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# The Vocabulary of Right Under the Indonesian Constitution: A Hohfeldian Analysis

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## Abstract

This article demonstrates how the Indonesian Constitutional Court interprets the term 'right' when deciding issue-level questions involving constitutional doctrine. In doing so, we employ the Hohfeldian scheme that configures right into four different meanings of claim right, privilege, power, and immunity. By looking at the molecular configuration of rights in the context of freedom of religion, natural resource control, educational policies, and fair trial, this we contend that the right under the constitution is interpreted by the Court in a dynamic-yet-configured fashion. In this sense, 'dynamic' implies that the Court's interpretation does not adhere to a fixed or consistent vocabulary, while 'configured' suggests that the vocabulary of right is fundamentally configured

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by both (1) non-relational liberty and (2) power that provides intervention, limitations, or even change over the nature of liberty into liability (i.e., duty to refrain from acting in a certain way). It is manifest that right is hardly expounded by the Court when the term is juxtaposed with any relevant governmental duties and powers. This demonstrates a judicial fabrication of a flexible legal concept used by the judicial authority to justify certain normative objectives.

**Keywords**: Constitution; Hohfeld; Interpretation; Legal Concept; Right

## I. INTRODUCTION

The word 'right' (*hak*) has been one of the major discourses in constitutional review adjudication in Indonesia. Say, for instance, what are the limits of right to religious practices, does *adat* or traditional people have the right to communal resources,[1] does the President has a prerogative right to elect a vice minister,[2] and so on. In practice, constitutional review cases have been much dealing with the ways the Constitutional Court interprets the legal concept of (human) rights (*hak asasi manusia*) enshrined under Article 28 of the 1945 Constitution. Moreover, the use of right, seen as a fundamental legal concept, is at some point intertwined with other ideas such as need (*kebutuhan*) and interest (*kepentingan*)—e.g., acknowledged by the Court as a condition to prove legal standing of a constitutional claim.[3] While the interpretation of right seems prevalent in the Court's constitutional reasoning, an analytic examination on the rather pliable use of the vocabulary is important.

This article is interested in understanding the use and interpretation of the word *right* by the Constitutional Court in several constitutional review decisions in Indonesia.[4] Our focus is to zoom in the ways the Court interprets right and the extent to which the right is being protected under the constitution—e.g., should we understand one's *right* to exercise her religion and belief equivalent

[1] Constitutional Court, Decision no. 35/PUU-X/2012 (2013).
[2] Constitutional Court, Decision no. 80/PUU-XVII/2019 (2019).
[3] Constitutional Court, Decision no. 006/PUU-III/2005 (2005); Constitutional Court, Decision no. 11/PUU-V/2007 (2007).
[4] Malika Rajan Vasandani, Dwi Putra Nugraha, and Susi Susantijo, "Affirmative Action Study on the Political Rights of Women in the Indonesian Constitution," *Constitutional Review* 8, no. 1 (May 2022): 62, http://dx.doi.org/10.31078/consrev813; Stefanus Hendrianto, "Constitutionalized But Not Constitute: The Case of Right to Social Security in Indonesia," *Constitutional Review* 6, no. 2 (December 2020): 241, http://dx.doi.org/10.31078/consrev623; Andy Omara, "Enforcing Nonjusticiable Rights in Indonesia," *Constitutional Review* 6, no. 2 (December 2020): 311.

to her *liberty* to proselytize?[5] In answering this inquiry, we borrow from Wesley Hohfeld's scheme of right as an approach that denounces the equivocal use of right.[6] Based on this scheme, we can identify four kinds of entitlement that lawyers somewhat obfuscate one from another. These are including claim-rights (or rights 'in the strictest sense'), privileges (or liberties), powers, and immunities.[7]

Suggested by the Hohfeldian framework of right, this study examines the molecular configuration of constitutional rights in the context of freedom of religion, natural resources, education policies, and fair trial.[8] We contend that the judges' interpretation of right is dynamic-yet-configured in a way that they tried to balance the communitarian and the liberal interpretation of rights.[9] Specifically, it is suggested that *right* as a legal concept under the constitution is hardly expounded by the Court when it is juxtaposed with any relevant governmental duties and powers. This phenomenon tends to demonstrate a judicial fabrication of a flexible legal concept used by the judicial authority to justify certain normative objectives.[10]

This study particularly focuses on three issues related to the scheme: (1) right deriving from primary rights or non-directed duties, (2) right as a form of non-relational liberty, and (3) right as a form of relation. Admittedly, there are certain problems with Hohfeld's scheme in its own right insofar as it is read all-inclusive and capable of encompassing all jural relations. Our investigation suggests that the scheme is inadequate in explaining the configuration of right to interpret and exercise religious teachings, right to free education, duty to respect right to fair trial, and the state's right to resource control (*hak menguasai negara*). As

5 Muchamad Ali Safa'at, "The Roles of the Indonesian Constitutional Court in Determining State-Religion Relations," *Constitutional Review* 8, no. 1 (May 2022): 113.

6 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning: And Other Legal Essays* (New Haven: Yale University Press, 1923).

7 Ibid.

8 Important to note that these contexts should not be seen as units of analysis. Rather, we tend to view those cases as exemplars of reasoning, based on which we attempt to understand the configurations of right in the Court's practices.

9 On balancing theory, see Robert Alexy, "Discourse Theory and Fundamental Rights," in *Arguing Fundamental Rights*, ed. Agustín José Menéndez and Erik Oddvar Eriksen (Dordrecht: Springer, 2006), 15–30.

10 Lee Epstein and Keren Weinshall, *The Strategic Analysis of Judicial Behavior: A Comparative Perspective* (Cambridge: Cambridge University Press, 2021); Cass R Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 2018).

we will observe, the scheme requires adjustments in order to adequately explain some jural relations under the Constitution.

Working under the legal hermeneutic tradition, this article aims to contribute to the discourse of rights meaning-making process in the context of constitutional law practice in Indonesia.[11] By understanding the constitutional reasoning of right, we can apprehend a clear and distinctive set of vocabularies that can better explain legal relations, particularly amidst the popular instrumentalization of the vocabulary of right in the many constitutional inquiries in the country. At a conceptual level, we also aim to contribute to the current conversation pertaining to the instrumentality of the Hohfeldian scheme in the public law context. We, nonetheless, limit the descriptive analysis to the hermeneutical aspect of the Court's decision without necessarily attaching a particular normative judgment to the description. Furthermore, our analysis is not intended to illustrate the so-called 'strategic behavior' of the judges in interpreting rights in a sense that our latter claim—about the proper balance between the communitarian and the liberal interpretation of rights—should be read restrictively not as a normative claim.[12]

This article is organized into three parts. *First*, it outlines the underlying approach regarding *right* as both a practice of semantic and a legal concept. By sketching the issue from the Hohfeldian framework of rights, and supplemented by several contemporary discussions and modifications, this article situates the talks about right not only as a matter of semantic question but also conceptual one. *Second*, this article examines four areas of case exemplars based on which we will draw the configuration of right as reasoned by the Court. Here, we focus on examining the molecular configuration of right as discussed in each of the thematic constitutional review cases. *Third*, from the cases examination, we later argue that the judges' interpretation of right is rather dynamic-yet-configured in a way that they tried to balance the communitarian and the liberal interpretation of rights.

[11] Carel Smith, "The Vicissitudes of the Hermeneutic Paradigm in the Study of Law: Tradition, Forms of Life and Metaphor," *Erasmus Law Review* 4 (2011): 21; Brian Bix, "HLA Hart and the Hermeneutic Turn in Legal Theory," *Southern Methodist University Law Review* 52 (1999): 167.

[12] On strategic judgment, see Epstein and Weinshall, *The Strategic Analysis*.

## II. RIGHT AS A LEGAL CONCEPT

It is a common discourse in Indonesian legal practice that the word right (*hak*) is intertwined with duty or obligation (*kewajiban*).[13] The typical reading of right is that it is *something that we ought to get, receive or accept*, while duty or obligation is simply *something that we ought to do or act.* This kind of reading is underpinned by the idea of correlative fairness, meaning that in justifying fairness legal actors must navigate and put right and obligation in balance, to the extent that in finding such a balance they usually enact the principles of proportionality (*proporsionalitas*) and reasonableness (*kepantasan*).[14]

In this section, we situate the vocabulary of right into the inseparable nature of the semantic and the conceptual.[15] To wit, right as a semantic practice simply means that it posits certain semantic significance when used in legal statements, for instance rights as stated by courts or written under the law. Meanwhile, right as a legal concept can be seen as a set of categories composed of theoretical constructs which have legal, moral, and ethical posture.[16] That being the case, the structure of our theoretical underpinning is grounded on Hohfeld's concern regarding right as a legal concept. According to Hohfeld, the word *right* used in legal practice is ambiguous and it tends to be injudiciously applied as a reference to entitlement of any kind. He then pointed out that *right* actually has four different meanings (and uses) as in: (1) right in the strictest sense (or claim right), (2) privilege (or liberty), (3) power, and (4) immunity. Hohfeld did not squarely describe the definitions of these concepts. Instead, he explained

[13] Majda El-Muhtaj, *Hak Asasi Manusia dalam Konstitusi Indonesia [Human Rights in the Indonesian Constitution]* (Jakarta: Kencana, 2015); Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia [Indonesian Constitution and Constitutionalism]* (Jakarta: Sinar Grafika, 2021).

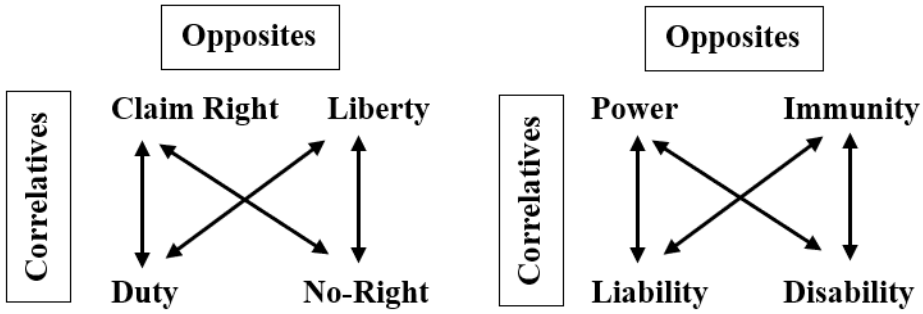
[14] Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015); David Bourchier, *Illiberal Democracy in Indonesia: The Ideology of the Family State* (London & New York: Routledge, 2014); Alexy, "Discourse Theory and Fundamental Rights."

[15] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); Roy Andrew Partain, "Creating Rights, Terminating Rights, Overcoming Legal Conflicts," *Constitutional Review* 8, no. 2 (December 2022): 215.

[16] George Andreopoulos and Zehra F Kabasakal Arat, "On the Uses and Misuses of Human Rights: A Critical Approach to Advocacy," in *The Uses and Misuses of Human Rights* (New York: Springer, 2014), 1–27; Ronald Holzhacker, "Gay Rights Are Human Rights: The Framing of New Interpretations of International Human Rights Norms"," in *The Uses and Misuses of Human Rights: A Critical Approach to Advocacy*, ed. George Andreopoulos and Zehra F. Kabasakal Arat (New York: Palgrave Macmillan, 2014), 29–64.

the definitions by showing the ways each of these concepts can be analyzed through a diametrical scheme of 'opposites' and 'correlatives' jural relations.[17] The following diagram shows the jural relations between those concepts.

Figure 1. Hohfeldian's Scheme




A brief description of each concept should be helpful at the moment. *First*, a claim right is a right correlated with the duties of others.[18] As for duty, Hohfeld mentioned that it is "that which one ought or ought not to do."[19] Current understanding of duty, however, is certainly more sophisticated than this. Relevant to this, we can borrow from Curran who aptly writes that "[t]hese duties consist in either refraining from actions that would impede the right holder in her exercise of the right or, sometimes, of performing actions that will give the right holder the thing she has a right to or help her to have or do the thing she has a right to."[20] That is, we may state that if A promises B to pay ten thousands rupiahs, therefore, A has a duty to give B ten thousands rupiahs. In turn, B has a claim right against A to get ten thousands rupiahs. B's claim and A's duty correlates and B's claim right entails A's duty. The reason why claim-right and duty are

[17] Luís Duarte D'Almeida, "Fundamental Legal Concepts: The Hohfeldian Framework," *Philosophy Compass* 11, no. 10 (2016): 555.
[18] Eleanor Curran, "Hobbes's Theory of Rights – A Modern Interest Theory," *The Journal of Ethics* 6 (2002): 63–86.
[19] Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *The Yale Law Journal* 23, no. 1 (1913): 16–59.
[20] Curran, "Hobbes's Theory of Rights."

correlated is because they describe two sides of one relationship.[21] It should be noted that claim rights concern actions or omissions by someone else.[22] However, while claim right and duty is in a correlative relation, claim right is in opposite relation with no-right. In this case, the term no-right can be simply understood as a position of not having a claim-right towards someone to perform or refrain from performing a certain action.[23]

*Second*, liberty is a freedom from a duty to abstain from doing something. Liberty (or privilege) is a right that is not correlated with duty—they are instead in opposite relation.[24] Liberty is correlated with a no-right so that in this position another party against whom the liberty is held has a no-right concerning the activity that it relates to.[25] Important to note that a privilege to μ doesn't entail duties on others not to interfere with the liberty-holder's μ-ing.[26] In that sense, two or more people may also have the same privilege to the same thing or action, and they can be in unconstrained competition with one another to exercise their rights.[27] For example, A has a liberty right to not give B ten thousands rupiahs, then B has a correlative no-right for the action that A not give her ten thousands rupiahs. In this case A does not have a duty towards B to give her ten thousands rupiahs, and B also has no duty to refrain from interfering with A's action.

*Third*, a power-right is one's ability to change legal positions.[28] More specifically, a legal power can be understood as a normative ability to change existing legal positions or to have affirmative control over a given legal relation.[29] For example, if A promises to B to pay ten thousands rupiahs in exchange of B gives A a pair of shoes. In this situation, B has the power to change his legal position by giving his shoes. That is, if B gives A his shoes, it will change B's

[21] Allen Thomas O'Rourke, "Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law," *South Carolina Law Review* 61, no. 1 (2009): 141–70, https://scholarcommons.sc.edu/sclr/vol61/iss1/5.
[22] D'Almeida, "Fundamental Legal Concepts."
[23] Ibid.
[24] Hohfeld, "Some Fundamental Legal."
[25] Nikolai Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights," *Murdoch University Electronic Journal of Law* 12, no. 1 (2005).
[26] D'Almeida, "Fundamental Legal Concepts."
[27] Curran, "Hobbes's Theory of Rights."
[28] R´eka Markovich, "Understanding Hohfeld and Formalizing Legal Rights: The Hohfeldian Conceptions and Their Conditional Consequences," *Studia Logica* 108 (2020): 131.
[29] D'Almeida, "Fundamental Legal Concepts."

claim-rights, privileges, and powers connected to it. In that sense, as Hohfeld claimed, "a legal power (as distinguished, of course, from mental or physical power) is the opposite of legal disability, and correlative of legal liability."[30] Thus, if B gives A his shoes, A has a legal liability to have a duty to pay ten thousands rupiahs to B. B's legal power correlates with A's legal liability.

*Fourth*, the last form of rights in Hohfeld's scheme is immunity. Hohfeld explained that "immunity is one's freedom from the legal power or "control" of another as regards some legal relation."[31] Furthermore, he also described that "immunity is the correlative of disability ('no-power'), and the opposite or negation of liability."[32] For instance, if the state has no power to place B to give his shoes to C, thus B has immunity in that situation, while the state has a disability ('no-power'). Importantly, B's immunity is correlative with the state's disability.

Hohfeld's scheme was originally concerned about the practice of right in private law.[33] To date, there have been some contentions saying that the theory only focuses on bilateral relationship. This is largely because the scheme conceptualizes entitlements (i.e., claim-rights, privilege, power) as a concept that consists of directed relations among specified individuals/entities.[34] The assumption is that every legal position must correlate with the legal position of someone else's as one side of a legal relation.[35] This, however, does not imply that the Hohfeldian entitlements are limited only to individuals. It can also be *multital* in nature, meaning that it can adjust between an individual and persons on the one hand, and another individual or persons on the other. The point is that, suggested by Westen, "an entitlement remains unconceptualized for Hohfeld unless it specifies the person or persons toward whom it is directed".[36] This conception is considered problematic by several theorists,[37] and it raises

30 Hohfeld, "Some Fundamental Legal."
31 Ibid.
32 Ibid.
33 Francois A. Fontaneau, "The Right to Religious Freedom & the Hohfeldian Analysis of Rights," *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* 3, no. 1 (2013): 92–99.
34 Peter Westen, "Poor Wesley Hohfeld," *San Diego Law Review* 55 (2018): 449–68.
35 D'Almeida, "Fundamental Legal Concepts."
36 Westen, "Poor Wesley Hohfeld."
37 Duarte d'Almeida, "Fundamental Legal Concepts."

debates over whether the Hohfeld's scheme can only be applied in the realm of civil law with a model of mutual relationships between agents.[38]

In fact, some argue that the scheme can also be used to analyze public law and many other areas of law. O'Rourke, for example, applies the Hohfeldian scheme in constitutional law context, showing how the constitution creates legal relations between an individual and the government.[39] Analogous to the Hohfeldian approach to the concept of property, it is claimed that "*constitutional right* in the broader sense may also be called a *bundle of relations*, meaning a bundle of relations between an individual and the government that arise from a particular clause or value of the Constitution."[40] Read in that way, examining the constitutional reasoning toward right from a Hohfeldian analysis can arguably help us understand the intertwinement between semantic and conceptual practice of right, particularly in the context of the highly abstract notion of right under the constitution.[41]

## III. THE INTERPRETATION OF RIGHT

This section describes the practice of interpretation of rights in several judicial review decisions at the Constitutional Court. Our focus is to zoom in on the ways the Court reasons about rights and the extent to which such rights being protected under the constitution. Upon examining the issue-level questions involving constitutional doctrine of rights *in* religious life, natural resources control, education, and fair trial, we contend that right as a legal concept under the constitution is rather *dynamic* in the sense that the Court's interpretation

[38] Vivienne Brown, "Rights, Liberties and Duties: Reformulating Hohfeld's Scheme of Legal Relations?," *Current Legal Problems* 58, no. 1 (2005): 344. In fact, the views of theorists are divided into two sides. "Some critics of Hohfeld's scheme argue that the notion of correlative duties does not apply to criminal or public law where this element of correlativity is either absent or can be accommodated only by strained attempts to identify putative correlative agents within the state's legal apparatus. They conclude that Hohfeld's scheme is of limited applicability and not appropriate to all areas of law. Defenders of Hohfeld's scheme have argued in response that, logically, duties are correlative to claim-rights, so that such correlative relations must be held to exist in practice. So, for example, they would argue that the duties of the criminal law are correlated with claim rights held by state officials."

[39] O'Rourke, "Refuge from a Jurisprudence of Doubt."

[40] Ibid.

[41] Ibid.

does not hinge upon a fixed or consistent vocabulary. As a result, right as a legal concept has various meanings and a vast array of legal implications.

### 3.1. The Dynamics of Interpretation

This subsection describes the dynamics of interpretation in four propositions, including: right is interpreted as: (1) a mixture of liberty and duty, (2) an assemblage of duty and responsibility, (3) duty, and (4) power.

*First*, the term 'right' is associated with a mixture of liberty and duty. Here, our examination focuses on the right to embrace religion in on the 1965 Anti-Blasphemy Law constitutional review case (140/PUU-VII/2009).[42] In this case, the Court seems to construe the right of freedom to embrace religion as a duty instead of liberty. Utilizing the Hohfeld's scheme of rights, the right of freedom to embrace religion can be categorized as liberty.[43] Recall that, According to Hohfeld, liberty is in a correlative position with no-right, and in a contradictive position with duty. In this case, the liberty to embrace religion is interpreted as duty—which should have been posited in a contradictory position. Although Indonesia does not have any statutory regulations obliging a person to have a religion, the Court interpreted the right to religious freedom as if it is a necessity or an obligation for the people to have a religion. This can be seen from the Court's reasoning that says "... every citizen, even as an individual or as a nation collectively must be able to accept God Almighty who animates other precepts ..."[44]. From the Court's perspective, all citizens must identify themselves with a religion because religion (the notion of belief in God) is one of the country's ideological principles. According to the Court,

[42] Constitutional Court, Decision no. 140/PUU-VII/2009 (2010). In this 2009 case, the applicants submitted a judicial review request about the provisions related to the prohibition of religious blasphemy. Under this Law, blasphemy is understood as deliberately publicly telling, encouraging, or seeking general support, and to do an interpretation of religion professed in Indonesia or religious activities that resemble those religious activities, which interpretations and activities deviate from the main teachings of that religion. One of the applicant's arguments is that this article generates religious discrimination which is contrary to human rights and freedom of religion in the 1945 Constitution.

[43] It is not classified as claim rights because exercising the right to embrace religion doesn't correlate with other people's or party's duty. On the other hand, it also doesn't fit into other forms of rights such as power or immunity.

[44] Constitutional Court, Decision no. 140/PUU-VII/2009, 271–72, 3.34.1.

> [t]he rule of law principle in Indonesia must be seen in the following way: the 1945 Constitution, namely a state of law that places the principle of God The Almighty as the main principle, as well as the underlying religious values that underpins the life of the nation and the state, not the state that separates relations between religion and the state, and not only adhering to the principle of individualism and the principle of communalism.[45]

Furthermore, the Court explains that "[t]he Indonesian Constitution does not promote any campaign for freedom in having no religion, promoting anti-religion, and does not allow any insult or defilement of religious teachings or books that are the sources of religious beliefs or defamation of God's name."[46] According to the Court,

> [o]n the basis of such a philosophical view of religious freedom in Indonesia, as a *Pancasila* state, any activities or practices should not be allowed to alienate citizens from *Pancasila*. In the name of freedom, a person or group cannot erode the religiosity of society which has been inherited as values that animate various statutory provisions in Indonesia.[47]

We can see that the term *right* in religious freedom is viewed by the Court as duty. However, at another point, the interpretation switches from duty to liberty. According to the Court, people possess the freedom to embrace any beliefs or religions they believe in, and that the state has an obligation to guarantee this liberty. The Court propounds that,

> [f]reedom of religion [*kebebasan beragama*] is one of the most basic and fundamental human rights for every human being. The right to freedom of religion has been agreed upon by the world community as an individual right that is directly attached, which must be respected, upheld, and protected by the state, government, and everyone for the sake of honor and protection of human dignity.[48]

*Second*, right is framed as an assemblage of duty and responsibility. This proposition can be found in constitutional review cases related to the right in education.[49] In these cases, our observation focuses on the right to the

[45] Constitutional Court, Decision no. 140/PUU-VII/2009, 3.34.10.
[46] Constitutional Court, Decision no. 140/PUU-VII/2009, 3.34.11.
[47] Ibid.
[48] Ibid.
[49] Constitutional Court, Decision no. 85/PUU-XI/2013 (2014).

administration of education. Similar with the previous case, we believe that the judges seem to construe right to the administration of education as a duty rather than liberty. As mentioned before, according to Hohfeld, liberty is in a correlative position with no-right, and in a contradictive position with duty. However, the Court's considerations seem to be treating the right to the administration as responsibility or duty. In explaining the right to the administration of education, the Court compares the right to education *vis-a-vis* the right to life. They illustrate that despite the state protects its citizens' rights to life, the citizens must also bear the responsibility to live healthily and to prioritize their lives or those under their care, so that they will not be robbed of their right to live either by others or by the absence of such responsibility. To put it in the educational context, the argument revolves around Article 6 of the 20/2003 National Education System Law which rules that "[e]very citizen is responsible for the preservation of education administration."[50] According to the Court, it is true that the government is responsible for its citizens' education, but, for the sake of their own self quality, all citizens must "participate" (*ikut*) in bearing the responsibility *toward themselves* to reach their desired level of education. Furthermore, the Court claims that such a statement does not diminish the role of the government altogether: Since the quality of a state depends on citizen participation, the government must not leave the development of the citizens to themselves—otherwise they might exercise such *freedom* by not taking any education at all. The Court thus declares that this Article is constitutional in so far as the term *duty* is to be interpreted as to *participate*. That is, the responsibility rests mainly on the state but the citizens must "participate in bearing the responsibility" (*ikut bertanggung jawab*).[51]

*Third*, we can also find that *right* is sometimes identical to *duty*. This proposition can be found in a constitutional review case regarding the right to

[50] Law No. 20 of 2003 on National Education System.
[51] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009 (2010).

fair trial (65/PUU-VIII/2010).[52] In this case, our analysis focuses on right to call witnesses. The Court interprets the *right* to propose (i.e., to call and examine) witnesses and/or experts who benefit the suspect during the investigation stage as *duty*. The Court initially regards the right to fair trial from the lens of claim-right, but then their perspective switches to the lens of duty or obligation. Fundamentally, the Court construed right in fair criminal trial processes as a resultant of tension between interests. That is, according to the Court, "criminal procedural law contains norms that balance the legal interests of individuals and the legal interests of society and the state, because basically in criminal law, individuals and/or communities deal directly with the state."[53] Such a tension, or in the Court's term *relationship*, of interests "places the individual and/or society in a weaker position. In this case, the criminal procedure law serves to limit the state power, exercised by investigators, public prosecutors, and judges, in criminal justice processes against individuals and/or the public, especially suspects and defendants involved in the process."[54] Rather than parsing the relational nature of the right to fair trial structure, the Court perceived that such a right is something naturally attached, while later disconcerting the matter of right and duty or obligation. The Court claims that "[c]onsidering a person's human rights remain inherent [*melekat*] to him even though he has been identified as a suspect or defendant. Therefore, under the rule of law, criminal procedural law is positioned as a tool so that the implementation of legal process is carried out fairly (due process of law) for the sake of respect for human rights."[55]

*Fourth*, right is also framed as power. In this sense, it is important to highlight the Court's interpretation of right in cases involving the state's *right* over resource control (*hak menguasai negara*) encapsulated under Article 33 paragraph (3) of

[52] Constitutional Court, Decision no. 65/PUU-VIII/2010 (2010). In this case, the Court decided that all provisions pertaining to the definition and use of witness has violated the Constitution insofar as the concept of witness "is not interpreted as including 'a person who can provide information in the context of investigation, prosecution and trial of a criminal act which he does not always hear for himself, he sees for himself, and he experiences for himself.'

[53] Constitutional Court, Decision no. 65/PUU-VIII/2010 at 87, 3.11.

[54] Constitutional Court, Decision no. 65/PUU-VIII/2010.

[55] Ibid.

the 1945 Constitution. In some of the Court's opinions, we found that the term *right* in natural resource control was actually interpreted as *power*. Particularly, the constitutional right of the state to control the natural resources is a right that derives from certain primary right. The term *derivative right* in this instance refers to a method of governmental management over natural resources.[56] This indicates that the purpose of such provision is to demonstrate the degree to which the state has direct management of natural resources.[57] In the 2012 Oil and Gas Law review case, the Court indicates the form of state's right to control in three different levels, that is, "the first and most important level is that the state runs a direct management of natural resources [...] so that the people will benefit more from natural resource management. State control in the second rank is the state's ability to make policies and management, and the state function in the third rank is the function of regulation and supervision."[58] However, direct management by the state can also be done "as long as the state has the capability in terms of capital, technology, and management to manage natural resources."[59] One of the dissenting opinions was expressed by Justice Harjono who opines that the private sector could manage natural resources only if "the state is unable to provide financing, especially in exploration where the risk is anything but low, because the cost of exploration is not small, while the possibility in finding the source of oil or gas is uncertain."[60] From this point of view, the hierarchy of state's right seems to build upon the effectiveness principle, in the sense that the constitutional criteria of state control—through the phrase 'state power'—must be read in conjunction with "for the greatest prosperity of the people."[61]

The above explanation suggests that the Court's interpretation of right under the Constitution is rather dynamic, which bears different meaning and legal

[56] Constitutional Court, Decision no. 001-021-022/PUU-I/2003 (2003).
[57] Constitutional Court, Decision no. 058-059-060-063/PUU-II/2004 (2005); Constitutional Court, Decision no. 008/PUU-III/2005 (2005).
[58] Constitutional Court, Decision no. 36/PUU-X/2012 (2012).
[59] Ibid.
[60] Ibid.
[61] Irfan Nur Rachman, "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945 [Legal Politics of Natural Resources Management According to Article 33 of the 1945 Constitution," Constitutional Journal]," *Jurnal Konstitusi* 13, no. 1 (2016): 191–212, https://doi.org/10.31078/jk1319; Mohamad Mova AlAfghani, "Strengths and Limitations of The Indonesian Constitutional Court's '6 Basic Principles' in Resolving Water Conflicts," *Constitutional Review* 9, no. 1 (2023): 179–220.

implications. In some instances, we can observe that right is not necessarily understood as claim-right but perceived as duty and responsibility instead, while in other instance, the interpretation shifts between the concept of right and duty. Moreover, there is also the case where right is understood as power. In the next section we argue that this mode of interpretation can also be seen as a set or constant form of configuration of rights.

### 3.2. The Configuration of Right: Between Non-relational Liberty and Power

In this sub-section, we argue that right in the *configured* sense is to be understood as a set of arrangement of (1) right in the form of non-relational liberty and (2) power that provides intervention, limitations, or even change over the nature of liberty into, ultimately, liability. Our examination in this subsection focuses on instances where right is understood by the Court as non-relational liberties—i.e., in which there is no jural relation that prevails as their correlative counterparts. From there, we will then examine how non-relational liberty is configured when encountered with governmental policy consideration. In these instances, liberty is virtually altered or transformed to a certain kind of liability, that is, a duty to refrain from acting in a certain way.

*First*, we find that the term *right* in religious freedom is an arrangement of non-relational (religious) *liberty* and power that alters it into *liability* to a certain religious activity. In the 1965 Anti-Blasphemy Law review case the Court construes the right to individually interpret religious teachings or to exercise religious activities as individual freedom in the form of non-relational liberty.[62] In general, the right to individually interpret religious teachings or to exercise religious activities is categorized as liberty. It does not fit into the classification of claim-right because one's religious interpretation or activity does not correlate with other's duty, nor with any other form of rights (e.g., power, immunity). That said, it cannot be simply understood as liberty in the Hohfeldian sense since the kind of liberty in the Court's opinion is fundamentally non-relational.

[62] Constitutional Court, Decision no. 140/PUU-VII/2009.

The Court argues that the right to individually interpret religious teachings or to exercise religious activities as *liberty* that has no relations with other people or parties. This is because the liberty only exists individually for the person itself and not against other people. It is asserted that "freedom of beliefs according to the Court is a freedom that cannot be limited by coercion and cannot even be tried because such freedom is a freedom that exists in the mind and heart of someone who believes in that belief." [63] Due to this internal nature of the right, other people or parties do not have any correlative or jural relations regarding one's right to individually interpret religious teachings or to exercise religious activities. This situation, however, could change if that person exercises her rights in public or against other people. In that case, this right can no longer be considered as *liberty* but instead, it is altered into a different category, since there is a duty that prohibits that person from doing so. In this sense, we find that the Court tends to construe the *right* to publicly interpret religious teachings or carry out religious activities as a kind of *liability* that bears correlative relation with the state *power*. From the Court's perspective, people have individual liberty to interpret any religious teachings or carry out any religious activities that resemble a religion professed in Indonesia, but they are not allowed to deliberately interpret religious teachings or carry out religious activities in which such interpretations and activities deviate from the accepted teachings of the religion. The Court asserted that,

> ... even if a deviant interpretation is considered as freedom of religion because it is related to the freedom to believe in beliefs, express thoughts and attitudes according to one's conscience [vide Article 28E paragraph (2) of the 1945 Constitution], this must be seen from two sides, namely the freedom to believe in one religion on the one side, and freedom to express thoughts and attitudes according to his conscience on the other side ... However, if the freedom to express thoughts and attitudes according to one's conscience (*forum externum*) already involves relations with other parties in a society, then such freedom can be limited.[64]

[63] Constitutional Court, Decision no. 287–88, 3.51.
[64] Constitutional Court, Decision no. 140/PUU-VII/2009 at 287–88, 3.51.

In that sense, the Court furthermore claims that "... [t]he Law on the Prevention of Abuse and/or Blasphemy of Religion does not limit a person's beliefs (*forum internum*), but only limits the expression of thoughts and attitudes according to his conscience in public (*forum externum*) that deviates from the main religious teachings adopted in Indonesia; expresses feelings, or commit acts that are essentially hostile, abuse or desecrate a religion in Indonesia."[65] The Court explains that if these limitations are not regulated, these sorts of deviant act may spark horizontal conflicts, as well as create unrest, division, and hostility in society.[66]

The Court's reasoning showcases that the *liberty-right* to deliberately and publicly interpret religious teachings or carry out religious activities has turned into *liability* if it deviates from the common-accepted teachings. The reason is that, according to Article 2 and Article 3 of the Anti-Blasphemy Law, violation against the limitations set by the state—that is, to deliberately and publicly interpret and exercise deviant religious teachings—will result in criminal sanction. The Court also explains that such a law essentially regulates two aspects of restrictions on religious freedom, namely restrictions on administrative and criminal restrictions:

> Administrative restrictions, namely a public prohibition to intentionally commit interpretation of religion or carrying out activities, which deviate from the main teachings of a religion in Indonesia whose sanctions are administrative activities starting from warnings to prohibitions as well as dissolution of the organization, while a criminal prohibition is a prohibition against any person who intentionally expresses feelings or commits acts which are essentially hostile, abuse, or blasphemy against a religion professed in Indonesia.[67]

The Court furthermore assesses that "religion in the sense of believing in a certain religion is the domain of the internal forum, [it] is freedom, a human right whose protection, promotion, enforcement, and fulfillment are the responsibility of the state, especially the government."[68] However, the Court claims that this right or freedom can be limited for the sole purpose of securing recognition and respect for the rights and freedoms of others and to fulfill fair

[65] Constitutional Court, Decision no. 140/PUU-VII/2009.
[66] Ibid.
[67] Ibid.
[68] Ibid.

demands in accordance with society values. In this sense, "along with being granted the right to freedom of religion, the state also has the right to provide regulations and limitations on the implementation of religious freedom."[69] The limitation is explicitly ruled under Article 28J paragraph (2) of the 1945 Constitution, stipulating that "[i]n exercising the rights and freedom, everyone must be subject to the restrictions set by law for the sole purpose of securing recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with moral considerations, *religious values*, security and public order in a democratic society."[70] The Court then proceeds to explain that in the case of limitations, "the state has a role as the balancer between human rights and basic obligations to realize just human rights. The state has a role to ensure that the exercise of one's freedom does not injure the freedom of others. This is where the state realizes its goal, namely, to achieve the best life possible."[71]

*Second*, we highlight that *right* in education is configured by non-relational (educational) *liberty* and *power* that alter it into *liability* to participate in education. Here, our particular interest is the case 11-14-21-126-136/PUU/VII/2009. As a general notion in this 2009 case, the Court claims that "the Constitution posits education as one of human rights, and as a right it is the duty of the state—especially the government—to protect, develop, uphold, and fulfill (this right)."[72] But on the other hand, the Court also recognizes several rights that constitute the right to education itself, including: the duty in the administration of education, the right for free education, the right for assembly and association, and the freedom to choose education. In that sense, the Court frames the citizen's right to choose educational forum (i.e., where she receives her education) as a non-relational liberty—at least to the extent of early childhood education programs that target children under the age of seven. The Court refers to Article 28 (2) of the National Education System Law and argues that this provision provides the opportunity for this sort of education to be administered either formally, non-formally, or

[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009 (2009).

informally.[73] For the purpose of administering an early childhood education program, the three types of education are basically open choices. Evidently, this is where the particular *liberty* is not *claim*-right, since it does not require the existence of another person's duty towards its fulfillment, in which Hohfeldian scheme of rights necessitates—i.e., the existence of duty as the correlation of a claim-rights due to among others the existence of an interest or measure of control at the hand of the claim holder.[74]

Nonetheless, power alters such non-relational liberty in education specifically when the Court makes the case of two different kinds of right to free education, namely (1) the right to be exempted from the cost of education and (2) the right to be treated non-discriminately in relation to educational cost. The duty related to the former finds its relevance in Article 31 paragraph 3 of the Constitution, stipulating that at least twenty percent of the state's revenue and budget is to be allocated for the administration of national education. This means that the budget for education sits at the top of the state's priority list and the fulfillment of that cost solely rests at the hand of the government insofar as it does not exceed beyond the limit of twenty percent. Hence, whether the state would bear all education costs or not depends on its financial capability.[75] Another point of argument is that the fourth paragraph of the preamble to the Indonesian constitution which mentions that the government shall, among others, educate the life of the nation. As such, the Court argues that educating the life of the nation does not mean that the whole education cost will be left to the state—while refusing any involvement of the society—because otherwise, it will place the state in such a manner that it becomes the sole institution capable of regulating and deciding every aspect of state and nation life (*kehidupan berbangsa dan bernegara*) thus eliminating any potential and resources in the society.

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[73] Ibid., [3.33]. The use of these three terms is limited in the context on how education is institutionalized as prescribed in Indonesian Law No. 20 Year 2003. Formal education is structured and conducted in tiers within formal institutions such as elementary or high school. Non-formal education is also structured and conducted in tiers but not within a formal institution. While informal education is experienced within the boundary of its subject's family and environment.

[74] Gopal Sreenivasan, "Duties and Their Direction," *Ethics* 120, no. 3 (April 2010): 465–494.

[75] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2019 (2019).

With regard to the latter kind of right—i.e., to be treated indiscriminately in relation to cost-burden—the argument revolves around the provision of Article 12 (2.b.) of the 2003 National Education System Law which regulates that, "every learner [in this context referring to any members of society undertaking self-development through the process of learning available in certain branch, level, or types of education] participates in bearing the cost of education administration, except for those who are exempted from such obligation by the virtue of existing statutory regulation."[76] It seems, at the first sight, that the rule incites discrimination, since it provides the basis for free education whilst the phrase 'except for' (*kecuali bagi*) implies that it does not treat all students equally. On this matter, the Court argued that the word participates (in bearing the cost of education administration) does not necessarily diminish the state's obligation and placing the burden on students' hands. Instead, to participate should be understood as the manifestation of the state's willingness to be open to any contribution from the society to fund the administration of education that is yet covered by the state. Furthermore, the phrase "with the exception of those who are exempted from such obligation by the virtue of the existing statutory regulation" acts as a balancing principle that there is duty to participate in cost-burden for the wealthy, while there is an exemption for the poor. This is arguably aimed at making sure that everyone has the same opportunity to access education.[77]

*Third*, the term *right* is essentially configured by non-relational *liberty* in fair trial and *power* that alters it into *liability* in the face of fairness and the legal interests of the community. Specifically, the constitutional right to fair trial comprises the so-called liberty for a case review (*peninjauan k*embali) that is fundamentally non-relational. As it is written under the Criminal Procedure Code, a convict or her heir has the right to submit a petition for review to the Supreme Court except against acquittal or dismissal from all legal charges. These parties can only submit a petition for review once. This limitation, according to the

[76] Law No. 20 of 2003 on National Education System.
[77] Constitutional Court, Decision no. 11-14-21-126-136/PUU/VII/2009, 3.26.

Court, has violated individual's rights and fundamental freedom enshrined under the Constitution. These rights and freedoms, argued the Court, are intertwined with the objective of criminal law, that is, to satisfy legal certainty (*kepastian hukum*) and justice (*keadilan*). The limitation for a case review petition, while admittedly may achieve the former, fails to pursue the latter as justice requires the law to seek for material truths—something that could be done if case review petition is not limited to only once. By referring to the idea of justice, the Court claims that "justice is a very basic human need, more fundamental than the human need for legal certainty; Material truth contains the spirit of justice, while procedural law norms contain the nature of legal certainty which sometimes ignores the principle of justice."[78] We can however identify the intervention of *power* to *liberty* when the Court frames the right to fair trial as a resultant of tension between interests. At this point, the Court took a conspicuous shift of argument, that is, seeing fair trial from the lens of liberty (i.e., to call witness) to the lens of duty or obligation. The Court argues that such an obligation to respect right to fair trial shall comprise (1) any efforts to protect [an individual] against arbitrary actions *from* state officials, (2) granting various guarantees for suspects and defendants to *fully defend* themselves, (3) the application of the *presumption* of innocence principle, and (4) the application of the *equality* before the law principle.[79]

Relatedly, let us examine the Court's assessment on the constitutionality of the meaning of witness in criminal trial. According to the Court,

> the arrangement or definition of witnesses in the Criminal Procedure Code, as regulated in the articles requested for review, creates multiple interpretations, and violates the *lex certa* principle—while the *lex stricta* principle is a general principle in the formation of criminal legislation. Provisions that imply multiple interpretations in criminal procedural law may result in legal uncertainty for citizens, because in criminal procedural law, investigators, public prosecutors, and judges have the authority to examine suspects or defendants who are entitled to legal protection.[80]

[78] Constitutional Court, Decision no. 34/PUU-XI/2013 (2013).
[79] Constitutional Court, Decision no. 65/PUU-VIII/2010.
[80] Ibid.

Thus, the Court argues, "the provisions for summoning and examining witnesses and/or experts that are favorable to the suspect or defendant, as ruled under Article 65 in conjunction with Article 116 paragraph (3) and paragraph (4) of the Criminal Procedure Code, must be interpreted to be carried out not only in the trial stage in court, but also under investigation."[81] It follows then that the rules on witness submission have violated the constitutional right to fair trial since they "neglecting *the right of a suspect or defendant* to submit (summon and examine) witnesses and/or experts who are beneficial to them at the investigation [by the police] level and only allowing to summon these witnesses and/or experts at the level of court examination."[82] The Court furthermore draws a kind of line of reasonableness and fairness that limits the right at hand. Even if we call fair trial is (inherent or attached) right, the Court suggests that, in fact, "it must be kept in mind that the submission of witnesses or experts who are beneficial for the suspect or defendant in the criminal justice process is not to hinder the enforcement of the criminal law. Although the rights of the suspect or defendant are protected by criminal procedural law, the limits of fairness and the legal interests of the community represented by the state must be taken into account."[83]

*Fourth*, we can assert that the state's *right* to resource control is an arrangement of its non-relational liberty and power that alters it into *liability* to control limitations. In this context, according to the Court, limitation on the right to resource control can be understood on two grounds, namely it is grounded on people's rights and the environment, and on the purpose of the control. In a 2013 judicial review case related to water resources control, the Court claims that "the right of control by the state over water is the "spirit" (*roh*) or "heart" (*jantung*) of [the law] *a quo*."[84] In this regard, the Court draws a very strict limitation of water control, that since "water is one of the most important and fundamental elements in human life and it controls the livelihood of many people. [...] [I]n

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Constitutional Court, Decision no. 85/PUU-XI/2013.

water exploitation there must be very strict restrictions as an effort to preserve and sustain the availability of water for the life of the nation."[85] Furthermore, there are six principles applicable to resource control limitations according to the Court, including (1) water exploitation must not interfere with, rule out, let alone negate people's right to water;[86] (2) the state's obligation to fulfill the people's right to water;[87] (3) the right to a clean environment;[88] (4) the right of supervision and control by the state;[89] (5) the priority of water exploitation by the State/Regional Owned Affairs Agency;[90] and (6) the authority of the government in granting permits to private companies, which is in water exploitation.[91] At this point, suffice it to say the constitutional principles have become *power* that alters the state's *liberty* into *liability* against certain forms of limitation.[92]

## IV. CONSTITUTIONAL RIGHT: WHAT KIND OF VOCABULARY?

In the previous section, we have argued that the vocabulary of right, as a legal concept under the constitution, has been interpreted by the Court in a rather 'dynamic-yet-configured' fashion. Right in the *dynamic* sense implies that the ways the Court interprets the term under the constitution do not hinge upon a fixed or consistent vocabulary. As a result, right as a legal concept has various meanings and a vast array of legal implications. Right in the *configured* sense is to be understood as a set of configurations of (1) individual freedom in the form of non-relational liberty, and (2) power that provides intervention, limitations, or even change over the nature of the individual's liberty into liability.

To elaborate these propositions, let us consider the following statements.

(1) A has nonrelational liberty to μ;
(2) B has power to Ø toward A to μ;
(3) A has liability toward B to μ.

[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] AlAfghani, "Strengths and Limitations."

From these statements, we may assume that constitutional right (1) is intervened by power (2) thus results (3) 'a new form' of right. For the Hohfeldian internal symmetry to hold, we sketch such configurations into the following figures.

**Table 1.** Non-Relational liberty under the Constitution

| | A has nonrelational liberty to μ |
|---|---|
| Jural opposite | A has duty to μ |
| Jural correlative | - |

Therefore,

**Table 2.** Jural relation under the Constitution

| | B has power to Ø toward A to μ | A has liability to Ø toward B to μ |
|---|---|---|
| Jural opposite | B has disability to Ø toward A to μ | A has an immunity to Ø toward B to μ |
| Jural correlative | A has liability to Ø toward B to μ | B has power to Ø toward A to μ |

Based on Table 1 and Table 2, we can see that the Hohfeldian scheme is inadequate to explain the characteristics or the forms of rights arising from non-directed duties.[93] That is, in the Hohfeldian perspective, claim rights are correlative with duties.[94] Duties in this frame are those that owed to someone[95] or also known as "directed" duties. In that regard, Hohfeld explained that "if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place".[96] From this example, we can see that duty is owed *directly* to a specific individual who holds a correlative claim right. In fact, we also use the term duty to refer to what we are required to do regardless of whether we owe it to anyone (i.e., non-directed

[93] "A duty is a directed duty if there is someone to whom it is owed; and that it is a nondirected duty if there is no one to whom it is owed." Sreenivasan, "Duties and Their Direction."

[94] "The duty that correlates with a claim right is a duty that is owed to the claim right holder; and a claim right is always something held against the bearer of the correlative duty." Ibid., 466.

[95] Siegfried Van Duffel, "The Nature of Rights Debate Rests on a Mistake," *Pacific Philosophical Quarterly* 93 (2012): 104–23.

[96] Hohfeld, "Some Fundamental Legal."

duties)—for example any duties imposed by criminal law, public law, and several standalone private law duties that imply no claim rights. These, according to d'Almeida, "[u]nlike directed duties, then, undirected duties do not correlate with claim-rights (or any other sort of entitlement) on anyone else. They are not relational positions."[97] As such, these non-directed duties are not covered by the Hohfeldian scheme.[98]

In a rather similar vein, our analysis showcases that the scheme needs a slight adjustment to explain jural relations arising from non-directed duties under the Constitution. From the Hohfeldian perspective, duties are the *correlative* of claim-rights and the *opposite* of privileges. In the right of freedom to exercise religion, for instance, the Court initially interprets such a right as if it is a necessity or duty for the Indonesians even if there is no statutory regulation that obliges the people to do so. The implication is twofold: on the one hand, we see that the *duty* to practice one's own religion does not have any correlative relation with other's *claim right*. On the other hand, the *duty* to exercise religion is not on the opposite side of the *liberty* to religious practices because the Court stipulates that believing a certain religion is itself *liberty*—"it is a human right that the protection, promotion, enforcement, and fulfillment of which are the responsibility of the state, especially the government."[99] These conditions show that the right of freedom to religion seems unfit in any legal entitlements or jural relations that Hohfeld has offered.

That being the case, there are two alternative adjustments to the Court's interpretation assessment through a Hohfeldian analysis. *First*, even though the non-directed duties are not in relational positions with any other sorts of entitlement of other parties, these duties still manifest *consistently*—not in correlative nor opposite sense—with other entitlements. Furthermore, there is even a possibility that a privilege arises from duty or an obligation. In line with this proposition, Hohfeld himself seems aware of the possibility of such relation

[97] D'Almeida, "Fundamental Legal Concepts."
[98] Ibid.
[99] Constitutional Court, Decision no. 140/PUU-VII/2009.

by assuming that "if for some special reason, X has contracted with Y to go on the former's own land, it is obvious that X has, as regards Y, both the privilege of entering and the duty of entering. The privilege is perfectly consistent with this sort, for the latter is of the same content or tenor."[100] Read in that way, the liberty to embrace religion, to access free education, and to provide witness in a criminal trial, all have been seen as a duty or obligation of the citizens. In line with this sort of obligation, the state is presumptively under the duty to provide freedom or privilege for the people to believe a certain religion according to their faith, to choose what kind of educational services for their kids, and to call witness during trial and investigation processes. These conditions show that duty and liberty are not correlated, nor opposite, but rather *consistent* with one another. Understood in that way, even if the Court declares some non-directed duties under the Constitution, they are, however, not necessarily not *consistent* with the other entitlement provided under the same provision.

*Second*, another adjustment we may indicate in the Hohfeldian scheme is that it cannot explain the characteristics or forms of rights of non-relational liberty, that is, liberty-no right relation.[101] Importantly, it is somehow relevant to the so-called 'derivate right' configuration under the state's right to control over (natural) resources. We might ask, at the moment, are we dealing with right as a relation (the state having privilege) or a concept (the privilege that the state has)? The distinction between right as a concept and a relation is crucial since the scheme appears to conflate the two: In a Hohfeldian analysis, privilege or liberty is a right that correlates with 'no-right' and has an opposite relation with 'no-duty'.[102] However, as Brown rightly suggests, this opposite of a relation involving duty implies two senses of permissible action, that is, 'Y does not have a duty not to Ø' which is a negation of the legal relation, and 'Y has a no-duty not to Ø' which is a negation of the legal concept.[103] The former asserts that the act is 'not prohibited' and the latter 'expressly permitted.'[104]

[100] Hohfeld, "Some Fundamental Legal."
[101] J.E Penner, *Hohfeldian Liberties, Property Rights: A Re-Examination*, Online edn (Oxford: Oxford Academic, 2020).
[102] Ibid.
[103] Brown, "Rights, Liberties and Duties."
[104] Ibid.

Relevant to this proposition the Hohfeldian scheme of privilege or liberty needs to be differentiated into three different kinds of liberty rights, which is called, borrowing from Brown, simple liberty, liberty right, and general liberty right.[105] A simple liberty is a liberty that arises because there is no prohibition against doing something and its actions stand outside the remit of the law,[106] for example, if 'Y does not have a duty or prohibition to eat breakfast, then Y has a simple liberty to eat breakfast.' In this case we can see that simple liberty is a form of liberties that does not have correlative relation and has an opposite relation with a general duty not to Ø.[107] On the one hand, liberty right is a liberty that lays within the authority of the law—of being expressly permitted and therefore made it lawful.[108] Liberty rights may be correlative or non-correlative. For example, "if X grants Y a license to enter X's land, then Y has a no-duty to X not to enter X's land. Here Y has a 'correlative liberty-right' against X to enter and there is a legal relationship between X and Y." On the other hand, if Y has a liberty against self-incrimination or liberty to embrace a religion, then these types of liberty-rights do not seem to be correlative. This can be understood as "Y has no duty to self-criminate' (or Y has express permission not to self-criminate)." A similar assertion goes with simple liberty, this type of liberty right does not have a correlative relation with others. Brown calls this type of liberty "general liberty-right."[109]

Arguably, the three kinds of *liberty-right* can be seen as a better reflection of what kind of right it is when the Court reasons about right to interpret religious teachings or carry out religious activities, right to free from educational cost, duty to respect right to fair trial, and state's right to resource control. Since there is no clear explanation regarding the permissible actions based on these kinds of right, it is fair to say that the Court has been fabricating *prima facie* a flexible legal concept to justify certain normative objectives (i.e., efficiency in providing public welfare, the limits of fairness and the legal interests of the community

[105] Ibid.
[106] D'Almeida, "Fundamental Legal Concepts."
[107] Brown, "Rights, Liberties and Duties."
[108] D'Almeida, "Fundamental Legal Concepts."
[109] Brown, "Rights, Liberties and Duties"

in criminal trials, public financial contribution to free education, and peaceful religious activities). But the thing is that the Hohfeldian liberty-no right relation eventually forms exceptions to such normative positions, providing rooms for the Court to configure jural relations and the permissible actions under the constitution.

## V. CONCLUSION

Ultimately, what do we talk about when talking about rights in the constitution? In this article, we contend that the nature of constitutional rights has been hardly expounded by the Court particularly when it is juxtaposed with the discourse of governmental duties and powers. We have also claimed that the term right under the constitution is interpreted by the Court in a rather dynamic-yet-configured fashion. The interpretation of right in the former sense implies that it does not hinge upon a firm or constant vocabulary as the Court has been equating right with other terms such as liberty, duty, and power. In the latter sense, right is understood by the Court as a set of configurations of (1) non-relational liberty and (2) power that provides intervention or limitations, and alters the nature of such liberty into, ultimately, liability.

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