THE FOUNDATIONS OF RIGHTS RECONSIDERED: ENFORCEABLE RIGHTS, LIBERTY AND CONFLICTS OF RIGHTS

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ABSTRACT

This paper considers the problem of conflicts of rights from the perspective of the rival choice and interest conceptions of rights. It argues that a compelling reason for favouring an interest rather than a choice theory conception of rights is that an interest theory of rights can account for the fact that different interests may generate different rights in different circumstances. An interest theory of rights can thus accommodate the demands of generality which a theory of rights must meet in order to overcome problems of cultural relativism and differing circumstances in time and location. The choice theory on the other hand is based on liberal values rooted in the notion of the sovereignty of the individual and committed to a notion of negative civil and political human rights. As such a choice theory of rights gives a distorted and biased view of the nature and purpose of rights which are generated by this political and cultural bias. The paper concludes that the status of human rights as moral rights is what necessitates an interest theory conception of rights, as the choice theory is inadequate owing to the classical liberal assumptions upon which it is based.

1 Introduction

This paper considers the problem of conflicts of rights from the perspective of the rival choice and interest conceptions of rights. It argues that a compelling reason for favouring an interest rather than a choice theory conception of rights is that an interest theory of rights can account for the fact that different interests may generate different rights in different circumstances. An interest theory of rights can thus accommodate the demands of generality that a theory of rights must meet in order to overcome problems of cultural relativism and differing circumstances in time and location. The choice theory on the other hand is based on liberal values rooted in the notion of the sovereignty of the individual and committed to a notion of negative civil and political human rights. As such a choice theory of rights gives a distorted and biased view of the nature and purpose of rights which are generated by this political and cultural bias.

The philosophical debate which is raised by the question of the enforceability of rights and conflicts of duties is illustrated by the ongoing engagement between those who endorse an interest theory of rights and those who regard rights to be choice-based. Briefly, what is at issue between these two rival conceptions of rights is the following: Interest theory regards rights as being of such fundamental moral weight to the individual that they justify the duties which they impose. Rights therefore consist of fundamental interests. Choice theorists on the other hand regard rights as conferring choices on their holders by conferring the powers of waiver and control over the duties of others. Rights therefore consist in making choices about the duties of others.

What matters for the connection between these two different types of specification, if not justification for rights, and the enforceability of rights, is that the choice theory more or less rules out the idea of the possibility of rights conflicts: The duty-bearer cannot logically be held to account for the joint performance of two or more conflicting duties. And as the choice or power to activate those duties resides with the right-holder(s), the way rights are regarded as being constructed according to the choice theory entails that

they be jointly performable. So choice theory therefore has to regard rights as consisting of those things which have 'compossible'[i] duties in the sense that they do not entail these types of unenforceable duties.

Interest theory on the other hand is more accommodating of the notion that rights can conflict at the level of the duties which they generate, as it regards rights as interest-generated, and if interests conflict, then so too can rights. Furthermore, it is a more flexible notion of rights, in as much as interests are seen to change over time and place, and so too the rights that correspond to them can be variable. As a result, trade-offs between rights may be seen as being a necessary feature of rights specified in this way, as what is being served is the interests which generate them, rather than some abstract notion of one person having power over the duties of performance of another. So the interest theory is more friendly to differences in context, whether these differences are cultural, political or temporal.[ii]

Section 2 of the paper considers the liberal position on rights and establishes how rights are regarded in liberal political thought. Consideration will be given to why this tradition tends to favour the notion of civil and political rights as having primary status as human rights, with reference to the positions of Ramsay and Waldron. This section will also consider the libertarian position on rights by examining Steiner's argument for negative property rights in An Essay on Rights. It is argued that such a conception of rights inevitably must imply a choice theory conception which implicates these rights in a cultural value bias and undermines the universality of a choice theory of rights. The critiques of Jones and Kelley of Steiner's theory of negative property rights are referred to in this regard.

Section 3 considers the charge of incompossible duties and the problem of the enforceability of rights if their duties conflict. Again Steiner's argument in this regard is considered, as are the responses of Waldron and Sher to this problem. Reference will be made to a strategy of enforceability which involves balancing rights at the level of their duties by taking account of the empirical demands in any given case. This relates to Raz's interest theory conception of rights which regards them as being dynamic in terms of the waves of duties which they generate, and thus such a strategy is required if rights are to have practical purchase.

The conclusion argues that the status of human rights as moral rights is what necessitates an interest theory conception of rights. While some of what are regarded as human rights could be accounted for on a choice theory account, particularly in western jurisdictions, the limited scope of the choice theory means that it is unable to account for some rights which are of the most fundamental importance to the agency of their holders by serving fundamental interests. Thus as a general theory of rights, the choice theory is inadequate short because of the classical liberal assumptions upon which it is based.

2 The Liberal Position on Rights

2.1 Classical Liberalism

The philosophy of liberalism is not static. It has developed over time, and in addition its development has not been one-dimensional. There are thus different contemporary conceptions of liberalism, and it is not always possible to reconcile these different ideas of what it is to have liberal values, and indeed what it means to be free. David Kelley comments on the roots and summarises the development of liberal thought in the following way:

> The words "liberty" and "liberalism" have a common root, reflecting the commitment of the original or classical liberals to a free society. Over the last century, the latter term has come to represent a political position that is willing to sacrifice liberty in the economic realm for the sake of equality and/or collective welfare. As a consequence, those who wish to reaffirm the classical version of liberalism - those who advocate liberty in economic as well as personal and intellectual matters - have invented a new word from the old root; they call themselves libertarians. Both in doctrine and in etymology, then, partisans of this view define themselves by their allegiance to liberty. Yet they spend most of their day-to-day polemical energies defending property rights and the economic system of laissez-faire capitalism that is based upon such rights (Kelley, 1984: 108).

The libertarian position on property rights is discussed in 2.2 in light of the commitment to negative property rights. However it is worth noting here that there is a bifurcation in liberal thought about the place of negative liberty and property rights, and this indicates different conceptions of what it means to have a right, and what the content of such rights can permissibly be. Liberalism in its classical or libertarian

formulation has problematic implications for a general theory of rights, and it is this strand of liberalism which underlies a choice theory of rights as conceived by Steiner.

Maureen Ramsay comments on the prevalence of liberal ideas in western political thinking, and the underlying assumptions of these ideas. Liberalism claims to be a philosophy which values the individual and thus safeguards the rights of the individual against the state. There is a thus an inherent bias towards the primacy of civil and political rights in liberal thought. It is partially as a consequence of this bias that the idea of property rights is so high on the list in most liberal conceptions of rights, as liberals 'extol the virtues of free choice, private enterprise and the market' (Ramsay, 1997: 1).

Furthermore, as far as human rights are concerned, it is the traditional civil and political rights which liberals favour as being of primary importance.[iii] Most liberal arguments are that such rights impose merely negative duties - that is the duty on the part of the state and others to refrain from interfering with the individual (Ramsay 1997: 146). Consequently such rights are regarded as being relatively 'costless' in the sense that they do not require resources to be allocated to their practice, but only in remedial cases where such rights have been violated is the state required to intervene to redress this (Ransay, 1997: 150). This issue of enforceability is pursued in Section 3 below, but it is worth noting here that the kind of rights which are prioritised by a liberal conception are to a large extent generated by the idea that individual (negative) liberty is the primary value for society to pursue and protect.

However, as is argued elsewhere, human rights include some minimal positive, second generation rights in so far as these are fundamental to agency, and as Ramsay notes, both first and second generation rights share the same moral foundations (Ramsay, 1997: 162). It is submitted that the classical liberal case of Cranston and others for a purely negative conception of first generation human rights is one which may be successfully challenged, and need not be a diversion here. However, there are three distinctive features which characterise the classical liberal position on rights to be noted: firstly, rights are held by individuals and are designed to give effect to the choices and preferences of individuals; secondly, human rights on the

liberal conception are civil and political in their content; and thirdly, the duties which rights generate are in the first instance negative duties of non-interference with the rights of the individual.

This last point is relevant to the defence of an interest theory of rights as it relates integrally to the adduced problem of conflicts of rights at the level of their enforcement which the choice theory seeks to avoid. As Jeremy Waldron describes this problem:

> The chances [are] much less that "negative" rights would conflict, because a given agent could perform any number of omissions at one and the same time. If we accept, however, that rights mark the way in which interests generate duties, then the picture is likely to appear much less tidy than this ... One and the same right may generate both negative and positive duties ... This means that it may be impossible to say definitively of a given right that it is purely negative (or purely positive) in character (Waldron, 1989: 511).

Prior to addressing the issue of conflicts of rights in Section 3 below, the following section considers how this conception of rights has been developed with specific regard to property rights on a libertarian conception of rights.

2.2 Libertarianism, Property Rights and Negative Liberty

It was observed in the section above that there is strong correlation between the premises of liberal thought and a defence of individual property rights. The stream of liberal thought that most emphasises this aspect is the libertarian one, and it is no coincidence therefore that Steiner, whose choice theory of rights is referred to here, is one of the primary contemporary exponents of this strand of thinking about liberty, rights and property. Consequently, Steiner's account is focused on, as his theory is taken as being paradigmatic of libertarian ideas on rights and property more generally considered.

Steiner, following Berlin's seminal argument on liberty, argues for a purely negative conception of liberty, as this is the only conception of liberty which he regards as intelligible, in the sense that it is able to

underlie freedoms that are jointly exercisable by their holders - that is negative freedom is necessary for compossible specific freedoms. Steiner describes the notion of negative freedom as being

> an uncontroversially empirical or descriptive one. That is, statements using it to describe a person as free or unfree[iv] to do a particular action presuppose nothing about the significance or permissibility either of that action or of any action preventing it (Steiner, 1994: 9).

Now according to this libertarian conception of negative liberty, a person is only regarded as being unfree if the action of another person is what prevents them from doing some particular thing. So for example, if my freedom of movement is impaired by my having been tied up by someone, then according to this conception I am genuinely unfree. Not so if I am rendered unable to move from lack of food, or if I have been threatened with the death of my child if I venture outside. So prevention of an action according to this notion of liberty must be constituted by 'a relation between the respective actions of two persons such that the occurrence of one of them rules out, or implies the impossibility of, the occurrence of the other' (Steiner, 1994: 33). Thus one's being free to do something is contingent upon the action being compossible with the exercise of the freedom of others.

Steiner then develops this position to argue that what this kind of freedom relies upon is the possession of the physical components of action, and thus freedom requires that the agents in question possess the relevant things. Everything, according to Steiner, is possessed by someone, and if it is the rights of ownership in things which renders their owners free to do with them as they please, then such rights can never conflict. Therefore, if 'freedom is the possession of things' (Steiner, 1994: 39) as Steiner would have it, then the exercise of freedom will imply that everyone has only so much freedom (in their own possessions) as will not encroach upon the similar freedom of others in disposing of their possessions.

It is necessary to consider how this conception of freedom informs Steiner's choice theory of rights, as it will be recalled that this notion of compossibility is one which Steiner insists upon as being a *sine qua non* for an enforceable set of rights, in so far as it is necessary to specify a set of rights which generate jointly performable duties. Steiner argues that there is a connection between his conception of liberty and the kind of duties which are entailed by rights, as these 'prescribe interpersonal distributions of pure negative

freedom' (Steiner, 1994: 74). In Steiner's argument for a choice theory of rights, it is only 'vested' liberties - that is liberties which are protected by a perimeter of duties of non-interference - which are constitutive of a compossible set of rights. Steiner explains this position in the following way:

> [T]he salience of nakedness, in the creation of incompossibilities, is clear enough. Any duty which depends for its fulfilment on the exercise of the naked liberty stands in danger of being non-fulfillable due to that liberty being numbed [by its conflicting with other duties or permitted actions]. And it's important to emphasise that such numbing can occur by virtue of an entirely permissible and even obligatory action. That is we are *not* here talking about a duty being non-fulfillable because another duty was breached: a non-fulfillability that, whatever other problems it poses, does not give rise to any problem of incompossibility ... a duty which can only be fulfilled by traversing the no-man's land of naked liberty is necessarily a candidate for incompossibility with other duties (Steiner, 1994: 87).

Thus, according to Steiner, the rights which are constituted by the protected domain of liberty consist of property rights - 'they are (time-indexed) rights to physical things' (Steiner, 1994: 91). In this way, the rights of all individuals will be compossible with the rights of everyone else, as what is implied is that no two individuals have at one and the same time the rights to the same physical thing. And it is this idea which is at the heart of Steiner's most pointed objection against the interest theory of rights, that is that it generates irresolvable conflicts of duties and thus the rights specified by an interest theory run the risk of being incompossible. This is addressed in Section 3, but it is necessary to critically consider this negative liberty-based conception of rights which Steiner presents, as if this conception can be shown to be flawed, then it could threaten the foundations upon which the choice theory of rights itself rests, especially with regard to the universality of that theory of rights.

Peter Jones remarks that Steiner's 'physicalist account of freedom' which is purely negative in content 'dovetails' with his account of rights, and so '[g]iven this equivalence between freedom and the possession of things, all rights are simultaneously property rights and rights to domains of (pure negative) freedom' (Jones, 1995 536). According to Jones there is both a practical and conceptual problem with this approach. Firstly, on a practical consideration of the matter, it may be impossible to identify everyone's time-indexed titles over specific things, such that we can determine the content and extent of particular rights, as many rights involve multiple titles of this sort. For example, the rights of free expression or movement would

require the identification of 'titles to all of the physical components of all of the actions which [one] may perform [which] looks like a task that is beyond human competence' (jones, 1995: 536).

Secondly, there is a conceptual problem in determining the extent of all the rights which people have by translating these into rights over specific things. So for example, Jones asks, '[c]an we capture the difference between torture and a painful but life-saving operation merely by extensional description?' (Jones 1995: 536). The problem turns of course on whether rights are defined '*intensionally*' or '*extensionally*',[v] as they are on Steiner's account. Jones argues that some intensional consideration of the content of rights is both essential and antecedent to an adequate extensionally specified set of rights:

> In other words, rather than intensionally defined rights being merely approximate and inferior descriptions of rights which are properly defined extensionally, intensional descriptions may be indispensable in moral reasoning and, logically, intensionally defined rights may have to precede, and may have to be used to give content to, people's extensionally defined rights (Jones, 1995: 536-7).

This point relates again to the question of compossibility and conflicts of rights which forms the subject of the following section. As Jones remarks, the test of compossibility cannot resolve the problem of rights requiring intensional as well as extensional specification. This is because there may be more than one set of compossible rights, and the extent of any given two rights which could potentially conflict must be determined by a 'line which sets the boundary between them' (jones, 1995: 537). So for example the rival claims of freedom of speech and preventing libel are 'inversely related' to one another. But while the extent of each of these rights is open to debate on an *intensional* account of rights, whatever their extent turns out to be will result in a compossible set of rights, but it makes no difference to their compossibility where that line is drawn (jones, 1995: 537). So the test of compossibility is unable to *normatively* specify the extent of rights. For that it is necessary to have recourse to some kind of *intensional* thinking about those rights.

This argument is reiterated by Kelley's argument in Life, Liberty and Property which outlines the relationship between liberty and property rights. Kelley argues that it is only the classical liberal position on rights, such as the libertarian position of Steiner and Nozick, that makes 'this strong link between liberty and property' (Kelley, 1984: 108). And what separates this libertarian position from liberal ideas

more broadly conceived is that the libertarian position seeks to derive property rights from liberty. Kelley goes on to identify the freedom which a property right confers as being the liberty to dispose of the property as one chooses. The problem lies in specifying how one gained the necessary ownership of the thing in the first place as it is this which confers the right, and '[t]he question, then, is whether we can derive this relation of ownership from the premise of a right to liberty (Kelley, 1984: 108).

The problem is therefore one of principle, as the principles which protect property rights by generating correlative duties do not tell us who *ought* to have rights to what. It is the absence of this specification which undermines the viability of the principles of property rights derived from liberty, as

> the principle of property should specify not only what sort of freedom is involved in owning an object, but also what sort of actions are sufficient to create ownership. The abstract form of the principle is then: each individual ought to be free to take certain actions, in the appropriate circumstances; and having taken those actions, he should be free to use and dispose of certain objects (Kelley, 1984: 109).

And Kelley doubts that such a principle (of specification as well as enforcement) can be derived from the principle of liberty alone. Kelley goes on to argue that such specification of property rights, as well as the principle of liberty, are both derived from an underlying notion of a right to life. There has to be, he argues, some 'fundamental' and 'ultimate' end from which all standards and values are derived, and that social organisation ought to make at least the pursuit of this end possible for everyone if rights are to be seen as general. The rights of liberty and property are both necessary elements in that scheme, but neither is derived from the other, but rather from the fundamental end of that society.

So Kelley too takes issue with Steiner on this point, as he argues that the demand of compossible rights conceived as property rights is not contingent upon a system of ownership of private property as is assumed. Rather '*[a]ny* system of rules that eliminates conflicts in the use of physical things would meet the formal condition of compossibility' (Kelley, 1984: 111). While private ownership is one such arrangement, there are numerous others which could equally fit the bill,[vi] including allocating partial ownership to more than one individual in the case of any one thing, or some system of communal ownership governed by rules which eliminate conflicts, for example as occurs in the use of roads and

ocean waterways. Even some kind of socialist economy could potentially meet the requirement of compossibility without assigning individual rights of ownership over anything (Kelley, 1984: 111-112).

And so Kelley goes on to assert that some kind of *evaluative* assumptions about the allocation of rights must therefore be introduced into the argument for private property rights. Otherwise there is no reason to prefer one system of allocation of such property over another (kelley, 1984: 112). Kelley concludes his argument by making the following point:

> We need to connect certain categories of action involving physical resources with basic ends and purposes if we are to provide a satisfactory foundation for property rights. It is only in this way ... that we can explain why certain actions in our *de jure* lists *ought* to have the consequences of conferring ownership rights over an object (Kelley, 1984: 118).

Kelley's argument thus captures the fundamental interest-based sort of rights central to this argument, as well as showing why any account of rights, even a libertarian theory of property rights such as Steiner's choice theory, must necessarily have recourse to some kind of teleological evaluation of what ultimate purpose those rights serve. The following section considers the requirement of compossibility in more detail, and assesses whether or not it is indeed a necessary feature of a set of rights.

3 Incompossible Duties and the Problem of Enforcement

3.1 Unavoidable Conflicts of Rights

It is the problem of extensional adequacy identified by Jones in the previous section that Steiner regards as the fatal flaw in a theory of rights which does not regard them solely as property rights - that is they 'don't constitute title-based domains' but rather are 'purpose-based domains' (Steiner, 1994: 91). The sustainability of this argument turns on whether or not rights can indeed conflict at the level of their duties, because if it can be argued that rights conflicts can occur without proving fatal to the rights in question, then Steiner's stringent requirement of compossibility may turn out to be redundant. This would cast doubt

on the set of rights specified on his choice theory account and support the position that an interest theory of rights is to be preferred on the basis of its general explanatory power.

Steiner goes on to point out that an interest theory of rights must admit of some conflicts of rights as being unavoidable. This is because on an interest theory account rights are generated by what are regarded as fundamental interests, and it is not only possible, but also quite likely, that the duties which correspond to these rights may not be jointly performable - that is they are 'incompossible' - and this theory of rights is thus unintelligible. Furthermore, as Steiner points out, the conflicts of duties may occur not only between duties generated by two different rights (an 'inter-right' incompossibility) but indeed also between the duties generated by the same right (an 'intra-right' incompossibility) (Steiner, 1994: 92). So for example,

> [t]he important interests which persons have both in privacy and in free expression are, as we know, ones which cannot invariably be jointly serviced. Nor, tragically, can the vital interests several persons may each have in gaining access to some scarce medical resource (Steiner 1994: 92)

and neither of these conflicts can be avoided by an interest theory account of rights.

The challenge which the interest theory is thus required to meet is to be able to account for these inevitable conflicts of rights in a way which does not compromise the way in which those rights are specified. In this regard, the arguments of Waldron, Sher and Jones will be considered with a view to showing that the ability to accommodate conflicts of rights is a desirable feature of the interest theory. This lends weight to its generality as a theory of rights, being neutral as it is between different values as interests.

Jeremy Waldron argues in his paper Rights in Conflict that while on an interest theory of rights, conflicts of rights are unavoidable, if rights are seen as having the characteristics ascribed to them by Raz, then rights can be seen to generate not single duties, but rather have as their correlatives multiple duties. And 'this multiplicity stands in the way of any tidy or single-minded account of the way in which the resolution of rights conflicts should be resolved' (Waldron, 1989: 503).

He begins by acknowledging the distinction between the choice and interest conceptions of rights, and he refers to Nozick's libertarian construction of rights as being 'side constraints' which limit the actions of a given agent. On such an account, as is the case with Steiner's theory, rights are negative generating only omissions as their first-order correlatives, and rights are also 'agent relative' as the duty to comply with the constraint is of concern only to the agent upon whom it falls. Clearly if rights are constructed in this way, then their duties cannot conflict, (Waldron, 1989: 503-504) which corresponds to Steiner's account of rights and duties and the requirement that they be compossible.

By contrast, Raz's account of rights, rooted as it is in the conception of fundamental interests, generates rights which could potentially have conflicting correlative duties, as compossibility is not a question which is entailed by the specification of rights on this account. Raz's theory

> singles out certain interests on the basis of their moral importance. We know individual interests often conflict with one another - that is the stuff of moral and political life. It does not always happen: no doubt there is a set S1 of individual interests the members of which are perfectly compossible with one another and can all be served and promoted without posing any hard choices. But it would be surprising - indeed a massively improbable coincidence - if the set of interests associated with the special level of concern that rights indicate (call it S2) just *happened* to be coextensive with S1. It is unlikely, not only because we have no reason for thinking that these properties - compossibility and moral importance - are invariably associated but also because what we know of the human condition indicates that many of the areas in which moral conflicts happen are exactly the areas of life in which important individual interests are engaged (Waldron, 1989: 505).

So while, as Waldron argues, an interest theory conception does not seek to avoid conflicts of duties generated by rights, an interest theory of rights nevertheless has to address the related problem of the unenforceability of such rights. On the basis that 'ought implies can' this is a challenge which appears more serious and potentially fatal for rights specified in this way. As Waldron argues, it is frequently raised as an objection to the notion of conflicts of rights that if for example, one can only save one of two people who are drowning with available resources, and since they are both deemed to have the same fundamental interest in being saved, then it cannot be the case that there is a moral obligation to rescue them both since this is impossible. It is this impossibility which makes the notion of such interests generating a corresponding right unintelligible (Waldron, 1989: 506).

But as Waldron goes on to argue, if rights are seen as being those of individuals, then rights cannot be written off because in the aggregate they are unenforceable. He uses the example of the now infamous right to paid holidays proclaimed by the UDHR. Of course this is a right which is not enjoyed by many people in the world and which indeed at present may be impossible to enforce. However, the claim of each person as an individual is not impossible to enforce, nor are the claims of individuals to health care or education (Waldron, 1989: 506-507) because it is not the case that everyone demands the fullest servicing of any of these rights all at the same time. Rather it is the rights of those who are most marginalised and disenfranchised which are likely to require active enforcement.

Furthermore, it unclear how 'unenforceable' these rights in aggregate really do turn out to be taken as universal rights, as this impossibility disappears when global responsibility for honouring the duties generated by fundamental rights is assigned. And, as Waldron remarks,

> a claim of right must be universalisable. But universalisability demands only that the reasons for holding that there is a duty to serve the interest of one person should also apply to the same effect in the case of any other, if her interests and circumstances are relevantly similar. It does not require compossibility in the sense defined (Waldron, 1989: 507).

Waldron goes on to identify the reason that there is a reluctance among some theorists to admit of rights which could potentially generate incompossibilities is that there is concern that this will result in an inflated conception of rights. One way of avoiding this inflation is to curb it by limiting duties to those which are compossible. While a full account of the reasons for rejecting this argument must be omitted here, one reason for preferring a theory of rights with compossible duties stems from the concern that resolving conflicts of rights may entail the slippery moral slope of utilitarianism in resolving those conflicts. However, Waldron wants to retain the strategy of trade-offs between rights, but contrary to utilitarianism, he argues that this need not be done in terms of the quantitative measurements which are entailed by a utilitarian calculus. Rather, trade-offs between duties must take into consideration the qualitative[vii] and circumstantial value of the rights in question (Waldron, 1989: 508).

George Sher also regards conflicts of rights, and thus the need for some strategy of duty trade-offs, as an unavoidable feature of an adequate theory of rights. His argument, which like Waldron's is conceived in response to Nozick, begins from the premise that 'we must acknowledge a need for trade-offs among right violations or injustices if we wish to accept the framework of rights and justice at all' (Sher, 1984: 212).

Sher's point of departure is that conflicts of rights arise in a variety of contexts, and resolving these conflicts entails choosing among a range of policies or courses of action, all of which may involve curbing somebody's right. And he goes on to argue that given the diversity of contexts in which rights are asserted, 'the dilemma is plainly not the exclusive possession of any single ideology. Indeed I suspect it must arise within any plausible account of what people have a right to or what justice requires' (Sher 1984: 214).

Sher also makes the point that even if it were possible to satisfy simultaneously all rights claims, it would never be possible to have sufficient or complete knowledge of the circumstances and history of each of the parties to the conflict. So frequently the problem of rights trade-offs is engendered by factual ignorance, rather than incompossibility (Sher, 1984: 215). So Sher argues

> a trade-off is warranted when it is unavoidable, [and] a trade-off is unavoidable when anything the agent does or abstains from doing can be expected to violate someone's rights or treat someone unjustly, and that ignorance frequently places agents in just this position (Sher, 1984: 222).

Sher proposes that such trade-offs can be made in a non-utilitarian way by aiming to maximise 'the degree to which we fulfil our duties ... [and] to minimise not negative value but rather the degree to which we treat people wrongly' (Sher, 1984: 221). This is different from a utilitarian strategy of trade-offs because what is being weighed teleologically is the allocation of duties, and the trade-offs are therefore between the duties, rather than entailing a trade-off of one or some rights for the sake of others. According to the strategy of separating the realms of specification and enforcement of rights proposed elsewhere, rights cannot be overridden or traded off in this way. Rather the trade-off at the level of enforcement and therefore between the duties, is intended to yield the optimal outcome for the rights in question in those particular circumstances.

The following section examines Waldron's argument for resolving conflicts of rights. However, before it is considered how rights and duties are to be balanced, it is worth noting one final point to underline the assertion that conflicts of rights are an unavoidable feature of a theory of rights. Jones argues that the test of compossibility which is used by choice theorists to discredit the interest theory fails, as compossibility is neutral between the two theories. It would be possible to specify a compossible set of rights on an interest theory account too, and whether or not such rights in addition conformed to the choice theory structure of a right would be immaterial to their specification and compossibility.

Therefore while compossibility is undeniably not a *necessary* feature of an interest theory of rights, *neither is it a necessary feature of a choice theory account*, as according to the choice theory rights are specified according to the powers they confer on their holders. There is nothing entailed in this specification that implies that all such choices need be compossible (Jones, 1995: 537). What creates the necessary demand of compossibility is the underlying assumption of these versions of the choice theory that 'freedom is the possession of things' as Steiner argues. However, what this definition omits is any normative discussion about who should possess what, as

> Steiner can therefore claim that respect for people's original rights to equal freedom demands that we accept whatever inequality stems from their own exercise of those rights. But what his identification of freedom with property rights clearly excludes is the typically liberal notion that people could and should enjoy rights to a set of equal fundamental freedoms *in spite of* inequalities in their income and wealth (Jones, 1995: 546).

Some potential conflicts of rights are therefore unavoidable on any specification of rights, including those which are liberty or choice based. What still needs to be clarified is how such conflicts may be resolved without having recourse to utilitarian reckoning which could threaten some of the rights in question.

3.2 Balancing Rights and Duties

It has been argued elsewhere that what is regarded as a viable strategy of enforcement of rights is a teleological balancing of rights at the level of their duties while avoiding some of the perceived problems which a utilitarian approach presents for the notion of rights. As Waldron argues, when the problem of

conflicts of rights arises, what is actually being sought is a way to resolve the conflict of the duties generated by rights, as

> talking about conflicts of rights is a way of talking about the incompatibility of the duties that rights involve. What we refer to as a trade-off of one right against another, then, need not involve the sacrifice of one of the *rights*; rather, it involves a decision not to do what is required by a particular *duty* associated with the right (Waldron, 1989: 509-510).

This point must be considered in light of position that rights, on an interest theory account at least, do not usually have single duties as their correlatives. Rather a single right may circumstantially generate a variety of different duties, as is suggested by Raz's 'dynamic' interest theory account of rights. What grounds the right of course is the fact an individual is regarded as having a sufficiently important interest to justify placing others under a duty to honour it (Waldron, 1989: 510).

So rights are seen to generate waves of duties, some of which may be candidates for trade-offs with similar multiple duties associated with other rights should a conflict arise:

> Rights conflicts arise when a duty generated by one right is not compossible with a duty generated by another. But it is most unlikely that, in a given case, *all* the duties generated by the rights in question will be incompossible (Waldron, 1989: 512).

So it is possible to 'balance' rights against one another in terms of the multiple duties which they generate, while still servicing some duties of each.

The difficulty arises in determining an ordering for the trade-off of duties against one another, as it requires some notion of 'the priority that the right has over other moral considerations' (Waldron, 1989: 512). This in turn implies again a consideration of the type of conflicts of rights that can arise. In the first instance, there are 'intraright' conflicts - that is conflicts of duties arising from the same right. For example, when there are a number of people who all require emergency medical attention from a limited stock of resources, and all are regarded as having a right to have their fundamental interest in receiving such treatment served, it may not be possible to discharge the duty to serve this interest for all of them, or for all of them entirely (Waldron, 1989: 514).

Such a situation appears to demand that a hard choice be made, and the only way to make this choice without compromising the right of any of the holders would be to consider how the limited resources could be put to maximal use in order that the rights of all are served either equally, or in a 'satisficing' way as has been argued elsewhere. What is not at issue however is that this is a determination which has to be made circumstantially with regard to the demands of time and place. Accepting that such trade-offs are sometimes both necessary and inevitable, does not rule out the qualitative weight of the interest which generated the right in the first place. As has been argued, specifying rights and enforcing them entail different types of considerations, and the solution does not lie in simply removing the more demanding interests from consideration.

This point can be illustrated by considering an example involving limited medical supplies. The United Kingdom suffers a large increase in the rates of influenza during the winter months, and the resources available to the health authorities are not sufficient to allow them to offer to everyone a ‘flu vaccine, which would presumably be the maximum enforcement of the right to health care in this case. Rather the strategy is to offer the vaccine to those most at risk of death from ‘flu, such as the elderly or those with heart conditions.

Consider the alternatives to which the same resources could be put. The health authorities could hold a lottery, so that the same number of people could receive a ‘flu vaccine, but would be selected on the basis of luck rather than their risk of serious illness and infection. They could use all the resources to treat some few patients on the basis of triage, so that only those who became the most ill received the maximum amount of care possible, and all others are left to rely on their natural immune systems. However both of these alternative would be to violate the rights of some for the benefit of others. What is necessary is to allocate the resources in such a way that the rights to basic health care of all are honoured as equally as possible. So those who are at risk of death if they contract the illness, or are at greater risk of contraction are given preventative treatment. All others are entitled to subsequent treatment in the event that they do become ill, commensurate with their right to receive such medical attention.

Note here that what is being traded off is not the right to received a certain level of health care. What is being traded off circumstantially is at the level of enforcement or duties, in order to achieve an optimal or 'satisficing' outcome for the enforcement of the right in question for everyone concerned, subject obviously to the limited resources allocated to the enforcement of that right. So trade-offs in the case of such conflicts of rights are not dismissed out of hand, but rather are made at the level of duties to give the best outcome for the rights in question in terms of their ability to maximise agency.

The second type of conflict of rights are 'interright' conflicts of the kind that arise when some of the duties generated by one right are incompossible with some of the duties generated by another. For example, an increase in resources allocated to education will imply a decrease in resources allocated to police protection. Again, it should be noted that this is never likely to be a zero sum game, as 'there will usually be *something* that we can do to promote the interest in education, even though many of the resources that schools are crying out for are diverted to provide citizens with better protection against murder' but hard choices inevitably arise necessitating trade-offs (Waldron, 1989: 514).

While each of these rights must be served in a 'satisficing' way, the specific demands of the given circumstances indicate which deserves more service in any given case. It is true that such a strategy is imperfect in the sense that it threatens to leave some rights woefully underserviced, but it is at least preferable to refusing to acknowledge the interest which generates the right as being of fundamental concern. In such situations

> a hard choice *has* to be made, on any account, and the only way of mitigating its hardness [would be] to diminish the concern we feel about one or both of the options. It is not the fault of the theorist who proposes trade-offs that there are sometimes several drowning people and only one lifeguard. The theorist's sin (if it is one) is simply that of recognising the dilemma for what it is, and of refusing in all honesty to say that a consideration loses that status of a right when it happens to conflict with another. Or to put it the other way round, people would still drown in these situations if we refused to countenance the idea of trade-offs; the only difference would be that we would no longer say that they had a right (Waldron, 1989: 508-509).

Furthermore, circumstances change, and the compromise made on servicing right A in the present, does not preclude its duties being given precedence over right B at some other time under different conditions.

And so Waldron concludes that conflicts of rights ought to be addressed by attaching some quantitative weight to the interests which rights generate and balancing their duties against one another on the basis of this weight. This is not to propose a slide into utilitarianism - on the contrary. The balancing is not of the rights themselves, but of the duties they generate, and so the aim is the optimal service of the fundamental interests which justify the imposition of those duties by generating rights. The slide into utilitarianism is effectively ruled out as the aim is to optimise the rights in question by considering what would be the best balance of the relevant duties (in terms of resources allocated to their practice) under the circumstances. It would not however be permissible to trade-off the rights themselves as would be acceptable on a utilitarian consideration of the matter.

4 Conclusion

This paper has sought to establish that conflicts of rights at the level of the duties which they generate is an unavoidable feature of rights. Consequently theories of rights must have as one of their features the ability to accommodate such conflicts. It has been the intention of this discussion to show that if rights are understood as being grounded by fundamental interests, this then provides a preferred construction for a general theory of rights: It is only if rights are understood in this way that the notion of fundamental or human rights can be accounted for, as it is often in cases where such rights are most difficult to enforce that they tend to be of most urgency.

Furthermore, an interest theory conception of rights can accommodate the demands of generality which universal human rights must meet. The interest theory can take into account any of a variety of sufficiently weighty interests as providing the grounding for rights. These interests may have a liberal basis, but the interest theory can also cope with rights constructions which do not have liberal roots and thus do not rest on liberty as the primary social value. An interest theory of rights can therefore meet the demands of a universal theory of rights that such rights be minimal and enforceable in addition to allowing for the

generation of both positive and negative duties which can be balanced against one another. It is this feature of an interest theory of rights which commends it as having greater generality and explanatory usefulness than the choice theory alternatives.

Endnotes

[i] This term is used in the sense in which Steiner uses it as meaning duties consisting of actions which are jointly performable. An 'incompossibility' would occur if someone had a duty to do two conflicting things.

[ii] The current debate between the two conceptions of rights is a great deal more complex and ranges over a greater number of issues than can be represented here, as this paper deals with only one aspect of what is at issue between them - that of conflicts of rights. For a recent account of the choice-interest theory engagement which addresses some broader isues see Kramer, M. H., Simmonds, N. E. and Steiner, H. 1998. A Debate Over Rights. Oxford: Clarendon Press

[iii] Indeed some theorists maintain that these are the only human rights which deserve that status. See Cranston's argument in What are Human Rights? (1973: 65-70).

[iv] It is necessary to note the distinction which Steiner makes between 'freedom' and 'liberty'. Freedom is, as he describes it, empirical, depending as it does on the factual absence of any restraint. Liberty can in addition be taken as being constituted by the normative ascription of duties to do or refrain from certain actions: that is 'to be at liberty to do is to have no duty not to do *x* (and to be at liberty not to do *x* is to have no duty to do *x*)' (Jones, 1995: 535).

[v] These terms - 'intensional' and 'extensional' - are taken to denote the difference between rights as they are understood on an interest theory account in terms of their purpose (i.e. what they are intended for) and rights as the are understood on the choice theory account in terms of the powers which they confer (i.e. what their extent is).

[vi] This argument underlines the difficulty which a theory based on individual ownership rights encounters when faced with examples such as the communal or unified ownership of the atmosphere, the objective of which is that it not be fragmented in this way. One could also raise the question of whether or not such things as the atmosphere or the ocean bed are owned communally at all, or rather they are in fact unowned, but that limited rights of use over them can be allocated. Steiner here would ask us to assume that some presumed right to equal liberty would lead to the obligation to act as if there is individual or private ownership of portions of the atmosphere or the sea bed, but this assumption is only necessary on an account of rights which requires that everything is owned by someone.

[vii] Qualitative here is meant in the sense that the interests that ground the rights are sufficiently important for the agency of their subjects that they justify holding others to be under a duty. The circumstantial value of rights is however dependent on how pressing that right is (for agency) in the context of the circumstances of the specific society, individual or community, and this of course is not homogeneously determinable. So for example a right to basic health care would be universally specifiable, as its implications for human agency are the same for everyone. But what its enforceability would demand is not homogeneously determinable but circumstantial, especially when other rights are taken into consideration.

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