7 The Idea of Rights (ii): On the Sources and Significance of Social Rights

7.1 POSITIVE LAW AND MORALITY AS SOURCES OF RIGHTS

7.1.1 No one can have a right solely in virtue of his individual identity. John Doe cannot be entitled to anything simply as John Doe. What then can entitle him? The short answer is, rules and principles. For there to be a right to something, there must be rules or principles which specify certain conditions and declare that all those and only those who satisfy them are entitled to it. To have the right to vote in a British general election, John Doe must satisfy the conditions specified in the rules of British electoral law: for instance, he must have British nationality, have reached the age of eighteen, not be a peer of the realm, a convicted felon or a certified lunatic. To have the right to have a promise kept, he must be a promisee, what this is being specified in the rules of the practice of promising: that is, he must be someone to whom another person has made a *bona fide* promise at a given time and place. Law, custom and morality have already been mentioned as sources of rights (see 6.1.1). What makes them sources is that they contain rules and principles. But, if they are to be the sources of John Doe’s rights, he must already be subject to them. What subjects him to them in the first place?

Law and custom are social institutions. Every system of positive law is the positive law of some community, and the same is true of every body of custom. Morality is social in the sense that without it there can be no social life at all: hence common morality. But social life can take different forms: hence particular morality. To be a member of a community is to be a moral agent with obligations as a member (see 2.2.2 and 2.3.3 above). As a person, John Doe is necessarily a member of a community. It follows that what subjects him to the law, custom and morality which are the sources of his rights, is that he is a member of the particular community whose law, custom and morality they are. Every community consists of a group of people living together upon terms which enable each to know what is due from him to other members and what is due from them to him (see 2.3.1 above). John Doe’s obligations are what is due from him, his rights what is due to him, as a member. But, if there are any human rights, not all rights are social. There must be some which people have simply as
human beings, irrespective of their membership of particular communities. However, more about that in the next chapter. Not all rights may be social but most certainly are: for instance, the rights which people have as citizens, neighbours, friends, parents, workers, colleagues, clients and customers.

7.1.2 Rules which confer rights must be constitutive, not regulative: that is, they must be rules which are logically prior to the cases which they cover. Regulative rules can impose obligations but they cannot confer rights. This is because the actions they regulate are logically independent of them. It is possible for people to do them or not to do them in the absence of any rules prescribing or forbidding them. This is not so in the case of right-conferring rules. It is not possible for people to be entitled to do something or to receive something in the absence of either rules or principles which confer the entitlement and prescribe the obligations correlative to it. In this respect, having a right is like having authority. A man cannot have authority over other people unless there are constitutive rules which confer it upon him and prescribe obedience to it. As with authority, so with entitlement: when it is conferred by rules, these must necessarily be constitutive. The difference between authority-conferring rules and entitlement-conferring rules is that the former must be secondary rules. The latter may be secondary or primary, depending upon the kind of right which is conferred.

Secondary rules are not about what is to be done but about who decides. Hohfeldian power rights entitle the right-holder to decide. They entitle a policeman to decide whether to question eye-witnesses and, if so, what questions they are to answer. They entitle a landlord to decide whether to raise the rent and, if so, by how much. They must therefore be conferred by secondary rules. But secondary rules are not needed to confer claim rights. They are rights to have things done and can be conferred by primary rules. The right to have a promise kept is conferred upon the promisee, and the obligation correlative to it to keep the promise is imposed upon the promisor by the primary rules which constitute the practice of promising. The same is true of immunity rights. They entitle the right-holder to be exempt from something: an MP from libel actions for what he says in Parliament, a conscientious objector from conscription. Rules which confer immunity rights are primary. They are about what is to be done and, more especially, what is not to be done. But they must be constitutive because without them there could be no entitlement to immunity.

It may be thought that liberty rights are an exception: that they can be conferred by regulative rules. The rule setting a speed limit of 30 miles per hour in built-up areas is regulative. What it regulates, the speed of vehicles in built-up