

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”.¹ 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.² 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.³ 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”⁴), 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.⁵ 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.⁶

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, than everyone has a right to x".⁷ 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”.⁸

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.