protectionist' English response to *Mare Liberum*, John Selden's *Mare Clausum* of 1636, was originally drafted in 1618 in the context of a fishing dispute between England and Holland:<sup>10</sup> an early 'cod war' so to speak. The 1636 publication of Selden's *Mare Clausum* was stimulated by a further outbreak of the fishing dispute. Selden's monarch in 1618, King James VI/I, was active in relation to international maritime law, being much concerned with the delicate matter of the control of piracy and on receiving complaints of unfair foreign competition in fishing and in the selling of fish, proclaiming that all foreign vessels would henceforth require a license to fish in British waters, thus giving rise to a resource-based dispute with the Dutch. The 1630s outbreak of the fishing dispute

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<sup>8</sup> Tuck, above n 4, 148.

<sup>9</sup> Malcolm Shaw, *International Law* (6<sup>th</sup> ed, 2008) 24.

<sup>10</sup> Tuck, above n 4, 86.

also gave rise to Charles I's peace-time implementation of 'Ship Money' in order to raise funds for the protection of the English fishing trade. 'Ship Money' was an emergency tax available to the monarch at his prerogative (ie without parliamentary approval) with the purpose of raising funds quickly in times of war, from coastal counties, in order to resource the navy. The Ship Money crisis contributed significantly to the larger constitutional crisis of Charles' reign and hence to the English Civil War. Modern international law was thus born out of the power struggles and the legitimacy struggles of emerging mercantile nations, hungry for markets, and out of the competing theories of governance that accompanied those struggles.

Thomas Hobbes is of course a central figure in the development of modern political theory, especially in the liberal tradition with its concern for checks and balances as between competing entitlements seen as inherent. Grotius lived long enough to read Hobbes and Hobbes was sufficiently interested in Selden's *Mare Clausum* to send for a copy while away from England.<sup>11</sup> Radical in a philosophical rather than in a political sense, Thomas Hobbes explored in *Leviathan* the duties and entitlements attending on legitimate governance whether the sovereign was a sole natural person (the monarch) or a collective ('a council'). In either case, sovereignty was seen by Hobbes as giving rise to the transfer of power from the populus to that sovereign, in effect a waiving or 'relinquish[ing]' of each 'man's ... right of resisting him to whom he so transferreth it.'<sup>12</sup> In

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<sup>11</sup> Ibid, 81; 119; also see 148-9. On these topics also see Andreas Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth,' (2011) 31 *Oxford Journal of Legal Studies* 565.

<sup>12</sup> Tuck, above n 4, 121.

other words sovereignty itself – the seigniorial or dominance relationships of submission and ‘sway’ – was being actively ‘interrogated.’

The relationships between sovereign entities, as exemplified by ‘cod wars’ or by armed conflicts over religion in continental Europe, were never far from the minds of the political theorists of the seventeenth century any more than from the minds of the international lawyers.<sup>13</sup> Liberal political theory in the hands of Locke, and of both James and John Stuart Mill in the nineteenth century, was bound up with considerations of the colonies and of Empire. All the way down to the liberal theorists of the twentieth century such as John Rawls, the rights of individuals and of collectives have been framed in ways that reflect larger ideas on the relationships between polities at the international level. Rawls’ own *Law of Peoples*<sup>14</sup> is an attempt, if generally considered a remarkably unsuccessful one, to explicate these connections and implications.

All of this tells us that power relations at the international level form the context within which norms of international law are conceptualised and articulated. Alongside this, political obligations of all kinds were undergoing theoretical analysis within a variety of intellectual traditions. Within liberal political theory for example, Hobbes himself had been careful to distinguish between ‘obligation’ and ‘liberty’<sup>15</sup> in the context of rights, such that the latter term conveys optionality or choice as in the waiving of an entitlement. An analysis of conduct at the international level,

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<sup>13</sup> See Martti Koskeniemi, *From Apology to Utopia* (2005) 89.

<sup>14</sup> John Rawls, *The Law of Peoples* (1999).

<sup>15</sup> Tuck, above n 4, 130.

such as the waging of war, inevitably involves such questions of the legitimacy of decision-making.<sup>16</sup>

### III KELSEN, LAW, AND POWER

During the twentieth century and under the influence of that century's own violent conflicts, international lawyers and scholars of international relations such as Morgenthau parted conceptual company precisely over the point that international law has its own contribution to make to a much larger, collective intellectual effort. Kelsen has a great deal to tell us about this;<sup>17</sup> as well as attempting to work out the details of a norm-based analysis of international law, Kelsen made considerable progress with establishing the conceptual criteria for such a project. For example Kelsen demonstrated the inadequacy of 'consent' as a theoretical basis for an intellectually satisfactory account of international law. While this would be to go beyond Kelsen's account, it could be said that the notion of consent in international legal theory is no more than the echo of a 'great powers' discourse. To the extent that any substance can be detected in it, a consent-based 'theory' reflects a world constructed on the basis of the whims of potentates.

Inclinations and moral values are not, for Kelsen, the proper basis for a systematic international law. In the time of the Weimar Republic German-speaking scholars were expected to share a view of the corrupt nature of contemporary international law, as manifested by the asymmetrical agreements entered into at Versailles in 1919. So much for the utopian idea

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<sup>16</sup> Stephen Neff, *War and the Law of Nations* (2008) 167.

<sup>17</sup> Von Bernstorff, above n 5, 173, 202.

of an international law that transcends national interests, was the received view; international law is no more than a facade for the exaltation of the strong over the weak. Kelsen's contemporary Carl Schmitt, his equal in intellectual capacity if not in intellectual or personal integrity, developed a theoretical account of international law that brought raw power to centre stage, a kind of right-wing Marxism in which instead of economic activity forming the determining base for all aspects of human society and human history, that foundational role was reserved for executive decision making. Schmitt's was an extreme version of the capitulation of international law to power, yet it illustrates the conundrum: international law is at the same time about power, and not about power.

The same can perhaps be said of law in general. One way in which law has been rather successful in dealing with the problem of power has been to treat not of power 'with a capital P' but rather with powers 'plural.' For example, administrative law has traditions of analysing implied powers, attributed powers, inherent powers and so on. This is of significance not only in the domestic setting, but also in terms of its more abstract dimensions, as a way of articulating legal power. It is also of some direct significance in international law, in the context of international institutions.<sup>18</sup> To discuss 'powers' rather than 'power' might be considered avoidance or more kindly, pragmatism. However it might suggest a worthwhile line of enquiry: to treat power in an analytic manner, rather like rights and obligations have been treated in various traditions relevant to international law. What is needed is an intellectual framework or apparatus in which powers are analysed in a somewhat atomistic or 'micro' manner

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<sup>18</sup> Explored, for example, by Jan Klabbers, *An Introduction to International Institutional Law* (2002).



and yet in which some semantic connection with larger senses of power is maintained. Within legal theory, there is only one serious candidate, given such a ‘position description:’ the theory of Wesley N. Hohfeld.

#### IV HOHFELD: POWER AS A LEGAL RELATIONSHIP

It is now therefore possible to address the question of what conceptual assistance Hohfeld might provide to the articulation of power within international legal theory. Hohfeld’s analytic scheme was first put forward nearly one hundred years ago.<sup>19</sup> It comprises in essence a schematic or table displaying the interrelationships among eight terms. Hohfeld’s objective was to be precise about legal relationships. The eight Hohfeldian terms are divided into two domains or ‘orders.’ The first order includes rights, privileges and duties. This is the more familiar ‘half’ of Hohfeld’s account. The second order includes power.<sup>20</sup> Hohfeld’s account of legal power takes the form of a set of assertions concerning four matters: the capacity in some actor to change existing legal relations; the vulnerability in another actor to having such changes made; the availability for some actor of protections against certain changes; and the specific prohibition in some actor of the changes with respect to which another actor holds a protection.

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<sup>19</sup> Wesley N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, (1913) XXIII *Yale Law Journal* 16. Karl Llewellyn was strongly influenced by Hohfeld; in turn Llewellyn taught legal theorist William Twining. Twining taught James Allan, my own teacher in legal theory, so that a tenuous lineage may thus be asserted.

<sup>20</sup> Relationships between the orders (for example relationships between powers and privileges) are rather obscure and will not be discussed here.

It should be emphasised that Hohfeld expressed no interest in what might be called the moral or ‘internal’ correlation of legal relations. Various philosophical and political traditions, such as the Kantian, focus on such correlations, asserting for example that an agent who is entitled to make claims on the basis of a right, will thereby incur responsibilities or other obligations.<sup>21</sup> This attitude has sometimes surfaced within international law: statehood in general, and territorial sovereignty in particular, may be said to bring with it both duties and rights. In contrast to this ‘deontological’ approach, Hohfeld’s analysis is rigorously instrumental or as one might say, ‘external.’ Duties and reciprocal obligations bind together different agents.<sup>22</sup> A legal community is constructed through the intertwining of these reciprocal connections. To change the metaphor, Hohfeldian legal relationships are like the bonds between amino acids in the structure of DNA – pairs match up in specific ways, and the multiple combinations of the simple basic units suffice to generate immensely varied forms of life. Hohfeld’s approach was pre-Socratic in its ambition: if the units of legal relationship can be identified, then all forms of their combination will be open to analysis.

While Hohfeld’s vision was grand in some respects, it was relatively modest in others. Hohfeld’s field of enquiry was private law among individual natural persons, as exemplified by contractual and property-based relationships (the time-honoured disputes over ‘Whiteacre’ and so

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<sup>21</sup> For example the citizen may have both prescribed rights and prescribed duties or responsibilities, with both kinds of attribute arising from citizenship as such, ie integrated. This approach is hinted at by the title of Victoria’s ‘Charter of Rights and Responsibilities’ but hardly explicated within the text of the Charter, whose provisions are Hohfeldian rather than Kantian: generally speaking citizens have rights and officials have the corresponding duties.

<sup>22</sup> John R. Morss, ‘On Having your Legalism and Eating It Too [Comment on Naffine, *Law’s Meaning of Life*],’ (2010) 35 *Australian Journal of Legal Philosophy* 116.

on). It is something of a step from that domain to the domain of international law with its interactions of complex collectives. But the applicability of Hohfeld's scheme to the legal interrelations of collectives has been demonstrated<sup>23</sup> and by extension, its applicability to international law has been proposed.<sup>24</sup>

Hohfeld's methodology involved two broad axioms. The first axiom is that legal relations are always reciprocal (or 'intersubjective' perhaps), so that there are always two ways to look at every legal relationship: from its two 'ends' so to speak. For example, one can look from the 'duty end' or from the 'right-claim end' of any duty—claim relationship. As Kramer puts it, in that respect Hohfeld's argument is simply that every 'up' has a 'down.' The second axiom is that all actual legal relations are exclusive of other possible legal relations. If X has a *duty* to perform Y (thus honouring a right claim held by Z), X cannot at the same time have a *privilege* ('liberty') to perform Y. Of course X may be at the same time under a duty vis-a-vis Z and at the same time enjoying various privileges, rights and so on.

Focusing on the second order, for Hohfeld there are four legal relationships which are closely interrelated: power, liability, immunity, and disability. *Power* is the capacity to change legal relations such as entitlements. Every incidence of power thus presupposes an incidence of *liability*, a vulnerability to such 'external' change of relevant legal relations. Each power is narrowly defined, and so is each liability. As Hohfeld stresses

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<sup>23</sup> Matthew Kramer, Nigel Simmonds, and Hillel Steiner, *A Debate Over Rights* (1998).

<sup>24</sup> John R. Morss, 'The Legal Relations of Collectives: Belated Insights from Hohfeld,' (2009) 22/2 *Leiden Journal of International Law* 289.

throughout his account, power and liability are two sides of the same coin. Neither is logically prior to the other. *Immunity* and *disability* are linked in a parallel manner. Every immunity presupposes, and is correlative with, a corresponding disability. Immunity refers to a precise form of protection against the exercise of a power. Disability characterises the precise and narrow restriction guaranteeing the immunity. Further, the two axes (the two sets of pairs of terms) are logically related. Power and disability are contradictories. A power to alter certain legal relations is strictly incompatible with a disability (in the same agent) to alter those very same legal relations. A power is not incompatible with a disability to alter a *different* set of legal relations. On the same line of reasoning, immunity and liability are incompatible to the extent that their referents coincide. Thus each of the four ‘positions’ can be reduced to any of the others. Liability is the counterpart of power; disability is the contradictory to power; immunity is the counterpart to the contradictory to power. In this way power may be said to be the key to Hohfeld’s second order; but the same may be said of each of the other three terms.

This logic-chopping may seem excessive. As with the application of any logical scheme it is a matter of seeing whether the formula is helpful, not merely coherent. Hohfeld’s account represents a tool with which to ‘open up’ our understanding of legal relationships at the global level. One way in which it does so is by offering an alternative vocabulary and hence an alternative set of conceptual implications. Thus self-determination, which is usually thought of as a right,<sup>25</sup> might perhaps be more accurately defined as a power. Self-determination involves a competence or a capacity to

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<sup>25</sup> Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) 397.

effect changes in legal relations of various kinds; and the assertion of constitutional authority often accompanies the declaration of independence. More plausibly self-determination might be a complex collection of powers, immunities, privileges and so on, that is to say a bundle of Hohfeldian attributes. In general it is likely that *norms* should be thought of as such aggregates of Hohfeldian attributes. The detailed articulation of an Hohfeldian approach to power in international law awaits a further opportunity. The forthcoming centenary (in 2013) of the first publication of Hohfeld's ground-breaking analysis might be an appropriate time to explore this proposal at greater length and in that process, to investigate the connections to a collective approach to rights in the international domain.<sup>26</sup>

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<sup>26</sup> John R. Morss, 'Will, Interest, and Waldron's Warning: Toward an International Law of Collectives', MS in preparation 2011.

