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Veröffentlichungsversion / Published Version

Zeitschriftenartikel / journal article

Empfohlene Zitierung / Suggested Citation:

Birnbacher, D. (2009). What Does it Mean to Have a Right? *Intergenerational Justice Review*, 4, 128-132. <https://doi.org/10.24357/igjr.4.4.509>

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What Does it Mean to Have a Right?

by Prof. Dr. Dieter Birnbacher

Abstract: This contribution offers an introduction into the language of rights and the role rights play in ethics and law, with special reference to the rights of children. It emerges that there are a number of very different functions characteristic of 'rights talk', both in ethics and law, and that many of them offer opportunities for strengthening appeals to moral and legal principles while others involve pitfalls that should be avoided. In conclusion, two of the theoretical questions raised by rights are addressed: whether the concept of rights can be replaced without loss by the concept of obligation, and whether rights should be seen as social constructs derived from obligations, or whether it is more plausible to reverse the order of priority.

The language of rights – a powerful ethical and political device

The language of rights is a particularly forceful device in moral and political debate. No other term is better suited to express strong moral emotions and political convictions. 'Rights talk' always carries a considerable emphasis, and this seems due to the fact that the language of rights from its very nature focuses on the perspective of those who have something to gain from a given moral or legal relationship. Though it is widely agreed that rights, at least in their primary sense, are correlated with duties or obligations, and that to ascribe a right to someone implies ascribing a corresponding duty or obligation to someone else, the language of rights brings the recipient of these obligations sharply in view and remains silent on those who are expected to accept these obligations and to act in accordance with them. This focus explains, at least in part, the greater power of the language of rights over the moral emotions. In general, it will be much easier to bring people to fight for the rights of A than for the fulfillment of their or others' duties towards A.

The focus on the perspective of the right-holder is only one aspect of the central function of the language of rights (which is particularly relevant in the context of chil-

dren's rights), its advocacy function. Whoever claims that a person A has (or should have) a certain right makes himself an advocate of A. He takes the side of A and makes it clear that he is prepared to defend A's right against anyone who fails to respect it, either in practice, by not observing it, or in theory, by calling into question A's legitimate possession of the right. In many cases, the advocacy function goes further and includes, beyond appealing to relevant persons expected to fulfill A's right, an appeal to a wider community. In these cases, the advocacy is not only directed to those identified individuals immediately concerned with A, but at an unidentified, anonymous and indefinite totality such as the community of politicians, society, or even, as in the case of human rights, mankind.

Within the advocacy function typical of 'rights talk' a division can be made between the kind of norms or principles to which the ascription of rights appeal. One use is to appeal to the norms and principles that are part of a system of moral or legal norms widely recognized in a moral or legal community. This use might be termed the *enforcing* use. Rights held by A are appealed to in order to enforce obligations on the part of B whenever this seems required by hesitation or failure on the part B to act in accordance with these rights. The invocation of rights in this sense is of the nature of a reminder. It is understood that B recognizes A's right and has no reason to question the legitimacy of these rights or of the claims based on it. The main purpose of the reminder is to draw B's attention to implications these rights have for his own dealings with A. B, for example, has subscribed to the right to free speech all the time, but under certain circumstances B must be reminded of the fact that this right applies even to the expression of opinions that he thinks morally or politically disastrous. In these cases, the advocacy inherent in the language of rights is based on a shared normative system the vitality of which depends on a continuous process of mutual monitoring. Viewed from the angle of society at large, it functions as device of normative self-control

and self-correction to which various social institutions contribute: politicians and other opinion leaders, the courts, the media and the general public.

A second function of the language of rights is the appeal to rights that are not, or not yet, part of the respective normative system but are postulated as necessary or desirable additions by moral or political reformers. This is the *manifesto* use of the language of rights or, as it may be termed, its *revisionary* use. In this use, rights are postulated in the knowledge that they are not as a matter of fact recognized, or only in special cases or by very few communities, with the hope that they will come to be recognized more widely at some future point of time. This use is perhaps even more typical of 'rights talk' than the first one because it brings out its characteristic surplus normativity. Appealing to rights does not only signify that they should be observed where observance is in some way deficient, but that they should be recognized in the first place. Rights, in this use, typically have a distinctly utopian flavor. They call for changes in the system of morality and/or law that are hoped for but not necessarily expected to come about. The reference to rights is counterfactual rather than of the nature of a mere reminder. This is evident in fields such as international law where the institutions necessary to enforce the rights formally asserted by international declarations are notoriously non-existent. An extreme example is the universal right to periodic holidays with pay declared in art. 24 of the UN Declaration of Human Rights. The revisionary function is a frequent characteristic especially of the proclamation of

Modesty forbids what the law does not.

/ Lucius Annaeus Seneca /

moral rights: Moral rights are postulated with an intention to transform them into legal rights by changing the legal system accordingly and by providing the institutions necessary for their enforcement. Ethics precedes politics. John Stuart Mill's defense, as philosopher and moralist, of the

moral right of women to political participation preceded his (unsuccessful) attempt to bring about a vote for women's suffrage as a Member of Parliament.

Rights - some distinctions

To a semantic purist, the fact that the language of rights takes over important rhetorical functions must seem a mixed blessing. He will approach 'rights' with a double suspicion. First, like other rhetorically colored concepts in morality and politics like 'freedom' or 'human dignity', the concepts of rights is liable to inflation, thereby blurring its contours and weakening its normative force. Second, its very popularity as a rhetorical device tends to make people less inclined to take account of the semantic differences that exist between the various uses of this concept in theory and practice.

I will refrain, in the following, to practice semantic purism and to present the myriad of distinctions and classifications that have been proposed concerning rights in philosophy and political science. A minimum of distinctions, however, is necessary to make transparent, in the words of Joel Feinberg's title, "the nature and value of rights" (Feinberg 1980, 143 ff.) and to clarify what it is that is postulated in so many moralities, constitutions, declarations and manifestos. One first distinction is that between the standard *relational* use of the term 'right' where rights refer to a relation between a right-holder A and a B who is correspondingly obligated by this right, and the *non-relational* use in which to have a right just means that one is permitted to do something. In many contexts we can phrase the statement that A is morally or legally *permitted* to act in the way he does by saying that A has a right to act in this way.

To have a right, in this non-standard sense, means that A is under no obligation to act otherwise than he in fact does. Thus, in saying that in any free society everyone has the right to act as he wishes as far as this in accordance with existing law one expresses the thought that everyone is permitted to do what he does provided this is not prohibited by an existing law. There is, in this use, no question of a special relation, constituted by a right, in which the individual stands to other persons or to society at large. Whether A has the right or not need not depend on any interpersonal relations between A and others. That A is permitted to do something might be seen to follow from the rela-

tion of A to him- or herself or to God. If, according to traditional Christian thinking, nobody has a right to suicide, this means no more than that suicide is illegitimate, quite independently from the relations in which the individual stands to others and independently from whether the verdict is justified by any obligations he may have to others.

In personam vs. in rem rights

In its standard use, to have a right means to stand in a certain normative relation to others, namely that of having a legitimate claim against them. If A is declared to have a right against B, A is thereby ascribed a legitimate expectation that B, by acting or forbearing to act in appropriate ways, respects that right, and a corresponding obligation on the part of B to do what B owes to A as his or her due. This kind of right can be of one of two natures (or both).

If A has a legitimate claim against one or more concrete persons, one can speak of an *in personam* right. If the claim is against an indefinite totality of persons such as society or humanity at large, one can speak of an *in rem* right. The paradigm example of an *in personam* right is the right involved in the institution of promises. It is an essential part of promising that the promisor confers a right on the promisee to expect and to demand the fulfillment of the promise. The promise establishes a moral relation between the partners that is highly personalized and highly asymmetric, by defining one of the partners as the right-holding and the other as the right-fulfilling party. Another typical case of an *in personam* right is the right of the child to be cared for by its parents. Here again, the distribution of rights and obligations is highly asymmetric, but differently from the promise case the right is not established by a free agreement but by a 'natural' relation. A further difference is that in the case of the child the right-holder is also the beneficiary of the right, whereas in the case of a promise the beneficiary can be a third party. If B has promised A to do something for A's child, A's child is the beneficiary of the promise but not necessarily the holder of the right involved in the promise. An example of an *in rem* right is the right to work. It is clear society at large is the addressee of this right, but it is far from clear how fulfillment of this right is to be secured and who is concretely obligated by it. As such, it is an abstract right without concrete addressee. It appeals to society as a whole to

accept certain obligations and to think about devising, constructing and entertaining institutions suited to meet them. Most rights postulated in the manifesto sense, including the rights of future generations, have to be classified as *in rem* rights in this sense. The same applies to the rights stated in the UN Convention on the Rights of the Child.

It is no accident that *in rem* rights are mostly *moral* rights. They are typically postulated with the purpose to establish legal rights where they do not yet exist and to establish the institutions necessary for their being respected within a society's given framework. This sheds light on important characteristics by which legal rights differ from moral rights. Establishing legal rights is a move in a language game that is essentially *pragmatic*. As a pragmatic device, legal rights are judged primarily by their instrumentality, i. e. by the extent to which they serve the ends they are designed for. One of these ends is the safeguarding of moral rights. Moreover, legal rights are *relative*, both in factual and in normative respects. Not only is it possible that a person can have a certain legal right in one legal community and none in a neighboring one, it is also the case that these rights often make no stronger claim than that to be valid in a certain society and within a certain period of time. Not only can the institutions capable of enforcing legal rights be created and abolished at will, but even the legal rights themselves are subject to change. Against this, the claim to validity that goes with moral rights is universal. If A has a moral right, A has this right no matter whether this right is in fact recognized or respected. A can possess this right even if it is not respected by the majority of existing societies. While a statement that A has a *legal* right is descriptive and particular, a statement that A has a *moral* right is normative and universal. As a move in the moral language game, the ascription of a moral right shares the claim to universal validity built into the very language of morality, however illusory (or hypocritical) this claim may seem on the background of historical and cultural relativity. The other side of the coin is that moral rights are largely ineffectual as long as they are not transformed into legal rights and made part of a system of law that sanctions violations. As a rule, a promisee is well advised to safeguard the moral rights accruing to him from a promise by the legal rights going with a legal contract. Though morality by itself is not without its own sanctions,

these are in general too weak to provide the trust required for cooperation.

In some legal systems, legal protection of interests is graded by distinguishing between *objective* and *subjective* rights. Rights are objective if the legal system imposes legal duties on citizens to respect certain limits in their dealings with one another and with third parties. Rights are subjective if the legal system makes provisions for opportunities of the right-holders to have their rights protected by legal action, either by laying complaint against violations in person or by advocates. In many countries, minors have subjective rights, whilst animals have only objective rights. Both have rights that are protected by law. But only children are capable of being vicariously represented by trustees who secure their rights on their behalf.

Liberties, claim-rights and powers

Another distinction between rights that dominates the theory of rights is that by their respective *content*. The favoured approach is to classify the content of moral or legal rights by the kind of goods that the exercise of the right is intended to safeguard. In the case of *liberties*, this is primarily freedom and privacy, in the case of *claim-rights* it is primarily integrity and opportunities, in the case of *powers* it is the interest in autonomously structuring one's social relations by establishing contracts and other agreements with others.

A right can be classified as a *liberty* if it means that A is free to act as he wishes without the interference of others. In particular, a liberty can be positive (right to free speech) or negative (right not to serve in the army). In each case the corresponding duty is negative, that of non-interference. If A has a liberty, B has an obligation not to interfere in A's exercise of the liberty, whether this consists in an activity or a forbearance. An example for a liberty in the context of children's rights is art.13, 1 of the UN Convention on the Rights of the Child, which assures the child freedom of expression.

With *claim-rights* the differences between the positive and the negative versions are more pronounced. To have a *positive* claim-right means to be entitled to being provided with some good (such as, for example, the means of subsistence, health care or work opportunities) by certain identified persons or by society at large. In this sense, a small child has a claim-right to be cared for by its

parents or, alternatively, by a guardian, and to receive the health care and education necessary for its development into an autonomous person. To have a *negative* claim-right means not to be exposed to certain violations of one's integrity and corresponding risks, for example by physical violence or psychological torture. The corresponding duties on the part of others are partly negative and partly positive. Others are not only required not to infringe on or to endanger the integrity of the right-holder, but also to actively provide the means necessary for achieving the good safeguarded by the right. These are usually taken to include whatever may be necessary to provide for the personal safety of the right-holder. In the case of children and other particularly vulnerable groups, rights are mostly of the nature of negative and positive claim-rights. This must not blind us, however, to the fact that the members of vulner-

At his best, man is the noblest of all animals; separated from law and justice he is the worst.
/ Aristotle /

able groups also enjoy liberties. Some of these may even conflict with the fulfillment of rights, such as in cases in which children refuse a medical treatment which they have a right to receive. A typical example of a claim-right in this sense is the provision of the UN Convention on the Rights of the Child that the system of adoption shall ensure that the best interests of the child shall be the paramount consideration (art. 21).

A right can be classified as a *power* if it confers on an individual the opportunity to change the moral or legal relations in which he stands to others. In modern societies, this kind of right has become more and more important with the growing liberty of the individual to establish, within certain limits, his roles and relations by his own will. The individual has successively become free to control the moral and legal obligations incumbent on him by making autonomous choices how far to bind himself by contracts, promises and personal bonds.

It goes without saying that distinguishing these kinds of rights does not mean to ignore their interrelations, both logical and factual. Powers are logically dependent on liberties. Liberties are factually dependent on claim-rights, at least if they are not meant as formal guarantees but as entitlements that the individual has a realistic chance to exercise

in practice. The distinction according to content is also relevant for the question of who qualifies as holder of the respective right. Since each kind of right is concerned with a certain kind of good, there are logical limits to the range of subjects that qualify as right-holders. A right, whether moral or legal, can only be ascribed to beings to which the corresponding good can be ascribed. As a consequence, the range of rights that can be ascribed to animals is narrower than that for children, which is again narrower than that for adults. Animals do not qualify as candidates for the ascription of liberties, or only to the extent that they are capable of intentional action. They do not qualify as candidates for powers. They do qualify, however, as holders of positive and negative claim-rights to the extent that their good depends, among others, on how they are treated by humans. Infants do not ordinarily qualify as candidates for civil rights such as the right to vote (except vicariously). But they obviously qualify for claim-rights such as the right to physical and mental integrity and to being provided with the means necessary for their development to maturity. There is, then, no once-for-all answer to the question of who qualifies as a bearer of rights. It depends on the kind of right in question. In general, the range of beings to which claim-rights can be ascribed is wider than that to which liberties and powers can be ascribed. And it follows that there is no reason to uphold the time-honored doctrine of the reciprocity of rights and duties according to which rights can only be held by beings that are capable of having duties. This doctrine is a non-starter because it overlooks the central function of the ascription of rights, its advocacy function. A being such as a sentient animal, an infant or a demented adult is no less qualified as right-holder by not being able to put forward its rights or even to know about them. On the contrary, because of their dependency on others these beings are particularly in need of having their rights respected.

Another relevant observation is that the legal system is considerably more generous in ascribing rights than the moral code. As an essentially pragmatic device it is much more free to ascribe rights to non-personal entities that would not qualify as holders of moral rights, such as trusts and heritages or (concerning the right to inherit) the *nasciturus*, the child yet to be born.

Another distinction that is of special importance for the relationship between parents

and children is that between *mandatory* and *discretionary* rights. Mandatory rights are rights that are conjoined with a duty to exercise the right. While liberties and powers are, in general, discretionary in the sense that the right-holder is free to exercise the right, some particular liberties and powers are mandatory in so far as they constrain their exercise. Thus, parents have the legal right to bring up their children and thereby the right to exercise their own personal preferences, for example (though with certain limitations) in point of religion, but this right is conjoined with a corresponding obligation. The right to vote, in some countries, goes together with an obligation to vote. Something similar holds for certain claim-rights. Thus, children have a legal claim-right to education in the sense that society has a duty to provide adequate educational opportunities. On the other hand, this right is mandatory by being conjoined with a duty. Children in general have no choice to go to school or not as soon as they have reached schooling age. Another type of right that is similar to a mandatory right in restricting the options open to the right-holder are *inalienable* rights. In this case, the right-holder is free to exercise the right he possesses, but he is not free to renounce the right or to exchange it for money or other goods, thereby permanently depriving himself of the opportunity of exercising the right. In this way, the right to freedom is customarily understood both in morality and in (constitutional) law. The right to freedom implies the right not to exercise this right in particular situations, but it does not imply a right to sell oneself into slavery.

The ethics and metaethics of rights

There are a number of controversial ethical and metaethical issues that regularly come up in discussions about rights and which can fruitfully be debated without going too deeply into substantive questions concerning concrete rights and their limits. One such issue is the status of rights in cases of conflict with other rights or duties.

It is generally agreed that rights are, as a rule, not absolute but have the status of *prima facie* rights, i. e. can and must be negotiated with other rights in cases in which conflicting rights cannot be respected at the same time. Thus, liberties are commonly held to be restricted by claim-rights and claim-rights by liberties, so that any one right is limited in its range by other items in the system of

rights, each in accordance with its respective normative weight. In German constitutional law it is agreed that even those basic rights that are granted without inherent limits do not hold absolutely but can in practice be limited if their exercise conflicts with other inherently unlimited basic rights. Only a so-called 'core content' of these rights is taken to partake of the non-negotiability that is characteristic of the right to human dignity (and its protection by the state) in the first article of the German constitution. The same holds for moral rights such as the right to physical integrity or the rights acquired by accepting a promise. For both rights, situations are easily thinkable in which they have to cede, on reflection, to the rights of others provided these carry more weight than the right sacrificed. It is a moot question, however, whether rights are negotiable not only against rights but also against duties without corresponding rights, i. e. to those duties traditionally termed 'imperfect duties'. Examples of 'imperfect' duties are the duty of generosity and the duty to come to the aid of the needy. Differently from 'perfect' duties that correspond to a right on the part of the recipient, imperfect duties leave the moral agent more choice in determining who is to receive the good the agent is morally bound to provide and in what exact way this is carried out. If I have contracted a debt it is usually clear who it is whom I owe the money and in what way and at what point of time I am expected to pay it back. The same holds for other perfect duties like fulfilling a promise or seeing to it that my child attends school. With 'imperfect duties' this is different. I have a choice about

the who, how and when of charitable giving, and I have more leeway to exercise my personal preferences. Charity is nothing I owe to its recipients. Is it legitimate to make an 'imperfect duty' take precedence over a 'perfect duty'? Is it morally unobjectionable to break a promise in cases in which this conflicts with coming to the aid of someone in need? This is answered in the negative by a great many philosophers, among them Kant and Schopenhauer, and there are many examples for which this answer seems adequate. Normally, it is no excuse for not paying back a debt that more good would be done by spending the money on a needy friend. For other cases, the doctrine of priority of rights over duties is clearly counterintui-

tive, for example if helping a friend in need is given priority over holding a promise on which nothing much depends. Rights are of varying normative weight, and at least those of relatively low priority may well be judged to be negotiable even with imperfect duties. Among the metaethical issues surrounding rights two stand out as being the subject of repeated and fundamental controversies. One is the issue whether the language of rights can be completely substituted by the language of duties. Some of the philosophical defenders of what has been called the *redundancy theory* of rights (such as Richard Brandt¹) have expressed doubts whether the particular psychological force of the language of rights can be reproduced by using only duty-talk. But they think that at least the semantic content of the language of rights is fully reproducible in the language of duties. Though this theory has found quite a number of adherents,² there are reasons to doubt whether it is adequate. For one, the correspondence with rights (on the part of the recipient) changes the semantic content of the concept of duty in its application to those 'perfect' duties that are of central relevance to morality and law as normative systems. At least for moral rights, having a right is more than being the object of others' moral duties. Differently from duties without corresponding rights, the right-holder can claim the fulfillment of his right as something that is due to him and for which, if fulfilled, gratitude would be out of place. Whoever has a *right* not to starve, need not wait for others to give him to eat.

No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it.
/ Theodore Roosevelt /

He is in a position to demand that he gets what is owed to him. One might even go further and follow Joel Feinberg by saying that rights seem to involve a second-order right that entitles the right-holder to claim, under appropriate circumstances, the fulfillment of his right.³ Conferring a right on someone means more than to postulate the legitimacy of a claim. It means to encourage and to support the right-holder in the attempt to make appropriate claims. This connotation of *empowerment* explains the close connection between the possession of rights on the one hand and *self-respect* and *human dignity* on the other. Moreover, the redundancy theory fails to do justice to the advocacy function of rights. Conferring a

right on someone does not only encourage the right-holder to put forward his right, but also others to speak up in his name, especially if the right-holder is temporarily or permanently unable to do so himself.

In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law.

/ Charles de Montesquieu /

Another controversial question is of interest primarily for ethical theorists. The question is whether rights are fundamental or derivative in the order of logical priority. Should rights be seen as social constructs that are - in some circuitous way - derived from duties or is it the other way round, so that rights are the fundamental category? Joel Feinberg speaks for many legal philosophers in preferring the first route: "It is because I have a claim-right not to be punched in the nose by you, ... that you have a duty not to punch me in the nose. It does not seem to work the other way round."⁴ This shows that for Feinberg rights are more fundamental than duties. It does not show that rights are the last word. In a later remark Feinberg makes it clear that *interests* are the fundamental category and that it is they that lie at the basis of both rights and duties: "My claim and your duty both derive from the interest that I have in the physical integrity of my nose."⁵ Both rights and duties function to protect interests, either actual or prospective, with rights protecting those interests that are particularly crucial for a good life. However, the fact that there are 'imperfect duties' that do not correspond to rights militates against Feinberg's proposed order of priority. 'Imperfect duties' protect the conditions of a good life in the same way as 'perfect duties' do. The only difference is that the correspondence with rights enables society to put additional pressure on the fulfillment of perfect moral duties. This explains why many

philosophers, including Kant and Mill, have seen a close connection between perfect moral duties and duties that it is legitimate to enforce by legal sanctions. Another argument for the priority of duties over rights is that it is easy to imagine a system of morality or of law without rights, but that it is impossible to imagine a system of morality or law without duties. In a world of angels where everyone did what duty enjoins, rights might in fact become redundant.

Notes:

1. Brandt 1959: 440.
2. E. g., Frey 1980.
3. Feinberg 1980: 141.
4. Feinberg 1992: 205.
5. Feinberg 1992: 205.

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Submitted: 15 May 2009

Accepted after revisions: 20 August 2009



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