

**SOME PARADOXES OF HUMAN RIGHTS:
FRAGMENTED REFRACTIONS IN NEO-LIBERAL TIMES**

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This essay is concerned with the cultural dimensions of the reductive paradox “scarcity in times of abundance”. Why is it that at a time of an abundance of human rights laws on paper, we also see a deepening lack of realization of human rights in the lives of subaltern peoples? The more human rights standards we have set in law, the more increase we have seen in violations of human rights. With increasing importance given to the idea of human rights by State and non-State actors alike, there has also been a devastating decrease in importance given to subaltern lives by these very actors. What is it about non-Western countries that make all international human rights reports represent them as the worst offenders? Are industrialized countries better at protecting human rights? Isn’t that a paradox in itself that “Capitalist” political formations protect human rights better than “non-capitalist” ones? This exploratory essay confronts these questions by identifying some paradoxes that are inherent in the idea and practice of human rights in a neoliberal

* Assistant Professor, Jindal Global Law School. I would like to acknowledge an intellectual debt to Prof. Wendy Brown’s influential essay “Suffering the Paradoxes of Rights” (2002) for the inspiration to engage in an exploration of a similar nature. My modest attempt unfortunately is woefully inadequate in comparison to the rigour and depth that she brings to her inquiry. I dedicate this essay to Ravi Nair who taught me that the struggles for human rights are so much more than gaining mere legal recognition, and whose indefatigable commitment to speaking truth to power and encyclopedic knowledge remains a source of inspiration in all the work that I do. He had once told me in the passing: “Come what may, don’t sell your soul.” I might have succumbed to many seductions of capital, but I want to assure him that I’ve not sold my soul, and have kept up the spirit of conscientious objections and subversion alive and kicking in all my human rights work, be it activism, teaching or research.

world. By raising questions around traditional debates like 'universality' and the meaning of the State, to discussing more complicated issues of imperialism, multiculturalism, representations, transnational migration and the markets of funding, I suggest a move away from the grand narratives of human rights as international relations, consensus building, or law making to their recognition as contested cultures of the quotidian, the cacophonous politics of the street, and the mundane negotiations of the everyday and ordinary.

I. PREFATORY CAVEATS

Let me start with a disclaimer – that this essay and the points that I raise are eminently prefatory in nature. As Jean Hyppolite wrote in his essay on the “preface” to Hegel’s “Phenomenology of the Mind”: “Don’t take the preface seriously. The preface announces a project and a project is nothing until it is realized”.¹ However, it might be right to also say, that the idea of a completed project is fatalistic in nature – it suffocates the idea of the project itself by announcing a cruel eventuality that might not augur well for the organic messiness of competing thoughts with which a project is conceived and initiated. So I’d request the reader to humor the meandering nature of my arguments that will oscillate between liberal orthodoxy and post-modern conservatism!

This essay is concerned with the reductive paradox of “scarcity in times of abundance”. I don’t conceive of this paradox in a purely economic sense, but also as a cultural one. Why is it that at a time of an abundance of human rights laws on paper, we also see a deepening lack of realization of

¹ J. DERRIDA, *Translators Preface*, in *OF GRAMMATOLOGY* ix-x (G. C. Spivak trans., 1994).

human rights in people's lives? The more human rights standards we have set in law, the more increase we have seen in violations of human rights. With increasing importance given to the idea of human rights by State and non-State actors alike (from NGOs to corporations to transnational organizations), there has also been a devastating decrease in importance given to human lives. What is it about non-Western countries that make all international human rights reports represent them as the worst offenders? Are industrialized countries better at protecting human rights? Isn't that a paradox in itself that "Capitalist" political formations protect human rights better than "non-capitalist" ones? I desist from using "Communist" or "Socialist" because they don't necessarily offer an alternative to Capitalism, or end up treating Capitalism/ Communism as exclusive and oppositional binaries, which they are not any longer.

If we look at the contemporary history of international human rights, the way violations have exponentially accompanied the proliferation of laws and standards is quite baffling. After World War (*hereinafter* "WW") I, the League of Nations (*hereinafter* "LoN") was constituted to ensure that a tragedy of such scale is avoided in future. It failed and WW II overwhelmed human imagination regarding how far the perversity of human evil can reach. With the vow of "Never Again", the failed LoN was replaced by the United Nations (*hereinafter* "UN"). Thankfully, the UN stands ground despite the spiraling culture of impunity – sometimes being a mere spectator to rampant acts of State aggression.

Like the birth of the UN was preceded by targeted annihilation of human lives on a massive scale, the birth of India was preceded by the horrors of partition. The independent nation received a Constitution that commendably proposed to guarantee human rights – and yet those very guarantees were subverted by the State during the Emergency in 1975-77. There have been several emergency-like situations since then that have brutalized minority

communities to establish the State's monopoly over violence: Marichjhapi in 1979, Nellie in 1983, the anti-Sikh pogrom in 1984, the post-Babri Masjid demolition anti-Muslim violence across cities in India, particularly in Bombay in 1992, the perpetual culture of State repression in Jammu and Kashmir and India's North East, secessionist movements in other parts, and most recently the pogroms notably in Gujarat in 2002, and Kandhamal in Orissa in 2009. Structural and systemic violence against minority communities, disadvantaged groups and women has carried on unabated both by State and non-State actors, despite the all-encompassing reach of Article 21 of the Constitution of India (Right to Life and Personal Liberty), a whole gamut of social justice legislations, an ostensibly independent judiciary and the power of Social Action Litigation (*hereinafter* "SAL"). Not surprisingly, there has actually been a normalization of State violence post-economic liberalization in India in 1991, where the logic of neoliberalism has brutally crushed people's movements that have resisted its perverse progress.

Are there ways to explain the operation of these correlations? Are there causal connections between the occurrence of violations and espousal of laws? There cannot be one answer to these questions, but we can search for explanations by identifying some of the pressing paradoxes that plague the operation and practice of human rights in India today. By no means exhaustive, this is an exploratory and fragmented attempt at confronting some of these paradoxes that I have faced practicing and theorizing human rights work in the areas of sexuality, gender-based violence, child rights, refugee rights and migration over the last decade or so.

As the title of the essay suggests, these are not mere reflections on my work. Reflection has the possibility of being a self-contained engagement – on the other hand, refraction is a project with the potential to destabilize and bend our disciplined contours of thought. Refraction doesn't necessarily suggest a "moving away" from issues at stake,

but a critical engagement that confronts not one, but competing truths that give rise to paradoxes.

II. HASTILY UNPACKING NEOLIBERALISM

This essay locates the phenomena of “scarcity in times of abundance” in a temporal frame of human history called “neoliberalism”. I will not engage in a dense discussion on what this trendy term means², but will attempt a brief preliminary unpacking of the term because it is the beast in the heart of the larger political project that that I am committed to.

While capitalism as an ideology puts into operation a political formation of governance like liberalism, neo-liberalism is the condition where practices of state liberalism get naturalized and internalized by individuals who inhabit a liberal state formation. This understanding of neo-liberalism marks a departure from the more popular economic explanations of the term that is marked by the hyper-efficiency and “shock therapy”³ logics of the Chicago Boys team led by Milton Friedman, who advocated for a complete hollowing out of the State from areas of economic transactions – particularly in times of crisis – to allow the market to take over and determine the course of the future, in turn militarizing countries across the world in the name of bringing prosperity. The market, unfortunately, is no holy cow and acts the way it is made to by the powers that be. Economic neo-liberalism contributed centrally to the present crisis of global recession.

² See generally D. HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); L. DUGGAN, THE TWILIGHT OF EQUALITY: NEOLIBERALISM, CULTURAL POLITICS AND THE ATTACK ON DEMOCRACY (2003) (for detailed discussions on the economic, political and cultural contexts of neoliberalism).

³ See generally N. KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM (2007) (for a fantastic exposition).

While many consider the crash of the global markets as capitalism's foot-in-the-mouth moment, it in no way marks the death of neo-liberalism as a cultural phenomenon. Because culturally, neo-liberalism has very smoothly done three things to ensure its robust and brutal longevity: first, it has enabled the mutation of the State into a firm; second, it has given birth to the responsabilized and self-governing citizen; and third, it has constantly projected experiences of human precarity (or risk, in more Foucaultian terms) as entrepreneurial opportunity.

These three ramifications of neo-liberalism on human sentiments have had devastating consequences on the idea and practice of human rights. As the State mutated into the firm, people were told not to claim rights and accountability, but to treat it as a service provider. If the service provider fails to deliver, you can always outsource the service to a private agency – don't blame the State, just replace it when it fails. The new mantra of citizenship was for people to become self-disciplined, where you'll not depend on the State for essential entitlements like health and education, but earn it for yourself through competition. People were told to ignore that society had inherent inequalities that deeply impaired some people's ability to compete on an equal playing field. If you are failing, it's your responsibility. The vulnerability of human lives was turned into economic opportunities for corporations – thus the birth of private insurance, and the near death of free primary healthcare. The question that should haunt us as we confront the specter of neo-liberalism is: what happens to questions of State accountability for human rights violations, when all experience of the human condition is being completely attributed to the individual and privatized? What happens to the notion of community that binds us together as peoples? Has neo-liberalism blurred the distinctive line between the State and the market? Does neo-liberalism mark the demise of the State, or its resurrection in a far more insidious and inescapable form?

III. Dis/IDENTIFYING THE STATE

The State is insidiously omnipresent in neo-liberalism – even when it is absent – and therein lies the paradox. Even when we sometimes feel that market forces are resulting in the State “withdrawing” – the specter of the State looms like a phantom that disciplines our imagination in such sophisticated ways that we are never able to think of ideas of belonging beyond it. With the spread of transnational capitalism, we are also experiencing the rise of genocidal nationalism.

This is the conspiracy of the Social Contract. I use the term “conspiracy” with purpose. A reading of Thomas Hobbes’ “Leviathan”⁴ constructs the grammar that we have not been able to escape in articulating what it means to be a citizen (and in the same breath a nationalist), and how belonging cannot be understood outside of the context of the State, and that the State is the most legitimate form of political community.

Ostensibly, Hobbes made us believe that the multitude⁵ that came together to form the Commonwealth was formed out of consent – where all and sundry in his state of nature consented to give up on their rights to be protected by the State. His bluff was called by feminist political theorist Carole Pateman in her authoritative work “The Sexual Contract”⁶, in which she convincingly illustrated how in the teleology of State formation, a sexual contract preceded the more public social contract that forfeited the right to consent by women through the operation of the Doctrine of Coverture⁷. So even before

⁴ T. HOBBS, *LEVIATHAN* (1996).

⁵ *See generally* M. HARDT & A. NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* (2005) (unlike Hobbes’ use, for a revolutionary understanding of the idea of the multitude).

⁶ C. PATEMAN, *THE SEXUAL CONTRACT* (1988).

⁷ ‘Doctrine of Coverture’ is a marriage contract that denudes the wife of any independent legal identity of her own. Her identity is subsumed under that of her husband’s, and she is unable to acquire or dispose property, sue or

the social contract was executed, women were already denuded of subjecthood. How can women be said to consent to their own subordination?⁸ And if we take Pateman's theoretical argument and apply it to other subaltern communities, the same machination becomes apparent – where their belonging to the State's body politic was acquired through coercion made to look like consent.⁹

This is a “new” dimension of the neo-liberal militarized-managerial security State and emerging practices of self-disciplined citizenship that Iris Marion Young, building on Foucault's influential works on Governmentality¹⁰, points at. She says that Hobbes' construct was a masculinist notion of protection by the sovereign State. Notwithstanding many feminist critiques including Pateman's, this masculinist notion of protection continues to animate the formation and operation of the State even today. The only difference is that the nature of power has now become “gentle and

be sued, or execute contracts in her name. William Blackstone defines it as: “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything [...] under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture”, see C. Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LIBRARY L. J. 459, 460 (2002), available at <http://people.virginia.edu/~jdk3t/ZaherWMS.pdf>.

⁸ See generally J. Richardson, *Contemporary Feminist Perspectives on Social Contract Theory*, 20 *RATIO JURIS* 402 (2007).

⁹ See generally M.C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY AND SPECIES MEMBERSHIP* (2007) (for a discussion on the exclusion of the disabled by the template of the Hobbesian social contract).

¹⁰ M. FOUCAULT, *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Graham Burchell, Colin Gordon & Peter Biller eds., 1991).

benevolent”¹¹ resulting in an extremely smooth manufacture of consent, which in case of Hobbes’ social contract was acquired through the experience of a life that was “solitary, poor, nasty, short and brutish”.

Before we look at more contemporary contours of State formation and operation, brief references to Locke and Rousseau – the other two in the Contractarian triumvirate – are in order. Locke in his “Second Treatise of Government”¹² sowed the first seeds of liberalism into the idea of the functioning of the State. By theorizing the birth of private property and the limits of State intervention to protect private property, Locke introduced into Western political theory the idea of a limited government – an idea that is today at the heart of liberal capitalist democracy.

Rousseau on the other hand was a ruthless critic of his Contractarian predecessors. “Man is born free, but everywhere he is in chains” opened his classic essay “On the Social Contract”.¹³ His idea of the Social Contract emerged out of a recognition that there was an original contract that robbed the poor to keep power in the hands of the rich, and it was to turn this unjust situation around that a new social contract was required. His iconic quote above was a reference to the original social contract that created the illusion that man was born free into a body politic called the State, but in reality his fate was existentially sealed.

Like Rousseau earlier and Pateman later, in the Indian context B.R. Ambedkar challenged the formation of a political democracy in India as one that is built on the caste system – where the very logic of social organization was based on a

¹¹ See generally I.M. Young, *The Logic of Masculinist Protection: Reflections on the Current Security State*, in *WOMEN AND CITIZENSHIP* 19-24 (2005).

¹² J. LOCKE, *SECOND TREATISE OF GOVERNMENT* (1980).

¹³ J.J. ROUSSEAU, *ON THE SOCIAL CONTRACT* (2010).

“division of labourers”, than merely a division of labour as in other parts of the world. His revisioning of the State was a call to annihilate caste, not just the uplift of the “untouchables” which has been a Statist agenda to sustain the caste hierarchy in the name of social justice.¹⁴

There’s also an anarchist version of political and cultural community that does not require the template of the State to organize their practices of belonging. James C. Scott’s influential work “The Art of Not being Governed” is a deep ethnography of parts of the Southeast Asian mainland massif called “Zomia”. It is “the largest remaining region of the world whose peoples have not yet been fully incorporated into Nation States”.¹⁵ As Scott says: “Its days are numbered”, which in other words means that the onslaught of the State is not going to spare these peoples who have created a completely different grammar of belonging.

Partha Chatterjee’s conception of “political society”¹⁶ also allows us to understand the terms of belonging that mediate the relationship between not-quite-citizens and the State in the non-western world that do not necessarily follow the modernist codes of conduct expected of nationalist citizens who inhabit “civil society”. For Chatterjee “civil society” is bourgeois society, and it is different from what he calls “political society” – a space inhabited by those who have been subjects of bourgeois (historically colonial) exclusion, experiments, and pity, but never agents with the opportunity to question, interpret, and shape their own histories.

While “civil society” is comprised of citizens, “political society” is the realm of illegality and/ or non-recognition,

¹⁴ See generally B.R. AMBEDKAR, *ANNIHILATION OF CASTE* (1990).

¹⁵ J.C. SCOTT, *THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA* i-ix (2009).

¹⁶ See generally P. CHATTERJEE, *THE POLITICS OF THE GOVERNED: REFLECTIONS ON POPULAR POLITICS IN MOST OF THE WORLD* (2004).

inhabited by “populations” – homogenized masses of non-/illegal-citizens (e.g., squatters, prostitutes, illegal migrants) – whose lives need to be managed by “civil society” actors including the State and the market. Inhabitants of “political society” are constantly negotiating their way through everyday practices and processes to confront the violence of exclusion and paternalistic compassion that “civil society” directs at them.

Chatterjee distinguishes the two thus:

“Civil society is typically about a kind of free associative, modern bourgeois life. It is quintessentially bourgeois politics. The challenge ... in most of the non-Western world is that most people are not bourgeois. What sense does it make to use the forms of modern law and modern administrative procedures on populations that cannot survive if you simply insist on protection of private property, equality of law, freedom of contract and these kinds of things? Most of these people would simply die or they would rise in revolt and break down the whole structure”.¹⁷

Inferring from the above discussion, it is apparent that the question of rights in the context of the idea of the State is not as straightforward as it sounds because the idea of the State, and its relationship to “citizens” and “populations” has been under interrogation. Yet, for all operational purposes the State remains the central and sole entity who is held accountable for human rights violations, even when the State itself is the violator. My argument is not about whether it should or shouldn’t be. Rather, it is to first recognize that the State is not the benevolent “giver” of

¹⁷ N. SHAIKH, THE PRESENT AS HISTORY: CRITICAL PERSPECTIVES ON GLOBAL POWER 71-88 (2007).

rights; it is only expected to guarantee rights that people have by the very virtue of being humans (a naturalist argument); or because people's struggles have claimed them from the State (a constructionist argument). But then again it is identified as the sole guarantor and made accountable to *respect*, *protect* and *fulfill* human rights. In legalistic terms, by *respect* we mean whether the State is responsible directly for the abuse or denial; by *protect* we refer to the State's accountability to control the harmful actions of non-State actors; and by *fulfill* we mean making the State responsible for creating enabling conditions where people have access to mechanisms for redressing wrongs.¹⁸

The paradox begins when we embark on the activity of identifying the State which will actively participate in operationalizing the respect-protect-fulfill triad. In the immediate post-WW II scenario, although the UN was founded on internationalist principles, the Westphalian model of the State was still intact. Territorial and governmental sovereignty reigned supreme, and the monopoly over legitimate use of violence rested with the State alone. With the end of the Cold War and the beginning of decolonization the State added a new dimension to its conceptualization: along with territory, population borders, and sovereignty was added *identity*. The State was now transformed into a Nation-State and citizenship acquired a new meaning. The category of "identity" further strengthened the impregnability of sovereignty and borders. The impact of the 1994 Bretton Woods Conference did not do much to impinge upon State sovereignty until the institutionalized advent of Structural Adjustment Programmes (*hereinafter* "SAPs"). It was at this point in time that a State's

¹⁸ See generally Alice M. Miller, A Methodological Framework for Applying a "Human Rights Approach" to Advocacy and Rights-based Programming, New York: Law and Policy Project, Mailman School of Public Health, Columbia University (June 2002) (on file with the author).

determinants started to ostensibly disintegrate. With the decline of the “welfare state”, State accountability was being replaced by State withdrawal. The irony of it all was that the call for State accountability – through a whole set of new international human rights instruments – was accompanied by a heightened call for limited government – with the reach of GATT/IMF/WTO-like formalities – from within the same institution – the United Nations.

The impact was apparent in India was well, when in 1991 with the advent of Liberalization, Privatization and Globalization (*hereinafter* “LPG”), a new era of economic policies were started to help the country recover from SAP induced debt traps. Undeniably the LPG process, which arrived with the claim of universal prosperity, further stretched the yawning gap between the powerful and powerless, and pushing more people below the poverty line. The irony in this case is also that in the same decade we had the Protection of Human Rights Act, 1993 being enacted and the strict legal standard of *locus standi* being relaxed manifold to usher in, with greater rigour, the powerful tool of Constitutional remedy called Public Interest Litigation (*hereinafter* “PIL”), or SAL.¹⁹ The use of PIL/ SAL magically expanded the array of rights under the Constitution also in the ‘90s.

These parallel streams of development are classic examples of how the nature of the State was undergoing transformation. On the one hand, the State rested the armour of sovereignty when it came to allowing global capital to come

¹⁹ It must not be forgotten that despite the stated success of PIL/ SAL in India to uphold the human rights of subordinated peoples, the phenomena began as a corrective measure to restore people’s faith in the judiciary after its legitimization of the State Emergency in the case of *ADM Jabalpur v. Shiv Kant Shukla*, (1976) 2 S.C.C. 521. See generally U. Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in 4 *THIRD WORLD LEGAL STUDIES* 107-138 (1985) (for a detailed discussion).

in, at the same time it resisted international interventions on questions of human rights violations – like it has been in Kashmir, or in Gujarat. It wholeheartedly participates and even adheres to the conditionalities of global trade regimes, but does not meet its international human rights obligations – India is still not party to any of the Optional Protocols to the International Covenant on Civil and Political Rights, it has not ratified the Convention against Torture, is not party to the Rome Statute of the International Criminal Court, and does not submit its periodic reports to the UN consistently and truthfully. Conversely, it has been an active player in the WTO rounds on trade disputes and a regular participant at the World Economic Forum.

It is a cruel reality that the State is actively withdrawing from services such as primary health and education. Social movements are engaging with the State to hold it accountable and demanding that private capital should not replace State responsibility. But are we actually seeing the decline of the State? While it withdraws from essential entitlements, it also obsessively invests in some others – like the military and law enforcement. The advent of capitalism then is not necessarily the withdrawal of the State, but as French historian, Fernand Braudel had observed like a soothsayer: “Capitalism only triumphs when it is identified with the State, when it is the State”.²⁰ And that is as close as we can get to a precise definition of neo-liberalism. What we are witnessing today is not State withdrawal, but a certain kind of State engagement that makes holding the State accountable for human rights violations a most complicated task – because global capital is increasingly becoming indistinguishable from local political will. Predicating human rights claims against the State, or against capitalism-induced violations that either inform the working

²⁰ FERNAND BRAUDEL, 3 CIVILIZATION AND CAPITALISM, 15TH –18TH CENTURY: THE PERSPECTIVE OF THE WORLD 64- 65 (1984).

of the State or is promoted by the State remains a veritable challenge. The paradox is whether to continue our engagement with the State, or to search for post-Nation State negotiating grounds.

IV. WHITHER UNIVERSALITY?

A second paradox that we come up against is an eternally vexing question: are all human rights universal? This seemingly simple question has plagued social sciences for a long time, and all attempts at searching for answers have further complicated our exploration. Human rights are understood to be universal because of the naturalist belief that people by the virtue of being human deserve of all human rights. This explanation raises two questions: first, is there a definition of what constitutes a “human being”? Second, where do we find the human rights that we are referring to as universal?

The geneses of documents that guarantee universal human rights – like the Constitution of India and the Universal Declaration of Human Rights (*hereinafter* “UDHR”) – clearly point towards the exclusionary premise of their foundation. The 1787 American Bill of Rights excluded Black people from its purview of guarantees; one of the early drafts of the UDHR did not recognize “sex” as a valid ground for discrimination; the Indian Constitution does not explicitly recognize sexuality or disability as valid grounds of discrimination. So, while human rights are claimed to be universal, one will have to qualify as a “human being” first to enjoy the guarantees of universality. Further, each of these documents enumerate a set of rights that are referred to as universal or fundamental, but not all of them consistently recognize them. For instance, the UDHR guarantees the right to education as a universal human right, but until a few years back the Indian Constitution did not recognize it as one.

One of the major objectives of people's movements in India has been to make the State recognize collective disadvantage by adding particular grounds of discrimination in the Constitution. But it will be naïve to believe that that mere inclusion will do away with the disadvantage. It is this paradox that brings into crisis the thesis of universality. A hypothetical illustration can explain this better.

The liberal rights discourse offers the promise that all human beings irrespective of their history will universally be able to enjoy its fruits – that of the market, equality, human rights, privacy, property, secularism, democracy and so on. Liberalism locates a threshold in the distance and says that all human beings are in a queue and will definitely cross that threshold and be endowed with all of liberalism's gifts. Let us imagine this happening through what can be called the "queue to civilization". The liberal discourse on rights tells us that all humans are in this queue that is leading them out of the "state of nature" into that of civil society, into modernity. The queue leads to a door that is the threshold of civilization, and when people cross it they are automatically bestowed with human rights guarantees. This linear process substantiates the importance of universality because everyone in the queue will get to cross the threshold.

This hypothesis does not provide explanation to two important issues: first, how is it decided as to who gets to stand in the beginning of the line and who stands in the tail-end? Second, is it possible that there are some people who have been forced out of the queue? Post-colonial historians have pointed out that colonialism offered a "civilizational" explanation to this: those who stand at the end of the queue are behind because they are civilizational backward. They are made to remain captive, in what Dipesh Chakrabarty has called the "imaginary waiting room of history". As he writes: "We were all headed for the same destination ... but some people were to arrive earlier than others. That was what

historicist consciousness was: a recommendation to the colonized to wait".²¹ Thus, white men and Bramhins get to acquire full personhood and the guarantees of universal human rights, whereas Black men and Dalits need to remain behind. The intersectional disadvantage of a Black/Dalit lesbian, disabled and poor woman might not even find place in the queue at all. Even if it is recognized that policies of affirmative action or reservations should guarantee a place for those who have never been in the queue, their place would remain in the wee end of the line. Whose place will be reserved through affirmative action, and who deserves to be in the queue still remains the discretion of the White and Bramhin men who are already across the threshold.

As Susan George has pointed out, the linear and exclusive logic that is used to design the "queue to civilization" is "take the best and leave the rest"– the same logic that justifies neo-liberal globalization. As George further observes, this queue leading to the distant threshold of liberalism's fruits, "gives the impression that all people from all regions of the globe are somehow caught up in a single movement, an all embracing phenomenon and are all marching towards some future Promised Land".²² The queue is clearly hierarchised and distance from the threshold determines when in the future the subaltern will get to cross it, or if the subaltern will get to cross it at all. This logic is captured in the Derridian expression *différance*²³ which uses civilizational difference as the justification of deferring the subaltern's march to the

²¹ D. CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 3-8 (2000).

²² See generally S. George, *Globalizing Rights?*, in GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999 15-16 (M. Gibney ed, 2003).

²³ Derrida used this word to understand the features that govern the production of textual meaning. The word is a combination of ideas signified by 'deferral' and 'difference'. See generally J. DERRIDA, *Différance*, in MARGINS OF PHILOSOPHY 1-28 (Alan Bass trans., 1982).

Promised Land. This deferral can even lead to denying several subaltern groups, what Hannah Arendt has called, albeit in a different context, “the right to have rights”.²⁴

The operation of a linear logic makes this notion of universality continue even today, and is technically referred to as formal equality. One way to disrupt the paradox of the linear narrative of human rights is to not think of them as universal, but as inherent, so that the need to cross the threshold does not arise in the first place at all. The challenge before us is about thinking of ways to operationalize this – where we look at discrimination not just as an issue of individual or privatized disadvantage, but part of institutional systems of structural exclusion.

V. HIERARCHIES OF RIGHTS AND SUFFERING

In the larger context of human rights, hierarchisation is explicitly institutionalized. The international human rights law regime recognizes that rights are divided into three generations – civil & political rights (1st generation), economic, social & cultural rights (2nd generation) and group or solidarity rights (3rd generation). This is reflected in the Indian Constitution’s segregation of Fundamental Rights from the Directive Principles of State Policy – making the former justiciable and the later non-justiciable. A close reading of the Constitution will reveal that a majority of the rights enshrined in the Fundamental Rights chapter are civil & political rights (*hereinafter* “CPRs”), and those enumerated as Directive Principles are economic, social & cultural rights (*hereinafter* “ESCRs”).

This hierarchisation is also an outcome of the Nation-State attempting to undermine the inherent nature of all human rights and from recognizing that they are indivisible. The logic is of pure convenience, and a sophisticated way of

²⁴ H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 280 (1968).

escaping accountability. CPRs are generally understood as negative rights, imposing a prohibition on the State from taking them away. For instance, the State cannot arbitrarily deprive anyone of her personal liberty. ESCRs on the other hand are referred to as positive rights, where the State is expected to proactively engage in guaranteeing it. For instance, the right to food can only be guaranteed if the State puts in place an effective public distribution system.²⁵ In the case of ESCRs then the State gets an opportunity to abrogate its accountability by citing economic inability to guarantee that right, and arguing that it shall realize it progressively. This rhetoric of “progressive realization” is a myth, because the State invests much more economic resources to maintain national security, and thus, cannot be allowed to give up on its responsibility to guarantee ESCRs. In historical context, while the Nehruvian State in India relegated ESCRs into the non-justiciable category of Directive Principles, that didn’t stop it from making mega plans and allocating funds for building large dams and highways. One response to the rhetoric of “progressive realization” is to interrogate the political economy of budgeting – to ask why allocations in health and education never match that of building industry, or strengthening the State’s armed forces.

Hierarchisation also operates at the level of the experience of disadvantage and suffering. A paradox closely connected with the “queue to civilization” hypothesis is the way in which people’s location on the queue is determined on the basis of the legitimacy of their form of suffering. Historically and even today, the arc of suffering is deeply hierarchised. Whose suffering is more important and deserves attention is decided on the basis of the legitimacy of

²⁵ See generally I. Berlin, *Two Concepts of Liberty*, in *LIBERALISM AND ITS CRITICS* 15-36 (M. Sandel ed., 1984) (for a theoretical underpinning of positive and negative rights).

that ground. For instance, discrimination based on race, caste, religion or class will always have more legitimacy than gender, sexuality or disability. Even within each of these grounds there are micro-hierarchies: as a *Chamar* you are better off than a *Bhangi*, or being a heterosexual Black man, you are more privileged than a disabled and homosexual Black man.

The emergence of these hierarchies is also a fallout of the liberal trope of formal equality, where there is apparent recognition of the fact that people need to be treated equally – but the fact that some are deemed to be more equal than others is not interrogated. Similarly, the hierarchies also ignore that different grounds of disadvantage can intersect to exacerbate the incidence of discrimination. The traditional privilege of a White man will be punctured if he is gay. But the impact of discrimination on a Dalit woman who is lesbian is excruciating in comparison, because of the existing burdens of being a woman and a Dalit.²⁶

This process of hierarchisation and non-recognition of intersectional disadvantage is reflected in the Indian Constitution. Article 15 provides for the right against discrimination on the basis of religion, race, caste, sex and place of birth. Forms of discrimination that fall within the purview of Article 15 are any disability, liability, restriction or condition imposed on the basis of the above prohibited grounds. For instance, sexuality does not find explicit mention as grounds for discrimination. This exclusion at the outset creates a Constitutional culture of homophobia, and thus, all the manifestations of discrimination will not apply in case of sexually marginalized persons. The imposition of any “disability, liability, restriction or condition” on the sexually marginalized, on the basis of their sexuality, does not qualify

²⁶ See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STANFORD L. REV. 1241 (1991) (on ‘intersectionality’).

as discrimination at all within the scheme of the Constitution. Their right to livelihood, if discriminatorily circumscribed, will not draw the protection of Article 15. I would go as far to say that the decriminalization of Section 377 of the Indian Penal Code by the Delhi High Court in the historic Naz Foundation case²⁷ on constitutional grounds is merely a symbolic achievement and will actually have very little transformative impact in the lives of the sexually marginalized.

What has been decriminalized in the Naz Foundation judgment is “adult”, “consensual” and “private” sex. While on the face of it the judgment is progressive, and indeed historic, it seeks to recognize only the rights of those homosexual men who have the privilege of a private space. The primacy put on private sex is clearly an elitist qualifier to read down the law, because it excludes from its purview a whole range of non-elite and indigenous sexually marginalized people who do not have the privilege of a private space²⁸. The “privacy” standard is a myth – because those who do have access to a private space were already outside of the reach of the law. My argument is not a dismissal of the judgment or the fact that it will truly empower the queer community, but that the trope of privacy is a contentious one which can in effect be more damaging than helpful.

As Wendy Brown notes in the American context of decriminalization of sodomy on the grounds of privacy:

“Privacy, for example, is for many feminists a site that depoliticizes many of the constituent activities and injuries of women: reproduction, domestic assault, incest, unremunerated household labour, and compulsory emotional and sexual service to men. Yet

²⁷ Naz Foundation v. Govt. of NCT of Delhi and Ors., 2010 Cri.L.J. 94.

²⁸ See generally Oishik Sircar, *Questions of Visibility*, 2 IN PLAINSPeAK 10-17 (2008).

for those concerned with sexual freedom, with welfare rights for the poor, and with the rights to bodily integrity historically denied racially subjugated peoples, privacy generally appears unambiguously valuable [...] Like rights themselves, depending on the function of privacy in the powers that make the subject, and depending on the marked identity that is at issue, privacy will be seen variously to advance or deter emancipation, to cloak inequality or procure equality”.²⁹

Further, it is necessary to note that the grounds stated in Article 15 are preceded by the word “only”. Judicial interpretation³⁰ has noted that if discrimination is found to exist on grounds other than those enumerated, then there is no violation of Article 15. Even discrimination on the basis of sex, coupled with discrimination on other non-enumerated grounds, would not constitute violation.³¹

This logic of prioritization of suffering gets applied to delegitimise many kinds of suffering. However, the logic of prioritization must be challenged and defeated through a rigorous interrogation that puts it under the scanner of the principles of inherent and indivisible human rights. While hunger and poverty are vital issues in the Indian human rights context, Amartya Sen has convincingly argued why we need to see all rights as indivisible and interconnected to respond to human un-freedoms in all its facets.³²

²⁹ See generally Wendy Brown, *Suffering the Paradoxes of Rights*, in *LEFT LEGALISM/ LEFT CRITIQUE* 420 (Janet Halley & Wendy Brown eds., 2002).

³⁰ See *Anjali Roy v. State of West Bengal*, A.I.R. 1952 Cal. 825.

³¹ See generally Ratna Kapur & Brenda Cossman, *On Women, Equality and the Constitution: Through the Looking Glass of Feminism*, in *GENDER AND POLITICS IN INDIA* (1999).

³² See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (2000).

VI. FREEDOM V. PROTECTION

Is the trade-off between freedom and protection a collateral damage for claiming human rights guarantees? If we want protection of some kind, do we need to give up on the privileges of freedom? This Statist rhetoric has become commonplace in the “war on terror” – people are urged to give up on some fundamental civil liberties to defeat the larger enemy of “terrorism”. We are told how such sacrifices would actually be our contribution towards the nation, thus, agreeing to be under constant surveillance, being frisked at the airport, arbitrarily apprehended and interrogated, our internet communications tracked.

The reason why faulty arguments like this convince most people can be owed to the practice of “pragmatic criticism” that Edward Herman and Noam Chomsky have cautioned us against in their reflections on the “manufacture of consent”³³. By taking a seemingly reasonable and self-righteous stand, the State as the pragmatic critic of “terrorism” actually contributes to “thought control”. In response, people are made to internalize the idea and live in an Orwellian world where Big Brother is constantly watching you. The neo-liberal regime of surveillance is in many ways post-Orwellian, where our internalization of self-disciplined behavior has also led to each of us disciplining each other even when the State is not present.

The ways in which so-called anti-terror laws like the Patriot Act in US, the erstwhile Prevention of Terrorism Act (*hereinafter* “POTA”) and the present Unlawful Activities Prevention Act (*hereinafter* “UAPA”) in India have blatantly compromised on the Constitutional guarantees of freedom and liberty are common knowledge, and very well documented.

³³ See generally EDWARD S. HERMAN AND NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988).

There has been enough documentation about the misuse of POTA, particularly toward the Muslims post-Gujarat 2002 and after every alleged “terrorist” attack³⁴, against brown-skinned people in US and the brutal murder by the London Police of an innocent Jean Charles de Menezes, the Brazilian youth, on mere suspicion in London, after the July 7, 2005 bombings. Of course, more recent cases of Muslim youth in Azamgarh in Uttar Pradesh, and in Jamia Nagar in Delhi³⁵ being arrested and tortured on mere suspicion is part of this larger phenomena.

Regulating borders to take away the freedom to move is another classic way of tackling “terrorism” – and the increasing restrictions on immigration of people from the South to the North post September 11, 2001, is reflective of that. The idea is to keep the “other” out through anti-immigrant policies, and being perversely oblivious to the fact that the State itself is complicit in unleashing brutal violence against its own citizens. A racist advertising campaign by the far-right Swiss People’s Party in Switzerland ahead of elections is aptly representative of this move: the posters depict a group of white sheep on the Swiss flag kicking a black sheep off the flag, and the copy reads: “To create security”. A later campaign by the same party showed a woman wearing a burqa against a background of minaret-like missiles jutting out of the Swiss flag.³⁶

The operation of the freedom versus protection paradox also plays itself out acutely in the case of violence against women (*hereinafter* “VAW”). The State’s response to countering VAW is generally to regulate women’s behaviour and conduct. In response to the rape of a teenage girl by a

³⁴ *See generally* PREETI VERMA, *THE TERROR OF POTA AND OTHER SECURITY LEGISLATION IN INDIA* (2004).

³⁵ *See generally* JAMIA TEACHERS SOLIDARITY GROUP, ‘ENCOUNTER’ AT BATLA HOUSE: UNANSWERED QUESTIONS (2008).

³⁶ L. Menon, *Swiss Far-right Poised to Win Poll*, *THE SUNDAY GUARDIAN*, Oct. 23, 2011, <http://www.sunday-guardian.com/investigation/swiss-far-right-poised-to-win-poll>.

police constable in Mumbai a few years back, the *Shiv Sena* mouthpiece “Saamna” said that it is women’s responsibility to dress and carry themselves properly to ensure that men don’t get provoked.³⁷ The police have on several occasions imposed curfews on women’s movement in public places on the pretext of curbing VAW. A similar position emerges with the imposition of dress codes in institutes and offices, to ensure that women don’t dress “provocatively”, and “welcome” sexual harassment. The State’s response has seldom been to make public and work places safer for women, instead it has always imposed protectionist measures – in effect pitting women’s right to protection from violence and harassment against their freedom to conduct themselves the way they want as well as to freely access public places.

Is this trade-off inevitable? How do we ensure that people’s right to protection does not come at the cost of the freedom of marginalized and minority communities?

VII. OF CITIZENS AND ALIENS

Globalization has brought with it the ability to move people across international borders for better prospects in life. The paradox, however, is that several of those moving are being forced to do so because the very place that they would call home have been taken away from them – be it because of wars that claim to usher peace and democracy or calculated genocides that are aimed at ridding the marked-out territory of people who are understood to be contaminating the cultural authenticity of a community.

What accompanies this movement of people is a complete loss of a category of belonging that is a primary claim to human rights guarantees – citizenship. In the context

³⁷ *Behave or Get Raped: Sena*, THE TELEGRAPH, Apr. 26, 2005, http://www.telegraphindia.com/1050426/asp/nation/story_4662542.asp.

of the Holocaust in Europe, Hannah Arendt identified “membership in a human community” as the most important qualification for accessing any human rights.³⁸ For her, the “stateless” are those people, who do not even possess the “right to have rights”. However, in post-WW II international law formulations, the “refugee” and the “stateless person” are not conflatable. Though uprooted, refugees still possess a State of affiliation, but the weight of her citizenship guarantee is almost completely hollowed out because the very State that is expected to protect her as a citizen becomes the reason for her persecution. Both the refugee and the stateless person live an alien existence.

The loss of citizenship begins from a point in time when people are desegregated within their own countries on the basis of identities – class, caste, gender, sexuality, ethnicity, religion, location, language – that adversely impact their access to fundamental human rights guarantees. The desegregation does not remain a mere bureaucratic and administrative device that would enable good governance, but turns into a tool for systemic exclusion and disenfranchisement. That is where we see the State, turning into a Nation-State – one whose primary objective is to produce a population of people who think alike, speak the same language (of political ideology and culture), and belong to the same ethnic community. Those who are not, or cannot “fit in”, are either forced out, or exterminated. The story of the Muslims in India, Hindus and Chakmas in Bangladesh, Tamil in Sri Lanka, Ahmadi in Pakistan, Lhotshampa in Bhutan, Chin and Rohingya in Burma, Uighur and Buddhists in China-occupied Tibet, Tutsi in Rwanda, Arab in Israel and Israel-occupied Palestine, and almost all non-whites in the Euro-Americas are the manifestation of the violence of nation-state formations that dominate or eliminate. Their condition is that of existential aliens. What follows this

³⁸ See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951).

“domestic” loss of citizenship is an excruciating incidence of persecution – because of which you will die, if you don’t flee.

The refugee is devoid of formal citizenship rights, without the means to call on the protective agency of a State. Although the status of the refugee is quite well established in today’s international law regime, most refugees fleeing persecution, by crossing international borders, do not have a ready guarantee and access to human rights when they reach their port of safety. They qualify from being “asylum seekers” to “refugees” only after going through sustained periods of incarceration in detention centers, and scarily interrogative questioning by adjudicating officers.

Most get deported. This explains the reason for the difficulty to flee persecution by crossing international borders being connected with the difficulty faced in qualifying for refugee status as per international legal principles of refugee determination. The notion of “persecution” in international refugee law, especially the 1951 UN Convention on the Status of Refugees (*hereinafter* “Refugee Convention”) being atavistic in nature and the increasing reluctance of governments to grant asylum has led to the escalation in the number of people in “refugee-like” situations: who are facing persecution, have not been able to cross their national borders, and are yet being denied basic citizenship and human rights.

Fleeing from their own governments, when persecuted people from the South attempt to gain asylum in a Northern country, they are constructed as security threats. There exists a contradictory nexus between refugees and national security concerns because one actually sees how the most disenfranchised and insecure people are labeled as potential threats to both “Western” culture and nation – more so when they are black, brown, burqa’d and bearded.

This phenomenon is especially prevalent post-September 11 in USA and July 7 in UK, many states are finding

it difficult to resolve their sovereign claim to border control with their international human rights accountability to protect refugees. International refugee law regulates States from arbitrarily rejecting the admission of foreign nationals into their territory. Border control is one of the major markers of State sovereignty today, which allows states to restrict entry into as well as reject people from of their territory. This also serves as a symbol for perpetuating forced “imagined communities” – to use Benedict Anderson’s³⁹ term – of homogenized nationhood. This is why control of its territorial integrity through the policing of migrant populations – refugees or otherwise – is one of the last remaining means of reifying *the Nation*.

This paradox takes a complicated turn in the context of South Asia, where none of the countries are party to the Refugee Convention, and neither do they have any national or regional refugee protection regime. India, for instance, has a completely *ad hoc* process of admitting, adjudicating and deporting refugees.⁴⁰

A cruel consequence of this *ad-hocism* is the case of 36 Arakanese and Karen freedom fighters from Burma, who were under arbitrary detention in the Presidency Jail in Calcutta for 13 years before being released in May 2011. However, only 31 walked free – three are still under incarceration and two had died in custody.⁴¹ This is an example of what can happen to refugees in India under threat of persecution from other South Asian countries.

³⁹ See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983).

⁴⁰ See generally O. Sircar, *Can the Women Flee? Gender-based Persecution, Forced Migration and Asylum Law in South Asia*, in *GENDER, CONFLICT AND MIGRATION* 255 (N.C. Behera ed., 2006).

⁴¹ Forbes, T. *Detained 13 years, Rebel Fighters Released From Prison in India*, MIZZIMA, May 19, 2011, <http://www.mizzima.com/news/regional/5292-detained-13-years-rebel-fighters-released-from-prison-in-india.html>.

Even in this case, their reason for incarceration was that they were alleged to be terrorists. Such a state of affairs continues due to the non-existence of a formal refugee-protection law in India, and in spite of the 1995 Supreme Court judgment⁴² that categorically states that all “refugees” within Indian territory are guaranteed rights to life and personal liberty, as enshrined in the country’s Constitution.

Will having a refugee protection law sufficiently address the issue, or is the paradox of moving populations, alien subjectivities and border control deeper than it appears?

VIII. THE TRAGEDY OF MULTICULTURALISM

A sympathetic response to the paradox of hierarchisation of suffering has been the idea of multiculturalism – a practice that is premised on the principle of pluralism that supports cultural and ideological diversity and works towards a mosaic society. Liberal Western countries like UK, France, Canada, USA and Australia have been the primary proponents of the practice of multiculturalism. The concept was strategically deployed at a point when these countries required skilled labour from Southern countries, and one way of attracting potential immigrants was to project themselves as places that are tolerant of other cultures. The practice of multiculturalism was also emblematic of support for human rights of all people, especially cultural rights.

What began as a progressive practice of plural governance has now been turned into a practice of coercive assimilation. This is evident from the ongoing controversies around the wearing of the hijab and turbans in France and elsewhere in Europe, and the need to prove “American-ness”

⁴² National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 S.C.C. 742.

to save yourself from arbitrary incarceration if you are a brown person in USA.⁴³ Similarly, in India the ongoing debate about having a Uniform Civil Code and separate educational institutes for Muslims, are incidents that rough out the smooth edges of the neat package of multiculturalism. All of these indicate that multiculturalism today means: as long as you behave like “us”, you will be guaranteed your rights. For the brown/black people from the Third World, entry into the “Western” world is determined on the basis of how well they can “assimilate”, and how ready they are to denounce and demonize their own cultures. This phenomenon operates meticulously at a time when it is the “West” which is strongly advocating for the free movement of capital across State borders, and at the same time obsessively guarding its borders to stop the entry of people who they feel will threaten their “manufactured” multiculturalism.

At the core of this tension is the sameness/difference debate. Originally discussed by Feminist scholars in the context of women’s equality, this debate now serves as an explanation for the politics of assimilation. Any claim for substantive equality by an “outsider”, demands that the claimant “becomes same”, like those who form and define the dominant culture of that country – in the process of guaranteeing equality, such provisions then hit at the root of plurality of experiences. This understanding of equality clearly follows the formal equality approach where equality is equated with sameness. In effect, sameness becomes the basis for equality – only if you are same you are entitled to be treated equally.

The assimilationist tendencies of multiculturalism is evident in a white paper that was released by the UK Home Office in February 2002, called “Secure Border, Safe Haven:

⁴³ See generally LetiVolpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

Integration with Diversity in Modern Britain”⁴⁴ which was paradoxically aimed at strengthening border control to protect Britain’s multicultural ethos from outside contamination, in the wake of September 11, 2001. Among other things discussed in the white paper, it raised great concern about what it calls “bogus marriages” among the Indian immigrant population. The paper used a narrative of othering to treat the practice of arranged marriages as a sham, alleging that it is an “Indian” practice, and is increasingly being used to secure easy immigration. In response it suggests that the “Western” standard of “love” marriage be put in place to counter the threat of arranged marriages, where couples will be expected to “prove their love” by not staying apart for the first two years of their marriage and only after which any claims for social security for the spouse may begin. This apart, the paper also suggests how immigrants need to take a citizenship pledge, a compulsory English-language test, and an exam on British life, society, and institutions to be able to enjoy British multiculturalism.⁴⁵

Similarly, declaredly multicultural countries from the West have engaged in severe xenophobic practices in the way they have treated refugees from the South. In a climate where rising concerns about terrorism and State security exacerbate exclusionary and racist impulses in Northern countries’ determining asylum status of Southern refugees, the challenge of establishing State accountability to protect refugees is not an easy task – increasingly one is able to identify reasons that go deeper than mere legalities that contribute to the factors

⁴⁴ UK Home Office, Secure Border, Safe Haven: Integration with Diversity in Modern Britain (2002), available at <http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf>.

⁴⁵ See generally Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107 (2005) (for a detailed critique of the White Paper).

that help determine refugee status. One such reason, that overpowers most others, is culture.

Interventions based on such an understanding encourage people to flee persecution and at the same time filter the guarantee of refugee protection through the process of demonizing the country of origin of the refugees. In this regard, refugee law operates on the basis of establishing “barbarity” as the qualification for gaining asylum. Asylum seekers from the South are either rejected on the basis of their potential threat to national security, or accepted on the basis of the denigrated culture they are fleeing.

While human rights guarantees are understood to be universal and inherent across the world, when it comes to the determination of an asylum seeker as a refugee, to establish “well-founded fear” in an objective fashion, asylum adjudicating officers construct essentialist and derogatory characteristics of asylum seekers’ countries of origin, as areas of barbarism or lack of civility in order to create a case for persecution that meets their qualifying standards. The central guiding principle of this kind is the construction of the asylum seeker as the “native”, who needs to be “civilized” and rescued out of the clutches of a “barbaric” State might be best described as, in the words of Jacqueline Bhaba, as “the worse the better”⁴⁶ – the more oppressive the home State, the greater the chances of gaining asylum. Such a construction invisibilises the agency that refugees exercise to flee, and devalues their resistant potential.

For instance, if a pro-democracy activist from Iran is fleeing to the US because she is under threat of being persecuted because of her political opinion – her asylum

⁴⁶ See generally Jacqueline Bhaba, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 18 HARV. HUM. RTS. J. 155 (2005).

application might fail because she is a woman, who cannot be imagined to be a political activist. If however, she presents her application on the grounds of having faced gender-based persecution, which is culturally sanctioned (like the threat of honour killing or genital mutilation), her chances for qualifying will increase manifold. Interestingly, as an Iranian refugee in the US, it will never be recognized that while she is pro-democracy, she is also anti-imperialist. Her refugee status will be a marker of USA's benevolence towards supporting its global "democracy making" project, and her embracing of the culture of "American democracy", and rejection of "Iranian bigotry".

As mentioned earlier, the absence of regional or national laws in South Asia have meant that people facing persecution can only avail of the recourse of applying for asylum to a Northern country. This, beyond being a practical constraint, is culpable of creating the stereotypical image of the third world victim subject. An examination of case law in various Northern countries will make it evident that most cases of persecution concern people from the South who face culturally sanctioned forms of violence. The present politics of asylum jurisprudence considers the Third World "native" subject in need of Western intervention for "protecting" and "saving" her from violence. Moreover, her attempt to flee persecution is constructed as her desire to live in a "liberal" and "equal" society – epitomized by cultures in the West – and renouncing her "own" allegedly barbaric culture.⁴⁷

IX. VIOLENCE AS SPECTACLE

The representation of violations in their goriest of detail has been a strategic element of doing human rights work. The

⁴⁷ See generally R. KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* Page (2005); O. Sircar, *Women's Rights, Asylum Jurisprudence and the Crises of International Human Rights Interventions*, in *THE FLEEING PEOPLE OF SOUTH ASIA: SELECTIONS FROM REFUGEE WATCH* 103 (Sibaji Pratim Basu ed., 2008).

idea is about turning an ignored incident of violation into a spectacle so that people respond. The paradox of this practice is fourfold fold: first is the ethical question of whether in an attempt to create the spectacle of violence we are complicit in perpetuating it. Second, is the consequential concern as to whether a repeated creation of spectacle results in the numbing of human response, in effect derailing the very objective with which the spectacle was created? Third, does spectacularizing an event of violence blind the consumers of that spectacle to the politics behind the production of the spectacle and the resistance practices of the community facing the violence? Do spectacular representations of suffering create customized and ideal victims of human rights violations?

As Hoijer points out, people tend to respond to human rights violations when the image represents an “ideal victim”, where some victims spectacularized as “better” victims than others.⁴⁸ Women, children and the elderly share top positions.

Some critical insights regarding violence as spectacle are available in the works of Joan and Arthur Kleinman, where they raise concerns about the market for the representation of violence as spectacle where suffering is commodified and sold:

“Images of suffering are appropriated to appeal emotionally and morally. . . . images of victims are commercialized; they are taken up into processes of global marketing and business competition. The existential appeal of human experiences, their potential to mobilize popular sentiment and collective action, and even their capability to witness or offer testimony are now available for gaining market share”.⁴⁹

⁴⁸ See generally B. Hoijer, *The Discourse of Global Compassion: The Audience and Media Reporting of Human Suffering*, 26 MEDIA CULTURE AND SOCIETY 513 (2004).

⁴⁹ See generally Arthur Kleinman & Joan Kleinman, *The Appeal of Experience*;

The Klienmans share the story of Kevin Carter, a photo journalist from New York Times who won the Pulitzer Prize in 1993 for his photograph depicting a vulture perching near a little emaciated girl in Sudan who has collapsed from hunger. The photo became an icon of starvation and has been used by several development and human rights agencies working in Sudan and generally on hunger. A year after the award of the Pulitzer, Carter killed himself. In a suicide note he admitted to not having been able to deal with the trauma of his experiences in Sudan.⁵⁰

In their analysis, the Klienmans ask what Carter's responsibilities were in the process of creating this spectacle of suffering. Was he there waiting till the vulture came close enough to the child, endangering its already vulnerable life, to be able to click the photo? Was it not his responsibility to actually save the child from the vulture? Was he another predator, like the vulture, trying to extract mileage out of this perverse frame of suffering? The girl had stopped to rest while struggling to reach a feeding center, wherein a seemingly well-fed vulture had landed nearby. Carter had said that he waited about 20 minutes, hoping that the vulture would spread its wings. It didn't. Carter snapped the haunting photograph and chased the vulture away. He later confided to friends that he wished he had intervened and helped the child. Journalists at the time were supposedly warned never to touch famine victims for fear of disease.

Similar questions emerge from the depiction of violence in the Indian context. The image of Qutubuddin Ansari

The Dismay of Images: Cultural Appropriations of Suffering in Our Times, in *SOCIAL SUFFERING 1* (Arthur Kleinman, Venna Das & Margaret Lock eds., 1997).

⁵⁰ B. Keller, *Kevin Carter, a Pulitzer Winner for Sudan Photo, Is Dead at 33*, *THE NEW YORK TIMES*, July 29, 1994, <http://www.nytimes.com/1994/07/29/world/kevin-carter-a-pulitzer-winner-for-sudan-photo-is-dead-at-33.html>.

appealing for mercy from a violent mob of Hindu right wingers with folded hands and tears in his eyes became the icon of communal hatred during the anti-Muslim pogrom in Gujarat in 2002.⁵¹ Did the Reuters photographer who clicked him play any role in rescuing him? In November 2007 we saw extremely disturbing images of a tribal woman in Assam, who was part of a protest rally, being stripped, beaten and sexually assaulted by three men in broad daylight as people watched and the photographer clicked.⁵² Did the photographers have any other responsibility apart from clicking pictures of the incident?

These uncomfortable questions also have a transnational significance, and don't only apply to journalists covering human rights. Activists are also complicit in creating spectacles out of incidents of violations. The testimonies of women at the 1993 "Women's Rights are Human Rights" Tribunal at the Vienna World Conference on Human Rights is a case in point. In a filmed documentation of the proceedings at the tribunal, majority of the testimonies dealt with sexual assault and primarily of women from the South.⁵³ The singular understanding of VAW as sexual harm reduced the women to victims in need of protection by the law and the State, than as citizens in need not only of protection, but participation and equality.⁵⁴ The question of representation of gendered-harm and its connection with culture was also evident through the testimonies. In the run-up to the Tribunal hundreds of

⁵¹ K. Sharma, *Leave Me Alone, Says Ansari*, THE HINDU, Aug. 8, 2003, <http://hindu.com/2003/08/08/stories/2003080806871100.htm>.

⁵² Neeraj Nanda, *Tribal Woman Stripped & Assaulted, Assam Flares in Shock*, SOUTH ASIA TIMES, Nov. 28, 2007, <http://www.southasiatimes.com.au/news/tribal-woman-stripped-assaulted-assam-flares-in-shock/>.

⁵³ THE VIENNA TRIBUNAL (Gerry Rogers 1994), see <http://www.wmm.com/filmcatalog/pages/c172.shtml>.

⁵⁴ See generally Alice M. Miller, *Sexuality, Violence against Women and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH AND HUM. RTS. 16 (2004).

testimonies were gathered by the organizers, the Centre for Women's Global Leadership at Rutgers University, USA, but only a few were presented at the Tribunal. The testimonies were also considerably edited to highlight the goriest of details regarding the kind of violence the victims had faced. What informed this process of selection?

The case of Bhawnri Devi's gang rape also raises concerns over how incidents are used as spectacles to reach objectives with which the victims of the violence have no connection. After the rape, some women's groups got together to form a collective called Vishakha, which moved a PIL in the Supreme Court of India and quite commendably got the court to draw up anti-sexual harassment guidelines for the workplace. The Vishakha case⁵⁵ is now world renowned because of its path breaking achievement. The tragedy of it all is that Bhawnri Devi's rape case, even after so many years, is still stuck at the Rajasthan High Court, and she as an icon of resistance has almost completely been forgotten.

On a slightly different register it can also be argued that the rise of neoliberalism has in many ways proved wrong the observations of Michel Foucault in "Discipline and Punish". Foucault argued that with the advent of modernity modes of punishment will become more routinized, and it will not remain as brutal and gory as it was in the pre-modern times. This change in the tactics of discipline is a necessary accompaniment of what he later called "governmental rationality"⁵⁶. However at the height of neoliberalism when the US was invasion-happy, the torture photographs from Abu Gharib prison appeared on the front pages of newspapers around the world. The ease with which these brutal images circulated with easemade it seemingly clear that modern statecraft requires the propaganda of its brutal power of

⁵⁵ Vishaka & Ors. v. State of Rajasthan, A.I.R. 1997 S.C. 3011.

⁵⁶ FOUCAULT, *supra* note 10.

monopolistic violence. Later images of Cherukuri Azad's bullet ridden body, Saddam Hussein's hanging, LTTE chief Velupillai Prabhakaran's corpse and the parading of Muammar Qaddafi's dead body seem to be part of a similar design of spectacularizing violence that attempts to reestablish the might of state power in an era where the state has given up on a majority of its sovereign functions to the market. Foucault might not have envisaged what neoliberalism could have done to this analysis.

Spectacles also create numbness to images of suffering. We do not pause to see the image of the victim of bombing in Baghdad, or Tripoli, or Srinagar any longer. When the train bombings happened in Bombay, on the same day there were bombings in Jammu & Kashmir as well. Media reports of course did not devote enough space to the J & K incident, not only because it was not as large as the Mumbai bombings, but also because it is news that readers have stopped responding to. The *Tehelka* magazine expose on the complicity of the State in the Gujarat pogrom is another case of numbness.⁵⁷ *Tehelka* created a much needed spectacle, but Gujarat 2002 has almost become stale news in popular public imagination – the spectacle of economic growth had overtaken the reality of genocide.

A recent illustration of spectacle politics is the response of the government to veteran Gandhian Anna Hazare's fast-unto-death, demanding the enactment of the Jan Lokpal Bill to curb graft. The fact that the Manmohan Singh government actually gave into a majority of Hazare's demands is a spectacular move by the State to posture itself as pro-people, human rights friendly and committed to rooting out corruption. In contrast, it is necessary to ask: why has the state not responded with equal urgency to Irom Sharmila's

⁵⁷ TEHALKA (THE TRUTH -GUJARAT 2002), Nov.03, 2007, http://www.tehelka.com/story_main35.asp?filename=Ne031107gujrat_sec.asp.

more than a decade long fast demanding the repeal of the draconian Armed Forces Special Powers Act? Does this have anything to do with the strong nationalist fervor that is integral to Hazare's campaign, with regular refrains of "Jai Hind", a huge flexi-banner of "Bharat Mata" adorning the stage at Delhi's Jantar Mantar where he was fasting on one occasion, and the patriotic waving of the tricolor? The State's maneuver has nicely created a spectacle that has blinded us to the ways in which it selects the fasts that it wants to end.

There is no denying, however, that spectacles indeed help the human rights cause. The media was almost silent on State atrocities in Manipur, but suddenly jumped to action when after the rape and murder of Manorama Devi, when Manipuri women held a naked protest outside the Assam Rifles. That was a spectacle of outrage, and got the media to finally break its own silence on the Manipur crisis.

With 24 hours news channels beaming the news of violations all the time, cause there is no dearth of that. The paradox is whether the hyper-visibility of human rights violations is coming at the cost of numbing public sensibility and diverting focus from experiences of suffering that are not marketable enough?

X. THE MARKET OF HUMAN RIGHTS

The market for human rights is a hugely lucrative place. Here the "best" of the world come together to dole out massive amounts of money, and dictate how the "rest" should be "civilized": in sophisticated circles of industry barons this is called "philanthropy", in bureaucratic circles of international aid, it's called "development", and in the circles of humanist economists they call it "micro-credit". There are several other avatars of the human rights market as well.

The operation of this market was seen in operation when the World Bank funded the Sardar Sarovar Dam project,

in the name of supporting India's development, without any interest in understanding the emergent cost-benefit ratio of the project. It did not insist that an Environmental Impact Assessment be done to gauge if the project was ecologically sustainable. They had no concern regarding how the displaced will be rehabilitated and compensated. Thankfully, the collective force of the Narmada Bachao Andolan made the World Bank institute the independent Morse Commission to look into the project, and for the first time ever in its history, the World Bank withdrew funding from a project to which it had full commitment from the beginning.

The flow of international aid for developmental and human rights work also operates within the confines of human rights markets. One glaring instance of the adverse effect of market oriented funding is in the area of HIV/AIDS. This specifically refers to US funding on HIV/AIDS that primarily dictates policies in Southern countries.

This market was initiated through the US President's Emergency Plan for AIDS Relief (*hereinafter* "PEPFAR") in 2003, by the administration of George W. Bush. PEPFAR is the largest financial commitment in history by one country to combat a single disease, and is implemented through US legislation known as the Global AIDS Act. Both PEPFAR and the Global AIDS Act were re authorized in 2008 for USD 48 billion over five years (2009 to 2013), with the goals of preventing 12 million new infections, treating four million people living with AIDS and caring for 12 million people, including five million orphans and vulnerable children.

The grand design and monetary might notwithstanding, PEPFAR is underwritten by a deeply conservative sexual morality. PEPFAR's original prescription for containing AIDS was its infamous ABC policy – Abstinence, Be Faithful, Use Condoms – in descending order of deemed importance. It was required that 33 percent of all PEPFAR funding for AIDS prevention would be spent on abstinence-until-marriage and

“faithfulness” programmes. Although this condition was removed in 2008, it was replaced with a new reporting requirement that continues to emphasise abstinence and fidelity to the exclusion of comprehensive approaches, such as those that include education about male and female condoms. As the website PEPFARWatch.org notes, “This can cause a chilling effect for organizations receiving PEPFAR funding, who may censor their prevention activities and fall short of providing comprehensive HIV prevention services to women, men and young people”.⁵⁸

Governments in India and many other Southern countries have been required to take cognizance of the Global AIDS Act which bars the use of federal funds to “promote, support, or advocate the legalization or practice of prostitution”. As a report by the Centre for Health and Gender Equity in the US points out:

*“Organisations receiving US global HIV/AIDS funding also must adopt specific organisation-wide positions that explicitly oppose prostitution and trafficking. Such funding restrictions force organisations working in public health from Southern countries that heavily rely on US funding to comply with an ideological litmus test that often runs counter to both public health practice and human rights standards”.*⁵⁹

Such conditions have gravely affected efforts initiated by sex workers themselves. For instance, in 2005, when Veshya Anyay Mukti Parishad (*hereinafter* “VAMP”), a sex workers’

⁵⁸ CENTER FOR HEALTH AND GENDER EQUITY (CHANGE), *Abstinence & Fidelity (Overview)*, http://www.pepfarwatch.org/the_issues/abstinence_and_fidelity/ (last visited Nov. 1, 2011).

⁵⁹ CENTRE FOR HEALTH AND GENDER EQUITY (CHANGE), *Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers*, <http://www.genderhealth.org/files/uploads/change/publications/aplobrief.pdf> (last visited Nov. 1, 2011).

collective in Maharashtra, returned a USD 12,000 grant from USAID because its members did not want to be bound by these restrictions, they were accused of engaging in child trafficking. Thus far, Brazil has been the only country to officially oppose the US' ongoing campaign. And although the pledge requirement has been challenged in US court where it received a court injunction, this affects only implementation within the US.⁶⁰

It is a pity that US funding and anti-trafficking policies, in their attempt to combat trafficking and arrest the spread of HIV/AIDS, have alienated and disadvantaged sex workers in the South, instead of making them equal stakeholders.

The reality of the situation is also that human rights work does need funding to continue working effectively and there is indeed no dearth of imperialist do-gooders who have enough money to give out in furthering their philanthropic dream of "civilizing the native". The paradox is about how human rights work in the South can be made self-sustaining, without being directed and controlled by huge international funding markets.

XI. POETIC DETOURS: WRITING THE HISTORIES OF NON-MOVEMENTS IN RED INK

I'll end this rather fragmented essay with a concluding refraction – a detour of sorts. I think detours are necessary as they allow us to traverse uncharted paths to arrive at our favoured destinations. Sometimes detours make us re-imagine our destinations and lead us to places that we didn't plan to go to. And I don't mean this in a pejorative way – detours are inevitable in any ethical voyage because our journeys are not just concerned with the destination, but also with every bit of the journey itself. Which is why I thought it is apt to conclude

⁶⁰ O. Sircar, & D. Dutta, *Strings Attached*, HIMAL SOUTHASIAN, Aug. 2010, <http://www.himalmag.com/component/content/article/246.html>.

the journey of writing this essay by sharing Naxal ideologue and poet Srijan Sen's poem "Das Kapital":

"Karl Marx wrote 'Das Kapital'.
His readers swelled their own capital.

The lessons that they drew from his pages ...
Was invested in building palaces.

Then they made the profound assertion:
'Das Kapital' needs full 'revision'!".⁶¹

Through a cruel hilarity, Sen points at a paradox that is embedded in ideas and texts that promise emancipation. As a committed Marxist, I am deeply appreciative of Sen's provocation because it forces me to think of detours – not to abandon Marxism, but to rethink the paths that have lead to the profound assertion that "Das Kapital" needs full revision.

Marx's brilliance of course lies in the fact that he pre-empted the trappings of emancipatory projects pretty early on in his writings. In his classic 1844 essay "On the Jewish Question" the young Marx complicated the notion of emancipation, and offered a critique of liberal rights that we can ignore today at our own peril. Marx questioned why the State should be regarded as the end of all emancipation to suggest that political emancipation by the State is only a masquerade to numb man's consciousness as a species. By distinguishing "political emancipation" from "human emancipation", Marx pointed out that the rhetoric of liberal rights ("the rights of man") that the secular state foregrounds is in effect not human emancipation:

"... man was not liberated from religion; he received religious liberty. He was not liberated from property;

⁶¹ See generally Srijan Sen, *Das Kapital*, in *THEMA BOOK OF NAXALITE POETRY* 72 (Sumanta Banerjee ed, 2009).

he received the liberty to own property. He was not liberated from the egoism of business; he received the liberty to engage in business".⁶²

This poem for me then is not one that denounces Marxism, rather it calls for a more rigorous engagement with it. It cautions us about unquestioningly believing in the "political emancipation" promised by universal human rights. To inject a little Foucault into our discussion, the poem urges us to interrogate human rights as constitutive of oppressive systems of power rather than as a body of knowledge or a tactic of management that is outside of it.

Certain ideas explored in this essay have emerged out of a larger collaborative project called "Human Rights Beyond the Law"⁶³ in which the idea of human rights is put under the scanner of "small voice[s] of history"⁶⁴ to expose the insidious ways through which human subjects are seduced through liberalism's promises of equality, merit, secularism and market-prosperity to fashion themselves into nationalist, heterosexual and entrepreneurial citizens. Those who resist the seduction, or call its bluff are subject to brutal forms of violence – both corporeal and cerebral. I borrow from this project to suggest how a move from a positivist understanding of rights as limits to arbitrary State action that are embedded in a document called the Constitution, to rights as embodied practices of resistance allows us to re-imagine the contours to human rights – as idea and practice – and disturb the linear trajectory of its historical narrative that reproduces the logic of colonial imperialism.

⁶² See generally Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (R.C. Tucker ed., 1978).

⁶³ See www.protestworkshop.jgu.edu.in (last visited Nov. 1, 2011).

⁶⁴ Phrase owed to Ranajit Guha, see generally R. GUHA, THE SMALL VOICE OF HISTORY: SELECT WRITINGS (Partha Chatterjee ed., 2010).

Let me share another poem – this one is called “Right” and is written by Naxal poet Cherabandaraju:

*“I will not stop cutting down trees
Though there’s life in them.
I will not stop plucking out leaves,
Though they make nature beautiful.
I will not stop hacking off branches
Though they are the hands of a tree.
Because –
I need a hut”.⁶⁵*

Our liberal human rights vocabulary is woefully inadequate in responding to this deeply unsettling paradox. I, for one, would unflinchingly support Cherabandaraju’s claim over the claim by a mining company which can orate this poem with far greater amplification by just changing the last line: “... because – we need a factory”; and then go on to wax eloquent about how that factory will help people build concrete houses, highways, hospitals. Huts – they are too infra dig! Their prototypes can adorn exotic resorts that are built by cutting down trees and defacing hills, but “real” huts should become extinct.

It is befitting to finally end this essay by dedicating it to the collective action of people in three events: first is the “new” intifada in Kashmir that started in the summer of 2010, the Arab Spring and the “occupy” movements in Wall Street and other financial districts in US and elsewhere in the world in collective, angry and celebratory resistance to the complex of crony capitalists, militaries and repressive States who have occupied and devastated the lives, livelihoods and lands of subaltern peoples all over the world.

⁶⁵ See generally Cherabandaraju, *Right*, in *THEMA BOOK OF NAXALITE POETRY* 56 (Sumanta Banerjee ed., 2009).

Maverick Slovenian philosopher Slavoj Zizek, during his speech to the protestors on Wall Street recently shared an old Communist joke. It was about a dissident who was being sent to a work camp in Siberia. Since he knew that his letters will be censored, he told his friends that he'll write to them using a simple code: blue ink for the truth, red ink for lies. When his first letter arrived, it's a glowing report of life in the camp – reminiscent of the “scarcity in times of abundance” metaphor I started the essay with:

“Everything is wonderful here: the shops are full, food is abundant, apartments are large and properly heated, cinemas show films from the West, there are many beautiful girls ready for an affair – the only thing you can't get is red ink”⁶⁶.

Zizek then pointed at the crowd and said: “You are the red ink”.

At the end of the day then (or in the beginning of the day rather), for me, rights are not about international relations, consensus building or law making. They are not even about the grand narratives of covenants, declarations and constitutions. Neither are they about orchestrated solidarity marches, facebook activism and online petitions. Rather they are about the contested cultures of the quotidian, the cacophonous politics of the street, and the mundane negotiations of the personal – what Asef Bayat calls “nonmovements”— “the collective endeavors of millions of non collective actors, carried out in the main squares, back streets, court houses, or communities”.⁶⁷ It's about the unrelenting journeys full of detours – for finding new

⁶⁶ Z. SLAVOJ, *WELCOME TO THE DESERT OF THE REAL: FIVE ESSAYS ON SEPTEMBER 11 AND RELATED DATES 1-4* (2002).

⁶⁷ A. BAYAT, *LIFE AS POLITICS: HOW ORDINARY PEOPLE CHANGE THE MIDDLE EAST ix-x* (2010).

meanings for our human condition beyond blood thirst, fiscal greed and civilizational domination — in search of red ink to write a very different history of the present: which despite being blunt and uncompromising about the brutality of our times, also desperately seeks “critical utopia”.⁶⁸

⁶⁸ Boaventura de Sousa Santos, *The World Social Forum: Towards a Counter-Hegemonic Globalization* (July 2003), available at <http://www.ces.fe.uc.pt/bss/documentos/wsf.pdf>.