

**HOHFELD WITHOUT RIGHTS**

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***Contents, Abstract & Conclusion***

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# CONTENTS

<b>Abstract</b>	p. V
<b>Introduction</b>	p.1
<b>Section 1 HOHFELD'S METHOD AND CONTRIBUTION</b>	
The problem of terminology	p. 6
Hohfeld's method and analysis	p. 8
Absentees from the tables; emotionally toned words	p. 11
<b>Section 2 THE WORD RIGHT: MEANINGS</b>	
What is right? What is a right?	p. 14
A word on duties and obligations.	p. 18
<b>Section 3 THE HISTORY OF MODERN RIGHTS DISCOURSE</b>	
Ancient legal systems	p. 20
Canon Law and Magna Carta	p. 25
Influence of the Jewish Tradition	p. 34
From the seventeenth century	p. 36

<b>Section 4 TYPOLOGY OF RIGHTS</b>	p. 56
<b>Section 5 THE RIGHTS DISCOURSE</b>	p. 61
Support for the rights analysis	p. 62
The critical movements	p. 76
Some other criticisms of the rights discourse	p. 82
Responses to criticism of the rights agenda	p. 92
<b>Section 6 RIGHTS ANALYSIS – REPLACEABLE</b>	p. 97
The Jewish Legal System, based on Obligations - Mitzvot between Man and God, and between Man and His fellow	p.102
<b>Section 7 EXAMPLES OF ANALYSIS – RIGHTS OR DUTIES IN THE LAW RELATING TO CHILDREN AND PROPERTY LAW</b>	
Children	p. 108
Property	p. 116
<b>CONCLUSION : WHAT IS TO BE DONE?</b>	p. 126
<b>BIBLIOGRAPHY</b>	p. 129

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## **Abstract**

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Rights discourse has become an important factor in legal analysis. However, even those who criticize it have not proposed any alternative to the use of rights as the principal idea behind all legal relations.

Wesley Newcomb Hohfeld, in his articles *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* drew attention to the failure of analysis based on rights and duties alone properly to describe legal relations, and proposed eight concepts which would enable clear thinking and proper understanding of legal relations. He also emphasized the need for clear definitions of the terminology used.

The objective of this paper is to show that the word “right” has taken on meanings far from the original meaning of the word – correct, proper, deserved – and as a result legal analysis has been distorted.

After a historical and philological survey, and a critical view of the rights discourse now current, I show that the Jewish legal system, as a comprehensive system of law, does not have any need of the term “rights” in its modern sense, being based on duties and obligations, and provides an example of an alternative method of legal analysis.

Examples, drawn from decided cases in the fields of property law and the law relating to children, are brought to show that analysis on the basis of obligations is not only adequate, but also leads to more appropriate solutions.

## CONCLUSION : WHAT IS TO BE DONE?

Is the system proposed, based on **obligations** and not on **rights**, capable of application? Can it be seen realistically as a substitute for existing systems? Is it appropriate for all, or only for Jews, or a Jewish state?

These questions arise from the foregoing discussion, and I have tried to show that the **obligations** analysis provides a comprehensive system for organizing the legal, moral and social relations in civilized society, without the manifest defects of the rights based system.

Of course it is impossible to predict if the system proposed will ever be adopted; clearly the change proposed requires a massive change in attitudes. On the other hand, as I have shown, it is possible to conduct discourse and debate, and to present legal arguments and resolve and adjudicate disputes, on the basis of the obligations discourse only.

There may be those who say that only in a Jewish state would it be appropriate to remove the rights discourse and substitute obligations analysis – and one run by Jews who accept the Torah, at that. To them I would reply that the obligations discourse is not dependent on any particular source: in the same way that utilitarianism is founded on purely secular ideology, placing happiness at the center of social, moral and legal discussion, so too the rights analysis currently in almost universal use does not look back to any Divine or other external source, and emerged from political, historical and social influences, as I have shown. In the same way, although I have

emphasized the Jewish sources for my thinking, I have done this only to show that there is a fully developed system of legal thinking based only on obligations, one which has been in existence for thousands of years without losing any of its force, and provides an adequate way of looking at man and the societies he creates.

The proposal made in this paper is, therefore, of universal application; any society can adopt it, gradually, by application case-by-case, issue-by-issue, or by enactment or amendment of laws, or in any way as seems appropriate.

“Jewish tradition traces back to the Bible the obligation of all mankind to establish a legal system, even before the Jewish people were so commanded”. So writes Nahum Rakover in *The “Law” and the Noachides*<sup>1</sup>. The command to set up a system of laws and courts predates the giving of the Torah on Mount Sinai, and the Talmud refers to this, and the six other laws given to all humanity as the Noachide laws, tracing them back to instructions given to Noah when he disembarked after the Flood.<sup>2</sup>

These laws are all given in the form of obligations, one positive, to set up a legal system, and six obligations to refrain: from idolatry, blasphemy, adultery, bloodshed, robbery, and eating the limb of a live animal<sup>3</sup>. They are of universal application, and no civilized person would object to any of them. But the important point is that all other laws may be derived from them, and I would suggest that it is possible to posit four categories of

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<sup>1</sup> (1990) 4 Jewish Law Association Studies p.169. See also J. David Bleich *Judaism and Natural Law*, (1988) 7 The Jewish Law Annual, 5.

<sup>2</sup> Genesis VIII-IX

obligations, incumbent on all persons and on government and its agencies, which cover all the conditions necessary for society:

I Respect all persons (including oneself)

II Respect property, (one's own and that of others, and unowned property)

III Uphold society

IV Behave in good faith.

Full development and description of these categories is a matter for another paper; but as an example, the obligation to respect property includes the laws of contract, of tort (trespass etc.), property offences in criminal law, as well as the law of property, environmental law, and also restrictions on governmental interference (eminent domain, etc.). The duty to uphold society includes other areas of criminal law, constitutional law, administrative law, and the duty of the sovereign to set up and maintain police and other agencies to uphold the law and courts and the legal system to adjudicate disputes, and also the duty of the citizen to inform himself about his society, to take part in the processes for electing a government, and to familiarize himself with the law.

These obligations form, as we have said, a firm and comprehensive basis for a modern legal system.

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<sup>3</sup> *Tosefta Avoda Zara 9:4, Talmud Bavli Sanhedrin 56-58.*