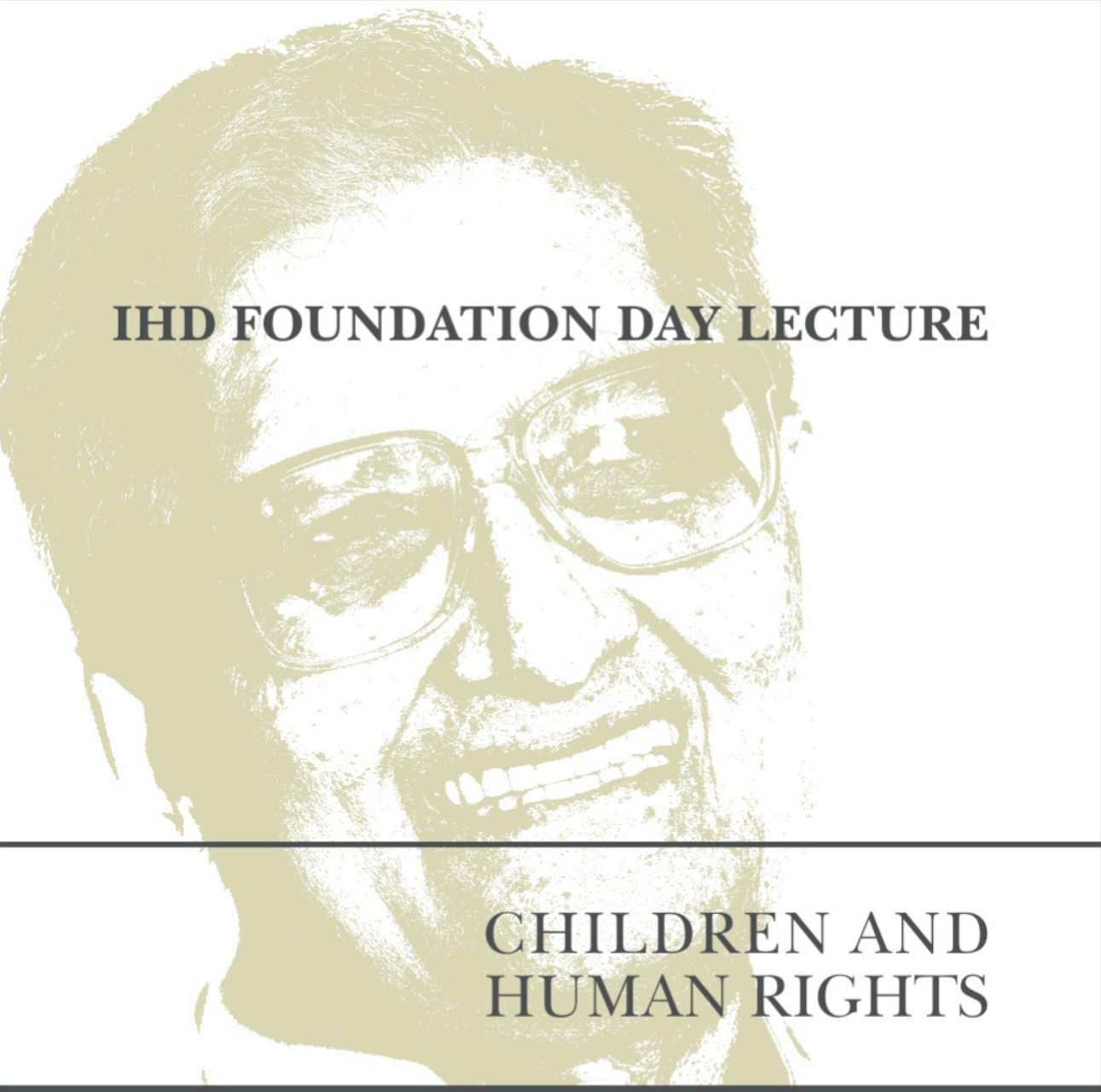

IHD FOUNDATION DAY LECTURE

CHILDREN AND HUMAN RIGHTS

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CHILDREN AND HUMAN RIGHTS[1]

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The framework of human rights can be usefully applied to addressing a number of deprivations that children face in society. The importance of human rights relates to the significance of the freedoms that form the subject matter of rights—freedom from hunger, and freedom from escapable morbidity or premature mortality. The discipline of human rights has much to offer in systematizing the perfect and imperfect obligations that society has towards children. Human rights generate reasons for action for agents who can help in safeguarding and promoting the interests of children.

I

There has been considerable economic and social progress in India in recent years. But some serious problems remain largely unremedied - in fact substantially unaddressed. The long-standing deprivation of the children of India has remained extraordinarily grim and unchanging. India has one of the highest incidence of child undernourishment in the world, and despite the progress in some of the Indian states, there is no evidence in recent years to indicate that there has been any major progress in reducing the proportion of underweight children for the country as a whole. In fact, the incidence of anaemia among children seems to have gone up - not down. There is also disturbing evidence that the coverage of full immunization has hardly increased for the country as a whole, despite progress in some parts of the country, and more than 40 per cent of Indian children are still partially or wholly unprotected from avoidable diseases. The new report published by the Citizens' Initiative for the Rights of Children under Six, called *Focus on Children under Six*, which was released on December 19, 2006, brings out quite starkly the seriousness of the predicament of young Indian children as well as suggesting some ways of addressing the problems faced by them.

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This disturbing picture needs rapid and firm remedying, and while this recognition is widespread, the ways and means of achieving this are far from clear. Undernourishment and medical neglect relate to the failures of various social agencies, including functionaries of the Central and state governments and other members of the society at large - within the respective families and outside - who do not take a sufficiently involved interest in correcting the failures.

Since action is needed involving many different agencies and persons, we have to look for a sufficiently broad framework which can unify the efforts of distinct agents of action moved by a shared recognition of the importance and urgency of redressing the dreadful deprivation of Indian children. It is natural to expect that the idea of human rights, along with the duties that go with these rights, could serve as a good intellectual basis for such a unified social approach. The discipline—and also the evocative power of human rights—has been frequently invoked in the contemporary world to help remedy preventable deprivation and injustice in many other fields. The moral appeal of human rights has been used for varying purposes across the world, from resisting torture and arbitrary incarceration to demanding the end of famines and neglect of political refugees. Can we not, it is natural to ask, use the framework of human rights to help us to remedy the long-standing deprivation of Indian children? The new report, *Focus on Children under Six*, to which I have referred already, invokes the appeal and force of human rights, even though the use is often implicit rather than spelt out.

The question we have to ask is whether the discipline of human rights is correctly and effectively usable for this purpose. This is the question that I want to address in this lecture, aside from discussing the discipline of human rights in general and its applicability to children's deprivations in particular. Our ability to make legitimate and effective use of human rights depends on an adequate understanding of the discipline of human rights - what they are, how they work, what they demand, and how they can influence not only our ideas but also the actual world that lies behind our hopes and commitments. The bulk of the lecture will deal with the nature and functioning of human rights, and how this discipline can be applied to what can be seen as the rights of children in particular.

Human rights may motivate law, but they have to be distinguished from legal rights, since these human rights exist whether or not the makers and interpreters of law have had the wisdom and opportunity to reflect these rights in actual legislation. As it happens, the Indian Supreme Court has been at the forefront in the world in interpreting legal requirements in the broad light of enlightened civil recognitions. And yet this remarkable record does not eliminate the need to treat human rights as being distinct from legal rights, even though many legal rights do adjust to the civic understanding of human rights, through fresh legislation or new interpretations presented by the courts.

II

Despite the tremendous appeal of the idea of human rights, it is seen by many legal and political theorists as intellectually frail and lacking in foundation and perhaps even in coherence and cogency. It is certainly true that frequent use of the language of "rights of all human beings," which can be seen in many practical arguments and pronouncements, has not been adequately matched by critical scrutiny of the basis and congruity of the underlying concepts. This is partly because the invoking of human rights tends to come mostly from those who are more concerned with changing the world than with interpreting it, to use a distinction made famous by that remarkable theorist turned political leader, Karl Marx. There is stirring appeal, on one side, and deep conceptual scepticism, on the other. Underlying that scepticism is the question: what exactly are human rights, and why do we need them?

In the interpretation pursued there, I would argue that human rights are best seen as articulations of a commitment in social ethics. Their ethical status is prior to their legal relevance, if any. In this sense the ethics of human rights is comparable to—but substantively very different from—accepting utilitarian reasoning. The ethical status of human rights can, of course, be disputed, but the claim is that they will survive open and informed scrutiny. The validity and universality of human rights is, in this view, dependent on the opportunity of unobstructed discussion and their viability in such open discussion.

The test of public reasoning, as John Rawls has argued in a different context, is the main criterion of objectivity in matters of practical reason (as opposed to objectivity in epistemology and philosophy of science):

To say that a political conviction is objective is to say that there are reasons, specified by a reasonable and mutually recognizable political conception (satisfying those essentials), sufficient to convince all reasonable persons that it is reasonable.[2]

In extending this idea, I would argue that this cluster of requirements can be fruitfully linked to the survival of a proposed principle in public discussion after they have undertaken their personal reflections, their individual and joint consideration of evidence, and their interactive deliberation and debates on how the underlying issues should be seen. Drawing on this general approach, I would argue that the claim to objectivity, in this general approach, lies in the ability to face challenges from well-informed and well-reasoned scrutiny, and it is to such scrutinies that we have to look in order to proceed to a disavowal or an affirmation.

This ethical and political interpretation of human rights contrasts with seeing human rights in primarily legal terms, either as *consequences* of humane legislation, or as *precursors* of legal rights. Once that is accepted, human rights can, of course, be reflected in legislation, and may also inspire legislation, but this is a further fact, to be distinguished from being seen as a defining characteristic of human rights themselves.

It is, however, true that taking a definitionally legal view of human rights appeals to many. Reasons for that appeal are not hard to understand. The concept of legal rights has been well established for a very long time, and the language of rights - even human rights - is certainly influenced by legal terminology. Also, a great many acts of legislation and legal conventions (such as the "European Convention for the Protection of Human Rights and Fundamental Freedoms") have clearly been inspired by a belief in some pre-existing rights of all human beings. In a classic essay "Are There Any Natural Rights?" (published in 1955), Herbert Hart has argued that people "speak of their moral rights mainly when advocating their incorporation in a legal system."[3] This is certainly a very important way in which human rights have been invoked, and Hart's qualified defence of the idea and usefulness of human rights in this context has been justly influential.

It is, however, extremely important to see that the idea of human rights can be - and actually is - used in several other ways as well. In a great many contexts legislation is not at all involved, and indeed in some cases legislation might be a serious error. Indeed, many of the cases in which the idea of human rights is used - often to great effect - are not matters of legal rights at all, but which can nevertheless be included within what can be broadly called moral or ethical rights. If a government is accused of violating some "human right" (for example through arbitrary incarceration with access to legal redress) that accusation cannot really be answered simply by pointing out that there are no legally established rules in that country guaranteeing those rights. The case for fulfilling these rights even in the absence of legislation is seen to be relevant and legitimate, and that is quintessentially an application of the idea of human rights.

This applies particularly to human rights that relate to development, such as the right to food or to medicine or to some basic income.[4] Many - indeed most - countries in the world have few of these developmental claims guaranteed by law, and hardly any country in the world has an adequate legal coverage against all the deprivations that are involved. This raises an immediate question: should a rights based approach to development be guided primarily by a law-related perspective, working either through *already established* legislation, or through demanding *new* legislation, or at least through thinking in terms of *ideal* legislation? I have argued against the adequacy of a rights-based approach woven, in one way or another, around *actual* or *proposed* or *imagined* legislation. This claim, which I have defended elsewhere in some detail, argues against seeing human rights as guiding principles to "actual legal," or "proto-legal," or "ideal-legal" ideas.[5] The legal relevance is posterior rather than prior to ethical reasoning, and legal use is not the only field of application of the ethical and political idea of human rights.

III

This is not to deny that there can be very important legal connections that make the ideas of human rights more effective and consequential. Legislation can indeed - often enough - help to promote the ethical claims reflected in human rights, and many concerned citizens and many NGOs have been intensely involved in promoting fresh legislation. As was mentioned earlier, the Supreme Court in India has, in addition to the legislatures, helped promote what are essentially agreed demands of human rights through interpreting law in the light of civil understanding. And yet there is much more to the human rights approach than that. Ethical claims can be advanced by many different means of which seeking new or better implemented laws is only one. Human rights cannot be entirely parasitic, in one form or another, on law.

The complex relation between human rights and legal rights is, in fact, a subject with some considerable history. The American Declaration of Independence in 1776 took it to be "self-evident" that everyone is "endowed by their Creator with certain inalienable rights," and thirteen years later, in 1789, the French Declaration of "the rights of man" asserted that "men are born and remain free and equal in rights." It is readily seen that these are clearly *pre-legal* claims with an invitation to reflect these claims in legislation. It did not, however, take Jeremy Bentham long, in his *Anarchical Fallacies* written during 1791-92 (aimed specifically against the French "rights of man"), to propose the total dismissal of all such pre-legal claims, precisely because they are not legally based.[6] Bentham insisted that "natural rights is simple nonsense: natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts." He went on to explain:

Right, the substantive *right*, is the child of law; from *real* laws come *real* rights; but from *imaginary* laws, from "law of nature" [can come only] "*imaginary* rights."

It is easily seen that Bentham's rejection of the idea of natural "rights of man" depends substantially on the rhetoric of privileged use of the term of "rights"—seeing it in specifically legal terms. However, insofar as human rights are meant to be significant ethical claims (pointing to what we owe to each other and what claims we must take seriously), the diagnosis that these claims do not necessarily have legal or institutional force—at least not yet—is basically irrelevant.

Indeed, just when Bentham was busy writing down his dismissal of the "rights of man" in 1791-92, the reach and range of ethical and political interpretations of rights were being powerfully explored by Thomas Paine's *Rights of Man*, and by Mary Wollstonecraft's *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects*, both published at the same time, during 1791-92, though neither book seems to have interested Jeremy Bentham.[7] They should, however, interest us. Tom Paine was identifying what we would now call "human rights," to guide our public efforts, including efforts to give legal force to them through new legislation

(Tom Paine's was the one of the earliest voices demanding anti-poverty legislation). In Tom Paine's understanding, these rights were not - as with Bentham - "children of law," but in fact "parents of law," providing grounds for legislation—a point of view that would receive support, two centuries later from the great Oxford philosopher of jurisprudence, Herbert Hart (as was discussed earlier).

Mary Wollstonecraft, in fact, did something that was perhaps even more radical. She discussed elaborately how women's legitimate entitlements could be promoted by a variety of processes, of which legislation was only one, and not necessarily the principal route. The effectiveness of these moral claims— - their practical "vindication" in addition to their ethical acceptance— - would depend on a variety of social changes such as extending actual educational arrangements, public campaign for behavioural modification (for example modifying what we would now call sexist behaviour), and so on. She would not have been in the least surprised that many social movements today, including the work of NGOs such as Amnesty International, Human Rights Watch, Medicines Sans Frontiers, OXFAM, and others, have had effectiveness in helping to protect and advance human rights—in economic, social, political, medical and other fields—through channels *other than* legislation.

It can indeed be argued that Mary Wollstonecraft was pointing to ways that provide powerful bases for the work today that many non-legislative organizations, including international associations, civil society organizations, and developmental NGOs, try to do, often with good effect. The United Nations, through the Universal Declaration of Human Rights, made in 1948, paved the way for many constructive global activities. That declaration did not give the recognized human rights any legal status, and but the effectiveness of recognition has come in other ways. The ways include fresh legislation which an agreed recognition can inspire, but also other efforts that are supported and bolstered by the recognition of some foundational claims as globally acknowledged human rights. Also, global NGOs (such as OXFAM, Save the Children, Actionaid, Medicines Sans Frontiers, and others) have been involved for a long time in advancing human rights through actual programmes in providing food or medicine or shelter, or by helping to develop economic and social opportunities, and also through public discussion and advocacy, and through publicizing and criticizing violations.

Indeed, some human rights that are worth recognizing are not, it can be argued, good subjects for legislation at all. For example, recognizing and defending a wife's moral right to be consulted in family decisions, even in a traditionally sexist society, may well be extremely important, and can plausibly be seen as a human right. And yet the advocates of this human right, who emphasize, correctly, its far-reaching ethical and political relevance, would quite possibly agree that it is not sensible to make this human right into a "coercive legal rule" (perhaps with the result that a husband would be taken in custody if he were to fail to consult his wife). The

necessary social change would have to be brought about in other ways. It is easy to find many examples of such legitimate but not ideally legislated human rights in the field of development. However, the more general point is that whether or not these serious claims are ideally legislated, there are also other ways of promoting them, and these ways are part and parcel of a rights based approach to development. They also have strong relevance to the subject of human rights of children.

IV

Yet these explanations still leave some issues basically unaddressed. We have to ask: what *gives importance* to human rights? I have argued that the importance of human rights relates to the significance of the freedoms that form the subject matter of these rights - freedom from hunger, freedom from escapable morbidity or premature mortality, and so on. Human rights generate reasons for action for agents who are in a position to help in the safeguarding or promoting of the underlying freedoms.

The induced obligations primarily involve the duty to give serious consideration to the reasons for action and their practical implications. I have discussed elsewhere, through drawing on a Kantian distinction, how human rights can lead both to "perfect" obligations (in the form of precisely specified duties of particular individuals or organizations) and "imperfect obligations" (in the more general and less strict form of a duty for anyone in a position to help to consider seriously what he or she should do, to advance these rights and freedoms).[8] The answer to the question what duties are correlated with recognized rights, thus, has to be answered at different levels of specification. But this is no embarrassment in ethics and political philosophy, since concerns in social ethics and general political principles often have that feature.

Also, the presumed precision of legal rights is sometimes contrasted with inescapable ambiguities in the ethical and political claims of human rights. This contrast, again, is not an embarrassment since a framework of normative reasoning can sensibly allow variations that cannot be easily accommodated in fully specified legal requirements. As Aristotle remarked in the *Nicomachean Ethics*, we have "to look for precision in each class of things just so far as the nature of the subject admits."[9]

Imperfect obligations, along with the inescapable ambiguities involved in that idea, can be avoided only if the rest of humanity - other than those directly involved - are exempted from any responsibility to try to do what they reasonably can, to help. A general immunity from having to do anything for others might seem plausible, at least arguably so, for *legal* requirements enforced by well specified legislation, but the case for such an impunity from a general (or "imperfect") obligation in the *ethical* domain would be hard to justify. As it happens, however, in the laws of some countries, there is even a legal demand, which can hardly have extreme precision, for providing

reasonable help to third parties. For example, in France there is provision for "criminal liability of omissions" in the failure to provide reasonable help to others suffering from particular types of transgressions. Not surprisingly ambiguities in the application of such laws have proved to be quite large and have been the subject of considerable legal discussion in recent years.[10] The ambiguity of duties of this type - whether in ethics or in law - would be difficult to avoid if third-party obligations of others in general are given some room, and this cannot be avoided for an adequate theory of human rights.

V

I turn now to a different ground for scepticism about the ethical and political interpretation of human rights: can we include in the domain of human rights claims on the society (such as economic or social entitlements) that are not entirely *achievable* at this time? Does the impossibility of complete fulfilment - in the present situation - nullify or damage or embarrass a claimed human right? It is mainly on the basis of this principle that there have been many attempts in the rights literature to keep the idea of human rights confined to so-called "first generation" rights, like liberty or freedom from violence, without including economic or social claims. This scepticism sometimes takes the form of arguing that unless there are institutions that are adequate to guarantee the complete fulfilment of a right, then there is no such right.

I believe this argument, common as it is, is mistaken. An *unrealized right* is a distinct category from a *non-right* - it is an acknowledged right that is not yet fulfilled, and is perhaps not completely fulfillable without some social changes. Indeed, precisely because we see claims of this kind as rights, we have particular reason to try to do what we can to make them realizable and then be actually realized, when necessary through new institutions. The usefulness of the acceptance of some rights as legitimate may lie, at least partly, in inspiring and helping to promote institutional change. The answer to the question "why human rights?" lies, to a great extent, in the social role of human rights in translating an ethical value into practical action aimed at promoting that ethics.

To this we have to add the further point, which is often not fully understood, that if a complete guarantee of fulfilment were indeed accepted as a necessary condition for any claim to be seen as a right, then not only the second-generation rights (connected with economic and social claims) but also first-generation rights (connected with liberty and non-interference) would be severely compromised. The elementary fact that it is not easy to guarantee complete non-interference in each others' lives, and even to ensure the absence of violent interference, was always clear enough, but that realization must be blatantly obvious today after such events as 9/11, or terrorist murders in Bali, or train bombings in Madrid or Mumbai. The "first" and "second"

generation rights are not as distinct in terms of fulfillability as some critics of developmental rights have tended to make them.

VI

I move now to a third question. If human rights are not vindicated by legislation, what criteria can we use for the ethical vindication of these claims? This is, of course, where we began, and I would add here the point that, like other ethical claims which are subjected to public reasoning, the robustness of human rights relates to the idea of "survivability in unobstructed discussion." The fact that the invoking of the idea of human rights has such social and political effectiveness is itself some evidence in the direction of the durability and reach of these claims, but it is possible, further, to have substantive arguments on what priorities we should place on different claims that all have widespread appeal, but differ in their importance in terms of human freedom as well as in our ability to make a real difference to their effective realization. To subject claims to human rights to public reasoning is a part of the discipline of human rights - not a sign of its weakness.

Indeed, the connection between public reasoning and the formulation and use of human rights is extremely important to understand. Any general plausibility that these ethical claims—or their denials—have is, on this theory, dependent on their survival and flourishing when they encounter unobstructed discussion and scrutiny, along with adequately wide informational availability.

VII

Can we fruitfully apply this framework of human rights to help think about what we owe to children in general and to the deprived Indian children in particular? I think the answer is definitely so. In fact this is how the work on children's rights have already begun with some force and reach. The use of participatory reasoning is greatly helped by the fact that India does have a functioning democracy, an active media, and a responsive judicial system that responds to civic reasoning and public understanding of problems and urgencies.

As argued in earlier parts of this lecture, the basic relevance of the idea of human rights to the conditions of all human beings would be hard to dismiss. And yet there is a special problem in the case of children, since they do not, frequently enough, take their own decisions. If rights are interpreted in terms of freedoms that the right-holders should have, their usefulness must depend on how those freedoms are exercised. But can children take their own decisions? If the application of human rights to children must involve the children themselves taking well-considered decisions on the exercise of those freedoms then we would seem to be on the threshold of a manifest contradiction. Can children really take these decisions? But is that the right question?

This brings me to the last debate I want to present in today's lecture. Is the idea of freedom entirely parasitic on the person taking control of the actual exercise of his or her freedom? I have argued elsewhere that this is not a particularly viable way of thinking of freedom in general.[11] When you are travelling in an aeroplane, your freedom to fly safely may be quite important to you. But that freedom is not typically best enhanced by your seizing control of the flight plan and cockpit operations. If your freedom includes the ensuring what you can be reasonably expected to want, then the promotion of that freedom may well have to be, often enough, in the hands of others. My freedom not to have cigarette smoke blown on to my face may depend not only on my own decisions, but also on those of others, including the smokers and those who may be able to restrain the smokers through social pressure or legal sanction.

Your freedom not to be exposed to malaria depends very substantially on what is done through epidemiological public policies. While exercising your own choices may be important enough for some types of freedoms, there are a great many other freedoms that depend on the assistance and actions of others and the nature of social arrangements. We live in an interdependent world, and the demands of liberty are more complex that the simple rule of leaving everyone to make their own little choices that animates some versions of the libertarian literature.

The distinction between the "opportunity aspect" and the "process aspect" of freedom, which I have tried to explore and investigate in my Kenneth Arrow Lectures (published in *Rationality and Freedom*, 2002) is, I believe, particularly relevant here. Insofar as the process aspect of freedom demands that a person should be making his or her own choice, that aspect of freedom is not particularly relevant to the human rights of children, except in some rather minimal ways (such as a child's freedom - and perhaps right - to get attention when it decides to scream the house down). But the opportunity aspect of freedom is immensely important for children. What opportunities children have today and will have tomorrow, in line with what they can be reasonably expected to want, is a matter of public policy and social programmes, involving a great many agencies.

The discipline of human rights has much to offer in systematizing the perfect and imperfect obligations that the society has towards children. Not only is there no contradiction here, the social perspective on human rights of children is quite central to the demands of a good - or of even an acceptable - society. If we have a long way to go in making good use of that perspective, especially in India, the fault does not lie in our stars. To think clearly on the subject, giving it due attention, may be a good way to begin. At least that is my submission on behalf of the children of India - indeed anywhere in the world.

NOTES

1 The application of the idea of human rights to the case of children, presented in this lecture, draws on the author's more general attempts to understand the nature and reach of human rights, in particular in Sen, 2004 and 2006.

2 See Rawls, 1993, p. 119.

3 See Hart, 1955, p. 79.

4 See Sengupta, 2000; (mimeo).

5 See Sen, 2004; 2006.

6 See Bentham, 1792, p. 501.

7 See Paine, 1791; Wollstonecraft, 1792.

8 See Sen, 2004.

9 The admissibility of inescapable ambiguities within a framework of rational assessment is discussed in Sen, 1993; and 1997; both reprinted in Sen, 2002. See also Sen, 1992a, pp. 46-49, 131-35.

10 On this, see Ashworth and Steiner, 1990; Williams, 1991.

11 See Sen, 1982; 1992, and essays 20-22 in Sen, 2002.

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