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## Human Rights in the Emerging World Order

Joseph Raz\*

### Abstract

Pursuing the so-called political account of human rights, this talk first explains some aspects of the relations between legal and moral rights, and between rights and interests, and then applies the analysis to provide an explanation of human rights. Using the rights to health and to education as examples, it rejects the traditional theory that takes human rights to be rights that people have in virtue of their humanity alone. But human rights are synchronically universal. They are rights which all people living today have, a feature that is a precondition of, and a result of, the fact that they set limits to state sovereignty and justify accountability across borders. Human rights function in the international arena to underline the worth of all human life. They give individual interests a central place in international relations, and have become a distinctive ingredient in the emerging world order where they generate new channels for political action in the international arena. They are by their nature moral rights that call for legal-political protection. Needless to say mechanisms for their protection should be efficient, reliable and fair, or they may cause more harm than good. Moral rights that cannot be fairly and effectively protected through legal processes are not human rights. The discussion of these points highlights the fact that the political account of human rights takes their existence to be contingent on social, economic and cultural factors, and the rights to health and to education are used to illustrate this dependence on factual contingencies. The fast-changing structures of the international scene include changes and challenges in the content and protection of human rights. The paper concludes with a discussion of the difficulties that cultural diversity creates for identifying the content of such rights, and for devising mechanisms for their protection.

I will start with some—hopefully truistic—observations about rights, which will lead to a reflection on the role that human rights play in the emerging world order. I say ‘the emerging world order’ for it seems that we are going through a period of fast transition. If it is sensible to date its beginning to the collapse of the Soviet Union and the Soviet Bloc,

\* Thomas M Macioce Professor of Law, Columbia University, and formerly Professor of The Philosophy of Law, University of Oxford. This article is an expanded and revised version of the lecture I gave at the opening plenary session of the 24th IVR World Congress in Beijing, September 2009, which was entitled ‘Human Rights in a New World Order’. I have retained its character as a mostly footnote-free and fluidly structured address. I am indebted to Professor Craig Scott for many comments and suggestions for improving the text. The unrevised ‘Human Rights in a New World Order’ speech will appear in the IVR proceedings as well as in translation in Chinese.

then it is clear that its progress is anything but smooth. But I will neither be concerned with analysing the prevailing forces pressing for the remoulding of the shape of our world, nor with predicting its likely future direction. Rather my observations are those of a spectator commenting on one aspect of the process: that concerning the role that claims of individual rights, and the attempts to implement them, play and can usefully play in it.

Recognition and implementation of individual rights are not necessarily the most important aspects of the emerging world order. But there is no denying that its emergence is accompanied by extensive debates about human rights, and intensive efforts to secure their implementation. My discussion of the place of rights in the world order is conducted against the background of this hectic activity. I will use two rights to illustrate some of my points: the right to education and the right to health.

The right to education is recognised in a variety of international treaties. Perhaps the main location is the 1948 Universal Declaration of Human Rights,<sup>1</sup> which in Article 26(1) declares:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

<sup>1</sup> Article 26(2) continues, 'Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace' [UDHR] (GA Res 217A (III), UN Doc A/810 at 71 (1948)). Beyond the Universal Declaration, all eight treaties that are considered the core in-force United Nations human rights conventions expressly include rights related to education. See eg Art 13 of the International Covenant on Economic, Social and Cultural Rights [ICESCR] (GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, *entered into force* 3 January 1976); Art 18(4) of the International Covenant on Civil and Political Rights [ICCPR] (GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, *entered into force* 23 March 1976); Art 28 of the Convention on the Rights of the Child [CRC] (GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), *entered into force* 2 September 1990); Art 10 of the International Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW] (GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, *entered into force* 3 September 1981); Art 5(e)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination [CERD] (660 UNTS 195, *entered into force* 4 January 1969); Art 10 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] (GA Res 39/46, annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984), *entered into force* 26 June 1987); Art 30 of the International Convention on the Protection of All Migrant Workers and Members of their Families [MWC] (GA Res 45/158, annex, 45 UN GAOR Supp (No 49A) at 262, UN Doc A/45/49 (1990), *entered into force* 1 July 2003); and Art 24 of the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities [PWDIC] (GA Res 61/106, Annex I, UN GAOR, 61st Sess, Supp No 49, at 65, UN Doc A/61/49 (2006), *entered into force* 3 May 2008). In several of these treaties, education is also referenced in other articles than the lead right-to-education article cited above.

The human right to health appears in Article 12(1) of the 1966 International Covenant on Economic, Social and Cultural Rights:<sup>2</sup>

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

My aim is to highlight both the vital importance of individual rights such as the rights to education and health in the world order, and to raise some difficult problems regarding their intellectual foundations, their definitions, and their implementation. I will advance no firm recommendations, though I hope that my comments help point to the direction in which both theoretical inquiry and political activity can contribute to their solution.

## 1. ON RIGHTS IN GENERAL

Let me start with some observations about rights in general. My observations are not a general account of the nature of rights. I have written about that before, and the following

2 Article 12(2) continues:

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The UDHR also included the right to health, in its Art 25 on the right to an adequate standard of living, but it was only with the ICESCR that the right to health was placed in a free-standing article. Alongside the UDHR and ICESCR, five of the other seven core UN human rights treaties expressly include rights related to health. See eg Art 24 of CRC; Art 12 of CEDAW; Art 5(e)(iv) of CERD; Art 28 of the MWC; and Art 25 of the PWD. Neither the ICCPR nor CAT expressly refers to a right to health (other than 'public health' being included at several points in the ICCPR as a legitimate objective on the basis of which various ICCPR rights can be justifiably limited, subject to proportionality analysis). However, health is necessarily implicit in CAT, given the very nature of torture and its effects on health; Art 1 of CAT prohibits the infliction of 'severe pain or suffering, whether physical or mental'. And the Human Rights Committee has long interpreted the right to life in Art 6 of the ICCPR to include right-to-health dimensions. As early as 1982, the Human Rights Committee, in its first General Comment on Art 6, indicated that the right to life generated a duty on states to take positive measures including what the Committee expressed as the 'desirab[ility]' that states 'take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics': Art 6 (16th Sess, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 127 (2003). Since then, the Committee has invoked health-related aspects of ICCPR rights in Concluding Observations in relation to various states' human rights performances, for example, with respect to the health consequences of homelessness in Canada in 1999: *Concluding Observations of the Human Rights Committee, Canada*, UN Doc CCPR/C/79/Add.105 (1999), at para 12.

observations do not qualify that analysis.<sup>3</sup> They point to features that are typical of many rights, and therefore reflection on them helps in considering the role of rights in the international, as well as in the domestic, arenas.

My topic is individual rights, but of course rights can be possessed not only by individuals. States, corporations and other legal persons also have rights. Since states and corporations are creatures of law, their rights are legal rights. Among legal rights we can distinguish those created by law from those recognised by law. If individuals have a right to free expression, then the legal right to free expression constitutes an adequate or a partial recognition of that prior right—call it a moral right—to free expression. I will ignore possible refinements here. For example, I take recognition to be constituted by the fact that the legal right has the same, or nearly the same, content as the moral right, regardless of whether it was adopted by law in order to give legal effect to the moral right, or for some other reasons. I will also disregard the fact that whether a legal right recognises a moral right is a matter of degree.

Some rights are created by law. A right to ownership of government bonds, like those bonds themselves, does not exist independently of the law. It is a legal creation. Legally created rights may be moral rights; that is, they may be legal rights that have moral force. Others may lack moral force. Sometimes the law creates new rights when the law-makers intend to recognise an independent right, but fail to do so. And such legally created rights too may be moral rights, that is, have moral force, or fail to be so. Where there is a moral obligation to obey the law, or to obey some parts of the law, rights created by morally binding law have moral force, even if the legislature that created them may have been mistaken in its belief that they recognise independently existing moral rights.

For the rest of my talk I will ignore legal rights with no moral force. So, when I refer to legally created rights I will be referring to morally valid legally created rights.

The existence of legally created rights teaches us important lessons. First, the (moral) rights that people have can change. As the law creates new ones or terminates the existence of old ones, our (moral) rights change. Second, moral rights can rest on—be justified by—factors other than more basic moral rights.

Let me elaborate on this second point. Legal rights, with moral force, that are created by law (rather than being simply legally recognised moral rights) are likely to be justified by considerations other than other moral rights alone, and possibly not to rest on any other moral right at all. For example, the justification of the rights one has in virtue of holding a government bond will include considerations that explain why government bonds are sound commercial instruments, considerations which would relate to the economic functioning of governments, and so on, and not merely, if at all, some

<sup>3</sup> Joseph Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194. See also Joseph Raz, 'The Nature of Rights' in Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 165 ff. The latter chapter is largely identical to the preceding article except for an added treatment of Ronald Dworkin's notion of rights as trumps at pp 186–92.

antecedent moral rights of the bond-holders. Alternatively or in addition, the justification of the bond-holders' rights will derive from the general obligation to obey the law, resting as it does on the need to secure peaceful government in the country, being again considerations that go beyond any antecedent right of the bond-holder.

Now, some people may say that only moral rights that are legal rights can be justified without being derived from other moral rights. 'Independent' moral rights—that is, ones whose moral status does not depend on being created by the law, or by other social institutions or practices—derive, they say, from other independent moral rights, and ultimately from fundamental moral rights which do not derive from—are not justified by—anything other than themselves. But there is no reason to think that that is so. That is, there is no cogent argument that would show why, if moral rights can arise out of morally significant legal actions, they cannot arise out of morally significant factors of other kinds. And the fact that they need to be morally significant is no restriction on what they are. They are made morally significant by justifying rights if by nothing else.

At most, *some* rights may be basic, in that their justification does not depend on other factors. They are in some sense self-justifying, or their validity is self-evident. I doubt that any rights are basic in that sense. While the argument of my talk does not depend on these doubts being well founded, it does depend on a general way of thinking about rights, which I will now explain. The explanation of this way of thinking about rights will show why my doubts are plausible.

The explanation depends on what I hope are entirely truistic observations. First, it is a common feature of rights that the objects of rights—that is, what one has a right to—are things of value. Normally, the objects will be of value to the right-holders themselves. This truism is to be distinguished from a second one, namely that having a right is itself something of value to the right-holder. Often, the value of the right depends on the value of the object of the right. Because the right is to something of value, the right itself is of value. The third truism is that the right of one person limits the freedom of other people. Generally speaking, people have a duty not to violate the rights of others. Each right establishes a set of duties, and identifies a set of people who are subject to the various duties. What unites the duties is that they secure (at least to some degree) the right-holder's control over the object of his right. Because (by the first truism) the object of the right is of value to the right-holder, controlling it is also of value. Hence the first and the third truisms yield the second one, that rights have value to those who have them.

However, these truisms need to be qualified. Most rights can be renounced; that is, right-holders can give up their rights, or some aspect of them. Very often right-holders can transfer, by gift or sale or in some other way, their rights to other people. Sometimes the very point and value of the right is in the value of the control over its object combined with the value of the ability to alienate that control, to give it up, or to transfer it. These are the typical cases in which the value of the right is detached from the value of its object to the right-holders. The interest of right-holders in their rights is in their ability to

alienate these rights. (There are other exceptions, but we need not dwell on them here.) Let me add just one further word of explanation: the value that the object of the right may have for the right-holder can depend on the moral duties of the right-holder—the value of having property includes the fact that it enables one to meet one’s responsibilities towards family members, the environment, and so on.

Given these truisms, we have to wonder about their significance. In particular, could it be that the object of a right’s being of value to the right-holder has nothing to do with the justification of the right, with the explanation of why the right-holder has that moral right? Could it be that the fact that having the right is of value to the right-holder has nothing to do with the explanation of why the right-holder has that right? That somehow sounds implausible. The natural explanation is that the fact that the objects of rights are of value is the reason or part of the reason why the right-holders have the right. Of course, people do not have a right to whatever is of value to them. Here the third truism comes into view: rights are grounds of duties on others. The bare fact that something is of value to me does not endow me with a right to it, because it does not in itself establish that other people have a duty to secure me with, or not to interfere with my, possession of it. It would appear that we have a right only if the right entails that the value of having it, or our need for it, is of a kind sufficient to impose duties on some others—more precisely, on at least one other.

The value of the right to its possessor is its ground. It is that value which justifies holding others to be duty-bound to secure or at least not to interfere with the right-holder’s enjoyment of the right, and it is only when such duties exist that the right exists. It exists because it gives rise to such duties.

Notice that here I shifted attention from the value of the object of the right to the value of the right to that object. The value of the right depends on the value of the object, but also includes the value of the secure enjoyment of that object. It further includes the exchange value of the right, in the case of rights to alienable interests—that is, the value of the fact that one can pass the right (and the underlying object of the right) to others, such as by way of gift or as part of a trade-off. As I noted above, with some rights (for example, many property rights), the main value of having the right is the value of being able to trade it. That value presupposes that the object of the right is of value to someone other than the right-holder. But the object may be of little or no value to the right-holder, for whom the main value is in the ability to sell the right.<sup>4</sup>

Truistic as they may be, the three truisms—that both the right and its object are of value to the right-holder and that the right of one generates the duty of another—do

<sup>4</sup> I should repeat that the observations I rely on here are generalisations that allow of exceptions, exceptions which indirectly prove the same general lessons to which I draw attention. For example, some rights invest their holders with control over objects that, far from being valuable, are harmful to them. Here, the right is valuable for its point is to provide the right-holders with control over the source of harm, which enables them to neutralise it.

nonetheless prompt the question: why is it that rights are of value to the right-holder and why do they involve duties on others? The explanation is that rights have a special role in our moral universe: they apply to cases where the value of something to a person is of a kind that warrants holding others duty-bound to respect it or otherwise secure its enjoyment in some ways.

This view of rights is broad enough to allow for a great variety of rights. They can differ in their object, in those on whom the duties to respect the rights fall, and in the nature and scope of those duties, as well as in other respects. So broad is the view that, rooted as it is in truisms, it may appear to say too little to be of interest.

The contrary is the case. In seeing rights as justified by what is of value to the right-holders, this view challenges the view that rights are fundamental. It also exposes one common lacuna in much discussion of human rights. So much of that discussion focuses on the value of the putative right or its object to the right-holder, as if this is sufficient to establish that there is such a right. So often there is little concern to show why others are subject to duties in regard to the putative right or its object. That something is of value to someone does not even begin to establish that I or anyone else has a duty to secure or protect his possession or enjoyment of that thing. A special argument is needed here, and it is all too often missing, an argument which relies on the special character of the value that the right provides.

Before moving on, a fourth truism should be noted. It has to do with the special control right-holders have regarding their rights. What is it? It is often said that right-holders have standing to complain about violations of their rights. Having standing means that the complaint cannot be blocked by saying ‘mind your own business’, or words to that effect. Such responses are often appropriate. In giving such a response, one refuses to enter into conversation with the person making the complaint, the person alleging that one acted improperly and thus either violated the complainant’s right or violated someone else’s right. The blocking move—‘it is none of your business’—does not deny that one acted improperly, nor does it admit it, nor does it invoke an excuse for one’s conduct. It simply denies the standing of the other to engage one on this point (at least in the context in which the complainant seeks engagement), and is a refusal to deal with him about it.

It is true that, subject to exceptions which I will come back to shortly, such a response is unacceptable if the complaint is made by the person whose right—it is claimed—has been violated and is made in an appropriate social or institutional context. But I do not share the views of several writers who made this fact the corner-stone of their theories of rights or even of morality as a whole, writers who looked for a further elusive factor that explains why right-holders have a standing regarding the violation of their rights. To understand my observations later on in the paper it is important to see where these writers went wrong. So I will say a little more on the subject.



As a matter both of moral principle and of common belief, it seems to me that we are all within our rights in forming views about the morality of the conduct of anyone without restriction. We should not form such views lightly, nor should we form them for some unworthy purpose. But that is true of all our beliefs. It may be particularly unappealing to be the sort of person who makes it his or her business to judge others, whether there is any point or purpose in doing so or not. Nevertheless one is within one's rights in forming such views, so long as one does so responsibly. Similarly, general principles of freedom of expression govern the communication of such views. Again, as with other beliefs, the right to communicate them should not be abused. But it is a universal right. There is no special standing here for people whose views or communications concern their own rights and their actual or possible violation. Indeed it would be a sorry society—including, as I will discuss later, world society—in which no one other than the victim or his close friends is allowed to protest against violations of people's rights.

Notice that the powers of enforcement and protection of rights do not belong exclusively to the right-holder either. All these precepts are widely recognised in the public culture and legal institutions of many countries. Journalists have a right and indeed a duty to uncover right-violations, and report on them. Governments have a right and a duty to protect right-holders; in this context, while some enforcement measures are at the discretion of, or affected by decisions and preferences of, the right-holders, others are not. They are a matter of public concern, and public officials are in charge.

So what is the special standing of the right-holders? Needless to say, the right-holders are most directly affected by respect for or violation of their rights. Therefore their concern is rarely trivial or nosey. That is why they have standing in matters to do with their rights. Other people have standing on the same footing, that is, when their interference has a serious point and expresses a genuine concern in a matter which is either not yet resolved or not yet properly handled. The difference is that, with the right-holders, the concern is almost always serious. Or at least appears serious: true, right-holders can pursue their rights for unworthy reasons, even when no non-trivial interest of theirs is at stake. But it is rare that others will be in a position to know that, and to insist that that is the case.

There is, of course, another way in which right-holders are involved, and it is this other way that seems to be the central factor explaining right-holders' special standing regarding their own rights. Commonly, right-holders have the power to waive their rights—permanently or on some occasions—and that includes the power to suspend the enforcement of their rights on one or more occasions. On occasion, they may prefer that a right not be respected or that its violation shall not be rectified. They can achieve such results by using the power to waive the right, whether generally or in a single instance, and they can waive their right to compensation or other remedies for its violation.

This said, there may be rights which cannot be waived. The rights to some basic freedoms are plausible candidates. But generally rights are (by the third truism) protected by duties on others, which can be—and that is the fourth truism—waived or suspended by the right-holder. It is this power, and not the standing to complain, that is at the core of the special standing of right-holders regarding their own rights.

These truisms, especially the last one, are important to the role of rights in the emerging world order, a subject to which we should now finally turn.

## 2. THE EMERGING WORLD ORDER: WHERE DO RIGHTS COME IN?

When talking of the emerging world order I have in mind the pattern of institutions, treaties and established practices that are emerging under the impact of the economic, social and cultural pressures in a world growing smaller and more interdependent through vastly enhanced communication technology. The new world order is in the making. We are in a period of fast changes in many aspects of the international situation, changes whose directions are uncertain. I would not venture to predict, or to recommend a blueprint for, a desirable outcome. My modest aim is to point to some possibilities and difficulties inherent in some of the current trends regarding the role of individual rights. But even that presupposes a certain awareness and understanding of those trends, for there is no possibility of sensible recommendations based on *a priori* considerations only. They must relate to the reality for which they are intended.

The individual rights discussed and pursued in the international arena are invariably human rights. Other rights come in when incorporated in treaties or the constitutions of international organisations. Human rights stand in their own right. Their implementation, like that of other legal precepts, requires institutionalisation. But when incorporated into law the relevant legal rights are, rightly, considered not to be rights created by law, but ones recognised by law. They are moral rights we have independently of the law, and that is why the law should recognise and enforce and protect them.

But why are they considered to be not only moral rights which the law should respect but moral rights of a special kind, namely, human rights? Briefly put, this is because they are thought to combine exceptional importance and universality. Even though various writers have offered explanations of the first element, that of importance, none seems to me successful either in explaining what is the importance of those rights or in establishing that only important rights can be human rights. In the present paper, I will ignore this element altogether. What about universality?

The theories that I will call 'traditional' claim that human rights are universal because they are rights every human being has as a human being. That is, being a human being is the ground of possessing those rights. This claim is hard to sustain concerning the rights

recognised as human rights in international instruments in the modern UN Charter era as well as in the more contemporary period of what I am calling the emerging world order.<sup>5</sup> Take my first example, that of a right to education. If people have the right identified by the Universal Declaration as a right to education in virtue of their humanity alone, it follows that cave dwellers in the Stone Age had that right. Does that make sense? Recall the language of the Declaration:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

The very distinctions between elementary, technical, professional and higher education would have made no sense at that time, and at many other times. Nor would it make sense to think of any part of education as compulsory. Who was supposed to do the compelling? Clearly the right here recognised is one that applies—if at all—to people who live in conditions not unlike ours. But if so then it cannot be grounded in our humanity alone.

It is plausible to think that the reasoning behind the right to education is that people's ability to have a rewarding, fulfilling life depends on having the skills required to cope with the challenges of life and to take advantage of the opportunities available at the time and in the place where they live or are likely to live. Given the circumstances of life today, that requires formal schooling, and given the political organisation of our societies into states, it makes sense to make governments responsible for the provision of education to all. This is a very abbreviated story. The explanation and justification of the right requires considerable amplification. I will omit that.<sup>6</sup>

Some theorists would insist that, even though the right to education recognised in international law today is not a universal human right, it derives from some ur-right which is genuinely universal. I can find no such right. I also believe that the motivation to look for one is misguided. The justification for the existing right to education that I sketched is based on perfectly universal considerations, namely on the importance of the

<sup>5</sup> For longer-standing human rights treaties of the UN Charter era, see the ICESCR, ICCPR, CERD, CEDAW and CAT. For post-Cold War treaties, see the MWC and the PWDC. In formal terms (date of conclusion and opening for signature of the treaty), the CRC falls exactly on the divide between these two periods, although its formulations would have been largely settled in negotiations prior to the advent of the present 'emerging world order' period. I have elaborated on the critique of the traditional theory and explained in greater detail my own approach in Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 321.

<sup>6</sup> Whichever way the explanation of the grounds of the right is to be augmented it will rely on empirical generalisations about social and political conditions, which, like all such generalisations, are not without exceptions. It is part of the burden of the explanation that the exceptions are not of a character to undermine the existence of the right.

opportunity to have a rewarding life and on the way the chances to have a rewarding life depend on possessing skills to tap the opportunities available in one's place and time. All practical moral conclusions are based on universal considerations applied to specific circumstances. There is nothing special to rights, or to human rights, in that. And the earlier-noted considerations about rights generally have shown that rights do not necessarily derive from other rights. More commonly, and perhaps in all cases, they derive from considerations to do with the value of life in the way my story about the right to education illustrates.

The more plausible claim is that human rights are synchronically universal, meaning that all people alive today have them. Something like that seems to be assumed in contemporary human rights practice. This is of crucial importance, as it expresses the view that human life is valuable unconditionally, a view we tend—I hope—to take for granted, but which is not always observed in practice. So, one crucial contribution of individual rights to the emerging world order is in underpinning its commitment to the value of human life.

There is an additional crucial contribution that human rights make to the emerging world order: the most powerful actors on the international scene are states, big corporations, and at least some international organisations. Human rights are rights of individuals, and as the fourth truism (and the attendant discussion of it above) says, right-holders have a say in their enforcement, and everyone—every individual or association of individuals—has standing to press for their recognition as demanding protection. This enables the cause of human rights to mobilise concerned individuals, and to generate considerable pressure on states, corporations and international organisations. As we know, this is indeed what has happened and what is happening. One of the most important transformations brought about by the pursuit of human rights has been the empowerment of ordinary people, and the emergence of a powerful network of non-governmental as well as treaty-based institutions pressurising states and corporations (and, to a lesser extent, international organisations) in the name of individual rights. The human rights movement launched a new channel of political action, which continues to be a major corrective to the concentration of power in governmental and corporate hands.

### 3. DIFFICULTIES AND RISKS

The importance of human rights, I suggested, is in affirming the worth of all human beings, and in distributing power away from the powerful to everyone, including any group or association willing to advocate and promote the interests of ordinary people. But human rights come with an intellectual claim not strictly required for the achievement of those two ends. If we recognise that all human beings can have rights because they are human beings, we already recognise that they all have moral worth. And the distribution

of power is an essential feature of rights, not only of human rights. All rights assign to the right-holders power over the object of the rights. Human rights involve the further claim that comes with synchronic universality, the claim that all people alive today have the same human rights.

I should make clear at the outset that I do not intend to criticise this feature of contemporary human rights doctrine. But it is important to understand why it is there. According to traditional human rights theory, with its belief that people have those rights in virtue of their humanity alone, it is obvious why all human beings have exactly the same rights: they are all human beings, and it is just that which endows each one of them with human rights. Theories of human rights which opt only for synchronic universality accept that different people can have different human rights, for they accept that factors other than being human determine which human rights one has. In my example of the right to education, these include the social conditions that make schooling necessary for the opportunity to have a rewarding life, and the political conditions that make it appropriate to hold governments responsible for the provision of education. But if people can have different human rights at different periods, why can it not be the case that people who live today can have different human rights? Why must human rights be synchronically universal?

I believe that there is no principled ground for identifying human rights with synchronically universal rights only. But there are important pragmatic reasons for singling out synchronically universal rights, and letting them inherit the title of human rights, derived from the defunct traditional theory. We single out as human rights those rights respect for which can be demanded by anyone. In particular, inhabitants of one country can address such demands to the governments of other countries regarding those governments' treatment of their own citizens. And those governments cannot block the demands by saying 'this is none of your business'. The ability of states to block interference in their internal affairs, to deny that they are responsible in certain ways to account for their conduct to outside actors and bodies, is what traditionally conceived state sovereignty consists in. But human rights, as they function in the world order, set limits to sovereignty. States have to account for their compliance with human rights to international tribunals where the jurisdictional conditions are in place, and to responsibly acting people and organisations outside the state.

This is the other crucial feature of the way human rights function in the emerging world order.<sup>7</sup> In order to function sensibly in that way—that is, in order to set a limit to state sovereignty—claims about human rights violations, coming from people or organisations outside the state blamed for committing or not preventing those violations, must be capable of rebutting the retort: conditions in our state are different and you are

<sup>7</sup> I do not argue for this point. That is, I do not argue that it would be good if human rights did set limits to state sovereignty, or that it is good that they do so. I merely observe that that is a crucial aspect of the way they actually function in today's world.

in no position to know what rights inhabitants of our country have, and therefore in no position to interfere in our affairs in the name of those rights. Human rights cannot be subjected to such a response because we identify human rights with those rights that all people living today have in virtue of the common conditions of life today, especially in view of the worldwide broadening and deepening of those conditions in the rapidly evolving circumstances of the emerging world order. That is part of the case for acknowledging that respect for those rights can be demanded by anyone, including people and organisations that have no connection with the country concerned. Because we have those rights in virtue of common conditions of life today, no special knowledge of the circumstances of this country or that are required to know that its citizens have those rights. And that is part of the case for taking them to set limits to state sovereignty, to be rights for whose implementation states are accountable to individuals, organisations and other states beyond their borders.

The synchronic universality of human rights raises the bar for any claim that any particular human right exists. As I have already intimated, many theoretical writers and political activists ignore the difficulty of the task their advocacy faces because they labour under the illusion that all they need to do is to point to the importance of the alleged right or its object to the putative right-holders. They neglect the need to establish a case for holding others to be under a duty to secure, at least to some degree or in some ways, the right-holders' enjoyment of the rights. I will point to two kinds of difficulties in establishing the case for such a right: difficulties to do with process, and difficulties to do with content.

Let me start with issues of process. I have in mind the question of institutions with legitimate authority to settle controversies regarding the scope of rights, and to enforce respect for them. Not all moral rights should be enforced by law. Respect for various moral rights should be a matter of individual conscience, and subject to voluntary interactions among individuals, free from coercion or from institutional involvement. Human rights are not among those. Needless to say, ideally they should be respected voluntarily, independently of any institutional involvement. But of all our moral rights only rights that should be respected and enforced by law are identified as human rights. Obviously, injustices are bound to occur if the recognition and enforcement of a right are entrusted to institutions that are inherently biased, lack independence and impartiality, and lack fair procedures, or to ones whose interventions are haphazard and arbitrary.

The vital importance of impartial, efficient and reliable institutions for administering and enforcing human rights has three implications for arguments about them. First, if there is a human right to something, then there is also a duty to establish and support impartial, efficient and reliable institutions to oversee its implementation and protect it from violations. Second, until such institutions exist, normally one should refrain from attempts to use any coercive measures to enforce the right. We are bound by such caution given the common and serious harms attending use of coercion on the international

scene, and the risks that purported enforcement measures are no more than misguided presumptions. Third, if, given the prevailing circumstances, there is no possibility that impartial, efficient and reliable institutions may come into existence regarding a certain right, then that right is not a human right.

I stated these conclusions in stark form, and, so stated, they are misleading, especially the second and third ones. It is likely, indeed I believe it to be the case, that the picture regarding institutional enforcement is mixed. Within some regions, for example within the Europe of both the Council of Europe and the European Union, there may well be adequate institutions and procedures for the recognition and enforcement of all human rights in so far as respect for them within these regions is concerned, while they may be absent in some other parts of the world. Moreover, some institutional arrangements, like the International Criminal Court, may be launched, and may still exist in an experimental spirit. They are not proven to be impartial, efficient and reliable. But they may become impartial, efficient and reliable with time. We should not hesitate to experiment when there are fair chances of success. You will remember that all my reflections are based on the perception that we are in the midst of a flux, a period during which many ideas are tried and only some succeed. That is the only way to make progress in international relations and we should not be fastidious in ways that make success harder. So, in effect my second conclusion is a call for vigilance, for awareness of the crucial importance of having appropriate institutions but also for willingness to be suspicious of enforcement of rights where attempts to enforce them are likely to lead to injustices.

My third conclusion was that, where there is no possibility of fair and reliable enforcement, there is no human right. This is the result of the general approach to rights, and in particular of their dependence on contingent factors. Think of any moral right that should not be enforced by law. The reasons for that will be that it cannot be effectively enforced, or that enforcement will be impossible or counter-productive. The reasons are rooted in the nature of human and social life and institutions. Some may be inseparable from the inescapable conditions of human life while others will be more contingent.

It is important here to remember that the conclusion is not that the right does not exist. It is only that it is not a human right. The contemporary practice of human rights identifies as human rights only those that should be enforced by law. It follows that, while there may be human rights that are not enforced by law and whose existence is the case for just such enforcement, there cannot be human rights that cannot be enforced by law. If enforcement—fair, efficient and reliable enforcement—is impossible, we should recognise that the right is not a human right, and refrain from calling for its enforcement.

Finally, I want to mention one particular content-related difficulty in establishing that any right is a human right. This difficulty relates to the suspicion that claims—or some claims—of human rights are culturally biased, that they represent an ideological claim that the ideas of the West should prevail across the globe. In a way, this difficulty is not specifically about establishing a duty towards putative right-holders. But in practice this is where the difficulty lies.



Take the right to health, for example. Who could deny that health is of value to the people whose health is in question? Who can doubt that this is a truly universal right, for health has been of value to people for as long as there have been people? Well, things are not that simple. First, it would be silly to think that people really have a right to be healthy, a right which is violated every time they are not healthy. A saner view of the right sees its focus in Article 12(2) of the ICESCR, with its list of state duties. But states, or governments, are not inter-temporally universal: they did not exist from the beginning of *homo sapiens*. Second, health can be said to have both an intrinsic and an instrumental value. The intrinsic value is that of the sense of physical well-being enjoyed by the healthy. The instrumental value is that health greatly increases one's prospects of having a rewarding life. If not all, at least many forms of ill-health—involving as it does pain, suffering and disability—make fulfilling and satisfying life much harder to achieve, or even impossible.

It seems to me plain that it is the instrumental rather than the intrinsic value of health that is the foundation of the human right to health. That is so because, absent special relations, no one has a duty to secure for me or for any other person a feeling of physical well-being. But they may have such a duty to secure people the opportunity to have a fulfilling life.

But let me return to my main theme: the difficulties of dealing with cultural diversity, as they manifest themselves in the case of a right to health. As we know, the very idea of health is culturally relative. Health relates to functionality, and functionality relates to the type of activities important for normal successful existence in a particular context. The right to health is broad enough to cover the prevention of disability and other disadvantages, and they provide obvious examples of cultural relativity: for example, does infertility or does facial disfigurement constitute a condition the prevention or removal of which is covered by the right to health? Notoriously, the mental conditions constituting mental illness are culturally relative, but so are, in less obvious ways, the conditions we classify as diseases.

There is another difficulty, and I want to highlight it in particular: the right as expressed in the ICESCR is 'to the enjoyment of the highest attainable standard of physical and mental health'. Attainability connotes duties being relative to the economic, social and political circumstances of different countries. But all countries are required to prioritise health. The question is, to what extent? Should health take priority over personal liberty, or commercial freedom? Does the right to health include a duty to prohibit smoking, or other activities damaging to health? Does it include a duty to make more expensive the availability of objects or opportunities engagement with which is risky in order to discourage their use? One can have a special tax on ski resorts, or restrict the production of cars to vehicles that cannot exceed 60 km/h, and so on and so forth.

The plain truth is that we should reject the highest attainable standard test if taken to refer to what is factually attainable. If we take it more sensibly to refer to what is attainable given proper weight to all other considerations, including other moral rights



and worthwhile goals, then the content of the right and the extent of required attainment are wide open and raise crucial questions, questions which affect not only the right to health but other rights and values as well.

I hope that everyone would agree that health should not take priority over all else. All of us, to various degrees, find satisfaction and fulfilment in activities that risk our health and life, and sometimes the risk is part of the point of those activities. The crucial point is that different cultures have different, conflicting, and yet reasonable attitudes to such conflicts. There is no single way of striking the balance between health and other concerns. In their lives different individuals strike a different balance, and, in their public policies, different countries strike a different balance. Some ways of neglecting or risking life for other ends are senseless or even wrong. But many different individual attitudes and public policies, though inconsistent with one another, are sensible or at least acceptable.

How can this be reconciled with the fact that we all have the same human rights, that they are synchronically universal? Does it not follow that the inhabitants of Tamil Nadu have a different right to health than the inhabitants of Vermont, not because the two states differ in wealth, but because they act on reasonable but conflicting views of what constitutes the highest attainable standard?

It is no good saying that the formulation of the right in the Covenant allows for it to be relative to such variations. True though this is, it does not help either with the point of principle or with the need to develop a sensitive practice. The difficulty is to make practical sense of the right, to acknowledge both its universality and its sensitivity to cultural variations. The dominant practice of international human rights appears deficient in this regard. Human rights advocates seem more likely to invoke cultural differences to condemn them rather than to acknowledge their validity.

But that is not all: human rights are there to be enforced. They call for authoritative institutions to be in charge of supervising their implementation and for institutions that have responsibility for their implementation. Those institutions—both the implementing institutions and the supervising institutions—will have to take practical decisions that acknowledge the soundness or condemn the unreasonableness or immorality of various cultural attitudes and practices. This raises the point of principle I referred to: the fact that, in acknowledging the human right to health, countries concede the right of international institutions<sup>8</sup> to judge not only their health policies but also their pursuit of other rights and values because, in deciding on the highest attainable level of health, the relevant international institutions must pass judgment over the way different countries compromise between concern for health and the pursuit of other values.

<sup>8</sup> At the moment these include the UN Human Rights Council, specific human rights treaty bodies and, if the state has accepted jurisdiction, the International Court of Justice. But my point is not specific to these institutions. Acceptance of a human right is acceptance that there can be, and should be, international bodies with power to oversee its implementation.

This raises the practically delicate question of ‘who decides’. Is it acceptable that international bodies whose office-holders tend to be drawn disproportionately from a few powerful countries should decide about the good sense or otherwise of the practices of countries all over the world?

#### 4. CONCLUDING WORDS

I want to conclude with questions rather than answers. I underlined the crucial role human rights play in the emerging world order—first, in expressing the worth of all human beings; second, in placing on the agenda concerns other than those of inter-governmental relations or big business profit; and third, in empowering individuals and voluntary associations in creating an additional channel for exerting influence and affecting the international order. I also underlined some of the difficulties and dangers of human rights practices. In the existing climate they lend themselves to reckless activism, which ignores the fact that rights impose duties and that the case for the existence of the duties has to be established beyond pointing to the value of the right to the right-holder. Furthermore, attempts to implement the rights can do much harm if not entrusted to the care of impartial, efficient and reliable institutions. Finally, contrary to much current rhetoric, human rights are not absolute, or, at least, most human rights and certainly the two on which my discussion has focused, the rights to education and health, are not absolute: their just interpretation and implementation require sensitivity to cultural diversity and to the validity of other ends.

Such problems exist, even if often to a lesser degree, in the domestic implementation of individual rights. We do not have recipes for solving the problems. We struggle with them over time through a process of public debate, informed by the opinions (rarely unanimous) of professional elites, leading to revisable decisions by authoritative institutions. We need to have something like that in a form suitable to the international arena. We have nothing of the kind, though we have some beginnings that may or may not lead to the development of international authorities and associated processes of the needed kind.

I started by saying that we live in a period of transition with fast changes. It is possible to be optimistic. It is possible to be pessimistic about the direction of things. We should definitely not be complacent.

