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Dethroning The Sovereign Individual: A Confucian Reconstruction of the Theory of Right Holding

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The Fate Symphony and Self-Salvation (Acknowledgement)

We all are not unfamiliar with the best-known, distinctive and impressive beginning four-note motif of Ludwig van Beethoven's the *Fate Symphony*, the Symphony No. 5. This four-note "short-short-short-long" motif is often understood as "fate knocking on the door" and it strikes a chord with listeners in leading them to empathise with how difficult real life could be and how we could fight back when fate knocks the door. The *Fate Symphony* echoes endless times of my PhD journey, therefore I would define this long, difficult, painful but finally happy-ending journey as my own Fate Symphony. This part constitutes the acknowledgement of my dissertation, I treat it not simply as listing a bunch of people to whom I would express my gratitude, but, more importantly, a sacred ritual I had since my undergraduate, in which I, alone, recalled the moments of sadness, confusion, hesitation and happiness during the journey of study, reflected on the setback I encountered and cheered for the achievement I gained, and, ultimately, drew a full stop of the journey.

Just like the motif of the *Fate Symphony*, fate knocked on my door many times my PhD journey. Having gotten stuck in the bottleneck for a long time without substantial progress, I felt myself lost in the endless long night without being able to see the dawn. There were a few critical occasions when I had to decide whether to quit my PhD program or continue the journey without knowing I could ultimately reach the finishing line. I started to question myself and even self-denied myself: am I still capable to pursuing my PhD degree? What does the title of "Dr" mean to me and my future career? Besides the difficulties I encountered in my dissertation, real life also played a "joke" on me: I experienced and got through the COVID-19 global pandemic, I fell ill unexpectedly, and the subsequent once-in-a-lifetime vicious inflation and cost-of-living crisis occurred in UK. It was a thunderstorm throughout the journey.

Every time I felt too much stress, *the Fate Symphony* always appeared on my earphones. I felt like I was having a dialogue with Beethoven at the spirit and soul level when listening to it. I kept reminding myself that it is always the darkest and

coldest period before dawn and the best way to respond when fate knocks on my door is to fight back as Beethoven did. In the *Fate Symphony*, the transition from the third movement to the triumphant and exhilarating finale begins is very quiet and hardly noticeable, with mainly the string group plucking the strings with fingers, rather than using the bow, to signify the calm and peace before the final victory. This resembles the countless nights when I was working alone in front of the laptop, achieving small milestones. This is a process of self-salvation, a process in which I re-recognise myself and prepared myself for the final viva.

The finale of the *Fate Symphony* finally resonates on my doctoral journey: I passed my viva without correction, an outcome I never expected. It is triumphant and exhilarating—I finally open the door on which fate kept knocking and I see the sunshine. I recalled the ending part of *The Uninhibited Life* (it is the acknowledgement of my master's dissertation and it had its own title as this one): 'I will soon go to the University of Edinburgh, UK, to continue my study, and it will be similar to *Journey to the West*[1] and I can anticipate this journey will definitely be full of difficulties, such as cultural differences and new challenges from academic research etc…', which was correctly anticipated, but I wrote to myself that I should not be inhibited by any secular difficulties and should pursue my spiritual integrity and freedom. I am glad I kept the promise: I composed my own *Fate Symphony* and I completed the finale.

Obviously I cannot complete this journey alone. First and foremost, I would like to thank Professor Tim Hayward and Dr. Euan MacDonald for being my supervisors. I appreciate your support and understanding when fate knocked on my door, otherwise, I might have been beaten by the difficulties I encountered during the journey. I also benefited much from the difficult conversations we had sometimes because they really pushed me to think about how to reach the finishing line of my PhD, what the contributions of my dissertation are, and something about self, career and future. The coffee chat one hour before the viva really gave me more confidence in viva. I would not be able to achieve the best outcome of the viva

[1] *Journal to the West*, or *Monkey*, is a Chinese novel that depicts the story that a Buddhist monk, Tang Xuanzang, travelled from China to central Asia and India, to obtain Buddhist classics, and he is accompanied by Monkey King , the well-known figure of this novel and his buddies, Zhu Bajie and Sha Wujing.

without your constant rigorous requirements for each chapter. I would also like to thank Professor Rowan Cruft and Professor Claudio Michelon for being the examiners of the dissertation. Your criticisms were extremely constructive and insightful, which inspired me to ponder further the gaps I need to bridge in the future. I really enjoyed the discussion throughout the viva.

I have been lucky to discuss the first chapter, especially my criticism of the Interest Theory of rights with Jiang Chengxiao. Your rich knowledge of civil laws helped me test the plausibleness of my argument, so I can properly refine my criticism of its problems. I owe my special thanks to Professor Jinghui Chen from Renmin University of China for helping me prepare the viva, the questions you raised led me to read broader literature before the viva and guided me to see the further development of each chapter. Your affirmation of my research potential has always been the drive for me to make academic progress. Also special thanks to my undergraduate tutor, Lecturer Yuanping Tang for the invaluable comments on the last chapter. You are always the role model as a Confucian scholar I admire. A further special thanks to Iris, Sheng, Sutat, Jieyu, Beijia and Zixun for helping me re-discover myself, allowing me to affirm that I am a person who aspires to success, perfectionism and a spirit of never giving up. I also received much helpful advice about viva from Dr Jiahong Chen, Dr Runguo Wu and Dr Yan Zhu and advice about life and marriage from Dr Canglong Wang. Also thanks Weibin for your friendship and emotional accompany since our undergraduate study. My study at the University of Edinburgh would not be possible without the scholarship from the China Scholarship Council.

Finally, I am deeply grateful for the patience, understanding and support from my family. We are connected and united together in the name of ‘family’ and we can thrive together when we empathise with the responsibility, difficulty and contributions that come with the social role that each one bears. I also missed very much those who passed away when I was pursuing my PhD, you are always in my heart.

Edinburgh, November 2023.

Abstract

This dissertation aims at developing a theory of right-holding not based on the concept of the sovereign individual, but based on the concept of the Confucian moral individual. The failure of the Will and Interest theories has its root cause in accepting John Stuart Mill's concept of the sovereign individual, but as Karl Marx and Evgeny Pashukanis point out, this concept shares the same logic of the commodity owner and it ultimately suffers from the problem of the logic of commodity form: assuming the egoistic, isolated and self-sufficient monad and inverting the logic between subjects and objects. The contemporary Chinese theories of right-holding try to respond to the Marxist critique here, but they all fail: they either completely abandon the concept of the sovereign individual, thus failing to explain the subjectivity of the right-holder or they retreat to the sovereign individual, and make the same mistakes again as the Will and Interest theories do. To rescue this problem, I argue that the concept of the sovereign individual should be replaced with the concept of the Confucian moral individual. The Confucian moral individual means an individual has innate moral inclinations which is capable of determining what an individual can do and what other people should and should not do to an individual and it can be used as the assumption of right-holding. Therefore, the Confucian theory of right-holding argues that the necessary but insufficient feature of right-holding is that holding a right indicates a justifiable ground for an individual to have the Hohfeldian entitlement(s) which has the peremptory force and can solve the problems that the two theories of rights fail to do.

Lay Summary:

My dissertation aims at developing a theory of right-holding that is not based on the concept of the sovereign individual, but on the Confucian concept of the moral individual. The reason for doing so is that the Will and Interest theories encounter difficulties in explaining the features of right-holders, but they are unable to rescue themselves. The Will Theory fails to explain the unwaviable rights, while the Interest Theory fails to explain some rights that are not beneficial to the right-holders. The cause of the problem of the Will Theory is that it relied on the concept of control, which is one of the elements that constitute Mill's concept of the sovereign individual. The cause of the problem of the Interest Theory is that the way rights benefit the right-holder it conceives solely originates from the way the Hohfeldian claim of non-interference against others, and the element of non-interference against others is another element that constitutes the sovereign individual. As a result, the two theories of rights are just two different faces of the sovereign individual. This well explains why they must stick to these two concepts respectively and why they ultimately fail to explain the rights above.

Karl Marx criticises the theory of right-holding based on the sovereign individual: the theory assumes an egoistic, isolated, and self-sufficient monad who is separated from his society, while he believes individuals should be a species-being and treat other people as an assistance rather than a limitation in realising one's rights. Marx and Evgeny Pashukanis further this critique by revealing that the logic of the legal form is identical to the logic of the commodity form, so the sovereign individual has his root in the commodity economy, and the prototype of the sovereign individual is actually the commodity owner, thus subject to the problem of commodity fetishism, an inversion of the logic between subjects and objects. As a result, the Will ad Interest theories turn out to be the commodity theories of rights, but in different forms.

The contemporary Chinese theories try to respond to the Marxist critique of right-holding, but they hold mixed views towards it. The Chinese socialist theory

of right-holding completely abandons this concept and adopts a class theory of rights, while the Chinese commodity theory of right-holding re-accepts it. However, the former theory cannot explain why some rights, such as the right to life, do not have an obvious class nature and it also fails to explain the subjectivity of the right-holder. The latter theory retreats to the Will and Interest theories, so makes the same mistakes as they do. The Chinese Confucian theory of rights attempts to argue that Confucianism is compatible with the concept of rights, but it also abandons the concept of the sovereign individual, and fails to explain the subjectivity of the right-holder. My theory of right-holding is built upon the lessons learned from the failure of the above theories.

The Confucian concept of the moral individual means that an individual has innate moral inclinations which help us explain the features of right-holding. More specially, the inclinations of righteousness and benevolence determine what an individual can do and the inclination of benevolence also determines that an individual should not interfere with another individual because being interfered with by others is not what an individual wants to happen to himself. Therefore, the necessary but insufficient feature of right-holding is that holding a right indicates that the right-holder holds a justifiable ground to have the Hohfeldian entitlement(s) and this ground includes the prescription of laws, a promise, a contract, etc. This theory can well explain unwaivable rights and rights that do not benefit the right-holders without relying on the concept of the sovereign individual and the commodity economy, but assumes an individual who is part of the society and can exercise rights altruistically, such as exercising political rights.

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Chapter 1: The Problems of the Debate between the Interest Theory and the Will Theory of Rights

Abstract: In this chapter, I offer an internal critique of the Interest and Will theories of rights, namely, they fail to achieve their goals in their own terms. More specifically, in terms of identifying right-holders, the Will Theory cannot explain unwaviable rights, while the Interest Theory fails to explain some rights that are not beneficial to right-holders. In terms of the peremptory force of rights, the Will Theory relies on the concept of control which is already problematic and it also misunderstands the Interest Theory's understanding of this feature, while the Interest Theory also fails because it cannot explain the peremptory force of some rights whose interests of an individual are neither justified or protected. The failure of both theories points to a common source that they conceive right-holders in a specific way, which accounts for the problems they have.

1. An introduction

Legal theorists have long been debating the nature of rights, trying to shed light on our usage and understanding of them. In this chapter, I will reveal the problems of the debate between the two main western traditions of rights, the Interest Theory and the Will Theory of rights.

Before I start my criticism of the two theories of rights, it is important to note the purpose of my criticism in this chapter. First, as I will show in this chapter, I will point out that both theories fail to achieve their theoretical goals in their own terms and their criticisms of each other do not pose a real difficulty to each other, unfortunately. By doing so, I will add my contribution to the current literature of this debate. Second, more importantly, I criticise these two theories not for the sake of the criticism itself, but for the sake of raising the question for the whole dissertation, thus laying the foundation for the rest of the chapters. Let me explain this in detail. When the problems of the two

theories of rights are revealed in this chapter, I will identify the root cause of them in the second chapter, which is that the two theories of rights implicitly accept the same concept as their assumption, John Staut Mill's concept of the sovereign individual. This concept depicts a unique normative status when an individual exercises his liberty in certain areas, which is then accepted by the two theories of rights. I will argue the acceptance of this concept is responsible for the problems of the two theories of rights identified in this chapter. I will also point out in the second chapter that the two theories of rights are united in the sense that they just display two different aspects of the concept of the sovereign individual and when we combine them together, they give us a complete image of the sovereign individual. These two chapters build up the theoretical target of the criticism of my dissertation and the rest of the chapters are designed to 'dethrone' the right-holder as the sovereign individual from a Marxist perspective and offer a reconstruction from a Confucian perspective.

1.1 The Will and Interest theories of rights

Let me begin by introducing the fundamental theses of the two theories of rights. The main thesis of the Will Theory is that: the sufficient and necessary condition for X to hold a right is that X has a control or choice over the enforcement of the right. The control here means that the right-holder can demand or waive the enforcement of duties. The contemporary representative of the Will Theory is H.L.A Hart and he formulates his most famous thesis on the Will Theory in his comparison between the duties of criminal laws and those of civil law:

> The crucial distinction, according to this view of relative duties, is the special manner in which the civil law as distinct from the criminal law for individuals: it recognises or gives them a place or *locus standi* in relation to the law quite different from that given by the criminal law…The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale

> sovereign to whom the duty is owed. The full measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or mandatory order to restain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise. [2]

According to this passage, we can see what 'control' means and how it functions in the Will Theory, namely, having a control in the hand of a right-holder is the sufficient and necessary condition for holding a right. Furthermore, the importance of this passage is not only that Hart formulates the representative thesis of the Will Theory, but also it shows that Hart adopts the concept of the sovereign individual in conceiving right-holding: he says an individual who has the right is a 'small-scale sovereign'. As I mentioned above, the concept depicts a unique normative status when an individual becomes a right-holder and the right-holder's ability to control the correlative duty is how the sovereign individual embodies in the Will Theory. At the current stage, I will not extend the discussion of the concept of the sovereign individual and the connection between Hart's Will Theory and this concept, as they will be analysed accordingly in chapter two, but it will be helpful to bear in mind that this concept is the key to unlocking the insight of the problems of the Will Theory I will point out in the rest of the chapter.

For the Interest Theory, Matthew Kramer points out that it mainly subscribes to the following two theses:

(1) Necessary but insufficient for the actual holding of a right by a person X is that the right, when actual, preserves one or more of X's interests.

(2) X's being competent and authorised to demand or waive the enforcement of a right is neither sufficient nor necessary for X to be

[2] H. L. A. Hart, 'Legal Rights', in *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Clarendon, 1982), 183–84.

endowed with that right.[3]

Kramer's arguments above abandon the Will Theory's thesis that having a control is required in holding a right; instead, he maintains that the protection of one's interest is the necessary but insufficient condition of holding a right. Besides Kramer, Neil MacCormick also provides a clear formulation of the theory. He points out three features of rules that confer rights:

> First, they concern 'good' (or 'advantage', or 'benefit', or 'interests', or however we may express the point). Whatever x may be, the idea of anyone's having a right to x would be absurd unless it were presupposed that x is normally a good for human beings, at any rate for those people who qualify as having the 'right' in question…Secondly, they concern the enjoyment of goods by individuals separately, not simply as members of a collective enjoying a diffuse common benefit in which all participate in indistinguishable and unassignable shares…Third, benefits are secured to individuals in that the law provides normative protection for individuals in their enjoyment of them.[4]

There are two main points of MacCormick's formulation here. First, similar to Kramer, MacCormick also argues that holding a right means a protection of one's interests and it has nothing to do with having a control in the hand of the right-holder, and this marks the main difference between the two theories of rights. Second, he mainly focuses on describing the features of holding a right and this is what Kramer means by saying 'necessary but insufficient for the actual holding of a right', namely, they try to find out the features of a right-holder rather than finding what makes a right-holder as the Will Theory does.

Joseph Raz is another representative of the Interest Theory and he defines rights below:

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[3] MATTHEW H. KRAMER, 'Rights Without Trimmings', in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Simmonds N.E., and Steiner Hillel (Oxford University Press, 2000), 62.

[4] MacCormick, 'Rights in Legislation', in *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, ed. P. M. S Hacker and Joseph Raz (Oxford: Clarendon Press, 1977), 204-205.

> Definition: 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.

Raz's definition above shows us that having a right indicates that an aspect of an individual's well-being is the ground for holding others to be under a duty.[5] Therefore, we can see that the commonness among the Interest theories is that the concept of interest is the key to understanding the feature of right-holding, either in the way that it is a ground of duties or in the way that holding a right protects the right-holder's interest.

Unlike the Will Theory, the Interest Theory does not say something directly about the concept of the sovereign individual and it may leave us the impression that the Interest Theory does not have any link with this concept. However, as I will argue in this chapter, the concept of interest the Interest Theory relies on originates from the Hohfeldian claim of non-interference against others whose paradigm is property rights and in chapter two, I will argue that the concept of interest defined above is consistent with one of the fundamental features of sovereign individual, which is that a sovereign individual cannot be interfered by the power of the society in certain areas of his conducts. At the current stage, I will not extend further the discussion of this point here and the purpose of pointing out the link between the Interest Theory and the concept of the sovereign individual is that I would like to remind my readers that the problems of the Interest Theory identified below have their root cause in this concept.

According to the summaries of the two theories of rights above, I point out that the focus of the two theories of rights is mainly on right-holding, because both theories mainly deal with the issues concerning one's holding a right. More specifically, they deal with the issues of identifying right-holders and the special feature of one's holding a right in legal reasoning, namely the peremptory force of rights. The former will be discussed in sections 2 and 3

[5] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986), 166.

and the latter will be discussed in section 4. In these sections, I will criticise that the two theories of rights fail in their own terms, namely, they fail to achieve what they are seeking to do—identifying right-holders and explaining the peremptory force of rights—and due to sticking to their own terms, they fail to respond to the criticisms, causing the stalemate of the debate. Besides the internal critique of both theories, the main contribution to the debate between two theories of rights is that I will attribute the problems of the two theories to a deeper root, which, I have shown briefly above, is the acceptance of the concept of the sovereign individual by both theories.

1.2 A Hohfeldian framework

To have a rigorous and consistent usage of the concept of rights throughout the dissertation, I will use Wesley N. Hohfeld's framework to analyse the Will and Interest theories. Hohfeld is a famous American legal theorist and he points out that our daily use and understanding of the concept of rights are loose and inaccurate because it usually conflates different categories of entitlements under the name 'right' and 'duty'. In his paper *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, he criticises the lack of discriminating analysis of legal relations and the reduction of all legal relations to 'right' and 'duties' in previous literature:

> One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties', and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests…[6]

[6] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,' *The Yale Law Journal* 23, no. 1 (November 1, 1913): 28, https://doi.org/10.2307/785533.

To correct this confusing usage of rights, he makes a subtle discrimination of different meanings under the names of ‘rights’ and ‘duties’ in a framework of ‘opposite’ and ‘correlative’ relations, which is as follows:[7]

Jural Opposites	rights	liberty	power	immunity
	no-rights	duty	disability	liability
Jural Correlatives	right	liberty	power	immunity
	duty	no-right	liability	disability

Diagram: The Hohfeldian framework and the Hohfeldian entitlements

Based on the opposite and correlative relations above, Hohfeld defines each position by showing its correlative and opposite legal positions rather than defining them by looking for synonyms directly. Therefore, the correlativity relation mainly denotes the mutual entailment between two legal positions that occur between two agents, whereas the opposite relation shows what the negative position is when an agent has a specific legal position.

Let me briefly expound on Hohfeld’s analysis of these eight legal positions. The correlativity between ‘right’ and ‘duty’ shows that a right is a claim over the duty bearer, requiring the counterparty to abstain from doing something or to assist in doing something; correlatively, a duty is then what owes to a right-holder’s claim.[8] A right can be specified by reference to a duty or a set of duties. To avoid the indiscriminating use of ‘right’, Hohfeld claims that a synonym that correctly matches the meaning above is the term ‘claim’[9]. Under the opposite relation, the negative position of having a right is the position of having no right.

The correlative relation between ‘liberty’ and ‘no-right’ shows that a liberty is an entitlement that one’s doing something is free from another’s right (the ‘right’ here actually means ‘claim’ in the sense Hohfeld specifies above).

[7] Hohfeld, 30.
[8] Hohfeld, 31.
[9] Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,’ *The Yale Law Journal* 23, no. 1 (1913): 32.

Under this definition, the correlative relation of a 'liberty' is that others are under a 'no-right' ('no-claim') position, which means that another's right (or claim) on the liberty-holder comes to nought.[10] He, therefore, claims that it is a *non sequitur* to conclude that having a liberty entails that a third party is under a duty. This, once again, justifies the necessity of correcting the mistake of the simplification of legal relations. In the jural opposite relation, a liberty is the negation of duty which means that a liberty to do something is that one is not under a duty not to do something a liberty not to do something is one is not under a duty to do something.[11]

The third relation is 'power' and 'liability'. Power means that a person's volitional control to make a change to a given relation and holds others to be under a liability, while a liability, is defined as being subject to a power without any resistance.[12] For example, an owner of personal property has the power to extinguish his own legal interest by abandoning the property. On the jural opposite axis, when one has a power, it means he is not in the position of disability. The correlative between 'immunity' and 'disability' shows that an immunity is an entitlement that renders a power of changing a legal relation disabled, and a person holding an immunity is not under a liability; a disability is correspondingly the position of no power.

These four pairs of fundamental legal relations can be further distinguished between two different categories: first-order relation and second-order relation.[13] 'Right' and 'duty' and 'liberty' and 'no right' are first-order relations in the sense that they apply directly to people's behaviour. 'Power' and 'liability' and 'immunity' and 'disability' are second-order relations because the basic function of 'power' and 'immunity' is to affect the first-order relation. For example, a power can change an existing first-order relations: when X sells

[10] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 1 November 1913, 33, 55.
[11] Hohfeld, 32.
[12] Hohfeld, 44.
[13] Matthew Kramer, 'Rights without Trimmings,' in *A Debate over Rights: Philosophical Enquiries*, by Matthew Kramer, N. E. Simmonds, and Hillel Steiner (Oxford: Oxford University Press, 1998), 20.

his bicycle, his property right is then alienated to the buyer, in which case he is exercising his power to modify the existing legal relations: his possession of the bicycle and his liberty to use it freely are then transferred. When the government attempts to exploit the bike without a justifiable reason, he has an immunity right to prevent this from happening and his right remains unchanged. In other words, it means the second-order relation cannot exist without the existence of the first-order relation.

The Hohfeldian framework is helpful for us to understand further the Will and Interest theories I have introduced so far. Let me begin with the Will Theory. What 'control' means in Hart's passage is the Hofheldian power, so 'right' only refers to claims that are paired with powers of enforcement or waiver over the duty. More specifically, the right-holder's control to waive or keep the duty, or to enforce or unenforced the duty when it is breached, or to waive or request the obligation of compensation is used in the sense of Hohfeldian power because, as Hohfeld's definition indicates, it makes changes to the first-order relation, in this case, the relation between 'claim' and 'duty'. On the contrary, if there exists a claim, but the control cannot be exercised, then a mere claim cannot be regarded as a right: 'Thus it is hard to think of rights except as capable of exercise and this conception of rights correlative to obligations as containing legal powers accommodates this feature.'[14] Based on this explanation, the core of the Will Theory lies in the Hohfeldian power and as I will show below, it is the main cause of the problems of the Will Theory and the rationale behind the emphasis on the Hohfeldian power can be traced back to the acceptance of the concept of the sovereign individual when understanding right-holding, which will be discussed accordingly in chapter two.

Now let me turn to the Interest Theory. Unlike the Will Theory, the Interest Theory does not commit to the necessary connection between the Hohfeldian claim and the Hohfeldian power in recognising a right-holder, as Kramer

[14] Hart, 'Legal Rights', 184.

argues: ‘The key point here is that a Hohfeldian claim can be combined in a single person with a Hofeldian power of enforcement/waiver but does not have to be so combined.’ Besides the difference above, we also need to distinguish the subtle difference of how rights protect the right-holder’s interests from the Hohfeldian framework. Kramer mainly uses the concept of right in the sense of the Hohfeldian claim, because he endorses Glanville William’s argument that ‘every right in the strict sense relates to the conduct of another’. ‘The conduct of another’ here refers to another’s Hohfeldian duty to forgo interference or provide assistance and it correlates with one’s Hohfeldian claim right. More specifically, a right-holder is a person who suffers from detriment when a duty owned to him is breached:

> Any person Z holds a right under a contract or norm if and only if a violation of a duty under the contract or norm can be established by simply showing that the duty-bearer has withheld a benefit from Z or has imposed some harm upon him. Proof of the duty-bearer’s withholding of a desirable thing from Z…must in itself be a sufficient demonstration that the duty-bearer has not lived up to the demands of some requirement. [15]

Therefore, we can see that Kramer refers rights mainly to the Hohfeld’s claim right because to identify the right-holder is to identify the performance of the duty which will bring benefit to the right-holder. However, Kramer points out that the Hohfeldian liberty works differently from the Hohfeldian claim with regard to how it affects others’ behaviour and how it protects one's interest. First, the focuses of the Hohfeldian claim and liberty are different. A Hohfeldian claim is specified by the action of the people who bear the correlative duties, while a Hohfeldian liberty is specified by the action of the people who hold the liberty.[16] In other words, a Hohfeldian claim does not directly tell us what a claim-holder can do because it only specifies the conduct of the duty-bearer, while a Hohfeldian liberty does not directly tell us what other people should do regarding one’s liberty, whether they are free to interfere with the liberty-holder or they bear the duty to assist in doing something. Second, the difference between the Hohfeldian claim and liberty

[15] KRAMER, ‘Rights Without Trimmings’, 81.
[16] KRAMER, 13.

determines how it protects one's interest respectively. As Kramer points out above, the claim-holder's interest is protected directly by another's performance of the duty. However, given that the Hohfeldian liberty does not specify how other people ought to behave, the interest of the liberty-holder is not protected directly by others' certain behaviour. The protection is mainly achieved, according to Kramer, by combining other rights that do not pertain to the liberty, such as the right to be free from physical assaults.[17] For example, one's liberty to consume her dinner does not require others under a duty to abstain from stopping one from consumption, but the liberty is protected by one's other rights, such as the right to be free from bodily attacks and the right to be free from theft of belongings. [18] Kramer's point above is very important for this chapter not only because this is how he understands the way rights protect the right-holder's interest, but also because this is how his theory gets wrong in understanding the concept of 'interest' and how this can be attributed to the acceptance of Mill's concept of the sovereign individual.

MacCormick, however, refers the concept of rights to all Hohfeldian entitlements, and his understanding of how rights normatively protect the interests of the right-holder is as follows:

> 'Normative protection' may be understood as involving any or all of the various modes identified by Hohfeld and others. Thus an individual A may in the relevant sense be 'protected' in his enjoyment of x if
>
> (a) Some or all other people are under a duty not to interfere with him in relation to x or his enjoyment of x,
>
> (b) he is himself not under any duty to abstain from enjoyment of, or avoid or desist from x (being therefore protected from any complaint as to alleged wrongful use, enjoyment, etc, of x),
>
> (c) some or all other individuals lack legal power to change the legal situation to the prejudice of A's advantage in respect of x (the case of disability/immunity),

[17] KRAMER, 11.
[18] KRAMER, 11.

(d) A himself is some respect enabled by law to bring about changes in legal relations concerning x in pursuit of whatever he conceives to be his advantage.[19]

According to the passage above, he does not limit his discussion of rights to the Hohfeldian claim-duty relation as Kramer does when he explains what the protection of one's interests means, but even so he cannot avoid making the same mistake as Kramer does: both of them conceives the concept of interest as conferred by the Hohfeldian claim of non-interference.

So far, I have introduced the basic principles of the Will and Interest theories and interpreted them within the Hofeldian framework. In the next section, I will point out the problem of the two theories based on the work above.

2. The problem of the Will Theory in identifying right-holders

2.1 An easy victory against the Will Theory?

Recall Hart's Will Theory above, the necessary and sufficient condition of becoming a right-holder is having a control, a Hofeldian power, over the correlative duty. This thesis receives much criticism from other right theorists because it significantly reduces the range of right-holders. For example, infants and the mentally disabled are excluded as eligible right-holders because they are incapable of exercising their control over the correlative duty. Hart, in his early paper *Are There Any Natural Rights?* admits that people should not extend the notion of rights to babies because it is adequate to say that it is wrong or we ought not to ill-treat them or we have a duty not to ill-treat them.[20] What he means here is that people can consider babies as beneficiaries of the duty of protecting them, but it is inadequate to grant rights to them as they lack the capacity to make claims or waive the duty.[21] Such a thesis seems to contradict our ordinary understanding of rights and our

[19] MacCormick, 'Rights in Legislation', 205.
[20] H. L. A. Hart, 'Are There Any Natural Rights?', *The Philosophical Review* 64, no. 2 (1 April 1955): 181. In Hart's original context, he also mentions that animals cannot have rights. For the purpose of my chapter here, I will not discuss the issue of animal rights.
[21] Hart, 180–81.

intuition: we have no difficulty in finding babies having rights in modern legal systems. Many theorists have argued that the Will Theory makes a mistake in denying the rights of children or mentally disabled people, while they do have rights in most legal systems. As an opponent of the Will Theory, Kramer comments that:

> One of the most arresting theses to which the Will Theory commits its upholders is the verdict that children and mentally incapacitated people have no rights…even when stripped of its ghastliness by being carefully explained, such a view tends to sound outlandish when stated.[22]

Leif Wenar expresses the same concern for the Will Theory as Kramer does:

> The limitations of the Will Theory are also evident in its inability to account for the rights of incompetent (e.g., comatose) adults, and of children…this is certainly a result at variance with ordinary understanding. Few would insist that it is conceptually impossible, for example, for children to have a right against severe abuse.[23]

Rowan Cruft's conclusion of the Will Theory is even more straightforward: the theory must be rejected due to the problem summarized above:

> The Will Theory must be rejected... Young children, adults with mental health problems and animals lack the ability to waive or enforce their claims, but it seems misguided to infer simply on this basis that young children, adults with mental health problems therefore lack rights.

An easy victory seems to be declared against the Will Theory among these theorists, according to the arguments above. However, I would like to pause here and challenge the victory here by asking a few questions. Did Hart, as an outstanding legal theorist in the 20th century, and his followers, not notice the bizarreness of his theory and make no reasonable defense? Or is his defence neglected by other theorists? My answer is that while facing such criticisms, the Will Theory does not fully utilise the useful resources it already has and

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[22] MATTHEW H. KRAMER, 'Rights Without Trimmings', in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Simmonds N.E., and Steiner Hillel (Oxford University Press, 2000), 69. https://doi.org/10.1093/acprof:oso/9780198298991.003.0002.

[23] Leif Wenar, 'The Nature of Rights', *Philosophy & Public Affairs* 33, no. 3 (1 July 2005): 240.

fully defends itself and the situation is worsened by other rights theorists misunderstanding or neglecting the effort the Will Theory has made. Let me review how the Will theorists respond to those criticisms first.

Hillel Steiner admits that the amount of right-holders under the Will Theory definition is smaller than the one under the Interest Theory and it causes morally unacceptability: 'And hence, especially in our current cultural climate, a theory that denies us the latitude to regard that protection as owed to them as a matter of their rights, appears to place itself well beyond the pale of moral acceptability.'[24] Normally, from a reader's perspective, Steiner is expected to justify why the Will Theory insists on such a counter-intuitive conclusion, or how the Will Theory can possibly accommodate the rights of those people in a way that people do not realise, so the Will Theory may seem acceptable. However, he switches the main focus, immediately after the admission above, to the question of who should be the culprit of this problem: 'I presume that the main path of rejoinder must lie in the usual direction: namely, seeking an alternative culprit who can be held responsible for this daunting prospect.'[25]

Steiner's defence strategy here should be reflected even before we know which culprit he finds to be responsible for this problem. His assumption of the above strategy is that the problem of the Will Theory does not originate from the theory itself, but from something external, and, accordingly, he can rescue the Will Theory by solving the problem of that external factor. This assumption, at least at this stage, contradicts the definition of the Will Theory itself. As we have seen above, the exclusion of certain groups of people from having rights relies on Hart's criteria for identifying right-holders, which is the power to claim, enforce, or waive the correlative duty. This is the main reason that causes the criticism of the Will Theory and it is internal to the theory itself. Therefore, we

[24] Hillel Steiner, 'Working Rights', in *A Debate Over Rights* (Oxford: Oxford University Press, 2000), 259.
[25] Steiner, 260.

need to be cautious about why Steiner attributes the problem to something external.

Having said that, we still need to see what culprit he finds is the cause of the problem of the Will Theory. His conclusion is the claim that rights are morally peremptory:

> Fortunately, we don't have to search all that far to find a likely villain… One of these might appear to be the proposition which we've just previously encountered: the claim that rights are morally peremptory. Isn't it precisely this claim—or, at least, the belief that it's one which is widely endorsed—that largely explains the motivation of those many different campaigning groups who urge the correlation of our duties to protect unempowerable creatures' interest with rights vested in those creatures themselves?

What he means here is that we should think about the question of why the rights of the unempowerable are peremptory before we criticise the Will Theory. He criticises this claim by criticising the reasons why people emphasise the peremptory force of rights.[26] By 'peremptory' he means that rights are assigned the status of 'trump' in relation to other moral values.[27] As the issue of the peremptory force of rights is another topic of this chapter, I will deal with it in detail later. The first reason Steiner argues is that the number of moral duties in our society is greater than what people can bear, and the duties to protect the unempowerable are more important among all those duties, so we should secure the peremptory status of rights for these people. However, he points out that even if we admit that some of the duties are morally peremptory, it does not imply that they need to be recognized as rights. The second reason, on the contrary, is that some people deviate from those duties, so we need to emphasise those duties and the correlative rights. By identifying these two reasons, he concludes that the moral unacceptability mentioned above by other right theorists should be attributed to the reasons above, not to the Will Theory:

[26] Steiner, 260–61.
[27] Steiner, 257.

> It seems clear that our current cultural climate is amply beset by both these sorts of deficiency: conduct reflecting either wrongly prioritized duties or utter neglect of them…What is clear, however, is that the blame for our being confronted with the aforesaid dismal moral prospect should be borne by that climate--by those whose conduct betrays these deficiencies—and not by the Will Theory.[28]

By combining my first concern above, Steiner's criticism above looks even more problematic from two perspectives. First, as mentioned above, he wrongly looks for something external to criticise. So even if we accept his criticism as valid that duties being morally peremptory does not mean granting correlative rights, or people simply neglect those duties, it will not rescue the Will Theory from being criticised that they deny the rights of those unempowerable. This leads to the second problem of Steiner's criticism, which is more important. So he not only misses the internal question of why they deny children and the mentally disabled to have rights, but also, even worse, begs the question. When he admits that duties to protect the unempowerable are morally important but that does not mean they can be recognised rights, he already assumes that those people do not have rights. As a result, he begs the question here because what we expect him to explain exactly is why the unempowerable cannot have rights, but he skips answering this question by adopting his strategy above.

What is more confusing is that he seems to reverse his position above and acknowledges that the Will Theory can accommodate the rights of the unempowerable differently. The core of his argument is that the unempowerable can have rights, but the control is transferred to the people who are qualified to protect their interests and I will call it 'the separation thesis':

> What scintilla of a practical or analytical difference can it make if we construe the rights correlative to those protection duties as ones held by

[28] Steiner, 260.

> those power-possessors rather than ones held by unempowerable creatures? As far as I can see, none.

The separation thesis here can be a double-edged sword for him. On the one hand, by accepting the separation thesis, Steiner undermines himself because his criticism of the cultural climate does not make sense. If a child can have right when his control of the duty is passed to his parents, then it is consistent with the cultural climate that duties to protect them is morally important and the children should be granted correlative rights or if people fail to perform the duty, his parents can claim on his behalf. Therefore, it confirms further my criticism above that Steiner's criticism of the cultural climate is irrelevant and unnecessary.

Except for the problem above, on the other hand, the separation thesis seems to offer an effective defence for the Will Theory because it does not limit the holding of the claim solely in the hand of those who lack the capacity to exercise it; their agents, such as parents, can exercise it on their behalf. If we accept this thesis, Kramer's criticism below seems to force the Will Theory to accept a thesis to which it does not commit:

> Not only does the adherent of the Will Theory submit that claims must be enforceable if they are to qualify as genuine claims—a proposition with which any adherent of the Interest Theory would firmly agree—but he also insists that the claims must be enforceable and waivable by the claim-holders if the claims are to qualify as rights.[29]

According to the separation thesis, the Will Theory does not insist that the right-holder and the claim-holder must be the same person, so Kramer's criticism here is unfair to the Will Theory. Compared with Steiner's first defence, the separation thesis looks like a more reasonable defence of the Will Theory. Given the thesis is important to the Will Theory, it deserves a more detailed analysis.

[29] KRAMER, 'Rights Without Trimmings', 64. Italic is added by the author.

This thesis does not originate from Steiner but from Hart. For him, while he emphasizes that it is hard to think of rights without the ability to exercise the claim, he adds a footnote to further clarify what he means here and that footnote can be understood as providing a complete elaboration of the separation thesis. He says:

> Where infants or other persons not *sui juris* have rights, such powers and the correlative obligations are exercised on their behalf by appointing representatives and their exercise may be subject to approval by a court. But since (a) what such representatives can and cannot do by way of exercise of such power is determined by what those whom they represent could have done if *sui juris* and (b) when the latter become *sui juris* they can exercise these powers without any transfer or fresh assignment; the powers are regarded as belonging throughout to them and not to their representatives, though they are only exercisable by the latter during the period of disability.[30]

The core of Hart's definition above is that rights still belong to infants, even if their power is temporarily passed to their parents. First, the content of rights that the representative can claim depends on the ones that infants can have when *sui juris*. Therefore, we can claim that the right that the representative can exercise is derivative and cannot exist on its own. Second, this point is further confirmed by that their representatives only hold the power temporarily and will return it to infants when they become *sui juris*. Hart's defense here is echoed by N.E Simmonds who does not even bother to formally respond to the criticism above. Similar to Hart, he only adds a response in the footnote:

> In what follows I ignore MacCormick's most well-known criticism of the Will Theory: that the theory must deny that children have rights. The argument is not one that has ever impressed me, although some find it compelling. The present essay concerns legal rights, and Hart offers a quite persuasive set of reasons for ascribing legal rights to children

[30] Hart, 'Legal Rights', 184, n86.

> even when the relevant powers of waiver and enforcement are exercised by adults.

Further clarification can be made by asking who is the small-scale sovereign, in Hart's terms, in the above situation when the right-holder and the power-holder are not the same. The issue occurs when there is disagreement on who should be regarded as the sovereign individual. Wenar admits that Hart made a defence of the Will Theory in the footnote above, but he criticises that Hart had to compromise the central thesis of his theory to realise his defence:

> Hart did in a footnote allow that children can have rights, which rights are exercised by their representatives, e.g., parents. Yet he was only able to reach this position by suppressing the central will theory thesis that a right-holder is sovereign over the duty of another.[31]

Wenar did not specify why Hart must suppress the central thesis of the Will Theory. The possible explanation is that he may misunderstand Hart's definition of the small-scale sovereign. When the right-holder holds the control in his own hands, then the small-scale sovereign is the right-holder himself who exercises the control and to whom the correlative duty is owned. Given that Hart's theory of rights emphasises the control over the duty and further elaborates the concept of control from three perspectives—the power to waive or claim the duty; the power to enforce or unenforced the performance of duty; the power to waive or claim the compensation when the duty is breached—it naturally leaves us an impression that the ability to control is the core element of constituting a small-scale sovereign.

However, a question is raised immediately when it comes to the case in which the right-holder and the power-holder are not the same people, then we are required to ponder over who the small-scale individual is. Are infants or their parents small-scale sovereign? Wenar seems to treat parents as small-scale sovereigns in this case because he argues that if we treat

[31] Wenar, 'The Nature of Rights', 240, n26.

children as right-holders, we have to sacrifice the thesis that a right-holder is sovereign, then this can only mean that the small-scale sovereign is parents, not the children, from his perspective.

However, Wenar neglects Hart's defence above. The criteria for identifying the small-scale sovereign under the separation thesis should be the ownership of the right, rather than who exercises the right. As Hart points out above, what parents can or cannot do depends on what rights infants have. Let me elaborate further on his point below. Due to the health and mental conditions of infants, the rights they have are designed and granted to them specifically by the legislation. For example, infants have the right to be taken care of, such as feeding them with adequate food and providing them with clothes, while a healthy adult does not have this right unless becomes mentally disabled. Infants also have the right to education when they reach a certain age and the purpose of this right is to guarantee that they grow up with adequate knowledge and form a correct outlook. These rights belong to the infants, not to their parents, though their parents may exercise them on their behalf. Furthermore, the ownership of rights also manifests in that the correlative duties are owed to infants, not to their parents. A similar example can better illustrate the relationship here. A king can delegate his power to his ministers and his ministers exercise on his behalf when he is unable to exercise his power, for example, being ill. However, delegating his power to his minister does not change his status of being a sovereign and the owner of the power.

According to my analysis above, unlike the theorists I mentioned above who declare an easy win against the Will Theory, I, on the contrary, argue that Hart's Will Theory can perfectly accommodate the rights of children and the mentally disabled people because he makes a substantial revision of his theory in this aspect by advancing the separation thesis, thus successfully defending his theory from the criticism above. Therefore, it is unfair to criticise the Will Theory that it denies children to have rights because Hart is

not committed to this conclusion after he develops the separation thesis. It is confusing why an easy win against the Will Theory can be declared by those theorists. If the theorists want to prove that the Will Theory is wrong in this aspect, they bear the burden of proving that Hart's separation thesis still cannot justify that children are eligible to have rights. However, no such argument is found in the above criticism.

I will end this section by reviewing Neil MacCormick's criticism of the Will Theory in this aspect. Like other theorists above, he also contends that the will theory should be abandoned because it cannot ascribe rights to children. But he does a more reasonable job than other theorists by criticising Hart's separation thesis. He says:

> For the case we are considering, the tactic is unemployable. Standardly, in the case of children, the party who in legal (or indeed in social) matters acts on a children's behalf is his or her parents or guardian. But it is at least possible to imagine a legal system in which a parent's duty to care for and nurture his or her own child is neither subject to the parent's issuing a self-directed request on the child's behalf nor indeed to any possibility of waiver by the parent as the child's representative. That is so whether or not the law accords to the parent's powers of waiver or enforcement over duties owed to the child by third parties. What is more, speaking morally, there seems to be no reason whatever to suppose that child or anyone acting on the child's behalf should be permitted or empowered to waive the parental duty or in any sense to acquiesce in its non-performance.

MacCormick's criticism is problematic because he begs the question. As I have shown above, Hart's point is that children can have rights because their parents exercise the power on their behalf. However, what MacCormick repeats above is that the parents' having the power of waiver and enforcement on children's behalf is insufficient to make children become right-holders. Then it means no more saying that: Hart's thesis that parents' having powers on behalf of the children can be the reason that children have rights is

unemployable because parents' having power cannot be the reason that children have rights. Therefore, it is a pity that MacCormick did not provide a substantial challenge to Hart's defence.

2.2 A real problem for the Will Theory

As I pointed out above, the real problem of the Will Theory is not that it exclusion children and the mentally disabled people from having rights. On the contrary, I fully support that Hart successfully defends the Will theory against the criticisms by adopting the separation thesis. However, the real problem for the Will theory is that by adopting the separation thesis, it traps itself in a self-contradicting situation, which ultimately hampers itself and leads to the failure of the theory.

While the separation thesis does explain how children can have rights in civil laws, such as the right to be cared for, it neither explains unwaivable rights, which is another issue being criticised, nor rescues the theory itself. Now let me discuss the issue of unwaivable rights. In most legal systems, people have rights not to be tortured and not to be assaulted and other people bear duties not to torture and assault others. However, laws prohibit the right-holders of these rights to waive correlative duties. For example, laws prohibit one from waiving someone else's duty not to torture. Similarly, laws prohibit killing innocent people and it is not permitted to waive the duty of not killing oneself even if he agrees. The failure to explain the unwaivable rights of the Will Theory has been identified by other theorists. For example, Wenar criticises that the Will Theory is implausibly narrow in the range of rights:

> For example, you have no legal power to waive or annul your claim against being enslaved, or your claim against being tortured to death. The will theory therefore does not recognize that you have a legal right against being enslaved, or against being tortured to death. Yet most regard these

unwaivable claims as rights, indeed as among the more important rights that individuals have.'[32]

Kramer also criticises that the separation thesis cannot explain unwaivable rights:

> Hart was still not willing to allow that the unwaivable duties established by the criminal law are correlative with any individual rights, and the reasoning in the passage on infants would manifestly not cover the unwaivable entitlements that are ordained by minimum-wage laws, for example… a more common reason for the unwaivability is that it helps to prevent the overall scheme from collapsing and that it serves the long-term interests of most workers.[33]

He further points out a serious problem caused by the Will Theory's emphasis on the power of waiver. His logic is that the more important interests, the fewer control laws give to people or even deny, such as the interest of not being assaulted; the less important interests, the more control laws give to people, such as the interest of property. Then, according to the Will Theory, people have few or no rights to more important interests, but have more rights to less important interests, which is against the common understanding of rights:

> …extremely important interests such as one's interest in remaining alive are typically protected by inalienable claims, whereas a variety of less important interests such as one's interest in retaining one's possession of certain books are typically protected by alienable claims…Yet we thus are forced to conclude that—according to the Will Theory—the firmest protections of our truly vital interests do not amount to rights, whereas the less formidable protections of relatively inconsequential interests do amount to rights.[34]

Kramer's criticism seems plausible, but, as I will show below, he did not touch upon the core of the problem of the Will Theory. Therefore, his criticism has been refuted easily by the Will Theory. I will show below that, even though the

[32] Wenar, 239.
[33] KRAMER, 'Rights Without Trimmings', 70.
[34] KRAMER, 70.

Will Theory successfully defends itself against criticism from the Interest theorists, it is a pity that it ends up hampering itself by its own standard, which is the separation thesis.

Steiner defends the Will Theory against the criticisms above by adopting the separation thesis. He first admits that private citizens lack discretionary control over criminal-law duties, while they have such control in civil laws.[35] For criminal-law duties, one's consent is insufficient to waive them, which is known as 'consent is no defence', while for civil-law duties, one's consent does constitute a defence against a breach of duty.[36] He then appeals to the separation thesis to solve this problem and the logic is to prove that, though citizens do not have the power to waive duties of criminal laws, the officials have this power, just like the case of children I discussed above, in which it is just that children pass the power to their parents. Let us see how he develops his argument here.

He assumes there exist subordinate officials and their superiors. The superior officials can delegate the subordinate ones to demand proceedings for the enforcement of the duty of criminal laws or they can withhold the power and delegate the subordinate ones to waive proceedings for the enforcement of the duty. He, therefore, concludes that having the power to demand enforcement and waive proceedings for the breach of duty, criminal duties are owed to superior officials, not to the victims of those breaches.[37] What he means here is that although citizens do not have the power to waive duties of criminal laws by themself, this power is actually transferred and held by superior officials and the latter exercise them on behalf of citizens, so citizens still have rights of not to be killed or tortured, for instance. This is the same as the argument Hart makes in the case of children.

[35] Steiner, 'Working Rights', 251.
[36] Steiner, 251.
[37] Steiner, 252.

But he further considers an objection that even superior officials can waive the duty *ex post*, but they lack the power to waive the duty *ex ante*.[38] For example, therefore, the Will Theory bears the burden not only to prove that superior officials can waive the duty not to rob others when the duty is breached but also to prove that superior officials can waive the compliance with the duty not to rob *ex ante*. The objection here is, in Hohfeldian terms, to say that superior officials have a disability. He develops a conceptual argument to counter this objection: if an official cannot waive a person's duty not to rob, then it means that such an official has a disability that is unwaivable by the holder of the correlative immunity, and such an immunity is held by a superior official.[39] If the superior official holds an unwaivable, he, in turn, has a disability, namely the disability to waive the subordinate's disability. As a result, another higher official must hold an immunity correlative to the disability. And if this higher official is also unable to waive the immunity, then there must be an even higher superior official holding an immunity. Therefore, Steiner argues that we can only stop this infinite regress by an immunity that is waivable:

> Unwaivable immunities (eventually!) entail waivable ones. So, yes, there can be unwaivable immunities. But what there can't be are unwaivable immunities without there also being a waivable one…What this demonstrates is that state officials' disabilities cannot be absolute ones…And even if a constitution disables some superior official from waiving it, Hohfeldian logic dictates that there must be some still more superior official in a position to release him or her from that disability.[40]

According to his argument above, there exists a state official in some position to waive that immunity, thus holding the power to waive the duty not to rob. He, thus concludes that the Will Theory can ascribe rights in criminal law because there is no conceptual distinction between the relationship between superior officials and citizens and the relationship between children and parents—both are instances of delegation. Before I reveal the problem of Steiner's argument

[38] Steiner, 252.
[39] Steiner, 253.
[40] Steiner, 254.

above, it does constitute a reasonable defence against Kramer's criticism above because it shows us how the power to waive duties of criminal laws can be exercised by state officials, thus making citizens as right-holds, same as the case of children.

Except for Steiner's excitement about his argument, the argument is problematic from two perspectives. First, Steiner uses the Hohfeldian legal relationships mistakenly. The disability of an official to waive the criminal-law duty is correlative to an immunity of a citizen who bears that duty, not to an immunity of a higher official.[41] The power or the disability to waive the duty here is the second-order Hohfeldian relations because they exist only for the alteration of the first-order relations, in this case, legal rights of criminal laws and correlative duties to those rights, such as the duty not to rob. Therefore, if the official has a disability to waive the duty not to rob, then it means that the legal relation remains unaltered—citizens still bear the duty not to rob—a Hohfeldian immunity. Then what is the relationship between subordinate officials and superior ones? As Stein points out, it is an instance of delegation and it is a first-order relation, which is about what the officials can and cannot do. If a superior official delegates the power to waive the duty not to rob to a subordinate, if the legal provisions allow that, then we can say the subordinate receives that power to waive the duty not to rob, as he now acts on behalf of the superior one. If a superior does not delegate such a power to a subordinate, then the subordinate is under the duty not to waive the duty not to rob, or he does not have the liberty to waive the duty. In other words, correlatively, the superior official has a right to exercise that power. From the perspective of the duty-bearer, when the subordinate official does not have the power to waive the duty, the subordinate official has a disability and the duty-bearer has an immunity. Once again, it is a mistake to claim that the subordinate official's disability correlates to the superior one's immunity.

[41] A similar criticism can be found here: Siegfried Van Duffel, 'The Nature of Rights Debate Rests on a Mistake', *Pacific Philosophical Quarterly* 93, no. 1 (2012): 114.

However, though the criticism of Steiner above is valid, it does not pose a real challenge to Steiner. It can be easily refuted by the Will Theory that the mistake made above is only terminological and it does not pose any substantial difficulty to the separation thesis. As Steiner points out, the power to waive duties of criminal laws does exist in some legal systems:

> Now there are many legal systems where superior state officials clearly do have this power. Having it, they're at liberty to exempt persons from compliance with an otherwise general criminal-law duty such as that not to rob or, in James Bond's case, to kill: they can confer privileges and immunities upon themselves and others.[42]

If the relationship between citizens and state officials is understood as delegation, the same as children and parents, then the superior official's power here, regardless of what it is called, can be seen as transferred by citizens to officials, and the latter act on the behalf of the former. Then citizens still have unwaivable rights, such as the right not to be robbed, because the power is just held by the official.

Steiner's defence seems reasonable if we just focus on his application of the separation thesis in the criminal law area above. However, a serious deviation from Hart's separation thesis, which he is committed to supporting, can be found when he admits the following fact in response to Kramer's criticism: 'what's certainly true is that *private citizens* lack such powers over criminal-law duties.'[43] A significant difference between Steiner and Hart can be found below. For Hart, the assumption is that children are granted rights and the range of rights parents can exercise on behalf of children is decided by what children have if *sui juris*. In other words, parents cannot do something beyond the content of children's rights. For instance, parents cannot claim to vote on behalf of infants because the latter does not meet the criteria for becoming electors. We can call this the principle of consistency of the separation thesis: it means that although the right-holder and the actual power-holder are

[42] Steiner, 'Working Rights', 253–54.
[43] Steiner, 251. Italic is added by the author.

separated, what the latter can do or cannot do is consistent with what the former can do or cannot do.

According to this principle, when Steiner says private citizens lack such powers, the only conclusion he can draw from here is that state officials lack such powers too if he would like to stick to Hart's separation thesis. Then the conceptual regress he developed above does not even exist because no official has the power to waive duties of criminal laws. The only possible explanation of Steiner's defence here may be that the power to waive duties of criminal law is a completely different kind of right held by state officials, while he may not realise he made such an argument. The legal consequence here is that new legal relations are created when state officials have some rights that citizens do not have. For example, when an official can waive the duty not to rob, then the duty-bearer has a liability correlative to the official, which is to have his duty waived. We should note that such a power-liability relation is a new legal relation that does not exist in the relation between citizens and duty-bearers. As a result, the relationship between citizens and officials is no longer a delegation, because the latter can do something that cannot be done by the former.

Moreover, Steiner's mistake further damages Hart's thesis. Since state officials have rights that citizens do not have, then state officials become right-holders and small-scale sovereigns in this case. This is surely not what Steiner expected to see. His strategy is to claim that although citizens cannot waive duties of criminal laws, they are not denied as right-holders because the power is just passed to state officials. Unfortunately, the case of rights in criminal laws is different from the case of rights in civil laws, so Steiner's strategy is doomed to failure. In the case of children, children have some rights as adults do, such as the right to life and they also have some rights that are specific to themselves, such as the right to be cared for. As I mentioned above, it is a reasonable and successful defence that the parents act on behalf of the children, so the fact that children are unable to control

correlative duties does not constitute a problem for the Will Theory. However, it is a mistake to apply the separation thesis in the case of criminal laws. As Steiner admitted citizens do not have the power to waive criminal-law duties, then the state officials' exercise of this power is not on behalf of citizens, so it cannot constitute the justification for the citizens to have rights as the case of children does. As a consequence, the Will Theory cannot accommodate unwaivable rights, such as the right not to be killed by appealing to the separation thesis.

The real problem for the Will Theory above is that it puts itself in a dilemma. On the one hand, Hart's separation thesis well refutes the criticism that the Will Theory mistakenly excludes children and the mentally disabled people from being right-holders and defends itself perfectly. It is a pity that other rights theories ignore his defence here, thus it is unfair to criticise the Will Theory for a conclusion to which they are not committed. On the other hand, the Will Theory cannot rescue itself against the criticism that it cannot accommodate unwaivable rights, specifically rights of criminal laws. Steiner attempted to copy Hart's successful experience and further defended the theory, but he neglected the difference between the two cases, especially the fact that citizens lack the power to waive criminal-law duties. His mistake here leads to a completely different conclusion he may not even realise that state officials who have the power to waive are right-holders and small-scale sovereigns, not citizens who should have been right-holders under his theory.

Besides appealing to the separation thesis, the Will Theory also tries to rescue itself in another way. N.E Simmonds, who supports the separation thesis as Steiner does, refutes the criticism above by arguing that legal rights are not conferred by criminal laws, but by private laws, though some of them are protected by criminal laws.[44] He says: 'Perhaps we have moral rights not to be murdered or assaulted, and perhaps the criminal law is aimed in part at

[44] N.E. SIMMONDS, 'Rights at the Cutting Edge', in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Simmonds N.E., and Steiner Hillel (Oxford University Press, 2000), 230, https://doi.org/10.1093/acprof:oso/9780198298991.003.0003.

the protection of such moral rights, but these rights are not conferred by criminal laws and are, to that extent, not themselves legal rights.'[45] On the contrary, he argues that the right not to be assaulted and the right to property, for instance, are private law rights that are manifested in civil laws. Simmonds endeavours to demarcate civil laws and criminal laws here, so no matter what criminal laws limit the power to waive duties of criminal laws, it does not affect the rights of civil laws. At first glance, Simmonds' argument seems reasonable, because I can have the property right of my items while criminal laws forbid me from waiving the duty not to rob my items. Similarly, I can have the right to life while criminal laws forbid me from waiving the duty not to murder me.

However, the argument cannot withstand further scrutiny. What Simmonds says here is that as long as civil laws grant rights to right-holders, it does not matter criminal laws play no role in deciding whether one can become a legal right-holder or not. As I mentioned above, the real problem for the Will Theory is that it cannot explain those unwaivable rights. However, Simmonds's argument only creates more confusion rather than clarifying it. Arguing that criminal laws do not confer rights does not automatically discharge the burden to prove why people can have some civil-law rights under the Will Theory when their power to waive others' duties is deprived. For example, although we keep emphasising that criminal laws prohibit the power to waive the duty of not to murder, waiving such a duty can hardly be found in civil laws either. In other words, one's consent here is not a defence to murder, and the power to waive the duty is also strictly limited.

The Will Theorisst may try to refute my criticism by arguing that the best example to discuss here is the property right and Simmonds does say that 'the most obvious example' of this case is the rights of property. It seems true that I have full control of my property, such as using, selling, or disposing of it. However, if I own an expensive Rolls-Royce car and someone steals it, then the theft is a serious criminal offence and I cannot waive the duty not to be

[45] SIMMONDS, 230.

stolen, because the value of the car exceeds a certain threshold and the police must intervene. Therefore, we may admit that, as Simmonds says, criminal laws do not play a role in conferring legal rights, but they still step in the situation in which some behaviors are seriously harmful to individuals and the public and, as a result, the right-holder's control over the duty should be limited. Under such a situation, people do not have rights as they do not have the control over the correlative duty. Then, when Simmonds argues that civil laws confer legal rights, the only reasonable conclusion we can infer from here is that such rights can exist without people having control over the duty, which deviates from the central thesis of the Will Theory.

In summary, we need to make a fair judgment of the Will Theory. As I showed above, the Will Theory has undergone much development since Hart developed the theory. Though Hart originally excluded children from being right-holders, he corrects this mistake by introducing the separation thesis. I fully endorse his revision of the theory here because the thesis well accounts for a common situation in which a delegation is needed for certain groups of people who are unable to exercise their rights due to young age or mental conditions. Therefore, as long as guardians exercise rights on behalf of those people, those people can become right-holders even though they are incapable of exercising rights themselves. The significance of Hart's revision here should not be ignored. First, the Will Theory should not be criticised for excluding children or mentally disabled people, an easy win against the Will Theory declared above only neglects Hart's revision here. Second, the separation thesis provides an opportunity for the supporters of the Will Theory to further develop the theory and we can see the attempt to solve the issue of unwaivable rights by constructing the relationship between citizens and officials as a delegation. Though I pointed out the attempt was unsuccessful, I do not see much debate focusing on the thesis from both supporters and opponents. Having said that, the Will Theory is still facing the difficulty that they cannot accommodate rights that cannot be waived by right-holders. It does not make sense to our common usage of rights why having the power to

waive the duty is a sufficient and necessary condition of identifying a right-holder.

3. The problem of the Interest Theory in identifying right-holders

3.1 Third-party beneficiary

The common critique of the Interest Theory is the problem of third-party-beneficiary: the Interest Theory is criticised that benefiting from the performance of a duty is not enough to make a person become a right-holder.[46] The classic critique comes from Hart:

> X promises Y in return for some favor that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who has or possesses these rights. Certainly, Y's mother is a person concerning whom X has an obligation and a person who will benefit by its performance, but the person to whom he has an obligation to look after her is Y…Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has a right.[47]

According to Hart, Y's mother is not a right-holder, even though she is the beneficiary in this case, because the promise is owed to Y and it is Y who has a claim upon X or waives the claim. Therefore, he claims that the notion of rights is not always identical to that of being benefited by the performance of a duty. This problem seems to become worse when there exists a chain of people who are connected to the above case by also benefiting from the performance of the duty, then a proliferation of right-holders occurs.[48] Suppose another person Z is waiting to be looked after by Y's mother when she is well looked after by X, so if Y's mother is well looked after by X, then Z can be looked after. If W is in a similar situation as Z, then the promise seems to generate an indefinite list of beneficiaries who can claim to be right-holders.

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[46] Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights', *Oxford Journal of Legal Studies* 25, no. 2 (2005): 262–64. Steiner, 'Working Rights', 284-5.
[47] Hart, 'Are There Any Natural Rights?', 180.
[48] Steiner, 'Working Rights', 284–85.

However, the critique here does not really pose a difficulty to the Interest Theory and I believe Kramer already made a successful defence. As he points out in his summary of the doctrines of the Interest Theory, the Interest Theory only endeavours to find out the necessary condition of holding a right, but not the sufficient condition. In other words, the Interest Theory endeavours to describe the features of right-holding, rather than arguing that being a beneficiary is a sufficient condition of right-holding: 'Proponents of the Interest Theory maintain that every right-holder is a beneficiary of a duty, but they do not maintain that every beneficiary of a duty is a right-holder.'[49] Therefore, Y's mother and the following Z and W do not become right-holders automatically, though they are beneficiaries of X's duty. However, according to what the Will Theory criticises above, they attribute the problem of third-party-beneficiary to the Interest Theory's treating 'being a beneficiary' as a sufficient condition of holding a right. This is an obvious understanding. Similar to Kramer, MacCormick makes it even clear that he endeavours to describe 'the general characteristics of those legal rules which confer rights upon individual',[50] and the three features he summarises above can be understood as the necessary conditions of right-holding, not the sufficient condition. The Interest Theory, therefore, should not be bothered with this critique. However, as I will argue below, the real problem of the Interest Theory is that even though they do not claim that being a beneficiary is a sufficient condition of right-holding, it is neither a necessary condition because the concept of interest it depends on is problematic.

3.2 The 'real' interest that the Interest Theory adopts

3.2.1 How to effectively criticise the Interest Theory?

In the following sections, I will argue that the main problem of the Interest Theory in identifying right-holders is that the concept of 'interest' the theory depends on is not 'interest' in general, but the interest conferred by the

[49] Kramer, 'A Debate over Rights', 67.
[50] MacCormick, 'Rights in Legislation', 189.

Hohfeldian claim of non-interference against others whose paradigm is property rights. To reach this conclusion, I will first think about how we can effectively counter the Interest Theory, because it is not as simple as just putting forward some examples that holding a right is not beneficial to the right-holder. Once we get an answer to this question, I will analyse the concept of interest from the Hohfeldian framework and conclude above.

For the Interest theorists, the core of their argument is that when an individual is holding a right, this right is generally beneficial to the right-holder. This argument should be analysed from two aspects. First, rights protect the interest of the individual because, as MacCormick points out, it will be absurd unless the idea of rights presupposes that a right is normally a good for human beings.[51] Second, more importantly, the Interest theorists also add a condition to their argument, which is that rights are beneficial to the right-holder in general cases, and they admit rights may not be beneficial to the right-holder in some exceptional cases, but the existence of these exceptional cases does not affect that rights are still generally beneficial to the right-holder. For example, MacCormick admits that not in every case does a right need to be beneficial to a particular potential right-holder or be thought by him.[52] Joseph Raz holds a similar view to MacCormick: 'Though rights are based on the interests of the right-holders, an individual may have rights which it is against his interest to have. A person may have property which is more trouble than it is worth…'[53] Karmer also shares a similar view as MacCormick and Raz:

> A right, by contrast, is normally advantageous. From the fact that a right is normally beneficial, however, we should not conclude that it is invariably so. On the other hand, each right protects some aspect of welfare or freedom that is usually desirable. On the other hand, some instances of the protection which a right provides can redound to the detriment of this

[51] MacCormick, 204.
[52] MacCormick, 204.
[53] Raz, *The Morality of Freedom*, 180.

> or that particular right-holder. Among the many theorists who have well recognised this point is Neil MacCormick. [54]

I must admit that the argument above looks persuasive and difficult to be refuted, however, as I will argue below, this is the very foundation of the Interest Theory, but it is also the source of the problems of the Interest Theory. To show this problem clearly, I will offer some counterarguments and examples in the following discussion.

Let us first see some exceptional cases in which an individual's interest is not protected. Rowan Cruft provides examples of this kind. He supposes that he holds property rights in some ugly and worthless garden gnomes but he cannot sell them because they are worthless nor he is interested in aesthetic appreciation of their appearance, he then concludes that the property right does not serve some of his interests nor does it serve his interest on balance. [55] He also gives a similar example that Y promises him that Y will have a cup of tea for supper and he accepts it. Though the promise gives him a right to request Y to have a cup of tea, his interests are not served in any way by Y having a cup of tea for supper.

As pointed out above, the Interest theorists are unlikely to be bothered by the cases above because they believe these cases are exceptional and they will not affect their argument that the necessary feature of right-holding is that rights benefit the right-holder. Raz argues that a promise has a *pro tanto* interest that promises made to him will be kept, even though one may lose interest in the specific content of some promises.[56] MacCormick also refutes the criticism similarly as Raz does:

> Perhaps in some cases property inherited—e.g. slum properties subject to statutory tenancies at controlled rents—are literally more trouble than they are worth, and, besides, something of an embarrassment to their

[54] Kramer, 'A Debate over Rights', 93.
[55] Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?', *Law and Philosophy* 23, no. 4 (July 2004): 373.
[56] Raz, *The Morality of Freedom*, 175.

> proprietor. None of that is in any way inconsistent with the proposition that the function of the law is to confer what is considered to be normally an advantage on a certain class by granting to each of its members a certain legal right.[57]

Let me summarise the logic of the Interest theorists' defence here. So the core of the defence is that they distinguish between general cases of holding a right, in which the interest of the right-holder is promoted, and exceptional cases in which the interest is demoted or unchanged. They assume that, therefore, as long as having a right, in most and general cases, constitutes an interest to the right-holder, we can still conclude that it is the necessary feature of right-holding, regardless of the existence of some exceptional cases in which having a right may mean no promotion or even a loss of interests for the right-holder. Once again, I must admit that the Interest Theory's defence here seems reasonable and it poses difficulty for the critics of the Interest Theory that simply putting forward some counter-examples does not effectively challenge the Interest Theory. Before I start my analysis, it will be helpful to take a step back and think about how we conceive the Interest Theory's defence here. Let us consider the following question: do the critics of the Interest Theory challenge the Interest Theory in the right way that will pose real difficulty to them?

Now let me start my analysis. Although Cruft's examples do show there exist some rights that do not promote one's interests, however, the examples he uses are not the same types of rights, thus having different power against the Interest Theory. In other words, as I will show below, the example of garden gnomes poses no difficulty to the Interest Theory, while the example of the promise to drink tea poses substantial difficulty to the Interest Theory. The example of the right of garden gnomes is, precisely speaking, the exceptional case for property rights because I agree with the Interest theorists that property rights are generally beneficial to the right-holders in most cases. If we keep using examples like this to criticise the Interest Theory, the Interest

[57] MacCormick, 'Rights in Legislation', 202.

theorists will not be much bothered with the criticism, because they already anticipate some exceptional cases like this and they only argue that in general cases, rights are beneficial to right-holders, not in those exceptional cases. For example, I have a property right of a broken laptop and it brings no interest to me when I hold a property right of it. The Interest Theory will respond by saying this example is exceptional and does not challenge the thesis of the Interest Theory.

Then a question appears immediately here: why property rights are generally beneficial to the right-holder? As this is the fundamental question to understand the Interest Theory and it requires an analysis in length, I will only have a short answer at this stage: holding a property right is generally beneficial to the right-holder, because the property-right-holder has a Hohfeldian claim right that other people at large bear the duty of non-interference with his property. The relationship between the Hohfeldian claim of non-interference and property rights should be clarified. The paradigm of the Hohfeldian claim of non-interference against others is the property right whose holder can claim that other people are obliged not to interfere with his property. Therefore, holding a property right is generally beneficial to the right-holder because it is our ordinary understanding that a property not to be interfered with, such as not to be damaged or stolen, is a general interest to the right-holder. Therefore, the reason why Cruft's example here is unsuccessful is that although the garden gnomes do not bring any benefit to him in any way, other people at large still cannot steal them and if they are stolen, he can request them to be returned if he does not want to waive the duty of non-interference. This point is consistent with our ordinary understanding of property rights because no one wants his property to be damaged or stolen and a society will be in chaos if properties can be easily damaged, stolen, or robbed.

However, his example of a promissory right is more effective in criticising the Interest Theory because a promise is made according to the agreements of

the people who voluntarily enter into the bond with other people and they can decide the content of the promise freely as long as it does not violate some prohibitive rules of laws, for example, people cannot agree on a promise to kill other people. In other words, there hardly exists a consensus that a promise must be beneficial to the promisee, so it can be either beneficial or not beneficial to the promisee depending on people's agreement. For example, I can promise my wife I will go downstairs every two hours and this gives her a right, but this right does not serve any of her interest nor does my failure to go downstairs harms her interest if my doing so only wastes my time. The real challenge Cruft's and my examples raise to the Interest Theory is that it challenges the plausibility of the distinction between the so-called 'general case' and 'exceptional case'. For the property rights, as I admitted above, the distinction between these cases is valid and plausible, but it does not make much sense for the Interest Theory to respond here that Cruft's example or my example above are exceptional cases for promissory rights, so they do not pose difficulty to the Interest theory. However, these examples do, because, as I argued above, it is possible and normal to make such promises in our daily practice, after all, they do not violate prohibitive rules, even though they do not serve the promisee's interest. Therefore, these examples should be considered as effective counter-examples to demonstrate that holding a right is not necessarily beneficial to the right-holder.

Furthermore, as Cruft points out, a critique of his example may argue that the promise has an interest that people generally keep their promises to the promisee. [58] However, this critique is problematic because it already presupposes a promise must be generally beneficial to the promisee, thus begging the question, while we have seen counter-examples that a promise can be either beneficial or neutral to the promise. In the latter case, even if there exists such an interest that people generally keep their promise to the promisee, this interest does not really mean anything to the promisee. Recall my example of going downstairs, how can this matter to my wife? If my doing so only wastes my time and reduces my time in writing my dissertation, she is

[58] Cruft, 'Rights', 373.

likely to stop me from keeping this promise because she believes I should spend more time doing more important things. However, if I am overweight and it causes a high medical bill every month, and doing exercise by climbing the stairs can reduce my weight, my wife is likely to expect me to keep the promise because my health and the reduction of medical bills matter to her. Therefore, Cruft's example above can be considered a valid counter-example to the Interest Theory not only because it proves that a promisee's right can be not beneficial to the right-holder, but also because the example is not an exceptional case.

Besides the challenge raised by the examples above, the Interest Theory's distinction between the general case and the exception case encounters further difficulty when there exist some kinds of rights that do not intend to benefit individuals at all, but benefit the public. As a result, unfortunately, the ground to say in general cases rights are normally beneficial to the right-holders just does not exist in these cases. Those rights are mainly connected with specific occupational roles.[59] For example, a journalist has a right to report news, but theorists point out that the right is not intended to benefit the interest of the right-holder, but mainly for the public to know the truth.[60] This example may be refuted that if a journalist is denied such a right, he loses some interests. For instance, he may lose the cost of petrol if he drives to the location where an important incident happens but ends up being denied to report it or he may lose the opportunity to increase his followers on Twitter when he is denied to report a piece of breaking news, etc. However, the retort above can be also well refuted that having such rights may expose one to some dangerous situations at the same time. For instance, a journalist may receive threats if he reports a scandal of a big company or he may get hurt by a falling object if he happens to report a hurricane, etc. Therefore, it would be fairer to say whether having rights to a specific occupational role is beneficial or harmful to an individual depends on many factors, such as the nature of the role and conditions when he exercises those rights, etc. Having rights as a

[59] Wenar, 'The Nature of Rights', 241.
[60] Van Duffel, 'The Nature of Rights Debate Rests on a Mistake', 109. Sreenivasan, 'A Hybrid Theory of Claim-Rights', 265.

police officer, in general, exposes one to more risks than having rights as a teacher of a high school, as the former may face a situation where he may meet criminals and have to fight against them. Besides the cases of journalists and police, we can find similar cases in judges, traffic wardens, army captains, etc.[61]

MacCormick can actually offer support for my argument above, though his original intention is definitely not this. He emphasises that we should understand the concept of rights as an 'institutional' concept, therefore, 'an inquiry into the nature of rights must therefore be an inquiry into the nature and character of the legal rules which concern the conferment of legal rights',[62] namely, in his own words, understand rights from the perspective of legislation. This helps us explain why rights conferred by occupations are not intended to benefit right-holders. Given the uncertainty of having some interests connected to occupational roles, legislators are unlikely to regard promoting the holder's interest as a crucial factor when they design these rights. However, compared with the uncertainty above, it is more certain to confirm who is to take the benefit of right-holders exercising their rights. As we have seen above, it is quite certain that the interest of the public to know what happens can be promoted by the exercise of journalists' rights. Similarly, justice can be maintained and disputes in a society can be resolved in an orderly way when judges exercise their rights conferred by their role. Therefore, from the perspective of legislation, it is likely that legislators regard the protection of the interest of the public as the primary factor when creating these rights, and leave the protection of the interest of the right-holder as the secondary factor or treat it as a means of securing the interest of the public. Therefore, it is undeniable that journalists or police officers enjoy the right not to be assaulted, for example, and the violation of such right usually bears heavier punishment, but the right here is the means to guarantee that the people can perform their role as a specific role smoothly. As MacCormick

[61] Wenar, 'The Nature of Rights', 242.
[62] MacCormick, 'Rights in Legislation', 191.

points out, ‘it is the end which makes sense of the means, not vice verse’.[63] So rights of this kind are intended primarily to benefit the public from the perspective of legislation, and the exercise of them is mainly to achieve this goal, though those rights are not necessarily beneficial to right-holders

Therefore, the examples of occupational rights above are critical against the Interest Theory. The Interest Theory, as we have seen above, relies on the assumption that in general cases rights are normally beneficial to the right-holders and the existence of some cases in which rights are not beneficial to the right-holders is exceptional and does not pose much difficulty to its argument. However, the existence of occupational rights makes the distinction above implausible. First, these rights are primarily beneficial to the public, not individuals. Therefore, to focus on whether individuals are benefited from these rights deviates from the main focus of these rights. Second, most importantly, no guarantee exercising these rights will promote the right-holder’s interest, which renders the distinction between ‘general case’ and ‘exceptional’ problematic. As I showed above, the journalist’s right to report news does not necessarily bring him any interest, because it is possible that he may suffer criticism if he inappropriately discloses interviewees’ privacy or he may be exposure himself to death if he travels to Turkey to report the earthquake occurred in February 2023. Therefore, it is more appropriate in this case not to argue that there exist general cases in which rights are beneficial to the rights because these rights can either bring interests or harm to the right-holder depending on different circumstances. As a result, the assumption the Interest Theory relies on is problematic when it comes to these rights.

Now let me summarise the points I made above and how they will be helpful to my discussion below. First, simply putting forward some examples that holding a right is not beneficial to the right-holder is not enough to successfully counter the Interest Theory, because they already develop a

[63] MacCormick, 201.

mature strategy to respond to the counter-examples. Second, the first point leads me to find out holding which rights could be generally beneficial to the right-holder, while holding which rights could be not. I argue that property rights belong to the first category because they confer the Hohfeldian claim of non-interference on the right-holder, while promisee's rights and occupational rights belong to the second category. In the next section, I will deepen my analysis by reviewing how four Hohfeldian entitlements benefit the right-holder in different ways and explain why property rights are generally beneficial to the right-holder while the other rights are not.

3.2.2 An analysis of the concept of interest from the Hohfeldian framework

In this section, I will argue that the concept of interest the Interest theory relies on is not interest in general, but only the interest conferred by the Hohfeldian claim of non-interference whose paradigm is property rights. Let me first start with the analysis of four Hohfeldian entitlements and I use the property rights as an example for the analysis here. It is important to note that the reason I use property rights below is not because of my argument above, but because property rights usually entail some of all the Hohfeldian entitlements. For example, when I have property right of my laptop, I have a Hohfeldian claim that other people bear the duty of non-interference, a Hohfeldian liberty that I can use it as I wish, a Hohfeldian power that I can transfer the ownership to someone else and an immunity that my ownership of the laptop is not subject to the change made by other people's power.

So among all these Hohfeldian entitlements, I will argue that only the Hohfeldian claim of non-interference is generally beneficial to the right-holder, while the rest of Hohfeldian entitlements are not. It is our ordinary understanding that properties are important for an individual to lead a normal life nowadays and properties here not only refer to tangible objects, such as a laptop, a house, etc., but also intangible property, such as intellectual property, and also bodily properties, such as life, health, and limbs etc. However, we need to distinguish between the importance of properties and the interest

conferred by holding a property right. The importance of properties is embodied mainly in the function of properties, but an interest in holding a property right embodies in confirming the ownership and control over the property and this is realized by conferring the Hohfeldian claim of non-interference on the right-holder, which means that the ownership and control cannot be interfered with and if they are interfered with, the right-holder can claim to restore them or claim a compensation. The importance of properties may vary due to the change of circumstances, but hardly anyone will deny the non-interference of the ownership and control of the property are the core interests for the property-right-holder. Therefore, this explains why holding a property right is generally beneficial to the right-holder, even though some properties may not serve the right-holder's interests. So Cruft's example of garden gnomes does not pose many difficulties to the Interest Theory because he still possesses the Hohfeldian claim of non-interference, which is still generally beneficial to him. As I clarified above, the relationship between the Hohfeldian claim of non-interference against others and property rights is that the paradigm of the former is property rights: people can request others not to interfere with their property.

It is important to avoid a misunderstanding that I am arguing here that all Hohdian claims are generally beneficial to the right-holder; instead, I only argue that only the claim of non-interference from others benefits the right-holder generally. Cruft's example of the promisee's claim right supports my argument here. His claim that Y should drink a cup of tea with supper does not serve his interest in any way and I believe this example is reasonable and persuasive because, as I argued above, the content of a promise can be freely determined by people's agreement which does not violate the prohibitive rules of laws and it can be either beneficial or not beneficial to the promisee.

The Interest Theory may respond that a promisee's claim right is still generally beneficial to the right-holder because the promisee can claim that people at

large bear the duty not to interfere with his exercise claim right here. For example, Cruft still benefits from exercising his claim in that case because other people should not interfere with his exercise of this right, such as cutting his telephone line so he cannot call Y or assaulting him so he cannot go to Y's house. Admittedly, the defence of the Interest Theory here seems plausible and I may even extend this defence to the Hohfeldian liberty that although a Hohfeldian liberty does not entail that other people bear a duty, the liberty sometimes combines a Hohfeldian claim of non-interference from other people and this is what Kramer exactly argues. [64] I will respond to this defence first and leave the discussion of Hohfeldian liberty later. The problem of this defence is that it undermines itself by admitting that it is the claim of non-interference against others, rather than the claim based on promise, that serves the interest of the right-holder. So Cruft does not benefit from his claim that Y should perform his promise, but benefits from the claim that someone should not cut his telephone line because it is his property or should not assault him because his bodily integrity should not be damaged. In other words, we should separate the two legal relations here rather than confusing them together to create the argument that Cruft generally benefits from holding this right. The first legal relationship is between Cruft and Y and Cruft is not benefited by exercising his claim. The second legal relationship is between Cruft and people at large and he is clearly benefited by exercising his claim of non-interference from others. As a result, this defence turns out to be supportive of my argument above that only the Hohfeldian claim of non-interference against others is generally beneficial to the right-holder, not all Hohfeldian claims.

Let me start with analysing Hohfeldian liberty. According to the Hohfeldian framework, holding a liberty entails that other people do not have a claim against the liberty holder, which means a liberty holder is not under a duty to do or not to do something. Generally speaking, when we say an individual is not under a duty to do or not to do something, it is only a description of the legal status of an individual. Whether an individual is beneficial by holding a

[64] KRAMER, 'Rights Without Trimmings', 11.

liberty depends on the content of duty. In legal practice, a duty can be either a burden or a triviality, so a liberty not to do something (a negation of the duty which is a burden), such as a liberty not to pay council tax by a full-time student, can be beneficial to the right-holder, while a liberty to do something (a negation of a trivial duty), such as a liberty to go to work by bus or by bike, can be not beneficial to the right-holder. I will use an example to illustrate the point here: a right to buy stocks. The right here is the Hohfeldian liberty because it concerns one's action, an action to buy or not to buy stock, or to buy it now or buy it later, or to buy stock or A rather than stock B. In other words, the right-holder is not under a duty not to buy stocks. Now suppose X chooses the wrong stock and loses 25% of his deposit, while Y makes the right decision and wins a 10% gain, so a right-holder can either benefit or not benefit from exercising this right. This fact is further supported by a common disclaimer made by the stock account provider that an individual should take responsibility for his investment decision and the stock account provider is not responsible for the accounter holder's loss in investment. In other words, the disclaimer warns us that exercising this right can be risky and people should be cautious when exercising it.

Finally, let me discuss the occupational rights. Occupational rights are typically Hohfeldian liberty because they are usually not under certain duties to do something, while people without holding a specific occupational role are usually under those duties. For example, only the police have the liberty to arrest other people, a doctor has the liberty to perform surgery, or a journalist to ask questions in a press conference, while ordinary people do not have these liberties above. As I argued above, these rights are created primarily for the interests of the public, such as the regulation of social order or the provision of social goods. Therefore, whether holding these rights benefits the right-holder can be an open question and it is neither a general case nor an exceptional case when holding them is not beneficial to the right-holder because the legislator does not have a standard answer here. The examples above pose a real difficulty for the Interest Theory, not only because it demonstrates that holding Hohfeldian liberty can be not beneficial to the right-

holder in some cases, but also, more importantly, that these cases are not exceptional. As a result, the Interest Theory cannot use their strategy of defence above that these cases are categorised as exceptional, while in general cases holding a Hohfeldian liberty is beneficial to the right-holder.

Kramer has a response to my criticism here that although a Hohfeldian liberty does not entail a duty from other people, the interest of the liberty holder is still protected by some other rights combined with this liberty:

> Not only will a liberty-to-do-Ø combine sometimes with a right-to-be-free-from-interference-with-the-doing-of-Ø specifically, but it often combines with other rights—such as the right to be free from physical assaults—which effectively shield the doing of Ø, albeit perhaps imperfectly. [65]

Kramer seems to explain how a Hohfelidan liberty benefits the right-holder, but does he? My answer is no. What he argues here is not that holding a Hohfeldian liberty is beneficial to the right-holder, but only that a right-to-be-free-from-interference-with-the-doing-of-Ø and a right to be free from physical assaults are beneficial to the right-holder. The latter right, in essence, is also a Hohfeldian claim of non-interference in the area of bodily integrity: other people bear the duty not to interfere with the safety of their life and the intactness of the body. Therefore, similar to my criticism above, Kramer's argument turns out to support my claim that only the Hohfeldian claim of non-interference against others is the only case that holding a right is generally beneficial to the right-holder, while the Hohfeldian liberty is not necessarily beneficial.

My criticism here can also be applied to other Hohfeldian liberties. Recall Cruft's example, regarding the promise between him and Y, Y has the liberty to make a promise. Raz says the interest in making a promise is that an individual chooses to voluntarily enter into a special bond with others, even though the promise itself may not be beneficial to the promisor.[66] Although

[65] KRAMER, 11.
[66] Raz, *The Morality of Freedom*, 175.

Raz does not say exactly the same thing as Kramer does, the underlying assumption between them is similar. Raz assumes that if an individual wants to make a promise voluntarily, other people should not hinder him from doing so. For example, other people should not use physical force to shut his mouth so he cannot make a promise, or if he makes a promise to the promisee by sending a text message, other people should not steal or hide his phone. So Raz is the same as Kramer because they both argue that a Hohfeldian liberty is protected by the combination of the Hohfeldian claim of non-interference. As a result, similar to Kramer's problem above, it is the Hohfeldian claim of non-interference that brings the interests to the right-holder, not the Hohfeldian liberty itself.

Now let me apply the above analysis to the example of property rights. The Hohfeldian claim based on property rights is that the property-right-holder can claim that other people bear the duty not to interfere with his exercise of the right, such as stealing it, damaging it, or disposing of it. There is not much doubt that this claim is generally beneficial to the right-holder because it confirms an individual's exclusive ownership or control over the property and prevents other people from harming it. If the interference of the property occurs, it harms the right-holder's interest, which is consistent with our ordinary understanding of the system of property. As I argued above, properties include bodily properties, such as life and physical body, so the right to be free from physical assaults Kramer put forward above is the Hohfeldian claim right based on a bodily property right. This right is probably the best example to support the argument that the Hohfeldian claim of non-interference against others is generally beneficial to the right-holder because it is difficult to deny not interfering with an individual's life and body are the most important interests of an individual, because if an individual is assaulted by others and loses part of his limbs, for example, he cannot lead a normal life, not even to mention his life terminates if he is killed.

Let me return to the Hohfeldian liberty conferred by property rights. The liberty here is that an individual is not under a duty not to do something with the property and being under this legal status does not guarantee that an individual will be beneficial by holding this right. For example, I can live in my house or refurbish it, which is beneficial to me, but I can also damage it, which is not beneficial to me. It is impossible to list all things I can do with my house here because the absence of a duty here means I can do anything to my house as long as it does not violate some prohibitive rules of laws. Therefore, holding a Hohfeldian liberty is not necessarily beneficial to the right-holder because it depends on the content of the actual behaviour of an individual. According to Kramer's defence of the Interest Theory above, the liberty to do something with his property is beneficial to the right-holder because the liberty is combined with some Hohfeldian claims of non-interference against others:

> Much the same can be said about Z's liberty to donate some of her money to a charity. Y is free to try to dissuade Z from handing over the money, but the laws against theft and assault and defamation confer rights on Z and on the charity which substantially limit Y's freedom to prevent the transfer of funds.[67]

Therefore, what protects the right-holder's interest, in this case, is not the liberty to donate some money to a charity, because a donation of an individual's money can be a financial burden for him, thus being not beneficial to him. However, I also admit that by donating money to charity, he may feel happy and establish a closer connection with the people who will benefit from his donation, which is a benefit to him. So a fair conclusion here is that this liberty protects some of his interests, while he loses some interest. What protects the right-holder's interest, in this case, is the Hohfeldian claim against theft, physical assault, and defamation because the freedom from the interference of the ownership of her money, her body's integrity, and reputation are generally beneficial to the right-holder. As a result, Kramer's objection here already made a significant compromise, because he admits that the liberty to donate money has to outsource the protection from the Hohfeldian claim of non-interference.

[67] KRAMER, 'Rights Without Trimmings', 11.

Now let me turn to the second-order Hohfeldin entitlements, the Hohfeldian power, and immunity. Given that they are entitlements based on the first-order Hohfeldian entitlements, whether holding them is beneficial or not to the right-holder depends on the content of the first-order Hohfeldian entitlements. For example, my Hohfeldian power to waive the Hohfeldian claim against theft is to abandon one's interest in the stolen property, so it is not beneficial to the right-holder. On the contrary, my Hohfeldian immunity to disable another person's power to take away my property is beneficial to him because it keeps the ownership of my property unchanged. Similarly, my Hohfeldian power to abandon my liberty to move my body freely, for instance, I permit another person to lock my limbs on a chair can be not beneficial to me. On the contrary, my Hohfeldian immunity that disables another's power to imprison me is beneficial to me. Therefore, it is neither general that holding the second-order Hohfeldian entitlements is beneficial to the right-holder nor exceptional that holding them does not protect the right-holder's Interest. Similar to Kramer's example of the liberty to donate money to charity, the Interest Theory may respond to my criticism here by arguing that the second-order Hohfeldian entitlements are still generally beneficial to the right-holder, because they are combined with other rights, such as the right to be free from theft and physical assault. However, this defence still means it is the right to be free from theft and physical assault that confers a general interest in the right-holder, not the power itself.

To summarise, the concept of interest the Interest Theory depends on is actually limited, only referring to the interest conferred by the Hohfeldian claim of non-interference. The figure below shows the location of this claim within the Hohfeldian framework: it is only a subcategory of the Hohfeldian claim among four Hohfeldian entitlements.

claim	liberty

Claim of non-interference	
Power	Immunity

Diagram: The Hohfeldian Claim of Non-interference in the Hohfeldian Framework

So when the Interest Theory claims that the necessary feature of right-holding is that rights generally protect the right-holder's interest, it only means it is the Hohfeldian claim of non-interference that generally protects the right-holder, not the other types of claims and the other three Hohfeldian entitlements. However, I do not argue that all the rest of Hohfeldian entitlements except the claim of non-interference are not beneficial to the right-holder at all. My criticism is that there is no necessary connection between holding these rights and being benefited by doing so and it is not the exceptional case when holding them is not beneficial to the right-holder.

3.2.3 How does the Interest Theory get wrong with the concept of 'interest'?

After the analysis of the Interest Theory, now let us see how it gets wrong with the concept of interest. My argument is that the Interest Theory hampers itself by its own theoretical goal and ultimately leads to its mistake in treating a specific way in which rights benefit the right-holder as a necessary feature of right-holding. As I pointed out at the beginning of section 3.2.1, the goal of the Interest Theory is to show us that the necessary or general feature of right-holding is that holding a right protects one's interests. However, the Interest theorists admit that there exist some rights that do not protect right-holders, so they have to adopt a strategy that it is the general case in which holding a right is beneficial to the right-holder and it is the exceptional case in which holding a right is not beneficial to the right-holder. Upon analysing all the Hohfeldian entitlements, I find out only the Hohfeldian claim of non-interference exemplified by property rights can be considered as generally protecting the right-holders because hardly anyone would like their property

rights to be harmed by others. The rest of the Hohfeldian entitlements, including Hohfeldian claims that are not about non-interference against others, are not generally beneficial to the right-holders for the reasons I argued above. To rescue this problem, these entitlements have to outsource the protection from other rights, but these rights, in essence, are the Hohfeldian claim of non-interference, such as claims against theft, physical assault, defamation, etc.

The Interest Theory may respond that the combination, not entailment, of the Hohfeldian claim of interference can be considered as a more fundamental way to protect the right-holder's interest because this Hohfeldian claim can set up a bottom line beyond which other's behaviour should not go. So even if we do not bear a duty not to hinder someone's liberty to make a promise, we still bear the duty not to force him to do something that violates his own will, for example. However, this response is a significant compromise of the Interest Theory and causes the incoherence of the theory. For Raz, holding a right indicates that one's interest is a ground for another's duty, then if the interest here only means a right-holder is free from interference from others, how can a single interest create a variety of rights? This problem is also applied to MacCormick because he has a similar argument as Raz's that rights exist prior to duty logically and they are the ground of the latter.[68] Then the existence of different rights demonstrates that they cannot be created just by a single interest conferred by the Hohfeldian claim of non-interference. MacCormick is further hampered by this response because he argues that each Hohfeldian entitlement provides a specific normative protection to the right-holder and they cannot be confused with the protection provided by the Hohfeldian claim of non-interference. Although Kramer does not accept the same argument as Raz and MacCormick do that rights ground duties, he is the same as MacCormick that each right serves the right-holder interest specifically. For example, the right to receive minimum wage serves the interest that workers' wages do not fall below certain levels.[69] Therefore,

[68] MacCormick, 'Rights in Legislation', 200.
[69] Kramer, 'A Debate over Rights', 94.

Kramer eventually will encounter the same problem above, the way the Hohfeldian claim of non-interference protects the right-holder cannot replace the way rights of different kinds benefit the right-holder individually.

Therefore, we can see that the Interest Theory encounters many difficulties caused by the concept of interest. This will lead me to find the source of the problem of the Interest Theory in chapter two and I will argue that the source of the problem originates from its acceptance of Mill's concept of the sovereign individual.

3.3. The problem of the peremptory force of rights

3.3.1 The definition of 'peremptory'

Besides identifying right-holders, another task of the Western theories of rights is to demonstrate the special importance of right-holding in practice and theory. As both theories claim that rights have peremptory force, I will review whether both theories can achieve this goal in their own terms. My conclusion is they both fail to demonstrate the peremptory of rights in their own terms. Now let me turn to the definition of 'peremptory' first.

Originally, Hart used the 'peremptory' to describe the special feature of a command used in legal reasoning. According to Hart, 'peremptory' means 'cutting off deliberation, debate, or argument and the word with this meaning came into the English language from Roman law, where it was used to denote certain procedural steps which if taken precluded or ousted further argument.'[70] What Hart means here is that when a command is expressed, it is not intended to function within one's deliberations as a reason for doing something, nor is it about giving a strong or dominant reason, because that already presupposes an independent deliberation is to go on. Instead, it simply intends to exclude any further deliberation.

[70] H. L. A. Hart, 'Commands and Authoritative Legal Reasons', 4 November 1982, 253–54.

Simmonds applies Hart's definition above in his theory of rights, then the peremptory force of rights means that rights cut off further deliberation and argument when one claims his right in legal practice and legal reasoning. He gives a concise example to illustrate it:

> When I demonstrate to a court of law that I have a right to a sum of money that the defendant contracted to pay, I do not expect the court to tell me that they will take account of my right, along with many other factors, in deciding whether to hold that the defendant is under a duty to pay: I expect my right to be conclusive of the matter.[71]

Having the definition and an example in hand, let me begin to analyse the problem of two theories of rights in this regard.

3.3.2 An preliminary inquiry into the peremptory force of right under the Interest Theory

Before I start my analysis below, it is important to point out the background of the discussion here. The Interest Theory is criticised by the Will Theory that the peremptory force of rights is lost in the Interest Theory and, on the contrary, the emphasis on the peremptory force of rights is considered as the advantage of the Will Theory. Therefore, I will first introduce how the Interest Theory understands this issue and how it is criticised by the Will Theory, then following such a critique, I will analyse the assumption of the Will Theory's emphasis on peremptory force and points out that the Will Theory uses its own standards to judge the Interest Theory and the theory of peremptory force is also defective by itself as it continues to adopt the concept of control which has been proven problematic.

The main theorist who touches upon the peremptory feature of rights is Raz. Let us recall his definition: 'X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a

[71] SIMMONDS, 'Rights at the Cutting Edge', 205.

sufficient reason for holding some other person(s) to be under a duty.'[72] According to him, the peremptory force of rights embodied in one's interest is sufficient to hold others to be under a duty, other things being equal. More specifically, he argues that it requires three conditions for the interest to give rise to a right and one of the conditions is that the reason for holding others to be under a duty has the peremptory force of a duty: (1) Only where one's interest is a reason for another to behave in a way which protects or promotes it; (2) only when this reason has the peremptory character of a duty; (3) only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest.[73] Based on these three conditions, he defines 'peremptory' as follows, however, different from Hart's definition: 'According to our account the special features of rights are their source in individual interest and their peremptory force, expressed in the fact that they are sufficient to hold people to be bound by duties.'[74] Two elements constitute Razian definition of 'peremptory'. First, there exist other grounds for not holding a person under a duty; second, when there exist conflicting considerations, the interest must defeat those considerations and not have its force weaken.[75] He uses an example of a right to free expression to demonstrate his point above. He admits that there exists a conflict between the right and the protection of people's reputation and the need to suppress criticism of the government during a national emergency, then he concludes that if the conflicting considerations override those supporting the right, one does not have a right to libel the government in an emergency.[76]

Raz's formulation above poses a question for us. On the one hand, according to Hart, the essence of peremptory force is to cut off further deliberation and calculation, but Raz's formulation above clearly contradicts this essence, because he requires a calculation of different interests in legal reasoning, and interests only give rise to a right when they defeat conflicting considerations,

[72] Raz, *The Morality of Freedom*, 166.
[73] Raz, *The Morality of Freedom*, 183.
[74] Raz, 192.
[75] Raz, 183–84.
[76] Raz, 184.

other things being equal. Simmonds criticises Raz that his definition of 'peremptory' is inappropriate because rights only ground duties when the reasons supporting rights are not outweighed by conflicting considerations.[77] Consequently, Raz put rights in a complex course of reasoning, as a result, the peremptory force of rights is lost because rights collapse into the general range of interests that are calculated in complex reasoning, making the existence of rights uncertain in leading to a conclusion that someone is under a duty.[78] On the other hand, we should be cautious to declare too easily that Raz is wrong and Hart is right. Specifically, we should carefully examine the assumption underlying the emphasis of peremptory force by the Will Theory, as it will be unfair to judge the Interest Theory from the standards of the Will Theory, and more importantly, the development of the peremptory force of rights by the Will Theory can be problematic in their own terms. Let me analyse the Will Theory in this regard in the next section.

3.3.3 The Will Theory and the peremptory force of rights

As we have seen above, for the Will Theory, the peremptory force of rights means that if one has a right that someone else should perform a certain act, the performance of that act is not a matter or calculation of interests, but may be demanded 'as of right'.[79] According to this definition, it is pointed out that the peremptory force can be explained in terms of Hofeldian correlativity, which means the existence of a right entails the existence of a duty or a set of duties.[80] In other words, when a right is claimed, the correlative duty is just out there. The similarity between 'peremptoriness' and 'correlativity' enhances further the point that the legal reasoning of claiming a legal right is not a process of balancing different interests.

Now we need to know the rationale behind the emphasis on the peremptory force of rights by the Will Theory. As we have seen above, the Will Theory

[77] SIMMONDS, 'Rights at the Cutting Edge', 204.
[78] SIMMONDS, 'Rights at the Cutting Edge', 131, 204.
[79] SIMMONDS, 176.
[80] SIMMONDS, 203.

treats the control over the correlative duty as the necessary and sufficient condition for becoming a right-holder. The duty here is not treated as a protection for the right, but rather as an object of the control the right-holder has; therefore, the essence of the exercise of the right is to demand or waive the object—the performance of the duty.[81] Given this understanding, it does make some sense to claim that the process of demanding or waiving the duty precludes a calculation of interests and other considerations, because normally we do not require a calculation of interests when I claim something which is an object under my control. For example, the keyboard in front of me now is an object under my control and I can use it to type a sentence in my chapter or delete anything I do not like. This process does not normally require a calculation of interests; instead, I just type the keyboard and it is typed by me. Therefore, the peremptory force of right is conferred by the concept of control; more specifically, it is the control that cuts off further deliberation and arguments and makes rights special in legal reasoning and practice. In the of the Will Theory, Simmonds points out that one of the advantages of the theory is that it captures the peremptory force of rights and the force originates from the choice of the right-holder:

> my rights are not simply good reasons for others to behave in certain ways…nor are my rights the justifications for duties…I claim that you are under such a duty, and the content of that duty makes my choice decisive for you in some particular respect…where rights exist, the enforcement of duties is not a matter for the state in pursuit of collective policies, but a matter for the choice of private individuals.[82]

According to Simmonds' argument above, I point out that the discussion of the peremptory force of rights is derivative in the sense that it is ultimately determined by a specific school of the theory of rights, namely, either the Will Theory or the Interest Theory. As a result, we may already notice the problem of the peremptory force of rights in the course of my analysis above: it is developed upon the concept of control which we have proved to be

[81] SIMMONDS, 215–16.
[82] SIMMONDS, 216,225. Italics are added by the author.

problematic. For example, it is true that when I claim that I have a right to life in a court and someone else is under the duty not to kill me, I expect my right to be conclusive, rather than being balanced in a complex reasoning. However, as we have seen above, I do not have the power to waive duties in criminal laws nor can state officials do this on my behalf. Two problems can be revealed here. First, the peremptory force of the right to life above clearly does not come from the control over the duty. A more general conclusion can be made that the peremptory force of those unwaivable rights does not come from the control over duties, as there is simply no such control in those rights. The peremptory force of those rights must come from somewhere else. Second, even if we take a step back and admit that the peremptory force does originate from the control of right-holders, its critique of the Interest Theory in this regard begs the question, because it judges the Interest Theory from its presupposed standards of peremptory force and, unsurprisingly, the Interest Theory has no Will-Theory understanding of peremptory force, but it has its own understanding, such as the Raz's version. Therefore, we are not yet at the stage to declare that the Interest Theory is wrong and the Will Theory is correct in this regard. Further analysis is required.

3.3.4 Revisit Raz's definition of 'peremptory'

As I have shown above, it seems that Raz and the Will Theory offer two different understandings of the concept of 'peremptory' and it also looks obvious that Raz makes a mistake in understanding this concept: he seems to offer an understanding of the peremptory force of rights which contradicts the original purpose of peremptory force—cutting off further deliberation. Therefore, the core of dealing with this issue is to understand what Raz really means here and I will show below that Raz does not make such a simple mistake and the Will Theory misunderstands his theory.

To recall, Raz admits that rights have peremptory force: 'rights have a special force which is expressed by the fact that they are grounds of duties, which are peremptory reasons for action', and specifically, the peremptory force is

expressed ‘in the fact that they are sufficient to hold people to be bound by duties.’[83] The problem of Raz’s argument is that he involves a process of balancing other grounds for not holding other people under a duty with rights in his theory, while this process should have not been involved if rights have peremptory force. As a result, it seems obvious that Raz makes a mistake here by offering a wrong understanding of the peremptory force of rights. However, it is too quick to make such a conclusion. If we were to conclude that Raz makes a mistake here, the only reasonable explanation is that Raz equates peremptory force with a process of balancing different interests. However, I am suspicious of this explanation, as this could be similar to the easy win against the Will theory declared by Interest theorists we have seen above. I will defend below that Raz does not make such a mistake as Will theorists claim.

Upon further analysis, contrary to Simmonds’s judgment, I will argue that Raz actually holds a similar understanding of ‘peremptory’ as Hart does. In the same chapter immediately after he claims that rights have peremptory force, he adds further that rights are special considerations, but the special feature comes from duties.[84] He then argues that duties play a special role in practical reasoning because they have pre-emptive force: ‘They have pre-emptive force…It is special since being pre-emptive it replaces rather than competes with (some of) the other reasons which apply in the circumstances.’[85] What he means ‘pre-emptive force’ of duties here is the same as the meaning of the peremptory force of rights, as he particularly emphasises that claiming a duty replaces rather than competes with other reasons.

In his article Promises and Obligations’, he further explains the peremptory force of duties directly. For him, he excludes that the peremptory force of duties has much to do with the weight of duties, because many duties are of little importance, such as the duty to keep promises of a trivial thing, but it

[83] Raz, *The Morality of Freedom*, 249, 192.
[84] Raz, 186.
[85] Raz, 186.

does not prevent them from being a duty.[86] Instead, the peremptory force of duties comes from that duties are imposed by mandatory rules which are exclusionary reasons for actions: 'Since obligatory acts are required by mandatory rules with exclusionary force, they are acts which the agent must sometimes perform even if they should not be performed on the balance of reasons.'[87] According to this, it clearly confirms that Raz has the same understanding of 'peremptory' as Hart does, as both emphasise that the balance of reasons of different weights should be excluded when something is claimed as having the peremptory force. Therefore, we can at least conclude that Raz does not make a mistake by equating 'peremptory' with a process of balancing interests.

Then what is the reasonable explanation that he offers seemingly contradicting understandings of peremptory force within his theory? My explanation is that he distinguishes between different stages of claiming a right. Let me use his example of freedom of expression. Before the balance of different considerations, a general right is only a prima facie ground for the existence of a particular right and the reason for holding others under a duty should defeat other considerations. After the balance, if the right defeats other considerations, rights become sufficient to hold other people under duties and Raz only means the peremptory force of rights in this sense. Therefore, we can see that Raz does not think that we can claim the peremptory force of rights at any stage of legal reasoning. Before a right is confirmed and claimed, we always need to debate whether it can defeat other considerations, for instance, whether the claim is restricted by other legal provisions, or whether there is any justifiable reason that denies the claim of rights. This is the first stage when we primarily consider whether a right can be claimed validly. Then, if a right can pass through the stage of balancing different considerations, it can be claimed with peremptory force. Let me use an example of legitimate defence in Chinese Criminal Law. Let us see Article 20:

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[86] Joseph Raz, 'Promises and Obligations', in *Law, Morality and Society: Essays in Honour of H.L.A. Hart / Edited by P.M.S. Hacker and J. Raz.*, ed. P. M. S. Hacker and Joseph Raz (Oxford: Clarendon Press, 1977), 223.
[87] Raz, 224.

> Criminal responsibility is not to be borne for a defensive act undertaken against ongoing physical assault, murder, robbery, rape, kidnap, and other violent crimes that seriously endanger personal safety that causes injury or death to the unlawful infringer since such an act is not an excessive defence.[88]

According to this article, legitimate defence is a justifiable reason not to be held under a criminal duty when a defence is undertaken against ongoing serious criminal behaviours. Suppose I am being robbed by a man and I grab the vase disposed on the side of the road and hit the man's head, then the man is injured. It is obvious that the robber has a right not to be assaulted and according to the definition of peremptory force, he should have been able to claim this right against me and my claim that injuring the man is more beneficial to me as I am being robbed by him should be precluded and cannot prevent me from bearing the duty not to assault him. However, the above article is a restrictive provision of the right not to be assaulted and it can override the right under the situation of legitimate defence. According to my analysis above, Raz may argue that the right not to be assaulted in the case of robbery does not even pass through the first stage of legal reasoning and it is specifically denied by the law, therefore it is not a valid claim, not even to mention it has peremptory force.

However, the article above also prevents legitimate defence that exceeds necessary limits:

> Criminal responsibility shall be borne where legitimate defence noticeably exceeds the necessary limits and causes great harm. However, consideration shall be given to imposing a mitigated punishment or to granting exemption from punishment.[89]

Suppose that I am suffering a minor assault from a man but I injured him seriously, then my defence exceeds necessary limits and since a minor

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[88] 'Criminal Law of the People's Republic of China (2020 Amendment)', accessed 1 November 2022, http://www.lawinfochina.com/display.aspx?id=34470&lib=law&SearchKeyword=&SearchCKeyword=%d0%cc%b7%a8.

[89] 'Criminal Law of the People's Republic of China (2020 Amendment)'.

assault is not considered as an ongoing serious crime, then the man can claim his right not to be assaulted and I beach the duty not to assault him, even though I can argue that it is more beneficial to me to injure that man at that moment. Raz may argue in the case, that the right is sufficient to hold me under a duty, thus having peremptory force.

Surprisingly, Hart provides a conceptual distinction of different reasons in deliberation which could help us understand Raz's approach better. In his discussion of peremptory force, he admits that it is not always possible that a peremptory claim can succeed in getting its hearers to accept it, as hearers may refuse to accept it or have their own deliberations. Therefore, the claimer may provide further reasons to support his claim, such as threats to do something unpleasant, and these reasons will indeed enter into a process of deliberation.[90] However, he points out such supplemental reasons are secondary in a sense a *pis aller* and we should not obscure the difference between them and the peremptory reasons: they function as secondary provisions in case the peremptory reasons, as the primary reasons, break down. Following his logic here, we can understand that rights have the peremptory force and they function as primary reasons; however, given the complexity in practice, there exist conflicting and supporting reasons at the same time and we are required to do further deliberation to see if a right can be claimed validly. Most importantly, Hart points out that the deliberation at the level of secondary reasons does not affect the peremptory force of the prime reasons. A further inference can be drawn here: if there exists any primary reason against the peremptory force of rights, it should be considered as well.

Therefore, we can defend Raz from Simmonds's criticism. As I already defended Raz above, he does not have a mistaken understanding of 'peremptory'; instead, his understanding of this concept is the same as Hart does. Then the reason why he mixes the balance of different considerations with the peremptory force is that he identifies different stages in which

[90] Hart, 'Commands and Authoritative Legal Reasons', 254.

different legal reasonings for rights are required. As my example of legitimate defence shows, claiming a right, even for rights with higher importance, such as the right not to be assaulted, can be denied legitimately under the situation of legitimate defence. Now, we need to figure out first whether the reason that I defend myself by injuring the man when I am being robbed by him should be considered as a primary or secondary reason. My answer is it is a secondary reason. Given robbery is included as one of the crimes that allow victims to injure or kill the criminal to defend themselves, then we should consider the rights not to be killed and assaulted are relinquished by a criminal when he starts to rob someone else. Logically, the behaviour of robbery voids one's rights not to be assaulted and not to be killed in the first place, then a legitimate defence, including injuring or killing the criminal, becomes valid. Therefore, we can conclude that committing certain crimes is a primary reason that functions against the peremptory force of rights, while a legitimate defence is a secondary reason because logically it only makes sense after certain crimes are committed. In the example that I injure someone when I am only under a minor assault, given that a minor assault is not the case in which one is permitted to injure or kill the criminal to defend himself, the man who is a criminal can still claim the right against me, regardless I can that it is beneficial for me to injure him at that time. My analysis here is consistent with Hart's argument above, a deliberation at the level of secondary reasons will not affect the peremptory force of a claim, but if there exists any primary reason, such as a right-holder is committing certain crimes, then it should be considered against the peremptory force of rights.

Therefore, we can conclude that even though Raz may leave us the impression that he mixes the balance of different considerations with the peremptory force of rights, it does not mean that he equates the former with the latter; on the contrary, he holds the same understanding of 'peremptory' as the Will Theorists do and also shows us that legal reasonings of rights at different stages are not the same and it is not always the case that the peremptory force of rights is absolute and precludes any further deliberations.

3.3.5 A critique

I have shown above that Raz and the Will Theory hold the same understanding of the peremptory force of rights, rather different understandings because they both emphasise that the peremptory force does not depend on the weight of rights and it precludes further deliberation of different considerations. However, even though they understand this concept in the same way, the grounds upon which they develop this concept are different. As I have pointed out above, an understanding of the peremptory force of rights is derivative from a specific theory of rights and it cannot be developed beyond the fundamental theses and the context of that theory. Therefore, for the Will Theory, the source of the peremptory force of rights is the control held by right-holders. Similarly, it should be unsurprising if I argue that, for Raz, the source of the peremptory force of rights is the concept of interest. Raz argues that the special role of rights is that the ground of holding others under a duty is the interest of others: 'To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e., that an aspect of his well-being is a ground for a duty on another person. The specific role of rights in practical thinking is, therefore, the grounding of duties in the interests of other beings.'[91] However, Raz's understanding of the peremptory force of rights is also subjective to the criticism of the Interest Theory, which is that the concept of interest is controversial. As I pointed out above, some rights do not serve the interest of right-holders, such as those occupational rights. Therefore, the peremptory force of a judge's right to sentence a criminal does not come from his well-being. Similarly, the peremptory force of my right to invest in stocks does not come from the fact it can serve my interests, as there is no guarantee that an investment will be successful; but mainly from my choice to take the uncertainty of losing or earning my investment.

Given that the understanding of the peremptory force of rights is derivative from a specific theory of rights, we should be cautious of not making the

[91] Raz, *The Morality of Freedom*, 180.

mistake of question-begging when criticising one specific understanding of it. Kramer is particularly sensitive to this problem and correctly reminds us that theorists should not judge the other theory by measuring it against their own criteria.[92] As I briefly showed above, Simmonds concludes without much prudence that the peremptory force of rights is lost in Raz's theory of rights. The reason for his mistake here is not only that he does not understand Raz's understanding of 'peremptory' correctly, but also that he only sticks to his Will Theory standard of understanding this concept and judges Raz from his own perspective, then we should hardly be surprised that Raz's theory fails when he is so judged. Therefore, I shall criticise the two theories of rights in this regard in their own terms and point out their problems.

Now let me start with the Will Theory. We should admit that it is correct to point out that a theory of right-holding must demonstrate the peremptory force of rights in legal reasoning and practice and prevent them from collapsing into a general kind of interest. It is fair to say that the Will Theory pays more attention to this issue than the Interest Theory. Hart is cautious when developing his theory that we should not make right redundant in our terminology, especially not making rights no more than an alternative expression of duties.[93] However, the problem of Simmonds's Will Theory is that it understands the peremptory force of rights in an absolute way and omits the potential conflict between the peremptory force of rights and other primary reasons. First, according to our common practice, it is not always the case that when one claims his right, no further deliberation is allowed to take place. The ideal situation may only exist in a simple case in which the fact of the case is pretty clear and the application of rules is straightforward. Suppose that I damage my landlord's carpet unintentionally, such as I spill a cup of coffee on it, then my landlord has a right to deduct some money from my deposit, and I am under a duty to pay for the cleaning or replacement of the carpet, even though I can argue that the damage was caused unintentionally. However, it is also common to see a further deliberation of

[92] Kramer, 'A Debate over Rights', 66.
[93] Hart, 'Legal Rights', 187–88.

different interests in a dispute of rights. Suppose the carpet is damaged due to an unexpected and unavoidable incident, such as a leak of the pipe under the carpet, then I can argue against my Landlord's right to deduct my deposit, as the damage is caused by something beyond my control. Therefore, we can see that a further deliberation of the reasons behind different parties does exist in some cases, as long as the conflicting reasons are reasonable and justifiable.

The second problem of Simmonds's Will Theory is that he fails to distinguish reasons at different levels and this explains why he makes the mistake above. Recall what he says about the peremptory force of right: '…I have a right to a sum of money that the defendant contracted to pay, I do not expect the court to tell me that they will take account of my right, along with many other factors, in deciding whether to hold that the defendant is under a duty to pay: I expect my right to be conclusive of the matter.'[94] If the fact of the case is clear and the evidence is sufficient, then there will be no difficulty in claiming that my right is conclusive, even though the defendant may argue that he is in an emergency using that sum of money—for example, his mother needs the money to receive an emergent medical operation—so it will be beneficial for him to use this money rather than repaying it. According to Hart's argument above, the reason provided by the defendant here is secondary, so it will not affect the peremptory force of rights. Therefore, we can interpret that Simmond understands the peremptory in the sense that rights are conclusive when they conflict with secondary reasons and we should admit that it is correct to say that the right is conclusive in this sense.

However, Simmonds ignores that there may exist some primary reasons against the right to a sum of money here. For example, if the defendant disputes that he was threatened to sign the contract rather than signing it voluntarily and supplies the court sufficient evidence to support his claim, then the court should consider the defendant's claim seriously. If the court accepts

[94] SIMMONDS, 'Rights at the Cutting Edge', 205.

the defendant's claim and evidence, the right to request that money is likely to be denied, not to mention it can be conclusive in this case. Therefore, when claiming a right faces a challenge from other primary reasons, it has to enter into a deliberation and see if a right can withstand the challenge. There is no guarantee that the claim of rights can always win and there is no point in arguing that rights can be conclusive in all cases. Having said that, it does not mean that the peremptory force of rights is lost. In this case, the right is simply denied because the ground which gives rise to rights is invalid and it is pointless to claim the peremptory force of rights when no right can be claimed here. According to the critique of Simmonds's Will Theory above, we can see that he confuses the conflict between rights and primary reasons and the one between rights and secondary reasons and his attempt to generate a general argument that the peremptory force of rights cuts off all deliberation and is conclusive in all cases is unsuccessful. It turns out that Simmonds and Raz are the same in the sense that when rights withstand the challenge from primary reasons and a claim of rights is valid, rights are 'conclusive' (in Simmonds's term) or 'sufficient' (in Raz's term) to hold others under a duty, cutting off any further deliberation. Ironically, while being criticised by Simmonds, Raz's account is better than Simmonds', because he did not confuse the two conflicts above and recognised two different stages in which rights play different roles in legal reasoning.

Having said that, Raz's understanding of the peremptory force of rights cannot escape from the criticism of the concept of interest. Besides the problem that the concept of rights is controversial, there is one more problem specifically to Raz and his understanding of the peremptory force. Cruft points out that there exist some rights that are unjustified, such as the feudal 'droit de seigneur', but they would exist if it was legally enshrined.[95] The interest behind this right is the interest of a feudal lord to have sex with a subordinate woman on her wedding night. The subordinate woman is under a duty to have sex with the feudal lord, but this interest of the feudal lord can be hardly justified because it causes gender inequality and violates the will of a subordinate woman; it may

[95] Cruft, 'Rights', 372.

be justified mainly by the enforcement of unequal legal rules. In this case, a right exists not because an interest justifies a duty, but it may exist because the law prescribes so. If this example is regarded as outdated, it is not that difficult to find another example, since there always exists some rights in our system that may seem not very reasonable, but they exist there before they are abolished. In the mini-budge published recently by the former Chancellor of the Exchequer, people who earn over £150,000 a year have a right not to pay for the 45% rate of income tax and the government is under a duty not to collect this tax. This particular budget received heavy criticism from the public and the reason is that it is likely to cause further inequality in society.[96] Therefore, it is difficult to argue that the interest of the people who earn over £150,000 justifies the right not to pay this tax. The budget subsequently became the first to be abandoned by the former Chancellor before the morality of other budgets was abandoned by the current Chancellor, which proves that the government admitted that the protection of the interest here was unjustified and wrong. It is fair to conclude that during the short time when the budget still existed, the right not to pay this tax was created not because the interest of the people who earn over £150,000 justifies it, but because it is so created by the government. Back to our discussion, the peremptory force of this right does not originate from the interest of those people, but from the rule that creates it.

To conclude, we can see that both theories of rights fail to account for the peremptory force of rights in their own terms. The account provided by the Will Theory of rights fails because it relies on the problematic concept of control and it neglects the fact that the conflict between rights and other primary reasons and argues the peremptory force of rights in an absolute way. For the Interest Theory, it is also problematic because it cannot avoid criticism of the concept of interests upon which its theory is based. Therefore, the criticism shows that the peremptory force of rights does not come from the concept of

[96] Andrea Shalal, 'IMF Says UK Fiscal Measures Will 'likely Increase Inequality,' Urges Rethink', *Reuters*, 27 September 2022, sec. United Kingdom, https://www.reuters.com/world/uk/imf-says-uk-fiscal-measures-will-likely-increase-inequality-urges-rethink-2022-09-27/.

control or interest, it could come from something else, which will be discussed in the following chapters.

4. Conclusion

In this chapter, I reviewed the debate between the Interest and Will theories and I pointed out that they both fail to successfully develop the theory of right-holding in their own terms. More specifically, the concept of 'control' the Will Theory depends on and the concept of 'interest' the Interest Theory depends on are both problematic, thus making them unable to identify right-holders in their supposed way and explain the peremptory force of rights. However, the ultimate purpose of revealing the problems of two theories of rights is not simply to criticise them, but also to find out the root cause of the problems. The discussion of this chapter so far gives some direction on what I should do in the next chapter. Let me start by asking a few questions. We already saw that the real problem of the Will Theory is its insistence on the Hohfeldian power in identifying the right-holder, but it encounters difficulty in explaining unwaivable rights, such as the right not to be killed or not to be slaved. Then it should naturally prompt us to ask why the Will Theory must insist on the Hohfeldian power in conceiving right-holding. Is there any rationale behind this? Similarly, we already saw that the real problem of the Interest Theory is the concept of interest only refers to the interest conferred by the Hohfeldian claim of non-interference, specifically a property-right-holder's claim that others bear the duty not to interfere with his property. The consequence of adopting this concept is that they cannot accommodate rights that are not generally beneficial to the right-holder, such as occupational rights and the right to buy stocks, which are Hohfeldian liberty. Therefore, being beneficial is neither a sufficient nor a necessary condition of holding a right. Then we should ask again why the Interest Theory must insist on the concept of interest in conceiving right-holding.

What are the answers to these questions? Hart already gives us some hints before I will answer these questions in detail. Let us return to Hart's passage I

quoted at the beginning of this chapter. He says the right-holder to whom the duty is owed is a small-scale sovereign and the outstanding feature of the right-holder is that he holds a Hohfeldian power to waive or enforce the duty. As I will argue in the next chapter, holding a control over some areas of conduct is one of the features of a sovereign individual, so Hart's emphasis on the concept of Hohfeldian power has its roots in accepting the concept of the sovereign individual. Similarly, It should not be difficult for us to understand why the Interest Theory must insist on the concept of interest. The Interest Theory has given their answer: the interest conferred by the Hohfeldian claim of non-interference is also the same interest a sovereign individual has.

Therefore, by pointing out the problems of the two theories of rights in this chapter, it lays down a foundation for the whole dissertation and the following chapters will be written upon this foundation. In chapter two, I will introduce John Stuart Mill's concept of the sovereign individual and argue the Interest and Will theories of rights are just different expressions of this concept—they just capture the different aspects of this idea and the problems of the two theories of rights can be traced down to the acceptance of the sovereign individual. In chapter three, I will show how the concept of the sovereign individual is seen as problematic by Marx and it has its roots in the commodity exchange economy pointed out by Pashukanis and the essence of a sovereign individual is no more a commodity owner. In chapter four, I will point out that the Chinese contemporary understanding of rights attempts to provide its own understanding of right-holding, but it turns out that it went to two extreme poles: on the one hand, it completely denied the concept of the sovereign individual, while, on the other hand, it completely accept it. In the final chapter, I will show that Confucianism can rescue the above problems by not relying on the concept of the sovereign individual, but by depending on the concept of Confucian moral individual.

Chapter 2: Sovereign Individual as the Cause of the Problem of the Western Theories of Rights

Abstract: In this chapter, I argue that the Will and Interest theories of rights accept Mill's concept of the sovereign individual which is built upon the elements of control and Hohfeldian claim of non-interference. The Will Theory emphasises the aspect of control a sovereign individual has over self-regarding activities and the Interest Theory emphasises the way a sovereign individual is protected against interference from others. By reconstructing two theories of rights in this way, it well explains the problems they caused that are identified in the first chapter.

Introduction

In the last chapter, I revealed the problems of the two theories of rights and the deadlock reached by the debate. In this chapter, I will argue that the root cause of the problems of the two theories of rights is that both of them accept a common assumption, which is to treat the right-holder as a sovereign individual. I use Mill's liberty principle to define the concept of the sovereign individual and I review the development of this concept in the western history. The problem of the Will Theory can be attributed to its acceptance of the importance of the control a sovereign individual has and the problem of the Interest Theory can be attributed to its acceptance of the importance of interest in Mill's liberty principle.

1. The Concept of the sovereign individual

1.1 John Stuart Mill and sovereign individual

1.1.1 Sovereign individual in Mill's *On Liberty* and its origin

To begin with, I must admit that the concept of the sovereign individual has different meanings and they are used in different contexts. For example, Friedrich Nietzsche uses this term in the ethical sense in which a sovereign individual is an independent master of his will who can make and perform a promise by himself.[97] Another popular usage of the concept of the sovereign individual is that it is used as the synonym of 'individualism' and it represents the priority of the individual in understanding the relationship between individuals and society.[98] The third usage of this concept refers to the methodological individualism and it was raised in jurisprudence in the 20th century. It is pointed out that since social structures, institutions, and practices are made by individuals' actions and beliefs, sovereign individual in the methodological sense means that we should explain and understand the legal phenomenon from an internal or participant point of view and the sovereign individual here is the judges.[99]

The quick introduction of the different usages of sovereign in the literature is not to criticise their usage as problematic. The only purpose, with the combination of my analysis of Mill's theory below, is to show that the western

[97] Friedrich Nietzsche, *Nietzsche: On the Genealogy of Morality and Other Writings*, ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge University Press, 2017), 37–38: 'Let us place ourselves, on the other hand, at the end of this immense process where the tree actually bears fruit, where society and its morality of custom finally reveal what they were simply *the means to*: we then find the *sovereign individual* as the ripest fruit on its tree, like only to itself, having freed itself from the morality of custom, an autonomous, supra-ethical individual (because 'autonomous' and 'ethical' are mutually exclusive…'

[98] Nicholas Abercrombie, Stephen Hill, and Bryan S. Turner, *Sovereign Individuals of Capitalism* (London: Routledge, 2014), 1: 'This book is about individualism and capitalism, and their relationship…The rise of individualism as a novel conception of the sovereign individual, and as a new pattern of individual behaviour, appeared to be corrosive of existing social arrangements.'.

[99] William Lucy, 'The Sovereign Individual,' in *Understanding and Explaining Adjudication* (Oxford: Oxford University Press, 1999), 95: 'the near-exclusive concentration upon judicial decision-making betokens the view that this is indeed where the explanatory action is- the implication being that to understand the law on must understand the actions of these individuals… Thus the orthodoxy apparently embraces the sovereign individual and sovereign individual is, unsurprisingly, a judge'.

theories of rights specifically accept Mill's concept of the sovereign individual, and this concept well accounts for the problems of the theories I identified in the last chapter.

John Stuart Mill is one of the most influential philosophers in the western history of liberalism. As I will show below, in his famous work *On Liberty*, he develops the concept of the sovereign individual and this idea sees the development over the western history and it helps us understand Mill further.

Let me now begin the analysis of Mill from a passage in *On Liberty*:

> The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[100]

The first and obvious importance of this passage is that it contains the definition of sovereign individual which I will be using throughout not just this chapter, but the whole dissertation. A sovereign individual, according to this passage, is defined from two main perspectives. First, sovereign individual means that an individual's liberty within the sphere that only concerns himself is absolute. This immediately brings about Mill's distinction between self-regarding actions and other-regarding actions. The formers, as the words suggest, are actions that affect himself, such as liberty of consciousness, thought, and feeling, while the latters are actions that affect other people.[101] His purpose of dividing actions into two different categories is to find out 'the nature and limit of the power which can be legitimately exercised by society over the individual'[102], in other words, what maxim is required to deal with actions of different categories. For self-regarding actions, when Mill says above that an individual has an absolute liberty in this sphere, it means that an individual's action is not accountable to society, so as long as such actions are harmless to other people, interfering with them is not justified: 'That the

[100] John Stuart Mill, *On Liberty* (Canada: Batoche Books, 2001), 13, https://doi.org/10.1017/CBO9781139149785.
[101] Mill, 15.
[102] Mill, 6.

only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'[103] For other-regarding actions, an individual is accountable to society and he may be subject to social or legal interference if the action is harmful to others.[104]

The second perspective from which a sovereign individual is defined is that within the sphere of self-regarding actions, the individual is sovereign. So what does 'sovereign' mean here? It contains the meaning of different aspects. First, it overlaps, to some extent, with what 'absolute' liberty means above in the sense that an individual's liberty to do something that is self-regarding cannot be interfered with by the society. If an individual's liberty that only concerns himself is interfered with, the sovereignty of an individual is compromised. However, 'sovereign' does not merely mean the freedom from interference. In his *Autobiography of John Stuart Mill*, Mill told us that he borrowed the definition 'sovereign' from another author Josiah Warren:

> In our own country before the book *On Liberty* was written, the doctrine of individuality had been enthusiastically asserted…[by] a remarkable American, Mr. Warren, had framed a System of Society, on the foundation of the Sovereignty of the individual… although in one passage I borrowed from the Warrenites their phrase, the sovereignty of the individual.[105]

Mill gives us a clue to further understand his concept here, so let me explore how Josiah Warren understands this concept. First of all, Warren uses this concept in a more general sense, emphasising the importance of individuality for society. He uses an example of musical harmony to demonstrate the relationship between individual notes and musical harmony:

> Musical harmony is produced by those sounds only which differ from each other. A continuous reiteration of one note, in all respects, the

[103] Mill, 13.
[104] Mill, 86.
[105] John Stuart Mill, *Autobiography of John Stuart Mill* (Auckland, NEW ZEALAND: Floating Press, The, 2009), 252–53.

> same, has no charms for any one…it is only when different notes are sounded together that we produce harmony…It is to the indestructible individuality of each note in music that we are indebted for this most humanizing art.[106]

The purpose of Warren's example above is to make an analogy between musical harmony and social harmony and argues that individuals, like notes, are the basis of social harmony: it is the uniqueness of each individual that constitutes a society. He points out that, however, the ancient and modern political fallacies were rooted in the demand for 'unity' in the sacrifice of individualities:

> It was a demand for 'unity,' 'oneness of mind,' 'oneness of action,' where coincidence was impossible. The demand disregarded all nature's individualities, demanded the annihilation of all diversity, and made dissent a crime.[107]

On the contrary, he argues that the basis for society and the realisation of social harmony is the sovereign individual:

> The true basis for society is exactly the opposite of this. It is the freedom to differ in all things, or the sovereignty of every individual…Disconnecting all interests, and allowing each to be the absolute despot or sovereign over his own, at his own cost, is the only solution that is worthy of thought. Good thinkers never commit a more fatal mistake than expecting harmony from an attempt to overcome individuality…[108]

According to the passages above, we can summarise Warren's understanding of a sovereign individual from two aspects: first, as the example of musical harmony indicates, the sovereignty of each individual means the uniqueness of each individual and it admits the difference existing among individuals; second, it means that individual is sovereign over his own, specifically, Warren

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[106] 'Equitable Commerce', in *Equitable Commerce* (Fordham University Press, 2019), 59–60.
[107] 'Equitable Commerce', 63.
[108] 'Equitable Commerce', 62–63.

points out that it means an individual has a liberty to his own and he is not submitted to any condition that he does not agree upon: '…if he is not compelled to submit to any condition not contemplated beforehand…then there is no violation of his natural liberty or sovereignty over his own.'[109] He further develops the second point above by associating it with the idea of control, a control of one's property, action, and responsibility according to himself:

> When one's person, his labour, his responsibilities, the soil he rests on, his food, his property, and all his interests are so disconnected, disunited from others, that he can control or dispose of these at all times, according to his own views and feelings, without controlling or disturbing others; and when his premises are sacred to himself, and his person is not approached, nor his time and attention taken up against his inclination, then the individual may be said to be practically sovereign of himself and all that constitutes or pertains to his individuality.[110]

What Warren emphasises here is that the control of the above things must be held in the hands of individuals, not someone else's. If the control is lost, the liberty and sovereignty of the individual are compromised:

> If their persons, their responsibilities, and all their interests are involved in the combination, as in communities of common property, all these must be entirely under the control of the government, whose judgment or will is the rule for all the governed. The natural liberty or sovereignty of every member is entirely annihilated…[111]

So far I have reviewed Mill's definition of the sovereign individual and Warren's and the connection between them can be established. As I will argue in the next section, Mill accepts Warren's concept of control in understanding a sovereign individual and this constitutes one of the fundament features of a sovereign individual.

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[109] 'Equitable Commerce', 78.
[110] 'Equitable Commerce', 80.
[111] *The Routledge Guidebook to Mill's On Liberty* (Routledge, 2015), 50.

1.1.2 Millian sovereign individual in religious freedom and its further development

Let us return to the question above: how did Mill inherit Warren's idea and embody it in his liberty principle shown above? Obviously, Mill does not emphasise the uniqueness of an individual in his liberty principle above, because the purpose of his principle is to deal with the limit of social interference with one's liberty. However, he accepts Warren's the sovereignty of individual in terms of control. More specifically, I will show that the Millian sovereignty of an individual embodies in his understanding of religious freedom. Jonathan Riley points out that Mill's liberty principle is actually a generalisation of the principle of religious freedom and I agree with his approach here because an individual's religious freedom makes perfect compatibility with Mill's liberty principle, which answers the question above. An individual's religious belief is generally self-regarding, no matter whether I choose to be an atheist, a Christian, or a Buddhist, as long as I do not try to preach to others, and I should enjoy the absolute liberty without being interfered with by others. Mill acknowledges this point: 'The great writers to whom the world owes what religious liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to others for his religious belief.'[112] What Mill conveys in this passage is just that religious freedom is absolute, but also individual is sovereign in this sphere because his religious belief only accounts for himself, which, in Warren's terms, means that the control of his religious belief is held by an individual, not by someone else.

Riley further points out that the theoretical sources of Mill's understanding of religious freedom originate from Thomas Jefferson and James Madison. Jefferson perfectly demonstrates the absoluteness and sovereign of religious freedom in his argument:

[112] Mill, *On Liberty*, 12.

> The right of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.[113]

In this passage, Jefferson confirms that the right of conscience is self-regarding and the sovereignty of an individual in this regard embodies that an individual does not submit to the government's power, but only to God. Jefferon's argument here further enriches Mill's understanding of the sovereignty of an individual because it requires that an individual has the highest authority, or no submission to anyone else, in dealing with one's conscience, a relationship with God. Madison has a similar argument as Jefferson does:

> 'that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence'…This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the creator. [114]

According to the analysis above, the sovereign individual under Mill's development means that an individual has a full control over self-regarding actions, in the sense that no one can interfere with them unless they are harmful to others, and also in the sense that they are not subject to anyone else's dictates or power; in other words, literally as 'sovereign' suggests, an individual has the highest authority in dealing with self-regarding actions.

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[113] Thomas Jefferson, 'SEVENTEEN Religion', in *SEVENTEEN Religion* (Yale University Press, 2022), 244.

[114] Franklyn S. Haiman, *Religious Expression and the American Constitution* (East Lansing, UNITED STATES: Michigan State University Press, 2003), 161.

Given that Mill's concept of the sovereign individual has its roots in the concept of religious freedom, a quick review of the western history in this regard will help us understand how the concept has developed over time. One of the most significant movements that promote religious freedom is the Reformation. Before the 16th century, the Catholic Church controlled both people's secular life and religious belief and demanded complete obedience to it. Due to its highest authority in the society and the exclusive control over the people, people had no control over their religious activity. Any attempt to challenge the Church authorities was repressed, but the problem of religious intolerance became serious: 'The pervasive Christian fear of the Turks, a result of the Crusades (1096-1099, 1147-1149, 1189-1192, and 1202-1204), contributed to sharpening Catholic intolerance toward other religious groups. In addition to Muslims, European Jews were considered foreigners and often personae nongrate in Western Christendom, and as such were subjected to various levels of discrimination…'.[115] To challenge the church's authority and regain the control of the individual's soul and destiny, Protestantism rose and the Reformation began.

Martin Luther was a significant figure in the history of the Reformation and he was the first man to formulate Protestant Principles. Overall, the theme of the principles is to return the final control of religious activity to individuals. In 1517 Luther published the *Ninety Five Theses*, criticizing the sale of indulgences by the Pope, which marked the beginning of the movement. The first five theses formulated the idea that repentance is an internal activity by an individual rather than by an external force:

> 1. Our Lord and Master Jesus Christ in saying: 'Repent ye,' etc., intended that the whole life of believers should be penitence.
>
> 2. This word cannot be understood of sacramental penance, that is, of the confession and satisfaction which are performed under the ministry of priests.

[115] Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley ; London: University of California Press, 2004), 148.

3. It does not, however, refer solely to inward penitence; nay such inward penitence is nought, unless it outwardly produces various mortifications of the flesh.

4. The penalty thus continues as long as the hatred of self—that is, true inward penitence—continues; namely, till our entrance into the kingdom of heaven.

5. The Pope has neither the will nor the power to remit any penalties, except those which he has imposed by his own authority, or by that of the canons.'[116]

According to these five theses, Luther demarcates a line between the internal activities of an individual and the external ones. Penitence is an internal activity conducted by an individual himself rather than by the priests, according to theses 1 to 4. The Pope can play a role in remitting penalties only through individuals doing this for themselves under these 5. Luther's contribution to developing the Millian concept of the sovereign individual is obvious, because a clear boundary between a sphere of an individual's actions and the public's sphere, or in Mill's words, the distinction between self-regarding and other-regarding activities, is the first step to establishing a sovereign individual, and Luther made this become possible by advancing the theses above.

John Locke, one of the most influential philosophers during the Enlightenment, had similar arguments as Luther, that individuals have the freedom of religion. His famous work *A Letter concerning Toleration* delivers this point, claiming that the affairs of soul are inward and personal, and the magistrate has no right to interfere with them. I will further examine his theory below.

First of all, he draws a line between civil life and religious life, as Luther did, and he argues that the civil magistrate is only in charge of civil affairs: '…the

[116] Martin Luther, C. A. Buchheim, and Henry Wace, *First Principles of the Reformation, or, The Ninety-Five Theses and the Three Primary Works of Dr. Martin Luther Translated into English*,. (London: J. Murray, 1883), 62-63.

care of souls is not committed to the civil magistrate…cannot belong to the civil magistrate, because his power consists only in outward force…'[117]. On the contrary, salvation and religion are personal and inward affairs: 'but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.'[118] The distinction between these two lives determines the realm in which an individual can control his own religious belief, while the public power is under a duty not to invade this individual realm. Second, based on this distinction, he argues that an individual should only follow his own mind concerning faith:

> 'For no Man can, if he would, conform his Faith to the Dictates, of another. All the Life and Power of true Religion consists in the inward and full perswasion of the mind: And Faith is not Faith without believing.'[119]

And no one can compel him to believe or not to believe something:

> 'it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion …and such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force.'[120]

Finally, he admits that even external forces, such as laws and penalties, could convince and change people's minds, it ultimately depends on an individual if he wants to gain the salvation of his soul; thus, he needs to make his final way to the heaven by himself:

> For there being but one truth, one way to heaven, what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors and to the religion

[117] John Locke, *A Letter Concerning Toleration*, trans. William Popple d, Early English Books, 1641-1700 / 767:42 (London : Awnsham Churchill 1690., 1690), 13.
[118] Locke, 13.
[119] Locke, 13.
[120] Locke, 13.

> which either ignorance, ambition or superstition had chanced to establish in the countries where they were born? [121]

According to the statements above, Locke not only argues that religious belief is an individual and internal affair but also argues that third parties, like the government and other people, are under the duty of not compelling individuals to believe or not to believe certain things. Therefore, Locke's arguments contribute to the key elements of Mill's sovereign individual. First, he separates realms between private and public lives, and it is further developed into a self-regarding sphere of actions and an other-regarding one by Mill. Second, based on the separation of realms above, an individual can decide his own faith rather than subject to others' dictate. This can be regarded as the early form of Mill's sovereign individual because it emphasises an individual's authority and control in deciding his own faith, but Locke has not yet contemplated this authority to the supreme level as Mill did.

Besides developing the concept of the sovereign individual from the perspective of religious freedom, it is also developed in property rights and Locke also has a significant contribution to this aspect. In *Two Treatises of Government*, he made a full argument of how an individual can have a property right. Before Locke, people were told that their enjoyment of the natural fruits came from God: '…God… 'has given the earth to the children of men', given it to mankind in common.'[122]. However, Locke questioned how any man could have property when 'God gave the world to Adam and his posterity in common'. To appropriate the natural fruits given by God to all mankind, people need to use their own labour:

> Though the earth and all inferior creatures be common to all men, yet everyman has a 'property' in his own 'person'. This nobody has any

[121] Locke, 14.
[122] John Locke, *Two Treatises of Goverment* (London, 1823), 115.

> right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his.'[123]

Then the process of transferring the natural goods to personal property is through mixing one's labour into the natural goods, like picking up fruits or gathering wood, etc: 'Whatsoever, then, he removes out the state that nature hath provided and left it in, he has mixed his labour with it and joined to it something that is his own, and thereby makes it his property.'[124] The significance of an individual's appropriation of the natural goods by his own labour is that he controls this process and he does not need to ask for consent from someone else:

> we see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out the state Nature leaves it in, which begins the property…and the taking of this or that part does not depend on the express consent of all the commoners.[125]

Furthermore, he argues that other people are under the duty not to interfere with other people's right to preserve themselves[126]: '…ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.'[127]

However, Locke points out that an individual can only get a certain amount of property within his labour capacity and for enjoyment, even though the acquisition of the property right does not need permission from another: ' 'God has given us all things richly'…But how far has He given it to us—' to enjoy'?...No man's labour could subdue or appropriate all, nor could his

[123] Locke, 116.
[124] Locke, 116.
[125] Locke, 116–17.
[126] Matthew H. Kramer, 'John Locke and the Origins of Private Property by Matthew H. Kramer', Cambridge Core, July 1997, 99, https://doi.org/10.1017/CBO9780511585630.
[127] Locke, *Two Treatises of Goverment*, 107.

enjoyment consume more than a small part; so that it was impossible for any man, this way, to entrench upon the right of another…'[128]

Locke's theory of property also contributes to Mill's sovereign individual. Locke shows us that an individual has ownership of his labour and no one can claim it. The property right is thus obtained by mixing one's labour with natural objects. By arguing this, Locke confirms an individual's control and authority over his labour and such understanding differs little from Mill's argument that an individual's liberty is absolute and sovereign over self-regarding actions. C.B Macpherson interprets this as an absolute individual possession:

> For to insist that a man's labour is his own… is also to say that his labour, and its productivity, is something for which he owes no debt to civil society. If it is labour, a man's absolute property, which justifies appropriation and creates value, the individual right of appropriation overrides any moral claims of the society.[129]

However, Locke reminds us that there is a limit where people should stop obtaining property beyond the limit of their enjoyment, so other people can obtain their shares. This indicates that Locke marks the boundary of one's obtaining and exercising his property right and this confirms the importance of the distinction between self-regarding and other-regarding actions I emphasised above. In summary, Locke makes substantial contributions to the development of the concept of the sovereign individual from the perspective of religious freedom and property rights, which helps us understand Mill better.

So far I have reviewed how Mill inherits the concept of the sovereign individual from Warren in his understanding of religious freedom and other theorists contribute to the development of this concept from religious freedom and property rights. Let me now take a step back and understand 'sovereign'

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[128] Locke, 119.

[129] C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: At The University Press, 1962), 221.

from the perspective of ordinary usage and it will be helpful in our understanding of Mill's idea of the sovereign individual. When talking about 'sovereign' in our daily discourse, it typically refers to a state and its sovereignty means that citizens of this state should obey its laws and other states cannot invade its sovereignty without legitimate reasons, which is called the 'internal' and 'external' sovereignty.[130] For example, the British parliament is recognised as having the internal sovereignty in the U.K. and the government should follow the acts and decisions it makes without conditions. We also condemned the U.S. war on Iraq because it is illegitimate to invade a sovereign state without the consent of the Security Council in the U.N. Theoretically speaking, Daniel Philpott points out, three elements constitute this concept. The first element is 'authority' in the sense that 'the right to command and correlatively, the right to be obeyed' and it is 'legitimate' authority when it is rooted in law, tradition or consent. [131] For instance, the authority of a state is embodied in that the government requires each citizen to pay tax, and all citizens should obey it except in special circumstances. However, a police officer or parents have authority, but they cannot be called sovereign. This brings the second element: supremacy, which means that the sovereign represents the highest authority and it cannot be further challenged or questioned.[132] The final element is 'territoriality', which means that the supreme authority exists within a discrete land and there are borders.[133] When combining these elements together, the definition of sovereign is that it is 'supreme legitimate authority within a territory'.[134]

With the definition of 'sovereign' in hand, let us recall Mill's definition of sovereign individual above:

> The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely

[130] Daniel Philpott, 'Sovereignty: An Introduction and Brief History', *Journal of International Affairs* 48, no. 2 (1995): 357.
[131] Daniel Philpott, 'Sovereignty: An Introduction and Brief History', *Journal of International Affairs* 48, no. 2 (1995): 355.
[132] Philpott, 356.
[133] Philpott, 356.
[134] Philpott, 357.

> concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. [135]

We will now begin to see why the three elements constituting the concept of 'sovereign' are helpful for us to understand Mill here. For Mill, probably the most important task for him is to delineate the 'territory' inside which an individual is a sovereign, but outside which an individual may be subject to social and legal regulations. Without a clear delineation of the territory, he cannot realise his theoretical goal, which is to determine the limit of the power that can be legitimately exercised over the individual. Therefore, a sovereign individual should be defined within certain borders and they are the reach of one's actions. If one's action only reaches to himself, such as eating an apple at home, then it is self-regarding and I am a sovereign individual towards this action. However, if my wife also wants to eat an apple and there is only one left, then my eating an apple can become other-regarding because I may cause harm to her, for example, she is more thirsty and hungry than me. Jefferson also notices the importance of delineating certain lines between individuals and government and the government should refrain from infringing the territory belonging to individuals, such as scientific freedom:

> Descartes declared it [the earth] was whirled round its axis by a vortex. The government in which he lived was wise enough to see that this was no question of civil jurisdiction or we should all have been involved by authority in vortices.[136]

Therefore, it is important to bear in mind that there is no sovereign individual without limitation; it must be defined within a certain sphere and this is what Mill emphasises in his principle. This point is particularly important and relevant to the rest of the chapter below: I narrow down the sense in which sovereign individual is used specifically in the western theories of rights.

Besides the elements of territory, the element of 'authority' also contributes to Mill's concept of the sovereign individual. As Daniel Philpott points out, the

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[135] Mill, *On Liberty*, 13.
[136] Jefferson, 'SEVENTEEN Religion', 245.

authority of a state means that a sovereign state must have uncontested control of its religion, army, economy, justice, etc. This is consistent with my argument that Mill accepts Warren's concept of control in developing the concept of the sovereign individual: within the sphere of self-regarding actions, an individual can control his own actions, such as determining how to use his things, in a similar way a political sovereign determines how their citizens should behave, such as obeying certain rules or custom, etc. Finally, the element of 'supremacy' contributes to the concept of the sovereign individual in the sense that an individual is the highest judge with regard to self-regarding actions and they are not subject to other people's order and interference, in the same way the political sovereign enjoys the supreme internal and external authority discussed above.

To summarise the discussion of this section, Mill's concept of the sovereign individual has two fundamental features: first, the individual has the control of self-regarding activities and second, the control above cannot be interfered with by the society. These two features become the foundation for the rest of this chapter because I will argue that the features of Mill's sovereign individual can be found in the features of the right-holder developed by the Will and Interest Theory.

1.2 Sovereign individual and right-holding

In the above sections, I introduce Mill's concept of the sovereign individual and I will argue in this section that this concept can be applied to the theory of right-holding. A question can be raised immediately to challenge my argument above. As I pointed out above, Mill only constructs individuals as sovereign in their self-regarding actions, and for other-regarding ones, individuals are not sovereign and are subject to social interference and control. However, rights include both self-regarding and other-regarding activities, so it seems obvious that any theory of right-holding is not completely compatible with the concept sovereign individual. For rights that are other-regarding, such as a right to promise something owed to someone else, it is inappropriate to claim that the right-holder is a sovereign individual.

I admit this question makes some sense, but the concern can be resolved without much difficulty. As I pointed out above, one of the most important elements that constitute a sovereign individual is 'territory' and it means that an individual can only become a sovereign individual within certain boundaries; in other words, there is no sovereign individual without a clear boundary of territory. Furthermore, the review of the western history of the development of this concept, especially religious freedom, also shows us that demarcating between personal affairs and public affairs is the first step forward to defining the concept of the sovereign individual. Therefore, the appropriate reading of Mill's passage I quoted above is that Mill understands a sovereign individual within the self-regarding sphere of one's activities, and beyond that sphere, individuals are not sovereign. Given that the context of the discourse of right-holding is different from Mill's and the boundary of a certain sphere is not fixed indefinitely, I do not need to strictly follow Mill and limit the 'territory' to just the self-regarding activities. Therefore, the concept of the sovereign individual that the theory of right-holding subscribes to can be defined below:

> In the sphere which concerns the affairs of rights, the right-holder is sovereign over those affairs.

This definition is developed upon Mill's concept of the sovereign individual and the main modification lies at the range of 'territory': it extends the range of 'territory' to all the affairs that are related to all kinds of rights, not just liberty. The Hohfeldian framework can help us further distinguish the difference between Mill's and my definition of the sovereign individual. According to Mill's definition, the type of rights he uses is Hohfeldian liberty because those behaviours, such as freedom of conscience, thought, and feeling, can be conducted mainly by oneself, in other words, an individual is under no duty to refrain from doing those behaviours, and other people have no-claim against them. However, my definition of the sovereign individual does not limit the type of rights only to liberty, but is open to all Hohfeldian entitlements. It means that, in a broader sense, right-holders are sovereign individuals when

they hold rights, and the sovereign individual in this sense will overlap the Mill's when a right-holder holds the liberty rights that only concern oneself.

Except for the difference above, the two main elements of the Millian concept of the sovereign individual, the concept of control that an individual has over himself and the non-interference from others I summarised above, are embodied in my definition above. First, the control means that when an individual becomes a right-holder, he takes ownership over the affairs related to rights, rather than being subject to orders from other people. In other words, the right-holder enjoys the highest authority in deciding how to exercise his rights without counselling higher authority. It also means that when an individual holds a right, others cannot interfere with his exercise of the right. From the perspective of the Hohfeldian framework, a right-holder as a sovereign individual means that an individual has a Hohfeldian claim that other people bear the duty of non-interference with the exercise of his rights.

Furthermore, it is important to note that this definition does not commit to individualism. As Raz points out, states, corporations, and groups can be right-holders.[137] Therefore, the function of treating a right-holder as a sovereign individual is to denote the special normative status a right-holder has and how it is embodied in the theory of right-holders, instead of arguing that only individuals can be right-holders or a sovereign individual must be a natural person.

So far, the concept of the sovereign individual in the sense of right-holding is built and we could have some intuitive observation that the Will Theory emphasises the element of control, while the Interest Theory emphasises the element of non-interference from others. In the rest of this chapter, I will argue that the two theories of rights are just a reflection of this concept from different aspects and this concept accounts for the problems of the two theories of rights I identified in the last chapter.

[137] Raz, *The Morality of Freedom*, 180.

2. Two theories of rights as two faces of sovereign individual

In this section, I will argue that two theories of rights are united in the point that they both accept the concept of the sovereign individual and they just differ in displaying different faces of sovereign individual.

2.1 The Will Theory of rights and sovereign individual

In Hart's early paper *Definition and Theory in Jurisprudence*, he uses the concept of choice to develop his Will Theory before using the concept of control we have seen above:

> I would, therefore, tender the following as an elucidation of the expression 'a legal right':…(b) under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action. (c) This obligation is made by law dependent on the choice either of X or some other person authorised to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorised person) so chooses or alternatively only until X (or such person) chooses otherwise.[138]

The concept of choice above is the key element Hart uses to develop his early version of the Will Theory. As the quotation indicates, the performance of duty to do or not to do something is dependent on X's choice, which means the right-holder has an option to decide whether to enforce or waive the duty. Therefore, having a choice in the hand of the right-holder is the sufficient and necessary feature of right-holding in Hart's early version of the Will Theory. Then the concept of choice is then further developed to the concept of control and let us recall Hart's definition small scale sovereign in his *Legal Rights*:

> The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of

[138] H. L. A. Hart, 'Definition and Theory in Jurisprudence', in *Essays in Jurisprudence and Philosophy*, by H. L. A. Hart (Oxford: Oxford University Press, 1983), 35.

> conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. [139]

According to Hart's definition here, the concept of choice is developed into the concept of control, which more accurately describes the feature of right-holding: a right-holder not only has the choice to request a duty-bearer to behave in certain ways but also can waive or enforce it. What control means here is a mixture of Hohfeldian claim right and Hohfeldian power.[140] The legal relation between 'right' and 'duty', as the first-order relation, is only the basis of this right and they are insufficient to constitute a right-holder as a sovereign individual. The key lies in the three fullest measures of control, which is, in essence, the Hohfeldian power: the common feature of these three types of control is that the right-holder can modify the existing legal relation: he can waive or keep the existence of the duty, or he can enforce or unenforced a compensation when the duty is breached, or he can even decide to keep or waive the duty to pay the compensation. This means that having the Hohfeldian power is a sufficient condition of having a right; if there is no such a power accompanying the claim right, the real right cannot exist. Hart confirms that the concept of control, the Hohfeldian power, is the key element that constitutes a small-scale sovereign.

The ground of Hart's emphasis on the concept of choice, and then on the concept of control can be well found in Mill's theory of liberty. For Mill, the distinctive endowment of a human being is to make a choice in his life, rather than just copying other's behaviour and thought or just following custom:

> …it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way…to conform to custom, merely as custom, does not educate or develop in him any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are

[139] Hart, 'Legal Rights', 183–84.
[140] MacCormick, 'Rights in Legislation', 193.

> exercised only in making a choice. He who does anything because it is the custom makes no choice. [141]

According to this quotation, the logic of Hart's concept of choice and Mill's concept of choice is identical, because both mean that an individual can do certain things based on their judgment and decision without following or copying others' behaviour. However, the concept of choice developed by Hart and Mill is not sufficient to constitute the concept of the sovereign individual. The decisive element of the sovereign individual lies in the concept of control and it can be found in both Hart and Mill's theories. As we have seen above, Hart argues that the concept of control is what makes the right-holder become a sovereign individual and Mill also inherits Warren's concept of control in defining the sovereign individual. However, Mill uses the concept of control in a more general sense, which means that an individual takes ownership of his self-regarding activities, such as his religious belief, rather than following others' orders. So when an individual has a control over his self-regarding activities, it means that he is his own judge to decide what to do.

Although Hart uses the concept of control in the sense of Hohfeldian power, while Mill uses it in the sense of taking the ownership of self-regarding activities, they are closely related in the following two ways. First, the former is built up on the latter: a Hohfeldian power does not exist if the first-order relationship between right and duty the Hohfeldian power depends upon is beyond the control of the right-holder. For instance, I do not have a Hohfeldian power to modify X's duty to pay £100 to Y if X only promises this to Y, not to me, because this legal relation only exists between X and Y. Second, the former is entailed by the latter: when a sovereign individual has the control over the certain affairs, it should entails that the individual has the Hohfeldian power to modify the current status of the affairs. For instance, suppose I am the owner of my bike, it entails that I have a Hohfeldian power to decide whether to sell it or send it as a gift to my friend. It does not make sense that I have the control over my property but I cannot dispose of it. Therefore, Hart's

[141] Mill, *On Liberty*, 54-5.

theory of rights captures one aspect of Mill's concept of the sovereign individual, which is the control over the self-regarding activities. Moreover, although the object of Hart's control is the first-order relationship, while the one of Mill's control is self-regarding activities, as I pointed out above, this is just the matter of demarcating the territory in which an individual is treated as a sovereign individual and the essence of Hart's concept sovereign individual and Mill's remains identical.

2.2 The Interest Theory of rights and sovereign individual

2.2.1 MacCormick and Kramer's Interest theories and sovereign individual

Now let me turn to the Interest Theory. Admitted here, the link between the Interest Theory and the concept of the sovereign individual looks less obvious than the Will Theory not only because the theorists do not explicitly or implicitly admit that they accept this assumption, but also because they conceive their work either, in MacCormick's words, as describing the nature and character of the rules that confer rights,[142] or in Kramer's words, as valuing analytical clarity and rigour by explaining the necessary condition of right-holding.[143] However, by revealing the logic of how the Interest Theory understands rights benefit the right-holder in the first chapter, I will argue that the Interest Theory accepts Mill's concept of the sovereign individual.

Let me recall the arguments I made in the first chapter. The way a right benefits the right-holder argued by the Interest Theory is developed upon the way the Hohfeldian claim of non-interference whose paradigm is property rights. More specifically, only the examples that meet the following requirement can support the Interest Theory: the example must show that holding this right is generally beneficial to the right-holder and it is an exceptional case when holding it is not beneficial or harmful to the right-holder. In other words, when the Interest Theory describes the necessary features of right-holding, the examples they use to support its argument are selective and

[142] MacCormick, 'Rights in Legislation', 191.
[143] Kramer, 'A Debate over Rights', 60–62.

limited, rather than general. This also means that a successful critique of the Interest theory must show that it is neither a general case nor an exceptional case when holding a right is not beneficial or harmful to the right-holder. Then I argued in the first chapter that the Hohfeldian claim of non-interference exemplified by property rights is the only suitable example that satisfies the above requirement because it is people's ordinary understanding that it is a commonly accepted interest that the ownership and control of one's property cannot be interfered with. Therefore, the right-holder under the conception of the Interest Theory is the property-right-holder, not the right-holder in general, and the Interest Theory of rights is in essence a theory of Hohfeldian claim of non-interference, although it does not admit it explicitly.

With this argument in hand, the connection between the Interest Theory and Mill's concept of the sovereign individual can be established: the necessary feature of the right-holder under the Interest theory is identical to the feature of Mill's concept of the sovereign individual. As I summarise above, the core elements of this concept are the control and the non-interference from the society. These two elements can be found in the property-right-holder that the Interest Theory constructs. First, the property-right-holder has the exclusive control over the property in the sense either he has the ownership of the property or he can dispose of it according to certain grounds. The former case is common when an individual has a property right over his personal belongings. The second case can be found in usufruct, such as a creditor's right to the collateral: although the creditor does not own the property, he can repossess the property or auction it off if the debtor fails to repay the money. Second, the property-right-holder has a claim against other people that they are under the duty of non-interference or the duty of compensation if the property is damaged. For example, a property-right-holder can claim that other people should not take his personal belongings, or a mortgagor's claim that the debtor is obliged not to damage the property or provide extra collateral if he believes the value of the property is depreciated. When combining these two elements together, the core of holding a property right is that it entails one's exclusive control over the property, and 'exclusive' here

means that it confirms a specific individual as the ownership of the property or as having the capacity to dispose of the property when certain conditions are satisfied, and at the same time, other people do not have these control and bear the duty of non-interference with this control.

Before I reveal more evidence that the Interest Theory accepts the concept of the sovereign individual, Kramer is likely to defend the Interest Theory by responding to my argument above that my argument above violates the Hohfeldian correlativity axiom because the Interest Theory is not committed to the claim that all Hohfeldian entitlements entail a duty to do or abstain from doing something from other people, such as the Hohfeldian liberty. This response can be refuted using the conclusion in the first chapter. Although Kramer is not committed to the claim that a Hohfeldian liberty entails a duty of non-interference, he admits that the liberty is usually protected with the combination of the Hohfeldian claim of non-interference, such as the claim against theft and physical assault. Therefore, what I pointed out in the first chapter is that what Interest theory argues is not how liberty or the Hohfeldian entitlements in general, protects the right-holder's interest, but how the Hohfeldian claim protects the right-holder's interest. So I do not argue that all Hohfeldian entitlements entail the duty of non-interference; on the contrary, I uphold the correlative axiom throughout my dissertation. The core of my argument in the first chapter is that it is the Interest Theory itself that conceives the way that rights benefit right-holders the same as the Hohfeldian claim of non-interference benefits right-holders.

Let me start with MacCormick's analysis. He argues that the content of all Hohfeldian entitlements, in essence, provides normative protection to the right-holder[144]. He then uses an example to support his argument above: according to section 5(1) of the Trade Union and Labour Relations Act 1974: '…[E]very worker shall have the right not to be— (a)excluded from membership (b)expelled from membership, of a trade union…by way of

[144] MacCormick, 'Rights in Legislation', 205.

arbitrary or unreasonable discrimination.[145] He then argues that this rule confers protection of the first three kinds of Hohfeldian entitlements: (1) the claim that people at large are under a duty not to injure worker by excluding or expelling him from a trade union; (2) every worker is in law free to apply for membership of a union of his choice; (3) any act that attempts to exclude a worker from the trade union lacks the legal effect if it is judged to be 'by way of arbitrary or unreasonable discrimination'.[146]

At first glance, MacCormick's arguments above seem plausible because all Hohfeldian entitlements seem to offer protection to the right-holder, however, the arguments cannot withstand further deliberation. First, a Hohfeldian claim can be either beneficial or not beneficial to the right-holder. MacCormick's example above is only a specific case in which holding a Hohfeldian claim is beneficial to the right-holder, but as I have shown in the first chapter, a claim can be irrelevant to the right-holder's interest at all, such as Cruft's example that he has a claim against Y that Y should have a cup of tea for supper. Most importantly, a claim like this is not exceptional because it is created by a promise between individuals and a promise can be either beneficial or not beneficial to the promisee. Second, similarly, a Hohfeldian liberty can be either beneficial or not beneficial to the right-holder because whether exercising it is beneficial or not beneficial to the right-holder depends on the content of the liberty and it is not exceptional that exercising it is not beneficial to the right-holder. For example, the liberty to smoke is harmful to one's health, while it is true that the liberty to join a trade union is beneficial to the right-holder. Third, whether holding a Hohfeldian immunity, as the second-order entitlement, is beneficial to the right-holder depends on the content of the first-order entitlement. A teenager's immunity from parents' power to stop him from smoking is difficult to be understood as beneficial to the teenager, while MacCormick's example above is beneficial to the worker because the liberty to join a trade union is beneficial to the worker.

[145] MacCormick, 205.
[146] MacCormick, 206.

Therefore, neither MacCormick's three examples above show that holding a right is generally beneficial to the right-holders because there exist counter-examples and these counter-examples cannot not be treated as exceptions for the reasons I discussed above. However, his example of the Succession (Scotland) Act 1964 is a suitable example that supports the Interest Theory and, more importantly, shows a clear connection between the Interest Theory and the concept of the sovereign individual. Under this Act, whenever a person domiciled in Scotland dies intestate leaving children, the children automatically are vested a right to the whole of the intestate estate.[147] This example can well support the Interest Theory for the following two reasons. First, when the children are conferred with this right and the executor is confirmed, the children (or the executor) have the claim that other people bear the duty of non-interference with his right, and holding this right is beneficial to the children because it protects the ownership of the estate from interference from others. Second, more importantly, holding this right is generally beneficial to the right-holder because it confirms the children's ownership over the estate and other people should not interfere with it. Therefore, this well explains why MacCormick argues that even if there exists a case in which people can inherit properties that may cause more trouble than its worth, a case like this can be categorised as exceptional.[148]

According to my analysis above, it is not the case that all Hohfeldian entitlements are generally beneficial to the right-holders as MacCormick argues, only the Hohfeldian claim of non-interference is. Therefore, only the example of the children is an eligible case to support the Interest Theory. The children in this case are sovereign individuals because the elements that constitute the concept of the sovereign individual, the control and the freedom from non-interference from the society can be found in this case: the children have the exclusive control over the estate as the owner and they also have the claim that other people are obliged not to interfere with their estate.

[147] MacCormick, 200.
[148] MacCormick, 202.

A similar analysis can be applied to Kramer. Let me start with the examples in which I do not think holding a right generally benefits the right-holder. Similar to MacCormick's example of workers' right to join the trade union, he uses an example of workers' right to receive minimum wage. I do not deny that the right to receive wages that do not fall below certain levels benefits the workers, but I deny that a Hohfeldian liberty, in which the right to receive minimum wage can be subsumed, is generally beneficial to the right-holder, because, for example, an individual's liberty to smoke is harmful to his health and this is a normal case for holding Hohfeldian liberty. So the example of worker's right here is only a specific case and cannot support that holding a right generally serves the interest of the right-holder.

Now let me consider another example from Kramer. He supposes that X is obliged to make monthly payments to support his mother after she reaches the age of seventy-five and he argues that X's mother is generally beneficial in this case because financial security is a major desideratum after one is retired.[149] Once again, I do not deny that financial security after retirement is generally beneficial to an individual and even there exist some situations when receiving financial support from others may render an individual to lose the sense of independence. However, this case is only a specific case and cannot support the thesis of the Interest Theory. X's mother's right here is a Hohfeldian claim that her son should pay her a certain amount of money every month and this claim can be created by either the promise between her and X or is created by laws that sons or daughters should bear the duty to pay their parents a certain amount of money after their parents reach a certain age, for instance. There are two reasons why this example cannot support the Interest Theory. First, there exist cases in which holding a Hohfeldian claim does not serve the right-holder's interest and these cases cannot be treated as exceptional, such as the examples I discussed in the first chapter, a claim to request another person to drink a cup of tea with supper. The reason for this is that when a Hohfeldian claim is created by a promise, it is possible and normal that holding such a claim does not serve the promisee's interest

[149] Kramer, 'A Debate over Rights', 93.

because the people who make the promise can decide the promise is not beneficial to the right-holder. Second, X's mother's right here is not a property right, but a promisee's right, because X's mother does not have ownership of the money before his son pays. As a result, X's mother does not have a Hohfeldian claim of non-interference against other people. However, if other people attempt to prevent her from receiving the payment from her son, such as assaulting her so she cannot meet her son if the way she receives the money is to meet her son in person or blocking the access to her bank account, so she cannot use her money, then she can exercise the Hohfeldian claim of non-interference because she has the ownership over her body and bank account, not because she is the promisee. This returns to my argument in the first chapter that it is the Hohfeldian claim of non-interference that generally protects the right-holder's interest, not the Hohfeldian claims in general.

However, an example of the fishermen's right Kramer uses is a suitable example to support the Interest Theory. The example is that the fishermen have the right to fish and when a factory pollutes the water, the fishermen can sue the factory's owner for violating their right to non-interference. The fishermen's right here is usufruct so the fishermen have the control over the affairs of fishing and also they have the Hohfeldian claim of non-interference against others. Therefore, it is the control and the Hohfeldian claim of non-interference that makes this right generally beneficial to the right-holder and because of these elements, the logic of holding a right to fishing developed by Kramer is identical to Mill's concept of the sovereign individual—the property-right-holder is also a sovereign individual.

2.2.2 Raz's Interest Theory and sovereign individual

Finally, let us turn to Raz. Raz treats the concept of interest as the ground of right-holding because he argues that to assert that an individual holds a right is to indicate an individual's well-being is the ground for a duty on another person.[150] Once again, Cruft's example above poses difficulty to Raz because

[150] Raz, *The Morality of Freedom*, 180.

Cruft's interest is not served in any way by another person having a cup of tea for supper, but he still holds the right to request that person to do so. Raz admits that this is the puzzle that while rights are based on the interest of the right-holder, a person may have property that is more trouble than it is worth, for example. His explanation of this puzzle is that:

> rights are vested in right-holders because they possess certain general characteristics: they are the beneficiaries of promises, nationals of a certain state, etc. Their rights serve their interests as persons with those characteristics, but they may be against their interests overall.[151]

A closer analysis of Raz's argument here is necessary. The core of this quotation lies in the second sentence that it is the interests an individual with certain characteristics has that rights serve, and these characteristics, according to the first sentence, indicate some kind of identity of an individual. Therefore, under Raz's theory, when we say holding a right is beneficial to the right-holder, it only means the right-holder benefits from having a specific identity, not by getting the actual effects of holding the right.

If we follow Raz's logic here, then when he admits that a person may have a property that causes more trouble than its worth, his underlying argument is that holding a property right serves the interests of the right-holder as a property owner. Then what is the general characteristic of a property owner? Although Raz does not give us an answer here, we can still learn from his theory and summarise the general characteristics. According to Raz's definition of rights, rights ground duties, then property rights ground duties as well. The important feature of property rights, though not exclusive feature, is that they are rights *in rem* that not just a specific individual, but a great many other persons are under a duty.[152] Let me use an example: I have a property right to my laptop and according to Raz, I have two interests here. First, I have a specific interest that comes from the actual effect of holding this right. I

[151] Raz, 180.

[152] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning - HeinOnline.Org* (New Haven; London: Yale University Press, 1964), 73, http://www.heinonline.org.ezproxy.is.ed.ac.uk/HOL/Index?index=beal/flch&collection=beal.

may use it to write my dissertation, for example, or leave it unused in the drawer or dispose of it as I wish. However, this interest could be contingent because I may have a property that does not benefit me at all. Second, I also have an interest that my right to the laptop is a right *in rem* that people at large bear the duty of non-interference. Then when he says that a person may have a property that is more trouble than its worth, property rights are still vested in him, his underlying argument is that it is the second interest that constitutes the general characteristic of the property owner, while the first interest is subject to variation, for example, a broken laptop may not serve my interest. Therefore, similar to the analysis of MacCormick and Kramer's theories above, Raz's Interest Theory also accepts the concept of the sovereign individual from two aspects. First, the fact that an individual can use or dispose of the property as he wishes indicates that he has control over the property, though holding this control may not actually benefit him in some cases. Second, the property-right-holder has a right *in rem* that other people bear the duty not to interfere with it. These two elements are exactly the elements that Mill's concept of the sovereign individual I constructed in the first section of this chapter.

Before I conclude my analysis of Raz, it is worthwhile to review his analysis of the right of promise, because as I will argue below the right of promise does not necessarily benefit the right-holder even though Raz argues so. According to his argument above, a promisee's right serves the promisee's interest as an individual being the beneficiary of a promise.[153] More specifically, he argues that it is the interest that promises made to the promisee will be kept that rights are invested to the promisee, while a promisee might lose interest in the specific content of some promises.[154] So he may respond to Cruft's example by saying that although his right to request another person to drink a cup of tea for supper is not beneficial to him directly, he still has a *pro tanto* interest that promises given to him will be kept, which seems to be a plausible response.

[153] Raz, *The Morality of Freedom*, 175.
[154] Raz, 175.

However, I will argue that Raz's argument here is still problematic because of the assumption of his argument above. What Raz argues here is that when a promiser makes a promise to a promisee, an interest lies in the expectation that the promiser will perform the promise regardless of whether the actual performance of the promise will be beneficial to the promisee. However, I will argue that Raz's argument here must assume that this promise is beneficial to the promisee. In other words, if promises are not beneficial to the promisee, there does not necessarily exist an interest that promises made to him will be kept. Let us consider some examples. Suppose A is my best friend in high school, while B is just my alumnus of high school whom I know (suppose we had a chance to talk to each other on some occasions but we did not contact each other after graduation). Both promise me when they travel to the UK, they will visit me. From my point of view, only A's promise matters to me and I will reasonably expect the promise will be kept because of the friendship between us and if he cannot keep his promise for some reasons, such as the outbreak of COVID-19, I will feel disappointed. However, if B cannot make it for the same reason, my normal reaction would be that I probably will not feel any disappointment because we know little about each other and I did not expect he will keep his promise.

Therefore, an interest that a promise is expected to be kept only exists when the performance of it can be expected to bring an individual's interest. It will be weird to expect a promise to be kept if it is not beneficial or harmful to the promisee; instead, the normal reaction here could be that an individual may not care about it if the promise is not beneficial to him or an individual may even reject it if the promise is harmful to him. The above case about B's promise to visit me can be categorised into the case that I may not care about this. Now let me give an example of the latter case. Suppose I am a government official responsible for city planning and a developer promises me they will send me a BMW car if I approve their planning application. I then check all the documents and they meet the requirements, so the application is approved. However, I will reject their gift because it is a bribe and I will be

prosecuted if I accept it. In this case, I do not expect this promise will be kept at all because it is harmful to my interest.

As I argue in the first chapter, a promise is created by people's Hohfeldian liberty, a liberty to enter voluntarily into a special bond between them and there is no guarantee that the content of this special bond must be beneficial to the promisee; in other words, people can make whatever promise they want as long as it does not violate the prohibitive rules of laws. Therefore, Raz's strategy to argue that a promisee's right is generally beneficial to the right-holder is problematic because this situation only exists when a promise is beneficial to the promisee, but in reality, we can have promises that are not beneficial, or even harmful, to the promisee.

To conclude, Raz accepts Mill's concept of the sovereign individual more directly. Rights serve the interests of a right-holder because of the individual holding a certain identity. According to my analysis of Raz's theory above, the general characteristic of being a promisee, an expectation that the promise made to him will be kept begs the question because it assumes the performance of a promise serves the promisee's interest, but this is the question that he needs to answer why being a promisee creates an interest that grounds the duty of another person. My criticism of Raz here is consistent with my criticism of MacCormick and Kramer that some of the examples he uses to support their Interest theories are unsuccessful because there exist counter-examples of the same type of rights in which holding those rights is not beneficial to the right-holder. In other words, in those counter-examples, there must be something other than interest that grounds the duty of another person. However, the general characteristics of being a property owner create an interest that grounds the duty of another because the combination of the control the property owner has over the property and the Hohfeldian claim of non-interference is the interest for an individual that hardly anyone will deny. Even though there may exist counter-examples in which holding a Hohfeldian

claim of non-interference is not beneficial to the right-holder, it can be easily categorised as exceptional.

2.3 The two theories of rights as two faces of a sovereign individual

Now let me summarise the discussion of this section. The Will Theory emphasises the control the right-holder has over the correlative duty, in the same way as Mill emphasises the control an individual has over self-regarding activities. Therefore, the connection between the Will Theory and Mill's concept of the sovereign individual is straightforward. The Interest Theory accepts this concept in a more complicated way, compared with the Will Theory. The Interest Theory appears to describe the necessary feature of right-holding and being benefited from holding a right is the necessary feature the theory argues. However, I argue that only the Hohfeldian claim of non-interference exemplified by property rights can be a suitable example that meets the requirement of the Interest Theory: only this right generally brings benefits to the right-holder, while other types of rights do not. Therefore, the Hohfeldian claim of non-interference plays a role as a medium between the Interest Theory and Mill's concept of the sovereign individual: the Interest Theory is, in essence, a theory of Hohfeldian claim exemplified by property rights and the property-right-holder is a Millian sovereign individual: the property-right-holder has the control over the property and he also has a right that other people bear the duty of non-interference.

The summary of the Interest and the Will theories provides a helpful perspective to review the debate between them again. As they both accept Mill's concept of the sovereign individual, the divergence between them is eliminated to some extent. As we can see, the Interest Theory also relies on the concept of control in the way a property-right-holder controls his property. Raz admits this point explicitly and more surprisingly, he accepts Hart's definition of control when he confirms that the promisee has the control over the promise:

> We should remind ourselves that while the promisee may not be the initiator of the bond of which the promise is the whole or a part, he is not entirely passive either. It is always up to him to waive his right under the promise and terminate the binding force of the promise.

This quotation creates a puzzle for the Interest Theory. Normally, such statements are not expected to be adopted by an Interest theorist because they are classic statements from Hart's Will Theory, but Raz still does this. However, this puzzle can be well resolved when Raz's Interest Theory is reconstructed as accepting Mill's concept of the sovereign individual as I constructed above because the concept of control is one of the elements that constitute the concept of the sovereign individual. This should reinforce my argument that the Interest Theory also accepts Mill's concept of the sovereign individual, although in a less straightforward way than the Will Theory does.

According to my analysis above, the Interest and Will theories display two different faces of a sovereign individual. The Will Theory emphasises the importance of control a right-holder has and control is laid as the foundation of right-holding that even Raz, as an Interest theorist, accepts. Thus, the Will Theory accepts the classic Millian concept of the sovereign individual. The Interest Theory displays the concept differently. First, the Interest Theory applies the concept of the sovereign individual in the Hohfeldian claim exemplified by property rights, thus a property-right-holder is the concrete embodiment of a sovereign individual. Second, the Interest Theory correctly points out that the necessary feature of a sovereign individual in the form of the property-right-holder is that they are the beneficiary of holding this right and this is achieved by controlling his property and a claim that other people bear the duty of non-interference. So it shows us another face of a sovereign individual and how the sovereignty of an individual is created by the system of property laws.

3. Sovereign individual as the cause of the problems of the western theories of rights

3.1 Explain the problems of the Will Theory

In the first chapter, I pointed out that the Will Theory is commonly criticised by other rights theorists for excluding some groups of people, such as children, from being right-holders, because such groups of people lack the capacity to exercise control over the duty-bearers. However, I defended that Hart rescued the Will Theory by applying his separation thesis, which is that parents or guardians of those people can exercise the control on their behalf, so it does not pose many difficulties to the Will Theory even when children are incapable of exercising their control. I then argue the real problem of the Will Theory, which I pointed out in the first chapter, is that it cannot explain unwaivable rights. The difficulty posed to the Will Theory is that the right-holder in this case does not have control over the duty, such as the duty not to assault or kill other people, but the missing of control here does not prevent people from having the right not to be assaulted or not to be killed. So what is the cause of the real problem of the Will Theory? Why must the Will Theory insist that control is the necessary and sufficient condition of right-holding? My answer is that the Will Theory accepts the concept of the sovereign individual as an assumption of right-holding implicitly and the corollary of accepting this assumption is that it has to bind having a control to holding a right.

Let us recall Mill's concept of the sovereign individual: people are sovereign individuals within a sphere of actions that only affects themselves. He treats self-regarding actions as human liberty: 'there is a sphere of action…comprehending all that portion of a person's life and conduct which affects only himself…This, then, is the appropriate region of human liberty.'[155] He then points out that his principle of liberty applies only to human beings with fully mature faculties: 'It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their

[155] Mill, *On Liberty*, 15.

faculties.'[156] The maturity of faculties is human beings' capability of self-improvement:

> 'Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion…as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion.'[157]

According to Mill's arguments above, an individual must have mature faculties to exercise liberty, and the capacities are attained by growing up over time. Such faculties, when one grows up, could include judgment, analysis, self-conscience, etc, and the final purpose of having these faculties is to make a choice: The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice.[158] As a result, he excludes children or youngsters from his discussion of liberty principle because they lack those faculties: 'We are not speaking of children, or of young persons below the age…those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.'[159]

The Will Theory clearly inherits Mill's legacy above. The reason for the Will Theory's claim that having a control or making a choice is a necessary and sufficient condition of right-holding is exactly the same as Mill's: both focus on the subjective qualification of exercising liberty or rights and they converge on treating the capability of making a choice as the decisive qualification. The only difference between them is that the Will Theory focuses on Hohfeldian power while Mill focuses more on Hohfeldian liberty, but this difference is only terminological. The inheritance of Mill's concept of the sovereign indivdual explains why the Will Theory does not recognise children as right-holders straightforwardly and it must resort to the separation thesis—parents and

[156] Mill, 13–14.
[157] Mill, 14.
[158] Mill, 55.
[159] Mill, 14.

guardians exercise rights on behalf of children. As I defended above, the separation thesis rescues the Will Theory from criticism perfectly and there is no theoretical obstacle in preventing children from having rights, but it is still difficult to deny that, from the Will Theory and Mill's point of views, children still lack certain qualification and they cannot become sovereign individual in the way that normal adults do.

However, the Will theory and Mill neglect the fact that there exist some areas of actions in which one's control or choice over them is limited or abandoned by laws. The existence of unwaivable rights is a case that does not require one's control over the duty. For example, an individual is generally prohibited from allowing others to kill himself, but even so, an individual still has the right not to be killed. Therefore, to summarise, the root cause of the Will Theory's problem is that it accepts the assumption of the sovereign individual, which ultimately misleads the theory to emphasise the importance of control in identifying right-holders, which does not work in the case of unwaivable rights.

3.2 Explain the problems of the Interest Theory

Now let me turn to the problems of the interest theory. In the last chapter, I pointed out that there are two main problems for the Interest Theory. First, the concept of interest is controversial. Some rights are established not for the interest of the right-holders, but for the interest of the public, such as rights conferred by occupational roles, like judges, police, or journalists. Some other rights, which even mainly concern individuals, can be either beneficial or harmful to the right-holders, such as the promisee's right or the right to invest. Therefore, the concept of interest does not bring much conceptual clarity but causes more confusion in explaining the features of right-holding. Second, given the concept of interest is problematic, the peremptory force of rights the Interest Theory explains, which is based on the concept of interest, is doomed to fail. It is undeniable that some rights do show an obvious feature that holding such rights is beneficial to the right-holders, such as the right to life, so it is fair to say the Interest Theory does capture one of the features of right-holding. However, similar to my questions posed to the Will Theory above, so

what is the cause of the problems of the Interest Theory above? Why must it insist on the concept of interest as the necessary condition of right-holding?

The answer is that the Interest Theory accepts Mill's concept of the sovereign individual. So when the Interest Theory argues that the necessary feature of holding a right is that it protects the right-holder's interest, it actually means it is the elements that constitute Mill's concept of the sovereign individual that protect the right-holder. More specifically, the combination of the elements of control and the Hohfeldian claim of non-interference is a general interest for an individual because it confirms and protects one's ownership over the properties, and this is the reason why the Interest Theory has such an argument. However, the problem with accepting Mill's concept here is that not all right-holders must be considered as sovereign individuals, so the Interest Theory only offers a partial explanation of right-holding. Let me use an example of the police's right to arrest a criminal and I will argue that the police here is not a sovereign individual for two reasons. First, the content of this right, such as the range and the conditions of exercising this right, is strictly written in laws and the police should follow the laws carefully when exercising it rather than exercising it freely. For example, while arresting a criminal may involve using physical force, the police are not permitted to torture or humiliate the criminal. Also, when the conditions of arresting a criminal are satisfied, he cannot choose not to arrest. Therefore, although the police have a right to arrest a criminal, he does not have the control a sovereign individual has over self-regarding activities or the control a property-right-holder has over his properties. Second, as I argued in the first chapter, occupational rights are mainly Hohfeldian liberty and according to the Hohfeldian correlativity axiom, a liberty does not entail a duty of non-interference, so the police's right to arrest a criminal does not entail a Hohfeldian claim of non-interference. However, a police can obviously claim that others bear the duty not to assault him, but this claim originates from him as an ordinary individual, not from his occupation as a police.

To conclude, the cause of the problem of the Interest Theory is that it accepts Mill's concept of the sovereign individual and by accepting this concept, it must argue that being a right-holder is generally beneficial to him because being a sovereign individual is generally beneficial to an individual. However, not all right-holders are considered as sovereign individuals so what the Interest Theory does is not revealing the necessary feature of right-holding in general, but only the necessary feature of some type of rights that makes the right-holder become a sovereign individual. This type of rights is specifically the Hohfeldian claim of non-interference, commonly seen in the property-right-holder's claim that others bear the duty not to interfere with his property.

3.3 Conclusion

In this chapter, I built up Mill's concept of the sovereign individual and I show how the Will and Interest theories subscribe to this concept from different perspectives and the subscription of this concept becomes the root cause of their problems. The problem of the Will Theory is that it only emphasises the control a sovereign individual has, but neglects that there exist other rights that do not require the right-holder to exercise this control. The problem of the Interest Theory is that the way a sovereign individual benefits itself is adopted by the Interest Theory to develop the feature of right-holding, but this only explains partially the feature of right-holding based on a certain type of rights that makes the right-holder become a sovereign individual, but cannot explain the feature of right-holding in general. To this extent, the Will Theory may appear to be applicable to explain a wider range of rights than the Interest Theory: the Will Theory can accommodate right-holders who are sovereign individuals, but no benefit from holding rights, while the Interest Theory can only accommodate right-holders who are sovereign individual and also benefit from holding rights. For example, the Will Theory has no difficulty in accommodating the promisee's right because the promisee has a control over the promise, while the Interest Theory cannot accommodate this right as it is not generally beneficial to the right-holder for the reasons I argued in this chapter.

In the next chapter, I will explore further the foundation of Mill's concept of the sovereign individual and I will argue that this concept has its roots in the commodity economy, just subject to the criticism by Marxism.

Chapter 3: Marxist Critique of the Will and Interest Theories of Rights

Abstract: In this chapter, I will argue that Mill's concept of the sovereign individual has its roots in the commodity theory and this is subject to the Marxist critique of rights. The Will and Interest theories which accept Mill's concept of the sovereign individual, thus, can be reconstructed as commodity theories of rights, emphasising different aspects of a commodity owner. Reconstructing the two theories of right-holding in this way further explains the deeper reasons why the two theories of rights go wrong.

Introduction

In this chapter, as its title indicates, I will show how Marxists criticise the western theory of rights, specifically how Karl Marx and Evgeny Pashukanis criticise the concept of the sovereign individual that the Will and Interest theories accept, which will be written in the first two sections. The first two sections of his chapter will play a transitional role for the whole dissertation. As I have discussed so far, chapter one points out the problems of the two theories of rights and the problems lead to a common sauce, which is an acceptance of the concept of the sovereign individual. Chapter two follows the findings in Chapter one and I adopt John Stuart Mill's definition of the sovereign individual, then I argue that the two theories of rights are just reflections of the different aspects of the concept of the sovereign individual and this concept is account for the problems of two theories. In short, the main function of the first two chapters is to set up the problems of the western theories of rights and it lays a foundation for the dissertation. After the first two chapters, the first two sections of this chapter will play a transitional role for the whole dissertation in the following two aspects. First, while the first two chapters are mainly descriptive in the sense that I mainly describe the problems of two theories of rights and point out their acceptance of Mill's concept of the sovereign individual, starting from here, the following dissertation will critical and argumentative. More specifically, in the first two sections, I will take a step back from the problems and debate of two theories of rights and argue that two theories of right-holding are, in essence, subject

to the logic of the commodity theory, then I will criticise the problems of the two theories from the perspective of the commodity theory. In chapter four, I will argue that Marx's Chinese successors misunderstand Marx's critique of rights and make serious theoretical mistakes, and then in the last chapter I will argue that the Marxist critique of the two theories of rights is still problematic and a Confucian theory of right-holding will give us a helpful approach to reconstruct the theory of right-holding.

1. Rights, sovereign individuals and Marx's critique

1.1 Rights as superstructure and Marx's critique

1.1.1 Historical materialism and rights

Before I start to analyse how Marx criticises the western theories of rights, let me begin with his methodology of criticising the western theories of right, the historical materialism and the understanding of rights as superstructure derived from this methodology. Marx's historical materialism was developing over time and the statements of this methodology are scattered in the literature. In his early work *German Ideology*, he argues that laws are the mental production of humans and we should analyse it from the material activity it interweaves:

> The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life…the same applies to mental production as expressed in the language of politics, law, morality, religion, metaphysics, etc. of a people.[160]

we should understand human activities from a 'bottom-up' methodology, not from a 'top-down' and it is material life that determines consciousness not vice versa:

> 'In direct contrast to German philosophy which descends from heaven to earth, here it is a matter of ascending from earth to heaven. That is to say,

[160] Karl Marx, 'The German Ideology', in *Karl Marx Selected Writings*, ed. David McLellan, 2nd edition (Oxford: Oxford University Press, 2000), 180.

not of setting out from what men say, imagine, conceive, nor from men as narrated, thought of, imagined, conceived, in order to arrive at men in the flesh; but setting out from real, active men, and on the basis of their real life-process demonstrating the development of the ideological reflexes and echoes of this life-process... Life is not determined by consciousness, but consciousness by life.' [161]

This early version of historical materialism is then developed into a mature and concise version in his Preface to *A Critique of Political Economy*:

'In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the social, political, and intellectual life process in general. It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.'[162]

This paragraph can be summarised as having the following three main theses:

(1) The forces of production determine the relations of production;
(2) The totality of these relations of production constitutes the economic structure of a society, as social existence, which determines the superstructure, such as law and politics, as certain forms of consciousness;
(3) It is the social existence that determines their consciousness, not vice versa.

[161] Marx, 180–81.
[162] Karl Marx, 'Prace to A Critique of Political Economy', in *Karl Marx: Selected Writings*, ed. David McLellan, 2nd edition (Oxford: Oxford University Press, 2000), 389.

According to the theses above, then what is 'superstructure' and do rights belong to this category? In Marx's work, superstructure refers to mainly a kind of category that is different from the economic base. The distinction between these two categories can be traced back to his distinction between material activities and conscious activities. He says that the first premise of human history is the existence of living human beings and they distinguish themselves from animals by producing their means of subsistence.[163] It is in the material life that people started to form social and political relations, then created superstructure. Opposed to the material world created by productive activity, the superstructure is human's mental production and they must arise from the material life: 'the production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life…the same applies to mental production as expressed in the language of politics, laws, morality, religion, metaphysics, etc. of a people.'[164] Thus, according to Marx's statements above, laws are the typical form of superstructure. Similarly, as rights mainly exist in law and are designed by human activities, they also belong to the superstructure and it is determined by the material base where they are created: 'Right can never be higher than the economic structure of society and its cultural development conditioned thereby.'[165]

Adopting his methodology of historical materialism, he conceives the western theory of rights as a superstructure that reflects the capitalist economic base. In *Critique of the Gotha Programme*, Marx critically reviewed the programme of the Social Democratic Workers' Party of Germany, in which he criticises rights using the methodology above. The first and the third sections describe the programme about fair distribution and the equal right of the proceeds of labour. The first section says: 'Labour is the source of wealth and all culture, and since useful labour is possible only in society and through society, the proceeds of labour belong undiminished with equal right to all members of

[163] Marx, 'The German Ideology', 177.
[164] Marx, 180.
[165] Karl Marx, 'Critique of the Gotha Programme', in *Karl Marx: Selected Writings*, ed. D. McLellan, 2nd edition (Oxford: Oxford University Press, 2000), 615.

society'[166] and the third section says: 'The emancipation of labour demands the promotion of the instruments of labour to the common property of society and the co-operative regulation of the total labour, a fair distribution of the proceeds of labour.'[167]

However, Marx treats the notions of equal right and distribution in these sections as 'obsolete verbal rubbish' and 'ideological nonsense'.[168] The reason why they are 'ideological nonsense' is that equal right here still depends on the principle of bourgeois, which is the exchange of equal value:

> 'Accordingly, the individual producer receives back from society -- after the deductions have been made -- exactly what he gives to it. What he has given to it is his individual quantum of labour… here, obviously, the same principle prevails as that which regulates the exchange of commodities, as far as this is exchange of equal value…Hence, equal right is still in principle—bourgeois right…'[169]

Similarly, it is not difficult to understand he criticises that the equal right is 'obsolete verbal rubbish', because, though the 'equal' right here refers to the measurement by an equal standard—labour—there exist many factors that make people unequal and the true inequality is disguised:

> 'But one man is superior to another physically, or mentally, and so supplies more labour in the same time, or can labour for a longer time; and labour, to serve as a measure, must be defined by its duration or intensity, otherwise it ceases to be a standard of measurement. This equal right is an unequal right for unequal labour. It recognizes no class differences, because everyone is only a worker like everyone else; but it tacitly recognizes unequal individual endowment, and thus productive capacity, as a natural privilege.'[170]

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[166] Marx, 564.
[167] Marx, 564.
[168] Marx, 615.
[169] Marx, 614.
[170] Marx, 615.

So what Marx points out here is that rights should be treated as superstructure and they are derived from the economic base. He further develops his thesis that economic base determines superstructure by revealing the form of the capitalist economy: the exchange of commodities which is based on the exchange of equal value. Marx's development here is significant because he points out that the theory of rights is not just a pure theoretical development, but relies on a certain form of economic base; in this discussion, the economic base upon which equal right is built is the commodity exchange economy. Therefore, he provides a helpful perspective from which we can understand the western theory of rights, which is from the perspective of the capitalist commodity economy. Evgeny Pashukanis, the contemporary Russian successor of Marxism expands Marx's view above and systematically develops a commodity economy theory of laws, which will be discussed in chapter four. In the next section, I will show how Marx demonstrates the identity between the logic of commodity form and the legal form and how this can help us understand the western theories of rights and the concept of the sovereign individual.

1.1.2 Commodity form, legal form and the form of rights

In the first chapter of Volume I of *Capital*, Marx explains the logic of commodity form through his understanding of the mystical character of commodities. Commodity, for Marx, has two values, a use-value and an exchange value. The use-value is the utility of a thing, created by a qualitatively distinct form of labour, which he calls 'concrete labour',[171] so the commodities the concrete labour creates are not equal to one another because the labour that creates them is unequal. At the same time, a commodity has an exchange value, which presents itself as a quantitative relation that makes it possible for one commodity to be exchanged with another commodity.[172] He then reveals that the mystical character of commodities originates from the commodity form, which is the exchange of

[171] Karl Marx, *Selected Writings*, 2nd ed. (Oxford ; New York: Oxford University Press, 2000), 469.
[172] Marx, 459.

equal value: the equality of all sorts of human labour is expressed objectively by their products all being equal values.[173] The key to understanding the logic of the commodity form is the process of exchange. For Marx, the process of the exchange of commodities is a process of qualitatively distinct and incommensurable commodities entering into a formal relationship of equivalence with one another, namely, qualitatively different objects become what they are not: equal.[174] As a result, human beings, as the creator of commodities, in the course of transforming concrete to abstract labour, 'forget' that commodities owe their existence to human activities in which they engage to produce them.[175] More specifically, the causal relationship between humans and their product of labour is inverted:

> humans, the subjects who create or cause the objects, become the object, i.e., are 'caused' by the very objects which they have created and to which they now attribute subjectivity or causal power. Human life under a capitalist mode of production becomes dominated by the passion to possess the commodity's living power…[176]

Marx calls this problem 'commodity fetishism', which means the commodity obtains a life of its own and dominates humans who create them but forget them:

> …to find an analogy, we must have recourse to mist-enveloped regions of the religious world. In that world the productions of the human brain appear as independent beings endowed with life, and entering into relation both with one another and the human race. So it is in the world of commodities with the products of men's hands. This I call the Fetishism which attaches itself to the products of labour, so soon as they are produced as commodities, and which is therefore inseparable from the production of commodities.[177]

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[173] Marx, 473.
[174] Isaac D. Balbus, 'Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law', *Law & Society Review* 11, no. 3 (1977): 573.
[175] Balbus, 574.
[176] Isaac D. Balbus, 'Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law', *Law & Society Review* 11, no. 3 (1977): 574–75.
[177] Marx, *Selected Writings*, 474.

Based on Marx's understanding of the logic of the commodity form, Isaac D. Balbus argues that the logic of the legal form is identical to that of the commodity form. [178] A citizen, similar to a commodity, is a 'qualitatively distinct concrete subject with qualitatively distinct human needs or interests, so each citizen is not equal to the other.[179] At the same time, the political representation, similar to the commodity exchange, requires qualitative distinct individuals to enter into a formal relationship equivalence with one another, then 'the qualitatively different subjects become what they are not: equal.' [180] This relationship of equivalence is made possible by the law which 'becomes the universal political equivalent by means of which each individual is rendered equal to every other individual.' [181] Therefore, he argues the logic of the legal form and the one of the commodity are homologous in the way of abstraction from the concreteness:

> Just as the commodity form 'replaces' use-value and concrete labour with the abstractions of exchange-value and undifferentiated labour-power, the legal form 'replaces' the multiplicity of concrete needs and interests with the abstractions of 'will' and 'right', and the socially differentiated individual with the abstraction of the juridical subject or legal person.[182]

Following Marx's definition of 'fetishism' of commodity, Balbus defines what the fetishism of the law means: the legal form creates a fetishised relationship between individuals and the Law in which individuals attribute subjectivity to the Law and conceive themselves as its objects or creations. [183] He points out the problem of the fetishism of law is, similar to the fetishism of commodity, that it inverts the logic between the subject and the object, namely, individuals own their existence to the law, rather than the reverse. For example, the saying that 'if we didn't have the Law everyone would kill each other' is a common instance of legal fetishism.[184] The problem with this saying is that the

[178] Balbus, 'Commodity Form and Legal Form', 1977, 575.
[179] Balbus, 575.
[180] Balbus, 575.
[181] Balbus, 575.
[182] Balbus, 576.
[183] Balbus, 583.
[184] Balbus, 583.

subjectivity of individuals depends on laws rather than laws being an object of people's rational choice; as a result, individuals are objectified and laws obtain autonomy by themselves.[185]

Balbus's argument above precisely summarises Marx's criticism of the formalism of the concept of equal right in *Critique of the Gotha Programme*: the concept of equal right is only an ideological reflection of the capitalist commodity economy and the equal right is only a formal concept which is an abstraction from the concrete individuals. Therefore, it is possible to reconstruct that Marx treats the logic of the form of rights as consistent with the commodity form and legal form. Let us recall Marx's *Critique of the Gotha Programme*. He says that each individual is qualitatively different from other people with concrete human needs and interests, so in this aspect, an individual is unequal to each other. However, individuals are measured by an equal standard when they are brought in front of rights, so the qualitative difference among individuals is ignored.[186] Therefore, the form of rights requires that qualitative distinct individuals enter into a formal relationship of equivalence, so right-holders are treated equally by laws. The form of rights, in Marx's words, 'rights by its very nature can only consist only in the application of an equal standard'.[187] Just as commodity form replaces use-value and concrete labour with exchange-value and abstract labour, the form of rights replaces the concrete social existence of individuals with abstract and formal right-holders.

To summarise, the methodology of historical materialism and the theory of commodity economy is the theoretical framework in which Marx criticises the concept of rights. In the next section, I will show how Marx criticises the concept of the sovereign individual the western theory of rights assumes and analyse it from the framework above.

[185] Balbus, 583.
[186] Marx, *Selected Writings*, 615.
[187] Marx, 615.

1.2 Marx's critique of the sovereign individual

Let us recall Mill's definition of the sovereign individual: 'To the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.'[188] So Millian sovereign individual means that with regard to self-regarding behaviours, an individual is sovereign to himself and no one is permitted to interfere with it. Marx has a critique of the concept of the sovereign individual in his famous paper *On the Jewish Question*. Overall, Marx criticises that the rights of man, the right of the member of civil society, relies on a problematic conception of individuals as egoistic men, men separated from other men and the community and the problem manifests typically in the definition of liberty.[189] In *Declaration of the Rights of Man of 1791*, it defines the concept of liberty as follows: 'liberty consists in the power of doing anything that does not harm others.'[190] The definition is consistent with Mill's principle of liberty: the purpose of his liberty principle is to prevent harm to others.' In other words, Mill means that if one's liberty does not harm others, other people should not interfere with it. Therefore, although the definition of liberty in *Declaration of the Rights of Man of 1791* existed before Mill was born, Mill accepted it as his definition of this concept, so, as I will show below, Marx's critique of the definition of liberty in *Declaration of the Rights of Man of 1791* can be applied to Mill.

So Marx criticises that the definition of liberty relies on a problematic conception of individuals as narrow and isolated:

> Thus freedom is the right to do and perform what does not harm others. The limits within which each person can move without harming others is defined by the law, just as the boundary between two fields is defined by the fence. The freedom in question is that of a man treated as an isolated monad and withdrawn into himself.[191]

[188] Mill, *On Liberty*, 13.
[189] Marx, *Selected Writings*, 60.
[190] Marx, 60.
[191] Marx, 60.

What Marx thinks at stake here is that the right of liberty is not based on the union of man with man and it does not treat other men as the realisation of one's liberty, but the limitation instead: 'It leads man to see in other men not the realisation but the limitation of his own freedom.'[192]. The same criticism is applied to the rights of property, equality, and security in the same way as he does above:

> Thus the right of man to property is the right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independently from society, the right to selfishness…equality, here in its non-political sense, is simply the counterpart of the liberty described above, namely that each man shall without discrimination be treated as a self-sufficient monad… the concept of security does not allow civil society to raise itself above its egoism. Security is more the assurance of egoism. [193]

According to his analysis above, he provides the most concise summary of his critique of the sovereign individual:

> Thus none of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interest and whims and separated from the community. Far from the rights of man conceiving of man as a species-being, species life itself, society, appears as a framework exterior to individuals, a limitation of their original self-sufficiency. The only bond that holds them together is natural necessity, need and private interest, the conservation of their property and egoistic person. [194]

The main point Marx conveys is that the concept of rights is developed upon the assumption that an individual is an isolated and egoistic monad rather being a species-being. Therefore, the revelation of the assumption here is helpful for us to understand the problem of Mill's concept of the sovereign individual. As Mill's definition of liberty is consistent with the one in *Declaration*

[192] Marx, 60.
[193] Marx, 60–61.
[194] Marx, 61.

of the Rights of Man of 1791, Marx's critique above can be applied to the critique of Mill's definition of the sovereign individual.[195] As we have seen in the second chapter, Mill's distinction between self-regarding and other-regarding actions creates the territory of an individual's liberty, so it marks the separation of the individual from the community and withdrawal to himself and his sovereignty toward the self-regarding behaviour marks the existence of a self-sufficient and isolated monad. The duty of non-interference of one's liberty borne by other people also conceives other people as a limitation rather than an assistance of one's liberty. Therefore, Mill's definition of the sovereign individual contains the problems that Marx exactly criticises in his *On The Jewish Question.*

Marx's concern here is that the assumption the concept of rights accepts causes the paradox that while individuals just begin to free themselves, they assume the egoistic man who is isolated from the community and treats other members of the society as a limitation rather than a realisation of one's liberty. Marx then explains the cause of this paradox lies in the problem of the political emancipation. The political emancipation dissolves the old feudalist society, abolishing the political character of the old civil society which defines individuals as separated and excluded from the society. However, the abolishment of the political character of the civil society also entails abolishing the bonds that fettered the egoistic spirit of man.[196] Furthermore, although political emancipation dissolves feudal civil society into its component parts, it does not revolutionise and criticise these parts themselves. As a result, the concept of egoistic man still does not develop beyond the material base and the recognition of the freedom of egoistic man is still 'the recognition of the unimpeded movement of the spiritual and material elements that go to make up its life'.[197]

[195] Graeme Duncan and John Gray, 'The Left Against Mill', *Canadian Journal of Philosophy* 5 (1 January 1979): 211.
[196] Marx, *Selected Writings*, 63.
[197] Marx, 63.

The more serious problem of assuming the concept of an egoistic man, as Marx criticises the inverted logic between subjects and objects existing in the commodity form, is that the logic of the egoistic men is also inverted and individuals become an object of capitalist civil society they create: 'Egoistic man is the passive, given results of the dissolved society, an object of immediate certainty and thus a natural object.'[198] This means that an egoistic man owns his subjectivity to the capitalist civil society, while, according to Marx, the capitalist civil society should be the object, created by the subject, the egoistic man, not the other way around. Given right-holders are built upon egoistic men whose existence is owned to the capitalist civil society, it means right-holders lose their subjectivity and become a mere object of the capitalist society. Marx recognizes this problem and the example below well demonstrates this problem:

> While, for example, security is declared to be a right of man, the violation of the privacy of correspondence is publicly inserted in the order of the day…This means then that the right of man to freedom ceases to be a right as soon as it enters into conflict with political life, whereas, according to theory, political life is only the guarantee of the rights of man, the rights of individual man, and so must be given up as soon as it contradicts its end, these rights of man.'[199]

The quotation here shows us the consequence brought by the inverted logic between subjects and objects, which is the vulnerability of the subjectivity of a right-holder: the right-holder loses his subjectivity and a right ceases to exist when a right conflicts with political life, while Marx believes it should not be the case here.

The problem of Mill's concept of the sovereign individual can be understood from the following two aspects. First, this concept assumes an individual as an isolated, self-sufficient monad and the separation from the society and his fellows, however, Marx argues an individual should be conceived as a species-being and recognises his own forces as a social force and no longer

[198] Marx, 63.
[199] Marx, 62.

separates social forces from himself in the form of political forces. Second, based on Marx's distinction between superstructure and economic base, the Millian definition of the sovereign individual has its roots in the capitalist economy and owns bourgeois characteristic: the nature of the sovereign individual is 'not man as a citizen but man as a bourgeois who is called the real and true man'.[200] In other words, the concept of the sovereign individual is subject to the logic of commodity form, thus suffering from the problem caused by commodity fetishism, the inversion of logic between the subject and the object the subject creates.

Therefore, Marx criticises the capitalist theory of right from his methodology of historical materialism and also his commodity theory. However, the subjects of laws and rights were not the main focus for Marx, so he did not develop a systematic theory of laws and rights. This job was later achieved by his Russian successor Evgeny Pashukanis who is recognised as one of the most outstanding Russian Marxist and legal theorists and his most outstanding contribution is his commodity theory of law. [201] Therefore, in the next section, I will argue that Pashukanis's commodity theory of law contributes to our understanding and criticism of the Will and Interest Theory.

2. Pashukanis's Commodity Theory, law and rights

2.1 Law and Commodity

In this section, I will outline Pashukanis' theory of law, and by doing this, we will see that Pashukanis gives us a reasonable explanation that the nature of law and right have a close connection to the capitalist commodity economy

[200] Marx, 61.

[201] E. B. (Evgeni i Bronislavovich) Pashukanis, *Law and Marxism: A General Theory*, ed. C. J. Arthur, trans. Barbara Einhorn (London: Ink Links, 1978). Pashukanis' s legal theory is widely acknowledged as the commodity exchange theory of law. *See* Robert Sharlet, 'Pashukanis and the Rise of Soviet Marxist Jurisprudence, 1924-1930,' *The Soviet and Post-Soviet Review* 1, no. 1 (January 1, 1974): 103. *See* Michael Head, *Evgeny Pashukanis : A Critical Reappraisal* (Routledge-Cavendish, 2007), 177–81. *See* Dragan Milovanovic, 'THE COMMODITY-EXCHANGE THEORY OF LAW: IN SEARCH OF A PERSPECTIVE', *Crime and Social Justice*, no. 16 (1981): 41. *See* Lon L. Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory,' *Michigan Law Review* 47, no. 8 (1949): 1159.

which creates a solid ground to form the idea of legal subjectivity and the concept of rights.

2.1.1 The context of Commodity theory

Before I start to explicate Pashukanis' Commodity Theory of law, there are a few questions we need to consider: why does he decide to analyse the concept of law from the perspective of commodity? What are the advantages of this approach over other approaches? Does the Commodity Theory truly provide us with a helpful way to rethink the concept of laws and rights? In the following sections, I will first show the context within which the commodity theory is developed and the theories it aims to criticise in response to the first two questions and then I will find out the connection between commodity theory and rights in response to the last question.

Overall, the main argument of Pashukanis' theory is that laws originate from the people's economic behaviour, mainly the commodity exchange in a capitalist society, so the content and the form of law are closely related to the logic of the commodity economy. To begin with, we should first understand the context in which Pashukanis develops his theory and what the rival theories are that he aims at criticising. In this work, Pashukanis picks two types of theory of law as the targets of his criticism. The first type of theory considers law as one of the 'ideological forms' and the supporter of this view is M.A Reisner. After the publication of *Law and Marxism: A General Theory*, the commodity exchange school of law was formed in the Community Academy by the Marxist jurists working with Pashukanis, and Professor Reisner's alternative Marxist conception of law as an ideological, normative phenomenon is the target.[202] Overall, Reisner is regarded as a representative of the psychological school of law and contributed to the legal debate in the 1920s.[203] Reisner was inspired by the idea that 'law consisted of normative

[202] Robert Sharlet, 'Pashukanis and the Rise of Soviet Marxist Jurisprudence, 1924-1930,' *The Soviet and Post-Soviet Review* 1, no. 1 (January 1, 1974): 115.
[203] Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (Routledge-Cavendish, 2007), 114, 135.

ideas existing as psychological reality in the mind of humanity, not identical with the law of the state and sometimes directed against it'[204] and he developed his theory of 'intuitive law' :

> When the production forces outgrow a particular means of production, and when the latter turns into a brake pressing upon them and fetters confining them, then intuitive law is born under the veil of the existing traditional law. Sometimes it grows for a long time in the unconscious stillness' and 'it needs no force in order that it may exist… the norms of intuitive law… are an exalted standard and criterion for the appraisal of positive norms [law of the state] and for disapproving them if their content is incongruous.[205]

Pashukanis agrees with Reisner that there is not too much doubt that the general juridical concepts can be considered in the category of ideology, but this does not mean that the nature of them is simply ideological and psychological, the words 'ideological' and 'psychological' mainly refers to people's psychological movement and subjective experience and process. [206] However, he contends that the existence of law, for example, does not only exist in people's subjective world, otherwise, law will disappear, or their nature will be changed randomly when people die, or they change their understanding. The purpose here is to remind us that we should not ignore that law has a closer relationship with the material conditions in which it is created. His criticism of Reisner's theory leads him to argue that we should find out how laws correspond to the objective social relations and by thinking in this direction, he finds out that law reflects the interrelationship of the owners of commodities, which is 'the objective social relations' just mentioned[207], and this leads him to construct his commodity theory of law.

The second type of theory of law that Pashukanis objects considers law as originating from norms. A famous example of this approach is Hans Kelsen's

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[204] Head, 135.
[205] Reisner, *The Theory of Petrazhitsky: Marxism and Social Ideology,* in Michael Head, *Evgeny Pashukanis : A Critical Reappraisal* , 135.
[206] Pashukanis, *Law and Marxism*, 74.
[207] Pashukanis, 82.

theory of law. Hans Kelsen is a famous Austrian legal theorist and the fundamental feature of his theory is that his theory is a pure theory of positive law, which aims at explaining the form of law, independent of its content: 'it seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different people.'[208] To build up his theory, he resorts to the concept of 'norm' and the core of his pure theory of law is to answer the question of how a norm is created, in other words, where the normativity of a norm comes from: 'The pure theory of law recognizes that a study of the statics of law must be supplemented by a study of its dynamics, the process of its creation. This necessity exists because the law, unlike any other system of norms, regulates this own creation.'[209] His answer to this question is that the normativity of a norm at a lower level comes from a norm at a higher level which governs the creation or the content of another norm, so a legal norm is valid because it is prescribed by another norm.[210] Therefore, for example, a decision that A is obligated to pay B $1000 is valid because there exists a norm that the debtor is obligated to repay the creditor. [211]

From Pashukanis's perspective, the key point of Kelsen's approach is that Kelsen argues it is the norm that generates the legal relation, not the other way around. However, Pashukanis contends that we should rethink it in the reverse logic, that is 'the relation has primacy over the norm', which is that norms are based on the legal relation: 'if no debtor repaid his debts, the relevant regulation would have to be considered as non-existent in real terms'; in reality, the existence of norms like this guarantees and safeguards the relation, not creating it.[212] Therefore, to display the objective existence of law, we not only need to know the normative content but also need to know what material conditions to which the law corresponds, which are the social relations, the relations of how they connect to each other. The concept of

[208] Hans Kelsen, 'Pure Theory of Law and Analytical Jurisprudence, The', *Harvard Law Review* 55, no. 1 (1942 1941): 44.
[209] Kelsen, 61.
[210] Kelsen, 62-63.
[211] Kelsen, 63.
[212] Pashukanis, 87,89.

‘social relation’ is then further developed by Pashukanis in the later part of his work and it mainly refers to the relation among commodity owners in capitalism. Pashukanis further adds that the problem of Kelsen’s approach is that if we insist on the priority of the norms over the legal relation, we exaggerate the force of norms and the creation of the norm without corresponding relation arising in practice will be rootless.

By reviewing the above two theories of law, we can see that these two theories are the Pashukanis’s targets of criticism and by criticising them, his theory will avoid making similar mistakes and this is where his Commodity Theory of law begins.

2.1.2 The Commodity Theory of law

In the above section, Pashukanis shows us that explaining the nature of law from the perspective of psychology or in terms of norms does not well account for the relationship between law and the social relations to which it corresponds. More specifically, he wants to answer the question ‘can law be conceived of as a social relation in the same sense in which Marx called capital a social relation?[213] He answers that the legal relation is, in essence, the interrelationship of the owners of the commodities and this is the main thesis that his commodity theory advances and the most important theoretical contribution he makes.[214] He points out that the legal relation is used to be only considered as a relation between humans in most of the philosophy of law, but this account fails to explain the historical source of the legal relation. He justifies his argument from different perspectives. First, he learns from Marx that property relation is the most fundamental and lowest layer of the legal superstructure. In his words, the property relation is very closely related to the relations of production in the way that the former is the legal expression of the latter, like what Marx says in *The Communist Manifesto*: ‘The modern bourgeois private property is the final and most complete expression of the

[213] Pashukanis, *Law and Marxism*.
[214] Pashukanis, 82.

system of producing and appropriating products, that is based on class antagonisms, on the exploitation of many by the few'.[215] Therefore, Pashukanis uses the example of contracts and argues that the legal relation of a contract is not based on the existence of state or norms, but actually depends on the economic relation of exchange.[216] Returning to the discussion I showed in the last section, here we can see again that Pashukanis disagrees with Kelsen in that he objects that legal relations are generated by norms; on the contrary, he specifies that the existence of a commodity and money economy is the precondition of concrete norms and also the condition of a legal subject to become a right-holder. A more detailed discussion will be carried on in the following discussion.

Pashukanis also justifies his argument from a dynamic historical point of view, that is how the working of economic activity becomes the source of the legal relation. He uses the example of trade with foreign tribes or resident aliens etc. to show that this is how *jus gentium* was created: the development of law does not correspond to the power of the state, but the requirement of trading transactions among people.[217] Furthermore, the creation of law also arises from the existence of dispute, namely, it is the dispute and conflict of interests among people in economic activity and the repeated occurrence of these activities that bring about the legal form and legal superstructure. In other words, the economic exchange activity and the conflict of interest create an ideal environment for individuals to act according to their own interests.[218] Once again, Pashukanis's point here is that it will be more helpful to understand law from the working of economy, rather than from norms. We will see in the next section his views above are further developed to demonstrate the close connection between rights and commodity exchange.

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[215] Karl Marx, 'Communist Manifesto', in *Karl Marx Selected Writings*, ed. David McLellan, Karl Marx Selected Writings, 2nd Edition (Oxford: Oxford University Press, 2000), 256.
[216] Pashukanis, *Law and Marxism*, 93.
[217] Pashukanis, 95.
[218] Pashukanis, 93.

Based on the analysis above, Pashukanis put forward a thesis that best expresses the core of his Commodity Theory of law: 'It is readily evident that the logic of juridical concepts corresponds to the logic of the social relations of a commodity-producing society.'[219] This thesis has a central place in Pashukanis's theory and it can be understood from the following aspects. Unlike Reisner or Kelsen, he argues that the legal relation is directly generated by the existing social relations of production, so we now understand why he criticises Reiner and Kelsen in the above method.[220] Based on this thesis, he believes the legal system differs from the other social system in that it deals with the conflicts and claims of interests among individuals: 'The legal system differs from every other form of social system precisely in that it deals with private isolated subjects… because it presupposes a person endowed with rights on the basis of which he actively makes claims.'[221]

Another reason why Pashukanis advances this thesis is that private laws have the root in commodity production relations.[222] The fundamental principle of private law is that each individual is regarded as free and equal[223] and they can conduct civil behaviour based on their own choice, rather than by enforcement from other people. More specifically, he emphasised that within private law, the legal subject finds an entirely adequate embodiment of the subject operating egoistically, the owner, the bearer of private interest in the real person.[224] What he means here is that within private law, the legal subjects are given much freedom to act according to their own will and everyone is treated equally in front of others so they are not coerced to do something due to the difference of social status. Based on his understanding of private law above, Pashukanis shows us that it is not difficult to find that private law shares a similar logic to the commodity economy. In a commodity society, each individual must be the owner of his commodity and they are free

[219] Pashukanis, 96.
[220] Pashukanis, 96.
[221] Pashukanis, 100–101.
[222] Pashukanis, 96.
[223] Pashukanis, 72.
[224] Pashukanis, 80.

to exchange commodities on the market and no one is forced to do something that he does not want to do. The most typical activity in a commodity society is buying and selling based on two parties' agreement or contact. From the above discussion, we can find that the formal freedom and equality are important in both private law and commodity society, so this will help us understand the concept of the sovereign individual accepted by the Will and Interest Theory, and I will have a detailed discussion in the below section.

This thesis that law and commodity exchange share similar ground then becomes the core of Pashukanis's theory of law. Furthermore, based on the thesis above, he develops another thesis that the legal subject shares a similar logic to a commodity owner: 'the legal subject of juridical theories is very closely related to the commodity owner'.[225] The thesis of the legal subject here is important and relevant to my discussion of the theory of right-holding in this chapter because it will lead us to reconstruct the nature of right-holding, which will be expanded into detail in the next section.

2.1.3 The Commodity Theory of Law and legal subject

In the last section, we see that Pashukanis objects to the approach of treating laws as a pure category of ideology and another approach of treating norms as the source of legal relations. In this section, I will show how Pashukanis's commodity theory explains the nature of rights.

So far, we have seen that Pashukanis understands law as a social relation, specifically the social relation among the owners of commodities. To better understand his theory of laws, I need to explicate his commodity theory. He constructs the commodity theory from two aspects.[226] First, the concept of ownership is essential for commodity theory and the core of ownership is the control of commodity and, most importantly, the concept of legal subjects

[225] Pashukanis, 39.
[226] Alan Stone, 'The Place of Law in the Marxian Structure-Superstructure Archetype', *Law & Society Review* 19, no. 1 (1985): 51–52.

becomes the best expression of this concept.[227] This means that the commodity owner must own his commodity and he can dispose of it: ' What, for example, is the significance of legal ownership of land and soil? 'Simply…that the landowner can do with his land what every owner of commodities can do with his commodities.'[228] What could happen if there does not exist the concept of ownership in a society? He answers that there will be no law required under this condition. For instance, since slaves are totally subservient to their masters, there does not exist the concept of ownership in such a society, and as a result, it requires no legal formulation specifically.[229] On the contrary, the concept of private ownership developed and flourished in capitalism, so this is why capitalism developed a mature system of law.[230] Based on his argument above, we can see the concepts of ownership and legal subjects are the important beginning points of his theory.

Second, following the construction above, another important feature of commodity exchange is that people are conducting behaviour under a conscious will.[231] Similar to Marx, Pashukanis also argues that commodities cannot trade themselves on the market, and this must be done by a subject, the owner of the commodities, and the necessary condition of making this possible is that people have possession of their own products.[232] Given commodity exchange involves conscious behaviour, then from Pashukanis' point of view, the existence of contracts in the legal system is the most important material facility that supports commodity exchange.[233] What is a 'contract'? Pashukanis defines it as something the wishes of commodity owners meet each other halfway:

> The legal subject is thus an abstract owner of commodities raised to the heavens. His will in the legal sense has its real basis in the desire to alienate through acquisition and to profit through alienating. For this

[227] Pashukanis, *Law and Marxism*, 109 - 10.
[228] Pashukanis, 110.
[229] Pashukanis, 110.
[230] Pashukanis, 115.
[231] Pashukanis, 112.
[232] Pashukanis, 112.
[233] Pashukanis, 121.

> desire to be fulfilled, it is absolutely essential that the wishes of commodity owners meet each other halfway. [234]

So Pashukanis' s definition of contracts above can be further explained that the essence of a contract consists of a promise from one party to do something in return for a specific promise from another party and the fundamental feature of a contract is that it is a voluntary arrangement between the two parties.[235] The existence of contracts is regarded as one of the ideas tied to capitalism and examples of it include the relationships between capitalist and labourer, seller and buyer, and creditor and borrower.[236]

According to the analysis above, a contract is one of the means of expressing one's will and it allows the subject to affect the legal sphere surrounding him under Pashukanis' understanding. He, therefore, emphasizes that the concept of contracts is central to the concepts of law and legal subjects:

> 'Historically speaking, and in real terms, the concept of the legal transaction arose…from the contract. Outside of the contract, the concepts of the subject and of will only exist, in the legal sense, as lifeless abstraction. These concepts first come to life in the contract. At the same time, the legal form too, in its purest and simplest form, acquires a material basis in the act of exchange'[237]

What he means here is that the existence of contracts provides conditions and a sphere in which an individual can think about what he wants or does not want according to his own will and negotiate with other people to reach a mutual agreement. Without a contract, there is no way people can exchange commodities because they cannot reach an agreement under what conditions a deal can be made, such as price and quantity. This is why he says that legal subjects cannot exist beyond the framework of contracts.

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[234] Pashukanis, 121.
[235] Stone, 'The Place of Law in the Marxian Structure-Superstructure Archetype', 51.
[236] Stone, 51.
[237] Pashukanis, *Law and Marxism*, 121.

As I mentioned at the end of the last section, the idea of formal freedom and equality is the basis of private law and commodity society. Now with Pashukanis' theory of law in hand, we can see that the existence of the elements of ownership and will in the commodities exchange brings about the principle that each individual should be treated as free and equal, and autonomous:

> the economically active subject—now as a legal subject—acquires…a rare gift: a will, juridically constituted, which makes him absolutely free and equal to other owners of commodities like himself. 'Everyone shall be free, and shall respect the freedom of others…Everyone possesses his own body as the free tool of his will.'[238]

Pashukanis calls this principle the principle of legal subjectivity of bourgeois society, which means 'the formal principle of freedom and equality, the autonomy of the personality'.[239] Similar to Marx, Pashukanis argues that the principle above is built upon commodity theory. He accepts Marx's distinction of the two values of a commodity: 'Just as in the commodity, the multiplicity of use-values natural to a product appears simply as the shell of value, and the concrete types of human labour are dissolved into abstract human labour as the creator of value…'[240]. So it is the exchange of commodities on a large scale that makes it possible that concrete labour is dissolved into abstract labour, through which all concrete and qualitatively different individuals can be abstracted as men in general; therefore, each individual is treated equally under this construction and a legal subject is thus created :

> …so also the concrete multiplicity of the relations between man and objects manifests itself as the abstract will of the owner. All concrete peculiarities which distinguish one representative of the *genus homo sapiens* from another dissolve into the abstraction of man in general, man as a legal subject.[241]

[238] Pashukanis, 114.
[239] Pashukanis, 40.
[240] Pashukanis, 113.
[241] Pashukanis, 113.

Therefore, with the help of the distinction between use-value and exchange-value, each one can be understood as formally equal and free regardless of his specific personality: 'Only when bourgeois relations are fully developed does law become abstract in character. Every person becomes man in the abstract, all labour becomes socially useful labour in the abstract, every subject becomes an abstract legal subject. '[242] This point is important because this is how the formal freedom and equality are constructed in his theory and it will help us understand the concept of right and the concept of the sovereign individual. I will have more discussion of this in the next section.

In the above two sections, we have seen how Pashukanis develops his commodity theory of law and how this affects our understanding of legal subjects. In his own words, the philosophy of law is the philosophy of an economy based on the commodity which is governed by the law of value and in the form of 'free contract'.[243] This is an important and unique theoretical contribution by Pashukanis and it provides us with an alternative and insightful perspective to understand rights and subjects. Let us move to the next section.

2.2 Rights and commodity exchange

In the above section, we have seen that Pashukanis developed a Marxist approach to explain the nature of law, that is to try to establish that legal relations are analogous to the relations among commodity owners. Based on this approach, I will argue that Pashukanis understands the concept of rights as the legal expression of freedom and equality that capitalist relations of production assume between commodity owners.

First, we need to understand the relationship between the concept of rights and commodity exchange. There are three dimensions from which Pashukanis thinks about the analogy between right-holder and commodity owner. First, as we have seen above, he emphasises that having the ownership of a property is the foundation of commodity exchange and the

[242] Pashukanis, 120-121.
[243] Pashukanis, 39.

ownership means what every owner of commodities can do with his commodities.[244] Therefore, we can infer from this argument that the right to own commodities could be the early type of right that people created in a commodity exchange society because having the right of ownership is the fundamental way for an individual to declare their ownership of a commodity and to conduct exchange and disposal, etc. He acknowledges commodity owner is a bearer of rights:

> …'That goods contain labour is one of their intrinsic qualities; that they are exchangeable is a distinct quality; that they are exchangeable is a distinct quality, one solely dependent on the will of the possessor, and one which pre-supposes that they are owned and alienable'… therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bear of rights.[245]

Second, right-holders and commodity owners are analogous in another aspect that either the behaviour of a right-holder or the one of a commodity owner is conducted under the individual's will and control. As we have seen above, Pashukanis mentioned that the commodity can only be exchanged with the owner's permission and the willingness of the buyer to buy it under certain conditions. At the same time, he holds a similar view that having a control over the content of rights is also significant for the right-holder: 'The person whose will is declared as decisive is the legal subject.'[246] We should not be unfamiliar with this statement here, because this is the view that has been accepted and developed later by the contemporary Will theory, namely, the essential condition of having a right is having a will to control something. Therefore, Pashukanis provides us with a helpful perspective to reconstruct the Will Theory: the Will Theory is another expression of the commodity theory because we will be able to see those elements that constitute the Will theory

[244] Pashukanis, 110.
[245] Pashukanis, 112.
[246] Pashukanis, 113.

can be found in Pashukanis' theory. I will have a full analysis of this in the later section.

In the last section, we also see that Pashukanis treats the concept of contracts as central to laws. According to this, the existence of contracts is also the objective bearer where two individual commodities owners can express their own will, negotiate with each other and reach an agreement. A similar conclusion can be applied to our discussion of rights-holders. The basic form of commodity exchange is buying and selling commodities on the market and this can be an original and early form of agreement in which the content of rights and duties are decided: when a deal is reached, the commodity owner has a right to request payment and the buyer has a duty to pay for commodity owner a certain amount of money when he agrees to buy the commodity. Therefore, the existence of a contract not only provides a method to express his will, but also provides a platform for the right-holders to determine freely what rights and duties to be set for both parties.

Third, Pashukanis points out that the elements of ownership and will are still not sufficient to constitute the concept of rights. He argues that, furthermore, there should exist a market in which exchange and trade can occur regularly. For example, he believes it does not make sense to claim that a man on an isolated island, like Robinson Crusoe, has a right because no human interaction and no commodity exchange is happening regularly there. even he undoubtedly has the ownership of things, like fruits or water, etc and he can dispose of them based on his own will.[247] We should not misunderstand Pashukanis here that rights can only exist out of commodity exchange, his main point can be understood that rights must be created when there exists a conflict of interests among people and they are created to settle disputes. This is why, he uses the example of trade by sea and by caravan to illustrate that there was no need to safeguard the property as the distance keeps other people away from making claims and no conflict of interest can happen in this

[247] Pashukanis, 125.

case; only when the permanent markets were established, the necessity of rights of disposal over commodities and property law is created, because on the market, the dispute and conflict of interest is unavoidable and this will trigger lawsuit and the economic subject first appears as the participants in the legal superstructure in the lawsuit.[248] Thus, the concept of rights can be made possible when a market is set up:

> Both value and property law are engendered by one and the same phenomenon: the circulation of products which have been transformed into commodities. Property in the legal sense did not arise because it occurred to people to invest in one another with this legal capacity, but because they were able to exchange commodities only in the guise of property owners.[249]

Therefore, he reminds us that we need to distinguish between private appropriation and the system of property rights, because the former is purely a personal expenditure of energy or personal use and consumption.[250]

According to the analysis above, I will argue that, for Pashukanis, 'right' is the legal expression of the freedom and equality existing among commodity owners that capitalist relations of production assume. To better explain this argument, the following questions need to be answered: why and how do capitalist relations of production assume the principle of freedom and equality? How can this principle be understood? And why does the concept of rights is the legal expression of this? In the last section, we have briefly touched upon the first question. He points out that in feudal society, it is custom or tradition that governs the operation of the society and they are by nature something confined to a limited geographical area; as a result, all rights were a privilege belonging exclusively to a certain subject or group of subjects and there lacks the notion of a formal legal status common to all citizens and all man.[251] He

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[248] Pashukanis, *Law and Marxism*.
[249] Dragan Milovanovic, 'On Evgeny B. Pashukanis, The General Theory of Law and Marxism', Classic Writings in Law and Society, 8 September 2017, 125, https://doi.org/10.4324/9781351298643-12.
[250] Pashukanis, *Law and Marxism*, 126.
[251] Pashukanis, 119.

then describes the transition from a feudal society to a capitalist society as 'the disintegration of organic patriarchal relations and their replacement by legal relations, that is to say by relations between formally equal subjects'.[252] Under capitalist commodity production, private property first becomes perfect and universal and breaks the ties with social status, like family.[253] Then in the capitalist relation, each commodity owner is free in the sense that the ownership of the commodity enables him to freely decide how he can use or dispose of his commodity; each commodity owner is equal in the sense that each concrete labour is measured under the same standard and the value of a commodity is decided by abstract labour which is a social average.

Now let me move to the second question. For Pashukanis, the freedom, and equality existing in capitalist production relations are as understood as formal:

> The development of the legal form, which reaches its peak in bourgeois capitalist society…One can also characterise this process as the disintegration of organic patriarchal relations and their replacement by legal relations, that is to say by relations between formally equal subjects.[254]

This is what he calls ' the principle of legal subjectivity, which means the formal principle of freedom and equality and autonomy, and so forth.[255] The formal character of this principle is closely related to the existence of use value and exchange value. As I just showed above, the use value dissolves into the abstract labour in the commodity exchange, and then each individual is considered abstractly and equally in outputting his/her labour regardless of the difference of concrete labour. Therefore, each individual is measured under the same standard and this is how formal freedom and equality are constructed.

[252] Pashukanis, 41.
[253] Pashukanis, 126.
[254] Pashukanis, 41.
[255] Pashukanis, 40.

Finally, let me answer the last question of why Pashukanis believes the concept of rights is the legal expression of the capitalist relation of men. The answer lies in Marx. He points out that rights are the superstructure reflecting the capitalist economy and the capitalist concept of rights, such as liberty and property rights, does not go beyond the capitalist production relations, which assumes an egoistic, isolated, and self-sufficient monads man. Pashukanis follows Marx and expresses similar arguments. This can be found in the three aspects I discussed above. First, the concept of rights originates from the concept of commodity ownership at its early stage of appearance; second, the idea of right-holder originates from the idea of capitalist commodity owners, because the commodity owner's control over his property becomes the decisive element that constitutes a legal subject; third, the concept of rights will not appear if the capitalist economy is not well established and if people in the capitalist economy do not have a dispute over their interests. Therefore, as I have shown above, the principle of freedom and equality is assumed by the capitalist production relations and the concept of rights is the legal expression of it.

Therefore, through the detailed exposition of Pashukanis's commodity theory of law, we can see a reasonable connection between rights and the model of commodity economy, thus it will provide us with a fresh view to understand the Will and Interest theories.

2.3 Commodity theory and sovereign individual

In the above section, I have outlined Pashukanis's commodity theory, in particular, his construction of law and rights from the perspective of commodity exchange. In this section, I will argue that the concept of the sovereign individual has its roots in commodity theory using Pashukanis theory.

2.3.1 Commodity owners, legal subjects and right-holders

We have seen so far that the idea of commodity owners, legal subjects, and right-holders are important concepts in his theory, so I will clarify the logic among these definitions in this section. My argument will be that the concept of commodity owners is the fundamental condition for legal subjects, then being the fundamental condition for right-holders.

First, let us recall the relationship between legal subjects and commodity owners. According to the logic of his theory, the foundation of legal subjects depends on the existence of commodity owners and this thesis can be supported by his following reasoning. First, having the control over the property, either exchanging or disposing of it, becomes the basis of the legal subject, because if a subject is subservient to someone else and loses the control over his property and freedom, then he loses the ground of becoming a legal subject, such as slave.[256] Second, the economic activities, especially those surrounding the commodity exchange, allow the idea of legal subjects to grow and develop. In the last section, we have seen that Pashukanis treats the concept of contracts as central in the legal theory and its existence allows individuals to realise their freedom to a maximum degree. However, the existence of contracts has to rely on the preconditions that man produces in society and also rely on the economic relation of purchase and sale.[257] Third, Pashukanis believes that the foundation of freedom of the legal subjects, that a legal subject can do what he wants according to his own will, can be traced back to the freedom that is given to an individual as a commodity owner. Therefore, we can see that the concept of commodity owner is the foundation of the one of legal subject, and as a result, the concept of legal subjects finds its best explanation in the context of commodity theory: 'In reality, of course, the category of the legal subject is abstracted from the act of exchange taking place in the market.'[258]

[256] Pashukanis, 110.
[257] Pashukanis, 93.
[258] Pashukanis, 117.

Now let me move to discuss the relationship between the concept of right-holders and the concepts of legal subjects and commodity owners in his theory. The logic between legal subjects and right-holders is as follows. First, Pashukanis argues that legal subjects become most free and confident in the realm of private law because private law provides a realm in which individuals are given the freedom to conduct civil behaviour.[259] Second, he argues that although the ability to conduct exchange transactions is only one of the manifestations of the general capacity to act and of legal capacity, it is the ability to perform an exchange that generates the idea of the bearer of rights: 'Only in commodity production does the abstract legal form see the light; in other words, only there does the general capacity to possess a right become distinguished from concrete legal claims.'[260] Furthermore, he points out that the conflict and dispute of interests between people create the need for the legal superstructure.[261] More specifically, although laws grow into multiple branches, like criminal law and international law, the fundamental logic of these laws does not diverge much from the logic of civil laws, which is that laws aim at dealing with disputes between different legal entities, like a dispute between individuals or a dispute between states. We have seen in the last section that Pashukanis argues that having a market that allows regular exchange is one of the conditions that create the concept of rights, then along with the discussion above, we can understand why an exchange commodity is needed necessarily is that only in the exchange can the conflict of interest occurs regularly. Therefore, he points out that the concept of rights is a key to understanding the concept of laws because we can learn that the property right could be the most important content in the capitalist laws at its early stage, as they are created as a legal tool to protect individuals' commodities and they also exist as the best form to realise the function of law and they are widely used in the lawsuit against other people's claim.[262]

[259] Pashukanis, 80.
[260] Pashukanis, 118.
[261] Pashukanis, 93.
[262] Pashukanis, 47.

Given the important status of the concept of rights in Pashukanis' theory, we need to further clarify the relationship between right-holders and commodity owners, because they look similar in many aspects. In the last section, I have shown both concepts are analogous in three aspects: first, the concept of rights could be initially established in the property laws area, because protecting an individual's ownership of his commodities is the important thing in commodity exchange; second, right-holders and commodity owners are analogous in that they have the control the over how to use the object, either keeping it or exchanging of it; third, the creation of rights and the one of the ownership of a commodity both require an establishment of a mature market, because only in the frequent exchange of trade does there exist the necessity to confirm an individual's rights and the ownership of a commodity. The purpose of clarifying the relationship between these two concepts here is that we need to see the close connection between right-holders and commodity owners which will ultimately help us understand the nature of the contemporary theories of rights.

2.3.2 Rights, sovereign individual and commodity theory

In this section, I will argue that the concept of the sovereign individual associated with the concept of rights does not go beyond the concept of the commodity owner under Pashukanis commodity theory.

Recall us recall the principle of legal subjectivity Pashukanis constructs above. From his perspective, the principle of legal subjectivity is effective in capitalist society from its early emergence and it focuses on promoting an individual's freedom and equality among people, etc, which then develop into the principles of freedom and equality.[263] Also, the principles of freedom and equality achieve significant progress in a capitalist society, because the increasing scale of commodity exchange in a capitalist economy requires the maximum sphere of individual freedom and requires us to treat all human labour as equal and abstract, so a value of a commodity can be determined

[263] Pashukanis, 40.

and an equivalent exchange can be made possible. Understanding capitalism in this way, I argued that the concept of rights is the legal expression of the capitalist principles of freedom and equality: 'Private property first becomes perfected and universal with the transition to commodity production, or more accurately, to capitalist commodity production.'[264]

I can now construct the sovereignty of the right-holder with the help of Pashukanis' commodity theory. My argument is the sovereignty individuality of the right-holder originates from the sovereignty of the commodity owner. More specifically, the logic of a right-holder is identical to the one of a commodity owner from Pashukanis's theory for the reasons I summarized above. Therefore, the sovereignty of the former can be found in the sovereignty of the latter. More specifically, when we say having a right means that the right-holder has a control, the concept of 'control' here can be easily found in the concept of ownership, which means that the commodity owner has the control over his commodities. Similarly, when we say having a right means that other people cannot interfere with this right, the concept of 'non-interference' here can also be found in the original motivation of establishing the concept of ownership, which is to prevent other people from taking one's property without the owner's permission. In chapter two, I have argued that the elements of control and a claim of non-interference constitute Mill's concept of the sovereign individual, and these elements are exactly what constitutes a commodity owner, so this confirms further that the sovereign individual has its roots in commodity owner and the theory of right-holding, which is built upon the concept of the sovereign individual, is ultimately the theory of commodity-owning.

So far, I have introduced Marx's and Pashukanis's commodity theories and how their theories ground the concept of the sovereign individual. It is time to show the Will and Interest theories can be reconstructed as commodity theories of rights that display the different faces of a commodity owner.

[264] Pashukanis, 126.

3. A Marxian critique of the Will and Interest theories of rights

In this section, I will review two theories of rights from Marxist commodity theory. My argument is that two theories of rights rely on the concept of the sovereign individual that 'perfects' in the capitalist commodity economy, so theories of rights are mainly the expression of the sovereignty of commodity owners. I will analyse the Will Theory first and then the Interest Theory.

3.1 The Will Theory and Marx

3.1.1The Will Theory, sovereign individual and commodity owner

In the last chapter, I have argued that the Will theory accepts Mill's concept of the sovereign individual. I will expand this argument that the concept of the sovereign individual the Will Theory accepts has its roots in the concept of commodity owner and I will argue further that the Will and Interest theories are two different reflections of the commodity owner.

Marx describes the process of exchange which well explains why the Will Theory emphasises the importance of control in conceptualising right-holders. First, commodities cannot go to the market and exchange themselves, so this must be done by 'their guardians', the possessors of commodities, and when the possessors exercise their will, the exchange starts.[265] Second, the exchange will not take place until the commodity owners enter into the exchange relationship and recognise each other as the owners of their property:

> In order that these objects may enter into relation with each other as commodities, their guardian must place themselves in relation to one another as persons whose will resides in those objects...[266]

[265] Karl Marx, *Capital: A Critique of Political Economy. Volume One / Karl Marx ; Introduced by Ernest Mandel ; Translated by Ben Fowkes.*, Penguin Classics (London: Penguin Books in association with New Left Review, 1990), 178.
[266] Marx, 178.

Then they reach an agreement in the form of a contract to exchange commodities:

> This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors the economic relation.[267]

According to Marx's description above, the will of the commodity owners is indispensable in the process of exchange: the exchange of commodities is, in essence, an exchange of wills between two commodity owners. As we have seen in the last section, Marx's views above are accepted by Pashukanis. He argues that the process of exchange presupposes a conscious act of the commodity owner's will and the existence of contracts is essential for the exercise of the will because the existence of contracts gives the choice to the legal subjects to decide what can be done between them. The key element of contracts here is that it gives the choice for legal subjects to act freely, which is exactly what the Will Theory emphasises.

Thus, Marxist commodity theories provide a helpful framework for us to reconstruct the Will Theory as a form of commodity theory. First, most fundamentally, Mill's concept of the sovereign individual that the Will Theory accepts can be explained in terms of commodity owner. The individual's absolute liberty with regard to self-regarding activities and the sovereignty over himself, body, and mind origin from the same logic as the commodity owner's absolute liberty to use his commodities as long as it does not affect other people and the sovereignty over his commodities. For example, the owner of an apple has the absolute liberty to store it or eat it as these behaviours do not normally harm other people, and ownership of this apple is sovereign in the sense that other people are under a duty not to interfere with it, such as stealing it or damaging it. Second, the concept of control the Will Theory accepts shares the same logic the will of the commodity has over his commodities. As Marx points out above, the exchange of commodities is made possible by the commodity owner's will: the owner decides to exchange or sell it. The commodity owner's will to exchange or sell his commodities

[267] Marx, 178.

here, in Hohfeldian terms, is the Hohfeldian power, the power to modify the ownership of a commodity, which is, in essence, the same as the Hartian power to enforce or waive the duty correlative to the Hohfeldian claim right: both are the Hohfeldian power. Therefore, it can be argued that the concept of control the Will Theory adopts has its origin in the commodity owner's power to modify the ownership of a commodity as he wishes and this power is later developed into the Hartian power in the Will Theory.

Another way that the Will Theory is consistent with the commodity theory is that the Will Theory advances the principle of formal freedom and equality as the commodity economy does. This can be found in Hart's work *Are There Any Natural Rights?* In this paper, he advances a thesis that responds to the question of the title of his paper 'if there are any moral rights at all', and he answers that 'there is at least one natural right, the equal right of all men to be free.'[268] What he means by 'natural' here is that all men have this right if they are capable of choice and they have it qua men and not only because they are in a society or some special relation; this right is not created or conferred by men's voluntary action.[269] So why do we have this natural right? He points out that by entering into certain legal relations, such as promises, consent, and authorisation, people agree that one party may have more freedom and the other one's freedom may be limited according to their agreement. He then argues that this is made possible and justified because there exists such a natural right:

> For we are in fact saying in the case of promises and consents or authorisations that this claim to interfere with another's freedom is justified because he has, in exercise of his equal right to be free, freely chosen to create this claim; and in the case of mutual restrictions, we are in fact saying that this claim to interfere with another's freedom is justified because it is fair; and it is fair because only so will there be an

[268] Hart, 'Are There Any Natural Rights?', 175.
[269] Hart, 175–76.

> equal distribution of restrictions and so of freedom among this group of man.[270]

So what Hart means here is that besides having a choice as a condition of right-holding, an individual also should be treated as equal and free to create a promise with others and justify interfering with another's freedom(What 'interference with another's freedom' means here is that another person is under a duty of to do or not to do something, not the interference that is based on race discrimination or the certain character of activities, such as cruel practices.).[271]According to his views above, Hart accepts a formal principle of freedom and equality when developing the Will Theory and this is consistent with the formal principle of equality and freedom that functions in the commodity economy pointed out by Marx and Pashukanis.

In summary, the right-holder under the Will Theory, which accepts Mill's concept of the sovereign individual, has its roots in the commodity owner. More specifically, the Will Theory emphasises the control and liberty the commodity owner has over his commodities and also the formal principle of equality and freedom that the working of commodity economy requires.

3.1.2 The problem of the Will Theory from Marx's perspective

As we have discussed above, the capitalist theory of right-holding has two problems: the theory not only relies on the concept of egoistic man, which assumes the monadic individuals who are separated from their community, but also, more seriously, the theory creates a formal right-holder, whose logic is identical to the formal commodity owner, but attributes the subjectivity of the right-holder to the capitalist civil society, which inverts the causal relationship between subjects and objects. The latter problem can be found in the Will Theory.

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[270] Hart, 190–91.
[271] Hart, 183.

Joel Feinberg is a follower of Hart's Will Theory and he argues that a claim is an essential element of holding a right:

> The legal power to claim (performatively) one's right or the things to which one has a right seems to be essential to the very notion of a right. A right to which one could not make claim (i.e. not even for recognition) would be a very 'imperfect' right indeed! [272]

Moreover, the concept of claim Feinberg uses comprises similar elements that Hart uses to define the concept of control in his Will Theory:

> If Nip has a claim-right against Tuck…Nip not only has a right, but he can choose whether or not to exercise it, whether to claim it, whether to register complaints upon its infringement, even whether to release Tuck from his duty, and forget the whole thing.[273]

From the perspective of the Hohfeldian framework, the concept of claim Feinberg uses here is the Hohfeldian claim right combined with the Hohfeldian power, given he confirms that the right-holder can modify the first order claim-duty relationship, either enforcing or releasing it.

However, Feinberg attributes the dignity of the right-holder to the concept of claim, which exactly commits to the mistake of inverting the logical relationship between subjects and objects that Marx criticises. He says:

> They [rights] are especially sturdy objects to 'stand upon,' a most useful sort of moral furniture. Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to 'stand up like men,' to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that

[272] Joel Feinberg, 'The Nature and Value of Rights', *The Journal of Value Inquiry* 4, no. 4 (December 1970): 251.
[273] Feinberg, 250.

> minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called 'human dignity' may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims.'[274]

The problem of Feinberg's arguments above, though it looks intriguing as he admits, is that he reverses the relationship between subjects and objects, which is criticised by Marx: it should be that the subject who defines the object, not the other way around. Let us analyse the quotation above closely. First, he argues that rights enable people to receive equal treatment from other people. However, using Marx's criticism of equal right in *Critique of the Gotha Programme*, the equality here is only a formal equality, deriving from the logic of the form of commodity. As a result, the concept of equality here does not contribute to the formation of subjectivity, because it is only an ideological reflection of the commodity form and a process of abstraction from the concrete and qualitatively different individuals. Second, he attributes the concepts of 'respect' for people and 'human dignity' to the concept of claim. However, this is how he inverts the causal relationship between subjects and objects. To treat an individual as possessed of human dignity or to respect a person is to recognise his subjectivity and to recognise that he is the creator of objects. Therefore, the concepts of 'human dignity' and 'respect' for people do not necessarily entail the exercise of claims and we can refute Feinberg in the following ways. Before rights were created in human history, it is too dogmatic to assert that there was no respect for people or no human dignity, because human dignity or respect for people can be realised by recognising one's social role. For example, a father's dignity or respect for him can be simply realised by recognising his role as a father from other people, such as obedience to his son, without involving the concept of rights. Even after rights were invented in human history, human dignity and respect for people do not

[274] Feinberg, 252. Italic is added by the author.

necessarily entail the concept of claim and this criticism is identical to the criticism of the Will Theory we already made in the first chapter: there exist unwaivable rights. For example, people are not normally allowed to waive others' duty not to kill themselves, but this does not deny that people should still show respect for life and that they still have dignity. On the contrary, as the Interest Theory points out, the deprivation of claim here is an enhancement of the protection of the right-holder's interest, dignity, and respect for people, for example.[275]

3.2 The Interest Theory and Marx

3.2.1 The Interest theory, sovereign individual and commodity owner

As I argued in the first chapter, only the Hohfeldian claim of non-interference whose paradigm is property rights satisfies the requirement of the Interest Theory: this right not only benefits the right-holder but also benefits the right-holder generally and the case that holding this right is harmful or non-beneficial to the right-holder is exceptional because the non-interference of one's property is hardly denied as a benefit to an individual, even the actual usage of a property may not serve the benefit of an individual in any way. For the reason above, the Hohfeldian claim of non-interference, commonly seen in property rights, is the ideal example that supports the Interest Theory's thesis. However, my argument is that except for property rights, not all rights are eligible to support the Interest Theory because holding those rights could be beneficial to the right-holder in some specific case, but there exist equally that holding the same rights could be not beneficial to the right-holder. For example, my Hohfeldian liberty to my body freely could be an interest to me, but a Hohfeldian liberty to arrest a criminal, if I am the police, does not protect my interest, and the latter case is not exceptional because this right is not intended primarily to benefit the right-holder but to the public or other people. Therefore, it is insufficient to argue that a Hohfeldian liberty is generally beneficial to the right-holder. I argue in the first chapter that the reason why the Interest theory must insist on such a requirement, implicitly though, is that

[275] MacCormick, 'Rights in Legislation', 197.

on the one hand, they argue that being beneficial to the right-holder is the necessary condition of holding a right and, on the other hand, they must deal with some exceptional cases which counter their thesis. However, sticking to this requirement leads the Interest Theory to accept the above right as the only suitable example to support their thesis.

According to the summary of the Interest Theory above, we can reconstruct the Interest Theory as a commodity theory of rights. As we have seen in the last section, the Will Theory accepts the control the commodity owner has over his commodities and applies it in developing the control the right-holder has over the correlative duty. The Interest Theory accepts the commodity theory straightforwardly because the Hohfeldian claim of non-interference whose paradigm is property rights derives from commodities. The concept of 'interest' in the Interest Theory relies on originates from the protection brought by commodities to the property owner. When an individual is a commodity owner, he has a Hohfeldian claim of non-interference with his commodity, such as no stealing and no damaging to his commodity. As Pashukanis points out, rights are only created when commodity exchange occurs regularly which then creates conflicts and disputes of interests among commodity owners, and the function of rights is to confirm the ownership of a commodity and settle the dispute and prevent interference against others. Therefore, the protection brought by the Hohfeldian claim of non-interference against others to the right-holder can be regarded as consistent with the protection bought by the Hohfeldian claim of non-interference with the commodity against others to the commodity owner.

As Marx points out above, the commodity owner can also exchange or sell its commodity, which is a Hohfeldian power. As I pointed out in the first chapter, whether holding the Hohfeldian second-order entitlements is beneficial to the right-holder is dependent upon the Hohfeldian first-order entitlement, so the Hohfeldian power to exchange or sell the commodity is beneficial to the commodity owner because this originates from his Hohfeldian claim of the

ownership of his commodity. Therefore, the commodity owner receives protection mainly through having a Hohfeldian claim of non-interference against others, and this point is well captured by the Interest Theory. However, other rights function differently than property rights. As I showed above, holding an occupational right does not necessarily protect the right-holder's interest, because the right is created upon a Hohfeldian liberty to perform certain social functions of a specific occupation role, which is not primarily intended to benefit the right-holder. Therefore, based on the analysis above, I conclude that the Interest Theory is, in essence, a Commodity Interest Theory of rights, in the sense that the protection of a right-holder's interests is not brought by rights of all kinds, but only by commodity/property rights.

3.2.2 The problem of the Interest Theory from Marx's perspective

By building the Interest Theory upon commodities, the Interest Theory inevitably inherits the problem of the form of commodity: the reversal of the causal relationship between humans and the objects they create revealed by Marx. The embodiment of this problem in the Interest Theory is that it attributes the subjectivity of the right-holder to the concept of interest. As I have shown above, there exist cases in which holding a right can be either beneficial or non-beneficial to the right-holder and these cases cannot be categorised as general or exceptional in understanding the feature of right-holding. However, the Interest Theory seems to ignore these cases or to consider the cases that holding a right is non-beneficial to the right-holder as exceptional and concludes that the necessary condition of right-holding is the protection of the right-holder's interests. The reason why they conclude so is that they presuppose the logical priority of interest in defining the subjectivity of the right-holder. For example, MacCormick emphasises that in the case of the mortgagor's entitlement, the essential task of law is to locate advantages for different parties:

> …what is essential to a clear and comprehensible law relating to mortgages is that the relevant legislation should make clear the

> respective advantages, protections, and powers accruing to each of the parties to any mortgage.[276]

What MacCormick means here is that law should allocate advantages rather than disadvantages to the right-holder, thus having an interest is logically prior to the right-holder. Similar to McCormick, Raz gives the concept of interest a more fundamental status: having an interest is the logical ground for holding a right:

> To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person… The interests are part of the justification of the rights which are part of the justification of the duties.[277]

Kramer elaborates on the importance of interest in understanding right-holding in a similar way as MacCormick and Raz. He argues that unless we can distinguish between 'beneficial' and 'detrimental', we cannot determine whether someone has a right or not. He uses two examples to support his claim: one is that X has a duty to provide his parents with financial support, and the other one is that X has a duty to inform his parents whenever they utter seditious sentiments. In the first scenario, he says X's parents hold a right against X, while they do not hold a right in the second scenario, because in the latter scenario, it is weird to say X's parents have a right to be informed since it is detrimental to their interests.[278] In other words, determining what counts as interest for an individual is prior to logically holding a right.

The theorists above encounter the problem of reversing the logic between the concept of interest, just as Marx criticises the inverted logic between labourers and the commodity they create. The theorists presume that an individual's

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[276] MacCormick, 203.
[277] Raz, *The Morality of Freedom*, 180.
[278] MATTHEW H. KRAMER, 'Rights Without Trimmings', in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Simmonds N.E., and Steiner Hillel (Oxford University Press, 2000), 92.

interest exists out there and a right is just a method to protect the interest. This presumption makes sense in the Hohfeldian claim of non-interference exemplified by property rights for the reasons I mentioned above. However, in the cases of occupational rights, an individual's interest to be protected does not pre-exist out there, so there is no causal relationship between holding this right and the interest to be protected.

As a result, the problem of the Interest Theory in these cases is that it begs the question: the Interest Theory is supposed to prove that the necessary condition of holding a right is that an individual's interest is protected, but they attribute the subjectivity of the right-holder to the concept of interest and assuming this as true. The consequence of this fallacy is that it does not define the subjectivity of the right-holder, but causes more confusion. For example, the police has a right to drive the police car without following the traffic rules, such as speeding, and a right to use the road with priority when there is an emergency. According to the Interest Theory, it should argue that these rights should protect the police's interests, however, not only are these rights intended primarily to protect the interests of the people who need police rather than the interest of the police, but also exercising this right may expose more risks to the police, such as car accident, etc. To insist that the police are the beneficiary is to distort the feature of the right-holder and establish a false relationship between holding a right and being beneficial from holding it.

In summary, the Will Theory and the Interest Theory are just two different reflections of Marx's commodity theory. The concept of control the Will Theory relies on can be traced back to the concept of control the commodity owner has over the commodity, so we can rename the Will Theory as the Commodity Control Theory of rights to reflect the relationship between control and commodity economy. The concept of interest the Interest Theory relies on is built upon how Hohfeldian claim of non-interference, exemplified by property rights, specifically protects the commodity owner's interests, such as the claim of no stealing, rather than how rights in general protect the right-holder's

interests. So we can rename the Interest Theory as the Commodity Interest Theory of rights to reflect the material ground upon which the Interest Theory is built.

4. Critique and defence of Marxism's critique of rights

4.1 Critique and defence

Steven Lukes is an important critic of Marxism's critique of rights and his paper *Can A Marxist Believe in Human Rights* is the early contemporary work on this topic.[279] By human rights, he follows Joel Feinberg's definition of human rights: 'generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably'.[280] He then defines his question as not whether Marxists can in fact believe in human rights, but rather whether they can believe in human rights and remain consistent with Marxist central doctrines.[281]

Then he argues there are two main reasons why he rejects that Marxists can believe in human rights. First, he believes that Marxists have to reject rights because they are inherently ideological and their real nature is to protect the capitalist ideology and interests: 'Marxism, in short, purports to unmask the self-understanding of Recht by revealing its real functions and the bourgeois interests that lie behind it'.[282] Second, more importantly, he argues that the ultimate reason why Marxists are hostile to rights is that they attempt to reject the conditions of morality. He points out that human life is inherently conflictual, which is what he calls the 'condition of morality' and rights are a set of rules which are designed to resolve this problem.[283] However, he criticises that Marxism denies the conditions of morality above and claims that they are historically determined, specific to class societies, and will disappear when communism is realised.[284] He, therefore, concludes that Marxism cannot

[279] Steven Lukes, 'Can a Marxist Believe in Human Rights?', *PRAXIS International* 1, no. 4 (1981): 334–45.
[280] Lukes, 336.
[281] Lukes, 335.
[282] Lukes, 342.
[283] Lukes, 342.
[284] Lukes, 343.

believe in human rights because they regard rights as ideological and illusory, and more importantly, the conditions of morality in which rights are needed will be abolished ultimately.

Critiques like Lukes can be also found in the literature. R.P. Peerenboom also argues that Marxism is hostile to rights because they treat rights as an illusion and they are doomed to play little role in communist society because the state will wither away, and self-interested individuals will no longer exist, which renders the need for rights disappear.[285] Stephen Brown argues additionally that Marxism's critique of rights is mainly directed at the liberal theory of negative rights,[286] and the effect of their critique compromises because they do not really reject the concept of rights per se, but only the particular instance of bourgeois rights;[287] furthermore, the interpersonal relationship is not what Marx supposes to be isolated and conflicting, but connecting with each other, because the individual who has a right also has a duty to act in accord with the rights of all other agents. [288]

Steve Lukes's critique sparks much discussion surrounding this topic. The defence of Marxism is carried out from different perspectives.[289] One defence has been made that Marx's critique only focuses on the rights of man, not the rights of citizen, and the latter rights do not assume the separation among people.[290] More specially, the later rights mainly refer to political rights, the

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[285] R. P. Peerenboom, 'What's Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics', *Harvard Human Rights Journal* 6 (1993): 47–48.
[286] Stephen Brown, 'The Problem with Marx on Rights,' *Journal of Human Rights* 2, no. 4 (December 1, 2003): 519–20.
[287] Brown, 521. Allen Buchanan, 'The Marxian Critique of Justice and Rights', *Canadian Journal of Philosophy; Supplementary Volume; Calgary, Alta.* 7 (1 January 1981): 292–93.
[288] Stephen Brown, 'The Problem with Marx on Rights,' *Journal of Human Rights* 2, no. 4 (December 1, 2003): 519–20.
[289] *See* David Baxter, 'Marx, Lukes, and Human Rights', *Social Theory and Practice* 15, no. 3 (1989): 355–73. *See* Amy Bartholomew, 'Should a Marxist Believe in Marx on Rights? | Socialist Register'. George G. Brenkert, 'Marx and Human Rights,' *Journal of the History of Philosophy; Berkeley, Calif.* 24, no. 1 (January 1, 1986). *See* Christopher M. J. Boyd, 'Can a Marxist Believe in Human Rights?,' *Critique* 37, no. 4 (November 1, 2009): 579–600.
[290] Jeremy Waldron, *Nonsense upon Stilts (Routledge Revivals): Bentham, Burke and Marx on the Rights of Man* (Florence, UNITED KINGDOM: Routledge, 2014), 129–30. Boyd, 'Can a Marxist Believe in Human Rights?', 586. [290] Bartholomew, 'Should a Marxist Believe in Marx on Rights?', 248.

rights to participate in a community to form their consent,[291] so these rights can only be exercised in a community with others and they, on the contrary, recognise people as a species being and do not need to assume the atomistic individual.[292] Another defence of Marxism's critique argues that their critique of egoism and atomistic individualism of rights does not contradict their support of the full development of rich individuality.[293] More specially, this defence shows that there is a distinction between atomistic individualism and rich individuality and Marx is fully supportive of the well-rounded development of an individual: 'only within the community has each individual the means of cultivating his gifts in all directions; hence personal freedom becomes possible only within the community.'[294] Finally, the defenders of Marxism in this regard mostly argue that their critique of rights only targets the concept of rights in the bourgeois society, not rights in general, so they can still believe in human rights, which is also coherent with the views above.[295]

In the next section, I will defend Marxist critique by arguing that rather than treating Marx's critique of rights as ideological, we can understand it as descriptive in the sense that it reveals the material assumptions the theory of right-holding accepts implicitly. By taking this step back, we can understand better the problems of the Will and Interest theories, not just debate the disadvantages and advantages of the Marxist critique of rights. Furthermore, my defence here will be helpful for us to understand what is going wrong with the Chinese Marxists' understanding of the theory of right-holding, which will be the main topic for chapter four.

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[291] Karl Marx and Richard A. Davis, 'Marx: Early Political Writings', Cambridge Core, June 1994, 43.
[292] Waldron, *Nonsense upon Stilts (Routledge Revivals)*, 130.
[293] Bartholomew, 'Should a Marxist Believe in Marx on Rights?', 249.
[294] Karl Marx and Frederick engels, 'The German Ideology', in *Karl Marx Frederick Engles Collected Works*, vol. 5 (London: Lawrence & Wishart, 2010).
[295] Bartholomew, 'Should a Marxist Believe in Marx on Rights?', 249. Waldron, *Nonsense upon Stilts (Routledge Revivals)*, 134. Waldron, *Nonsense upon Stilts (Routledge Revivals)*, 134

4.2 A defence of Marxist critique of right

To begin with, it is not unreasonable to criticise that Marx's critique of rights is ideological and holds a hostile view towards the capitalist concept of rights. Marx makes this explicit in his *The Communist Manifesto*:

> The distinguishing feature of Communism is not the abolition of property generally, but the abolition of bourgeois property…just as your jurisprudence is but the will of your class made into a law of all, a will whose essential character and direction are determined by the economical conditions of existence of your class.[296]

We should not be surprised by Marx's argument here because, as I pointed out in the first section, this is consistent with his methodology of historical materialism. And it is also correct that Marx believes rights will disappear when we reach the higher stage of communist society when wealth will be affluent and there will be no more conflict of interest then:

> In a higher phase of communist society, after the enslaving subordination of the individual to the division of labour, and therewith also the antithesis between mental and physical labour, has vanished; after labour has become not only a means of life but life's prime want; after the productive forces have also increased with the all-around development of the individual, and all the springs of co-operative wealth flow more abundantly—only then can the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners: from each according to his ability, to each according to his needs![297]

Pashukanis holds a similar position as Marx that laws and rights will persist as long as the capitalist exchange economy continues to exist.[298] And he further adds that although the proletariat may use these forms at the early stage

[296] Marx, 'Communist Manifesto', 256, 258.
[297] Marx, 'Critique of the Gotha Programme', 615.
[298] Head, *Evgeny Pashukanis*, 184.

when productive force has developed to a higher level and scarcity has been overcome, the form of law and right will ultimately wither away:

> 'The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law… the withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say, the disappearance of the juridical factor from social relations.'[299]

However, Marx's contribution to our understanding of the theory of right-holding should be acknowledged despite the criticism above. As I argued in the discussion so far, the Will and Interest theories display a clear connection with the commodity theory, but the way I reach this conclusion is hardly ideological but descriptive: this conclusion is drawn by comparing the logic behind the Will and Interest theories and the logic of commodity theory, I find out that the elements that constitute a commodity owner, thus being a sovereign individual in Mill's sense, are the ones that form the main arguments of both theories—the concept of control the Will Theory accepts originates from the control a commodity owner has over his commodities and the concept interest the Interest Theory accepts originates from the way the system of commodity protects the commodity owner, mainly through the Hohfeldian claim of non-interference against others. Therefore, a fair judgment of the Marxist critique of rights is that the beginning point where Marx and Pashukanis start their criticism of the bourgeois concept of rights is ideological and to some extent, hostile to this concept, however, the concluding point they have, which is the identity between the logic of legal form and commodity form is descriptive, because it correctly captures the ground upon which the Will and Interest theories are developed and reveals the deeper reasons why the two theories go wrong without appealing to any particular ideological position.

[299] Pashukanis, *Law and Marxism*, 61.

Given the explanation above, it is not difficult to respond to critiques of the Marxist critique of rights. So Lukes is correct that Marx tries to deny the condition of morality in a communist society, which is the conflict of people's interest, but I would argue before Marxists can conclude that laws and rights will wither away in the communist society, which can be treated as an ideological conclusion, they already reveal the material ground upon which the concept of right is developed, which is, in essence, descriptive, logically prior to their ideological conclusion. If they do not understand the material conditions which create laws and rights, how can they conclude they will disappear when those conditions no longer exist in the future? Similarly, Stephen Brown is correct that Marxism focuses more on the critique of negative rights, but it is also correct that the Interest Theory is specifically a theory of the Hohfeldian claim of non-interference against others which is in essence a negative right, and Marx and Pashukanis correctly point out the source of this right is the commodity owner's right that others bear the duty of non-interference with his commodities. Lastly, given the Will and Interest theories of right-holder are built upon the commodity theory of rights, Marx and Pashukanis are correct to point out that these theories accept the concept of the sovereign individual, which is the isolated, egoistic and self-sufficient monad, but this does not mean they only understand individuals in this way; on the contrary, they argue that individual should be treated as a species-being and we should treat others as an assistance of realising one's end rather than limitation.

As I will argue in the next chapter, the problem of the contemporary Chinese theories of right-holding is that it only sees the ideological aspect of Marx's critique of rights and ignores the descriptive aspect. But of course, this is not the only problem of the contemporary Chinese theories of rights.

Chapter 4: A Review and Critique of Contemporary Chinese Theories of Right-holding

Abstract: The contemporary Chinese theories of rights can be conceived as a different response to the concept of the sovereign individual accepted by the Will and Interest theories. The first stage sees the development of the Chinese socialist theory of rights, which completely abandons the concept of the sovereign individual, but it encounters serious problems in theory and practice in China. In the second stage, the Chinese commodity theory of rights endeavours to correct the mistakes made by the first theory, but it retreats to Pashukanis's commodity theory, thus becoming identical to the western theories of rights. The Chinese Confucian theory of rights, featured in the third stage, tries to argue that Confucianism is compatible with the concept of rights, but it equates 'right' as a moral standard with 'right' as a legal apparatus conferred in the hands of individuals.

Introduction

Let me summarise what I have discussed so far. The problems of the Will and Interest Theory of rights originate from their acceptance of Mill's concept of the sovereign individual and the ground of Mill's concept can be further traced back to the commodity form and thus subject to the problems of the commodity form. So to find an alternative to the Will and Interest theories, the potential approach will be to find out if we can have a theory of right-holding that is not based on the concept of the sovereign individual. In this chapter, I will show how the contemporary Chinese rights theorists, who are mainly influenced by Marxism and Confucianism, develop the alternative theory of right-holding. Although their arguments vary, they are united at one point: they are responses to the concept of the sovereign individuall. According to point, I will divide the contemporary Chinese theories of right-holding into three stages: first, the Chinese socialist theory of rights, which abandons concept of the sovereign individual; second, the Chinese commodity theory of rights, which retreats to Pashukanis' commodity theory, thus re-embracing this

concept; third, the Chinese Confucian theory of rights, which re-explore the possibility of developing the theory of right-holding from the Confucian perspective.

1. The Chinese socialist theory of rights

The Chinese socialist theory of rights was developed from 1949 when the People's Republic of China was founded until 1966 when the cultural revolution began. To better understand the arguments and features of the theory of rights at this stage, I will briefly introduce the overall background of this period and then we can understand in which context the theory was constructed. A principle will help us understand the background here.

Although China won the second world war and the communist party won the civil war and established a socialist government, the two wars brought much destruction to the country and the government had to build up a socialist society almost from the beginning. To recover the economy and improve people's lives as quickly and effectively as possible, the government called for everyone to focus on constructing and serving socialism and Mao Zedong developed this into a principle called 'Politics in Commands' in 1958. The core of the principle is 'politics' and it refers to building up a socialist state, so the principle requires that the mission of building up a socialist state should become fundamental guidance to work in all areas.[300] This principle was first summarised in the newspaper 'Politics in Commands is A Guarantee of Running an Enterprise Diligently and Frugally' in *China Daily* on 27th of 9 March 1958 and it praised a construction company that did very well in running the company at that time because they correctly formed the thought that the company should serve the socialism wholeheartedly and everyone

[300] 'Politics in Commands is A Guarantee of Running an Enterprise Diligently and Frugally' in *China Daily* in 27th of March 1958. Literatures in English that discuss the definition of 'Politics in Command' are: Yu Huang and Yu Xu, 'Broadcasting and Politics: Chinese Television in the Mao Era, 1958-1976', *Historical Journal of Film, Radio, and Television* 17, no. 4 (October 1997): 565. Li Xing, 'From 'Politics in Command' to 'Economics in Command': A Discourse Analysis of China's Transformation,' *The Copenhagen Journal of Asian Studies* 18 (2005). Roderick MacFarquhar, *China under Mao: Politics Takes Command*; a Selection of Articles (Cambridge: MITPress, 1966).

should work hard to build the socialism in their job.[301] Soon after this report was published, 'Politics in Command' became a slogan and it was widely used in different industries, like agriculture, media, and education and it is applied in the legal theory as well.

1.1 The socialist understanding of law

1.1.1 The socialist definition of law

The obvious influence of this principle on the research of laws and rights is that the theory at this stage has a clear political orientation, which is to support socialist laws and criticise capitalist laws, so the dichotomy between social laws and capitalist laws can be easily found in the theory of this time. Consequently, the understanding of laws in this way influences their understanding of rights. More specifically, it leaves little theoretical room for the concept of the sovereign individual. To begin with, let me introduce a few theses that the legal theorists argued and this includes theses about laws and rights in general and specific theses about socialist and capitalist laws.

First, the fundament thesis they advance is that the nature of law is the will of the ruling class and it is ultimately determined by the material condition of the ruling class[302], and they justified it by quoting what Marx says in *The Communist Manifesto*: '…just as your jurisprudence is but the will of your

[301] 'Politics in Commands is A Guarantee of Running an Enterprise Diligently and Frugally' in *China Daily* in 27th of March 1958.

[302] The Teaching and Research Group of State and Law of Remin University of China, *Lectures of The Theory of State and Law Part I*, Remin University of China Press (Beijing, 1957):51. This is the early textbook that systematically teaches the general theory of law in Chinese university at that time. 9
Overall, the legal theory research at this stage is quite basic because it is a fairly new project for the theorists. During this period, there was no even an independent subject called 'legal theory' or 'jurisprudence', it is under the subject of 'The Theory of State and law'. In 1958, the academic journal Law published 7 articles under the theme of 'Lectures of The Basic Theory of State and Law' and the articles cover 7 topics which are: Lecture 1: State and law are the tool of the ruling class; Lecture 2: The Socialist State is the state of proletariat's dictatorship; Lecture 3: The socialist democracy; Lecture 4: The communist party is the leader of the system of proletariat dictatorship; Lecture 5: Socialist law is the tool to realise proletariat dictatorship. Lecture 6: The socialist legal system. Lecture 7: The function of the state and law of the People's democracy and dictatorship in the socialist revolution and construction.

class made into a law of all, a will whose essential character and direction are determined by the economical conditions of existence of your class.'[303] The target of their argument here is the bourgeois' view that laws do not have a class nature and it represents all people's wills because such an argument disguises the nature of capitalism.[304] This argument can be further analysed in two aspects. First, from the conceptual perspective, it accepts Marx's historical materialism and connects the concept of laws with the will of the ruling class, and denies that law can be general without class nature. This argument lays a foundation for the legal theories at this stage, because this is the ground they used to distinguish between socialist laws and capitalist laws in the specific arguments, and it also influences the understanding of rights. Therefore, this is the key to understanding the theory of law and rights during this time. Second, at the political level, it is consistent with the principle of 'Politics in Command', because the theorists clearly understand that they were constructing the socialist laws, not another type of laws, and they keep themselves politically correct by criticising the problems of the capitalist law.

The second thesis they put forward is that the definition of law in general :

> 'Law is the totality of the rules of conduct, established and sanctioned by the state and it reflects the will of the ruling class, and it is guaranteed by the compulsive force of the state, and its purpose is to protect, secure and develop the social relationships and social order beneficial to the ruling class.'[305]

According to this definition, four elements constitute the nature of laws: first, these norms reflect the will of the ruling class and this is clearly inferred from the first thesis I just discussed. Second, these norms are established and confirmed by the state. The establishment of norms by the state means that there is no such a norm existing before and it is newly created by the state to protect its interest. The sanction of norms by the state means that some norms already existed in the society, like customs, and the state grants the

[303] *Lectures of The Theory of State and Law Part 1*, 51.
[304] *Lectures of The Theory of State and Law Part 1*, 51.
[305] *Lectures of The Theory of State and Law Part 1*, 53.

legally binding force to them. Third, the implementation of law is guaranteed by the compulsive force, and fourth, they only serve the interests of the ruling class by confirming the citizens or group's rights and duties.[306] As I will discuss in the next section, this definition is a copy of the Soviet legal theorist, Andrei Vyshinsky's definition of law and it is because of this definition along with the principle of the consistency between public interest and individual interest that the concept of the sovereign individual is abandoned by the Chinese socialist theory of laws and rights.

Under the two general theses about the nature of laws, the specific theses about socialist and capitalist laws can be understood as an application of the first thesis to two types of laws. First, the law of the bourgeois only represents the will of the bourgeois who are the minority of the society and the law is only a tool to maintain their rule over the proletariat, while the socialist law represents the will of the majority of the people which is the working class. Therefore, the socialist law is the law that ends the exploitation of the majority by the minority and gives rights and democracy to the majority of people.[307] Second, they define the socialist law:

> The socialist law is the totality of the rules of conduct, established and sanctioned by the socialist state, and its compliance and application are guaranteed by the compulsive force of the state, and its purpose is to protect, secure and develop the social relationships and social order beneficial to the ruling class.[308]

There is not much difference between this definition and the definition of law in general.

Besides these theses, the Chinese legal theorists advance the principle of the consistency between public interest and individual interest. This principle

[306] *Lectures of The Theory of State and Law Part 1*, 53.
[307] The Teaching and Research Group of State and Law of Remin University of China, *Lectures of The Theory of State and Law Part 2*, Remin University of China Press (Beijing, 1957):214.
[308] *Lectures of The Theory of State and Law Part 2,* 216.

states that the citizens' interests are consistent with the public interests.[309] It means that the individual's interests are derivative from the public interests. Following this principle, the theorists argue that we should understand the relationship between these two interests is that individuals' interests should obey the public interests because the latter is the source and guarantee of the former while protecting individuals' interests can advance social development. As I will analyse in the section, this principle, alone with the socialist definition of law, the concept of the sovereign individual is abandoned by the Chinese theory of rights. In the following sections, I will first reveal the theoretical ground of the Chinese socialist theory of law, which is Vyshinsky's class theory of law and then I will analyse the Chinese socialist theory of rights.

1.1.2 Vyskinsky's class theory of law

According to the consensus of the theorists, the legal theorists at this stage are deeply influenced by the Soviet legal theorist Andrei Vyshinsky.[310] Andrei Vyshinsky is a Soviet politician, serving as a Deputy Minister for Foreign Affairs and as a state prosecutor before entering the Ministry of Foreign Affairs, and an influential legal theorist, who was named a member of the Academy of Science and became the principal organizer of the new jurisprudence after Pashukanis was ousted in 1937.[311] After the new Chinese government was founded, his theory of law was introduced into the academic circle. In 1955, his book *Voprosy Teorii Gosudarstva I Prava* (*Questions of The State and Law*) was translated into Chinese and it contains the most important work from his publications[312] and there are a few publications introducing his life and his contribution to the legal theory.[313] Also since 1955, the Chinese

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[309] Ibid 230.

[310] Sun Guohua, Zeng Bin, 'Review of Vyshinsky's Definition of Law', *The Jurist*, No.2 (1996):40. Lei Lei, 'The General Theory of Law and Its Development in China', *China Legal Science*, No.1 (2020):12-13. Yu Xingzhong, 'Legal Pragmatism in the People's Republic of China Comment', *Journal of Chinese Law* 3, no. 1 (1989): 29–52.

[311] Andrei Vyshinsky, *The Law of The Soviet State*, trans. Hugh W. Babb, vol. 1 (The Macmillan Company, 1948), x.

[312] Andred Vinshinsky, *The Questions of State and Law*, trans. Li Jiao, Zheng Hua etc (The Law Press, Beijing, 1955).

[313] Zi Fan, 'The Glory Life of Comrade Vyshinsky', *Word Knowledge*, No.23 (1954). Zhang, Shangzhuo, 'The Outstanding Contribution of Fellow Andrei Y. Vyshinsky to Legal Science—A Introduction of Vyshinsky's *The Questions of State and Law*', *Legal Studies*, No.4(1955).

Association of Politics and Law exchanged literature with the A.Y Vyshinsky Institution of Law of the Soviet Academy of Science and Soviet Foreign Library, which advanced the spread and study of Vyshinsky's legal theory.

I will argue that the arguments of the Chinese socialist theory of laws originate from Vyshinsky's theory of laws. First, following Marx's historical materialism, he comes up with a similar conclusion that 'legal relationships (and, consequently, laws) are rooted in the material conditions of life and that law is merely the will of the dominant class, elevated into a statute.'[314] Second, he defined law in the following way:

> Law is the totality (a) of the rule of conduct, expressing the will of the dominant class and established in legal order, and (b) of customs and rules of community life sanctioned by state authority—their application being guaranteed by the compulsive force of the state in order to guard, secure and develop social relationships and social orders advantageous and agreeable to the dominant class.[315]

When we compare this definition with the one provided by the Chinese socialist theory of law, we can see they are literally identical. The outstanding feature of both definitions is that both emphasise the class nature of laws. The reason why Vyshinsky emphasises that law is the reflection of the will of the dominant class is that the class struggle still exist after the proletariat gained the political power and they should use the law as a mean of the struggle for socialism: 'After the proletariat has grasped power, the class struggle does not cease. It continues a new form, and with ever greater frenzy and ferocity, for the reason that the resistance of the exploiters to the fact of socialism is more savage than before.'[316] Therefore, the socialist law is created in response to the class struggle: 'In the Soviet state, law is entirely and completely directed against exploitation and exploiters…It is invoked to meet the problems of the struggle with foes of socialism and the cause of building a socialist society.'[317]

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[314] Andrei Vyshinsky, *The Law of The Soviet State*, 1:13.
[315] Andrei Vyshinsky, 1:50.
[316] Andrei Vyshinsky, 1:39.
[317] Andrei Vyshinsky, 1:50.

This feature is fundamental in Vyshinsky's definition of law and it is also the ground of another feature that the application is guaranteed by the compulsive force of the state: 'The effective operation of these rules is guaranteed by the entire coercive force of the socialist state…finally to annihilate capitalism and its remnants in the economic system…'[318]

These two features are completely accepted by the Chinese legal theorists at that time. First, they admit that the first feature profoundly clarifies the nature of law: 'In this principle, it profoundly elaborates the class nature of law. It points out... the class nature of law is the will of the ruling class, the will of the class that controls the regime. It is neither the will of a specific individual nor the will of the class that is being ruled.'[319] Second, they confirm that the coercion from the state is the source of the biding force of the legal rules and the obedience from people: 'Because of the guarantee from the state power, it makes legal rules have the general biding force and the nature that legal rules must be obeyed and cannot be violated, and if violated, people will receive sanction from the state authority.'[320] Therefore, the acceptance of Vyshinsky's theory of law is at this stage obvious and the reason for this is that the definition was particularly suitable to the overall political environment at that time because the government needed to use laws as a tool to maintain the proletariat's regime against any attack from the bourgeois.[321]

The consequence of accepting Vyshinsky's class theory of law, when returning to the theme of this chapter, is that it leaves no room for the concept of the sovereign individual. First, under this definition, the proletariat, the majority of the people, is the ruling class, so their interests are consistent with an individual's and also are the ground of the latter's, according to one of the principles the Chinese legal theorists advance. That means when the public

[318] Andrei Vyshinsky, 1:50.
[319] *Lectures of The Theory of State and Law Part 1,* 51.
[320] Ibid.
[321] Wang Zhihua, 'The Destination of The Soviet Union—The Extraordinary Life of Vyshinsky', *Qinghua Legal Forum*, No.2 (2009):486. Sun Guohua, Zeng Bin, 'Review of Vyshinsky's Definition of Law', *The Jurist*, No.2 (1996):40.

interests conflict with the individual's, the individual's interest should give way to public interests. In other words, the individual has no control over his interests, because his interests are mainly determined by the public interest; also the individual interests can be interfered with by the public interests when they conflict with the public interests. Second, the commodity economy upon which the concept of the sovereign individual is developed is regarded as the product of the capitalist force, so the concept of the sovereign individual should be rejected by the socialist laws: 'The criminal law of the proletarian dictatorship is not at all a 'form of communion of egoistic, isolated subjects, bearers of an autonomous private interest or ideal property owners.' As Pashukanis asserted.'[322]

1.2 The socialist understanding of rights

The Chinese socialist theory of laws is the overall context where the theory of rights was developed, so we can reasonably expect the theory of rights to come with the socialist characteristics. Besides the context above, let me introduce a more specific context in which the socialist theory of rights is developed.

The most important milestone in contemporary Chinese history of rights is the legislation of the Constitutional Law published in 1954. The legislator made it clear that the Constitutional Law is a socialist constitutional law and it is a progressive constitutional law and different from the capitalist one because it gives real rights to its people. There are four reasons why they believe people get real rights under constitutional law. First, people are given a wide range of rights, such as political rights and social rights.[323] They believe these rights can't be realised in a capitalist society because the rulers are afraid of people exercising these rights and overriding the capitalist regime; on the contrary, it

[322] Andrei Vyshinsky, *The Law of The Soviet State*, 1:50–51.
[323] Yang Huanan, 'The Fundamental Rights and Duties in Our Constitutional Law', *Legal Studies*, No.3 (1954): 26-27. There is another similar paper, see Wu Jialing, 'The Fundamental Rights and Duties of the People's Republic of China', *Teaching and Research*, No.7 (1954): 15-19.

is possible in a socialist society because people's interests and the state's interests are consistent.[324] Second, the government provides people with sufficient material support to guarantee the enjoyment of people's rights, like building more schools and press, etc and most importantly, develops the economy to strengthen the economic base, so people can realise their right to work and rest and the quality of their life will be improved; however, in the capitalist society, the capitalists are not willing to provide the necessary facilities to the people and it is difficult for people to exercise their rights.[325] Third, it is progressive because it provides real equality among people: all citizens are equal regardless of nationality race, sex, occupation, social origin, etc, while in the capitalist society, the capitalists and landowners still occupied the majority of the wealth, the workers and peasants were poor, so remaining being exploited.[326] Fourth, women enjoy the same rights and duties as men in political, economic, and domestic life and all ethnic groups are equal regardless of the number.[327]

The example of constitutional law contains much information that we can learn to understand the Chinese theory of rights at this time. Overall, the above advantages of constitutional law are consistent with the theses about the nature of laws I mentioned in the last section. The fundamental feature here is that it clearly declares the constitutional law as socialist and so the rights written down in this law are socialist. Due to its socialist nature, the progress that the constitutional law makes is consistent with the principles mentioned above. For example, the advantage that a wide range of rights is granted to the people in the constitutional law is the reflection of the principle that socialist laws protect people's rights and provide a real guarantee and support to them. Consequently, the advantages above are also consistent with the principle of humanitarianism because the purpose of the constitutional law is to liberate people from the old society and treat them as an end and give them real rights to realise the true emancipation of individuals.

[324] Yang Huanan, 26-27.
[325] Yang Huanan, 27.
[326] Yang Huanan, 28
[327] Yang Huanan, 28.9

With the analysis above in hand, let us now see the socialist definition of rights and duties:

> rights are the ability or possibility the right-holder has, prescribed by laws and protected by the state, that he can do something or require other people to do something; correspondingly, duties are the necessity, prescribed by laws and protected by the state, that the duty-bearer do something or not do something, corresponding to rights in the legal relationship.[328]

What does 'possibility' mean here? Once again, this is the word borrowed from Soviet legal theory and the early discussion of rights took place in private law.[329] The 'possibility' here does not mean that rights are the actual behaviours of a right-holder, but it means the behaviour possibility laws prescribe and guarantee it is laws that prescribe and guarantee. In other words, laws create the conditions for an individual to do certain things, but this does not mean an individual already enjoys this right, it only means a possibility.[330] For example, when the law says citizens have a right to a property, it only means laws prescribe so, but it does not mean they already have a property right. To realise this right, people need to have money to buy a property and also need to sign a purchase contract, etc. Therefore, we need to develop conditions that could help turn the possibility into realization.[331] Besides the concept of possibility, another important feature of the definition above is that rights are protected by the state, which means that if the duty-bearer refuses to do something claimed by the right-holder, the right-holder can request enforcement from the state.[332] Therefore, this is why 'duty' is

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[328] *Lectures of The Theory of State and Law Part 2,* 326.

[329] M. Krylova, 'The Civil Relationships in Soviet Civil Law', trans. Sun Wenhai, *Law*, No.3 (1957),48. M. Krylova etc, *The Theory of State and Law Part 2*, trans. Li Jiaen etc., Renmin University of China Press (Beijing, 1956):452-455. The teaching and research department of Renmin University of China, ed., *Selective Translation of Ariticles of State and Laws*, trans. Yin Ping etc., vol. 1 (Beijing: Renmin Univerisity of China, 1956).Ma Qi, On the General Constitutive Conditions of Compensation for Damage, *North East Renmin University of China (Social Science)*, No.Z1 (1957),163-165.

[330] M. Krylova, 'The Civil Relationships in Soviet Civil Law', 48. *Selective Translation of Ariticles of State and Laws*, 190.

[331] Ibid, 48.

[332] Ma Qi, On the General Constitutive Conditions of Compensation for Damage, 164-165.

defined as a necessity because it is necessary that a duty-bearer should do or not do something from the ruling class's perspective and it is laws that prescribe so.

According to the definition above, let me call this the Possibility Theory of rights in the following discussion. Overall, the theory is consistent with the general and specific arguments of law and rights I have discussed so far. The concepts of 'possibility' and 'necessity' show us that the concept of rights has much connection to the state's compulsory force, the coercive aspect of law. Under this theory, it means that holding a right is not just something to do with one's behaviour, it also requires the state to actively provide support and guarantee the enjoyment of rights. This is consistent with the definition of socialist laws and it is also the reason why the theorists believe people enjoy real rights in a socialist society. Besides this, prescribing rights and duties requires the state to make a judgment—what is lawful and correct—and by doing this, it reflects the will of the ruling class which is also consistent with the definition of law.[333]

At a glance, the Possibility Theory looks a bit similar to the Will Theory. The behavioural possibility that the right-holder has is similar to the concept of 'choice' of the Will Theory because the right-holder in both theories seems to be given some room in which they can decide what to do. However, we can find that they are still different in a few aspects. First, in the Possibility Theory, as its name suggests, rights only mean the behavioural possibility and it depends on some sort of state's assistance to make it real for the individuals. For the Will Theory, the right-holder has actual control over the legal relationship, and he is already a small-scale sovereign. From the perspective of the Hohfeldian framework, the Possibility Theory does not specify that the right-holder must have a Hohfeldian power to become a right-holder. Therefore, the right-holder under the Possibility Theory is not a sovereign

[333] The teaching and research department of Renmin University of China, *Selective Translation of Aritricles of State and Laws*, 1:192.9

individual because he does not have a control over the legal relationships as the one under the Will Theory does.

So far, we have seen that the theory of rights at this stage was developed in a non-classical western way by introducing socialist elements into the theoretical construction, such as class nature and the will of the state, etc. As a result, the concept of the sovereign individual can hardly be found in this theory, but this poses a question of how socialist rights can be more progressive than bourgeois ones. This will lead to the critique of this theory in the next section.

1.3 A critique of the Chinese socialist theory of rights

1.3.1 The problem of the methodology

In this section, I will point out that the Chinese socialist theory oversimplifies Marx's methodology of historical materialism, as a result, the class nature of rights is overemphasised. Let us recall the main theses of Marx's historical materialism: first, the forces of production determine the relations of production; second, the totality of these relations of production constitutes the economic structure of a society, as social existence, which determines the superstructure, such as law and politics, as certain forms of consciousness; third, it is the social existence that determines their consciousness, not vice versa. [334] Historial materialism is a theoretical tool for Marx to understand the capitalist superstructure because he can always trace the logic of the superstruction back into the economic structure,[335] such as his critique of 'equal rights' in *the Critique of the Gotha Programme*.

However, the Chinese socialist theory of right-holding is problematic because they understand Marx's historical materialism in an oversimplified way. As I pointed out in the last chapter, with the help of historical materialism, Marxism

[334] Marx, 'Prace to A Critique of Political Economy', 389.
[335] John McMurtry, 'Making Sense of Economic Determinism', *Canadian Journal of Philosophy* 3, no. 2 (December 1973): 258–59, https://doi.org/10.1080/00455091.1973.10716880.

reveals that the concept of the sovereign individual has its roots in the commodity economy and the connection between the Will and Interest theories and the commodity theory is thus established. Therefore, it is undeniable that historical materialism reveals the economic base upon which the Will and Interest theories are built, and this is what I mean by Marx's historical materialism has the descriptive aspect. However, the Chinese socialist theory only sees the ideological aspect of this methodology and ignores the descriptive aspect, which can be found in the following ways. First, not all rights have a clear connection with class nature and ideological orientation. For example, it is weird to say that the right to life and the right not to be tortured have an obvious class nature or that these rights only belong to the socialist society instead of the capitalist society, because it is simply against our common sense. On the contrary, these rights have been declared as universal in human rights documents because they are so fundamental that everyone quo human being should have them. Therefore, there exist some rights that transcend class nature and it is weird to conclude that such rights are socialist or capitalist.

Second, the Chinese socialist theory of rights fails to understand Marx's historical materialism correctly. We need to think about three questions: first, what is the core of the Chinese understanding of historical materialism? Second, how does this understanding relate to Marx's historical materialism? Third, how can we fairly evaluate Marx's historical materialism? Now let me begin with the first question. As we can see, following Vyshinsky's logic, the Chinese understanding of historical materialism emphasises much the decisiveness of the economic base, be it capitalism or socialism, in understanding laws, so laws, as the superstructure, is a mere reflection of the specific form of economy. Vyshinsky never denies the class nature of law and its roots in the socialist economy: 'In the Soviet state, law is entirely and completely directed against exploitation and exploiters…According to Lenin, the Civil Code was directed against the 'abuse of the New Economic Policy,' that is, against the bourgeois principles and the bourgeois content of the civil

codes of capitalist countries.'[336] A similar argument can be found in the Chinese socialist theory of laws. For instance, the theorists make a clear argument that the purpose of the socialist laws is to establish socialism and communism: 'To complete the great mission of establishing socialist and communist society, we must set up socialist laws; regarding laws of the class of exploiters, they must be abandoned. The law of the exploiters is the embodiment of the will of the exploiters and it is the part of the superstructure based on the economic system that exploits the majority by the minority.'[337]

According to these arguments, the task of understanding rights looks like an easy job for them because what they need to do is simply to locate the economic base upon which rights are created and then explain the nature of rights from there. It has been pointed out by Chinese theorists in recent years that this method collapsed historical materialism into crude economic predeterminism.[338] By economic predeterminism, it means it treats economic factors as the only decisive factor in accounting for the development of society and history and the phenomenon of politics, morality, and culture can be reduced to the economic phenomenon. [339] Under this definition, the Chinese socialist theory of laws is only a form of economic determinism existing in legal theory, because it relies on the distinction between the capitalist economic base and the socialist one. As a result, the theoretical exploration of the nature of law is over-simplified as a process of finding its economic base and then making a conclusion from there. This methodology is problematic in the following aspects. The emphasis on the class nature of laws and the distinction between capitalist and socialist laws intensifies the antithesis

[336] Andrei Vyshinsky, *The Law of The Soviet State*, 1:50–51.
[337] The Teaching and Research Group of State and Law of Remin University of China, *Lectures of The Theory of State and Law Part 1*, Remin University of China Press (Beijing, 1957):147. This is the early textbook that systematically teaches the general theory of law in Chinese university at that time. >?<
[338] Shen, Jiangping, 'The Historical Materialist Critique of Economic Determinism', *Chinese Social Science*, No.3 (2020): 26-27. Jiang, Zhengfeng, 'Historical Materialism is not Economic Determinism', *Guangdong Social Science*, No.1 (2019):91-92. Li Runpei, 'An Explanation of Marx's Dialectic Conception of History: A Critique of the Economic Determinism', *Journal of Guangxi University (Philosophy and Social Science Edition)*, No.3 (2008), 57-58.9
[339] Shen, Jiangping, 'The Historical Materialist Critique of Economic Determinism', 27.

between capitalism and socialism, which ultimately leads to making a revolution necessary for overthrowing capitalism by proletariats and making the state and laws wither away in the future. However, as I mentioned above, not all rights have a class nature because some rights, such as the right to life, are fundamental for all humans regardless of the difference in ideology and the form of economy. Then if the way to correct the problem of the capitalist laws and make progress in human history is by completely overthrowing capitalism through the proletarian revolution, it means socialism will end up abandoning those rights because they already exist in the capitalist society, thus being capitalist rights. Socialism becomes rootless and utopian.

Then how can the problems of the Chinese socialist theory of rights be attributed to Marxist historical materialism? When the legal theorists at the later stage reflect on this question, they answer that the reasonableness of Marxist historical materialism should be defended and we cannot confuse it with historical fatalism or economic predeterminism.[340] The main point of their defence is that there is a substantial difference between the two methodologies in understanding the function of the economy in human history. Historical materialism, they argue, does emphasise the importance of the economy in deciding the development of history, but Marx did not treat it as a single decisive factor and denied the interaction between the superstructure and the economic base.[341] In the letter to W. Borgius, Engels made a similar defence for historical materialism. He said if we consider human history in the long term and the wider area it dealt with, we can find economic development is the axis of the curve of historical development, but this does not mean

[340] Bao Weijie, Wu Haijiang, 'Marx's Historial Determinism and Its Contemporary Value—A Review of Karl Popper's *The Proverty of Historicalism*', *Maxism Studies*, No.9 (2018). Jiang Zhengfeng, 'Historical Materialism Is Not 'Economic Determinism'', *Guangdong Social Sciences*, No.1 (2019); Sun Dafei, 'Address the Misunderstanding of the Economic Determinism of Marx's Historical View', *Jianghan Forum*, No.10 (2016). Liu Huaiyu, 'Marx's View of History: Is it 'Economic Determinism' or 'Economic Domination Theory', *Theoretical Investigation*, No.1 (2002). Zhu Shifeng, 'Refuting Marxist Economic Determinism', *Jianghuai Forum*, No.2 (2014).9

[341] Bao Weijie, Wu Haijiang, 'Marx's Historial Determinism and Its Contemporary Value—A Review of Karl Popper's *The Proverty of Historicalism*', 65. Jiang Zhengfeng, 'Historical Materialism Is Not 'Economic Determinism'', 63. Sun Dafei, 'Address the Misunderstanding of the Economic Determinism of Marx's Historical View',40.

economic development is the only dynamic of history, the superstructure, like laws, also plays a role in deciding the history: 'Political, juridical, philosophical, religious, literary, artistic, etc., development is based on economic development. But all these react upon one another and also upon the economic base. It is not that the economic position is the cause and alone active, while everything else only has a passive effect.'[342] Therefore, according to Engels's defence here, they argue that we should not misunderstand Marxism as claiming that the economy decides everything or economy is the only factor in deciding human history or the only perspective to understand the superstructure.[343]

However, the problem of the Chinese socialist theory of rights is that it still misunderstands historical materialism in a vulgar and non-dialectical way. The vulgar Marxism can be found in Joseph Stalin and its main tenet is that the superstructure is the mere reflection of the economic base:[344]'there are comprehensive laws of the social process that are wholly independent of actions of individuals. Men's choices do not and cannot affect these large-scale, collective historical developments…'.[345] When we compare Engels's definition and the tenet of vulgar Marxism, we can see that the problem of vulgar Marxism is that they oversimplify the relationship between the economic base and superstructure and only see the former as the only decisive factor to explain the latter.

Then we can see that the Chinese socialist theory of rights made exactly the mistake above. It is undeniable that rights are created under certain social and economic conditions, so explaining them from an economic perspective is not unreasonable. However, it is a mistake to use it as the only way to explain the concept of rights and the conclusions they come up with are implausible.

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[342] *Marx and Engels Correspondence, trans* Donna Torr, International Publishers (New York, 1968).
[343] Jiang Zhengfeng, 'Historical Materialism Is Not 'Economic Determinism'', 63.
[344] Daniel Bell, 'The Once and Future Marx,' *American Journal of Sociology*, October 15, 2015, 187.
[345] Howard sherman, 'Marx and Determinism', *Journal of Economic Issues* 15, no. 1 (1981): 63, https://doi.org/10.1080/00213624.1981.11503814.9

Recall the theorists argue that socialist rights are more progressive than capitalist rights in that they grant real equality, freedom, and care to the majority of people and end the privilege of the bourgeois and the government provides real protection and support to the people. The conclusion they made above is simply based on the assumption that the nature of the capitalist economy is the exploitation of the majority by the bourgeois, while socialism aims to eliminate exploitation and develop the productive force, so ultimately when socialism is transited to communism, people are fully emancipated and well-rounded developed.[346] Under this assumption, it is not difficult to understand why they conclude so, but this assumption is problematic. First, as mentioned above, it ignores the independence of superstructure and it cannot explain why some rights are important to all people regardless of economic conditions and ideology. Second, their understanding of socialism and capitalism is one-sided. Capitalist countries nowadays also promote social welfare and improve the working class's rights, while the history of public ownership in China shows that, on the contrary, the productivity was less efficient and people's rights became worse, rather than being improved as they suppose. Therefore, what is wrong here is the vulgar way of understanding and using Marxism, not historical materialism itself.

Finally, how can we review the critique of Marx and the defence? My response will proceed in the following way: first, I will consider a challenge from Karl Popper that it is hard to prevent historical materialism from being used as economic determinism, but I will refute his challenge by arguing that historical materialism reveals the fact that economic conditions and superstructure are two fundamental factors in deciding the development of human history, but they are not connected to each other linearly and causally, so we can still avoid confusing historical materialism and the vulgar economic determinism; finally, we need to realise that the theory of right conceptualised by this methodology is historically, socially dependent and it will not generate a theory of right in general.

[346] *Lectures of The Theory of State and Law Part 2,* 225-229..

First, let us see Karl Popper's critique of Marx's historical materialism. Overall, he argues that he recognises the fundamental status of economic conditions in the development of human history, but he points out that Marx's methodology that all thoughts and ideas are explained by reducing them to the underlying essential reality, i.e., to economic conditions, can be easily overrated when it is applied in any particular case.[347] The danger of over-stressing economic historicism is that it is very often sweepingly interpreted as the doctrine that 'all social development depends upon that of economic conditions, especially upon the development of the physical means of production'[348] But he says this doctrine is false because there is an interaction between economic conditions and ideas and in some case our knowledge is more fundamental than the material means of production. For example, imagine if one day our economic system was destroyed but our knowledge of technology and science was preserved, then the reconstruction may not take long, but if the situation is the other way around, then it would soon lead to the disappearance of the material civilisation.

I agree with Popper that it is not easy to distinguish between historical materialism and economic predeterminism, and the Chinese socialist theory of rights already shows how theorists can misuse historical materialism. However, it is one thing to say it is difficult to distinguish between the two and it is another thing to say they are identical. As we have seen see above, vulgar Marxism simply treats economic conditions as the cause and superstructure as the result, but according to Marxism itself, Marx and Engels do not treat them as relating to each other in a causal logic, not even to mention they oversimplify that economic conditions are the cause and superstructure is the result. What they try to tell us through historical materialism is to remind people that material production plays an important role in deciding human history and people should follow the historical trend

[347] Karl R. Popper, *The Open Society and Its Enemies*, *The Open Society and Its Enemies* (Princeton University Press, 2020), 317, https://doi.org/10.1515/9780691212067.
[348] Popper, 318.

rather than impeding it. Finally, as we have discussed above, historical materialism emphasises the importance of economic conditions in analysing laws and rights, and as we have seen in the last chapter, Marx and Pashukanis have correctly revealed how the concept of the sovereign individual has its roots in commodity economy and how this helps me establish the connection between the Will and Interest theories of right and the commodity theory, then it means that the problem does not lie on the methodology itself, but on how we use it correctly to analyse the problem. Therefore, we should not conclude that historical material will eventually collapse to economic predeterminism.

1.3.2 The problem of the Chinese socialist theory of rights

Besides the problem of the methodology, the definition of the Chinese socialist theory of rights is also problematic. As I pointed out in the introduction, the Chinese socialist theory of rights endeavours to develop a theory of rights without accepting the concept of the sovereign individual, However, this endeavour is unsuccessful because it collapses the theory of rights as the mere reflection of legal rules and the will of the ruling class. First, an incoherence between the socialist legal theory and the definition of rights can be found. On the one hand, we can see the theorists' effort and ambition is to create socialist rights which are supposed to be more progressive than the capitalist ones, and under their construction, people are supposed to be treated as an end and have more freedom, which is supposed to solve the problem of sovereign individual Marx points out in *On The Jewish Question*. However, on the other hand, this effort is hampered by their emphasis on the class nature and the coercive feature of laws, making an individual inferior to the state. Recall in the last section, under the Chinese socialist theory of laws, there exists a principle of law that states that the individual interests and the public interests are consistent. The reason for this is that in a socialist society, private property and man's exploitation by man are eliminated, so an individual's interest is naturally promoted when the overall public interest is promoted. For example, the development of the productive force, which is a public interest, will benefit individuals' interests in many ways, such as

providing sufficient food to people and providing a better education system for children, etc., which are individuals' interests. However, individuals' interest loses their independence and become subordinate to the public interest under this principle. More specifically, according to the definition of law, laws are the reflection of the ruling class's will, so it is the ruling class who defines the public interest and determines whether the public and the individual's interests are consistent or not. However, under this logic, an individual's will is replaced by the public will once the former conflicts with the latter, and the individual's interest can be ignored or interfered with in the name of the public interests.

Second, the subjectivity of the right-holder under the socialist definition of rights is lost. The ground of their definition of rights as behaviour possibility comes from their understanding that rights are just the reflection of legal rules, which is ultimately the reflection of the will of the ruling class. Let us recall the socialist definition of rights: rights are behaviour possibility prescribed by laws and guaranteed by the stated, and it is the same as the definition of duty: duties are the necessity of what a duty bearer should or should do, prescribed by laws and guaranteed by the state. Therefore, the theorists argue that the nature, content, and range of rights are derivative from the type of legal rules and ultimately depend on the material life conditions the ruling class relies on.[349] This definition encounters two difficulties. First, this definition only covers those rights that are prescribed directly by laws, If laws do not say anything about what a person can do, then no behaviour possibility and rights can be found here. However, there exist rights that are not prescribed by laws. For example, rights can be created according to the agreement of people as long as the agreement does not violate the prohibitive rules of laws, which comes from the legal principle of 'Everything that is not forbidden is allowed', such as the promisee's rights and the promisor's duty which are created by a promise between two parties, not by the prescription of laws.

[349] *Lectures of The Theory of State and Law Part 2,* 328.

Second, the right-holder finds no theoretical place in this theory. Given rights are just the prescription of the legal rules, right-holders only exist in the consequential provisions of laws: they are only the consequence when the conditions upon which the right vests established by institutive provisions are satisfied. However, it is theoretically impossible for laws to cover every aspect of people's lives and tell people what rights they have one by one. Instead, they normally do this by listing the prohibitive and restrictive rules, so people have a right to do something as long as they do not violate those rules. The purpose of doing this is to realise people's potential and creativity and allows them to make choices in their life. In other words, the theory ends up being a theory of legal rules of rights rather than a theory of right-holding. We should not be surprised with this as the theory is not committed to accepting the concept of the sovereign individual, but it poses difficulty for itself how the socialist laws can better protect the right-holder than the bourgeois laws.

The lesson we can learn from the failure here is that it is worthwhile developing a theory of right-holding without accepting the concept of the sovereign individual, but it should not sacrifice the importance and independence of an individual's interest and make it as subordinate to the public interest and it should not abandon the subjectivity of right-holder.

2. The Chinese commodity theory of rights

In this section, I will argue that the theme of the legal theory at this stage is 'reflection and re-recognition', a reflection of Vyshinsky's class theory and a recognition of the importance of Pashukanis commodity theory and I will argue that the Chinese commodity theory of right reaccepts concept of the sovereign individual.

2.1 Reflection and Recognition

2.1.1 A reflection of the cultural revolution

The start of the cultural revolution marks the end of the first stage of the Chinese contemporary theory of rights and it began the 10-year destruction of

the country's economy, politics, and culture. In the higher education field, unfortunately, the universities were closed and the academic research paused completely, so there was no research on law and rights during this time. The cultural revolution is a serious political mistake that the Communist Party made in modern Chinese history and it forces people in all areas, including legal theorists, to reflect on its causes and learn lessons from it. Since this is the context in which the Chinese commodity theory of laws and rights is developed, I will briefly introduce the history of this event and how it influenced the theorists' understanding of law and rights in the new period.

In 1966, Mao Zedong believed a large number of representatives of the bourgeoisie and counter-revolution revisionists were already hidden in the party, the government, the army and culture, and the leadership of many organizations were no longer in Marxists and [350]people's hands; what was worse, the people in power in the party who accept capitalism already formed a headquarter in the central government and they will seize regime and override the dictatorship of the proletariat; therefore, the simple struggles cannot resolve this problem and only through a thorough culture revolution across the nation and mobilise the masses bottom up to expose their dark side openly and comprehensively can we regain the power from the capitalist roaders.[351] Although the political event is under the name of 'cultural revolution', it is, in essence, a power struggle that Mao Zedong tried to regain his leadership of the party, and the Marxist theory of class struggle and revolution is utilised as a tool to realise and disguise his real purposes. The cultural revolution caused serious destruction to the country and in legal practice, laws were abandoned and people's rights were seriously violated.

[350] '关于建国以来党的若干历史问题的决议,' accessed April 13, 2021, http://www.gov.cn/test/2008-06/23/content_1024934.htm. English translation: 'RESOLUTION ON CERTAIN QUESTIONS IN THE HISTORY OF OUR PARTY SINCE THE FOUNDING OF THE PEOPLE'S REPUBLIC OF CHINA,' accessed April 13, 2021, https://digitalarchive.wilsoncenter.org/document/121344.9

The failure of the cultural revolution forced the leaders of the party to reflect on the mistakes made by Mao Zedong in the following years. The sixth Plenary session of the eleventh Central Committee of the communist party of China deeply reflects on their mistake. One of the mistakes they found, which is relevant to the topic of my dissertation, is the use of the principle of 'taking class struggle as the key link'. This principle means the contradiction between the proletariat and bourgeois still exists in the society, so all people should never forget the class struggle and should take class struggle as the key link in every aspect of life. The cultural revolution was defined as the struggle against the revisionist line and capitalist road, however, there were no grounds for this definition and the reality is that the class struggle was no longer the top problem at that time.[352] At that time, the socialist transformation was just completed and the exploiters as classes were eliminated, so there was no economic or political necessity for carrying out another revolution in which 'one class overthrows another' and this means that the revolution could not come up with any constructive program either and could only bring disorder, damage, and retrogression to the society.[353] Under this wrong understanding, people are simply divided into either enemy or people, or either the ruling class or the exploiting class; thus, this results in treating law as a tool and Vyshinsky's definition of law became popular at that time. I will have a detailed discussion in the following part.

Besides the party's rectification to restore order, another influential decision made by the party is the Reform and Opening-up and this explains why they reaccept the commodity economy, which allows them to re-recognise the importance of Pashukanis' commodity theory. The core of the reform is to reform the planned economy. The party admitted they simply equated the development of the commodity economy to capitalism and overemphasised the advantage of the planned economy in the past, thus the government controlled too much of the economy and enterprises lacked the freedom and

[352] Ibid
[353] Ibid.

motivation to increase productivity actively.[354] Therefore, they abandoned the idea that the planned economy and the commodity economy are contradictory to each other and acknowledged that the development of the socialist commodity economy is a stage that the socialist economy cannot surpass and the socialist economy should follow and apply the laws of economics.[355] They also confirmed that the purpose of the socialist commodity economy is to acknowledge the independence of individuals and enterprises in the market and to encourage them to increase the productivity in economic activity. Besides reforming the planned economy, they also decided to open the economy and cooperate with foreign countries. I will argue below the Reform and Opening-up marks the end of Vyshinsky's theory and an acceptance of Pashukanis commodity exchange theory.

To summarise, the end of the cultural revolution and the start of the Reform and Opening-up is a historical turning point for China. It is the historical changes that led the legal theorists to reflect on the previous theory of law and reconstruct them for the new era and the theory of rights they developed at this stage is the Chinese commodity theory of rights.

2.1.2 A reflection of Vyshinsky and a re-recognition of Pashukanis

So the reflection of the Chinese socialist theory of laws and rights starts from the reflection of Vyshinsky's class theory. The scholar who firstly and most influentially reflects on why Vyshinsky's class theory of law is unsuccessful is Zhang Wenxian, who is now the leading legal theorist in China.[356] More specifically, he criticised that Vyshinsky's theory of law simply treats law as a

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[354] 'Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China-- Beijing Review,' accessed April 13, 2021, http://www.bjreview.com/Special_Reports/2018/40th_Anniversary_of_Reform_and_Opening_up/Timeline/201806/t20180626_8001933641.html.

[355] Ibid

[356] Back to early 1980s, he was the lecturer of the law school of Ji Lin University and he was the earlier explorer of the contemporary western legal theories and this was benefited from his experience of research aboard. From 1983 to 1985, he was a visiting scholar of the law school of University of Columbia. In his early publications, he already showed his positive acceptance of the western legal theories and started to introduce them to the Chinese academic circle.

reflection of the will of the ruling class and a tool of ruling, making the class nature the only feature of law. More specifically, he criticises Vyshinsky from the following perspectives: from a conceptual perspective, the problem of this definition is that class nature is not the fundamental and unique feature of law because other phenomena, like politics, have a similar feature; from a practical perspective, such a definition can easily lead to the overemphasis of class struggle and abuse of political power or political clearance in the name of law.[357] Zhang's critique above won much support from other progressive legal scholars at that time and they agreed that Vyshinsky's definition cannot explain the nature of law[358] and when this theory is combined with the highly centralised political structure, the planned economy and the culture which is duty-oriented and lack of democracy, law lost its independence and reflected only the political leaders' will, not people's will.[359] As a result, most of the theorists agreed that Vyshinsky's theory of law should be completely abandoned and the theory of law should be reconstructed.

Then what is the alternative theory of laws the theorists construct and what is the theoretical ground of the alternative theory? The answer to the first question is obvious: the alternative theory of laws is the Chinese commodity theory of laws. However, the second question is less straightforward to be answered because the theorists did not make it clear what Marxist theories they accept as they did in accepting Vyshinsky's theory. To answer this question, I will first show the arguments of the alternative theory and then reveal the ground of the arguments, my argument is that they accept Pashukanis' commodity exchange theory and construct the theory upon it. Zhang, once again, was a leader in the reconstruction of the alternative theory and he put forward a few influential arguments about law and rights. Overall there are two main theses he proposes. First, he defines laws as a system consisting of rights and duties and legal theorists should treat the concepts of

[357] Zhang Wenxian, 'The Reform and Development Call For The Renew of Legal Science', *Modern Law* Science, No. 5 (1988):3.
[358] Zheng, Chengliang, 'Commodity Economy, The Development of Democratic Politics and The Reconstruction of Law', *Politics and Law*, No.1 (1989):10.
[359] Zhang Zonghuo, 'Further Thinking on Law as A Theory of Right', *Law*, No.1 (1989):5.

rights and duties as the basic elements of laws, not class struggle or the will of the ruling class.[360] He points out all laws, like constitutional law or civil law, are designed to determine rights and duties among different subjects, and all legal activities, like legislation or jurisdiction, aim at settling down the dispute and application of the rights and duties.[361] At the conceptual level, rights and duties are the elements of legal norms and legal relations because a norm must either prescribe one's right or duty or prescribe both and a legal relationship is a relation between the right-holder and a duty bearer.[362] These are the reasons for his definition of laws above.

Second, Zhang distinguishes between two types of laws upon this definition: one type of law is duty-oriented and the other one is right-oriented. [363] The purpose of making the distinction here is that Vyshinsky treats laws as duty-oriented, while laws built upon commodity economy are right-oriented laws. By 'orientate' he means which concept, rights or duties, should be treated as a more fundamental element of laws, so 'right-orientated' means that rights are the foundation of laws and they decide many other elements of laws, including duties and conversely, 'duty-oriented' means that duties are the foundation of laws and they decide other elements of laws.[364] According to the distinction here, he points out that laws of the pre-capitalist society are duty-oriented, but Vyshinsky also treats laws as duty-oriented because he emphasises on the duty individuals owed to the collective, the society and the state and laws are a tool and compulsory force for the ruling class to enforce the performance of duty[365], while capitalist laws are 'right-oriented' because laws need to confirm the ownership of the commodity and the capacity of the commodity owner and also prevents interference with the commodity.[366] He came to this conclusion by comparing the difference between the natural economy and the commodity

[360] Zhang Wenxian, 'The Reform and Development Call For The Renew of Legal Science', 3-4.
[361] Ibid, 4-5
[362] Ibid, 4-5.
[363] Zhang Wenxian, 'From Duty-orientation to Right-orientation is The Patten of The Development of Law', *Social Science Front*, No.3 (1990):135.
[364] Zhang Wenxian, 'The Semantic and Value Analysis of 'Right-Orientation', *China Legal Science*, No.4 (1990):24.9
[365] Zhang Wenxian, 'The Reform and Development Call For The Renew of Legal Science', 4.
[366] Zhang Wenxian, 'The Full Development of the Commodity Economy Is The Fundamental Basis of The Construction of Law', *China Higher Education (Social Science)*, No.5 (1988):57.

economy. At the quantitative level, the scale of the economic activities in a commodity economy is much bigger and the frequency of trade is much higher than that of the natural economy in feudal society; therefore it is inevitable there exist different interests and conflicts among them and, as a result, the commodity economy requires legal rules to make exchange possible and resolve the conflicts when they occur, which naturally stimulates the creation of the private law.[367] The function of private law is to determine who can exchange commodities and what they can exchange and this can be perfectly done by prescribing people's rights and duties: the rules need to determine who has the right to trade and also the capability to trade; also, they need to make sure the person is the owner of the commodity and thus property rights are naturally needed to determine the ownership of a commodity and other people bear a duty of non-interference.[368] Therefore, private laws which originate from the commodity economy lay down the fundamental principles for modern laws that everyone should be treated equally and everyone is free to act according to his will as long as it does not violate laws.[369]

At the qualitative level, he points out that a feudal society is built upon the hierarchy among people and they are ranked according to their social status, so the main function of laws is to prescribe people's duties and maintain the social hierarchy, while in the capitalist society, people enter into the exchange economy freely, so the function of laws is to prescribe people's both rights and duty, rather than duty only. So he admits that capitalist laws are the early laws that can be considered rights-oriented and it is progressive because they ended the hierarchy in feudal society and they advanced the repaid development of the commodity economy.[370] Through the analysis above, he recognises the importance of the commodity economy for socialism: the full

[367] Ibid, 57
[368] Ibid, 57.
[369] Ibid, 59.
[370] Zhang Wenxian, 'From Duty-orientation to Right-orientation is The Patten of The Development of Law', *Social Science Front*, No.3 (1990):135.

development of the commodity economy is the fundamental basis of the construction of law in socialism and it is a stage that socialism cannot skip.[371]

Based on his understanding of the commodity economy, he argues that the commodity economy creates the ground for the concept of rights.[372] First, the commodity economy creates the use of contracts through which the exchange of commodities is possible: 'contract is the product of commodity economy…and it is the form and procedure in which the transfer and exchange of property rights take place accordingly.'[373] Second, the exchange of commodities requires that each party is independent, which means that each party understands that he is able to make decisions by themselves and take responsibility for his behaviour, so awareness of subjectivity is formed.[374] An individual who is subordinate to other people and lacks the ability to dispose of his property cannot become a right-holder:

> The precondition of commodity exchange is that both parties of exchange should have an independent status, namely, not subject to bodily possession or bodily dependence on others, and they can make a decision for themselves and take ownership of the exercise of their own wills and choice, and own the right of possession of the object of exchange, and the exchangers have their independent interests.[375]

Third, with the development of productivity, people can produce more commodities than ever before, then some commodities become surplus to demand and people start to have private property and trading becomes more active. As a result, the concept of rights, especially property rights, becomes necessary because it is required in different areas of the commodity economy and is perfected in capitalist society.[376]

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[371] Zhang Wenxian, 'The Full Development of the Commodity Economy Is The Fundamental Basis of The Construction of Law', 56-57.
[372] ibid, 58.
[373] ibid, 58.
[374] Ibid, 58
[375] ibid, 58.
[376] Ibid, 59.

According to the analysis above, I will argue that the above theory of laws and rights is established on Pashukanis' commodity exchange theory of law, though Zhang did not say it explicitly. Let us recall the main arguments of Pashukanis's theory. First, the logic of law corresponds to the logic of commodity exchange, and the evidence can be found in private law, especially in contract law, because in both cases, people are free to exchange the commodity that belongs to themselves at their will. Therefore, law achieves its perfect form in capitalism. Second, we can find the ground of legal subjects, like right-holders, in commodity owners too, because they both require one's control and will over the things they own. The requirement here results in the creation of what he calls the principle of subjectivity of the bourgeois society, which is the formal principles of freedom, equality and autonomy. Having Pashukanis' arguments here, it is not difficult for us to recognise that Zhang makes similar arguments as Pashukanis does. As he argues above, the development from 'duty-oriented' laws to 'right-oriented' laws is the reflection of the evolution of a natural economy to a commodity economy, then the reason why private laws play an important role in advancing and protecting right-holder's interests in modern society is that the development of the commodity economy perfects in capitalist society and it requires naturally private laws to do so. Moreover, he also confirms the development of the commodity economy is built upon everyone being free and equal, which then forms the idea of subjectivity and raises the awareness of rights. According to his arguments above, we can see that when he developed his theory of rights, he chose Pashukanis's theory rather than Vyshinsky's. This is consistent with the overall background of Reform and Opening-up which encourages the development of the commodity economy.

According to the analysis so far, the essence of the Chinese legal theory at this stage is the criticism of Vyshinsky's class theory and the acceptance of Pashukanis's commodity theory. However, Pashukanis's theory is accepted selectively. One of the problems of Pashukanis's theory is his belief that the legal state and private law will gradually wither away in a society based on

public property or a planned economy.[377] In the early 1920s, the idea of withering away of state and law was popular among scholars and it is believed that the process is ongoing: 'one thing remains beyond dispute: the state and likewise the law in the class sense is vanishing, withering away.'[378] However, after seven years, the soviet policies had changed and industrialisation and collectivisation required the state and laws to be strengthened, not weakened or vanished. Though Vyshinsky accepts that the state's withering away will be inevitable, this will be achieved not by a weakening of the state authority, but through its maximum intensification, finishing off the remnants of the dying bourgeois.[379] This is because, as I mentioned above, Vyshinsky argues that the class struggle will continue even after the proletariat won the political power and the state and laws play an important role in guaranteeing the victory of the proletariat: 'During that period, the state is still necessary to the proletariat because the majority—which was only yesterday the exploited—must now crush the exploiter minority.'[380]Therefore, Vyshinsky criticises that any theories which provide interpretations different from his are an attempt to disarm the proletariats and weaken the authority of the proletariat state and the dictatorship of the proletariat. Pashukanis's theory, unfortunately, is the one being criticised by Vyshinsky because Pashukanis fails to understand and emphasise the importance of the state and laws in the transitional period.

However, Vyshinsky's critique of Pashukanis here does not prevent Chinese legal theorists from choosing Pashukanis's theory, though implicitly and selectively because they believe their theory**,** which is Pashukanisian, explains the nature of law better than Vyshinsky's, while they do not accept Pashukanis's prediction that the state and laws will wither away soon. On the contrary, Vyshinsky's theory is abandoned because it over-emphasises the class nature, but fails to explain how some fundament rights can be possible,

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[377] ROBERT STEWART SHARLET, 'Pashukanis and the Commodity Exchange Theory of Law, 1924-1930: A Study in Soviet Marxist Legal Thought' (Ph.D., 1968), 237.9
[378] SHARLET, 238.
[379] Andrei Vyshinsky, *The Law of The Soviet State*, 1:62.
[380] Andrei Vyshinsky, 1:41.

such as the right to life. By abandoning Vyshinsky's theory, then they began the reconstruction of the legal theory above. To summarise, Zhang's arguments consist of the following sub-arguments.

Claim 1: Rights and duties are the basic element of laws, not the class struggle nor the will of the ruling class.

Claim 2: According to claim 1, laws can be divided into two main types: one type is 'right-oriented' laws and the other is 'duty-oriented' laws. Pre-capitalist laws are mainly 'duty-oriented' and capitalist laws built upon commodity economy are 'right-oriented'. The development of a commodity economy is the stage socialism cannot skip.

Claim 3: the commodity economy supports that individuals should be free and equal to participate in exchange activities, which creates the concept of rights and right-oriented laws.

He argues there are a few advantages of this reconstruction of laws. First, the 'right-oriented' theory emphasises the value of subjectivity in law.[381] An individual in a legal relationship is the subject who conducts legal behaviour and bears the results of the legal behaviour. Therefore, being a legal subject means an individual is independent and autonomous and does something at his will. If an individual cannot enjoy rights and bear duties and does not have freedom of choice and will, then he is neither a legal subject, nor is he only a subject with limited ability. Then the commodity theory captures the feature here and well explains it, while Vyshinsky's theory fails in this respect. Second, the 'right-oriented' theory reflects the multiple values that laws promote**.** Modern laws pursue multiple values, such as economic growth, political development, social welfare, etc, not just the social order and the interest of the ruling class.[382] Vyshinsky's theory emphasises too much on the interests of the ruling class and ignores particularly that laws also safeguard the operation

[381] Zhang Wenxan, 'The Transform of Paradigm of The Contemp9orary Chinese Legal Philosophy: from The Paradigm of Class Struggle to Right-orientation', *The Chinese Legal Science*, No.1 (2001):70.

[382] Zhang Wenxan, 'The Transform of Paradigm of The Contemporary Chinese Legal Philosophy: from The Paradigm of Class Struggle to Right-orientation':71. .

of the commodity economy.[383] Pashukanisian commodity theory of law fits into the Chinese commodity theory of laws smoothly because it provides sufficient theoretical support to develop the values of freedom, equality, welfare, autonomy, etc.

2.2 The construction of the Chinese commodity theory of rights

In 1988, Ji Lin University held an academic conference, whose topic was 'the basic categories of law'. In this conference, under the influence of Zhang Wenxian, the legal theorists reached a consensus that Vyshinsky's theory should be abandoned, and legal theory should find its ground in the commodity economy.[384] The legal theorists, for the first time, had a deep discussion of the concept of rights, so the value of this conference should not be ignored.

Overall, the theorists mostly agreed with Zhang Wenxian that the development of the commodity economy provides an ideal environment for the development of rights and accept that modern laws should be 'right-oriented' laws.[385] Within the context above, some legal scholars at the conference developed their theories of rights. At that time, the Chinese legal theorists started to learn from the western theory of rights and get to know the different schools of rights.[386] However, the influence of the Soviet Possibility theory still exists. For example, Lin Zhe defines rights as a behavioural possibility and reality:

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[383] Ibid, 71.

[384] Zheng Chengliang, ' 'On The Theory of Right-Orientation', *Politics and Law*, No.4 (1989); Zhang Zonghuo, 'Further Thinking on Law and The Theory of Right', *Law*, No.1 (1989). Lin Zhe,' The Debate of Rights', *Politics and Law*, No.3 (1989); Bian Wen, 'Commodity Economy, The Development of Democratic Politics and The Reconstruction of Law—Documentary of the Conference of The Basic Category of Law ', *Contemporary Law*, No.3 (1988).

[385] Zhang Guangbo, 'General Discussion on Rights and Obligations', *Contemporary Law*, No.3, (1988):13.
Yang Chuntang, Li Min, 'Rights Are The Inherent Requirement and Realization of Commodity Economy and Democratic Politics', *Modern Law Science*, No.3, 1988:24

[386] Zhang Wenxian, 'Thought of Right and Duties', *Contemporary Law*, No.3 (1988):14. Lin Zhe, 'Explanation on The Concept of Legal Rights', *Law*, No.6, (1991):9-11

> ‘First, from the perspective of the existing form of legal rights, it originally embodies as legal provisions…. Second, rights mean a behavioural possibility and reality. The establishment of legal rights gives the right-holder who obtains it legally a possibility to do or not to do something protected by law; the possibility means that the subject can obtain, from legal norms, an ability to do or not to do something by himself, or request others to do or not to do something.’[387]

According to the definition here, we can see that Lin’s definition of rights is a Possibility Theory, having a right means a behaviour possibility that is defined by legal norms, and once the right-holder exercises this right, the ‘possibility’ transforms into the ‘reality’. However, as I already pointed out above, the Possibility Theory still emphasises too much that rights are prescribed by laws and ignores the subjectivity of right-holding.

Zhang Wenxian defines the concept of rights as below: rights are an active method, prescribed or sanctioned by law and embodied in a legal relationship, for people to make choices within a certain boundary to obtain interests for themselves.[388] Let me analyse Zhang’s theory First, according to his definition above, his theory is a combination of the Will and Interest Theories of rights because it recognises that rights give choice to the right-holder on the one hand and recognises that rights protect the right-holder’s interests on the other hand. He is the early legal theorist who introduced the Will and Interest theories of rights to the Chinese theorists back in the 1980s and he admits that each theory captures some features of rights, but it is only a partial understanding of the nature of rights.[389] Therefore, he argues that the complete theory of right is a combination of each theory: ‘the right-holder exercises his choice or his freedom in a certain way and his choice or the freedom of will is to realise certain interests.’[390] Second, he does not treat the prescription from laws as the only way that rights are created, but rights can be created by sanction from laws, so his theory values the importance of an

[387] Lin Zhe, ‘Explanation on The Concept of Legal Rights’, *Law*, No.6, (1991):11
[388] Zhang Wenxian, ‘The Reform and development Call For The Renew of Legal Science’, 6.
[389] Zhang Wenxian, ‘Thought of Right and Duties’, 14.
[390] Ibid, 14.

individual's choice to do something within a certain boundary, while does not have the difficulty the Possibility Theory has. Therefore, the promisee's right can be included in his definition because although laws do not prescribe what rights a promisee can have, it sanctions it if the content of the promise does not violate prohibitive rules of laws. [391] Third, he accepts the concept of the sovereign individual, although he does not admit it explicitly. Besides that his theory is a combination of the Will and Interest theories which I have argued accept the concept of the sovereign individual, he also emphasises that the right-holder only makes choices within a certain boundary, which is one of the elements of sovereign individual I identified in chapter two. Furthermore, the ultimate reason why he accepts this concept is that, as we have seen so far, he explicitly accepts commodity economy as the ground of laws and rights:

> Commodity economy and democratic politics treat the recognition and full respect of the independence of an individual's identity, the independence of personality, the independence of will, and the independence of interest as the assumption, and recognise individuals' rights are the end and ground of other rights.[392]

Under the influence of Zhang's theory, theorists at this stage mostly prioritise the value of individuals in the theory of rights. Yang Chuntang and Li Min argue that the awareness of rights ultimately originates from the commodity economy:

> The awareness of rights has its roots in the awareness of subjects and the awareness of subjects has its roots in the equality and independence of subjects. Only in the commodity economy…can we create such a subject. The fundamental feature of the commodity economy is that the status of the commodity producer is equal... contract is the basic form they confirm their rights and realise their rights to each other... In order to obtain

[391] Zhang Wenxian, 'The Reform and development Call For The Renew of Legal Science', 6.
[392] Ibid, 6.

another's commodity, the exchange must follow the principle of the exchange of equivalence.[393]

Although the theorists use 'commodity producer' rather than 'commodity owner', the difference is only terminological because the parties who participate in the exchange are subject to the regulation of the principle of the exchange of equivalence. Their understanding of the importance of commodity economy leads them to the definition of rights: rights are the kind of freedom of choice and self-realisation of an individual's factors within the range of rules, and it is a pursuit and acquisition of legitimate interests and values.[394] Similar to Zhang's definition of rights, Yang and Li's definition is a hybrid theory of the Will and Interest theories and they accept the concept of the sovereign individual because they attribute the subjectivity of the right-holder to the subjectivity of the commodity owner, which is the ground of sovereign individual.

We have seen, so far, how the Chinese theorists reconstructed their theory of rights and why they accepted Pashukanis's theory as the ground of the theory of rights and abandoned the Possibility Theory. From a Marxist's perspective, the theories at this stage are, in essence, a return to the classic Marxism, which recognises that laws and rights are perfected in capitalism and are still needed in the transitional period. However, developing the commodity economy is only the beginning of the construction of socialism, and recognising the value of individuality in rights and the importance of rights is the acceptance of the western theory, but the theorists failed to consider the problem of sovereign individual Marx criticise in *On the Jewish Questions*, and also failed to consider the question how to develop the theory of rights in the Chinese context which is believed to be incompatible with the concept of rights. These are the questions that the Chinese theories of rights in the third stage will answer. Now let me move to the next section.

[393] Yang Chuntang, Li Min, 'Rights Are The Inherent Requirement and The Form of Realization of Commodity Economy and Democratic Politics', 24-25.
[394] Ibid, 24.

2.3 A critique of the Chinese commodity theory of rights

In this section, I will show how and why the Chinese commodity theory of rights accepts the theory of commodity exchange, therefore it is a retreat to the capitalist theory of rights and the problem is that it offers no critique of Mill's concept of the sovereign individual while as socialist theorists, they are supposed to do so.

As we have seen above, Pashukanis argues that the legal form is a peculiar form that arose from definite commodity exchange relations under capitalism, while Zhang Wenxian also made a similar argument that law is the superstructure that is based on commodity economy and the full development of commodity economy is the process that the development of law must go through. The commonness between Pashukanis and Zhang is that they are analysing the legal form itself and they are both against the shallow and mechanical Marxist understanding of law, such as

treating law as an ideological instrument of class rule. However, we should understand why the capitalist commodity economy is given so much importance in the Chinese legal theory at this stage and it requires further analysis. The analysis below will show us how Zhang reconsiders the relationship between socialism and the capitalist economy and criticises the theory.

To capture the core of Zhang's theory, we need to know how he understands the nature of the capitalist mode of economy. First, commodity economy, from his view, is an exchange economy, an activity that is sale and purchase between independent and autonomous legal or natural persons in their name and this form of economy only emerged after capitalism was established. [395] He points out that the formation of the global market, the development of industrialisation, and the division of labour greatly boosted the development of the commodity economy and it reached its highest level in capitalism. The

[395] Zhang, Wenxian, 'The Route to The Society of Rule of Law for China', *Chinese Social Science*, No.2 (1989), 3.

flourish of the commodity economy then advanced the creation of civil laws and commercial laws and constitutional laws and their common purpose was to protect people's rights. Second, he argues that the capitalist commodity economy is the ground that cultivates the western values that deeply influence the modern society. He says the theory of social contract is the best example because it is the application of contracts used in the market in the political area: 'The theory of social contract is the beginning point of the logic of bourgeois democracy and rule of law… 'social contract' is a theoretical assumption not experimental fact, but we should see at the same time that there is a real ground for the emergence of the notion of social contract, which is the full development of commodity economy and wide application of contracts.'[396] Following the logic above, he argues that the freedom of thought and speech, the principle of subjectivity, and the concept of rights all have their root in commodity economy because they are the application of the principles that allow the operation of the economy, such as the freedom of subject and the institution of private property, in the legal areas. For the concept of rights, he emphasises that the commodity economy is active and fully developed in capitalist society and people's awareness of ownership also reaches a high level, so property rights and claim rights, and procedural rights are created systematically in civil laws[397]. The protection of rights then is applied in public laws which limit the use of public power and rights become trump in the western culture.

It is important to note that Zhang's theory above was developed in the context in which China was implementing the Reform and Opening-up policy and the development of a commodity economy was one of the main tasks at that time. However, some theorists criticise him that his thesis that laws are right-oriented is an acceptance of capitalist individualism in legal theory.[398] Feng Yuexian points out that Zhang appears to analyse the form of laws and laws in

[396] Zhang, Wenxian, 'The Route to The Society of Rule of Law for China', 6.
[397] Zhang, Wenxian, ' 'The Route to The Society of Rule of Law for China', 6-9.
[398] Feng Yuexian, 'Question the Right-oriented Theory of Law'-Comment on 'Socialist Law is a New Type of Right-oriented Law'', *Chinese Law*, No.6 (1990). Zhang Hengshan, 'What is the Focus of Law?-Comments on the Right-oriented Theory', *Politics and Law*, No.1 (1989).

general and then concludes that laws are built upon the basic concepts of rights and duties; however, he shows that the so-called right-oriented theory of law has its roots in capitalist culture and history and it is still, in essence, individualism: 'Right-oriented conception of law was created in the struggle of the bourgeois against feudalist dictatorship, it is against the rule of the principle of Divine Rights of Kings and try to break the bodily control, eliminate the privilege of feudal aristocrats, the hierarchy, overthrow feudalism and provide a thought weapon for the development of freedom of capitalism...the right-oriented theory of law is still based on and focus on individualism.'[399] He finds that Zhang himself accepts the above views and he quotes Zhang's own words to support his argument: 'the ultimate purpose of the development of the commodity economy and democratic politics is to make each concrete individual, not abstract collective, society and state, obtain more freedom and happiness, which is the ultimate value of rights.'[400] The problem of Zhang's theory, he concludes, is that this conception of laws has been criticised and found problematic in western society, then it does not make sense for the Chinese theory to retreat to this outdated theory.

I agree with the critique above, Zhang's theory appears that he is undertaking the analysis of the general theory of laws, which is to analyse the form of laws. His analysis is, to some extent, helpful at that time because it provides an alternative theory of laws to replace the socialist class theory of law developed in the first stage. He also defends that his theory does not aim at promoting individualism and the distinction between right-oriented laws and duty-oriented laws is made at the conceptual level, not something to do with individualism or collectivism. [401] However, I think his defence is unsuccessful here and this is caused by his acceptance of the capitalist mode economy as a commodity exchange economy. As we have seen above, according to his understanding, the core of capitalism is the capitalist commodity economy,

[399] Feng Yuexian, 'Question the Right-oriented Theory of Law'-Comment on 'Socialist Law is a New Type of Right-oriented Law'', *Chinese Law*, No.6 (1990), 33.
[400] Zhang, Wenxian, 'The Reform and Development Call For The Renew of Legal Science', 6.

[401] Zhang Wenxian, 'The Semantic and Value Analysis of 'Right-Orientation', No.4 (1990):24.

and his argument that the capitalist commodity economy is the ground of the western modern laws, such as civil laws, makes him implicitly accept the assumptions that underpin the operation of the capitalist commodity exchange economy, which is Pashukanis' 'the principle of legal subjectivity', i.e., the formal principle of freedom and equality and the autonomy. Therefore, what he distinguishes, between the so-called right-oriented laws and duty-oriented laws, is a distinction between commodity-economy laws and non-commodity-economy laws.

Recognising the nature of Zhang's theory of laws, it is not surprising to find out that his definition of rights accepts the concept of the sovereign individual, as I showed above and we can see the similarity between Zhang's theory and the Will and Interest theories. It is not difficult to understand the reason why Zhang developed his theory in this way. From a practical perspective, the theory of laws and rights at this stage is constructed under the background of constructing the socialist commodity economy in China, and, from a theoretical perspective, the right-holder is constructed as a commodity owner and market participant, then no wonder their theory of rights is a return to the western theory of rights.

What is at stake here is that we can then find out the inconsistency between Zhang's theory of rights and the theoretical goals he endeavours to achieve. Although we have found that Zhang's theory of laws and rights accepts a capitalist commodity economy, he tries to show that socialist laws are a new type of right-oriented laws. He points out that socialist laws are more progressive than capitalist laws in the following aspects: first, capitalist laws serve the interests of the bourgeois exploiters and extract the surplus value from the labourers, while socialist laws serve the interests of proletariats; second, from the perspective of the wideness of the legal subjects, capitalist laws only benefit bourgeois, the minority of the population, while socialist laws benefit a wider range of people and proletariats will realise the emancipation of all human beings; third, while capitalist laws prescribe different kinds of

rights to people, it lacks the state support to become realised, while socialist laws can turn the rights into reality. [402] However, the comparison above is problematic, because it makes the same mistake as the Chinese socialist theory of rights did previously, simply using class theory to distinguish between socialist laws and capitalist laws, as if it is as easy as distinguishing between black and white. However, as I pointed out above, Zhang's theory of laws and rights is based on the capitalist exchange economy, then the above distinctions are not valid, because the subjects of laws and rights in both societies are the commodity owner and the participants of the capitalist commodity economy. Therefore, we cannot conclude that socialist rights are better than capitalist ones, because both laws and rights serve the interests of the commodity owners and the essential role of laws and rights is to guarantee the operations of the commodity economy and both public authorities will try to provide facilities to ensure people realise their rights and perform duties in a commodity economy.

What is worse here, the theory constructed above faces incoherence. On the one hand, Marxism requires the elimination of private property and the establishment of public ownership in socialism and solves the problem of sovereign individuals he identifies in *On The Jewish Question*. However, on the other hand, as Zhang's theory shows, the right-holder is a commodity owner who pursues interests for himself and potentially encounters conflict of interests from others, therefore we can find that the theory of rights at this stage fails to respond to Marx's criticism. This confirms again my criticism above that it is still far away from achieving the theoretical goals of the Chinese commodity theory of rights: the theory of rights they constructed is not more progressive than the capitalist theory of rights. The deeper reason for the failure here is that the theorists at this stage failed to locate the concept of rights in the complicated context of China in which, on the one hand, the commodity economy and western values are widely introduced to the Chinese society, while, on the other hand, China remains a state that

[402] Zhang Wenxian, 'The Semantic and Value Analysis of 'Right-Orientation', No.4 (1990):31-32.

accepts Marxism and Confucianism as its most influential cultural traditions. Therefore, the Chinese commodity theory of rights over-emphasises the general importance of the commodity economy and ignores how the Chinese theory of rights can be fitted to specific traditions and cultures. The unanswered questions bring about the development of the Chinese theory of right at the third stage.

3. The Chinese Confucian theory of rights

3.1 The context

So far I have reviewed Chinese theories of rights in two stages. In the first stage, the theory goes to one pole, which is a complete abandonment of the concept of the sovereign individual and develops a class theory of rights. In the second stage, the theory goes to another pole, which is a complete return to the concept of the sovereign individual and develops a commodity theory of rights. Neither attempt is successful for the reasons I discussed above. However, the theorists continue to explore a theory of rights that does not depend on this concept without returning to two approaches above. Confucianism appears as an alternative approach at this stage not only because it is distinctive from Vyshinsky's class theory and Pashukanis's commodity theory, but also because the development of the Chinese theory of rights reach a point where theorists are required to take a step back from Marxism and think about how Confucianism, as another influential ideology in the Chinese society, can contribute to the development of the theory. In the following part, I will review the Chinese Confucian theory of rights in the following three steps: first, I will introduce the context in which the theory is developed; second, I will introduce the debate over whether Confucianism is compatible with the concept of rights or not; third, I will point out the problem of the Chinese Confucian theory of rights.

To begin with, the context is the revival of Confucianism and the reconsideration of its relationship with the western culture. Tu Weiming, the

world's leading Confucian theorist, points out that Confucianism can work compatibly with what we used to believe as the products of capitalism, such as market economy, democratic polity, individualism, etc.[403] This claim is supported by his finding that from 1960 to 1990, the 'Four Mini-Dragons', South Korea, Taiwan, Hong Kong, and Singapore, have experienced a revival of Confucianism as a political ideology which is supposed to be incompatible with capitalism, but these countries developed the economy and democracy rapidly, and the same in China after the Opening Up and Reform after 1978.[404] More importantly, he emphasises that these countries constructed their countries in their own ways, rather than simply copying the western experience—they developed a less adversarial, less individualistic, and less self-interested modern civilization.[405]

It is within this context that the east can meet the west and a dialogue between the two can be possible. More specifically, Chinese theorists at this stage endeavour to develop Confucianism as providing the eastern knowledge to the western theory of rights, especially how Confucianism can help us develop the theory without accepting the concept of the sovereign individual. Tu uses human rights as a case for discussion, which is an early intellectual endeavour in this aspect. He argues that the eastern intellectuals have been devoted students of the modern West for several generations, so the Enlightenment values, including human rights, have become an integral part of their own cultural heritage.[406] Therefore, the issue here is not the question of choosing either Confucianism or western human rights, but how eastern intellectuals can use their cultural roots to critically respond to human

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[403] Tu Weiming, 'Implications of the Rise of 'Confucian' East Asia', *Daedalus* 129, no. 1 (2000): 202. TU WEIMING, 'Beyond the Enlightenment Mentality,' in *This Sacred Earth: Religion, Nature, Environment*, ed. Roger S. Gottlieb (Abingdon, Oxon, UNITED STATES: Taylor & Francis Group, 2003), 287..

[404] TU WEIMING, 'Joining East and West: A Confucian Perspective on Human Rights', *Harvard International Review* 20, no. 3 (1998): 47. More research about the development of the East Asia can be found in: Weiming Tu, *Confucian Traditions in East Asian Modernity: Moral Education and Economic Culture in Japan and the Four Mini-Dragons* (Cambridge, Mass.; Harvard University Press, 1996).

[405] WEIMING, 'Joining East and West', 47.

[406] WEIMING, 49.

rights.[407] He argues that Confucian humanism offers an account of the reasons for supporting human rights that do not depend on a liberal conception of the person and Confucian humanism is a conception of the person that encourages self-cultivation and respects the dignity of the person in terms of a series of concentric circles, namely, self, family, community, society, nation, world, and cosmos.[408]

Tu's 'compatible' arguments receive objections from the western and even eastern theorists. R.P. Peerenboom believes that Confucianism is incompatible with human rights because certain inalienable rights originate 'from birth', qua members of a biological species, not human beings qua social beings.[409] The contradiction he finds out here is the Confucian ethical focus versus the universality of human rights.[410] Henry Rosemont Jr holds a similar argument, claiming human rights are established regardless of personal characteristics, so Confucianism is incompatible with human rights because there are no culturally independent human beings in its theory.[411] Roger Ames also argues that Confucianism cannot accept human rights because they cannot accept the self as independent and prior to the society.[412] Lee Seung-Hwan criticises that Confucianism's ideal of society is basically the family writ large, so virtue and harmony is the goal of Confucianism and there exist hierarchy and paternalism in the family ethics.[413]As a result, the rights discourse is inappropriate in the family ethics, because the society should be nonlitigious, and appealing to rights breaks the family harmony and the hierarchy and roles in the family, while rights are based on egoistic individuals that will look for his interests and assume equality among people.[414]

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[407] WEIMING, 49.
[408] WEIMING, 48–49.
[409] Peerenboom, 'What's Wrong with Chinese Rights', 40.
[410] Peerenboom, 42.
[411] See Henry Rosemont Jr, 'Why Take Rights Seriously? A Confucian Critique', in Leroy S. (Ed) Rouner, *Human Rights and the World's Religions* (Notre Dame: University of Notre Dame Press, 1988), 167.
[412] See Roger T. Ames, 'Rites as Rights: The Confucian Alternative', in Rouner, 205.
[413] Seung-Hwan Lee, 'Was There a Concept of Rights in Confucian Virtue-Based Morality?,' *Journal of Chinese Philosophy* 19, no. 3 (September 1, 1992): 251-2.9
[414] Lee, 255.

All these discussions took place from around the 1980s to the 1990s and the theory and debate then were spread to the Chinese academic circle in the later years, which marks the beginning of the third stage. Overall, having seen the problems of the Chinese socialist and commodity theories of rights, Chinese theorists at this stage are required to take a step back from Marxism and go in another direction to think about how the concept of rights can be conceived from the Confucian perspective However, as I will show below, they still make mistakes and miss this opportunity and lost their way to success.

3.2 The debate over Confucianism and rights

As briefly introduced above, there already exists criticism from the western theorists that Confucianism is incompatible with the concept of rights or human rights, so whether Confucianism is compatible with rights becomes one of the themes on which the Chinese Confucian theories of rights focus and theorists are divided into the 'compatible' view and the 'incompatible' view. For the former view, the logic of their arguments is to find out some thoughts in Confucianism and then argue that these thoughts already expressed the idea of right. Theorists holding this view make arguments in various ways. Chen Qiaojian is one of the theorists who supports that Confucianism is compatible with the concept of right and the main logic of his argument is that Confucianism already took some fundamental values, like life or private property seriously and they are ideas and practices of rights in Confucianism, though strictly speaking from a linguistic point of view, we cannot find the same thing called 'rights' existed in the ancient literature.[415] He finds that there already existed the idea of property and the importance of determining the field's ownership in Mencius's thought:

> 'This is the Way of the people: those who have a constant livelihood have a constant heart; those who lack a constant livelihood lack a constant heart…Now, benevolent government must begin with setting the field

[415] Chen Qiaojian, 'Reconstruct Rights in Confucianism and Its Significance, *Journal of East China Normal University (Social Science Version)*, No.6 (2019). Also see Chen Qiaojian, 'On Classic Confucian' s conceptions of Public and Private Interests—On the Misunderstandin of It', *Modern Philosophy*, No.6 (2011), 104-105.

boundaries. If the field boundaries are not straightly set, the well-fields will not be equal, and the grain income will not be even…when the field boundaries are straightly set, one can sit down and fix the allotment of the fields and the regulations about income'[416]

He argues 'a constant livelihood' means some kind of property right and setting the field boundaries is to determine the allocation of the field and make sure there is no dispute about the ownership, while the ruler has a duty of making sure people's livelihood is sufficient and a duty of not interrupting people's field. [417] Besides the idea of property, he also finds that Mencius respects people's lives 'To kill one innocent person is to fail to be benevolent'[418] and he argues this reflects the idea of the right to life.[419] Chen's logic of supporting the 'compatible' argument is quite common among other theorists. Pei Chuanyong argues that there is the right to education in Confucianism because Confucius says: 'In teaching there should be no distinction of classes', which conveys that people are entitled to receive an education regardless of identity and family background; he also argues that Confucianism supports that people right of receiving legitimate interests because Confucius allows people to seek a rich life: 'if the search for riches is sure to be successful, though I should become a groom with whip in hand to get them, I will do so.[420] Bai Tongdong advances the above arguments by arguing that Confucianism is supportive of positive rights, such as the right to education and legitimate interests we have seen above, and also the right to enough resources, food, living, and the right to be taken care of when becoming old or sick. [421] The overall reason that supports the arguments above is that Confucianism, as the most influential philosophy in China and other eastern countries, does have ample thoughts that emphasise people's lives, private property, education, etc., so the Chinese theorists identify them

[416] Mengzi and Bryan W. Van Norden, *Mengzi: With Selections from Traditional Commentaries* (Indianapolis, UNITED STATES: Hackett Publishing Company, Inc., 2008), 66,.9
[417] Chen Qiaojian, 'Reconstruct Rights in Confucianism and Its Significance, 36.
[418] Mengzi and Van Norden, *Mengzi*, 2008, 180.
[419] Chen qiaojian, 37.
[420] Pei Chuanyong, 'The Value and Rights of Human—The Findings of Confucius Theory of Human', *Literature, History and Philosophy*, No.4 (2004), 90-91.
[421] Bai Tongdong, *Old State and New Destinity: The Classic Confucian Political Philosophy from The Perspectives of Past and Today and The West and China*, (Beijing, Beijing University Press, 2009), 183-199.

in Confucianism and try to transform them as the constitutive elements of the theory of rights. As Tu Weiming says, the eastern intellectuals 'earnestly engaged in probing the Confucian traditions as spiritual resources for economic development, nation building, social stability, and cultural identity' and this work requires to 'transform creatively the enlightenment mentality fo the modern west into a thoroughly digested cultural tradition of their own. This, in turn, is predicated on their capacity to creatively mobilise indigenous social capital and cultural assets for the task.'[422]

Besides the above way, other theorists try to support the 'compatible' argument by translating rights into the language of duty.[423] The logic of their argument is that for the right-holders, having rights means other people bear certain duties to them and those duties are determined by morality, so rights can be understood in terms of duties and Confucian morality, which has ample resources about duties, can support the concept of rights without much difficulty.[424] Yu Ying-shih, as a supporter of this method, uses a dialogue between Mencius and King Hui of Liang as an example to support his argument. Mencius counsels the king that he should provide sufficient material to his people and he will win their support in the end:

> When determining what means of support the people should have, a clear-sighted ruler ensures that these are sufficient, on the one hand, for the care of parents, and, on the other, for the support of wife and children, so that people always have sufficient food in good years and escape starvation in bad; only then does he drive them towards goodness; in this way people find it easy to follow him.…[425]

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[422] WEIMING, 'Joining East and West', 48.

[423] Chen Lai, 'Confucian Ethics and the Value of 'Human Rights'', *Journal of Peking University (Philosophy and Social Sciences)*, No.05 (1998), 61. Chen Lai, *Confucius and the Modern World*, (Beijing, Beijing University Press, 2011), 29. Ying-shihHG Yü, *Democracy, Human Rights, and Confucian Culture*, *Chinese History and Culture* (Columbia University Press, 2016), 268–69

[424] Ying-shihHG Yü, *Democracy, Human Rights, and Confucian Culture*, *Chinese History and Culture9* (Columbia University Press, 2016), 268.

[425] Yü, 268–69.

By using this example, he concludes that we can find Confucianism can accommodate the concept of rights because the idea that the government bears the duty to care about their people can be easily translated to rights that people have:

> '…if we translate his language of duties into the language of rights, it would then become immediately clear that people not only have the right to the use of land and the right to be left alone during agricultural seasons but also the right to education. Confucian texts as well as historical records are full of discussion of duties or responsibilities expected of individuals in all kinds of political and social roles. Many of them, I believe, can be transposed to read as rights of their beneficiaries. Rights and duties entail each other; they are two sides of the same coin.'[426]

In other words, he believes that as long as there exist government's duties to take care of the people in various areas, we can conclude that people can be understood as having rights benefiting from those duties, like the right to living and education, etc. This view is echoed by other scholars and they believe though we cannot find any direct arguments for 'rights' in Confucianism, the arguments for the government's duties to people can be found easily, especially in the areas of people's living and life, which can be understood as people's rights in this area.[427]

However, the 'compatible view' receives fierce criticism from the 'incompatible' view. The main criticism is that the effort to prove that there exists the concept of rights in Confucianism confuses the concept of rights and the moral standard of 'right'.[428] The logic of the criticism here is that it is undeniable that Confucianism emphasises the values of life, property, and education, but it does not treat them as rights but merely establishes moral standards of 'right' and 'wrong': it is right to protect them and it is wrong to harm them, but this

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[426] Yü, 269.

[427] Chen Lai, *Confucius and the Modern World*, (Beijing, Beijing University Press, 2011), 29. Jiang Xinyan, *The Chinese Philosophy in English Speaking World*, (Beijing, Renmin University of China, 2009), 154.

[428] Li Hanji, 'The Confucian Concept of Rights-Difficulties and Reflections', *New Journal of Tianfu*, No.059 (2015),78.

does not mean Confucianism already treats them as rights people can have. An example is frequently used by both the 'compatible' view and the 'incompatible' view to support their position.[429] In *Confucian Analects*, Book X chapter XII describes an incident: 'The stable being burned down, when he was at court, on his return he said, 'Has any man been hurt?' He did not ask about the horses.'[430] The form views argue Confucius's reaction to the incident here shows that he already formed the idea of the right to life in his theory because he cares about people's lives more than horses' lives.[431] However, the criticism points out that what Confucius said here only means that he treats people's lives seriously and it is morally right and normal to care about people's lives before caring about the horses' in the above case, but it should not be over-interpreted that a concept of rights is established here.[432] What makes a difference between 'being right' and 'having a right' is that the latter entails the emphasis on the existence of subjectivity of the right-holder, while the former only describes certain moral rules and whether something complies with the rules, but it does not necessarily entail the subjectivity of the right-holder. [433] This criticism makes much sense here because the concept of rights only appears for a few hundred years, while the moral rules of 'right' and 'wrong' can exist in any society whenever they need them to judge people's behaviour. Therefore, we cannot simply equate 'being right' with 'having a right'.

The method of justifying Confucian rights by translating rights into duty also receives serious criticism. Two mistakes are identified here in this method. First, the ruler indeed bears certain duties to their people, but it is based on benevolence, not on people's rights, then it means that the duty here cannot generate people's rights and they cannot claim anything from the ruler if he

[429] Wang Hui, 'Are 'Confucian rights' Rights?', *Jiangxi Social Sciences*, No.12 (2018), 25-26. Li Hanji, 'The Confucian Concept of Rights, 78.

[430] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean* (Newburyport: Dover Publications, 2013), 234.

[431] Chen Qiaojian, 'On Classic Confucian's conceptions of Public and Private Interests—On the Misunderstandin of It', 104.

[432] Wang Hui, 'Are 'Confucian rights' Rights?', *Jiangxi Social Sciences*, No.12 (2018), 25. Li Hanji, 'The Confucian Concept of Rights, 78.

[433] Li Hanji, 'The Confucian Concept of Rights-Difficulties and Reflections', 78-79.

fails to be benevolent to their them.[434] Second, the theorists confuse the logic of duties and rights.[435] According to Yu's logic above, rights and duties are correlative, just like two sides of a coin, so once a duty is determined, then a duty can be translated into a right. However, identifying a duty does not mean that there exists a right. Just as the first point mentions, if a duty is based on other moral principles, not individuals' rights, then no right is granted here.[436] Therefore, simply finding the theoretical resources of duties in Confucianism cannot necessarily guarantee the concept of rights can be found there.

3.3 A critique of the Chinese Confucian theory of rights

As we have seen above, the unique theoretical contribution of the Chinese Confucian theory of rights comes from the creative endeavour to argue that Confucianism, which is a feudal philosophy, can potentially accommodate the concept of right, which is the product of capitalism. However, on the other hand, they receive much criticism because they did not correctly develop their theory. Regarding the debate about whether Confucianism is compatible with rights or not, I agree with the criticism from the 'incompatible' view that we should not confuse the distinction between 'right' as a moral standard and 'right' as a legal apparatus conferred in the hand of right-holder, and it is also wrong to conclude that people have rights simply by arguing that Confucianism has rich thoughts of justifying government's duties and people who benefit from the government's duty become right-holders automatically. The cause of the mistake above is, to some extent, similar to the one of the Chinese socialist theory of rights. As I pointed out above, the Chinese socialist theory of rights completely abandons the concept of the sovereign individual and it only treats the concept of rights as the reflection of the legal rules and the will of the ruling class; in other words, they fail to explain the subjectivity of the right-holder. The 'compatible' view above also ignores the subjectivity of the right-holder. The essence of this view is that holding a right is just a reflection of the moral standard of what right is. Therefore, for instance,

[434] Wang Hui, 'Are 'Confucian rights' Rights?', 28-29.
[435] Wang Hui, 'Are 'Confucian rights' Rights?', 28-29.
[436] Wang Hui, 'Are 'Confucian rights' Rights?', 28.

people have a right to food just because it is morally right that the government should perform its duty of caring for its people. To develop a Chinese Confucian theory of rights in this way is an over-simplified understanding of Confucianism and the lesson to learn from this mistake is that to criticise the concept of the sovereign individual is not by completely abandoning it, but by recognising the subjectivity of the right-holder and conceiving it from a non-commodity-theory perspective.

Though the theory receives much criticism, I still treat it as a meaningful exploration of the alternative theory of right-holding and I believe we can achieve this by adopting Confucian's arguments correctly. First, as mentioned in the critique of the Chinese commodity theory of rights, the problem of the theory is that it retreats to the concept of the sovereign individual and fails to solve the problem Marx points out in *On The Jewish Question*. As I will argue in the final chapter, Confucianism can provide a helpful perspective from which we can potentially solve the problem caused by the concept of the sovereign individual, because Confucianism does not conceive individuals as egoistic, isolated, and self-sufficient monads, while it is friendly to the values that we cherish in the modern society, such as individual's well-being, the importance of property, etc. Therefore, a connection between Confucianism and the concept of rights can be established. Second, according to the lessons we learned from the failure of the Chinese theories at different stages, the correct way to respond to the concept of the sovereign individual accepted by the Will and Interest theories is not by abandoning the subjectivity of the right-holder and treating rights as the mere reflection of legal rules or moral standard, but by seeking a conception of the individual that is different from sovereign individual. As I will show in the final chapter, Confucianism is a theory that tries to understand the subjectivity of an individual and it will help us understand the feature of right-holding without relying on the concept of the sovereign individual.

Chapter 5: Confucianism, Moral Individual and Right-holding

Abstract: In this chapter, I argue that the concept of the Confucian moral individual can replace the one of the sovereign individual as the basis of the theory of right-holding. The Confucian theory of right-holder neither argues there exists a so-called concept of rights in Confucianism nor does it equate 'right' as moral standards with 'right' as a legal apparatus conferred to individuals. The essence of this theory is that it argues the concept of the moral individual can become an assumption of the theory of right-holding as the concept of the sovereign individual does. Its central argument is that holding a right indicates a justifiable ground for an individual to have the Hohfeldian entitlement (s) and it can explain the cases that the Will and Interest theories fail to do.

Let me recap what I have discussed so far. The Will and Interest theories encounter difficulties in explaining the features of right-holding. The Will Theory fails to explain the unwaivable rights, while the Interest Theory cannot explain some rights that do not benefit the right holder. The ultimate cause of their failure is that both theories accept Mill's concept of the sovereign individual, but they emphasise the different aspects of this concept. I then reveal, following Marx's historical materialism, that the concept of the sovereign individual has its roots in the commodity economy: the sovereign individual originates from the commodity owner. As a result, the two theories of rights suffer from two main problems as the concept of the sovereign individual does pointed out by Marx. First, the theories of rights conceive individuals as egoistic, isolated, and self-sufficient monads, while individuals should be treated as a species-being and others should be treated as an assistance rather than a limitation of an individual's behaviour. Second, given the concept of the sovereign individual is subject to the logic of commodity form, the theories of rights are subject to the criticism that Marx makes of commodity fetishism: they invert the logic between subjects and objects. This further explains why the Will and Interest Theory must rely on the concept of 'control' and 'interest' to define the subjectivity of right-holder.

The contemporary Chinese theories of right-holding can be understood as providing different responses to the concept of the sovereign individual, but they fail to develop a successful theory. The Chinese socialist theory of rights over-emphasises the class nature of rights and ignores the universality of some fundamental rights, but the main difficulty of this theory is that the definition of the subjectivity of the right-holder is missing in this theory, thus failing to explain the feature of right-holding. The Chinese commodity theory of rights corrects the mistakes made by its predecessor and re-recognises the commodity theory as the root of the theory of laws and rights. As a result, the theory of rights it develops is similar to its western counterpart and it is subject to the same criticism made by Marxism. The Chinese Confucian theory of right-holding tries to argue that Confucianism is compatible with the concept of right, however, the theory wrongly equates 'right' as moral standards with 'right' as a legal apparatus conferred to an individual. Once again, the theory makes a similar mistake as the Chinese socialist one does: it treats the concept of rights as the mere reflection of the moral rules, so the definition of the subjectivity of the right-holder is missing. However, Confucianism contains rich theoretical resources for understanding the nature of individuals, so it could help us think outside the box.

Therefore. this brings us to this chapter: if the core of the western theory of right-holding relies on the adjective 'sovereign' to conceive individuals, can Confucianism provide an alternative adjective to conceive individuals that can also explain the feature of right-holding? My answer is yes and this adjective is 'moral'. I will explain what a moral individual means and how this could contribute to our understanding of the features of right-holding.

1. Moral individual and right-holding

In this section, I will argue that Confucianism provides a theory of the individual that can be used as the assumption of right holding without necessarily subscribing to the concept of the sovereign individual, the

adjective here is ‘moral’. Before I begin my analysis, I need to clarify a few things. First, it is important to avoid a misunderstanding that I am trying to argue there exist some kinds of Confucian concepts of rights. The nature of such work is to find some textual evidence in Confucian literature and then say they express something similar to rights, which has been shown as problematic in the last chapter. My work is to find out specifically whether the ‘Confucian’ individual can be used as the assumption of the theory of right-holding, so we do not need to rely on the adjective ‘sovereign’ which has dominated the existing literature of right-holding. Second, the main Confucian philosopher I will discuss and use below is Mencius who is regarded as the ‘Second Sage’ of Confucianism[437], because he has fruitful arguments of individuals and they can potentially be developed as an assumption of right-holding, but I will also cite works from Confucius when they are relevant. When both Mencius and Confucius share similar views, I will use ‘Confucianism’ as a more general term. Regarding the version of the translation of Mencius and Confucius’s works, I use James Legge’s version as his version is the most classic one, I will use other versions when they provide an additional understanding of Confucianism.

1.1 The concept of the moral individual

1.1.1 moral individual and the ‘four sprouts’ of an individual

To begin with, by ‘moral’ individual I mean an individual is a subject who has innate moral dispositions and will act according to them. It is worthwhile to clarify in what sense I mean ‘moral’ here before I explain its definition in detail. The word ‘moral’ here is not understood in a normative sense, such as being a morally good person, but understood in a descriptive sense, which refers to the common humanity understood by Confucianism, same as the word ‘sovereign’ which describes the feature of an individual. Having said that, a contrast between the concept of the moral individual and the one of the sovereign individual can be seen here: the emphasis on the ‘sovereign’ individual is on the dominion over the affairs defined by rights, while the one

[437] ‘Second Sage’ means he is the second important Confucian philosopher, after Confucius himself.

on the 'moral' individual is on the nature of an individual as a human being which is not reducible to any particular social role, but is grounded in the common humanity. Let me analyse it in detail below.

Confucianism, as the mainstream of the Chinese tradition, provides ample theoretical resources for understanding the nature of humans and Mencius is an influential theorist who systematically develops the theory in this aspect. Mencius's main thesis is that all men have certain moral inclinations and they are internal to people's minds. The most famous statements come from his work *Mencius (2A:6)*. First of all, he says all men commonly have hearts that cannot bear to see the sufferings of others and he uses an example that all people will feel sympathy when a child falls into a well to demonstrate this point:

> 'All men have a mind which cannot bear to see the sufferings of others…When I say that all men have a mind which cannot bear to see the sufferings of others, my meaning may be illustrated thus: even nowadays, if men suddenly see a child about to fail into a well, they will without exception experience a feeling of alarm and distress. They will feel so, not as a ground on which they may gain the favour of the child's parents, nor as a ground on which they may seek the praise of their neighbours and friends nor from a dislike to the reputation of having been unmoved by such a thing.'[438]

It is pointed out that Mencius here does not attempt to say that all people will necessarily take action to save the child, but that any person would at least have a momentary feeling of compassion just suddenly, which means that it is not the result of the calculation of self-interests.[439] So the core of Mencius's example here is that all men share some kinds of common moral inclinations internal to their human nature. Following this example, Mencius says that people commonly have four feelings and they make humans different from

[438] Ke Meng, *The Chinese Classics: The Work of Mencius-with A Translation, Critical and Exegetical Notes, Prolegomena, and Copious Indexes*, trans. James Legge (The Clarendon Press, 1895), 202.
[439] Mengzi and Bryan W. Van Norden, *Mengzi: With Selections from Traditional Commentaries* (Indianapolis, UNITED STATES: Hackett Publishing Company, Inc., 2008), 46,.

animals: ‘From this case we may perceive that the feeling of commiseration is essential to man, that the feeling of shame and dislike is essential to man, that the feeling of modesty and complaisance is essential to man, that the feeling of approving and disapproving is essential to man.’[440]

He then expands these four feelings to four cardinal virtues, which is famously known as the ‘four sprouts’ of human (2A:6): ‘The feeling of compassion is the sprout of benevolence. The feeling of disdain is the sprout of righteousness. The feeling of deference is the sprout of propriety. The feeling of approval and disapproval is the sprout of wisdom’, and these four sprouts are internal to human nature like the limbs human has: ‘People having these four sprouts is like their having four limbs.’[441] As the word ‘sprout’ is less commonly used in the western theory, some clarifications of the word are needed here. In Mencius's text, 四端 (*si duan*) are the original characters, 四(*si*) means four, and 端 (*Duan*) means an end or side of an object or the beginning of one thing, literally speaking. The more accurate meaning of ‘sprout’ can be understood by his analogy between ‘four sprouts’ and ‘four limbs’. As our four limbs are the four ends of our body and they help us feel the world and perform certain functions, such as grabbing things or walking on the ground, the ‘four sprouts’ can be similarly understood as the four ends of our heart and their function is to react to certain situations. In James Legge's version of translation, he translates 端 (*Duan*) into ‘principle’, which may be more understandable for western readers, but the translation is not completely accurate because ‘principle’ lacks the meaning that ‘sprout’ contains. More specifically, it does not make much sense to translate that ‘The feeling of commiseration is the principle of benevolence’[442], because the feeling of commiseration is not the same thing as the principle of benevolence. But it makes sense to say the

[440] Meng, *The Chinese Classics*, 202.

[441] Mengzi and Bryan W. Van Norden, *Mengzi: With Selections from Traditional Commentaries* (Indianapolis, UNITED STATES: Hackett Publishing Company, Inc., 2008), 46–47. In James Legge’s version of translation, he use ‘principle’ instead of ‘sprout’, but I believe Norden’s translation is more accurate because in Chinese characters for the reasons in the following part.

[442] Meng, *The Chinese Classics*, 202–3.

feeling above is the sprout of benevolence because feeling compassion is how we react to the case like a child falls into the well and people having this feeling is the beginning point of being benevolent. Therefore, I will use 'sprout' instead of 'principle' in the rest of the chapter.

With the definition of 'four sprouts' in hand, the concept of the moral individual means that an individual has four innate moral inclinations and he will interact with others in the society in certain ways. In the next section, I will argue how the concept of the moral individual can potentially replace the concept of the sovereign individual as the assumption of the theory of right-holding.

1.1.2 The sprouts of righteousness and benevolence and right-holding

Among these four sprouts, I will argue below that the sprouts of righteousness and benevolence contain the development of individuals which could be developed as the assumption of right-holding. In his dialogue with the king's son Tien, Mencius has a summary of what righteousness and benevolence are (7A:33):

> 'He thinks how to put a single innocent person to death is contrary to benevolence; how to take what one has not a right to is contrary to righteousness; that one's dwelling should be benevolence; and one's path should be righteousness..'[443]

It is interesting to see that Legge uses the word 'right' here in describing a thing that belongs to another person and a similar translation can be found in Norden's translation too: 'To take something that one is not entitled to is to fail to be righteousness.'[444] As I pointed out in the last chapter, the definition of righteousness here is commonly used by some Chinese theorists as evidence to show that there already existed a concept of right in Confucianism because they believe the idea of not taking other people's things contains the idea of

[443] Meng, 468.
[444] Mengzi and Van Norden, *Mengzi*, 2008, 180.

property rights.[445] However, we should not conclude easily that Mencius already developed a concept of rights: what Legge and Norden's translation here only means some kind of ownership in Confucianism and it is against righteousness to take something that one has no ownership of, but it is way too far to conclude that it means the concept of rights here. The more reasonable interpretation of Mencius's understanding of righteousness and benevolence is that being righteous and benevolent is the features of being a moral individual.

Let me explain the concept of righteousness first. In Mencius's theory, how to be a righteous person is always connected with how to deal with properties or personal interests. Here are some examples. In his dialogue with Pang Kang, he says that we cannot tell whether it is righteous or not just by using the number of things that a person receives; in other words, receiving more things from others does not necessarily mean it is unrighteous. Instead, we need to see whether a person accepts those things on a reasonable ground (3B:4):

> Pang Kang asked Mencius, saying, 'Is it not an extravagant procedure to go from one prince to another and live upon them, followed by several tens of carriages, and attended by several hundred men?' Mencius replied, 'If there be not a proper ground for taking it, a single bamboo-cup of rice may not be received from a man. If there be such a proper ground, then Shun's receiving the kingdom from Yao is not to be considered excessive. Do you think it was excessive?[446]

A similar argument can be found in his dialogue with Wan Chang about I Yin (5A:7):

> I Yin was a farmer in the lands of the prince of Hsin, delighting in the principles of Yao and Shun. In any matter contrary to the righteousness

[445] Chen Qiaojian, 'Reconstruction of Rights in Confucianism and its Significance', *Journal of East China Normal University (Philosophy and Social Sciences)*, No.06 (2019). Jia Jinhua, Huang Chenxi, 'Obligations and Rights: From the System of Proprity to Classical Confucianism's View of Righteousness and Interets and Its Modern Enlightenment', Confucius Research, No.6 (2019).

[446] Meng, *The Chinese Classics*, 269.

> which they prescribed, or contrary to their principles, though he had been offered the throne, he would not have regarded it…In any matter contrary to the righteousness which they prescribed, or contrary to their principles, he would neither have given nor taken a single straw.'[447]

These examples tell us that the number of things an individual receives is not the standard of righteousness, it is the ground of receiving things from others that constitutes the standard of righteousness. When people accept something from others without any consideration of propriety or righteousness, Mencius concludes that it is a case of 'Losing the proper nature of one's mind.'[448] More specifically, he means that such people lose their sprout of righteousness.

According to Mencius's arguments above, we can see that Mencius argues that it is righteous to receive and keep something that someone ought to have, even if it is a very valuable item, and it is not righteous to receive or keep something that someone ought not to have even just trivial things. The core of his argument is that an individual, as a moral agent, can own a thing when having it is consistent with righteousness. He answers what is righteous to own things in his dialogue with Chan Tsin regarding the items Mencius received (2B:3).

> When I was in Sung, I was about to take a long journey. Travelers must be provided with what I necessary for their expenses. The prince's message was, 'A present against travelling-expenses.' Why should I have declined the gift? When I was in Hsieh, I was apprehensive for my safety and taking measures for my protection. The message was, 'I have heard that you are taking measures to protect yourself, and send this to help you in procuring arms.' Why should I have declined that gift? But when I was in Chi, I had no occasion for money. To send a man a

[447] Meng, 361–62.
[448] Meng, 414.

gift when he has no occasion for it, is to bribe him. How is it possible that a superior man should be taken with a bribe.'[449]

According to his statements above, the reason why he accepts the money from the prince is that he has a reasonable reason to use money, such as travelling or security, while the reason for rejection is that there is no occasion to use money, so sending money to him is an attempt to bribe him. Rejecting the money in this case is the realisation of righteousness((7B:31): 'All men have some things which they will not do; extend that feeling to the things which they do, and righteousness will be the result.'[450]

Now let me discuss the concept of benevolence. For Confucius, benevolence is understood in both positive and negative senses. In a positive sense, benevolence means benefiting other people as one does to himself (6:28): 'Now the man of perfect virtue, wishing to be established himself, seeks to establish others; wishing to be enlarged himself, he seeks also to enlarge others.'[451] In a negative sense, it means treating other people reciprocally(15:23): 'Tsze-kung asked, saying, 'Is there one word which may serve as a rule of practice for all one's life?' The Master said. 'Is not Reciprocity such a word? What you do not want done to yourself, do not do to others.'[452] It is worthwhile to explain why these two sayings are cast as the core of benevolence, while Confucius still defines benevolence in other aspects, for instance, (12:1) 'To subdue one's self and return to propriety' and (12:22) 'It is to love all men'.[453] An interpreter points out that Confucius answers this question in his own words[454] (4:15):

'The Master said, 'Shan, my doctrine is that of an all-pervading unity.' The disciple Tsang replied, 'Yes'.

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[449] Meng, 215.
[450] Meng, 493.
[451] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, trans. James Legge (Newburyport: Dover Publications, 2013), 194.
[452] Confucius, 301.
[453] James Legge, *The Chinese classics: Confucian analects The great learning The doctrine of the mean The work of Mencius.* (T' ai-pei: Wen hsing shu tien, 1966), 250, 260.
[454] Yang Baijun, The Interpretation and Commentary of Analects, (Beijing, The Zhong hua Book Company), 1960, 20.

> The Master went out, and the other disciples asked, saying, 'What do his words mean?' Tsang said, 'The doctrine of our master is to be true to the principle of our nature and the benevolent exercise of them to others—this and nothing more.'

Here 'my doctrine' means the core of Confucius's theory and since benevolence is the core of Confucius's theory, so this passage is the explanation of benevolence and the two principles above are its embodiment in two different senses. So benevolence not only means love and taking care of others but also means that everyone is treated in the same way that everyone treats himself, as we have seen above. For instance, if one cherishes his life and does not want himself to be killed, then he should not kill other people too.

Mencius shares a similar view with Confucius that benevolence, in a positive sense, means caring for others and feeling sympathy when knowing others' sufferings, but he develops it further by arguing that benevolence is one of the moral sprouts that human nature has. Let me discuss an example. In his dialogue with the king of Chi, the king asked Mencius if minsters can put his sovereign to death, and Mencius gave a positive answer (1B:8): 'he who outrages the benevolence proper to his nature is called a robber; he who outrages righteousness, is called a ruffian. The robber and ruffian we call a mere fellow. I have heard of the cutting off of the fellow Chau, but I have not heard of the putting a sovereign to death in his case.'[455] So we can see that if the king is ruthless to his people and causes suffering to them, Mencius allows people to rebel against him and even put him to death. In his dialogue with King Hui of Liang, he criticises him for being ruthless to his people when they need help (1A:3):

> 'Your dogs and swine eat the food of men, and you do not make any restrictive arrangements. There are people dying from famine on the roads, and you do not issue the stores of your granaries for them. When people die, you say, 'It is not owing to me; it is owing to the year.' In what

[455] Meng, *The Chinese Classics*, 167.

> does this differ from stabbing a man and killing him, and then saying 'It was not I; it was the weapon?'[456]

Consequently, the sufferings of people violate people's heats of benevolence and righteousness, so Mencius endorses that it is acceptable to rebel against the king.

Mencius also defines benevolence in a negative sense as Confucius does(7A:17): 'Let a man not do what his own sense of righteousness tells him not to do, and let him not desire what his sense of righteousness tells him not to desire; to act thus is all he has to do.'[457] This is why he says 'to put a single innocent person to death is contrary to benevolence' because being killed by others is something that an individual does not wish and desire, then it becomes a moral rule that we should not kill an innocent person.

Then, how can the sprouts of righteousness and benevolence an individual has, as a moral individual, help us in developing the subjectivity of a right-holder? Although I aim at criticising the concept of the sovereign individual, we need to understand why it is accepted as the assumption of the western theory of right-holding. The reason is that two elements that constitute the concept of the sovereign individual define two areas that a theory of right should deal with. As I pointed out in chapter two, the two elements are the element of control the sovereign individual has over certain activities and the element of non-interference against others. However, beneath the surface that the two elements define the concept is the definition of areas that a theory of right should deal with. The element of control mainly defines what an individual can do or cannot do something, namely, a demarcation of the boundary of an individual's behaviour, while the element of non-interference against others defines what other people can do or cannot do something that affects an individual's behaviour, namely, a demarcation of the boundary of other people's behaviour. Therefore, any concept of the individual that tries to replace the concept of the sovereign individual must define two areas above.

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[456] Meng, 132.
[457] Meng, 457.

I will argue that the Confucian moral individual defines two areas above. The sprout of righteousness defines what an individual can do. In Mencius's example of receiving gifts from others, he accepts the sliver because accepting it is in line with righteousness and he rejects the bribe because accepting it is against righteousness. In his example of rebelling against the tyrant, people rebel against the tyrant because doing so is in line with righteousness and benevolence. Moreover, the sprout of benevolence also defines the relationship among people, namely, what people should or should not do to each other. For example, Confucius and Mencius share the similar principle of reciprocity that 'what you do not want done to yourself, do not do to others'. According to this principle, we draw the same conclusion that other people bear the duty of non-interference with an individual's behaviour because being interfered with by others is what an individual does not want to be done to himself. So we cannot kill an innocent individual because being killed by others is what an individual does not wish to happen to himself. However, as I said above, we cannot over-interpret that Confucianism already created the concept of rights in his theory, such as the right to life. The proper reading is that Confucianism provides a potential that the concept of the Confucian moral individual can be used as the assumption of right-holding.

Therefore, we can see that we can draw similar conclusions from the Confucian moral individual as we can do from the Millian concept of the sovereign individual. For an individual with a sense of righteousness, he is capable of owing things that he ought to have and unable to claim things that he ought not to have. An individual with a sense of benevolence will care about other people's lives and will not harm others. However, this is only a preliminary analysis of why a Confucian moral individual can be potentially developed as an assumption of right-holding, a more detailed discussion will be carried out in section 2.2 below. To justify my claim, I need to deal with the following issues. First, what are the critiques of Confucianism on this issue? This is to show what difficulties are that my argument should overcome. Second, why are the existing responses to the critiques unsuccessful? This is to review the current literature and point out that they are unable to address

the concerns raised by the critiques. Last, I will put forward my argument that will not only overcome the difficulties mentioned above but will make a unique contribution to the existing literature.

1.2 The critique and defense of Confucianism in right-holding

1.2.1 An overview of the critique and defence

In this section, I will argue that the critique and the defence of Confucianism in right-holding both make some seemingly reasonable points for their positions, but it is paradoxical that both critiques and defence can be easily refuted by their opponents. My explanation of this is that the critics only capture some trivial problems of Confucianism, but miss the more important question that can pose a real challenge to Confucianism. The defenders of Confucianism, as a result, are misled by the critics to respond to the above problems and fail to consider what is at stake in this debate. As I will argue below, the real question that both sides need to consider is not whether Confucianism is compatible with the concept of rights nor whether we can find something that looks like the concept of rights in Confucian theory, but whether the Confucian moral individual can replace the Millian sovereign individual as the assumption of right-holding. By considering this question, the current debate can be reshaped and more useful discussion can be brought in.

There are a few critiques of Confucianism that it is incompatible with the concept of rights. First, Confucianism is generally regarded as discouraging the pursuit of interests but encouraging the pursuit of benevolence and righteousness instead when there is a conflict between them.[458] There is some textual evidence that can be found in Confucian and Mencius's work. For instance, the most commonly used evidence is from a dialogue between Mencius and King Hui of Liang. When the king asked Mencius what profit he could provide to his kingdom, Mencius questioned the king that he should focus more on benevolence and righteousness, not profit (1A:1):

[458] Sungmoon Kim, 'POLITICS AND INTEREST IN EARLY CONFUCIANISM', *Philosophy East and West* 64, no. 2 (2014): 425.

> ‘Why must your Majesty use that word ‘profit’? What I am provided with, are counsels to benevolence and righteousness, and these are my only topics. ‘If your Majesty says, ‘What is to be done to profit my kingdom?’ the great officers will say, ‘What is to be done to profit our families?’ and the inferior officers and the common people will say, ‘What is to be done to profit our persons?’ Superiors and inferiors will try to snatch this profit the one from the other, and the kingdom will be endangered…if righteousness be put last, and profit be put first, they will not be satisfied without snatching all.’[459]

Confucius also shows little emphasis on the pursuit of interests and he admits this (9:1): ‘The subjects of which the Master seldom spoke were—profitableness…’[460] More specifically, according to his view, the pursuit of interests is what a mean man cares about and a superior man should care more about righteousness (4:16): ‘The mind of the superior man is conversant with righteousness; the mind of the mean man is conversant with gain.’ [461] The consequence of the selfish conduct above is that it causes trouble to people’s relationships (4:12): ‘He who acts with a constant view to his advantage will be much murmured against.’[462]

The second problem of Confucianism is that it is role-based ethics, particularly it is the family-role-based ethics, therefore hierarchy exists among people, and not rights but duties are emphasised.[463] The supporting evidence of this critique can be easily found in Confucius and Mencius’s literature. Confucius distinguishes two main social roles, which are ‘prince-minister’ and ‘father-son’ and emphasises the importance of performing corresponding duties of a social role in a society in his dialogue with the Duke Ching of Chi (12:11):

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[459] Meng, *The Chinese Classics*, 126–27.
[460] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 216.
[461] Confucius, 170.
[462] Confucius, 169.
[463] Henry Rosemont, Jr., ‘Why Take Rights Seriously A Confucian Critique,’, in Leroy Rouner, d., *Human Rights and the Worlds Religious* (Notre Dame: University of Notre Dame Press, 1988), 167. Joseph Chan, ‘A Confucian Perspective on Human Rights for Contemporary China’, *The Eascct Asian Challenge for Human Rights* 212 (1999): 219.

> ‘The Duke Ching of Chi asked Confucius about government. Confucius replied, ‘There is government, when the prince is prince, and the minister is minister; when the father is father, and the son is son. ‘Good!’, said the duke, ‘if, indeed; the prince be not prince, the minister not minister, the father not father, and the son not son, although I have my revenue, can I enjoy it?’’[464]

Therefore, we can see that Confucius sees the maintenance of the order between the prince and the minister and that between father and son as the key to a successful government. However the relationship between the prince and minister, though not familial, is identical to the familial relationship because the prince is regarded as the father of the whole country to his subjects. The core of these social roles is that each individual under a specific role is expected to do what the role requires and not to do what the role does not allow. For instance, a father is expected to take care of his family members, and a son is expected to obey his father’s teachings or orders and serve him with filial piety. There are plenty of examples of a son’s duty towards his parents in *Confucian Analects*. In his dialogue with Tzse-yu, Confucius defines what filial piety is (2:7): ‘The filial piety of nowadays means the support of one’s parents. But dogs and horses likewise can do something in the way of support; without reverence, what is there to distinguish the one support given from the other?’[465] Therefore, for a son to serve his parents with filial piety, he has a duty to serve them with sufficient material and respect. While a son’s duties are emphasised, we can hardly find any rights that are conferred to him in the text.

Mencius develops further Confucius’s distinction of different social roles and claims that there are five social relationships in the society (3A:4):

> ‘This was a subject of anxious solicitude to the sage Shun, and he appointed Hsieh to be the Minister of Instruction to teach the relations of humanity: how, between father and son, there should be affection; between sovereign and minister, righteousness; between husband and

[464] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 256.
[465] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 148.

wife, attention to their separate functions; between old and young, a proper order; and between friends, fidelity.' [466]

The five social relationships here are father-son, sovereign-minister, husband-wife, old-young, and friend-friend. Similar to Confucius's definition of filial piety, a set of duties are assigned to a son while no rights can be found in this relationship. For instance, a son has duties to understand and obey his parents, which is a requirement qua a man (4A:28): 'if one could not get the hearts of his parents he could not be considered a man, and that if he could not get an entire accord with his parents, he could not be considered a son.'[467] Similar to Confucius that a son should provide material support to his parents, Mencius also claims that a son should carry on filial piety after his parents die (4B:13): 'The nourishment of parents when living is not sufficient to be accounted the great thing. It is only in the performing their obsequies when dead that we have what can be considered the great thing.'[468] Once again, what a son can do is rarely found in Mencius's text.

The third difficulty Confucianism has in accepting the concept of rights is that the harmony of a society is the goal of Confucianism and legal litigation is regarded as contradictory to this goal. The most obvious evidence comes from Confucius's goal of no litigation within a society (12:13): 'In hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations.'[469] The logic of Confucius's goal here is not difficult to understand because it is based on the two assumptions above which are the priority of righteousness over interests and the role-based ethics which emphasises duties over rights and the harmony of the relationships. A legal litigation normally involves a dispute of an individual's interests and it normally harms the harmony of the relationship between individuals, so it is not surprising that Confucius is trying to eliminate litigations within a society.

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[466] Meng, *The Chinese Classics*, 252.
[467] Meng, 314.
[468] Meng, 322.
[469] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 257.

The fourth problem of Confucianism is that the emphasis Confucianism makes on the importance of life, food, and education only establishes the standards of right and wrong, not the rights of these things: 'They expressed the judgments of 'right' or 'wrong', but not claimed that people have those rights. If we translate them into English, we can only use 'it is not right that…' to understand the sayings, 'put to death on an innocent person', but we cannot assume here 'the people have a right of life'.'[470] As I will show below, this is the most important problem to consider, not only because it poses a real difficulty for Confucianism, but also because this challenge gets further endorsement by the history of the western theory of rights: the Confucian arguments of people's enjoyment of life, education, and material interests only conveys 'right' in the objective sense, which means what right is and how to act rightly, but not 'right' in the subjective sense, which means a power, ability or faculty that an individual has and exercises.[471] I will deal with this critique at length in the following part.

Now let me deal with the first three critiques. I must admit that those critiques seem reasonable at first glance because the discouragement of the pursuit of interests, the emphasis on duties of a social role, and the discouragement of lawsuits are hostile to the western culture of rights. However, there are two problems with those critiques. First, none of the critiques above offers any substantial objection to why a moral individual, instead of a sovereign individual, cannot be an alternative assumption of right-holding. They are only a general critique of Confucianism, thus failing to reflect the assumption of right-holding, not even to mention considering whether we can replace the adjective 'sovereign' with 'moral'. Second, what is worse for those critiques, they can all be refuted within the Confucian tradition. First, although Confucianism gives priority to righteousness over interests, it does not mean it

[470] Li Hanji, 'The Confucian Concept of Rights—Difficulties and Reflections', *New Journal of Tianfu*, No.05 (2015), 79.

[471] Brian Tierney, 'The Idea of Natural Rights-Origins and Persistence', *Northwestern University Journal of International Human Rights* 2 (2004): 6.

completely bans the pursuit of an individual's interests for the following reasons. For close relationships, like father-son or husband-wife, it is better to maintain the relationship with care and love, rather than with egoistic interest calculation. However, when the relationship breaks down to a point of no return, Confucianism finds no good reason not to support that people can claim their interests in such a situation, because how can we care for a person if we cannot care for that person's needs and interests?[472] For those relationships that are not as close as family ones, like sovereign-minister or between strangers, claiming one's interest is not that destructive but an important method to protect oneself from harm and exploitation.[473] Moreover, we should not oversimplify the relationship between righteousness over interests. Confucianism does value righteousness more than interests when they conflict with each other, but it does not mean that they are intrinsically contradictory to each other, and righteousness always wins the priority. As we have seen in Mencius's understanding of righteousness above, he did ask the king to focus more on righteousness and benevolence, not interests, but it is important to note that the context of the dialogue is about how to rule a country. When it comes to personal affairs, we already see that he supports people to pursue things that can be obtained on reasonable grounds. Confucius does make a distinction between mean men and superior men, and we can see that the pursuit of righteousness is highly recommended by him, but doing so does not necessarily prohibit the pursuit of an individual's interests, because, after all, the majority of people are just ordinary people and it is normal for them to care more about their interests, rather than righteousness.

Second, although basic social relationships are established, Confucianism does not require the absolute obedience of the inferior to the superior. On the contrary, as I have pointed out above, Mencius allows people and the minister to rebel against their sovereign when he does not behave correctly as a sovereign. Of course, we cannot easily equate the rebel here with a right in

[472] Chan, 'A Confucian Perspective on Human Rights for Contemporary China', 220.
[473] Chan, 221.

the modern sense, but at least we can see that Confucianism does not prohibit people from doing it. Therefore, it is true that hierarchy does exist among people, but it can be corrected or changed when it is necessary; then it is difficult to conclude that absolute obedience is required by Confucianism in relationships. The problem of this critique has a deeper root: the critique understands Confucianism as a role ethics.[474] When Confucianism is treated as a role ethics, the confirmation of social roles and the maintenance of social relationships become the end and virtues become the means, dependent on the specific social relationship. For instance, courage and justice are defined within the social relationships:

> '…we can argue from a Confucian perspective that if courage or justice do have a referent, it is primarily as a generalization derived from acting courageously or justly within our family and community relations. Courage is an abstracted characterization of the unrelenting tenacity of this mother protecting her child from danger, and justice is the deliberate, circumspect evaluation of the applications of these students by this teacher.'[475]

However, an objection is raised against the understanding of Confucianism as a role ethics. Shen Shunfu points out that role ethics is only a part of Confucianism, and it cannot explain the whole picture of Confucianism; on the contrary, he argues that humanity and virtue are the themes of Confucianism and Mencius is the foremost philosophy that expounds on humanity and virtues.[476] According to my analysis above, I agree with Shen here because Mencius and Confucius understand humanity and virtues in a more general sense, independent of any particular social roles. For instance, the feeling of commiseration of a child falling into a well exists among all people no matter they are the relatives of the child or not. The 'four sprouts' of humans is also an example of how Mencius understands individuals, which is not reducible to a specific social relationship but is dependent on common humanity.

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[474] Roger T. Ames, *Confucian Role Ethics: A Vocabulary* (Hong Kong: The Chinese University of Hong Kong Press, 2011), 159.

[475] Roger T. Ames, *Confucian Role Ethics: A Vocabulary* (Hong Kong: The Chinese University of Hong Kong Press, 2011), 159–60.

[476] Shen Shunfu, 'Virtue Ethics or Role Ethics—On The Spirit of Confucian Ethics', *Studies of Social Science*, No.5 (2014), 11.

By having this understanding of Confucianism, the above critique can be refuted easily. Confucianism does not treat the maintenance of social relationships as an absolute and final goal; on the contrary, the pursuit of virtues, like righteousness or benevolence, is the end, not the means. Therefore, the superior, like the sovereign or father, is still subject to the judgment of virtues. When they are not doing well under the standard, the inferior can disobey their authority. Under the role ethics, such disobedience is impossible because doing what a social role requires is the ultimate end and the sprouts of righteousness or benevolence can hardly play a role in correcting the problems caused by the superior.

Third, although Confucius's ideal is to have no litigation taken place in the society, it does not mean he denies the existence and importance of the pursuit of personal interests. It only means that when a dispute occurs, people are encouraged to resolve it through mediation or reconciliation rather than using litigation as the first option.[477] A counter-argument is found that Confucius encourages people to claim their interests by using the principle of justice when they are injured by others (14:36):

> 'Someone said, 'what do you say concerning the principle that injury should be recompensed with kindness?' The master said, 'With what then will you recompense kindness? Recompense injury with justice, and recompense kindness with kindness.'[478]

This example confirms two defences of Confucianism above: it confirms that Confucianism does not deny the reasonableness of defending one's interests when it is harmed by others and it also confirms that people should not keep silent when they are injured by others; instead, they should respond it with justice, which means that Confucianism holds an open attitude for people choose which method to use to seek compensation for the injury, though litigation may not be encouraged as the first option.

[477] Chan, 'A Confucian Perspective on Human Rights for Contemporary China', 227.
[478] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 288.

If we just review three responses and critiques within the contents above, it seems both sides present some reasonable grounds to support their positions, but they both ignore the potential challenge that the other side may put forward. If we take a step back and review them, we can see that it is the critics of Confucianism that lead the debate and the defenders are just busied in responding to the problems put forward by the critics. However, as the question of whether Confucianism can provide an alternative assumption of right-holding is ignored by the critics and the defenders also fail to realise the importance of this question, they both miss the opportunity that can advance our understanding of this concept. As a result, the problems of Confucianism that the critiques point out do not constitute the difficulty for Confucianism, not only because they can be overcome by Confucianism itself, as the defence has already done, but also because they fail to consider why a Confucian moral individual cannot be developed as the assumption of right-holding. Similarly, the defenses above are unsatisfying either, because they are trapped in the deadlock of the debate, on the one hand, and fail to consider the question above, on the other hand.

But the real challenge is the fourth problem because it says that what Confucianism says about righteousness or benevolence only expresses the standard of right and wrong, so there is no development of individuals as a subject, while the western theory of right-holding does lie on the understanding of individuals as sovereign. If this critique makes sense, then it completely denies the potential to argue that Confucianism can provide an alternative assumption of right-holding. This is a serious challenge and I will have to deal with it carefully.

1.2.2 Some preliminary responses

Let me begin with some preliminary responses. I will argue that the critique only sees part of the picture because it fails to carefully distinguish between some principles that are not individual-related and some that are individual-related. By doing so I will be able to make a more sophisticated conclusion

and also prove why some Chinese scholars are wrong due to their ignorance of this distinction. Let me start with a popular example that is commonly discussed by Chinese scholars who believe there exists a concept of property rights in Confucianism.[479] In his dialogue with the Duke Wan of Tang, Mencius has two sayings that are interpreted by some Chinese scholars that they express the concept of rights. The first example is about his understanding of the relation between people's morality and livelihood (3A:3):

> 'The way of the people is this: if they have a certain livelihood, they will have a fixed heart; if they have not a certain livelihood, they have not a fixed heart. And if they have not a fixed heart, there is nothing which they will not do in the way of self-abandonment, of moral deflection, of depravity, and of wild license.' [480]

The reason why some theorists argue that the quotation above contains the idea of rights is that Mencius uses the phrase 'a certain livelihood'. Literally, 恒产(*heng chan*) is the phrase that Mencius uses and it is translated into 'a certain livelihood'.恒 (*heng*) is an adjective and it means something certain and constant, and 产 (*chan*) is a noun and it means certain means of living and income. For instance, farmland is the most important livelihood for people because it allows people to farm and make their living. Therefore, at first glance, 'a certain livelihood' looks very similar to the idea of ownership because the ownership of a thing is certain and constant and brings certain interests to the owner. According to this understanding, Chen Qiaojian, argues 'a certain livelihood' means some kind of property institution in Chinese feudal society, and whenever there is an institution of property, the corresponding rules will confer rights to people. [481] Then when Mencius says having a certain livelihood gives people a fixed heart, it could be understood that Mencius is trying to establish the idea of property rights which gives people some kind of

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[479] Chen Qiaojian, 'Reconstruction of Rights in Confucianism and its Significance', *Journal of East China Normal University (Philosophy and Social Sciences)*, No.06 (2019), 36. Yu Zhiping, 'Regulate the Livelihood of the People: from the Need of Living to Property Rights', *Confucius Studies*, No.3 (2021), 7.

[480] Meng, *The Chinese Classics*, 239–40.

[481] Chen Qiaojian, 'Reconstruction of Rights in Confucianism and its Significance', *Journal of East China Normal University (Philosophy and Social Sciences)*, No.06 (2019), 36.

assurance and guarantee. Chen argues further that people's right to a certain livelihood is a positive right in the sense that they can claim this right and the ruler has a duty to guarantee its realisation. Another example that supports the argument above is that in Mencius's dialogue with the king of Chi, Mencius advises the king that he should provide a certain livelihood to his people (1A:7):

> 'Therefore an intelligent ruler will regulate the livelihood of the people, so as to make sure that, for those above them, they shall have sufficient wherewith to serve their parents, and for those below them, sufficient wherewith to support their wives and children; that in good years they shall always be abundantly satisfied, and that in bad years they shall escape the danger of perishing.' [482]

The second example that is interpreted as containing the idea of rights is that Mencius emphasises the importance of setting the boundaries of land (3A:3):

> 'The duke afterward sent Pi Chan to consult Mencius about the nine-squares system of dividing the land. Mencius said to him, '…Now, the first thing towards a benevolent government must be lay down the boundaries. If the boundaries be not defined correctly, the division of the land into squares will not be equal, and the produce available for salaries will not be evenly distributed. On this account, oppressive rulers and impure ministers are sure to neglect this defining of boundaries.' [483]

Chen also believes this quotation contains the idea of rights because it means the distribution of property and demarcation of the ownership of property. He then argues the purpose of laying down the boundaries is to prevent the rulers and ministers from interfering with land, so the right here is a negative right in the sense that it prevents others from interfering with it.[484]

I must admit that the quotations from Mencius above do look persuasive in developing a concept of rights that is similar to the western one. For example,

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[482] Meng, *The Chinese Classics*, 148.
[483] Meng, 244.
[484] Chen Qiaojian, 'Reconstruction of Rights in Confucianism and its Significance', *Journal of East China Normal University (Philosophy and Social Sciences)*, No.06 (2019), 36.

the idea of ‘livelihood’ does look like an early thought of private property, and ‘laying down boundaries’ of land does look like demarcation of ownership and determines some negative results if the ownership is defined incorrectly. However, as pointed out above, the arguments go in the wrong direction. What Mencius said above is, in essence, a counsel to the king on how to rule his people and exercise his power properly, therefore only establishing the standards of right and wrong, not the concept of rights, because little can be found in developing the subjectivity of an individual. In other words, what makes the difference between the theory of rights and the standards of right and wrong is that the former should tell what an individual can do or what others should do to the right-holder, while these two things are missing in the latter theory. As pointed out above, it is the difference between ‘right’ in the subjective sense and ‘right’ in an objective sense. For instance, it is right for a student to attend school on time and it is wrong to be late, but attending school on time does not mean he becomes a right-holder. Therefore, a pure moral standard of right and wrong is just a moral standard, it cannot be interpreted that doing the right thing means having a right. Therefore, what Mencius says in the quotations is only advising the king that it is right to give his people a certain livelihood and sufficient materials to support their family and it is right to set up clear boundaries of land; However, we cannot find sufficient evidence to show that he is trying to confer some kind of rights to people they can exercise. Therefore, the correct approach to argue that Confucianism is compatible with the concept of rights should be to find the Confucian arguments about the nature of individuals and see if they can be developed into a theory of right-holding while being an alternative to the western version.

1.2.3 The Confucian ‘people-as-root’ theory of rights

Before I move to my own argument in the final section, I want to point out there is one Chinese scholar who defends Confucianism from the perspective of individuals rather than repeating the arguments other Chinese scholars make we saw above. Xia Yong is the leading theorist in criticising the western theory of rights in contemporary China and endeavours to argue that

Confucianism is compatible with the concept of rights. As I will discuss his theory in detail below, he interprets a Confucian individual from a political perspective and argues that a Confucian individual can become a ground of right. The logic of his argument is that the concept of rights in Confucianism can be expressed through the political principle of 'people-as-root' (*Min Ben*).[485] 'People-as-root', as the words suggest, means people are the root of the nation. Mencius has a classical expression of this principle (7B:14): 'The people are the most important element in a nation; the spirits of the land and grain are the next; the sovereign is the lightest.'[486] Xia further explains this principle from two aspects: first, this principle is used as a standard of good politics, which means that benefiting and loving people should be the standard of good and benevolent politics; second, this principle is used as a standard of political legitimacy, which means that people are the principal subject of politics, not the sovereign, and the rule of the country should win the agreement from people; governance without people's agreement and support is governance without political legitimacy. [487] Besides that people are the root of a country, he also finds that they enjoy an even higher authority than the Heaven because it has to understand the world through the lens of people: 'Heaven sees as my people see; heaven hears as my people hear.'[488]

However, Xia does not stop his argument at this point, as the 'people-as-root' is a general principle and does not say much about the nature of individuals. He, therefore, finds the answer in how Confucianism understands human nature: 德 (de, virtue) is the core of human nature.[489] He explains that 'virtue' here does not only mean morally good characters, such as being kind or well-behaved, but it also means the inborn capabilities of being a moral individual. It is important to note that here Xia's use of 'virtue' here is the same as I use

[485] 'Min' means people and 'Ben' means a basis or root, so *'min ben'* means treating people as a basis. Xia Yong, *The Philosophy of Civil Rights in the Context of China* (Leiden, UNITED STATES: BRILL, 2011), 26.
[486] Meng, *The Chinese Classics*, 483.
[487] Xia, *The Philosophy of Civil Rights in the Context of China*, 29–30.
[488] James Legge, trans., *The Chinese Classics: The Shoo King-with A Translation, Critical and Exegetical Notes, Prolegomena and Copious Indexes*, vol. III (LONDON: TRUBNER & CO, 1865), 292, http://archive.org/details/in.ernet.dli.2015.531101.
[489] Xia, *The Philosophy of Civil Rights in the Context of China*, 34.

'moral': we both use it in the descriptive sense that they mean some kind of human capability to become an individual, not in the normative sense of being a good person. Literally speaking, 德 (*de*) is the character, and it can be translated into 'virtuous' or 'moral'. So the difference between Xia and me is only the difference in translation. In Mencius's text, he calls it 'the nobility of the Heaven' (4A:16): 'There is a nobility of Heaven and there is a nobility of man. Benevolence, righteousness, self-consecration, and fidelity, with unwearied joy in these virtues; all these constitute the nobility of Heaven. To be a kung, a ching, or a tafu; constitutes the nobility of man.'[490]. So we can see that 'the nobility of the Heaven' is what an individual has naturally from the Heaven and the four sprouts of humans are the individual's capability to pursue the virtues such as benevolence and righteousness.[491] Therefore, he argues that 'virtue' here can be understood as some kind of moral qualification and competence of will.[492] By 'moral qualification' he means that the qualification an individual has to become moral, in the descriptive sense I defined at the beginning of this chapter, to be an individual that has certain moral inclinations. By 'competence of will' he means the competence to act and take responsibility for their behaviour. Then he argues that it is because of the qualification and competence here that give rise to some political rights, such as political participation or rebellion.

Since having a right depends on an individual's virtue in the sense he defined above, does each person have this virtue equally? His answer is yes because Confucianism recognises that every human being is equal by nature (17:2): 'By nature, men are nearly alike;'[493] and everyone can have it when he/she cultivates himself: 'From the Son of Heaven down to the mass of the people, all must consider the cultivation of the person the root of everything besides'.[494] Then he argues one of the methods that people can cultivate their

[490] Meng, *The Chinese Classics*, 418–19. 'kung, 'ching', 'tafu' are the titles of government officials.
[491] Xia, *The Philosophy of Civil Rights in the Context of China*, 34.
[492] Xia, 35–36.
[493] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 318.
[494] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 318, 359.

virtue is through political participation because the process of self-cultivation is never isolated from other people, but, on the contrary, it requires engagement with other people in the community. For instance, *the Great Learning* teaches people that, to be a man, besides learning knowledge and cultivating himself, a person still needs to regulate his family, govern the state and make peace for the whole world:

> The ancients who wished to illustrate illustrious virtue throughout the kingdom, first ordered well their own States. Wishing to order will their States, they first regulated their families. Wishing to regulate their families, they first cultivated their persons. Wishing to cultivate their persons, they first rectified their hearts. Wishing to rectify their hearts, they first sought to be sincere in their thoughts Wishing to be sincere in their thoughts, they first extended to the utmost their knowledge. Such extension of knowledge lay in the investigation of things.[495]

To summarise Xia's arguments above in one sentence, he says that from an individual's perspective, everyone has an equal opportunity to have virtue and everyone can achieve this by participating in the community and human life.[496] According to the arguments above, he concludes that the concept of rights already existed in Confucianism embodied through the principle of 'people-as-root' and in the form of political participation.[497] However, he points out that the problem of Confucianism is that it lacks operative procedures to support the concept of rights, so the right to rebel, for instance, is only a non-systematic and non-procedural right. By 'procedure' he means, from a positive sense, there are certain rules determining the legal subject, and on the other hand, from a negative sense, there are certain rules protecting people's property and freedom from interference from the government. He admits that under the Chinese feudal autocracy, the development of civil rights was limited and incomplete because there was little development of democracy, civil freedom, and the judicial system which were well-developed in western society.[498]

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[495] Confucius, 357–58.
[496] Xia, *The Philosophy of Civil Rights in the Context of China*, 105.
[497] Xia, 43.
[498] Xia, 45.

Xia Yong's theory makes some breakthroughs to the existing literature because he supports his argument that the concept of rights already existed in Confucian tradition by arguing that the Confucian understanding of individual and human nature could potentially support the concept of rights, rather than engaging in the more general debate about the role-based, duty-based and anti-litigation culture of Confucianism, as the critique and defence do above, though I disagree with him that there exists the so-called the concept of rights in Confucianism. I think what he does here captures the key question of this debate, which is whether the Confucian conception individual can accommodate the concept of right-holding. His theory opens a helpful perspective for us to reconsider this debate and the theory of right-holding.

However, unfortunately, I have to point out that Xia misses the opportunity to develop the discussion further, though he is already on the right track. More specifically, as he finds that the Confucian virtues mean some kind of subjective qualifications and competence of right-holding, then the next step should have been the consideration of some potential challenges post against this understanding. For example, what happens if not everyone can be a benevolent or righteous person or if some people abandon cultivating their virtues? Or even further, can this subjective understanding of the individual provide an alternative assumption of right-holding? These questions are worth considering because they will pose a substantial challenge to the Confucian theory of right-holding. However, he only attributes the weakness of Confucianism to the problem of feudal autocracy, which is not completely wrong, but he should have followed the approach of his argument and considered the potential questions above. Thus, he misses the more important questions and fails to rescue the current debate about Confucianism and rights. Therefore, I will begin my analysis from where Xia stops.

2 A Confucian moral individual theory of rights

2.1 Critique and defence of the Confucian understanding of individual

As we have seen so far, a Confucian understanding of human nature could be used as the assumption of the theory of right-holding, so let me consider some objections first. The first and most important question could be what happens if some people are just morally bad, such as a cold killer? This question should not be ignored, because, for example, a person without the sprout of righteousness means the person loses the qualification or capability of having a right. Mencius has an answer to this question. In his dialogue with Kung Tu, Kung had a confusion why the nature of some people is good and the nature of others is bad, Mencius answered that the four sprouts of humans are innate to humans and the difference among people in nature occurs because they hold different views about it and whether they cultivate it or not (6A:6):

> 'Benevolence, righteousness, propriety, and knowledge are not infused into from without. We are certainly furnished with them. And a different view is simply owing to want of reflection. Hence it is said, 'Seek and you will find them. Neglect and you will lose them.' Men differ from one another in regard to them; some as much again as others, some five times as much, and some to an incalculable amount: it is because they cannot carry out fully their natural powers.' [499]

So we can see that Mencius does not deny people behave differently in practice, but this does not mean that human nature is different. The difference among people originates from that the effort each person exerts in self-development and the environment in which a person is living are different. He uses an agricultural metaphor to demonstrate this point (6A:7):

> 'Mencius said, 'In good years the children of the people are most of them good, while in bad years the most of them abandon themselves to evil. It is not owing to any difference of their natural powers conferred by Heaven that they are thus different. The abandonment is owing to the

[499] Meng, *The Chinese Classics*, 402 – 3.

circumstances through which they allow their minds to be ensnared and drowned in evil.

There now is barley. Let it be sown and covered up; the ground being the same, and the time of sowing likewise the same, it grows rapidly up, and, when the full time is come, it is all found to be ripe. Although there may be inequalities of produce, that is owing to the difference of the soil, as rich or poor, to the unequal nourishment afforded by the rains and dews, and to the different ways in which man has performed his business in reference to it.'[500]

According to Mencius's view above, human nature is, like barley, similar to each other, in essence, but not everyone can become perfect, because the effort that people exert in cultivating themselves and the environment in which they grow up are different, just like that not every barley has the same production, because the labour people put in growing them and the natural conditions of growth are different. For Mencius, it is one thing that some people behave immorally, and it is another thing that they still hold a similar human nature, the four sprouts, as others do. Therefore, even if some people are morally bad, they are not deprived of the human nature that all men equally have, and, thus, retain the potential that the moral individual can still be used as the assumption of the theory of right-holding. In other words, the critique above does not pose much difficulty here.

The second question is similar to the first one, but from a different perspective, and it comes from the problem of Confucian virtue ethics. As we can see above, virtues, such as benevolence, righteousness, propriety, and knowledge, are emphasised by Confucianism, so some critiques say that an individual is expected to overcome selfish desires and pursue the highest ethical goals while being a right-holding does not require such a high commitment:

[500] Meng, 404.

> ‘For society to achieve collective humanity, the people that constitute it must be willing to put aside narrow self-interest…Confucius’ ethical gaze was so trained on the lofty heights attainable by humankind that he neglected to provide for even a minimal level of institutional protection for the individual against the state and others.’[501]

This challenge seems plausible because being virtuous as a condition will significantly reduce the range of people who can become a right-holder and it seems to contradict common sense that all men are equal in having rights and no one should be discriminated against because of their moral status.

However, the second critique has two main problems. First, to understand Confucianism as a ‘virtue ethics’ in the way that the west understands it is problematic. Bryan Norden points out that translating ‘*de*’ as ‘virtue’ is literally a standard translation, but ‘*de*’ does not mean exactly the same thing as ‘virtue’ is used in English: literally, ‘virtue’ means stable disposition, the possession of which contributes to leading a flourishing life, such as wisdom and courage, etc. However, Liu Liangjian points out that, in ancient Chinese, ‘*de*’ means some kind of features that are acquired from nature, so for human beings, ‘*de*’ is not limited to moral qualities but includes one’s physical shape and physiognomy.[502] Furthermore, even for moral qualities, ‘*de*’ is used neutrally, not just positively: there are good ‘*de*’, such as harmony and compliance, and also ominous ‘*de*’, such as resentment and revulsion.[503] It is found that it was not until around the third century BC that ‘*de*’ started to refer to individual virtues. Therefore, the first problem of the critique is a simple equation of ‘*de*’ with ‘virtue’, while ‘*de*’ means both an individual’s virtues and the feature or nature of people. The first problem then results in the second problem. Given ‘*de*’ does not necessarily mean people’s virtues, it is wrong to conclude that Confucianism requires virtues as a condition of becoming a right-holder.

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[501] Peerenboom, ‘What’s Wrong with Chinese Rights’, 42,47.
[502] Liu Liangjin, ‘Virtue Ethics and Confuciansm: A Methodology Reflection’, in Stephen Angle and Michael Slote ed., *Virtue Ethics and Confucianism* (London, UNITED KINGDOM: Taylor & Francis Group, 2013), 67.
[503] Liu Liangjian, 68.

I will argue that Confucianism does not treat virtues as a necessary nor sufficient condition to become a right-holder. First, it is important to understand the word 'sprout' when Mencius describes human nature. As I just pointed out above, 'sprout' is an agricultural term, and it means the upper part of a plant that is growing, opposite to 'root', the nether part.[504] Two things need to be clarified here. First, the possession of the four sprouts by people is only incipient, it only means some kind of capability to feel, think or perceive, just like a sprout is at the early stage of a plant, so it does not mean that everyone can become virtuous ultimately. On the contrary, it is pointed out that people are not often aware of them, or even they realise them but they usually fail to manifest them in practice, as Mencius points out above. Second, based on the problems just mentioned, Confucianism claims that people need the process of cultivation to become virtuous, and the model of cultivation corresponds to the understanding of human nature. It is pointed out Mencius's cultivation of the self is a mixture of the discovery model and development model: for those who are unaware that they have innate human tendencies, they have the capacity to discover them, and for those who do not manifest them very well in practice, they need to develop themselves to become virtuous in the end. This is consistent with Mencius's overall position that the four sprouts of human nature are just incipient and people differ in practice because not all people cultivate their nature evenly. A vivid example may help us better understand this point here. Let us say being virtuous is like a Daffodil blooming in spring. From the nature point of view, each daffodil has the same potential to bloom but this is only incipient. Some may grow well and bloom ultimately due to receiving more sunshine and warmth from nature, while some may even stop growing halfway, but this does not change the fact they are the same species and have the same potential to bloom. Similar things can occur in humans too. In sum, we cannot conclude that Confucianism requires that everyone should become virtuous equally because as the word 'sprout' indicates, being virtuous is only incipient and it

[504] Bryan W. Van Norden, 'The Emotion of Shame and the Virtue of Righteousness in Mencius,' *Dao: A Journal of Comparative Philosophy* 2, no. 1 (2002): 46. Liu Liangjin, 'Virtue Ethics and Confuciansm: A Methodology Reflection', 67.

can wither away as a plant does if we do not cultivate it well. Once again, an individual being less virtuous does not deprive him of the human nature that is similar among people, thus retaining the same potential of becoming a right-holder.

Let me end this section with an example. Recall the example of a child falling into a well Mencius uses. Mencius says when a child fell into a well, all men have a mind which cannot bear to see the sufferings of others and the feeling of commiseration here is the sprout of benevolence. How can we further explain this and how can this relate to right-holding? First, the feeling of commiseration is some kind of incipient and original feeling that everyone has, regardless of whether one is virtuous or not. That means even an immoral person or uncultivated person will have a moment in his mind when the danger of the child causes alarm and distress to him. Second, when the sprout of benevolence is applied in practice, it defines two areas that the theory of right-holding should deal with. With regard to the area of what an individual can do, people can do something to protect their lives and others' lives. With regard to the area of what people cannot do to an individual, people are prohibited from harming others because it is cruel and causes negative feelings in their minds. This prohibition is further confirmed by the principle of 'reciprocity' that 'What you do not want done to yourself, do not do to others.'.[505] Therefore, from a point of view of benevolence, the concept of the moral individual can be developed as the assumption of the sovereign individual.

Now there is one critique remaining, which is that Confucianism does have some statements in which Confucius and Mencius show their care about people's lives, but they only establish the standard of right and wrong and we should not interpret them as establishing the idea of rights and right-holding. It is now to deal with this question.

[505] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 301.

2.2 A theory of individuals or a theory of moral standards?

2.2.1 A critique

As the critique points out, a theory of moral standard of right and wrong cannot become the assumption of a theory of right-holding, while the concept of the sovereign individual can. As I argued above, the concept of the moral individual deals with the issue of what an individual can do, and an answer to this issue constitutes the main content of right-holding, while it also deals with the issue of the relationship an individual has with other people and an answer to this issue constitutes the main content of the correlativity of right-holding. Therefore, I must firstly argue that Confucian's conception of righteousness and benevolence is a theory of individuals, instead of a theory of moral standards and it can respond to the two issues above.

But now let me consider a critique that claims Confucianism does not develop a theory of individuals. Shen Shunfu criticises that Confucianism does not treat individuals as a subject.[506] He points out that for an individual to become a subject, it must contain three main features that are mainly developed in the western tradition: first, an individual has reason which means that his behaviour is conducted under his consciousness and will; second, an individual is autonomous which means that his behaviour is conducted under his judgment and choice, not under other people's order or enforcement; third, an individual is an independent individual, which means that each individual should be treated as an end in himself, not as a means to something else.[507] According to these criteria, he argues that Confucianism has two main problems in preventing it from developing subjectivity. The first problem is that Confucianism does not encourage intentional behaviour and only encourages the natural growth of human nature.[508] In other words, the element of free will is missing in Confucianism. For instance, he points out in the dialogue with

[506] Shen Shunfu, 'Subject and Virtues: On the Confucian Subjectivity', *Academics* (2017), No.2, 51.
[507] Shen Shunfu, 46-47.
[508] Shen Shunfu, 52.

Kung-sun Chau, Mencius says righteousness is something internal to people and people should practice it but should nourish it without a specific purpose; people should remember how it works, but do not assist the growth of that nature.[509] There is an example from Mencius that supports his claim (2A:2):

> 'There was a man of Sung, who was grieved that his growing corn was not longer, and so he pulled it up. Having done this, he returned home, looking very stupid, and said to his people, 'I am tired today, I have been helping the corn to grow long.' His son ran to look at it and found the corn all withered.'[510]

Here the growth of corn is an analogy to the development of human nature and pulling up the corn is an analogy to the conscious behaviour of humans, then he concludes that this example well demonstrates that Confucianism does not emphasise the importance of the function of consciousness and reason in people's behaviour and the concept of individuals is undeveloped in Confucianism. The second problem he points out is that Confucianism subdues the realisation of an individual's desire.[511] For example, Confucius is believed to be a non-egoistic man (5:4): 'There were four things from which the Master was entirely free. He had no foregone conclusions, no arbitrary predeterminations, no obstinacy, and no egoism.'[512] Mencius also expresses the concern about the pursuit of an individual's desires (7b:35): 'To nourish the mind there is nothing better than to make the desires few. Here is a man whose desires are few: in some things he may not be able to keep his heart, but they will be few. Here is a man whose desires are many: in some things he may be able to keep his heart, but they will be few.'[513] According to the views of Confucius and Mencius above, Shen concludes that the pursuit of individual interests and desires is discouraged in Confucianism, and it finally results in the loss of self, not to mention autonomy and independence.[514]

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[509] Meng, *The Chinese Classics*, 190–91.
[510] Meng, 190–91.
[511] Shen Shunfu, 52.
[512] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 217.
[513] Meng, *The Chinese Classics*, 497.
[514] Shen Shunfu, 53.

However, I want to refute Shen's critique here because the criteria he uses to define individuals are the ones used to define the concept of the sovereign individual. The elements of free will, autonomy, and independence of individuals he mentioned can be understood as the embodiment of the control a sovereign individual has. Then he begs the question: Confucianism does not develop the concept of the sovereign individual because it is not a theory of the sovereign individual. As we have seen in chapter three, Marx criticises this concept of the sovereign individual, so it does not make sense to take the subjectivity developed by this concept for granted and then it is unfair to re-use it to judge Confucianism. In the next section, I will analyse how Confucianism can accommodate the concepts of equality and freedom without following the logic of the sovereign individual. The reason why discussing these two concepts is that, as Pashukanis points out, the concept of the sovereign individual has its roots in the commodity economy which assumes equality and freedom among individuals. By doing this we will have a better understanding of the concept of Confucian moral individual.

2.2.2 Confucianism on equality and freedom

I will begin the analysis of the concept of equality. As we have seen above, the main difficulty that prevents Confucianism from accommodating the concept of equality is that Confucianism is role-based ethics, and people are differentiated by their social roles and the hierarchy exists among people. A.T Nuyen reveals that there is some kind of standard understanding of equality behind this critique: 'the assumption in the standard view is that to be committed to equality is to be committed to a certain kind of egalitarianism in which rights, privileges, wealth and other social goods are more or less equally distributed.'[515] However, he points out that even though there is a certain conception of equality that entails this kind of egalitarianism, it is not the only one or most plausible conception; instead, if we can find that the unequal distribution of social goods in Confucianism does not indicate a lack of equality but demonstrates a commitment to equality, then we can recognise

[515] A. T. Nuyen, 'Confucianism and the Idea of Equality,' *Asian Philosophy* 11, no. 2 (2001): 67.

that Confucianism supports equality rather than denying it.[516] So in a general sense, Nuyen and I share similar views that the western conceptions of equality, freedom, and autonomy, for instance, are not the only and most plausible conceptions and it may turn out that Confucianism has its own conceptions of these concepts, but they may emphasise on the different aspect of those concepts.

So Confucianism does have its understanding of equality and we can find the textual evidence. As we have seen above, Confucius said: 'By nature, men are nearly alike', 'alike' here means 'sameness' and it is regarded as the early term equivalent to 'equality'.[517] Therefore, it is acknowledged that Confucianism is committed to natural equality that all people are born equal.[518] Mencius shares a similar position as Confucius does (6A:7): 'Thus all things which are the same in kind are like to one another; why should we doubt in regard to man, as if he were a solitary exception to this? The sage and we are the same in kind.'[519] But he develops this view further and argues that all human beings are good by nature because all people have the four moral sprouts, as I already discussed above. Furthermore, Mencius believes that all people have the equal capacity to develop themselves and that all people have the equal potential to become a sage. When Chiao Tsao asked if all men can become a sage, Mencius answered yes without hesitation (6B:2): 'It is said, 'All men may be Yaos and Shuns;'—is it so? Mencius replied, 'It is.''[520] But he does not mean that everyone can equally become a sage in the end, because the effort each person exerts in self-development and the circumstances under which a person is living are different. As we saw above, he uses barley to demonstrate this point:

[516] Nuyen, 67.
[517] Nuyen, 68.
[518] Bloom, Irene, Fundamental Institutions and Consensus statements: Mencian Confucianism and Human Rights, in De Bary, W Theodore & Weiming Tu eds, *Confucianism and Human rights* (New York, Columbia University Press), 98.
[519] Meng, *The Chinese Classics*, 405.
[520] Meng, 424. Yao and Shun are outstaniding leaders of ancient Chinese tribes and they are the representatives of sages in ancient China.

> ‘Mencius said, ‘In good years the children of the people are most of them good, while in bad years the most of them abandon themselves to evil. It is not owing to any difference of their natural powers conferred by Heaven that they are thus different…There now is barley…Although there may be inequalities of produce, that is owing to the difference of the soil, as rich or poor, to the unequal nourishment afforded by the rains and dews, and to the different ways in which man has performed his business in reference to it.’[521]

According to this example, Mencius means human nature is similar to each other, but not everyone can become perfect ultimately because the effort one puts in cultivating themselves and the environment in which he grows up are different, just like all barley is the same in nature but their production is different due to the difference of the labour people put and the natural conditions of growth. In summary, it is not unreasonable to read the above statements as saying that Confucianism is committed to natural equality, which means that all people, by nature, regardless of being sages, gentlemen, or common people, are born equal, and are also committed to moral equality, which means that all people have the equal moral potential to be morally good regardless of their social backgrounds, though people vary in practice.

Besides the natural equality and moral equality we discussed above, the Confucian concept of equality is embodied in Mencius’s acknowledgement of an individual’s dignity.[522] He said (6A:10): ‘

> Therefore, men have that which they like more than life, and that which they dislike more than death. They are not men of distinguished talents and virtue only who have this mental nature. All men have it; what belongs to such men is simply that they do not lose it. Here are a small basket of rice and a platter of soup, and the case is one in which the getting them will preserve life, and the want of them will be death; if they are offered with an insulting voice, even a tramper will not receive them,

[521] Meng, 404.
[522] Sungmoon Kim, ‘Confucianism, Moral Equality, and Human Rights: A Mencian Perspective’, *The American Journal of Economics and Sociology* 74, no. 1 (2015): 162.

or if you first tread upon them, even a beggar will not stoop to take them.'[523]

In the passage, Mencius says that people normally desire life and dislike death, but if there are things they like more than life and dislike more than death, they will not fear death. The thing that people like more than life here is an individual's dignity, in the sense that no one should be treated with disrespect due to his low social, political, or economic status.[524] So even the uncultivated people, such as beggars, hate being treated with humiliation, even if they need food. It is pointed out that Mencius's concept of dignity is the moral entitlement of everyone as a human being and it is rooted in moral equality that all humans have the potential to become a sage.[525] More specifically, why people do not accept food offered in a humiliating way comes from the heart of shame and dislike. It is interpreted that, though Mencius did not make it clear in the passage, the dignity here does not come from external sources, like the Heaven, but from the heart of shame and dislike: 'though an individual says he is in an emergency of hunger, he still dislikes to be treated without politeness and would die rather than eating because of his heat of shame and dislike, which dislikes something more than death. All men have this heart.'[526]

Therefore, it is not the case that equality is missing in Confucianism in understanding individuals. The fairer judgment of Confucianism may be that it contains conflicting views of equality. On the one hand, undoubtedly, it is a feudal thought and it contains the idea of hierarchy based on people's social roles, which is against the idea of equality. However, on the other hand, it is committed to the ideas of equality above. So what is at stake may not be that the element of equality is missing in understanding individuals in the Confucian tradition, but whether the idea of hierarchy poses the real difficulty

[523] Meng, *The Chinese Classics*, 411.
[524] Kim, 'Confucianism, Moral Equality, and Human Rights', 162.
[525] Kim, 163.
[526] Chen, Qiaojian, 'Shame, Dislike, Righteousness and Right—The Explanation and Meaning of Mencius's 'The Heart of Shame and Dislike is the Sprout of Righteousness'', *Journal of Sun Yat-Sen University (Social Science Edition)*, No.2 (2016), 140.

in understanding individuals. I will return to this question after I analyse the concept of freedom.

Let me now discuss Confucianism's understanding of freedom using the same approach above. I will argue that it is not the case that the idea of freedom is completely missing in understanding individuals in Confucianism. On the contrary, we can find that it exists in the cases in which an individual has a choice to decide what to do in a moral dilemma. I will discuss two examples below and each example emphasises one aspect of freedom. The first example I would like to show emphasises the aspect of freedom of choice. The example is about rescuing a sister-in-law when she is drowning, while there is a rule that males and females shall not touch their hands in giving and receiving things. Mencius says (4A:17):

> 'He who would not so rescue the drowning woman is a wolf. For males and females not to allow their hands to touch in giving and receiving is the general rule; when a sister-in-law is drowning, to rescue her with the hand is a peculiar exigency (*quan*).' [527]

In this case, the dilemma is that either an individual follows the rule and leaves the sister-in-law to die or breaks the rule and saves the life. We can see that Confucianism does not require individuals to follow the rule mechanically; instead, an individual has a choice to make some changes to the rule when an emergency like people drowning occurs. This is what the character '*quan*' means, considering things as a whole and balancing the interests and losses that a decision may incur. An individual without the ability to make choices by himself cannot decide to save the sister-in-law in this case because he is unable to decide whether to prioritise the value of saving one's life over the one of obedience to the rules or vice versa.

The second example emphasises both the freedom of choice and the autonomy of individuals. A famous example is about Mencius's ambition and his understanding of autonomy. Mencius says (6A:10):

[527] Meng, *The Chinese Classics*, 307.

> ‘So I like life, and I also like righteousness. If I cannot keep two together, I will let life go, and choose righteousness. I like life indeed, but there is that which I like more than life, and therefore, I will not seek to possess it by any improper ways. I dislike death indeed, but there is that which I dislike more than death, and therefore there are occasions when I will not avoid danger…Therefore, men have that which they like more than life, and that which they dislike more than death. They are not men of distinguished talents and virtue only who have this mental nature. All men have it; what belongs to such men is simply that they do not lose it. Here are a small basket of rice and a platter of soup, and the case is one in which the getting them will preserve life, and the want of them will be death; if they are offered with an insulting voice, even a tramper will not receive them, or if you first tread upon them, even a beggar will not stoop to take them.’[528]

This first part of the passage shows that Mencius has the freedom to choose the ambition of his life because he can decide to sacrifice himself to realise the value of righteousness. The second part of the passage conveys not only that Mencius argues that people should be treated with dignity, which I have discussed above, but also conveys that people have autonomy about what to choose in a dilemma like this..[529] .

However, it may be objected that only sages like Mencius can make such a sacrifice and we cannot expect normal people to do the same, so this example cannot prove that normal people have the freedom of choice. This objection seems reasonable, but it has three problems. First, this objection at least admits that the sage in Confucian tradition has some kind of freedom to choose what to do in their life, so the concept of freedom is not completely missing in understanding individuals in Confucianism. Second, we cannot infer from the passage that Mencius expects normal people to behave as sages do. As I have discussed above, Mencius acknowledges that there exist

[528] Meng, 411.
[529] Yu Tao, ‘Confucius and Mencius’s Confucian Ethics of Subjectivity and Its Modern Significance’, *Dong Yue Tribune*, No.3 (1999), 73.

variations in people's practice because the effort they put into cultivating themselves and the environment they grow up are different. What Mencius tries to point out here is that when people face a dilemma like this above, if they follow the heart of shame and dislike, they will choose to object to the food rather than accept it; but if in case they accept it, it should be considered as normal, after all, it is the individual's choice. In other words, Mencius here does not require being a sage as the precondition for an individual to have the freedom to act. The reasonable reading of this passage is that a sage is more likely to seek righteousness rather than life, while a normal person may not act as perfectly as a sage does, but no matter what a normal person chooses to do, the decision he makes is a choice based on his own will. Furthermore, if people refuse to accept food because they value their dignity, this also means that an individual's behaviour is driven by his innate moral inclinations, namely the 'four sprouts' of humans, not by the external enforcement by other people. Therefore, Mencius acknowledge that people have autonomy in the sense that all men are the master of their behaviour because they act according to their moral judgment and, not other people's order or enforcement; although there exists the difference in the degree of development and self-cultivation of the moral inclinations among people, it does not prevent them from having the choice to choose their life independently. To conclude, similar to the my analysis of equality above, it is not the case that Confucianism lacks the element of freedom in the development of individuals as a subject, what is at stake here is how we can deal with the conflicting views about freedom within the Confucian tradition.

So far, we have seen that Confucianism holds a complex view of individuals as a subject. Here is what a Confucian individual looks like. On the one hand, he is born equally in the sense that he is born with some kind of innate and incipient moral inclinations, namely benevolence, righteousness, propriety, and wisdom, and also in the sense that he has the equal potential to become a noble man if he makes an effort to cultivate himself. He is also free in the sense that his behaviour is driven by his innate inclinations, such as feeling disrespect when someone offers food in a humiliating way and feeling

commiseration when seeing someone drowning, rather than from the external order or coercion above. However, on the other hand, Confucianism faces incoherence. First, the role-based ethics defines an individual according to his social roles, such as being a son or a minister and so on. As a result, the duties of a social role are more emphasised than the benefits an individual can get from the role. For example, the duties of a son include obedience to the father and performance of filial piety to parents and the elder, while the benefits a son can get can be hardly found in Confucianism. Second, given that people are defined according to their social role, a hierarchy exists among people. For example, a king is superior to his minister, a husband is superior to his wife and a father is superior to his son, and so on. The existence of hierarchy poses difficulty in realising equality among individuals.

Therefore, to proceed with any helpful discussion, we must accept that the Confucian understanding of individuals is not simply black or white, it holds complex attitudes. Let us now consider the following question: can it be argued that the inequality existing in the hierarchical society is not necessarily a violation of the principles of equality?[530] This question seems self-contradicting, but this exactly reflects the Confucian complex view on this issue, and it is the real question that we need to carefully think about. Nuyen answers the question by distinguishing two aspects of equality, the horizontal aspect involving equals and the vertical aspect involving unequals. He borrows the definition of equality from Aristotle:

> 'Since equality is 'the intermediate between two unequals', equality means the proportionality between the four terms. Thus, if the two parties, A and B, are two equals then their shares of the good, X and Y, should be equal; but if they are two unequals then their shares should be unequal to the same proportion. In general, equality, for Aristotle, requires that equals should be treated equally and unequals should be treated

[530] Nuyen, 'Confucianism and the Idea of Equality', 69.

> unequally. The principle of equality… is violated 'when either equals have and are awarded unequal shares or unequals equal shares''.[531]

According to this definition, his point is that if the people in question are unequals, then the unequal treatment of them is indeed equality, equality in its vertical aspect.[532] Then he believes that since humans are unequal in all aspects, like shape, height, and weight, etc, then what is at stake is not whether the unequal distribution of rights in Confucianism is a justifiable violation of equality, because this is an empirical question and the distribution of rights in practice cannot be done completely proportionately. [533]

Therefore, the crucial question then lies in whether the Confucian measure of merit is appropriate. He finds that Confucianism did not use wealth or nobility of birth as a measure of merit, but uses excellence, which contains natural talents and one's effort to achieve excellence. As Confucianism insists the natural equality, so what makes the difference among people is the effort people put into developing themselves. He concludes that the Confucian measure of merit, excellence, is appropriate because it is committed to natural equality and denies inequality due to the difference of natural talents, but it encourages individuals to develop themselves and ultimately become a noble man. His response to the inequality between father and son, sovereign and minister, and husband and wife, which is called Three-Bonds, includes two points. First, Tung Chung Shu who developed the theory of Three-Bonds, is a politician from the West Han dynasty, not a major Confucian philosopher, so the theory of Three-Bonds is used to emphasise the authority of the king, father, and husband, to maintain the social stability. Second, there is no mention of such doctrines in canonical Confucian texts.[534] For example, Mencius does mention five relationships, namely the relationships between father and son, king and ministers, husband and wife, the old and young and friends, but he does not mention the absolute obedience from the inferior to

[531] Nuyen, 68, cited from Ross W.D. (Trans.) (1980) Nicomachean Ethis (Oxford, Oxford University Press), 112.
[532] Nuyen, 69.
[533] Nuyen, 69.
[534] Nuyen, 64.

the superior; instead, his purpose is to teach people how to deal with each relationship properly: 'between father and son, there should be affection; between sovereign and minister, righteousness; between husband and wife, attention to their separate functions; between old and young, a proper order; and between friends, fidelity.'[535]

Nuyen's effort in advancing the understanding of equality and Confucianism should be analysed further. The contribution he makes to the existing discussion is that he admits that the Confucian understanding of equality is not simply black or white, but it holds complex views about it. However, his response to the critique of inequality existing in Confucianism is problematic in the following two aspects. First, his attempt to exclude the idea of hierarchy from Confucian tradition is problematic. Tung Chung Shu was the minister who gave counsel to the king of West Han that all schools of thought should be abandoned and only Confucianism should be adopted as an official thought and the king accepted his counsel. This event marks the establishment of Confucianism as the official ideology of the Chinese feudal society. Therefore, even though there are some modifications and departures of the early Confucian texts, it is still the development of Confucianism. More specifically, it may be true that Confucius and Mencius do not specify that there exists a hierarchy in each pair of relationships, but it does allow certain kinds of interpretation and development that are based on the role-based ethics. Tung's Three-Bonds theory is such a kind of development, because it is developed upon the Confucian understanding of social relationships, but adds the elements of hierarchy and obedience into each relationship, making it seem more conservative and less friendly to the idea of equality. Therefore, the exclusion of the idea of hierarchy from Confucianism is an attempt to escape from facing the problem of Confucianism.

The second problem of Nuyen's analysis originates from the first problem. As he does not think there exists a hierarchy among individuals in Confucianism,

[535] *The Chinese Classics*, 252.

he does not treat social role as a measure of merit, therefore concluding that the Confucian measure of merit is appropriate. His conclusion is problematic here because hierarchy among people and the obedience from the inferior to the superior is the inequality that exists in Confucianism, and it is caused by using social roles as a measure of merit. Social role indicates an individual's relationships with other people in a society, so when a boy is born, he becomes a father's son and when he grows up and works as a government official, he becomes a minister of the king. Therefore, the inequality caused by social roles is inappropriate because the primary purpose of the distinction of social role is to specify what a specific social role can and cannot do, rather than causing hierarchy and inequality among people. Furthermore, some roles, such as being a son, are determined at birth; as a result, the inequality caused by social roles has little difference from inequality caused by birth which is clearly against the principle that everyone is born equal. Therefore, what we can learn from Nuyan is that he asks a good question and it helps us to clarify equality in different senses, though his answer to this question is unsatisfying for the reasons above.

So back to the focus of my dissertation, can the inequality existing in Confucianism not necessarily pose the difficulty in allowing a Confucian individual to replace the concept of the sovereign individual as the assumption of right-holding? My answer is no. An urgent and important issue here is how to deal with the idea of inequality in Confucianism. As I pointed out above, Confucianism does understand individuals within a social network, namely an individual is defined through his social roles. However, this understanding is subject to certain kinds of interpretation and development. The Three-Bonds theory is one of them as we have seen above, but accepting Confucianism's role-based ethics does not necessarily lead to concluding that there exists a hierarchy in those relationships and the inferior must obey the superior unconditionally. Nuyen is correct in the sense that he points out the Three-Bonds theory was created at that time to serve the purpose of political stability because the emphasis on the authority of the superior over the inferior is helpful to reduce dispute and disagreement, thus maintaining political and

social stability. However, the role-based ethics can be understood in a more general sense. It can be understood that each individual plays a set of roles in society, namely what an individual can do or cannot do under a specific role, but we do not need to say that there must exist a hierarchy in a specific relationship or people in a specific relationship must maintain the harmony of the relationship and avoid dispute. For instance, contemporary China is still influenced by Confucian culture because people still care more about family and emphasise the social roles an individual bears, but it does not cause many difficulties for people to have equality in their relationships. For instance, the absolute obedience from a son to his father can be hardly found in real life, and it is more common to find more disagreement and dispute in a family and society. Therefore, the Confucian role-based ethics is not the culprit that causes the inequality in the Confucian tradition, the idea of inequality was formed under specific historical and political conditions of the Chinese feudal society. A fair judgment of Confucianism here is that it does create the potential that it can be interpreted in the above way and creates inequality among individuals, but this does not automatically mean that Confucianism cannot accommodate modern culture at all. More importantly, whether it can provide an alternative understanding of right-holding still remains unanswered.

So I will argue below why a Confucian individual can be a right-holder from the perspective of equality. First, as a response to the critique that Confucianism only sets up the standard of right and wrong and does not contain any development of individuals, I argue that the ideas of natural equality and moral equality that Confucianism advances are not a standard of right and wrong, but a development of the concept individual. As I showed above, Confucianism believes all men are alike, it also believes that an individual has an equal opportunity to develop himself to become a noble person. The beliefs here are the Confucian understanding and development of individuals because it deals with the issue of what an individual can do, with which a theory of right-holding should deal.

Therefore, we can see that the ideas of equality Confucianism advances above respond to the issues that a theory of right-holding must deal with. First, the idea of natural equality confirms that all men are alike in nature, which mainly deals with the relationship with other people, treating other people equally in the way that we expect to be treated. Second, the idea of moral equality confirms that all men have the equal potential to become noble, which answers the question of what an individual can do, though in the sense of self-cultivating himself, not commodity exchange. Therefore, Confucianism does develop a theory of individuals and it treats everyone as equal in the sense of natural and moral equality. Though Confucian equality has a different meaning than the meaning of equality used by the western theory of right-holding, they are similar in the sense that they settle the issues of what an individual can do and the relationship an individual has with other people.

Now let me move to the concept of freedom. As we have seen above, Confucianism does hold some views that are not very friendly to the development of an individual's freedom, but on the other hand, it holds some views that individuals have the freedom to choose what to do in their life. Following the logic of Nuyen's question above, we can ask a similar question: Is the discouragement individual's freedom in Confucian tradition necessarily a violation of the principle of freedom? A fair answer to this question is it is difficult to deny the reduction of an individual's desires and subduing one's self and return to propriety are not the violation of the principle of freedom, because there exist some limitations when an individual is going to pursue his interests. So the attempt to say Confucianism fully supports and contains the western concept of freedom is simply a distortion of Confucianism. However, this is not the end of our discussion. It is also a fair answer that under some circumstances, individuals have the freedom to choose what they desire, such as the pursuit of righteousness over life.

Therefore, we can take a step back and ask the following questions: does Confucianism develop the idea of individuals in terms of freedom? If so, does

the limitation that Confucianism poses on an individual's freedom necessarily make it impossible for it to develop the theory of right-holding? My answer to the first question is that Confucianism contains the development of individuals in terms of freedom. According to my discussion above, on the one hand, the Confucian concept of freedom deals with the issue of interpersonal relationships. As we have seen above, the principle of reciprocity clearly states that do not do something to others that you do not want done to yourself[536], so this means that Confucianism contains the requirement of what other people should do to respect an individual's freedom. Let me go back to the example that Mencius uses above if an individual dislikes something more than death and chooses to die, then other people should respect his choice because, under the same circumstance, they also expect the same respect for their choice from other people. On the other hand, the Confucian concept of freedom specifies what an individual can do, such as the freedom to do something consistent with righteousness. Therefore, we can see that Confucianism understands freedom not in an objective sense, but in a subjective sense: it contains the development of individuals as a subject, though the Confucian concept of freedom is not exactly the same as the western one.

Then my answer to the second question is that the limitations of freedom found in Confucianism do not necessarily pose difficulty in developing a theory of right-holding. Let me use the example above. As we saw above, Mencius said he accepted the fine silver that was given by the friends of Sung and Hsieh, but he rejected the one that was given by the king of Chi.[537] The reason for acceptance of the former is that the money could be used for essential travel or buying weapons to protect himself, but the reason for the rejection of the latter is that the money was used to bribe him. If we suppose that what Mencius said here is a kind of property right of the former sliver, can the Confucian theory of individuals justify it? Let us see how the western theory of individuals justifies it first. The commodity exchange theory will

[536] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 301.
[537] Meng, *The Chinese Classics*, 215.

argue that Mencius has a right to sliver because there exists an agreement between him and the senders. What will Confucianism say about this here? First, Mencius is an individual with a heart of righteousness, so he can tell it is reasonable to accept money from friends for travel and personal security, but it is unreasonable to accept money as a bribe. What the heart of righteousness functions here is that it sets up the ground for an individual's behaviour, so an individual has the freedom to choose what to do as long as it is consistent with righteousness. Second, Mencius's choices are driven by his heart of righteousness, so he accepts money from his friends but rejects it from the king, and Confucianism can acknowledge that it is Mencius's freedom to do so because his behaviour is in line with the principle of righteousness. If a person loses his heart of righteousness and accepts the bribe, Confucianism will not support he holds a right here as it is against the principle of righteousness. According to the descriptions above, we can find the justification of the property right here is quite similar between the western theory and Confucianism: both allow individuals to make choices in practice but differ on the reasons for people's choices. Therefore, the concern that Confucianism discourages the development of freedom does not pose any difficulty in treating Mencius as a right-holder.

Let me discuss another example. Mencius said that when a king violates the principles of benevolence and righteousness, people can put him to death. If we suppose that what Mencius said here is a kind of political right, such as political participation, what will the western theory and Confucianism justify it respectively? For the western theory, the government is elected by the people, so there exists some kind of agreement between the government and its people that the government should represent its people and promote their interests and people have the rights of political participation, such as voting and hearing, etc. According to this description, we can still find that political rights have the root in the commodity economy, it is a kind of contract 'signed' between the government and its people, and the 'commodity' exchanged here is not tangible items but the government's power and people's rights. For Confucianism, the justification of political rights comes from an individual's

heart of benevolence and righteousness.cc If a king is a tyrant, people then suffer from cruel dictatorship, war, poverty or famine, etc. When these occur, people commiserate with the suffering of their fellows and feel shame and dislike of the occurrence of these things, so political participation, such as rebellion, is their choice to rectify the mistakes that the government makes and to realise benevolence and righteousness. So similar to my analysis of the example above, people have the freedom to rebel against the government because it is in line with the hearts of benevolence and righteousness. The right to life can also be justified here because killing an innocent person is against the heart of benevolence and the principle of reciprocity leads people to avoid killing from happening. Therefore, we can find again that the concern that Confucianism limits the individuals' development of freedom does not actually prevent people from having the freedom to rebel against their king and also the right to life.

So what is wrong with the concern that Confucianism restrains the development of individuals' freedom here? As James Legge points out when Confucius says 'subdue one' self', he does not mean subduing and putting away the self and desires in general, but only the selfish desires in the self.[538] Similarly, he points out that when Mencius says individuals should make the desires few to nourish the mind, the desires here are understood in a bad and inferior sense.[539] This perfectly resolves the concern above: Confucianism only discourages people's freedom to pursue selfish or inferior desires, but, on the contrary, it allows people's freedom to pursue the interests and desires that are consistent with benevolence and righteousness. However, it may be objected that people who participate in commodity buying and selling are usually selfish because they seek the maximum interests: the seller wants to earn more profits and the buyer wants to pay less; as a result, giving up selfish desires means Confucianism still cannot accommodate rights like these. However, this objection is problematic. As we have seen above, Mencius does not treat owning something or the freedom to do something as

[538] Confucius, *Confucian Analects, The Great Learning & The Doctrine of the Mean*, 2013, 250.
[539] Confucius, 497.

selfish; on the contrary, he does not think there is any difficulty for him to accept fine silver from friends because he has a reasonable ground to accept it. Moreover, to pursue something noble and to give up something selfish is the process of cultivating one's self and Mencius already admits that people can differ on this significantly, but the button line is that as long as an individual's choice is consistent with righteousness, we should recognise the validity of his choice even though it may be selfish.

Therefore, we can see that Confucianism develops its own development of individuals, which is embodied in its development of the understanding of the concepts of freedom and equality. But we should note that these concepts in Confucianism do not have the same meaning as those in the western tradition. For example, equality means the equal status people have in commodity exchange in the western theory of right-holding, while it means equal human nature and the equal potential to cultivate oneself in the Confucian tradition. Based on the concept of the moral individual, it provides us with a new understanding of right-holding.

2.3 A Confucian theory of right-holding

It is high time that I expound on the theory of right-holding built upon the concept of the moral individual. My argument is that the necessary but insufficient feature of holding a right is that the right-holder holds a justifiable ground to have the Hohfeldian entitlement(s). This ground could be the prescription of laws, a promise, a contract, or a general legal principle, such as 'Everything which is not forbidden is allowed'. For example, when I hold a property right to my laptop, it means I hold a justifiable ground to have this right, for example, I buy it from the shop, or it is a gift given by my parents whose nature is an agreement between me and my parents that they send me a laptop as a gift and I accept it. The phrase 'justifiable ground' is the concrete embodiment of Mencius's concept of 'righteousness' and 'benevolence' applicable in the theory of right-holding So the justifiable ground that I buy the

laptop from the shop is in line with ‘righteousness’ because I obtain the laptop based on the contract signed between me and the seller.

This theory can explain well the cases that the Will and Interest theories fail to do respectively. Although I argue that there is no difficulty for the Will Theory to grant rights to children, let us see how the Confucian theory of right-holding can explain this case. For example, when a child holds a right to education, it indicates the ground that laws prescribe so and the deeper ground why laws prescribe so is that they recognise that a well-rounded development of a child cannot be achieved without sufficient and proper school education. Now let me turn to unwaivable rights that the Will Theory fails to explain. As MacCormick and Kramer point out, unwaivable rights are those rights that are more important to people, such as the right not to be seriously assaulted, so laws usually deny the right-holder to power to waive the correlative duties. Therefore, when people hold a right not to be seriously assaulted, it indicates the ground that laws prescribe so, and whether the right-holder has a power to waive the correlative duties does not matter here and does not constitute a ground of holding a right. Now let us discuss those rights that are not generally beneficial to the right-holder which the Interest Theory fails to explain. For example, the police have the right to arrest a suspect, and holding this right is not beneficial to the police, but mainly for the interest of the public, as I argued in chapter one. What holding the right above indicates is that an individual holds an occupational role as a police and it is laws that grant the right to arrest to the police. A similar conclusion can be drawn from doctors’ rights, such as the right to operate a surgery or the right to obtain information from the patient. So holding these rights indicates that laws or policies permit doctors to conduct certain behaviours and it also indicates that there exists an agreement between the doctor and the patient: the patient consents to share his medical history with the doctor or consents to a surgery, for instance.

Furthermore, this theory can explain the fundamental feature of holding a right: holding a right entails the protection conferred by the Hohfeldian claim of non-interference against others. The right-holder can receive this protection not only through being a sovereign individual but also through being a moral individual: an individual should not interfere with another individual because being interfered with by another person is what he does not want to happen to himself. This further explains that my theory is not simply a theory about moral standards: the reason why an individual should not interfere with another individual is not simply because it is morally wrong to do so, but originates from a specific conception of individuals, be it the sovereign individual or the moral individual. This explanation is also applicable to all my arguments above.

This theory can also explain the peremptory force of rights. As I pointed out in chapter one, the peremptory force of rights does not mean cutting all deliberation in identifying a right-holder. At the early stage of identifying a right-holder, we have to consider different reasons that oppose and support holding a right respectively and balance them. For example, in the case of legitimate defence, whether the defender holds a right to kill or injure a suspect depends on whether he is facing ongoing violent crimes. If evidence shows that he does face ongoing violent crimes, then he is conferred the right to defend himself, including killing or injuring the suspect. Then holding this right here has the peremptory force because it indicates the ground that the criminal law already confers the right to the right-holder and cuts off all other deliberations. A similar conclusion can be drawn from other rights. For example, when I have a right to my laptop, it indicates that I obtain it through a legitimate ground and this ground cuts off further deliberations; when the police have the right to arrest a suspect, it indicates that they obtain this right through their occupational role as police and this ground cuts off balancing other considerations. Therefore, the peremptory force of rights originates from the peremptory force of the justifiable ground.

My theory may be objected that the concepts of 'righteousness' and 'benevolence' are controversial and subject to different interpretations of what righteousness and benevolence are, then how can we use them in identifying right-holder? This objection is similar to the critique of the third-party beneficiary targeted on the Interest Theory: not all individuals who are beneficiaries are right-holders. As I pointed out in chapter one, Kramer makes a successful defence here because his theory endeavours to summarise the necessary feature of right-holding, not which beneficiary can become a right-holder. Similarly, my theory does not attempt to argue which behaviour that is consistent with righteousness and benevolence can be sanctioned as a right. For example, whether a right to euthanasia is consistent with righteousness or benevolence can be extremely controversial and my theory is going to argue that whether people can have a right to euthanasia even if doing so is consistent with righteousness and benevolence, for instance, doing so may relieve the pain a patient suffers from. However, if one country permits so, such as the Netherlands, then holding this right indicates a legitimate ground to do so and the exercise of this right which is permitted by laws should be considered as consistent with righteousness.

According to the analysis above, the Confucian theory of right-holding has the following advantages. First, it does not necessarily assume an egoistic and isolated individual and the conflicts among people. As we have already seen, one of the problems of the western theory of right-holding Marx points out is that the concept of the sovereign individual assumes an egoistic and isolated monad and treats other people as a limitation of realising one's right. Fairly speaking, the conception of individuals in this way makes sense in property rights, after all, a property may always face the risk that it may be stolen and damaged by others and the right-holder should request others not to interfere with his property, which can be considered as an egoistic behaviour and treats others as a limitation of realising his right. Even though I criticise this concept, I will not deny the reasonableness of how the sovereign individual can well explain the concept of property rights. It can be reasonably understood that Confucianism will accept the inevitability of conflicts and

disputes existing in a society. The principle of reciprocity is formulated exactly to deal with this issue: the reason why Confucianism asks people not to do something to others if he does not want the same thing to happen to him is that it is possible that interfering with others can occur all the time. However, not all rights need to be assumed as an egoistic individual. As I pointed out above, having political rights, such as political participation, does not necessarily benefit one's interest, but mainly the interest of the public, so an individual here is not egoistic but altruistic. For example, a white man may exercise his political rights to support the promotion of black people's rights. The white man here can be altruistic rather than egoistic because he may believe we should promote the public good by supporting black people's rights and he treats each individual as the internal part of the community rather than alien to it. The concept of the moral individual can well explain cases like this. As we saw above, the reason for the political revolution Mencius advances is that if the king is cruel to his people, people can rebel against him and make things correct out of the sprouts of righteousness and benevolence. People's behaviour here is clearly not egoistic but altruistic and assumes the connection rather than the separation between individuals and the community. Furthermore, the concept of the moral individual can also explain property rights without relying on the assumption of egoistic individuals. As I just argued above, holding a property right indicates a justifiable ground that the way the right-holder obtains the property is consistent with righteousness. Mencius's example of receiving money from friends tells us that he can accept the money from his friend because he needs that money for travel or personal security, but if there is no reason to receive money, then it is a bribe from others. Therefore we can see that even without the assumption of egoistic individuals, right-holding can still be justified.

The second advantage of the Confucian theory of right-holding is that it is not committed to the mistake of inverting the logic between subjects and objects. As I pointed out in the first three chapters, the Will and Interest theories are in essence commodity theories that are based on the concept of the sovereign individual whose root is in the commodity economy. Therefore, they have to

rely on either the concept of control or the concept of interest to define the subjectivity of the right-holder and they fail to explain the subjectivity of the right-holder when the concept of control or interest is missing in certain cases. Let me use the example of rights conferred by being a police. Both the Will and Interest theories encounter difficulties in explaining this right. The Will Theory cannot explain it because the police do not have the Hohfeldian power to waive the duties and the Interest Theory cannot explain it because holding this right is not beneficial to the police, but mainly for the public. On the contrary, the Confucian theory of right-holding can well explain this right. First, given working as a police can make a contribution to the maintenance of safety and order in a society and it is also how an individual can cultivate himself, then if one chooses to become a police, he has the freedom to become a police and his choice here is consistent with the sprouts of righteousness and benevolence. Second, when an individual holds a right to arrest a suspect, for instance, it indicates a legitimate ground that the police are legally permitted to arrest a suspect, which ultimately corresponds to the point above that it is an individual's freedom to work as a police and this choice is consistent with the sprouts of righteousness and benevolence. Therefore, the subjectivity of the right-holder under the Confucian theory of right-holding is not defined through the concept of control or interest, but through the justifiability of certain behaviours.

Similar reasoning can be applied to political rights. First, if an individual is conceived as egoistic and separated from his community, it is difficult to understand how they can exercise political rights whose purpose is mainly to promote the good of the society. This is how the Will and Interest theories are hampered by this difficulty. This right only makes sense when an individual is conceived as moral and owns the sprouts of righteousness and benevolence which could lead him to do something beneficial to the society, not just for himself. Second, when an individual holds a political right, such as the right to vote, it indicates a legitimate ground behind holding this right which ultimately corresponds to the point that voting in an election is consistent with an individual's sprouts of righteousness and benevolence. Therefore, the

subjectivity of the right-holder in this case is defined through the legitimacy of voting in an election, not through that exercising this right benefits the right-holder nor that an individual has a control over the affair.

3. Conclusion

In this dissertation, I argue that the existing understanding and debate of the concept of rights is largely limited by the acceptance of the concept sovereign individual, whose prototype can be traced back to the capitalist commodity owner. I argue that we should not be limited by this assumption only, and see if there is any other conception of individuals that can be served as the assumption of right-holding. Then I narrow down the question to that if the core of the western theory of right-holding lies in the word ‘sovereign’, can we find another adjective as an alternative? As a Chinese researcher, I finally resort to Confucianism and the adjective I find is ‘moral’ in a Confucian sense, and I argue that the Confucian moral individual can be developed and defended as an alternative assumption of right-holding. It is important to avoid a misunderstanding that what I did was not trying to find some so-called Confucian concepts of rights in Confucian literature. The nature of my work is to argue that besides the ‘sovereign’ individual, the Confucian ‘moral’ individual can also be used as the assumption of right-holding. As I have discussed above, we can see that we do not necessarily have to accept the concept of the sovereign individual as an assumption of right-holding, while the Confucian individual shows its capacity to explain most types of rights we have and also avoid the problems caused by the sovereign individual.

The contribution of my research is that it helps the west and China to understand this concept better. For the western theorist, it can offer an opportunity for theorists to take a step back from the deadlock of the debate between the Will and Interest Theories and realise that they are no more than explanations of a sovereign individual from different perspectives. My main contribution to western literature is that I point out a new direction of how can we reflect the western theory of right-holding, which is to ask ourselves

whether ‘sovereign’ is the only reasonable adjective to describe individuals and then use it as the assumption of right-holding. My conclusion is that no, and I find that the Confucian moral individual is the alternative. For Chinese theorists, it avoids a complete acceptance of the dogmatic Marxist understanding of rights, as it can lead to an extreme of understanding rights as a pure instrument of ideology and the early Chinese practice has shown us the problem of this. It also shows us that the attempt to show there exist some kinds of Confucian concepts of rights by finding some textual evidence in Confucianism is to over-simplify the research question because it is simply impossible for Confucianism, as a theory dating back 2000 years ago, to have such a concept that only appears after the development of capitalism, and it only causes more confusion of the meaning of rights rather than improving our understanding of it. My other contribution to Chinese literature is that I point out the correct approach is to think about whether the Confucian conception of individuals can be used as a proper ground for right-holding and I prove that the Confucian moral individual can explain right-holding while avoiding the problems caused by the western and Chinese theories.

My dissertation is not the end of the journey to reconstruct the theory of right-holding, it is just a beginning in a new direction.

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