ON THE NATURE OF PERMISSION

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Abstract

Traditionally, permission is considered either as a derivative concept or a subsidiary concept. Its function is primarily limited to one of derogation or cancellation of norms. Such a view is especially predominant among the legal philosophers. Permission is hardly given any serious consideration by the moral philosophers too. Very often it gets buried under the questions and concerns of obligation. The paper attempts to critically examine the nature and function of permission. In the process, it challenges some received views and modifies some. Further, it argues that permission can be treated as an independent concept in its own right, that it cannot be reduced to other prescriptive concept nor can it be merely defined as a function of other prescription. It is in this context that the paper also examines the nature of conceptual relation of permission with the concept of right. For a more comprehensive understanding of the concept of permission, it suggests an inter-disciplinary approach.

Keywords: Permission, obligation, sanction and immunity

Introduction

Permission as a concept has escaped the critical attention of thinkers and scholars for so long in the past.[1] It lacks rich history compared to other normative and axiological concepts. However, one aspect of permission in the form of *human rights* has received considerable attention of thinkers in the more recent times. Struggles for equality and self-determination of ethnic groups around the globe and the rampant incidences of human rights violation, especially in the third world countries, saw the need for a more comprehensive approach to examine and categorise norms and normative concepts. The

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Universal Declaration of Human Rights by the United Nations in December 1948 gave more impetus to normative studies.

Even today, we often fail to see the subtle and yet myriad reverberations and implications encapsulated in the structure of permission. Scholars in general and philosophers in particular working in the areas of normative studies were for the most part preoccupied with the concept of duty or obligation and so the concept of permission was traditionally relegated to the background. Only in the mid- and late-20th centuries, permission as a normative concept has been highly problematised, and rightly so, by von Wright, the father of modern deontic logic, in his formal study of norms and normative concepts.[2] On the problematic nature of permission, he writes, "The independent status of permissive norms is open to debate. The problems in this region are, it seems, more urgent to a theory of prescription than to a theory of other types of norms" (von Wright 1963: 85).

He perceives the concept of permission as the *problem child* of the philosophy of norms (von Wright 1999: 37). One may even be tempted to treat it as the problem child of deontic logic itself. von Wright not only revived studies in deontic logic or logic of norms with his publication in 1951[3] but he also contributed a lot towards the development of this logical system. Besides von Wright, there have been few others, of late, who think that permission as a concept needs to be given more attention as it is crucial for understanding different kinds of normative systems. In this work, we will consider some of them and also attempt to provide an overview of the concept of permission.

Conceptualisations of Permission

At times, we treat permission as though it were some kind of transactional commodity, i.e., '*give and take*' sort of a thing. For instance, one *asks* permission from somebody and in turn, somebody *gives* permission to the seeker of permission. This is quite compatible with the common sense view of permission. The question is when and why does one seek permission? Normally, one seeks permission to perform p or forebear p, (p for an act-category or description of a state of affairs) from some established authority. This idea of transaction involving permissive norm presupposes the idea of social institution which legitimises the transaction. In such a context, permission is sought if and only if the performance of certain act or the bringing about of certain state of affairs p is obligatory, positively

or negatively. Thus, in seeking permission, one is asking for some favour or exception – that one may be exempted from the pressure of some mandates, sanction or norms that are in operation. Such a view is commonly held by legal thinkers and practitioners.

This view has significant implications on the status of permission. It denies the independent status of the concept of permission. It maintains that permission comes into being if and only if there are some prior imperatives, a set of *do's* and *don'ts*. It presupposes imperative. Accordingly, permission has been viewed by some only as a subordinate to or rather having a subsidiary character with respect to imperatives or mandates. Bobbio writes, "Permissive norms are subsidiary norms: subsidiary in that their existence presupposes the existence of imperative norms."[4] In the same context, he goes on to say that the permissive norm is characterised by its function of "abolishing norms". This is to say that the role of permission is essentially to cancel or restrain imperatives which are in operation. It stands as a meaningful norm as long as there are some imperatives, but the moment the imperative comes to a naught for any reason, permissive norm loses its ontological ground. Its distinguishing feature as well as importance lies in its function of changing the normative character of other prescriptions. Ross more or less takes up the same stance when he takes the view that without the context of obligations, permission is useless (Ross 1968). Bulygin too argues on the similar lines that without the notion of permission as exception "there would be no possibility of normative change from acts of authority" (Bulygin 1986: 213). The above view can be best summed up by quoting a passage from Ross:

> Telling me what I am permitted to do provide no guide to conduct unless the permission is taken as exception to a norm or an obligation… I know of no permissive legal rule which is not logically an exemption modifying some prohibition, and interpretable as the negation of an obligation (Ross 1968: 122).

However, others like Boella and Torre maintain that permissive norm is not limited by its derogative function only. In fact, this is not *necessary* as the derogative purpose of an existing obligation or imperative can be taken care of by imposing some more complex conditional norms. For instance, though it is prohibited to kill, a person is not guilty of killing if she does that in self-defense; but the defense should not be against the agencies of the state like police or army. Despite the superficial variance, the view of Boella and Torre hardly differs from the former ones as they also basically treat

permission as a case of *exception*. If one closely looks into the views stated above, one will notice that there is hardly any conflict of ideas amongst them. The underline idea is that permission as a normative concept must presuppose obligation or require the existence of obligation.

Re-Framing the Concept of Permission

The limitations of the views discussed above are obvious. We need to explore and examine further various shades or aspects of permission. In the process, we will reject some views, partially modify some views and reinforce some. We will do so with the help of a thought experiment.

There is a little girl by the name *Künü* who wants to clean the river bank in the village. In her village, there is no norm that prohibits any activity at the river and yet *Künü* goes to the village chief and seeks permission to clean the river. The chief readily grants her permission. A lot of things can be learnt from this story:

i. Permission does not presuppose an imperative (that is, cleaning river bank is not prohibited).
ii. It does not derogate any imperative.
iii. It has not changed the normative status of any prescription.
iv. It acquires an independent ontological status.
v. By granting her permission, the chief gives *immunity* against possible prohibition in the future or perhaps from the subordinates if any; or from other members of the community.
vi. Cleaning the river bank may be considered as a permissible act in some sense of the term since there is no norm prohibiting it or requiring it.

Before we consider the above points, it will be helpful to first look into an important classification of permission suggested by von Wright, namely, *weak permission* and *strong permission*. A permission is said to be weak if there is "absence of prohibition" or if an act in question is not subject to any norm, while a permission is said to be strong if there exists a corresponding obligation or if the act in question is *explicitly* permitted (that there is a norm permitting the performance of such an act). Accordingly, going by this classification, we can see that cleaning river bank in the village is already permitted in the weak sense of the term.

To get back to the above points, it clearly follows from the above example that the received views are highly contentious on many

aspects and hence, there is a need to review or revise them. As such, we will reject the following viewpoints:

i. Permission has no independent status.
ii. Permission has only subsidiary function in a normative system.
iii. Permission has only derogative function.

Points (i) and (ii) are related. Permission comes into existence through the act of *giving* and *taking* permission. It has not been *derived* from obligation. On the contrary, we can maintain that the very act of bringing about a permissive norm has created a corresponding obligation, obligation on the part of the chief to ensure that nobody interferes at the activity of the little girl. In this sense, we can even argue that permission is more basic.[5] Some more details related to this point will be taken up for discussion later on. Also, we can see that in the absence of the idea of permission, by using obligatory norms, namely, obligation and prohibition, we cannot fully explain the transaction of this normative activity that happened between the chief and the little girl. In other words, giving permission is neither the same thing as "It is not prohibited" nor "It is not obligatory". Also the conjunction of these two sentences cannot give a normative sense that is equivalent to the notion of permission. The little girl got something more than mere 'absence of obligation."[6]

With reference to point (iii), it is clear that by giving permission to *Künü,* no norm was derogated. Rather in some sense, the village chief has created a new norm.

The next point to be discussed and modified without fully rejecting it is this:

iv. Permission basically serves the function of changing the normative status of an obligatory action.
v. Permission presupposes imperatives.

Point (iv) may be seen as an extended idea of point (iii). The reason is that whenever a permissive norm has served any derogatory function, it also changes the normative status of the act in question. Coming back to the story of our little girl, her act of seeking permission is not about seeking an exception to some norm as stressed by Boella and Torre and so granting permission to *Künü* did not change any norm or prescription. However, it can be maintained that through this normative act, a certain act is now subject to norm. Thus, permissive norm not only changes the normative status of obligatory norms but through an act of giving permission or promulgation of a new norm, the norm-authority can also change the normative status

of an act or activity, from unregulated to regulated; for instance, right to clean and safe drinking water or right to food. In India, these human needs have become fundamental rights.[7] We will also examine the relation between permission and right after a while.

Regarding (v), we can suggest some appropriate modification by borrowing an insight from the above story – that permission does not always presuppose imperative but that *it presupposes the existence of a norm-authority*.[8] In the above story, there is a village chief who represents a norm-authority. It is not true that one has to seek permission only if an act in question is prohibited or obligatory. The idea that permission has meaning as long as there is some corresponding imperative and becomes null and void with the abrogation of imperative is not only problematic but also incorrect. As noted earlier, cleaning the river bank comes under weak permission as there is no norm regulating any activity in or by the river.

Permissive norm has other important extra-normative functions. From the above story, we can see that permission can serve *informative* function.[9] That is, by way of seeking permission, *Künü* is both informing the village chief about her plans and probably also asking the chief's advice if it is wise or desirable on her part to do that. The informative function of permission that we see in this context cannot be defined in terms of a function of imperative, a view that we noted above. Sometimes seeking permission is simply to seek *recognition* and *power* by way of informing the authority concerned. For instance, our little girl can now proudly tell any member of the community that she took permission from the chief to clean the river bank. Not only that she can even request or persuade other members of the village to stop littering the river bank. By way of giving permission, she has been *empowered* to carry out her activity. Even in actual normative context, at times, it becomes a necessary requirement to get proper permission from the government to do even charitable works like providing relief materials to victims of natural calamities like earthquake, floods, or to run an orphanage. It would be very difficult to say that such activities are merely an absence of prohibition or are forbidden for which one needs to seek special permission for exemption. The act of seeking permission in such a context is better understood as serving informative function. From a different perspective, granting of permission by a competent authority to subordinates or NGOs in a society for performing good or desirable deeds may be seen as an act of *empowerment* or *delegation of power* (von Wright 1963).

Someone may allege that the above example has little or nothing

to do with prescriptions because this is a community affair and so they have no legal or deontic implications. However, our interest is not just limited to the function or meaning of permission only in the legal context. Prescriptive concepts are also used meaningfully at smaller units of society or state, like a community or a colony, including inter-personal relations within a community. Another point of significance that can be made from this observation is this: permissive norm does not presuppose obligatory norm but that it presupposes a norm-authority which is capable of issuing sanction against undesirable action or state of affairs.

Digging Deeper into the Concept of Permission

We noted above, point (v), from the reflection on our example that the notion of permission has some connection with the notion of *immunity*. We suggested that *Künü* obtained some immunity against possible interference. We will now probe deeper into the nature of the relation between permission and immunity. While trying to explore the formal structure of normative concepts and their inter-relationship, discourses in deontic logic got intertwined with legal notions such as sanction, punishment, immunity, liability, etc. This approach is termed as "*restricted theory of obligation and permission*" by von Wright.

John Austin, a legal positivist, is known for his attempt to define prescriptive concepts in term of sanction (Austin 1832). Perhaps, being influenced by legal ideas and perspectives, von Wright too tried to define permission with respect to sanction. He did so by challenging and modifying a definition of permission given by A. R. Anderson (Anderson 1958: 100-103).[10] Anderson's definitions of prescriptive concepts may be loosely presented as follows:

i) An act is obligatory if and only if its denial or non-performance *strictly*[11] implies a sanction.
ii) An act is prohibited if and only if its performance *strictly* implies sanction.
iii) An act is permitted if and only if its performance does not *strictly* imply sanction.

von Wright rightly points out that Anderson's definition of permission is too weak. The above definition of Anderson leaves a possibility that someone might face a sanction for performing a permissible action. And this is counter-intuitive. He questions thus: "Must it not, however, be as *certain* (emphasis: mine) that

the man who does the permitted is not punished for what he has done as it is that he who neglects his duty is punished?" (von Wright 1968: 90). Having pointed out this difficulty, von Wright goes on to define permission as follows: "I shall say that there is a strong permission to do an action, if and only if, commission of this action is a sufficient condition of immunity to punishment for it" (von Wright 1968: 95). In the same context, von Wright problematises Anderson's definition of obligatory norms saying that "[a] sinner escapes punishment." That is to say that the *necessary* relation, which Anderson claims to exist between the ideas of obligatory norms and sanction, is problematic. It is *possible* to perform a prohibited act or not to perform an obligatory act and still escape punishment. For instance, one can bribe or threaten a traffic policeman and get away without paying fine for the violation of a traffic rule. But that does not mean that the act in question has ceased to be obligatory. As such, he suspects the definitions given by Anderson.

From the immediately preceding paragraphs, it is quite clear that the definitions of prescriptive concepts are given against the backdrop of certain legal framework or system. If our line of thinking is correct, then it is clear that legal thinkers, including von Wright and Anderson, treat the notion of sanction to be more basic or primitive. It is being used to define prescriptive concepts. One may even argue that they are taking legal system as the proto-type for both understanding and defining prescriptive concepts. This raises an important dilemma. The reason is that the idea of sanction (in my opinion), presupposes prescriptive concepts. Why do we impose sanction (or punishment), for instance? It is because some norm is being violated. In other words, without the notion of norms, we cannot talk meaningfully about imposing sanction. By using the idea of sanction or punishment to define prescriptive concepts, one will only get oneself ensnared in some vicious circle.[12] However, we will not explore this point further and round up the present discussion by noting that the notion of permission provides a kind of immunity against possible punishment or sanction.

The idea of immunity raises certain important issues as well. Immunity or sanction is directly connected with the idea of agency and not primarily with states of affairs or act-categories. Though prescriptions are applied to actions and activities, we do not generally say that punishment is given to an action; it is given to an agent, a person performing an action. For instance, permission is *given* to an agent. Through permission, an agent is also *empowered* to do something.[13] Thus, permissive *force* rests with the holder of

the permission, the agent, though it is given essentially in relation to the performance of some action. While the action in question may continue to remain prohibited in general, if a person is given a permission to perform that action, she gets immunity against possible punishment. In other words, in some context, permissive norm does not change the normative status of an action; it need not derogate or abrogate a standing norm; it may only grant immunity to a person. In addition as noted above, an act may or may not have prior prescriptive status but an agent can still meaningfully and legitimately seek permission to perform that act. In doing this, the agent acquires '*prohibition immunity*' or '*punishment immunity*.'

The relation of immunity with the notion of agency is worth exploring. It opens up the possibility of classifying the notion of permission further into what may be termed as *permitted act* and *permitted right*. The notion of permitted act is agent-oriented or context specific. A permissive norm that comes into existence as a result of agreement between two parties: permission-seeker and permission-giver for a specific reason may be termed as permitted act. This may be exemplified by the kind of permission our little girl got for cleaning the river bank. The function of this type of permission is not to change the status of obligatory norms but to provide immunity, among others, to the agent for performing certain action. In contrast, a permitted right may be defined as those acts which are strongly permitted in the sense that they are enumerated as rights in a corpus of norms. A permitted right is protected by law, in other words. This classification of permission is not novel. It is similar to what Mackinson and Torre, (2001, 2001) roughly define as *static permission* and *dynamic permission*: while static permission corresponds to the existing corpus of norms which are explicitly stated, recognized and protected, dynamic permission may be viewed as those permissions which are ensued by an act of legislation. The former is treated by them as a kind of 'weakened obligation' or strong permission while the latter is treated by them as essentially a kind of *prohibition immunity*. Permitted act (or dynamic permission) is closer to the idea of permission conceptualised by legal thinkers who maintain that permission plays a derogative role and makes sense only in relation to imperatives. It is possible that granting such a favour will involve the act of derogating some existing norms. However, permitted act need not necessarily function to derogate other norms as is the case with our little girl. Moreover, in the present characterization of permitted act, the notion of agency is brought to our central focus which was not done by others.

Permitted act is related with the competence of the norm-authority. This is also to say that *permitted acts* are characterised by *transient* and *conditional* elements. It involves at least three factors: (1) norm-authority, (2) agent (3) context or reason. Let's recall our example for some illumination. Our little girl is the agent and the village chief is the norm-authority. The context or reason is *Künü's* desire and plan to clean river back. Since the act in question is not *inconsistent* with any prevailing obligations or norms, the chief consented to *Künü*'s request. However, this permission does not become a right. If the chief is unhappy with the performance of the little girl, probably suspecting that she is up to some mischief, then he may withdraw or retract the permission given to her.

A permissive prescription will be called a *right* (permitted right) if and only if there is a corresponding obligation. A right can be *claimed* by any norm-subject and the norm-authority has an obligation towards the claim. One does not seek or request for permission to be given in the sense of exception; a norm-subject need not seek permission to exercise her right. As a matter of fact, in certain cases, a person may be reprimanded for seeking permission from the norm-authority which is already a permitted right.[14]

The relation between right and obligation has also been explored in the context of what is being termed as promissory rights (Gilbert 2004). Works done in this aspect of study have strengthened the age old claim that rights and obligations are two sides of the same coin. This relation has been discussed in the works of thinkers like Gilbert (2004), Hohfeld (1913-14), Raz (1984), Hart (1995), etc. For instance, Gilbert writes, "Intuitively, a promise obligates the promisor in a particularly direct way, and likewise directly gives rise to a right in the promise. It is tempting to say that both the right and obligation are part and parcel of promising." (Gilbert 2004: 84). Hart more or less echoes the same thing on the relation between right and obligation as a result of a promise when he maintains that

> We voluntarily incur obligations and create or confer rights on those to whom we promise;… The promisee has a temporary authority or sovereignty in relation to some specific matter over the other's will which we express by saying that the promisor is under an obligation to the promisee to do what he has promised. (Hart 1995: 193-4).

Such is the nature of relation between rights and obligation (or duty) that Waldron even goes on to say that until one understands the nature of this special relation, one will not be "in a position to move definitionally from statements about duties to statements about the rights of individuals." (Waldron 1984: 8).

Promissory rights may be broadly viewed from two contexts: (i) outside the context of normative institution and (ii) within the context of normative institution. If approached from the perspective of the former, the notion of right may be explained in relation to permissive norm and within some theoretical framework of *contractualism*; however, if approached from the perspective of the latter, it is unclear regarding the nature of the relationship holding between right and permission. It is not clear as to how we can conceptualize right in a context of a promise-making involving two individuals or private parties. Apart from raising this doubt, we will not explore it further in the present work. This point is being raised to highlight the fact that the exact nature of the relationship between permission and right remains to be explored fully.

Conclusion

In this essay I have pointed out certain shortcomings in the way permission has been conceptualised from various perspectives. Subsequently, an attempt has been made to overcome those shortcomings by giving some suggestions. In the process, we have given emphasis on the idea of agency, viz., and norm-subject, for developing a more in-depth understanding of the concept of permission. Permission is not a simple concept that can be studied only in the domain of deontic logic or in the domain of legal studies. For a fuller understanding, one needs to tackle the concept of permission from an inter-disciplinary approach. This realisation is important because it gives a new status and insight to the concept of permission as argued above. Moreover, the present discussion also tells us that we need to see permission in relation to various other normative concepts. For instance, what exactly is the nature of relation holding between permission and right or between permission and sanction? The answer is not clear though we have reasonable insights to work on.

Notes

1. In the history of deontic logic, the first person to attempt a formal study of deontic concepts was done by Earnst Mally in 1919 when scholars and nations were confronted with many issues of human rights. Earlier, the concept of tolerance, another dimension of permission and forerunner of human rights discourses, has received some philosophical attention from thinkers like Locke and Mill. Locke in his classic work *A Letter Concerning Toleration* (1689), relates the idea of toleration with the obligation of the Magistrates and not with rights as such; Mill's main argument in favour of tolerance is that the sole reason for

which power can be rightfully exercised by the authority over any member of a community is to prevent harm to others. See his *On Liberty* (1859). In the modern time, H. L. A. Hart (1963), and Suzan Mendes (1989) among others, have tried to analyse this concept of tolerance in the context of liberalism.

2. Deontic logic is a formal study of norms. It attempts to describe the logical behaviours of normative concepts, viz., permission, obligation and prohibition. The modern study of deontic logic was developed by G.H. von Wright with the publication of his paper in the Mind in 1951. However, in this work, I will not discuss issues and problems involving the concept of permission in deontic logic.
3. von Wright, in his 1951 seminal paper, didn't, however realise that permission as a concept and as an operator will have so much problems and implications. It was only in the light of the later developments that he began to take serious interest in the concept of permission.
4. This was quoted by Jorg Hansen and Leendert van der Torre in their paper, "ESSLLI08: Deontic Logic in Computer Science Part 4b/5: Multiagent Games with Permissive Norms", which is made available online - https://icr.uni.lu/leonvandertorre/papers/ESSLLI08-4.pdf. Accessed on 13/08/2020.
5. Within a hierarchical structure, the question of which prescription is more basic or more important does not arise. They become relative to their function. A permissive norm can derogate a prohibition and an obligatory norm can cancel out a permission norm. A higher authority can change the normative status of a norm or a prescription issued by the subordinate authority.
6. In standard deontic logic, permission is defined as "absence of obligation".
7. It is generally maintained that certain norms can be derived from other existing norm. The above right – right to clean and safe drinking – is an example. By a theory called "theory of emanation", this given right has been derived from article 21 (Right to Life) of the Indian Constitution. However, the nature of this derivation is contentious in legal reasoning. In what sense this is derived? The inference involved here is strictly neither deductive nor inductive in nature. One can deny that the inference involved in this derivation is not logical as maintained by von Wright, see p. 204, von Wright, 1983. On the contrary, it is largely accepted as a creation of a new norm which is in consistent with the corpus of the law.
8. The existence of a norm-authority creates certain normative relation between the authority and the subjects or members of a community or society. The norm-authority has a responsibility towards the security or welfare of the members and so performance of some unregulated act may require to be brought to the attention of the authority if it involves a public space.
9. Boella and Torre also inform that Guibour and Mendonca have similar view of permissive norm and called it as "Indicative Function". But the sense I read into "informative function" of permission is slightly different from the above position. For them, by "indicative function" they merely mean the task of finding out whether some act is prohibited or not. It plays the functional role of indicating to their addressee which behaviors are authorized by the authority that issues them (Boella and Torre, 9. 2003).
10. In this work, Anderson tried to reduce deontic logic into alethic logic.
11. The term "strictly" is a technical term that may be roughly read as necessary or necessarily.
12. Though sanction may have heuristic importance in understanding prescriptive

issues or concepts, it cannot constitute logical structure of the definition of deontic concepts. It is *external* to the formal construction of deontic concepts.

13. It may be noted that while the notion of empowerment has a strong link with permission, the notion of sanction is associated in a very strong sense to obligation or prohibition.
14. A permission seeker may be reprimanded on the ground that she has wasted the time of a judge or such acts can also be seen as contempt for court in certain extreme case. This point has been brought to my notice by Prof. Raghuramraju, Department of Philosophy, University of Hyderabad.

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