interpreting rights concepts and filling them with concrete legal and institutional meaning. But this revised, 'political' conception of human rights discourse and practice in postcommunist legal reconstruction sits uneasily with the idea of an autonomous rule of law that is ostensibly the basis of the whole enterprise.

NOTE

A number of different understandings about rights — their derivation, nature, content, and consequences — appear in the readings in Chapters 3–5 and the immediately preceding readings. Consider the following lists, (1) setting forth in the left column assertions or understandings about rights that derive from natural rights or related deep premises about the nature of human beings or divine law, and typify much (surely not all) rights discourse within liberal societies, in opposition to a list (2) setting forth in the right column very different understandings that, for example, (a) inform arguments in favour of cultural relativism that Chapter 7(A) discusses, and (b) inform utilitarian or policy-oriented arguments as opposed to argument derived from natural rights or related deep premises about the nature of human beings or divine law.

<table>
<thead>
<tr>
<th>inalienable absolute</th>
<th>socially constructed, given and taken qualified, contingent, content dependent on context</th>
</tr>
</thead>
<tbody>
<tr>
<td>universal eternal, ahistorical</td>
<td>particular, culturally specific historicist, evolving, open to change based on utility, power</td>
</tr>
<tr>
<td>based on equal human dignity</td>
<td></td>
</tr>
</tbody>
</table>

In the end, one cannot think pragmatically about human rights work without some such list of possible costs in mind.

DAVID KENNEDY, THE DARK SIDE OF VIRTUE

(2004), at 3

Chapter One: The International Human Rights Movement: Part of the Problem?

... Among well-meaning legal professionals in the United States and Europe — humanitarian, internationalist, liberal, compassionate in all the best senses of these terms — the human rights movement has become a central object of devotion. But are there also dark sides? This chapter develops a short list of hypotheses about the possible risks, costs, and unanticipated consequences of human rights activism. [...]

... Ultimately, we must also compare whatever assessment we make of the human rights vocabulary against the costs and benefits of other emancipatory vocabularies which might be used to the same ends. In the end, of course, different observers will weigh the costs and benefits of human rights activism in different ways. [...]

... For me, nothing goes in the “costs” column until the human rights movement has a bad effect. A bad effect means influencing someone to act (or fail to act) or to think in a way which counts as a cost (again, ethically, politically, philosophically, aesthetically) for the person making the argument...

Here is my short list of pragmatic worries.

Human Rights Occupies the Field of Emancipatory Possibility
[The author here discusses the 'hegemony' of human rights as resource allocation, criticism and distortion.]

The claim here is that this institutional and political hegemony makes other valuable, often more valuable, emancipatory strategies less available. This argument is stronger, of course, when one can say something about what those alternatives are — or might be. But there may be something to the claim that human rights has so dominated the imaginative space of emancipation that alternatives can now be thought
only, perhaps unhelpfully, as negations of what human rights asserts — passion to
its reason, local to its global. . . . This is easiest to see when human rights attracts
institutions and resources which would otherwise flow elsewhere. But this is
not only a matter of scarce resources.

Human rights also occupies the field by implicit or explicit delegitimation of
other emancipatory strategies. . . . Where this is so, pursuing a human rights initia-
tive or promoting the use of human rights vocabulary may have fully unintended
negative consequences for other existing emancipatory projects, including those
relating to more religious, national, or local energies. . . .

To the extent emancipatory projects must be expressed in the vocabulary of
"rights" to be heard, good policies which are not framed that way go unattended.
This also distorts the way projects are imagined and framed for international
consideration. For example, it is often asserted that the international human rights
movement makes an end run around local institutions and strategies which would
often be better — ethically, politically, philosophically, aesthetically. . . . A "universal"
idea of what counts as a problem and what works as a solution shunts out all sorts
of promising local political and social initiatives to contest local conditions in other
terms. But there are other lost vocabularies which are equally global — vocabularies
of duty, of responsibility, of collective commitments. Encouraging people concerned
about environmental harm to rethink their concerns as a human rights violation
will have bad consequences if it would have turned out to be more animating, for
example, to say there is a duty to work for the environment, rather than a right to a
clean environment.

The "right to development" is a classic — and well-known — example. Once
concerns about global poverty are raised in these terms, energy and resources are
drawn to developing a literature and an institutional practice of a particular sort at
the international level. Efforts which cannot be articulated in these terms seem less
legitimate, less practical, less worth the effort. Increasingly, people of goodwill
concerned about poverty are drawn into debate about series of ultimately impossible
legal quandaries — rights of whom, against whom, remediable how — and into
institutional projects of codification and reporting familiar from other human rights
efforts, without evaluating how these might compare with other deployments of
talent and resources. . . .

Human Rights Views the Problem and the Solution too Narrowly

People have made many different claims about the narrowness of human rights.
Here are some: the human rights movement foregrounds harms done explicitly by
governments to individuals or groups — leaving potentially more severe harms
brought about by private groups or indirect governmental action largely unad-
dressed and more legitimate by contrast. Even when addressing private harms,
human rights focuses attention on public remedies — explicit rights formalized and
implemented by the state. One criticizes the state and seeks public law remedies, but
leaves unattended or enhanced the powers and entitlements of private actors . . . .

When combined, these ideas about human rights often define problems and solu-
tions in ways unlikely to change the economy. Human rights foregrounds problems
of participation and procedure, at the expense of distribution. As a result, existing
distributions of wealth, status, and power can seem more legitimate after rights have
been legislated, formal participation in government achieved, and institutional
remedies for violations provided. However useful saying "that's my right" is in
extracting things from the state, it is not good for extracting things from the
economy, unless you are a property holder. Indeed, a practice of rights claims
against the state may actively weaken the capacity of people to challenge economic
arrangements.

. . . [T]he imbalance between civil/political and social/economic rights is neither
an accident of politics nor a matter which could be remedied by more intensive
commitment. It runs deep in the philosophy of human rights, and seems central to
the conditions of political possibility that make human rights an emancipatory
strategy in the first place, and to the institutional character of the movement.

The strong attachment of the human rights movement to the legal formalization
of rights and the establishment of legal machinery for their implementation makes
the achievement of these forms an end in itself. . . . These are the traditional problems
of form: form can hamper peaceful adjustment and necessary change, can be overin-
clusive or underinclusive. Is the right to vote a floor — or can it become a ceiling?

The emphasis on human rights can leave unattended the wide array of laws that
do not explicitly condone violations, but that certainly affect their frequency and
may in fact be doing more harm than the absence of rights. These background laws,
left with clean hands, can seem more legitimate. . . .

Even very broad social movements of emancipation — for women, for minorities,
for the poor — have their vision bunkered by the promise of recognition in the
vocabulary and institutional apparatus of human rights. They will be led away from
the economy and toward the state, away from political and social conditions and
inward forms of legal recognition . . . .

Human Rights is Limited by its Relationship to Western Liberalism

Human rights encourages people to seek emancipation in the vocabularies of rea-
son rather than faith, in public rather than private life, in law rather than politics,
in politics rather than economics. The human rights vocabulary helps draw the lines
between these spheres. In each case, it underestimates what it takes as the natural
base and overestimates our ability to instrumentalize what it takes as the artificial
domain of emancipation. Moreover, human rights is too quick to conclude that
emancipation means progress forward from the natural passions of politics into the
civilized reason of law. The urgent need to develop a more vigorous human politics
is sidetracked by the effort to throw thin but plausible nets of legal articulation across
the globe. Work to develop law comes to be seen as an emancipatory end in itself,
leaving the human rights movement too ready to articulate problems in political
terms and solutions in legal terms.

The posture of human rights as an emancipatory political project which extends and
operates within a domain above or outside politics — a political project repackaged as

form of knowledge — delegitimates other political voices and makes less visible the local, cultural, and political dimensions of the human rights movement itself.

... 

The human rights movement contributes to the framing of political choices in the third world as oppositions between “local/traditional” and “international/ modern” forms of government and modes of life. This effect is strengthened by the presentation of human rights as part of belonging to the modern world, but coming from some place outside political choice, from the universal, the rational, the civilized. By strengthening the articulation of third world politics as a choice between tradition and modernity, the human rights movement impoverishes local political discourse, often strengthening the hand of self-styled “traditionalists” who are offered a commonsense and powerful alternative to modernization for whatever politics they may espouse.

... 

Human Rights Promotion Can Be Bad Politics in Particular Contexts

It may be that this is all one can say — promoting human rights can sometimes have bad consequences. All of the first nine types of criticism suggested that human rights suffered from one or another design defect — as if these defects would emerge, these costs would be incurred, regardless of context. Perhaps this is so. But so long as none of these criticisms has been proven in such a general way (and it is hard to see just how they could be), it may be that all we have is a list of possible downsides, open risks, bad results which have sometimes occurred, which might well occur. In some context, for example, it might turn out that pursuing emancipansion as entitlement could reduce the capacity and propensity for collective action. Something like this seems to have happened in the United States in the last twenty years — the transformation of political questions into legal questions, and then into questions of legal “rights,” has made other forms of collective emancipatory politics less available. But it is hard to see that this is always and everywhere the destiny of human rights initiatives.

... 

QUESTIONS

1. How damaging to a rights-oriented international movement are the criticisms about rights discourse and argument that are developed (and in some cases, responded to) in the preceding articles? To which of them are the UDHR, treaties and other materials examined in Chapters 3–5 most vulnerable?

2. Duncan Kennedy and Klare both stress that, at a given point, rights-based assertions give out, and a claimant or judge or other decision-maker must resort to (Kennedy) ‘open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability’. Klare stresses that ‘choices must be made in elaborating significant consequences. The problem is that rights discourse itself does not provide neutral decision procedures with which to make such choices. In order to resolve rights conflicts, it is necessary to step outside the discourse’. Apply these observations to a conception as basic as the ‘right to life’. What ‘choices’ about the meaning of this conception are before treaty-makers, legislators, courts or advocates elaborating this right, and through what methods or processes can those choices be resolved? What different issues are posed by, say, a ‘right to health care’?

3. Duncan Kennedy, Klare and Sunstein all stress the significance of the indeterminacy of rights-based argument, including the problem of conflicting rights. Kennedy notes that these features of ‘open texture or indeterminacy’ are open to the same analysis as ‘legal argument in general’. That is, they are not particular to rights. Give some examples, other than those stated in the preceding writings, of pressing and difficult issues raised by the ICCPR, CEDAW or the ICESCR that stem from the indeterminacy of the texts or contradictions among rights? How would you go about resolving a concrete issue about the content and reach of a right that involves indeterminacy or contradiction (say, the right to speech or privacy)? Bear in mind that for many international human rights issues and in many states, it will be impractical or impossible to invoke the jurisdiction of a court that could issue a ‘binding’ precedent.

4. Do you understand David Kennedy’s “dark side” of human rights to advance significantly different criticism of rights, rights rhetoric, and rights-based advocacy and strategy than do the three articles preceding it? In what respects? To the extent that these three earlier (in time) articles address in different ways some of Kennedy’s concerns, how do you assess their arguments?

5. With respect to David Kennedy’s arguments, consider: (a) What illustrations could you offer of situations where reliance on rights rhetoric to advance popular claims crowded out other “emancipatory vocabularies” and strategies — for example, mass political action — that could possibly or even likely have achieved more? Consider, for example, earlier materials examining the struggles for “women’s rights”, the arguments against torture, and arguments in favour of economic/social rights like health care or housing. Is mass political action — electoral campaigns, marches by protestors to a capital city, boycotts — necessarily independent of rights rhetoric embedded in such action? (b) Suppose that a human rights advocate argued to a minister of education in a developing country that giving schoolgirls equal educational opportunities would improve talent, energy, productivity and the level of economic well-being within the family and the country — that is, benefits will far exceed costs. Is the “hegemony” of rights rhetoric apt to block such argument? Could both modes of argument be used together? What of using simultaneously several different modes of argument — utilitarian, fairness-based, rights-based — with respect to environmental degradation? (c) Do this book’s earlier materials support the author’s argument that human rights directs so much attention to the public sector (that is, the state as the only identified violator of human rights in the conventions and in human rights discourse) that many violations occurring in the nonstate sector (employment discrimination, family violence) are apt to remain hidden and untouched? (d) The author several times characterizes human rights as claims and arguments based on reason, whereas other emancipatory languages and strategies rely on faith and emotion. Do you agree with this?