6 Freedom, Autonomy and Rights

Despite the diversity of justifications that can underlie rights and despite the diversity of rights that they can deliver, virtually all theories of rights give an important place to freedom. Sometimes the freedom to which individuals are said to have a right is characterised in a general way as a right to 'freedom' or 'liberty' without further qualification. Sometimes rights to freedom are broken down into a set of more specific freedoms such as freedom of speech, freedom of association and freedom of religion.

Institutionally rights to freedom can be provided for in any of the four forms distinguished by Hohfeld. So rights to liberty need not be provided for only as liberty-rights. Certainly, under any legal system, much of people's legal freedom is likely to consist of the residuum left over after a set of prohibitions has been established: people will be legally 'at liberty' to engage in a range of activities merely in that they are placed under no legal obligation not to engage in those activities. As we noticed in Chapter 1, some of the most cherished freedoms—such as freedom of expression or freedom of worship—are provided for in some legal systems merely as liberty-rights: people are legally free to express their views or to practise a particular form of worship merely in that no law prescribes that they should do otherwise.

However freedom may also be provided for by way of claim-rights: individuals may have legal rights that others should not impede their behaving in certain ways. The duties that correspond to such claim-rights may relate very directly to specific freedoms; for example, a legal system may impose upon people duties to refrain specifically from silencing others or from interfering with their religious activities. Alternatively legal duties may stand in a rather less direct and specific relation to particular freedoms. In English law, for example, many freedoms are 'protected' only by a general legal duty to refrain from assault.

In addition the freedom that people enjoy under a legal system is affected significantly by the powers and the immunities that they are
accorded by that system. I am legally free to marry or to divorce only to the extent that I am legally empowered to marry or to divorce. I can be confident of my legal freedom to conduct my life according to my own lights only to the extent that I am immune from others' being legally empowered to impose decisions upon me. It may seem more natural to think of powers and immunities as determining people's 'abilities' rather than their 'freedoms'. If a legal system makes no provision for divorce, I am legally unable rather than unfree (duty-bound not) to divorce. If I remain unenfranchised, I am legally unable rather than unfree (duty-bound not) to vote. However, given that the distribution of powers and immunities in a society significantly determines the control that individuals have over their own lives and over the lives of others, it would be pedantic and misguided to ignore what people are legally 'able' or 'unable' to do in assessing what they are 'free' or 'unfree' to do.

Why has the concern for freedom so often been expressed by way of rights? Before turning to rights to particular freedoms, I want to examine the idea that there is a right to liberty simpliciter. The right to liberty, unqualified and unadorned, has figured constantly in declarations of rights; it has also been, and still is, the battle-cry of a multitude of causes. But how are we to understand that right? A limited, but nevertheless very important, way in which it might be interpreted is as the right not to be enslaved. Slavery is the most complete antithesis of freedom and universal rights to freedom must stand opposed to slavery. However a society without slavery can still be a society in which people's liberty is severely limited and, most frequently, the right to liberty has been used to claim more than non-enslavement.

So should we interpret the right to freedom literally? Do people have a right to unlimited freedom? That, as Dworkin has argued (1978, pp. 266–78), makes no sense – at least, not if the right to freedom is understood as a right in the 'strong sense'. Laws limit liberty. The law against murder makes me unfree to murder you and you unfree to murder me. The law against libel renders me unfree to libel you and you unfree to libel me. Yet, ordinarily, we would not think of those laws as violating people's rights. On the contrary, we would be more inclined to think of them as upholding rights.

Thus those who insist that there is right to freedom do not usually mean that there is a right to any and every freedom. Just what combination of freedoms and unfreemods there ought to be is