

16 Human Rights as Instruments of Emancipation and Economic Development

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1. PRECEPT AND PRACTICE

On 10 December 1948, the General Assembly of the United Nations proclaimed the Universal Declaration of Human Rights, which was a call to a certain universalist commitment to promoting some basic rights that all individuals possessed simply by virtue of being human, and irrespective of their religion, race, gender, and nationality. This was the first time that such a proclamation had been made at a global level and endorsed by virtually every country in the world.¹

There is of course a long history of individual activism and philosophical pamphleteering for some basic rights for *all* human beings. Jefferson, Kant, Locke, Gandhi, the poetry of sufi saints and the writings of spiritual leaders, and even many nonbelievers, such as India's first prime minister, Jawaharlal Nehru, and the philosophers Bertrand Russell, David Hume, and John Stuart Mill easily spring to mind. There also had been initiatives undertaken by individual countries to recognize some basic rights of individuals within their national boundaries. The UN Declaration has special significance, because it was the first effort to bring the whole world under a common recognition of rights and to give this a semi-legal status.² In today's rapidly globalizing world we cannot ask for anything less. The Declaration has had huge ramifications, because many global agreements and initiatives – concerning the rights of the workers, the rights of the children, the treatment of prisoners, the protection of the environment, and economic objectives

¹ One reason for such widespread acceptance is – ironically – because, unlike the UN Charter of 1945, the Declaration did not place any legal obligations on nations that accepted it. With time, though, some of its clauses have begun to acquire a more obligatory character.

² This harks back to the Kantian dream that “if a single universal, rational, and supreme code of international practice could be established throughout the world, then perpetual peace was possible” (Chatterjee 2004, 98).

I am grateful to the Human Rights Institute, University of Connecticut, for organizing this important conference, and to the conference organizers for having given me the opportunity to address the gathering. This chapter is a revised version of the lecture I gave on that occasion and I am grateful to my audience for the lively discussion, and to Sabina Alkire, Marty Chen, Shareen Hertel, Hyejin Ku and Lanse Minkler for many helpful comments and criticisms at the time of writing up the paper. I presented a part of the paper at the conference on ‘Equality and the New Global Order’ at Harvard University, on 12 May 2006, and would like to record my thanks to the several commentators for the many valuable suggestions.

like the Millennium Development Goals – are outgrowths of that initial proclamation.³

Taking advantage of the fact that the readership of this volume will include researchers and students, I want to move away from these general, universal declarations – with which we all would easily agree – to some more conceptual and contentious matters, and focus on economic rights in the context of globalization.

Globalization can confer huge benefits on humankind, but it also can marginalize and impoverish large sections of the population in both poor and rich countries, unless it is complemented with intelligently designed policies meant explicitly to combat these inequities. At least in this context, the need for intelligent design must be considered above controversy.

Concern for the poor and the risk of their getting further marginalized during the process of globalization is, I believe, a matter of intrinsic moral significance (see Pogge 2005). But even if we do not consider it to be so, we must realize that when large segments of people get marginalized, this can cause political instability, strife and turmoil; and so it may well be in our self-interest to address these fall-outs.

In an earlier world, these problems were addressed at the level of each nation state separately, and that may have been, for most purposes, the right strategy. But in today's world, as the economies of different nations move closer to one another, it becomes difficult to solve or even begin to address one nation's problem without some policy coordination with other nations. The right policy to counter poverty or large inequality in one country may require us to know what is happening in other nations, because a unilateral move can cause the flight of capital or the diversion of trade flows.

It follows from this that it may no longer be possible to address the issue of labor rights in one country without doing so in another. So if we think of some basic rights – such as a worker's right to a living wage and to certain basic freedoms, a child's right to basic education, a poor farmer's right to clean air, and even certain human rights such as the right to bodily integrity – then some global coordination of policies is crucial.⁴ But this is by no means an easy problem. Various economies of the world are at vastly different levels of development, and cultures and belief systems across nations can be not just different but contradictory and even confrontational. Agreeing even in outline to a common minimal standard for such a diverse world is unlikely to be easy.

I do not choose my subject because of the academic's love of disputation and arguments – though I cannot deny finding these innately pleasurable – but because proclamations that have universal appeal, although extremely important, are of limited reach and can even harm us if they are not backed up by close reasoning and scrutiny. The World Bank has enshrined as a virtual logo its aim: "Our dream is of a world free of poverty." At the International Labour Organization, people wear T-shirts and badges that declare: "Say No to Child Labor." Individual rights

³ See Brysk (2002) for discussion of many of these rights.

⁴ Another interesting link between globalization and rights occurs via the nature of democracy. Although for small groups democracy may be predicated on common aims and objectives, as the group becomes larger (for instance, when we go from the nation to a collectivity of nations), interests become adversarial. This does not mean an abandonment of democracy but, rather, a structuring of it that recognizes the adversarial interests of its constituents. Equality of rights would then have to be the basic building block of such a democracy (Mansbridge 1984).

are routinely upheld in public discussions in the United States. If despite this the world is awash in poverty, 186 million children toil as laborers, and fellow human beings are humiliated and tortured not just in remote totalitarian states but in Abu Ghraib and Guantánamo Bay, evidently we are not succeeding in translating our proclamations into action.

These are huge moral lapses, but they are also intellectual failures. They suggest that our charters and laws may not be right, and even when they are, the details of how we translate them into actual actions may be faulty. I hope to persuade the reader that some of these problems are intellectually hard and need a lot of effort and analytical skill to solve them; and abstruse though such an exercise may seem, it is crucial that we do not forsake it if we are to translate our precepts into practice.

I shall be concerned in this chapter with rights that are enforced, if not fully, then in large measure, and if not immediately, then in some foreseeable future. This bears on the long-standing debate on whether a right that is not enforced is even meaningful, with the legal positivist school taking the view that it is not, and the natural rights school arguing that what constitutes a basic human right arises from our idea of what it means to be human and remains valid whether or not it is enforced (Dworkin 1978). This is not the occasion for me to join this debate, though my inclination would be to reject both these polar positions.

To acknowledge something as a right surely imposes on us an obligation to uphold it or to take measures toward its implementation at least in the future. On the other hand, as Harvey (2004, 702) puts it eloquently, the positivist position cannot be exactly right either, for then we would have to presume that it was “a linguistic mistake to assert that apartheid violated the human rights of non-white South Africans.” One way to bridge the gap between the two schools is to recognize that the mere assertion of a law or a right or a rule at times creates pressures that lead to partial enforcement, even though there may be no formal mechanism for enforcement.⁵ Just as some prophecies can be self-fulfilling, some laws can be self-enforcing or at least give rise to forces that create pressures for its enforcement.⁶ To declare that blacks in South African had a right that was being violated wantonly under apartheid is to build up pressure for restoring that right.

In American restaurant bathrooms, one frequently sees signs on the wall which say, “Employees must wash their hands with soap.” One may take the view that this demand is useless unless there is a mechanism for enforcing it, because otherwise this will have no effect on behavior. One way to counter this is to argue that the remark before the “because” in the previous sentence is valid, but what follows is not. This is because human beings, or at least some of them, *are* affected by displayed instructions that sound reasonable.⁷ Hence, the very fact of putting up a reasonable instruction has a self-enforcing affect on some onlookers.

⁵ An extremely cogent evaluation of some of these critiques – of the idea of human rights preceding their incorporation into the law and policy – occurs in Sen (2001, ch. 10). He takes the view that “human rights may also exceed the domain of *potential*, as opposed to *actual* legal rights” (229).

⁶ The concept of the expressive function of the law embodies some of this idea (Sunstein 1996; Cooter 1998).

⁷ At times, one may need to implore twice, as used to happen on Delhi public buses in the 1980s. Above some seats would be the sign “Ladies Seat,” and, on occasions, above these would be another beseeching sign: “Let ladies sit on Ladies Seat.”

2. THE FALLACY OF BINARINESS: A PRELIMINARY REMARK

It is useful to begin by introducing one specific problem that I shall be concerned with in this essay – that of labor standards. All – or, at least, most – of us will agree that workers should not be exposed to excessive health and safety hazards, children should not have to do hard labor or regular work, no worker should have to work more than a reasonable number of hours (for instance, ten hours a day), and no one should be forced to work against one's wishes. But converting these slogans into action can have many pitfalls.

First, we must not make what I shall call the “fallacy of binariness.” In a Woody Allen story, one Mr. Needleman, while discussing what kind of a funeral he would like, says, “I much prefer cremation to burial in the earth,” and then, with no further provocation, goes on to add, “and both to a weekend with Mrs. Needleman.”⁸

In this particular case, it is not evident why Mr. Needleman proffers the needless information about where in his scale of preferences a “weekend with Mrs. Needleman” stands in comparison to cremation and burial, but there are many situations in life in which it may be crucial to know the “third option.” To know that child schooling is better than child labor does not automatically amount to a case for banning child labor, if there is a real possibility of a third outcome for children – for instance, that of neither school nor work, but of malnutrition or starvation. And so, before imposing a ban, we must make sure that banning child labor will lead a child to schooling and not to malnutrition or starvation. This elementary fallacy can lead to errors in the specification of policy with adverse consequences for the very individuals we intend to help. In the above case, this involves child labor, but this is a general point, and a lot of our labor-market policies are flawed precisely because they are founded on the fallacy of binariness.

In other words, in trying to root out one evil we must not become so single-minded that we do not care if this evil is rooted out by replacing it with a bigger evil. This is not a word of empty caution but a trap that ordinary, considerate human beings face the risk of falling into. This is what leads many protestors to unwittingly become pawns in the hands of the very power lobbies that they may be protesting against. I want this thought to remain as a backdrop. We shall have occasion to return to it after we have discussed the meaning and importance of economic rights and move to an analysis of which ones ought to be upheld and which ones abandoned.

3. EMPOWERMENT AND ECONOMIC PROGRESS

The free market is a powerful machine for coordinating the actions of multitudes of human beings absorbed in their own limited pursuits. Given certain preconditions, the free market mechanism can be efficient and can promote economic growth. But, unfortunately, this powerful machine or “invisible hand,” as Adam Smith had called it, is no creator of utopia and no respecter of individual needs, fairness or equity. If a person is kind and humane but physically unable to work, she

⁸ The quote is from page 3 of “Remembering Needleman,” which is part of Woody Allen's collected short stories *Side Effects* (Random House, New York, 1975).

will be doomed to poverty and perhaps starvation. If some individuals come into adulthood without the advantage of inheritance or human capital, they will have to live in deprivation. The fact that the ten richest people in the world earn the same as the entire population of Tanzania – some \$37 billion– does not make this mechanism wince.⁹

Anyone with a modicum of sensitivity will realize that, although the market mechanism has its strengths that need to be used, it also needs controls and corrective interventions. As Harvey (2004, 703–04) put it so eloquently:

Markets are engines of technological innovation . . . and certain kinds of economic efficiency; but they are not very good at securing the economic and social entitlements proclaimed to be human rights in the Universal Declaration. . . . I therefore came to view economic and social human rights as having a similar relationship to the market mechanism that minority rights have to majority rule.

But intervening for the poor and giving people certain basic rights is more than an end in itself. Granting people rights – and working to ensure that they get to exercise these when the need arises – empowers people and can boost an economy’s growth and development.¹⁰ For the poor, the destitute, the marginalized, the discriminated against, and the downtrodden, the largest handicap is a lack of self-confidence. Not only do they suffer because others treat them dismissively, but, as a series of psychological experiments and micro-studies show, the biggest damage is that they lose faith in themselves. The granting of certain basic human rights can create a sense of empowerment and give hope to the hopeless,¹¹ the long-term benefits of which can far outweigh the costs of instituting such empowerment.

Some recent aptitude tests given to school children in India – administered by Karla Hoff and Priyanka Pandey (2005) – where all children were treated the same and no mention was made of anybody’s caste before the tests were conducted, revealed that all caste groups performed at roughly the same level. Of course, there were individual variations in performance; however, when averaged out over all members of each caste, the scores turned out to be pretty close to one another. But when the same kinds of tests were given to the children after they were identified in class by the teacher calling out each child’s name *and caste group*, the children from the backward castes began faltering in their aptitude tests, getting lower marks on average. The scars of hundreds of years of discrimination and denial of not just property but also basic human rights seemed to suddenly get activated by the public announcement, reminding them of and disclosing to everybody their disadvantaged status. There can be controversy about what the mechanisms are behind this trigger. Perhaps the children lose faith in themselves or, maybe, as the authors

⁹ These numbers, based on World Bank data and some numbers published in *Forbes* magazine, were computed in Basu (2006b).

¹⁰ The UN has been promoting the idea of the “right to development” – a term that was coined by the Senegalese jurist, Keba M’Baye. On one level, a right like this can be seen as too all encompassing to be of use. But, if we view this as promoting the idea of individual empowerment and freedom so that people have the *scope* for development, then this can be a valuable rallying idea (for discussion, see Sengupta 2006).

¹¹ Another way of viewing this is to recognize the familiar need all human beings have for basic security – that is, to keep at bay critical pervasive threats, and then to view human rights as a way of ensuring minimal human security (Alkire 2003).

hypothesize, they no longer believe that they will be judged fairly by the teachers. Once their caste status is announced, they feel automatically disenfranchised of the right to good grades.¹²

This general point receives reinforcement in some data that I collected while visiting an NGO-run teaching institute for slum children in Kolkata (formerly Calcutta). The details of the data and the tests I ran on these are reported in Basu (2006a). What comes out quite starkly is that what is most important for a child's aptitude is not the income or the wealth of the child's household, but whether the parents talk to each other and whether the parents talk to the child.

What is of interest to us in the context of the present paper is the suggestion that the child's *social* conditions matter significantly in how he or she performs in school; and they seem to matter more than the *economic* conditions of the child's household. Children whose parents converse among themselves and with the children clearly make for more congenial living conditions for the children; and this seems to translate into human capital for the child. Another suggestion is that a person's "citizenship status" matters. If a person feels a proper "citizen of the household," it bolsters his or her self-confidence and this again results in intelligence and human capital. If the parents talk to you, it bolsters your status in the household and that citizenship status aids intellectual performance.

To give people a sense of status in society, community, and the household – which in turn entails having some minimal rights – unleashes energies and initiatives that, at first blush, seems unexpected. In addition to the kinds of experimental research mentioned earlier, we now have interesting studies of how empowering women can make them come into their own in household decisions. There are studies in India showing that if a household's total income remains the same but the woman's income increases, the woman begins to exercise greater say in household matters.¹³

There are studies from Bangladesh that show that women who join community groups – such as Grameen Bank borrower's group – begin to exercise greater say in their households, even when the outside interaction does not lead to any new earnings for the household.

India has recently enacted a very controversial law that gives people the right to a certain amount of work. It is, however, a very limited right. In each household, the law guarantees that at least one person will have the right to one hundred days of work. If they do not find it in the market, the state government has the responsibility to provide work – if it fails to do so, individuals have the right to take the government to court. As of now the law applies only to some select districts in rural areas, but the intention is to eventually extend it to all rural areas. The activists and the (very few, I must add) economists who campaigned for this policy argued that its aim is not only to mitigate poverty, but to also give the poor a sense

¹² Recent tests done in South Africa by Erica Field and Patrick Nolen (2006) seem to confirm something similar. Make children take aptitude tests with no talk of race and they perform at reasonably comparable levels. But change the atmosphere by talking about race, and then make them take similar level tests, the black children – in this case, especially the boys – begin to falter.

¹³ See Basu (2006) for discussion of some of the results discussed in this and the next two paragraphs.

of right and entitlement. If the rich can call up the local government when the road outside their home is not well maintained, surely the poor should be able to call up the government if what they need most – namely, jobs – are not available.

There has been much debate about the fiscal consequences of this law and the labor market distortions that it can create; and indeed, these are not matters to be ignored.¹⁴ But as an instrument for giving people a sense of basic economic rights and entitlement, this cannot be faulted. As the studies mentioned earlier show, the effect of such a law could go well beyond the immediate benefits of the money earned through such employment; for instance, the jobs may bolster self-confidence and superior performance from the awareness that one has the same rights in society that the rich and powerful have always had.

The connection between rights and economic performance and progress seems to be clear and present. But I want to enter more controversial terrain by discussing what exactly the granting of a right means in the context of an economy; and, when there are several possible meanings of granting a right, which ones should we adopt where. I will also discuss which of the many possible kinds of rights ought to be respected, which ones help, and which ones hurt the carrier of the right. My aim here is not to give full answers by actually classifying rights into different categories but, rather, to lay out some general principles and essential taxonomies that can be used in crafting laws and designing policies.

4. TRADEABLE RIGHTS

One philosophically intricate question that we need to confront is whether, when we grant a person a right, we also should grant the person the right to waive that right (or trade that right away). In our laws and proclamations – and even in academic writing – this is not always made clear, and a lack of clarity on this can lead to great inefficiencies and inequities.

I should clarify that I am not talking here about the distinction between alienable and inalienable rights, following Jefferson's famous words about "the unalienable rights of man" – in particular, the right to "life, liberty and the pursuit of happiness." These were drawn, in turn, from John Locke's idea of the right of human beings to "life, liberty and estate" (meaning property). The term "inalienable" typically refers to the fact that no one can take the right away from the person endowed with such a right. But whether the person endowed with the right cannot *himself* or *herself* waive the right, sell the right, or gift the right to someone else is not automatically clear. Indeed, because Locke clearly did not think of one's "estate" as something that is immoral to sell – such as many would consider one's life or limb – plainly Locke was not thinking of our basic rights as untradeable or unwaivable. In

¹⁴ The right to work has a long history. Arguably, it was in the French constitution of 1793, where it was recognized for the first time as a basic human right. But this is one area where there can be serious contention between the legal positivists and the natural rights school, as some would argue that permanent full employment is impossible for any nation – even if it consists of only Japanese. Hence, some would argue that this right can be no more than a pointer to a certain direction and sets a responsibility on the part of the government to keep unemployment as low as technically possible (see Harvey 2002).

fact, my hunch is that Locke was making a categorical mistake by clubbing together rights, which he himself (on cogitation) would consider to be rights in different senses.

Note, first of all, that when most of us talk of a person having a certain right to a certain property (for instance, the person's car), we mean that no one can take it away from him by force. But, by contrast, he certainly can waive that right or trade it. He can give it away to his niece, if he wishes; he can exchange it for money or other goods.

Economists tend to go further and carry this notion of rights not just to goods and services, but to many other things as well. Typically, when an economist says that some person has the right to something – call it *R* – she presumes that the person can sell that right. This is indeed the presumption behind Ronald Coase's famous law. Suppose we agree that John has the right to a smoke-free atmosphere. Jill comes into his room and strikes a deal with him. She will pay him a dollar and he will not object to her smoking a cigarette. Would this be considered a violation of his right? I think most economists and many people will consider the answer to be "no."

Now consider the case where a rich landlord tells a very poor serf, whom he dislikes intensely, that he will give the serf's family \$100 if he will kill himself. Suppose the serf agrees and the "trade" is carried out. Has the serf's right to life been violated? Many would consider the answer to be "yes."¹⁵ As for what economists would say, I prefer not to speculate.

This shows that when we say that a person has a right to *R*, there is some ambiguity about what this means, for in some cases we mean he has "full right" to *R* (including the ability to waive the right), whereas in other cases at least some people believe that this means even he himself cannot waive that right. I shall call the former kind a "tradeable right," and the latter an "untradeable right."

It is possible to categorize these further, and my classification also bears resemblance to others that have been suggested in the literature (for instance, Lyons 1979; Feinberg 1980).¹⁶ As Feinberg (1980, 156–58) points out, right-holders are not always obliged to exercise their rights; in fact, the ability to occasionally forego one's rights often makes for a nicer society. But note that when I speak about a tradeable right, I mean it in a stronger sense than the holder having the meta-right to occasionally forego or sell the right. Certainly he or she can do that, but I mean that, in addition, he or she can waive it off forever. Consider the right not to have to work more than ten hours a day. There is a difference between not exercising that right on a particular day (maybe for an overtime fee) and telling the employer that one is giving up that right forever ("If you give me this job I will henceforth work as many hours as you wish, foregoing in advance the right to object."). By a tradeable

¹⁵ It is possible to argue that making an offer like this is to immediately diminish the status of a person. Hence, it is not a simple take it or leave it offer. Once an offer like this has been made, there is no returning to the world before the offer was made.

¹⁶ One advantage of classification is that it permits the use of a larger bundle of rights. Although we may not agree to confer the status of rights to several needs if there was only one kind of right, we may be able to accommodate a wider range of human needs as rights if we can separate these out by the use of different epithets.

right, I mean having both these rights – that of not *exercising* a right and that of waiving the right itself.

The ambiguity about whether a particular right is tradeable or not crops up in many areas, and we need to confront it frontally. From the way some basic principles are stated in economics it seems to be implicitly assumed that all rights, the exercise of which has no negative fall-out on others who are not voluntarily party to the deal, should be tradeable rights. This follows from the Pareto principle or, relatedly, from the principle of free contract, which says that if two adults voluntarily agree to an exchange or trade in a contract having no negative fall-outs on uninvolved third parties, then government has no business stopping such a deal. Indeed, the foundation of modern market economies is predicated on contracts and exchanges of this kind being possible. The possibility of such transactions is often taken as an index of economic freedom. A typical economist would argue that governments that intervene and ban such transactions harm enterprise and progress; accordingly, he or she would oppose all such government interventions.

Consider one example of the application of the free contract principle. In the United States, workers have a right not to be sexually harassed in the workplace. Now suppose that a firm puts up a sign outside its personnel office stating the following: “We offer great salaries, excellent health plans, and plenty of vacations, but we reserve the right to sexually harass our workers. If you agree to these conditions, you are welcome to join our firm.” In other words, the firm is offering the workers money and benefits in exchange for having them waive their right not to be sexually harassed. Equally, this can be thought of as a trade. A person can trade her right not to be sexually harassed for money and other benefits. Pursuant to the principle of free contract, it appears that such transactions should be allowed.

Most of us, however, feel uncomfortable with this conclusion. But it is not good enough to disallow such waivers purely for reasons of discomfort. We must found the prevention of such waivers in reason and reasonable ethics. One route is the use of deontic rules. “One must not be allowed to trade one’s bodily integrity, irrespective of its consequences.” “It is wrong for children to work no matter what the consequences of non-work happens to be.” These are deontic rules, because they make no reference to the consequences of such rules, such as the effect on the welfares of the citizens involved. I believe such principles should be used minimally. I want to found my arguments for deciding on whether a particular right should be treated tradeable or not on the welfare consequences of such a decision, and make room for deontic rules only when that does not yield a clear answer. There is more to this than personal predilection. When we craft rules for distant societies – for individuals with whom we have little or no interaction – it is natural to underplay the importance of welfare consequences. Distance may or may not lend enchantment, but it always blurs awareness. Hence, when deciding for distant societies, we have a bias toward the use of deontological principles, often in quite an ad hoc fashion. What I am arguing is that we must resist this penchant.

Before discussing the case of what stand we should take on sexual harassment, consider another problem. Workers in most nations have the right not to expose themselves to large health and safety hazards. But suppose a mining firm refuses to put in expensive safety equipment in their mines and offers instead to pay an

extra salary to workers willing to go down those shafts. Suppose this is a very poor region and some workers are therefore willing to accept the deal. Has their right to safety been violated? Should such contracts be allowed?

I do not think that the answer to each of these and other similar *sounding* questions will be the same. I have elsewhere taken the view that the right not to be sexually harassed should be a nontradeable right. No one should be given the option of waiving it in order to get other benefits. The reason is not embedded in the person who waives it. I believe an individual should have such a right if that was all there was to it. But if such rights are granted in general and firms are allowed to freely buy up the rights of workers not to be harassed, it can be shown that any worker who insists on signing a no-harassment contract will get a low wage. In other words, in a legal regime that allows “contractual” harassment (like the firm earlier that makes the terms abundantly clear), those with the strongest aversion to harassment will get punished by the market, because they will get a lower wage than they would in an economy in which contractual harassment is declared illegal. And I would maintain that no one should have to pay a penalty for having a preference not to be harassed. As is discussed in the next section, I call certain preferences “inviolable” and argue that the preference not to be harassed ought to be considered an inviolable preference.

Indeed, in the United States you cannot trade your right not to be sexually harassed, *a priori*. This is even clearer in the case of what is called a “yellow dog contract,” whereby an employee relinquishes the right to join a trade union during the term of his or her employment. By the Norris-La Guardia Act or the Anti-Injunction Bill (1932), yellow dog contracts are explicitly illegal in the United States. In other words, a person’s right to join a trade union is not a tradeable right.

The decision about which rights should and should not be considered tradeable is often hard. Consider the problem of mine safety in a developing country. Typically, poor people will be willing to take undue health risks in order to earn a subsistence income. Our first response may be that no one should be so poor that he has to take such risks. But the counter response is that if they *are* that poor, then surely we do not have the right to take away their right to survive by saying that they should not take undue health risks. That would amount to committing the fallacy of binariness.

The government, we could argue, should get rid of this kind of poverty. But that still leaves the question: “What if government fails to do so?” Should we not in that case give people the option to fend off extreme poverty by, if need be, taking up risky jobs? But that, in turn, implies that there may not be an obvious case for banning hazardous work in poor nations. If government succeeds in obliterating extreme poverty, then people will choose not to take up such hazardous work, so the law will be of no consequence. And if government fails to obliterate extreme poverty, then it is not clear that such a law – which may cause starvation and chronic hunger – is a good idea.

It is, however, possible that a ban on hazardous work will lead employers to install new technology to make the mines safer. But there is also the risk that they will close down their operations and contribute to greater unemployment and poverty in the region. In the field of human and labor rights, much of what starts out looking obvious has the propensity to spring surprising complexities.

5. MAINTAINABLE AND INVOLABLE PREFERENCES

In general I take the view, in keeping with the analysis of Coase, that rights should be specified as clearly as possible for as many goods and actions as possible. I would then go further and say that we should typically give greater rights to the disadvantaged and the dispossessed, so as to give them a sense of empowerment and enhance their sense of citizenship. The ambiguity is not about these principles, but about which rights should be treated as tradeable and which not. I sketched a few arguments for some specific examples earlier. For developing a transparent and *generalizable* criterion, we need to have some prior normative rules for ranking preferences the same way that we rank actions – castigating some as bad and praising some as good. We do not typically rank preferences morally, but it is arguable that we can and should.¹⁷ If a person says that she does not like people of a certain race, or that she prefers not to be friends with anybody who is overweight, most of us would consider these to be unacceptable preferences. We may not do anything about this, but we still consider such preferences wrong. Let me now call all preferences that we do not consider morally wrong “maintainable preferences.” Here are some preferences that I would consider maintainable, and I expect so would most other people:

“I prefer apples to oranges.”

“I prefer not to work four days a week.”

“I would rather be unemployed than face sexual harassment at work.”

“I consider it my right to be able to join a trade union, and I prefer not to join a company that denies this to me.”

Clearly we cannot have *moral* objections to this. You may not wish to marry the person who plans to work three days a week or, for that matter, the one who does not share your passion for oranges; but surely you will not morally castigate these people for having these preferences.

However, among maintainable preferences we need to separate out two kinds of such preferences, and the rules for government intervention depend on this categorization. To understand this, observe that some preferences may be dysfunctional in the sense that they could hurt their carriers. A person with the second preference will clearly be poorer for working so little – she has to pay a price for her preference. Now we, outside observers, may decide to take a stand on this “price for preference.” We may consider certain preferences to be so understandable that no one should have to pay a price for having that preference. Many would consider the last two – and especially the third – preferences listed earlier to be of this kind. Not only is the strong aversion to harassment a maintainable preference,¹⁸ but most of us would argue that no one should have to pay a price for having this preference. Many would feel similarly about a worker’s right to associate with other workers. Let us call a maintainable preference, which has this property, an “inviolable preference.”

Notice that this is typically not the case with the second or the first preference. It would be perfectly reasonable to tell the person with the second preference:

¹⁷ These ideas were suggested and developed in Basu (2000; 2003).

¹⁸ That is – just to remind the reader – we do not morally disapprove of this preference the way we disapprove of someone’s racism preference.

“Yours is a maintainable preference – I have no moral objections to it, but you do understand that you will be poorer by virtue of having this preference. You surely cannot expect society to compensate you for your high leisure preference.”

In other words, although the second person’s love of leisure and the third person’s strong aversion to workplace harassment are both maintainable preferences, only the latter is an inviolable preference.

Of course, being a normative matter, there is no hard and fast rule about where we should draw the line between these categories. It is also possible to see that what we consider inviolable may change through time and even across space. But in most of our minds, at this point of time we can create the categories of inviolable and noninviolable preferences.

Now we are ready to create an argument for why it may be correct to ban yellow dog contracts and to disallow contractual sexual harassment in the workplace. Suppose we consider the fourth preference above to be inviolable and consider the case of yellow dog contracts. Assume firms are permitted to demand that potential employees relinquish the right to join trade unions. This will give rise to two kinds of firms (for the same kind of work) – some paying a lower wage and making no such demands and others paying a better wage but requiring individuals to give up their right to join unions.¹⁹

Now workers with strong preference for joining unions – the fourth preference in the list – will be joining the former firms. In other words, they will have to be reconciled to a lower income *by virtue of their preference*. But the inviolability of the preference for joining unions means that this should not happen. The way to ensure this is to have a law, like the Norris-La Guardia Act, that bans yellow dog contracts.

This is the crux of the argument about why certain rights may have to be made nontradeable. Allowing the trading of these rights inflicts a cost on some people who have a strong preference for holding onto these rights. And if this preference is inviolable, then government is required to protect people from having to pay a price for having the preference. One way of doing this is disallowing anybody from trading or waiving this right.

It is worth noting that the overall moral system being used here is neither pure welfarism nor deontological ethics. It is a “miscible moral system,” which uses welfarism – and in particular, Paretianism – first to weed out certain options, and then permits the use of nonwelfarist considerations – for instance, dignity, autonomy, and agency – to further eliminate options.

We may be able to carry this argument over to other matters; for instance, sexual harassment in the workplace, hazardous work, and so on. Yes, individual freedom would at first sight seem to require that having given a person a right – such as the right not to be harassed at work – we should give the person the additional right to trade this right. Given individual rationality, this can only benefit the individual. But the exercising of this latter right – that is, the right to waive the basic right – could

¹⁹ A standard market arbitrage argument leads to this conclusion. But in reality, one often finds that those workers with the least rights and working in the most hazardous conditions are also the poorest. Hence, the theories of “equalizing wage differentials” may deserve further empirical and theoretical investigation.

mean that others who attach a greater value to the basic right will now have to pay a price for that. If this is unacceptable, then the state needs to step in.

But this is not the end of the matter. There may be other reasons for letting people trade their basic rights that arises with extra vehemence in the context of developing countries.

6. TRADE-OFFS AND A COMMENT ON THE THIRD WORLD

There was a time when each country's rights problem was considered of prime interest to the government and civil society of that nation; however, this has changed with globalization. Through a combination of factors – greater information about what is happening in distant lands,²⁰ interest, even if vicarious, in the lives of the peoples of those lands, the fact that through channels of trade and capital flows the crushing of rights in another nation may actually change the wages and prices of goods in your locality, and the realization that if another nation punctures a hole in the ozone layer, it could be as bad news to you as to the other nation – we have come to take an interest in human (especially economic and labor) rights in other countries. And, nowadays, through international organizations and global activist movements, it is actually possible to give some effectiveness to one's displeasure or approval of what is happening in other lands.²¹

One cannot, however, deny that the scope of influence runs disproportionately from rich countries to poor countries.²² And with this arises huge responsibilities about how we dispense with the interventions. There is no doubt that some of the worst violations of basic, everyday rights occur in the Third World, but there is a complication that also occurs with special vigor in poor countries that makes this a difficult and sensitive problem that demands care in handling (Basu 2005). The classic example is child labor. This is a dreadful institution and all reasonable people seek its demise as quickly as possible. Without going into the details of this vast subject,²³ I want to conduct a discussion that bears on the concepts developed earlier.

Economists have argued at length about whether a legislative ban on child labor is desirable. The *laissez-faire* argument – at the risk of oversimplification – goes

²⁰ This does not refer only to television images and journalistic reporting. There are now excellent statistical studies that collate and rank human rights violations in different countries. See, for instance, Cingranelli and Richards (1999), and for up-to-date downloadable data, see <http://ciri.binghamton.edu/>.

²¹ As Brysk (2002, 5) observes: “[The] literature on human rights has moved beyond the conventional wisdom that situated human rights violations and remediation predominantly within the state, to suggest ways in which globalization creates new opportunities to challenge the state ‘from above and below.’” See Fung, O’Rourke and Sabel (2001) on the difficulties of thinking about common standards for our contemporary world of such wide disparities.

²² For a discussion of the modes and technology of cross-country “human rights” influence and the legitimacy of global action that have national or local influences, see Rosenau (2002), Pogge (2005), Basu (2005), Buchanan and Keohane (2006). It has been argued that when we think of the world as a whole, the equivalent of the state is the “global order” (Risse 2005). Responsibility for the *world's* poor therefore rests with the global order in somewhat the same way that the responsibility for a nation's poor lies with the government.

²³ There is a large literature on the subject, covering empirical studies, economic theory, law, and history. For the recent survey and analysis, see Edmonds and Pavnick (2005), as well as Bhaskar and Gupta (2006).

as follows. Suppose parents are altruistic about their children,²⁴ so that when they take decisions about their children it is *as if* they are deciding for themselves. It then follows, by the principle of free contract, that for parents to send their children to work is not a matter on which the state should come in.

But this argument can be countered using the tools of analysis developed earlier. It is arguable that a parent's desire not to let her children work is not just a maintainable preference but also an inviolable one. No parent should have to pay a price for having such a preference. Now consider what seems quite realistic – to wit, that different parents will have different degrees of aversion to letting their children work. If, under these circumstances, child labor is treated as legal, then it can be shown that parents who have a strong aversion to sending their children to work will be penalized for their preference. To see this in the simplest possible case, suppose some parents are so extreme in their preferences that they will never send their children to work. If child labor is made legal, lots of children will begin to work (recall that we are considering a poor country). This increase in labor supply will certainly cause wages to fall. This may not matter to households that send their children to work, because even though per hour wage may be lower there will now be more hands at work. But households with the strong aversion will be worse off for sure, as they will not send their children to work even when adult wages fall and children are legally allowed to work. Hence, making child labor legal amounts to extracting a price from those with strong preference against child labor. The inviolability of this preference, however, means that this should not happen; accordingly, child labor must be declared unlawful.

Unfortunately, the argument cannot stop here. To see this, consider a person's preference not to suffer food deprivation. Surely we will agree this is an inviolable preference. Now, in a poor country where lots of people live on the threshold of hunger, it is easy to see that we can have situations in which to ban child labor is to violate this inviolable preference. By contrast, not to ban child labor is to violate another kind of inviolable preference, as we saw earlier.

When a person's right comes into conflict with another person's love of opulence, we may easily agree on the primacy of the rights, but we do not have this luxury when one person's right of one kind comes into conflict with another person's right of that or another kind (Osmani 2005). This problem often arises in developing countries, because everything occurs in the shadow of malnutrition and hunger. If avoiding hunger is a right, or aversion to it an inviolable preference, then in the exercise of all other rights or the upholding of all other inviolable preferences we have to be reconciled that upholding all these fundamental values may not be possible. We are then forced to contend with trade-offs, no matter how painful.²⁵

²⁴ There is now mounting evidence on this. I find this somewhat embarrassing, since it is a testimony to the power of economics, that we seek statistical confirmation about the fact that parents love their children.

²⁵ There is a small but growing literature on the algebra of how multiple and conflicting normative criteria can be combined to create a single order or partial order (see, for instance, Tadenuma 2006; Yoshihara 2006). The general exercise of building rights-consciousness into a welfarist setting – that is, in contexts in which people are interested not just in the outcomes but also processes, and in particular the respect of individual rights – also has been formally attempted (see, for instance, Pattanaik & Suzumura 1996).

This is the reason why we cannot sit back, taking the moral high ground, and simply ban what *seems* wrong in developing countries. We cannot just ban certain abhorrent practices and be unmindful of the fact that that may lead to other kinds of deprivations and sufferings, as the fallacy of binariness warns us. This is not so only for child labor. Consider the controversial move made by some countries asking workers to give up their right to collective bargaining in order to work in an export-processing zone (EPZ). Many countries with unruly labor find that, without such a clause, they cannot run EPZs. Now, whereas for moderately prosperous countries we can argue that such exceptions for EPZs cannot be allowed for the same reason that yellow dog contracts are wrong, the decision is more troublesome for a poor country, like some in sub-Saharan Africa or Bangladesh. When the difference between being able to work in an EPZ is equivalent to the difference between being able to feed one's children properly and not, or the difference between being and not being able to send one's children to school, it is not clear that one can take away an individual's right to waive the right to collective bargaining (see Kabeer 2004). The right to collective bargaining, in such situations, may have to be treated as a tradeable right because, whereas the preference for collective bargaining may be an inviolable preference, we are here faced with a situation in which one inviolable preference is pitted against another.

If we want to have a code of crafting policy – where can child labor be banned outright, where should we allow workers to take on the health hazards they are willing to expose themselves to, and so on – we will need to decide on trade-offs between rights and the inviolability of preferences. We would have to decide that while *x* and *y* are both rights, one may be lexicographically prior to the other, or that one may be violated up to a certain extent for the sake of the other and so on.

This is a large exercise and will have to be done gradually, maybe effecting changes as and when we encounter conflicts and are forced to choose, and then using these choices to enshrine general rules. But this discussion should alert us to the fact that to call something a right does not mean that it will have to be upheld in all contexts. For one, this may simply not be possible, as Gibbard (1974), Farrell (1976), Suzumura (1978), and Subramanian (2006) have shown in the context of individual liberty, building on the work of Sen (1970). Moreover, we may decide to recognize certain rights in the sense of attaching moral worth to them and *trying* to uphold them, but being prepared to trade them for other moral imperatives.

It must be stressed, however, that to argue that something should not be enshrined in a code of law (for example, not banning child labor) does not mean going over to the *laissez-faire* extreme of recommending that we do nothing. There are numerous actions governments and international organizations can take that are nonlegislative. Financial support to eradicate certain phenomena such as poverty and illiteracy; subsidies to encourage certain desirable practices; and advertising and campaigning to change people's preferences and opinion are all interventions that are nonlegislative. When fundamental rights are mutually in conflict, this may be the only way out.

7. CONCLUSION

The world is an unfair place. There are the innately disadvantaged; there are those who come into adulthood with no inheritance of wealth, education or heritage.

It takes immense harshness or a convoluted belief in previous lives and sins to be able to sit back and not try to make some amends for these imperfections. This chapter took the view that the market mechanism can confer great benefits, but it needs to be tempered by a specification of minimal human and economic rights and the design of policy interventions that try to offset some of the extreme disadvantages that some people face.

The specification of basic human rights, and the development of institutions for upholding these basic rights, can go a long way to offset some of the natural inequities of the world left *laissez-faire*. But the subject of rights is not one of mere campaign and activism. To do so without thought is to risk playing into the hands of powerful lobbies and groups with vested interests that are ever present in the wings. We need to think through which rights should be upheld and which not, and, among the ones we choose to uphold, which rights ought to be treated as tradeable and which ones not.

The aim of this chapter was not to make actual suggestions. Indeed, on a variety of matters I, myself, am full of doubts and hesitations. If, after reading this essay, a reader finds herself in a greater dilemma about child labor and hazardous work, or in a quandary about worker rights in export-processing zones, then that would confirm that her earlier complacency was not well founded and that, in turn, would mean that the chapter has served a purpose. The aim of this chapter was to draw out the complexities of this topic, and to suggest some new instruments of analysis and shed new perspectives on old practical problems. Once analysts and policy makers understand these complexities, they may feel less confident about their decisions, but others will have greater reason for confidence in them.

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