The nature of rights and the relevance of historical research.

A critical glance at some theses[1]

In the last decade, we encounter an animated debate on the nature of rights. For a long time, this has been a debate between two parties, the will theory on the one hand, the interest theory on the other hand. But presently, different versions of a 'third theory of rights' are being put forward. This debate is strictly systematic in character.[2] At the same time, we find an increasing literature on the history of rights talk. This conference's topic provides a cause to ask for possible impacts of the historical investigations on the systematic one. In the first part, the most important questions, aspects and developments of the systematic debate will be laid out. It will not be neutral but heading towards what I conceive to be the most promising concept of rights. For brevity, it will be built around premises, theses and proposals. In the second part, two concrete theses about a positive impact of investigations into the roots of rights talk on the systematic debate will be discussed. In the second part, the systematic relevance of historical researches on rights talk will be discussed. This discussion has to be limited in different aspects. Two aspects are important to make explicit. Methodologically, the second part is based on two concrete theses brought forward by two distinguished scholars about a positive systematic impact of historical investigations. Both theses will be criticized. So, the upshot will be quite negative.[3] But that does not amount to the positive thesis that historical investigations do or even can't have an important impact on the systematic debate. At the same time it is important to keep in mind that the discussion is not conceived of as a general discussion of the relation between concepts and their history. It presents a case study. The second limitation concerns the historical focus. It lies on works investigating into the roots of rights talk in the middle ages.

Part I: The systematic debate on the nature of rights

Premise 1: A theory of rights has to illuminate the role of rights in practical reasoning

There is hardly any contemporary debate on a normative issue that is not at least partly also a debate on rights, be it in form of the question who has a right to what against whom or in form of the question who or what can have rights in the first place. Theories of rights must be able to explain what these debates are about insofar as they are debates about rights. Point of reference has to be what role rights play in practical reasoning.[4]

[1] This is a rough paper. Please, do not circulate.
[2] Historical knowledge is immaterial. Nigel Simmonds in his contribution to the classical debate between will theory and interest theory is an exception (Simmonds 1998).
[3] In that sense, you will probably profit more from the positive first part even though the main aspects are laid out in a sketchy way.
[4] The background idea is that conceptual clarifications in legal or moral theory aim at helping to answer the practical questions "How should I act?" or "How should just institutions look like?". Of course, this is far from trivial and not all participants in the debate about the nature of rights would agree.

Premise 2: Rights have a triadic structure

The term 'right' is used in a manifold ways. It is common to distinguish between four simple and most basic kinds of rights.[5] What we call rights in everyday discussions are normally bundles of these simple rights. All of these simple rights have a triadic structure: Every right is the right of a right holder against someone, the addressee of the right, to something, the object of the right.[6] Object of a right is always an act or a forbearance. Two of the rights have the structure of active rights – rights that the right holder himself acts in a certain way. Liberty rights are permissions to act like the right to worship or to use a certain path. The so called power rights are a specific kind of permissions to change normative relations, for example by giving binding commands, entering into contracts or releasing someone from a duty.[7] Claim rights and immunity rights, in contrast, have the structure of passive rights – they are rights that others act in a certain way – or forbear to act. Examples of claim rights are the right that others pay back their debts, do not hit one or help one in case of urgency. Immunity rights are the counterpart of power rights – they are rights that others do not change one's own normative situation.[8]

'Having a right' means accordingly to stand in a normative relationship to moral or legal actors. Rights are best understood as relational normative or, stronger, deontic properties.[9]

Thesis 1: Claim-rights are the paradigmatic kind of rights

In the systematic debate on rights, claim rights are considered as the paradigmatic rights. They express a right-duty-relation. Whenever someone has a claim right against some actor, this actor has a duty towards the right holder to act in a certain way. Duty and right have the same action as their object. This relation is called the correlativity of rights and duties. Importantly, the duty is a directed duty, the addressee being the right holder. The duty is owed to him. Its violation would not only be wrong but wrong the right holder.[10]

[5] The paradigm is the conceptual framework of Wesley Newcomb Hohfeld. It has proofed most helpful as an analytical tool. He distinguishes between eight fundamental legal concepts that should allow for an adequate analysis of any legal phenomenon. Four of them are often referred to as rights. Hence, it is not uncommon to understand him as distinguishing between four simple rights even though he distinguishes between claim rights as rights in the strict sense and the other rights.

[6] Alexy 1985, 171f.

[7] This is not a strictly Hohfeldian approach, as he denies that powers have a deontic status at all. See for this: Schnüriger 2013.

[8] Possible examples being an immunity right that our neighbour doesn't just sell our garden gnomes, that the government doesn't abrogate our right to elect or that our spouse doesn't just end our legal marital relationship from one day to the next.

[9] Stepanians 2005, 39, 43, 131. He doesn't use the expression 'deontic'.

[10] Waldron 1984, 8.

Thesis 2: The relevant question is: "Under what condition is a duty owed to an entity?"

The best way for a theory of rights to start is to ask for the difference between a duty being directed in that sense towards or to an entity and just being a duty related or regarding an entity.

Proposal 1: The will theory

The will theory sees the difference in the control an entity has over another's duty: „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. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation, or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty, and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise."[11]

It is certainly correct that an entity with this kind of control over another's duty has a special standing and that right holders often have this kind of control. But it seems too strong a criterion for a theory of rights, quite independently from the fact that it could lead to implausible ascriptions of rights. It has often, and plausibly, been objected that too many entities are excluded from having rights – entities not having the mental capacities required to exercise control over another's duty: small children, mentally disabled humans and so on. The second objection is that it would be conceptually impossible to have inalienable rights.

Proposal 2: The interest theory

The second classical theory of rights is based on the idea that rights and, for that matter directed duties, promote interests of the right-holder. The interest theory faces in this form a contingency problem: Not every individual that benefits from a duty has a correlative right. The interest theory is in need of a 'non-contingency criterion'.[12]

The semantic criterion of qualification

Classically, interest theorists opt for a semantic criterion postulating a necessary relation between the content of the directed duty and the relevant interest. But this approach faces two serious challenges:

[11] Hart 1982, 183f.
[12] Jhering 1906, 336; Lyons 1994, 29; Kramer 1998, 81.

Problem A): Too many (kinds of) right-holders

It allows for too many right holders. To exemplify this with one of Matthew Kramer's examples: Does the grass has a right that you keep off if you are obliged to do so?[13] Your duty to keep off would be in the grass' interest. Kramer, an emphatic interest theorist of this kind, responds to this challenge by introducing a criterion of relevancy: Only individuals with moral status can have rights.[14]

Problem B): The third-party beneficiary problem

The second challenge is the notorious third-party beneficiary problem. To make an example: Frank has promised Megan to look after Megan's mother. Does Megan's mother have a right? The interest theory seems to be forced to give an affirmative answer. By the same token, it is open to question it if it can ascribe a right to the promisee, to Megan. That is directly opposed to our common sense understanding. Certainly, Megan as the person to whom the promise is given has a right. But we are not sure if her mother has a right, too.

So prominent this challenge figures in the literature, so unsatisfying is its handling. The literature misses the crucial point: By presenting a semantic version of the 'non-contingency criterion', this version of an interest theory is forced to conflate the two ways a duty can be related to an individual introduced before. It has to say that every duty against an individual must be a duty concerning the very same individual. Conversely, it has to say that every duty concerning an individual must be a duty against the very same individual – at least, if it satisfies the relevance criterion from above.[15]

<u>The criterion of justification or the justificatory interest theory</u>

A more promising 'non-contingency criterion' refers to the justificatory basis of a directed duty. In other words: We can make sense of the difference between 'duty against' and 'duty concerning' by clearly distinguishing the justification of a duty from its content.[16]

A last point remains open: Why should rights only be based on interests? The interest theory is too exclusionary insofar as it presupposes a welfarist stance in axiological matters. We need a more neutral approach to the concept of rights.

[13] Kramer 2001, 32.

[14] These are individuals, as he explains, whose interests are of inherent value and can therefore justify others' duties (Kramer 2001, 49; Kramer/Steiner 2007, 303f). In terms of his non-justificatory approach, that seems arbitrary. It is not comprehensible why one should mark out those individuals as potential right holders whose interests can justify others' duties when it is irrelevant for having a certain right if they really do justify another's duty.

[15] The interest theory in that way commits a most fundamental mistake Kant warns us against in a famous passage: We commit an amphiboly of moral concepts by not distinguishing between 'duties against someone or something' and 'duties regarding someone or something' (MS AA VI, 442).

[16] A justificatory version of the interest theory has been but forward by Neil MacCormick and Joseph Raz. But problematically, they combined it unconvincingly with a refusal of the triadic structure of rights at it is expressed in the correlativity thesis.

The following proposal of a third theory of rights under the heading 'Status Theory of Rights' accomplishes all the criteria mentioned so far: it is a justificatory approach, axiological neutral and emphasizes that only individuals with a moral status can have rights. It is important to notice, that 'status' as in 'moral status' can have at least two dimensions: a deontic one and an axiological one (Kamm 2007, 227ff). The status theory works with an axiological concept of status, according to which having moral status presupposes having inherent value. A deontic status consists of the most essential deontic property an entity has.

Proposal 3: Status theory of rights

A has a right against B, that B ϕs, iff

a) B has a duty to ϕ
b) A has inherent value
c) the duty exists for the sake of A
d) a property of A is a sufficient reason for B's duty to ϕ.

To summarize: Rights are some of the deontic properties of individuals with inherent value: the duties others have for the sake of the right-holders.

Part II: the possible impact of the history of rights

It is not easy to assess in what way exactly the systematic debate on rights could profit from researches into the history of rights. The literature remains often vague? Scholars assess the systematic relevance of their historical researches in divergent ways – if they do so at all. It is perhaps fair to say that most of them are guided by the abstract but mostly implicit assumption that historic researches into the history of a concept in one way or other improves its understanding. A recurrent theme, but hardly ever spelled out in more detail is the idea that contemporary political theorist have to come to terms with the complex heritage of rights language and that a view on its historical roots may help to provide a new – and probably better – perspective on it (Brett 1997, 9). But it is not obvious what that should be the case. In what follows, two concrete theses about the systematic impact of historic researches shall be discussed.

Against redundancy

As Richard Tuck makes clear, his much discussed study *Natural rights theories. Their origin and development* from 1979 was undertaken with the motivation to solve some of the problems philosophers in the twentieth-century were confronted with. What he was mainly concerned with was the striking disparity between the increasingly important role of the language of human rights in 'normal political debate' and its missing role in the work of most academic political philosophers who thought of it as 'elusive and unnecessary'. As the main reason for this attitude towards rights Tuck identified the contemporary prevalence of the interest theory and its focus on claim rights that – according to Tuck - conceives of right

holders merely as beneficiaries of duties and allows therefore to translate rights statements without any loss into less problematic statements about duties.[17] His investigation into the development of the rights language should help to defend and re-establish an 'independent' concept of rights, that can ascribe an 'explanatory or justificatory' role to rights (1979, 1, 6f).

In order to make sense of the language of rights, two periods must be studied according to Tuck. In the early and high middle ages, rights language develops in a way very close to 'our present understanding'. In the 16th and 17th century the classic texts of rights theory are written, Hugo Grotius and John Selden being the crucial figures here. According to Tuck, rights language develops in a way very close to 'our present understanding' already in the early and high middle ages, where we encounter an approximation of the terms 'ius' and 'dominium'. A milestone in this development is the famous discussion on Franciscan poverty. Feeling threatened by the radical conclusions the Franciscan doctrine of poverty allowed for, Pope John XXII pioneered a natural rights theory by arguing that Adam had from the beginning – even before the creation of Eve – dominium over temporal things and that it was conceptually of the same kind of dominium as the one God had over the earth. In this view, it is neither allowed nor possible to alienate property as such because it pervades the whole human life and social intercourse. For example, consuming the products of the countryside is to exercise a propriety right in them. "The end result of this debate was that the conservative theorists had been led to say that men, considered purely as isolated individuals, had a control over their lives which could correctly be described as *dominium* or property. It was not a phenomenon of social intercourse, still less of civil law: it was a basic fact about human beings, on which their social and political relationships had to be posited." (1979, 24). A further, decisive step was done by Jean Gerson (1363-1429) who understands 'ius' as a 'dispositional *facultas* or power'. This understanding allowed him to assimilate 'ius' and 'libertas', as Tuck writes and for what he has been criticised (1979, 26).[18] The upshot is that having a right means having the sovereign control over a certain realm. It is important to see that having a right in this sense means being at liberty to act or to forbear to act, being free from interventions of others and having the control over another's duties – the duties of non-interference, for example. A right in this sense is a bundle of claim rights, liberty rights, power rights and immunity rights. So, the basic elements of what has been called 'possessive individualism' are supposed to be present as early as in the middle ages and not only since the 16th and 17th century when classical political theories are built around this idea of right holders as sovereigns with the competence to transfer their rights – or at least some of them - to the state. It is not necessary to follow this path any further in order to be able to ask for the systematic relevance of Tucks approach. Unfortunately, Tuck himself abstains from explicitly drawing the conclusions of his research.

[17] The utilitarianism of many Anglo-American political theorists made the interest theory according to Tuck all the more attractive in these circles.
[18] Tierney 1983, 439.

On principle, Tuck's undertaking to reconstruct the particular role rights can fulfil by investigating into the concept's history seems plausible.[19] But it is nevertheless open to at least three interrelated reservations.

1) Starting point of Tuck's study on the history on rights is a worry that figures prominently in the systematic debate on rights among legal theorists in the 20th century.[20] Philosophers, legal theoreticians and political theorists criticized rights talk as redundant. Most often, the criticism was directed against the correlativity thesis in the interpretation of the interest theory. Some of the most distinguished legal theorists like Kelsen or Hart referred crucially on this worry in order to praise the will or choice theory of rights as the only valuable approach.[21] But this 'reductionist worry' has never been articulated properly by its advocates.[22] Indeed, the exposition in the first part of this talk made clear that not only the will theory can present a non-trivial or non-redundant concept of rights. Even the interest theory is able to do that. So, Tuck starts on an unclear basis and works with a false alternative. At best, his undertaking is threatened to be problematically biased.

2) Whereas Tuck starts with a diagnosis of a contemporary gap between the role of rights in political debates and in academic publications, he tries to close the gap not by investigating into the role rights play in these debates but in past ones. But it is far from clear that rights talk in contemporary debates play the same role as they used to play in the past. He himself is aware of this methodological problem as he emphasizes that an investigation into the development of the rights language must not be understood as an 'exercise in historical lexicography'. It is closer to a traditional history of ideas insofar it has to make sure what role rights played in theories about politics. To accomplish his thesis on the systematic impact of his study, he would have to show that rights talk nowadays can and should play the same role as the one he identified as the past role. If one keeps in mind what form contemporary normative discussions have, it seems not self-evident that a will theoretical-approach can do justice to these debates. Even if Tuck should be right that we encounter a will theoretical rights talk in the middle ages, that doesn't mean that the same can be said about modern rights talk. That is related to a more general reservation.

3) Emphasizing the systematic relevance of historical research may support a kind of conceptual and even substantial normative conservatism. Brian Tierney, for example, ends his impressive book on the history of natural rights with a worry we could call 'the proliferation worry'. He may be partly right in criticising that rights language seems to have to stand in for every normative concern. But when he disqualifies talk about rights of animals or rights of unborn generations mentioning the danger of an impoverishment of our

[19] Tierney setzt systematisch ähnlich ein, aber nicht mit der Redundanzthese. Diese Schlacht scheint für ihn offenbar geschlagen, obwohl er sich auch der WT zuordnen lässt.

[20] Edmundson introduces the expression ‚reductionist worry' (2004, 6), Stepanians prefers ‚eliminativist worry' (2005, 23).

[21] Even Neil MacCormick developed his justificatory version of an interest theory of rights – which allowed to conceive of rights as the reasons for the corresponding duties – in order to escape a trivial and dispensable concept of rights (1977, 199).

[22] That's all the more problematic as Tuck implicitly uses it in order to disqualify the interest theory and to join in with Harts will theory. Stepanians tries to reconstruct different versions of this worry (2005).

normative discourse (1997, 346), that is far too fast. Rights talk will have another extension than it used to have when the normative context changes.

Even though the danger of a will theoretical bias of Tuck's research has been mentioned, he is not blind for early forms of a version of what one could call an interest theory. Indeed, according to him the first theory of natural rights we encounter is of this form. According to Tuck it is to be found in the work of some glossators in the twelfth century.[23] But it had only a short span of life in the middle ages.

The second thesis we are going to discuss emphasises that we encounter quite from beginning the basic forms of the two classical approaches to the concept of rights.

Against revisionism

In a series of stimulating articles, Siegfried van Duffel argues that historical knowledge is indispensable for the systematic, philosophical analysis of rights (2004, 147; 2010, 65; 2012, 120). According to him, the classical debate on the nature of rights is misguided because the main opponents take it to be a debate about competing theories of one phenomena or one concept.[24] Rights have, according to van Duffel, a twofold nature and it is not possible to bring them under one concept.[25] Even though both of the classical theories aim at an important and integral element of rights talk, they are nevertheless problematically revisionary.[26]

But what have they in common and justifies conceiving both conceptions as conceptions of rights? It is this question that can only be answered historically. Van Duffel maintains that rights language has its systematic and historical roots in natural rights language. Rights are 'embedded in natural rights theories'. It is not necessary to have a theory of rights in order to be able to identify something as a natural rights theory as van Duffel writes: "We could identify natural rights as what is due to human beings (as a matter of justice) simply because they are human beings." (2010, 68) So, rights talk is based on the question what is due do humans simply because they are human beings. Furthermore, it appears right from the beginning in two forms. The two forms of rights talk do not only share that they express what is due to human beings. They also share a more concrete understanding of human beings as actors. It is human agency that lies at the heart of rights talk.[27]

[23] Critically: Tierney 1983, 435f.
[24] Both theories are better understood as referring to different 'kinds of rights', as he quite misleadingly writes (2012, 120). In *From Objective Right to Subjective Rights: The Franciscans and the Interest and Will Conceptions of Rights* he refers to talk about 'theories of rights' (2010, 65f).
[25] Siegfried van Duffel credits Tuck to be onto the very same point with his infelicitous differentiation between active and passive rights (vgl. 2010, 65; 2012, 120).
[26] That's what his criticism of the classic debate amounts to, even though he doesn't frame it in these terms.
[27] When adding that this approach would at the same time deliver a solution to the problem of distinguishing between subjective rights from objective right van Duffel seems methodologically to put the cart before the horse.

Van Duffel illustrates his general historical thesis with the Franciscan poverty-debate.[28] As has been mentioned already, the Franciscans' opponents emphasized that human beings have by nature dominium and that means normative control over certain parts of their surroundings. By acting in the world, they practice their rights. Here, we face a conception of agency as sovereignty. Agency in this form is constituted by rights and not the good to be protected by rights. To put it differently: Agency as sovereignty is a deontic status. As it is well known, William of Ockham defended in the final stage of the quarrel the Franciscan claim to poverty by admitting that the Franciscans have a right to use what they need urgently. He could thereby rely on slightly older debates. According to van Duffel, the underlying idea is that humans have the permission to use what they need in order to live according to God's plan. This is far from being trivial. It is a permission to interfere with the positive rights of owners (2010, 82). As he makes clear such a right does not necessarily have to imply duties. The important point is that William of Ockham is supposed to refer to agency as a good that can be protected or facilitated by the instrument of rights.

It is crucial to see that van Duffel's criticism of the will and the interest theory as being revisionary is not based on a plain criterion of extensional adequacy. It is based on the idea that there are two conceptions of rights that have their place in two different normative theories about what is owed to human beings simply because they are humans. Van Duffel is right in criticizing much of the contemporary debate for not reflecting on the role of rights in a broader normative context. But he seems to connect conceptual and substantial concerns too tightly.

A first reservation is to be made concerning the conception of rights that is rooted in agency as a good to be protected or facilitated by rights. That's the sense of rights William of Ockham agitated for. Even if van Duffel's historical thesis should be correct, it cannot be excluded that rights talk has undergone a kind of emancipation from the substantial, axiological context it has arisen from. And indeed, there are more human goods (referred to in the literature on rights and in political discussions) than just agency. The concept of rights is situated on quite a formal and general level. It should allow for debates on what rights people have and not exclude certain kinds of rights by conceptually excluding their axiological basis. By accepting the interest theory as one of the two conceptions of rights, van Duffel seems somehow to accept this very point.[29] However, as the second conception has a totally different structure, this kind of abstraction or generalization wouldn't help to close the gap between the two conceptions of rights. This second conception faces reservations on itself. The idea that humans are to be conceived of as right holders having normative control over the temporal world is based on strong assumptions. It cannot easily be generalized. And indeed, the way van Duffel introduces and defends the intention of the will theory in the systematic discussion shows that it has lost its reference to the question what is due to humans just because they are humans. It only asks who has the control over

[28] The following paragraph presents van Duffel's illustration in quite interpretative terms.
[29] But some remarks suggest that van Duffel adheres to the idea that the interests to be protected are based on the value of an autonomous good life.

another's duties. The attempt to connect this with the idea of Adam as a *dominus* tends to overlook or, at least, to plain down the many historical ruptures in between.[30] More important is a general conceptual problem lurking behind this proposal to base a concept – or conception – of rights on agency as sovereignty. This can best be shown by referring to the conceptual framework laid out at the beginning of the talk. In his criticism of the systematic debate between the will theory and the interest theory, van Duffel does not only accept the Hohfeldian analysis of the most basic elements of everyday rights talk but also the directedness of duties as the adequate starting point to investigate into theories of rights. In contrast, when discussing the historical roots of rights talk he starts with a focus on active rights. Even more, he starts with a simple active right – a liberty or permission – on the one hand, a complex right including powers on the other hand. That's doubly problematic. The systematic connection between the four basic and simple rights is not easy to understand and we should be careful not to pass from one of these rights to the others too soon. Caution is all the more advised when simple rights are compared with complex rights. On the one hand, van Duffel refers to directed duties as being correlative to claim rights. That's the context of agency as a good to be protected or facilitated. On the other hand, van Duffel refers to directed duties in the context of agency as sovereignty whereas sovereignty is constituted by a bundle of rights in the sense of a complex property right. It is important to keep in mind that the relevant duty directed to the property owner corresponds now to one element in this bundle, a simple claim right. It is characteristic of ownership that the right holder has also a power right over the duty and that way the control over it. But the directedness of the duty is independent of the power.

So, there are kinds of rights that connect claim rights with power rights in a way that the addressee of the duty correlative to the claim right has also a power over the duties. But we cannot and should not conclude that every actor having a power right over a duty is also the addressee of this duty.[31] It may be that the term 'ius' used to occur primarily in contexts where it was decisive to know if someone had the control over another's duty. But this would have been due to specific circumstances and we should not build our fundamental concepts according to such quite peculiar historical circumstances. Even more, if the best substantial theory of rights should be based on the idea that humans must be conceived of as sovereigns having control over a certain part of their surroundings, that would be part of a substantial moral or political theory, not (part of) a theory of rights in the sense required and presupposed in the systematic debate on the concept of rights.

[30] The adequacy of the historical thesis is not under discussion here. But it is worth mentioning that there are also alternative reconstructions of the tight relation of claim rights and the power to control the correlative rights (e.g. Coing 1959, 11-14).

[31] In fact, van Duffel does not commit this failure. But he suggests to distinguish two senses of directedness of duties – so that a duty can be taken to be directed to one actor in one sense and to another actor in the other sense. That goes hand in hand with different descriptions of the duty.

Conclusion

The discussion of the two concrete theses about a positive impact of historical research on the systematic debate on rights has been quite negative. Both have been based on the very plausible idea that rights should be conceived of as having a particular role in practical reasoning. But we had to see that the attempt to escape the Scylla of a trivial concept of rights on the route of historical insights brings us dangerously near to the Charybdis of a concept of rights that mixes conceptual and substantial questions in a highly problematic way.

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