

## Rights

Political debate is littered with references to rights – the right to work, the right to education, the right to abortion, the right to life, the right to free speech, the right to own property and so forth. The idea is no less important in everyday language: children may claim the 'right' to stay up late or choose their own clothes; parents, for their part, may insist upon their 'right' to control what their children eat or watch on television. In its original meaning, the term 'right' stood for a power or privilege as in the right of the nobility, the right of the clergy, and, of course, the divine right of kings. However, in its modern sense, it refers to an entitlement to act or be treated in a particular way. Although it would be wrong to suggest that the doctrine of rights is universally accepted, most modern political thinkers have nevertheless been prepared to express their ideas in terms of rights or entitlements. The concept of rights is, in that sense, politically less contentious than, say, equality or social justice. However, there is far less agreement about the grounds upon which these rights are based, who should possess them, and which ones they should have.

There is, in the first place, a distinction between legal and moral rights. Some rights are laid down in law or in a system of formal rules and so are enforceable; others, however, exist only as moral or philosophical claims. Furthermore, particular problems surround the notion of human rights. Who, for instance, is to be regarded as 'human'? Does this extend to children and embryos as well as to adults? Are particular groups of people, perhaps women and ethnic minorities, entitled to special rights by virtue either of their biological needs or social position? Finally, the conventional understanding of rights has been challenged by the emergence of the environmental and animal liberation movements, which have raised questions about the rights of non-humans, the rights of animals and other species. Are there rational grounds for refusing to extend rights to all species, or is this merely an irrational prejudice akin to sexism or racism?

### Legal and moral rights

Legal rights are rights which are enshrined in law and are therefore enforceable through the courts. They have been described as 'positive' rights in that they are enjoyed or upheld regardless of their moral content, in keeping with the idea of 'positive law' discussed in the last chapter. Indeed, some legal rights remain in force for many years even though they are widely regarded as immoral. This can be said, for instance, about the legal right enjoyed by husbands in the UK until 1992 to rape their wives. Legal rights extend over a broad range of legal relationships. A classic attempt to categorize such rights was undertaken by Wesley Hohfeld in

*Fundamental Legal Conceptions* (1923). Hohfeld identified four types of legal right. First, there are privileges or liberty-rights. These allow a person to do something in the simple sense that they have no obligation *not* to do it; they are 'at liberty' to do it – for instance, to use the public highway. Second, there are claim-rights, on the basis of which another person owes another a corresponding duty – for example, the right of one person *not* to be assaulted by another. Third, there are legal powers. These are best thought of as legal abilities, empowering someone to do something – for example, the right to get married or the right to vote. Fourth, there are immunities, according to which one person can avoid being subject to the power of another – for instance, the right of young, elderly and disabled people *not* to be drafted into the army.

The status which these legal rights enjoy within a political system varies considerably from country to country. In the UK, the content of legal rights has traditionally been vague and their status questionable. Before the Human Rights Act 1998, most individual rights, such as the right to free speech, freedom of movement and freedom of religious worship, were not embodied in statute law. Indeed, UK statute law consisted largely of prohibitions which constrained what the individual could do or say. For example, although there was no statutory right to free speech in the UK, there were a host of laws which restricted what UK citizens could say on grounds of slander, libel, defamation, blasphemy, incitement to riot, incitement to racial hatred, and so forth. Legal rights in the UK were often therefore described as 'residual', in that they were based upon the common law assumption that 'everything is permitted that is not prohibited'. The danger of this situation is that, lacking clear legal definition, it may be difficult or impossible to uphold individual rights in court. Although the Human Rights Act 1998 introduced greater clarity in the definition of rights, it did not give them entrenched status, allowing Parliament, albeit by a special procedure, to infringe the Act.

In contrast, a Bill of Rights operates in the USA and many other states. A Bill of Rights is a codified set of individual rights and liberties, enshrined in constitutional or 'higher' law. It is usually said to 'entrench' individual rights because such documents are complicated or difficult to amend. As such, a Bill of Rights can be seen to offer a number of clear advantages. In the first place, unlike traditional 'residual' rights in the UK, a Bill of Rights provides a clear legal definition of individual rights. Moreover, it can be said to have an educational value: by making people more aware of the rights they have it can promote within government, in the courts and among the general public what has been called a 'human rights culture'. Most significantly, however, a Bill of Rights establishes a mechanism through which rights can be legally defended and thus protects the individual from over-mighty government. This it achieves by investing in

the courts the power of 'judicial review', enabling them to check the power of other public bodies if they should infringe upon individual rights.

A Bill of Rights, nevertheless, may also bring disadvantages. UK conservatives, for instance, have traditionally argued that individual rights are best protected by common law because rights are then rooted in customs and traditions that lie at the very heart of the legal system. By comparison, a Bill of Rights may appear both inflexible and artificial. On the other hand, socialists have often objected to Bills of Rights on the grounds that they serve to protect class interests and so preserve social inequality. This can occur through the entrenchment of property rights, making nationalization impossible and blocking radical social reform. One of the most serious drawbacks of a Bill of Rights is, however, that it dramatically enlarges the authority of the judiciary. Given the typically vague or broad formulation of rights, judges end up deciding the proper scope of these, which, in effect, means that political decisions are taken by judges rather than by democratically elected politicians. Finally, it is clear that the mere existence of a Bill of Rights does not in itself guarantee that individual liberty will be respected. The Soviet Constitutions of 1936 and 1977, for example, established a truly impressive array of individual rights; but the subordination of the Soviet judiciary to the Communist Party ensured that few of these rights were upheld in practice. Similarly, despite the enactment in 1870 of the Fifth Amendment of the US Constitution granting the right to vote regardless of race, colour or previous condition of servitude, blacks in many Southern states were not able to vote until the 1960s.

A different range of rights, however, may have no legal substance but only exist as moral claims. The simplest example of this is a promise. A promise, freely and rationally made, invests one person with a moral obligation to fulfil its terms, and so grants the other party the right that it *should* be fulfilled. Unless the promise takes the form of a legally binding contract, it is enforced by moral considerations alone. It is, quite simply, the fact that it is freely made that creates the expectation that a promise will be, and should be, fulfilled. In most cases, however, moral rights are based, rather, upon their content. In other words, moral rights are more commonly 'ideal' rights, which bestow upon a person a benefit that they need or deserve. Moral rights therefore reflect what a person *should* have, from the perspective of a particular moral or religious system.

The danger with moral rights is, however, that they may become impossibly vague and degenerate into little more than an expression of what is morally desirable. This was precisely the view taken by Jeremy Bentham (see p. 359), the British utilitarian philosopher, who rejected the very idea of moral rights, believing them to be nothing more than a mistaken way of describing legal rights that *ought* to exist. Nevertheless, despite Bentham's scepticism, most systems of legal rights are under-

pinned, at least in theory, by some kind of moral considerations. For example, legal documents like the US Bill of Rights, the UN Universal Declaration of Human Rights (1948) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) have all developed out of attempts by philosophers to define the 'Rights of Man'. In order to investigate moral rights further it is necessary to examine the most influential form of moral rights – human rights.

## Human rights

The idea of human rights developed out of the 'natural rights' theories of the early modern period. Such theories arose, primarily, out of the desire to establish some limits upon how individuals may be treated by others, especially by those who wield political power. However, if rights are to act as a check upon political authority, they must in a sense be 'pre-legal', law being merely the creation of political authority. In the seventeenth century, John Locke (see p. 268) identified as natural rights the right to 'life, liberty and property'; a century later, Thomas Jefferson defined them as the right to 'life, liberty, and the pursuit of happiness'. Such rights were described as 'natural' in that they were thought to be God-given and therefore to be part of the very core of human nature. Natural rights did not exist simply as moral claims but were, rather, considered to reflect the most fundamental inner human drives; they were the basic conditions for leading a truly human existence. As such, natural rights theories were psychological models every bit as much as they were ethical systems.

By the twentieth century, the decline of religious belief had led to the secularization of natural rights theories, which were reborn in the form of 'human' rights. Human rights are rights to which people are entitled by virtue of being human. They are therefore 'universal' rights in the sense that they belong to all human beings rather than to members of any particular nation, race, religion, gender, social class or whatever. Human rights are also 'fundamental' rights in that they are inalienable: they cannot be traded away or revoked. This was clearly stated in the American Declaration of Independence. 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'