

CHAPTER 3

THE WITHDRAWAL OF RIGHTS

The framework within which this study takes place, considers rights as valid claims, that is, claims that are justified within a system of rules. The validity of these claims is grounded on a certain description, which is held sufficient for justifying the claims, of those who fit this description.¹³⁸ In this sense, the possessor of rights can simply be considered as the person holding a set of qualifications, which certifies her status as a right-holder. The way I describe a possessor of rights entails the possession of some individual mental capacities, together with some normative requirements, that are part of the agent's membership of the moral community. Both individual (or "agent-relative", or "Kantian") and communitarian requirements, so lexically ordered, create justifying grounds, which is not only the necessary but also the sufficient condition, for ascribing moral agency to someone. Of course, both kinds of requirements need to coexist, since the moral agency results from the existence of an aggregate of characteristics, whose combination creates the moral agency. Each of these sets of characteristics can be considered as a necessary condition, but only their conjunction creates the validity of the claims, or the justifying grounds for possessing rights.

When the conditions and circumstances, under which one becomes a possessor of rights, are fully defined, we can decide to what extent that person should possess her rights. The possibility of determining degrees of possession of each component of the qualifications for possessing rights creates the possibility of determining the degrees of one's possession of rights. An absence of some components, or insufficient measure of any of them, undermines the validity of the claims that are supposed to be justified by the existence of these components. This is the starting point of my discussion about the withdrawal of rights. When considering the level of a person's moral agency, we actually determine the level of the possession of rights to which she is entitled, and if there is incompatibility between these levels, we have to adjust and regulate them. The adjustment might be performed in both directions: on the one hand, we can bestow rights that one is entitled to have but as yet does not actually possess. However, on the other hand, we can withdraw rights that the person is not entitled to possess.

The withdrawal of rights can be justified in different ways. At one level, rights can be denied temporarily, until one fulfills some requirements lacking at the moment. When this situation is changed, and these requirements are sufficiently fulfilled, these rights are returned or given to the person. This is the case when considering children's rights. The quantity of rights that children possess, should be correlative to their moral and mental development, and be dependent on it. This level is quite clear in the domain of legal rights, where the required qualifications for the possession of each right are clearly defined. For example, a person cannot have the right to vote for the government or to drive a car, before reaching a certain age. At the appropriate age she can vote (when age is the only requirement), or apply for a driving license (in addition to the fulfillment of some other requirements). Another example is the legal right to citizenship. An immigrant has to live for a certain amount of time in the country, before being entitled even to apply for citizenship. After the required stay in the country, she can receive citizenship (after fulfilling some additional requirements).

At another level, rights can be permanently denied, when certain requirements will never be fulfilled. The easier way to clarify this idea is, again, to look at legal rights. The right to be elected for presidency in the USA is given only to those who are born in the USA. Hence, this right will never be held by an American citizen who arrived in the USA as an immigrant, even though he possesses all the other citizenship rights. When considering moral rights, this situation is analogous to assessing the rights of mentally retarded persons. These prospective agents may never possess the mental requirements necessary for full membership in the moral community. Thus, we may not ascribe to them some capabilities that are considered necessary for the possession of certain rights (some of the requirements that belong to the first or "subjective" set of requirements for agency). In these cases we may not bestow upon them certain rights, even though they can enjoy other rights.

These two levels can be regarded as a simple manifestation of Dworkin's "trump" theory.¹³⁹ The prospective agent does not have, temporarily or permanently, a trump card that overpowers certain other considerations. However, there is also a third level of withdrawing rights. At this level we withdraw some of the actual rights, which the agent already possesses. This happens when an agent possessed some rights before, and ceased to maintain the justifying grounds for their possession. These are the cases where the agent fulfilled the requirements that justified her possession of some rights, and at a certain time ceased to fulfill these requirements. At this stage the reassessment of her rights, requires that those rights which she is no longer entitled to have, will be withdrawn from her. The typical circumstance, in

which this procedure takes place in rights-talk, is the case of punishment. There, the agent intentionally reneges on her obligations as a member of the moral community, and undermines the justifying grounds for her moral status, and accordingly, her entitlement to possess rights. We can, therefore, use Dworkin's terminology, and consider this agent as one who lost her trump card or, in effect, lost her rights. We can justify this withdrawal of her right, by saying that she does not follow the description that created her former moral status and bestowed upon her the rights that this status usually entitles.

Each of these levels of withdrawing rights, requires its detailed arguments and separate justifications. Part of them, at least in principle, can have an accepted justification, and the discussion can turn around the specific cases of withdrawing rights (some of which may, sometimes, be found insoluble). Although the solutions of such discussions are always partial and not satisfactory, and sometimes they are only a compromise between conflicting interests, we can agree on the way we should try to solve them. More interesting but much more difficult to discuss, are those cases where the conflicts are not between the community and an individual within it, but rather between two members of the moral community. Here the question: who holds a trump against the other, is very complicated. The interests of both parties are sometimes hard to measure, and sometimes have the same weight. We cannot merely say that one's rights were overridden by the other's rights. We need to show how the other's interests (that are protected by his rights) were found more urgent, or got more weight, and thus justified the overriding of someone else's rights (that are supposed to protect her interests). Here, a more complicated procedure is needed, in order to decide which one of the conflicting interests gets priority over the others. For this, we need to turn to the social function of rights, and to the moral aspect of their possession.

The position regarding the concept of a right, nearest to the one I want to promote in this study, is to be found in Rawls' attitude towards their status. He says:

"A conception of a right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons".¹⁴⁰

Although there are differences between the Rawlsian concept and mine, I found his view regarding the social function of rights, very useful and clear. This is the format for settling conflicts between claims. Settling conflicts between claims of different persons should be performed by appealing to the



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