

## COMMENT ON PROFESSOR GOPAL SREENIVASAN'S "A HYBRID THEORY OF CLAIM-RIGHTS"

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### I

In this interesting paper, professor Sreenivasan provides an account of rights that seeks to avoid the main difficulties that affect the Will Theory and the Interest Theory. Drawing on Hohfeld's classical analysis, professor Sreenivasan identifies rights with claim-rights. He says "the best objection that each theory wields against the other is unanswerable".<sup>1</sup> Gopal formulates the Will Theory in this way:

(WT) Suppose X has a duty to . Y has a claim-right against X that X just in case:  
Y has some measure of control over X's duty.

Citing Hart, he takes the full measure of control over X's duty to comprise the power to waive X's duty, to enforce it or not, given that X has breached it, and the power to waive X's duty to compensate. As Gosal recognizes, the paradigms of the Will Theory are the claim-rights recognized in property and contract law, where right holders have typically the full measure of control.

Gopal argues that the Will theory is too restrictive because it cannot accommodate inalienable rights and the rights of incompetent adults. Thus he says: "The Will Theory makes inalienable claim-rights incoherent in principle".<sup>2</sup> While the holders of inalienable rights lack the power to waive the correlative duties, incompetent rights holders cannot exer-

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<sup>1</sup> Sreenivasan, Gopal, this volume, p. 776.

<sup>2</sup> *Ibidem*, p. 768.

cise the powers of control on which the Will Theory relies. This objection is not compelling, however. As Gopal himself concedes, “lesser measures of control” can be accommodated as approximations to the case of full control. In fact, though holders of inalienable rights do not have the full measure of control over the correlative duties, they typically retain the power to enforce correlative duties and the power to waive compensation duties.

Since the inalienability objection is not compelling, Gopal must complement it with what I will call the *strength difficulty*. According to the Will Theory, inalienability must weaken rights, because inalienable rights do not include the power to waive correlative duties. Yet the disability associated with inalienable rights —says Gopal— is typically seen as *strengthening* those rights. Replying Simmonds, Gopal sets out the strength difficulty as follows:

...it cannot seriously be maintained that reducing the right-holder’s measure of control is consistent with strengthening her claim-right, at least not on the Will theory’s conception of a claim-right. Someone with only a residual measure of control over my duty to lacks the ability to exert her will in certain ways – notably, to make it the case that my failure to does not count as a breach of my duty. How can this not weaken her ability to exert her will, and so not weaken her claim-right on WT?<sup>3</sup>

Gopal formulates the Interest Theory in these terms:

(IT) Suppose X has a duty to . Y has a claim-right against X that X just in case:

Y stands in a sanctioned relation to benefiting from X’s -ing.

The Interest Theory covers easily the cases of inalienability and incompetence, but is subject to the well-known third-party beneficiary objection. As is well known, Raz’s formulation of the Interest Theory is meant to overcome this objection:

(RZ) Y has a claim-right against X that X just in case:

other things being equal, an aspect of Y’s well-being (his interest) is a sufficient reason for holding X under a duty to .

As Raz himself acknowledges, this formulation must confront a new difficulty, which I will call the *weight difficulty*. Gopal expounds it in these terms:

<sup>3</sup> *Ibidem*, p. 770.

“The weight of the claim-right —that is, the weight of its correlative duties— is often, so it seems, much greater than the weight of the right-holder’s interest. But it is unclear how this can be, given that the right-holder’s interest is meant to be *sufficient* to justify the correlative duty”.<sup>4</sup>

To deal with the weight difficulty, Raz proposes a “piggy-back solution”: the weight of an individual’s interest may be sometimes *augmented* by taking the interest of third parties into account. An example is a journalist’s claim-right to keep her sources secret. Against this solution, Gopal says:

My objection... is that it instrumentalizes the individual right-holder. If fails to take his or her status as a right holder seriously enough. If an individual’s claim-right is to prevail against the onslaught of the social calculus, it must do so of its own accord – or, at least, substantially of its own accord.<sup>5</sup>

Gopal proposes a Simple Hybrid Model that is supposedly resistant to the objections against the Will Theory and the Interest Theory:

(SH) Suppose X has a duty to . Y has a claim-right against X that X just in case:

*either* Y has the power to waive X’s duty to  
*or* the justification of Y’s disability to waive X’s duty is settled by considering whether vesting Y with a power to waive X’s duty would, on balance, advance Y’s interests.

To solve a number of technical problems —which I will not consider here— Gopal turns the Simple Model into the Complex Model:

(CH) Suppose X is duty-bound to . Y has a claim-right against X that X just in case:

the question of whether Y (or his surrogate Z) is vested with some measure of control over a duty of X’s to (and if so, of which one is and with what measure ) is settled by the consideration of what would, on balance, advance Y’s interests.

<sup>4</sup> *Ibidem*, p. 776.

<sup>5</sup> *Ibidem*, p.777.

## II

I take Gopal's paper as seeking to provide an analysis of both *moral* and *legal* rights. On the one hand, he adopts the Hohfeldian notion of a claim-right, applicable centrally to legal rights, and takes many examples of claim-rights from the law. On the other hand, he adopts the well-established usage in moral philosophy of rights as trumps or constraints on the utilitarian calculus. In the absence of this usage, it would be difficult to make sense of the instrumentalization problem. Therefore, Gopal's project should be assessed in terms of its ability to account for both moral and legal rights.

It is not clear to me that any conceptual analysis of rights can meet the above standard of success at the present stage of legal evolution. In the seventeenth and eighteenth centuries, the situation was probably different. At those times moral and legal rights were essentially associated with the value of personal autonomy. According to the Kantian doctrine of right, for instance, legal rights were public and institutional ways of recognizing the status of persons as ends-in-themselves. Rights were intelligible concepts against the background of a fundamentally non-consequentialist moral outlook. In turn, legal rights recognized individual autonomy by vesting in individuals the powers that Will Theory picks out. It is no surprise that Hart mentions rights in property and contract law as the central examples of claim-rights. Those legal rights constituted the basic legal machinery of the Kantian conception of law.

The Will Theory is an incomplete and fragmentary way of articulating the classical conception of rights. In fact, the theory focuses on the powers of right holders, but ignores the underlying autonomy-based justification. Gopal cites Hart's suggestion that the justification of claim-rights associated with the Will Theory is "the interest in autonomous choice".<sup>6</sup> On the Kantian view, however, rights cannot be grounded on any interest—not even an interest in autonomous choice—because that would amount to disregarding the value of autonomy. Rights should be based on the status of individuals as autonomous agents. A formulation of the Will Theory faithful to the moral and legal tradition from which it takes its cue should refer both to the powers pres-

<sup>6</sup> *Ibidem*, p. 771.

ent in classical legal rights and to its associated justification on basis of the value of individual autonomy.

Toward the end of the nineteenth century, the harmonious picture of legal rights and underlying autonomy-based moral rights broke down. In a well-known process that spanned over decades, the individualistic paradigm of legal rights was gradually replaced by a paradigm centered on interests and social goals. Legal rights were no longer a way of recognizing the status of autonomous agents but instruments for enhancing the interests of individuals —particularly the worst-off— and for implementing social goals. Jhering’s famous theory of rights as legally protected interests exemplifies this new approach to the law. The Interest Theory is, of course, an attempt to account for this new conception of legal rights, which disconnects them from the value of individual autonomy. Though the Interest Theory is sensitive to the greater variety of legal rights in modern legal systems, like the right to a minimum wage or the right to education, it is at odds with those features of moral and legal rights that answer to the classical paradigm. These features are emphasized in the contemporary notion of rights as trumps or constraints.

Given the historical linkage between rights and non-consequentialism, it is natural that the Interest Theory cannot provide a satisfactory account of rights. The instrumentalization problem is just an instance of this general truth. Even if we leave aside Raz’s “piggy-back solution”, the Interest Theory cannot accommodate the anti-consequentialist overtones of the concept of rights. As Eric Mack has recently shown, the Interest Theory is in tension with two central features of rights-based theories: the impermissibility to trading off rights against aggregative goals and the principled rejection of paternalism.<sup>7</sup> The Interest Theory —particularly in Raz’s version— is incompatible with those features because it understands the value of rights as based on the interests of rights holders. These interests can have either agent-neutral (impersonal) or agent-relative value. If they have agent-neutral value, rights fall prey to the utilitarian calculus. In effect, given that the normative force of rights is grounded on the right holders’ interests, there is always the possibility that those interests be outweighed by other people’s interests. Alterna-

<sup>7</sup> Erick Mack, “In Defense of the Jurisdiction Theory of Rights”, *The Journal of Ethics*, 4, 2000, nums. 1 and 2; reprinted in Pincione, G. and Spector, H. (eds.), *Rights, Equality and liberty*, Dordecht, Kluwer, 2000.

tively, if the rights holders' interests only have agent-relative value (*i. e.*, they only provide reasons for the right holder), the theory cannot explain how those benefits or interests can justify holding someone else under a duty. In both variants (agent-neutral or agent-relative value), rights could not block (in a principled way) interferences intended to advance more successfully the right holder's interests. For instance, if the right to reject medical treatment were based on the patients' interests, it might be possible to justify the imposition of a blood transfusion on a Jehovah's Witness.

I believe that an illuminating theory of rights should take into consideration the changing paradigms in which the notion of rights is embedded. It seems obvious that while the Will Theory tries to capture the classical features of rights, the Interest Theory seeks to accommodate the widely different kinds of rights that modern legal systems recognize and their different underlying justifications. Therefore, it may be impossible to provide an analysis of rights that does full justice to the various and changing ideas with which the concept of rights was associated at different points of its historical evolution. A partial success may be the most we can aspire to. Conceptual analysis is very often criticized by its lack of historical awareness. Though I am not in general sympathetic to this kind of criticisms, usually linked to an anti-intellectual bent, I do believe that the analysis of rights can enrich itself by paying more attention to the facts that I have outlined.

### III

If we are confronted with the need to opt for one theory, I think that the Will Theory carries the day. Consciously or unconsciously, Hart dropped from the explicit formulation of the theory any reference to its underlying autonomy-based justification. We should celebrate this because, as I suggested, legal rights are embedded in different normative paradigms. For instance, we cannot assume that the justification of modern welfare rights matches the justification of classical rights in private law. Unlike the Interest Theory, the Will Theory is neutral with respect to justificatory matters and, therefore, is in a better position to account for different kinds of legal rights.

So what are the obstacles that stand in the way of embracing the Will Theory? As I said above, Gopal tries to rebut the Will Theory by means

of the strength difficulty. He claims that typical inalienable rights, like the right not to be enslaved, are stronger than alienable rights because of the disability such rights incorporate. This conclusion seems to contradict the Will Theory. Since this theory equates rights with powers, a right comprising fewer powers —so the argument goes— must be weaker than a right including all the relevant powers.

In my opinion, the argument from the strength difficulty relies on a controversial assumption. It is true that inalienable rights are typically stronger than alienable rights. However, the explanation of this fact need not lie in the disability, as the argument assumes. Classical inalienable rights, like the right to freedom, are “stronger” than alienable rights not because of the disability, but because of the *weight* of the duties that correlate with them and the importance of the value that such duties secure. Even if the holder of an inalienable right has lesser power to control the correlative duty than the holder of an alienable right, the greater weight of the former right might simply mirror the greater weight of the correlative duty. This is clear in the case of the right not to be enslaved. In effect, enslaving a person destroys her status as an autonomous agent, regardless of whether she voluntarily consented to become a slave. On the classical Kantian view of rights, the inalienability of the right to freedom is in accord with the autonomy of the will. Thus, the second formulation of the Categorical Imperative forbids us to treat not only the humanity in others but also the humanity in ourselves as only a means. Consenting to become a slave is a direct violation of this prohibition. Classical inalienable rights are stronger than ordinary rights not because but despite of the disability they include.

As soon as we dismiss the strength difficulty, inalienability poses no serious problem to the Will Theory. It can handle inalienability because holders of inalienable rights have residual control of the correlative duties. We can reinforce this conclusion by noticing that Hart’s enumeration of the powers associated with rights leaves aside an essential ingredient illuminated by Feinberg. When we say that Y has a claim-right against X that X     we imply that Y is in a position to make a valid claim that X should     and to make a complaint if his claim is not satisfied.

#### IV

Even if my treatment of the strength difficulty were unsuccessful, Gopal should still prove that the Hybrid models can handle this difficulty more successfully than the Will Theory. This is far from obvious. Gopal says that the disability of inalienable rights is typically seen as strengthening those rights. The hybrid models fail to explain this fact (if it is fact). Why should rights become stronger when the second disjunct of the Simple Hybrid model is true (and weaker when the first disjunct applies)? I can see no reason for this asymmetry. Nor does the Complex Hybrid model explain why inalienable rights are stronger than alienable rights (notice that Gopal could not explain the difference in terms of the importance of the interests or values that the rights protect. This would bring us back to my analysis of strength as weight, which solves the strength difficulty).

To show that the Hybrid models are superior to the Will Theory, Gopal should also prove that such models are immune to the difficulty that threatens the Interest Theory (and to which the Will Theory is not subject). Thus, he argues that the Hybrid models avoid disregarding the status of individuals as rights holders (*i. e.*, the problem of instrumentalization). This is not clear to me. On the one hand, according to the Complex Model, the question of whether the right holder is vested with a measure of control of the correlative duty must be settled by considering the balance of his interests. Therefore, the attribution of rights under that model is compatible with illiberal paternalistic interferences. For instance, if the State of Sonora passed a law abrogating the powers of citizens to protect their liberty to smoke, it could well claim that the law respects citizens' rights because it is justified on the balance of each citizen's interests. Gopal could reply that the duty to respect citizens' liberty to smoke is justified on independent grounds. But the paradox remains that the Complex Hybrid model does not allow citizens to invoke the most natural defense they have in this case, namely, that the law violates their right to smoke.

On the other hand, individual autonomy is the most natural justification of the legal powers on which the Will Interest focuses. The Complex Hybrid model excludes a Kantian justification of those powers and, therefore, fails to do justice to their traditional anchorage in the value of individual autonomy. Accordingly, the instrumentalization problem could reappear under a different shape. The balance of interests that justifies



powers might be traded off against the interests of other people, or of society at large. It is true that the model restricts trades offs to the right holder's balance of interests, but this restriction seems arbitrary. The Complex Hybrid model suggests that the attribution of legal powers to individuals must be grounded on their interests. Once this is admitted, it is difficult to stop the sliding into the utilitarian calculus. For example, the arrest of certain individuals (*e. g.*, Arabs) could be justified if it is needed to preserve public tranquility. (Notice that constitutional guarantees are best conceived as Hohfeldian powers).

## V

Gopal also suggests that admitting claim-rights under the criminal law runs afoul of the Will Theory. I disagree. In fact, right holders do have the full measure of control under the criminal law because they can waive criminal prohibitions, just as they can waive private law prohibitions. For instance, if Alice waives her ownership right over her piano (and no one else claims it), Martin's taking control of it cannot constitute robbery. What rights holders cannot typically do under the criminal law is to cancel the offender's liability to punishment, because criminal prosecution is a public matter. In contrast, rights holders can waive the obligation to compensate under private law. But this difference does not affect the Will Theory, for it does not pick out the power to cancel criminal liability once the offence has been performed.

True, in some cases, like murder and assault, rights holders cannot even waive criminal prohibitions. This is probably the thrust of the claim that there are no claim rights under the criminal law. However, the inalienability of those rights is not necessarily connected to their criminal law protection. Individuals lack the power to waive their rights against murder and assault even under private law. These are unlawful acts even though the victims (or their heirs) have the power to waive the duty to compensate. I concede, however, that the holders of inalienable rights have narrower residual powers under criminal law. This is not a serious difficulty for the Will Theory. The Hybrid models also imply that there are fewer rights in the criminal law, because the standard argument for denying victims the power to cancel the offender's liability to punishment relies on the public interest, rather than on the victim's balance of interests.