

CHAPTER 1

THE CONCEPT OF RIGHTS

The most decisive issue in formulating a theory of rights (or a theory of the withdrawal of rights) deals with the question: "What can be conceived as rights?" This question relates to the epistemological, ontological and normative status of rights. The present study concerns itself mainly with the social function of rights: it therefore skirts epistemological and ontological matters, and concentrates on the ethical and political status of rights. Accordingly, I do not address the question regarding what kinds of entities rights are. At most I relate to the questions of how do we recognize rights, their content and validity.

However, any discussion regarding the content, validity, scope or practice of rights has its meaning within a certain "semantic realm"¹². This realm is attached to a normative system, which includes its fundamental notions, rules, common beliefs and conventions. Judith Jarvis Thomson describes this metaphorically by:

"Thinking of morality as a continent and of rights as a territory or realm somewhere in it; understanding what is within the realm of rights requires getting a sense of where in the continent it lies".¹³

By saying this she means that:

"The concept of a right is only one among many moral concepts, and understanding what it is to have a right requires us to get a sense of how that concept is related to the others".¹⁴

This idea is widely accepted in different variations, and it became a reference point in most of the arguments in and around rights-talk. Ronald Dworkin, for example, assumes that a theory of rights has to be related to other elements of political theory¹⁵, and expresses the commonly held axiom regarding the dependence of rights on the political, social and moral basis that constitute the meaning and validity of rights. This attitude brings the discussion about rights to the realm of norms¹⁶, goals, aims and, essentially,

powers and liberties – which are the main elements of human interrelations and conflicts.

Having a right gives its owner some kind of what Thomson denominates as “valuable moral status”¹⁷, or what Melden calls the “normative status a human being has with respect to others”.¹⁸ The content and category of that status are, however, determined by an overall legal, moral and political world-view. This view locates the right in the appropriate context of social life, as a conclusion of some fundamental decisions about the nature of rights. Among these decisions are our resolutions to questions about the connections between rights and interests, the correlation between rights and duties, and briefly, what do we mean by a right. Additional decisions we should make are whether rights are (affirmative) claims, entitlements, side constraints upon others’ actions, “trumps”, established ways of acting, etc.

Another decision to be made is this: at what level of urgency should we begin to consider the need to fulfill rights? On the lowest level, rights can be considered as important interests that get more weight than interests that are not protected by rights. Here, rights are considered as special interests whose fulfillment gets high priority. A more stringent level gives interests protected by rights, a “lexical priority” over other interests (which means that they have to be fully satisfied before other interests are taken into consideration). At this level, interests, which are protected by rights, have to be taken more seriously, and be fully fulfilled before we turn to the fulfilling of other social or moral obligations or requirements. The third and highest level of obligation at which we can consider the fulfillment of rights, sets up rights as an obligatory basis for strict constraining requirements on others’ actions¹⁹ or even a basis for limiting the freedom of others.²⁰ At this level, rights can also impose limitations on the actions of others, or even impose requirements that others should abstain from certain actions. However, there is another way to evaluate rights, without a direct reference to interests. From this aspect of evaluation we have to decide whether we consider rights as “trumps”, in Dworkin’s terminology, and hence function as what Rawls defines as a “final court of appeal for ordering the conflicting claims of moral persons”.²¹ Such an attitude toward rights sometimes requires us not only to impose constraints on others, but also to take concrete actions to fulfill the rights. This concept of rights involves, at least, “some sort of normative direction on the behavior of others”, as Rex Martin carefully formulates this demand.²² Such an understanding of rights means that the acknowledgement of one’s claim as a right includes, inter alia, the assurance that the relevant respondent will carry out the requirements that are demanded by that right. Otherwise the fulfillment of the above right may be subject to the respondent’s good will or benevolence. At this level,

possessing a right also includes having all the necessary conditions and means to capitalize on that right. It means that the owner of a right has a real capability of exercising his right. Henry Shue, who holds such a position, maintains that: "If everyone has a right to y, and the enjoyment of x is necessary for the enjoyment of y, than everyone has a right to x".²³ The acceptance of such a sense of rights, urges the participant of rights-talk to accurately define each element and component of the concept of a right, and to create a scheme in which having a right means having some moral status or moral assets.

In the coming pages I map the semantic realm in which my discussion takes place, and present my concept of a right. In brief, I give reasons for my preference for considering rights as valid claims that exist within a normative order and are justified within a system of rules or principles. I also regard them as interest-related and as including their "conditions of engagement", that is, having a right includes having all that is necessary to exercise it.

1.1 SOME AGREEMENTS ABOUT RIGHTS

In the broadest sense, rights can be conceived in accordance with Tibor Machan's formulation: "*social conditions that ought to be maintained*, [or] moral principles pertaining to aspects of social life"²⁴. These expressions capture the implication that rights are a set of normative rules or demands that must be retained in order to sustain the social framework and to make social interactions possible. Besides such a general description, there are many details that can be accepted as common characteristics of rights, as discussed in different sorts of rights-talk.

The basic convention about rights is that they "belong within normative orders"²⁵, or have a substantial meaning within common and acknowledged normative frameworks. This gives rights not only validity, but also an obligatory status. Without the existence of a normative system, there cannot be any power, force or authority to rights or to right-holders. (In chapter 2, I discuss the significance of rules and principles to the existence and validity of rights). Their colleagues can simply disregard or ignore the rights or the duties that are imposed by these rights. The normative order within which rights are claimed, ensures the possessor of a right that her claim is not only recognized but also respected. The postulate of having a normative system as a preliminary demand is parallel to the claim that rights need a background (and an endorsement) to which they refer, and from which they get their meaning and validity (the "realm of rights"). At the theoretical level this



<http://www.springer.com/978-1-4020-0886-3>

The Withdrawal of Rights
Rights from a Different Perspective

Ezra, O.

2002, XX, 284 p., Hardcover

ISBN: 978-1-4020-0886-3