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QVADIA EZRA

# THE WITHDRAWAL OF RIGHTS

*Rights from a Different Perspective*

KLUWER ACADEMIC PUBLISHERS

# THE WITHDRAWAL OF RIGHTS

Rights from a Different Perspective

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## THE WITHDRAWAL OF RIGHTS

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STUDIES IN EPISTEMOLOGY,  
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## INTRODUCTION

This study seeks to participate in, and to advance, a widespread tradition in the contemporary ethical-political discussion, which is usually called “rights-talk”. This tradition has gathered momentum during the last two generations, mainly as a result of the dissatisfaction with some conclusions that follow from consequentialist or utilitarian attempts to resolve moral dilemmas or moral conflicts. Such attempts might well result in some decisions that seem morally monstrous in certain cases, where a pure utilitarian calculation may justify the cause of a minor injustice, in order to avoid a major harm or hardship. A utilitarian consideration might justify, for example, the injury of an innocent person, in order to save the lives of some (or even many) others. However, such conclusions strike at some of our fundamental beliefs regarding justice, fairness and humanity. We have the feeling that in these borderline cases, there is an irreparable conflict between consequentialist theories and some of our accepted moral values.

As a reasonable way to overcome such conflicts, we assume that people have, as individuals, some basic interests that must be protected and should not be denied even for the sake of social utility, great as it may be. These interests, when they receive the acknowledgement of the social framework as valid, are considered as rights, and as rights they protect the individual’s interests, and can compete with other moral considerations such as the common good or the rights of other individuals. A theory in which the normative codes are used as instruments for protecting interests and rights of individuals is usually called a “right-based theory”.<sup>1</sup> Although there are many possible justifications for protecting rights of individuals (such as duty-based or goal-based theories), right-based theories are those that serve most frequently for this purpose.

In my view, when we base rights on interests, we do not wish to imply that only those interests which are protected by rights are more important than other interests. We also do not mean that these interests have a lexical priority over other interests (that is, that these interests should be fully satisfied before fulfilling the other interests). We mean that the rights that

protect those interests are not merely "side constraints" on actions of others, as Nozick considers them. We intend to say that they can function as grounds for explicit and obligatory demands from certain individuals or bodies.<sup>2</sup> In Dworkin's terminology, we can say that a possessor of a right has a "trump", which can override other moral considerations.

This study adopts the Rawlsian concept of the role of rights in society. According to this concept, rights function as a final court of appeal in ordering conflicts between claims of moral individuals.<sup>3</sup> This means that rights confer upon their possessors a valuable moral status that can justify the imposing of duties and burdens upon others, including limitations upon the liberties of others. Such an approach towards rights requires that the main part of any discussion regarding rights will be dedicated to defining the legitimate restrictions that may be imposed on others, when exercising these rights.

However, in order to discuss the benefits involved with the moral status of a possessor of rights, as also the burdens it imposes upon the duty-bound persons (or corporations which are considered, for our purposes, as "artificial persons"<sup>4</sup>), we must set out the semantic realm within which rights acquire their meaning and validity. In this realm the term "right" is only one of many moral terms which, when considered as a whole, create its sense and its obligatory status. To this realm belongs our understanding of norms, aims, desires, justification, validity, etc. Our concept of a right is derived from our understanding of its relation to the other normative terms within this realm.<sup>5</sup> This entails that the sense and validity of a right will be coherent with the ethical and political theory, within which this right is claimed.

We assume that validating a right is possible only within a normative system, whether this system is legal or moral. This validity should reflect our moral and political view, which is the collection of our normative beliefs joined into a coherent and consistent set. When we consider a right as valid, we at once define the identity of its possessor and what is to be done in order to enable her to exercise and capitalize on this specific right. This includes the range and weight of the right, and the mutual linkage between the possessor and the other partners to the social interaction. Most of our acknowledgement of the validity of a right, relates to the efforts to ensure the possessor the ability to gain the benefit from her moral status, and to guarantee that she is aware of her moral status, which entitles her to possess this right. The more people recognize the significance of rights to their coexistence, the more will there be interests, which are acknowledged as rights in that society.

The desire to internalize the idea, that rights are moral assets that people should acquire in the course of their membership in a common framework (a



state or a community), also finds its expression in the theoretical discussion of rights. Most of the discussions within rights-talk concentrate on the significance of conferring, bestowing and possessing rights. They deal intensively with the sets of safety and protection constraints required for a successful exercising of rights. The main goal of these discussions is to inquire into the validity of right-claims, and the range of their applicability. Most of the participants in rights-talk intend to minimize the possibility of violating or denying people's rights, and try to support the goal of providing as many rights to as many people as possible.

In this study I address another issue, and deal with rights from the point of view of their withdrawal. I want to inquire into the conditions and circumstances under which rights lose their validity, and in which it is justifiable to withdraw these rights from possessors who already possess them (by taking them back or limiting their range), or deny them to potential possessors who claim to have them (by not bestowing them). This does not mean to say that I ascribe less importance to the possession of rights, or try to reduce their significance and status within the community. The opposite is true. In order to prevent the erosion of their role in society, and to encourage their obligatory status, I think that we should prevent unjustifiable or excessive use of rights. This would strengthen the reality of possessing rights by those who justifiably exercise them. The stringent application of the conditions for the possession of rights, would strengthen the validity of the possessor's claims, and increase the obligation of the community to guarantee the possessor's ability to capitalize on her rights. On the other hand, this stringency increases the commitment of the community, to avoid situations where people enjoy rights that they are not entitled to possess. This would add some additional significance to the possession of rights.

However, in order to define the conditions and circumstances under which rights lose their validity, we must form a framework within which rights are valid. This framework defines the relations that a right establishes between its possessor, respondent and their surroundings. It also defines the content of a right, its conditions of validity, and the mutual linkage between the moral concepts that create the moral status of a right. I deal with these issues in the first chapter of this study.

The first chapter lays down the conceptual framework within which I discuss, in the following chapters, the possession and the withdrawal of rights. In that chapter I present my overview of the content of rights, which I presume can exist solely within a normative system, whether moral or legal, and apply only to things that are valuable to their owners. Among the different ways of regarding rights, I prefer, in this study, to consider them as "affirmative claims". The main reason for this is my desire to consider

interests as rights, only when there is a specified respondent, who is duty-bound because of this interest, and is obliged to fulfill it. I also prefer not to consider rights merely as justified claims, but to accept Joel Feinberg's concept of rights as "valid claims" – that is a justification within a system of rules.<sup>6</sup>

Another characteristic of the view that is presented in the first chapter is the assumption that the possession of a specific right includes the possession of all the necessary conditions for exercising this right. Here I follow Henry Shue, who expresses this view by saying: "If everyone has a right to y, and the enjoyment of x is necessary for the enjoyment of y, then everyone has a right to x".<sup>7</sup> This expresses the desire that the possessor of a certain right will be able to capitalize on (that is, to successfully exercise) her right whenever she prefers to, and also the desire that this right will not turn out to be an abstraction that exists only in theory. Such an attitude places welfare and human rights at its center and insists that these rights should be concrete and applicable.

The second chapter continues to develop the conceptual framework within which this study takes place. It deals with the identity of possible right-holders, or with the question: who is capable of possessing rights? To this question there are two leading answers. One is to define a possessor of rights in individual terms. I use the term "agent-relative" to identify this approach, whose main idea is to ascribe rights to persons according to some individual characteristics, that mainly relate to the perceptual, cognitive or mental abilities of the agents. As a representative theory of this approach I choose Alan Gewirth's theory of rights, as introduced in his book *Reason and Morality* (1978). This theory concentrates on the moral agent, and ascribes rights to an agent because of her following the Principle Of Generic Consistency (PGC). According to Gewirth, being a purposive-prospective (that is, "rational") agent entitles a person to possess the generic features of action: freedom and welfare (which are necessary for the definition of an event as an action). When such an agent also acts in accordance with the PGC, she is entitled to possess rights. Since the rights of a person are based on her mental capacities (and more specifically on her following the PGC), she possesses them regardless of her social status or social role.

The other leading answer that is discussed in the second chapter, considers moral agents as members in the moral community. I use the term "communitarian" for describing such theories, and choose A.I. Melden's theory, as this was introduced in his book *Rights and Persons* (1977), as a representative theory. In this theory, those who share a certain set of moral and normative conventions, principles and rules, are considered as members in the same moral community. This status bestows upon them certain rights,

but requires their fulfilling of some duties and obligations that they bear as members. Within the community there must be sincere mutuality and reciprocity between the members, in order to enable all of them to exercise and capitalize on their rights. However, this makes the moral status of the members, as possessors of rights, conditional to their fulfillment of their commitments and obligations towards the community within which they “transact”, that is, actively pursue their rights and duties.

My preference in the second chapter is for the communitarian approach, mainly because it gives a better guarantee for the fulfillment of rights, by those called upon to respect them. In my view, the community is necessary in order to ensure its members the ability of exercising their rights, and in this sense it functions as a guarantor of these rights. This function is crucial especially with regard to human and welfare rights, which are my main interest. These rights are usually addressed to the community or the state. Prior to the existence of the community, these rights have no respondent, and hence cannot be exercised by their possessors. Additional confirmation for the significance of the community to welfare and economic rights is to be found in Gewirth's more recent book: *The Community of Rights* (1996). Even Alan Gewirth, whose basic position is Kantian (and this makes his theory an outstanding representative of agent relative theories), acknowledges the significance of the community for the welfare of human beings. In this book he considers “The Community of Rights” as:

“A society whose government actively seeks to help fulfill the needs of its members, especially those who are most vulnerable, for the freedom and well-being that are the necessary goods for human agency, when persons can not attain this fulfillment by their own efforts”.<sup>8</sup>

However, in order to identify who can have an “entry-ticket” to the community, I use the terminology that is used in agent-relative theories. I determine some individual or subjective requirements, that function as the criteria for assessing the extent of agency to which the agent can attain, when entering the community. To these criteria I add some communitarian requirements for moral agency, which together with the subjective requirements, create the status of a moral agent who can possess rights. The extent, to which a member is entitled to possess rights, depends on the extent to which this member actually fulfills both kinds of requirements. In essence, this is an expansion of Gewirth's Principle of Proportionality, which originally referred only to the subjective requirements. Here, this principle is used also for the communitarian requirements, which can change the moral status of the member, when they are not sufficiently fulfilled.

The main idea of my concept of possessing rights is that the actual measure of their possession by the moral agent, as a member of the community, should be conditional and proportionate to the actual fulfillment of each requirement (individual or communitarian) by this possessor. Whenever there is an incompatibility between a member's entitlement to have a certain measure of rights, and the actual measure of possession, the community has to rectify this by matching the correct measure of rights to the member's entitlement. When a member possesses fewer rights than she deserves, the community must bestow upon her the missing rights. On the other hand, when she possesses more rights than her measure of fulfillment of the requirements for having these rights entitles her to possess, the community has to take away the excessive rights from this member. This matter is the topic of the third chapter.

In the third chapter I present my view concerning the conditions and circumstances within which rights do not apply, or should be withdrawn. This chapter continues the line of argument of the previous chapters, and considers the validity of a person's claims (that is, regarding her rights), as resulting from the acknowledgement of these claims by the community. This acknowledgement is given according to the fulfillment of the necessary conditions that were defined as bestowing these rights. The extent to which these conditions are fulfilled, determines the extent to which the community allows the possessor to have her moral status. In this chapter I argue, that since the possession of rights results from interrelations between members of the community under certain conditions and circumstances, changes in these relations or circumstances affect the moral status of the possessors, and accordingly, affect their possession of rights.

The components of a fully specified right, namely the conditions of possession and engagement, its weight, addressee and range, create both the conditions where this right can be exercised, and where this right does not apply. When the community decides that one or more of these conditions are not sufficiently satisfied, the possessor's entitlement to keep his right is reduced, and accordingly the range, scope or power of this right may be reduced or canceled. If so, it is the community's obligation to withdraw the excessive part of the exercising of this right, or even to completely withdraw the right. This may be clear and easy to implement with regard to legal rights, whose validity results from clearly stated rules. However, when dealing with moral rights, whose validity results from principles, the assessment of both, the extent to which the above conditions are fulfilled, and the appropriate measure of rights that should be conferred or withdrawn, will always be approximate and uncertain. This fact entails that the

community should be very careful and cautious, when deciding on the withdrawal of moral or human rights.

The next two chapters (chapters 4 and 5) are used as test cases for my position regarding the withdrawal of rights. In these chapters I try to implement the guidelines for the withdrawal of rights in specific issues. I deal with these issues from a right-based point of view, but try to show how my position relates to the main approaches to these issues, which have been discussed in the literature. This requires of me that I offer an exposition of these existing approaches at least as background for my discussion, at the beginning of each of these chapters.

The fourth chapter of this study deals with the most frequent case of the withdrawal of rights, which is the case of punishment. I offer an exposition of the two leading approaches to the matter of punishment: the forward-looking, that is, mainly based on utilitarian considerations, and the backward-looking, which is based on retribution. I argue that the justification of punishment is best considered at two levels. The first of these is the justification of the very *practice* or *institution* of punishment, which deals with the question, why do we punish at all. The second is the matter of the justification of a *specific case* within this practice, and thus answers the question, why do we punish a specific offender. The forward-looking approach suggests a reasonable answer to the first question, while the backward-looking approach provides a better answer to the second question. So, it becomes apparent that in order to justify punishment in general and in particular cases of punishment, we have to provide a justification that includes both forward and backward-looking considerations.

This method of dealing with punishment leads me to prefer an approach that has been called "fair-play retributivist" or "right retributivist". According to this approach, there must be an equal share of burdens among the members of the moral community, and every participant has to respect his obligations as a member. When an offender commits a crime, he disturbs the balance between the obligations and rights among the community, inasmuch as he enjoys the benefits of the social cooperation without shouldering its burdens. Hence, he enjoys rights that he should not have, and these rights should be withdrawn from him. This way of justifying punishment answers the questions why there is a duty to punish, and why this duty is imposed upon the community. The community, as the authority that allocates and controls the balance of rights and duties among its members, has to guarantee the proper use of rights, and the sufficient fulfillment of obligations within the community. In cases of distortion in the use of rights or in fulfilling duties, it has to reassess the possession of rights

by those who cause this distortion, and confer rights according to the possessors' new entitlement.

This method of justification is also used for the case of capital punishment, which is also discussed in the fourth chapter. I suggest certain conditions and circumstances within which this punishment may be considered as legitimate. After presenting the main arguments used by Abolitionists, who oppose this penalty, and Retentionists, who support it, I offer my view regarding capital punishment. I maintain that this penalty may be imposed for cruel and vicious crimes that are committed by culprits who were sentenced to life imprisonment, prior to the crime for which they are sentenced now. This is because we want to preserve a balance between the severity of the crime and the gravity of the punishment. Imposing another life imprisonment for the additional crime, will be, in fact, abstaining from punishing the offender, because he then enjoys the same rights that were possessed by him before the additional crime. This would be a distortion of the principle that requires a correlation between the rights that a person is entitled to possess, and the rights that this person actually possesses. This would also be unfair towards the other prisoners who are sentenced to life-imprisonment but did not commit another crime. The "fair play retributive" or "right retributive" approach, which imposes upon the community a duty to punish offenders, demands that the community will not ignore the additional crime, and thus must withdraw the only right that is yet possessed by the offender. Of course, there must be some constraints that arise from the irreversibility of capital punishment, such as the demand for a unanimous decision among judges and jury, and the possibility of appealing to a higher instance before the execution. In my opinion, the death penalty may, in certain circumstances, be considered legitimate.

The last part of the fourth chapter deals with social (as opposed to legal) withdrawal of rights. In this part I examine the phenomenon of "outing" (i.e. the exposure of the sexual orientation of homosexuals and lesbians) and its ethical aspects, from a right-based point of view. I argue there, that a person's right to privacy with regard to his sexual orientation should be respected even when this person is a public figure. However, when this person attempts to insult, hurt or strike at homosexuals or at their rights, while he is himself a homosexual, his "outing" is justifiable. This is based on the fair play retributive attitude towards the withdrawal of rights. A person, who wishes to injure or violate the rights of others, should suffer by being deprived of some of his rights. In a case where the appropriate way to punish him is by exposing him to the dangers and threats from which other homosexuals suffer, his homosexuality should be disclosed.

The fifth chapter deals with cases where rights are denied to possible or future right-holders, who are not yet considered as full-fledged members of the moral community. These possible right-holders do not sufficiently fulfill the subjective requirements for agency, and hence they can be considered only as partial members of the community. In other words, their "entry ticket" to the moral community is only partly valid. The extent to which they possess the subjective requirements for agency, entitles them to possess some, but not all, of the rights that full-fledged agents enjoy. Other rights are denied to them, permanently or temporarily, in order to adjust their actual possession of rights to their correct level of agency.

The fifth chapter examines three issues. The first is children's rights. These rights should be limited to the extent to which the children can be considered as responsible, or the extent to which they possess the subjective requirements for agency. This means that during their maturation, children gradually acquire more rights and liberties, according to their moral and mental development. When they are fully mature they enjoy the status of full members of the moral community, and should enjoy all the rights that such a status entitles.

The second issue that is discussed in the fifth chapter is the rights of fetuses, in the context of the morality of abortion. The discussion of this issue requires the discussion of two different aspects. The first is the alleged blow at the sanctity of human life, and this matter is discussed only in brief. The second is the ostensible violation of the fetus' right to well-being. I deal with this issue as a conflict between the mother's rights to freedom, well-being, autonomy and self-determination, and the fetus' right to existence and well-being. However, this conflict is usually of a forced-choice kind, where the rights of the two parties cannot coexist, and the fulfillment of one of them abolishes the right of the other. The community, as the respondent of these rights cannot provide for the fulfillment of both, and hence has to decide in general, and perhaps also in specific cases, which right overrides the other. I argue that this conflict should be resolved according to the possessor's moral status within the community. Accordingly, since the mother is an actual (and a full-fledged) member of the moral community, while the fetus is only a future member (and hence is considered as placed in a lower moral status), the mother's rights in general override those of the fetus, and abortion is legitimate. In cases where there is a possibility of responding to both claims and saving the fetus' life (cases of late abortion which is, in fact, early delivery), the community has to make as many efforts as it can to respect the fetus' rights and give it life.

The third issue discussed in the fifth chapter is that of the rights of mentally retarded persons. The limitation of their liberty rights is based on a

justification, which is similar to the limitation of children's rights, namely, the ascription of only limited responsibility and autonomy to mentally retarded persons. This explains why we deny them some liberty rights. However, while children's rights are usually denied only temporarily, the rights of mentally retarded persons are usually denied permanently. This difference requires that we should be much more careful with regard to the denial of the rights of mentally retarded persons. I discuss a few cases where such rights are in doubt. The first one concerns their right to consent or refuse to medical treatment, where I argue that the only case where this right should be withdrawn from them is when the treatment is necessary for saving their lives. The next issue that is questioned is their reproduction rights. This issue is divided into two questions. One is whether they have a right to parenthood, in the sense of giving birth to babies. My answer to this question is strictly positive. This means that I oppose compulsory castration or sterilization, and even the compulsory use of contraceptives. The second question, whether mentally retarded people who have children have a right to bring them up by themselves, is much more complicated, because a new factor appears: the right of the newborn babies. My answer to this question is less decisive. I argue that when all possible assistance of the community will not be sufficient to guarantee the children's decent growth and development, the community should consider removing the children from their parents' guardianship. I think that this should be the last resort to be considered, in order to protect the children's right to a secure future, as Joel Feinberg calls this basic right, because this act brutally strikes a blow at the parents' rights. However, in serious or acute cases of mentally retarded parents, this has to be done, in order to guarantee the children's welfare, well-being and even safety and security.

As the reader will probably notice, this study has been deeply affected by Alan Gewirth's theory, which inspired me to start dealing with rights in the first place. I use many of his ideas, even though not always in a way that he would agree with. This mainly refers to the implementation of his terminology and his principle of proportionality in a basically communitarian right-based theory, which he principally rejects. However, even though his epistemological project that establishes moral agency, and hence the possession of rights on the basis of consistency is logically valid, I choose not to content myself with only the subjective requirement of rationality, in order to possess rights.

Gewirth argues that since the agent's right-claim is based on his own agency needs, it is "prior to and independent of a community or social rules, except in a certain minimal sense".<sup>9</sup> He assumes that the addressees of a person's claim can understand this claim and comply with it, and this



understanding and ability do not involve social rules or institutions, that would incorporate or sanction these claims. I will not enter here too deeply into the debate with MacIntyre, Frankena, Ross and others<sup>10</sup> whether a claim-right can *exist* prior to the existence of a community or not. Instead, I will deal with a related question, whether we can *ensure* or *guarantee* the fulfillment of a right, prior to the existence of the community. In this matter, I think that the respondents' understanding is not sufficient for their acceptance of the burdens to fulfill their duty. I think that a person's understanding of himself as being theoretically *obligated* by a duty, is different from his readiness to see himself as genuinely *bound* by the duty.

The question of whether a person's innate desire to be consistent obliges her to do what she morally ought to, depends on our meaning and understanding of the terms "consistency" and "ought". However, in the sort of the pre-communal understanding to which Gewirth presumably refers, it is the person's free choice to comply with her obligations to others, or to abstain from doing so. A similar argument has been raised by Jacob Joshua Ross who claims that from the fact that a person's action logically requires that she will have generic rights, it does not follow that she has a moral right to demand the fulfillment of her needs. This is because rights are not derived from logic, but from the moral relations accepted by the community. Ross regards Gewirth's assumption that if a person logically has to have something, then she also has a moral right to demand this thing, as merely an example of what Joel Feinberg calls "rights in the manifesto sense". These are valid claims to something, but as yet constitute no claim against any respondent whose duty it is to provide for these claims.<sup>11</sup> I think that in order to make such rights concrete or applicable, we need the community to function as their guarantor or bailor. If the community recognizes them as valid claims, it has to either nominate their respondents and make sure that they fulfill their duties, or to be itself the respondent who is duty-bound to fulfill these rights. This is, in fact, the case for moral rights, human rights, welfare rights and economic rights; without the existence of the community, these rights do not have a respondent. If we want these rights to be concrete or "real", we must have the community's acknowledgement of them as valid claims. Thus the desire to ensure the actual fulfillment of rights, and to guarantee that their possessors will be able to exercise and capitalize on them, leads me to the communitarian approach, where the community exists even prior to the possession of any right. When the community acknowledges the validity of human rights or welfare rights, it simultaneously acknowledges that these rights impose duties on the community itself. When we deal with claim-rights whose respondent is not the community, and their respondent denies her correlative duty, the