

## Chapter 4

# The Tragedy of Victimisation Rhetoric: Resurrecting the 'Native' Subject in International/ Postcolonial Feminist Legal Politics

Through travelling to other people's 'worlds' we discover that there are 'worlds' in which those who are the victims of arrogant perception are really subjects, lively beings, constructors of vision even though in the mainstream construction they are animated only by the arrogant perceiver and are pliable, foldable, file-awayable, classifiable. (Lugones, 1990)

To have a right as a woman is not to be free of being designated and subordinated by gender. (Brown, 2002)

[E]ven while it is important to critique an ahistorical category of 'woman' it is just as problematic to seek authentic versions of women's locations within societies. The erection against the modernist discourse of 'woman' is not to revert to its other 'traditional roles' but to delineate the problematics of both these forms of female gender construction and the complex ways in which they intersect. (Grewal, 1994)

In postcolonial India, the subject of sex and desire play out in a multitude of cultural spaces: in celluloid fantasy; 'radio *mirchi*' (chilli) chartbuster numbers; and erotic dance sequences both on screen in the cinema halls and off screen in the cacophony of Indian weddings. Women do dance in the postcolonial world, though this image is largely absent from the imagination and scholarship of the international women's rights movement. It is at one level hardly surprising given the representations of the third world subject - in particular, the female subject - that dominate news items in the Western hemisphere and the developed world. Indeed, that look of starvation, helplessness and victimisation is remarkably familiar to our imaginations, irrespective of the reality.

the  
victim  
subject

The victim subject is a transnational phenomenon. It appears, at least within legal discourse, in both the West and the postcolonial world. However, the postcolonial or third world victim subject has come to represent the more victimised subject; that is, the real or authentic victim subject. Feminist politics in the international human rights arena, as well as in parts of the postcolonial world, have promoted this image of the authentic victim subject while advocating for women's human rights.

In this essay, I examine how the international women's rights movement has reinforced the image of the woman as a victim subject, primarily through its focus on violence against women (VAW). I examine how this subject has been replicated in the postcolonial context, using the example of India, and the more general implications this kind of move has on women's rights. My main argument is that the focus on the victim subject in the VAW campaign reinforces gender and cultural essentialism in the international women's human rights arena. It also reinforces

some feminist positions in India that do not produce an emancipatory politics for women. This focus fails to take advantage of the liberating potential of important feminist insights that have challenged the public/private distinction along which human rights have operated, and of traditional understandings of power as emanating exclusively from a sovereign state.

In the first part of this chapter, I examine how the victim subject has become the dominant focus of the international women's human rights movement. I examine this move specifically within the context of VAW campaigns and then look at the broader implications it has for women's rights. I argue that the victim subject has reinforced gender essentialism and cultural essentialism. These have been further displaced onto a third world and first world divide. I discuss how this displacement resurrects the 'native subject' and justifies imperialist interventions. In the second part of this essay I demonstrate how the victim subject has been central to feminist legal politics in India, especially in relation to nationalism, and how this focus in turn is a symptom of the postcolonial condition (Anderson, 1991; Jayaprasad, 1991; Pandey, 1990). In the final section, I argue in favour of transcending the victim subject and disrupting the cultural and gender essentialism that have come to characterise feminist legal politics. I discuss the political and emancipatory value of focusing on the peripheral subject and identifying her locations of resistance when addressing women's human rights.

### The hegemonic victim subject

The 1993 Vienna World Conference on Human Rights marked the culmination of a long struggle to secure international recognition of women's rights as human rights. It was a turning point for both the international women's rights movement and the human rights movement. State parties participating in the conference acknowledged that women too were entitled to enjoy fundamental rights. These included full and equal participation in political, civil, economic, social and cultural life at the national, regional, and international level. Article 18 of the declaration provides that:

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.<sup>1</sup>

Article 39 of the Vienna Declaration also urges states to withdraw reservations to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The final document that emerged from Vienna also acknowledged that, partly as a result of the artificial line drawn between the public and private sphere, certain gender-specific issues had been left out of the human rights arena

1 Vienna Declaration and Programme of Action, United Nations World Conference on Human Rights, UN GAOR, at 25, UN Doc A/CONF/157/23 (1993) Part I, Art 18. See Otto, 1993, p 371 for an analysis of how the public/private distinction continues to inform international law and its exclusionary impact on women.

(Charlesworth, Chinkin and Wright, 1991; Engle, 1993; MacKinnon, 1992; Romany, 1993; Schneider, 1991). The document provided that a broader spectrum of harms experienced by women in the family be subjected to human rights scrutiny. Article 38 of the Vienna Declaration provides:

[t]he World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.

The demand to include violence against women as a human rights issue was reiterated at the Women's Conference in Beijing in 1995 (Bunch, 1990). The Beijing document challenged the public/private distinction along which human rights have traditionally operated and increased awareness of the fact that power operates in multiple arenas. Since that time, the international and regional women's rights movements, alongside the official recognition of women's human rights, have continued to focus primarily on the issue of violence against women and victimisation of women. Immediately after the Vienna conference, the UN General Assembly passed a Declaration on Violence Against Women (The Declaration).<sup>2</sup> The Declaration was adopted to strengthen and complement the process of effective implementation of CEDAW. It recognised that violence against women 'is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women' (The Declaration, Preamble). It reiterates the consensus reached at Vienna, that violence against women covers 'gender-based violence ... whether occurring in public or in private life' (Vienna Declaration, p 217). Under Art 2 of the Declaration, violence against women specifically includes violence in the family, marital rape, female genital mutilation, and other 'traditional' practices that are harmful to women. It also covers similar violence in the community, including harassment at work and violence perpetrated or condoned by the state, wherever it occurs. The Declaration also set the basis for the appointment of a UN Special Rapporteur on Violence Against Women to cover aspects of violence against women, including its causes and consequences. In 1994, Radhika Coomaraswamy from Sri Lanka was appointed as the UN Special Rapporteur on Violence Against Women. During her tenure, she

2 Declaration on the Elimination of Violence Against Women, GA Res 104, UN GAOR, 48th Sess, 85th plen mtg, Supp No 49, at 217-19, UN Doc A/48/49 (1993). The United Nations Economic and Social Council endorsed the resolution of the UN Commission on Human Rights to appoint a special rapporteur on violence against women, its causes and consequences, for a three-year term: UN ESCOR, 42d plen mtg, UN Doc E/DEC/1994/254 (1994).

submitted a series of annual reports to the UN General Assembly addressing the issue of violence against women.<sup>3</sup> Even Recommendation 19 of the CEDAW, which deals with violence against women and is not binding, has achieved greater visibility after the Human Rights World Conference in 1993.<sup>4</sup>

The focus on VAW has had some extremely important and beneficial consequences for women. The women's human rights movement has drawn attention to the lack of domestic governmental responses to women's demands for more effective rape laws, laws against child sexual abuse, and domestic violence laws. The VAW campaign has been overwhelmingly successful in translating very specific violations experienced by individual women into human rights discourse.<sup>5</sup> VAW discourse has succeeded partly because of its appeal to the victim subject. In the context of law and human rights, it is invariably the abject victim subject who seeks rights, primarily because she is the one who has had the worst happen to her. The victim subject has allowed women to speak out about abuses that have remained hidden or invisible in human rights discourse. Moreover, the Vienna World Conference and subsequent women's conferences have enabled women to speak out to the international community. A powerful form of this presentation has been through personal testimonials in public tribunals, as at Vienna, or through international video links.<sup>6</sup> These accounts are usually very graphic and horrifying,

3 See Reports of UN ESCOR the Special Rapporteur on Violence Against Women, Its Causes and Consequences, 1997 to 2003, including Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 53d Sess, Provisional Agenda Item 9(a), E/CN.4/1997/47 (1997) (concerning violence in the community); Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 54th Sess, Provisional Agenda Item 9(a), E/CN.4/1998/54 (1998) (concerning violence against women as perpetrated and/or condoned by the state); Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 55th Sess, Provisional Agenda Item 12(a), E/CN.4/1999/68 (1999) (concerning violence against women in the family); Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 56th Sess, Provisional Agenda Item 12(a), E/CN.4/2000/68 (2000) (concerning trafficking in women, women's migration, and violence against women); Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 57th Sess, E/CN.4/2001/73 (2001) (concerning violence against women perpetrated and/or condoned by the state during times of armed conflict); Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 58th Sess, E/CN.4/2002/84 (2002) (on cultural practices in the family that are violent towards women); Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, UN ESCOR Hum Rts Comm, 59th Sess, E/CN.4/2003 (concerning developments in the area of violence against women from 1994-2002).

4 UN General Recommendation No 19, Violence Against Women, UN CEDAW Comm, 11th Sess, UN Doc A/47/38 (1992) provides that discrimination against women includes gender-based violence; that is, violence directed against a woman because she is a woman, or violence that affects women disproportionately. It further states that gender-based violence is a form of discrimination that inhibits a woman's ability to enjoy rights and freedoms on an equal basis.

5 The campaign on reproductive rights has also acquired a certain degree of visibility. However, it has not translated into effective policies or actions by state parties. See UN Report of the International Conference on Population and Development, UN GAOR, 49th Sess, UN Doc A/CONF/171/13 (1994). Furthermore, the failure of the governments participating in this meeting to incorporate sexual rights into their programme leaves women's roles as mothers and procreators undisturbed. Their identities as sexual beings entitled to sexual rights, rather than exclusively as victims of sexual wrongs, remains unaddressed (Lai and Ralph, 1995).

6 See, for example, UN Global Videoconference, A World Free of Violence Against Women (8 March 1999) at <http://webevents.broadcast.com/unifem/women> (last visited 28 December 2003).

and are told through the location of the victim subject. 'Victim talk' has an appeal at the level of popular discourse that must not be underestimated (Minow, 1993).

The victim subject also provides a shared location from which women from different cultural and social contexts can speak. It provides women with a subject that repudiates the atomised, decontextualised and ahistorical subject of liberal rights discourse, while at the same time furnishing a unitary subject that enables women to continue to make claims based on a commonality of experience. Any further fragmentation of the subject raises fears that the absence of a common subject will leave feminists divided and women even more disempowered. The idea of multiple or fractured subjectivities threatens to deprive women of a foundation from which to make claims for rights and for broader global recognition (Benhabib, 1989; Brown, 1995, p 77; Fineman, 1990, pp 34-43). If women's experiences are represented as fragmented, they may lose power and undermine certain 'truth claims' about women's lives.

However, an exclusive reliance on the victim subject to make claims for rights and for women's empowerment has some serious limitations. The articulation of the victim subject is based on gender essentialism; that is, overgeneralised claims about women (Harris, 1990; Kline, 1989). As Chandra Mohanty points out, essentialism assumes that 'women have a coherent group identity within different cultures ... prior to their entry into social relations' (Mohanty, 1991, p 70). Such generalisations are hegemonic in that they represent the problems of privileged women who are often (though not exclusively) white, Western, middle class, heterosexual women. These generalisations, based on some abstract notion of strategic sisterhood, efface the problems, perspectives, and political concerns of women marginalised because of their class, race, religion, ethnicity, and/or sexual orientation (Ong, 1996). The victim subject ultimately relies on a universal subject: a subject that resembles the uncomplicated subject of liberal discourse. It is a subject that cannot accommodate a multi-layered experience.

The second problem with a reliance on the victim subject, particularly in the context of violence against women, is that it presents a position based on cultural essentialism. Women in the postcolonial world are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West. In the end, the focus on the victim subject reinforces the depiction of women in the postcolonial world as perpetually marginalised and underprivileged, and has serious implications for the strategies subsequently adopted to remedy the harms that women experience. It encourages some feminists in the international arena to propose strategies which are reminiscent of imperial interventions in the lives of the native subject and which represent the 'Eastern' woman as a victim of a 'backward' and 'uncivilised' culture.

Thirdly, the victim subject and the focus on violence invites remedies and responses from states that have little to do with promoting women's rights. Thus, a related concern is that the victim subject position has invited protectionist, and even conservative, responses from states. The construction of women exclusively through the lens of violence has triggered a spate of domestic and international reforms focused on the criminal law, which are used to justify state restrictions on women's rights – for the protection of women. The anti-trafficking campaign, with its focus on violence and victimisation, is but one example. It has spawned initiatives by some states that impose minimum age limits for women workers going abroad for employment. In 1998, Bangladesh banned women from going abroad as domestic workers. Although Bangladesh is reconsidering the ban, it still remains in effect. In a similar vein, although not entirely prohibiting migration by women, the Nepal Foreign Employment Act 1985 prohibits issuing women with employment licences to work overseas without the consent of the woman's husband or male guardian (Sanghera and Kapur, 2001, p 24). Similarly, the government of Burma, reacting to a publication of a report by Human Rights Watch about the trafficking of Burmese women and girls into Thailand's sex industry from the eastern Shan State, imposed rules prohibiting all women in this area between the ages of 16 and 25 from travelling without a legal guardian (Belak, 2003). The UN Protocol on Trafficking 2001 and the South Asian Convention on Trafficking 2002 regard the consent of the women who move or are moved across borders as largely irrelevant.<sup>7</sup> Such measures conflate women's movement or migration with trafficking, where even women moving (legally or illegally) to seek higher-wage work are suspected of being trafficked.<sup>8</sup> At the same time, there is no mandatory requirement to provide any services or protect the rights of the victim under these documents, as states are reluctant to provide support for non-nationals. Such interventions reinforce women's victim status and resort to a protectionist and conservative discourse that early feminist interventions struggled to move away from through anti-discrimination discourse.

### Gender essentialism

Gender essentialism refers to the fixing of certain attributes to women. These attributes may be natural, biological or psychological, or may refer to activities and procedures that are not necessarily dictated by biology. These essential attributes are considered to be shared by all women and hence are also universal. 'Essentialism thus refers to the existence of fixed characteristics, given attributes, and ahistorical functions that limit the possibilities of change and thus social reorganisation' (Grosz, 1994, p 84). It is 'a belief in the real, true essence of things, the invariable and fixed properties, which define the "whatness" of a given reality' (Fuss, 1989, p xi). The limits of gender essentialism are not new to feminist legal thinking, and in recent years there has been considerable critique of the hegemonic generalisations

<sup>7</sup> Article 3(b), United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially in Women and Children (GA Res 55/25, UN GAOR, Annex II, Supp No 49, at 60, UN Doc A/45/49 (2001)) which came into force 25 September 2003; and South Asian Association for Regional Co-operation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002), Art 1(3).

<sup>8</sup> US Act 2001, s 102(b)(4).

about women that result from essentialism (Spelman, 1998). In the postcolonial context, Spivak has addressed some of the problems of essentialism in the work of the subaltern historians, who are attempting to recuperate the voice of the marginalised subject. She has argued that the 'subaltern cannot speak' and that subaltern historians are erecting a native subject with an authentic voice (Spivak, 1988, p 296; Spivak and Rooney, 1994, p 151). She challenges the essentialism that is inherent in such a position.

Anti-essentialists argue that the claims of essentialists represent primarily the problems of privileged women and result in the production of theoretical agendas and perspectives that efface the problems of more marginalised women. In the US, gender essentialism has been challenged by black, Latina/o and lesbian feminists as being exclusive and failing to recognise that women experience various forms of oppression simultaneously (Anzaldúa, 1999; Cain, 1989–90; Collins, 2000; Crenshaw, 1989; hooks, 2000). Black, Latina/o, Asian American, Native American and Muslim women experience the complex intersection of sexism, racism and/or religious identity. Their experiences of gender oppression cannot be extricated from their experiences of racial oppression because they occur simultaneously. They come to the law not just as women, but as black women, and/or Latina/o women and/or Muslim women, negotiating with the dominant and stable discourses on race, ethnicity, culture, sexuality, religion and/or family (Butler, 1993, pp 223–42). For those who do not experience such intersecting oppressions, the focus on gender remains less complicated. As Marlee Kline explains, the focus on gender as the primary variable of oppression conceals the way in which privilege may be operating simultaneously. Kline argues that white women 'are able to ignore the experience of our race because it does not in any way correlate with an experience of oppression and contradiction' (Kline, 1989, p 123). Arguments that focus on sex discrimination do not reflect the fact that women do not experience discrimination exclusively on the basis of sex. Rather, they may also experience discrimination on the basis of race, religions, ethnicity, caste, physical ability and/or sexual identity. To focus only on the category of gender is to obscure the ways in which women – particularly women in minority and disadvantaged communities – experience multiple forms of subordination. To focus on gender as the exclusive or primary site of oppression, reflects only the experience of those women who do not experience other forms of subordination, such as religious, ethnic or caste subordination. These various forms of subordination are not separate and discrete, but rather intricately connected.

Some scholars such as Catherine MacKinnon have nevertheless focused on the commonality of women's experiences. She states, 'what [women] have in common is not that our conditions have particularity in ways that matter. But we are all measured by a male standard for women, a standard that is not ours' (MacKinnon, 1987, p 76). In her analysis, sexuality and sexual relations remain central to women's oppression. 'If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition' (MacKinnon, 1989, p 172). MacKinnon argues that, as sexual exploitation and sexual violence are experiences women share in common, these commonalities are more important than any differences between women. In her view, all women experience oppression at the hands of patriarchal power, and she argues that power is invariably male (MacKinnon, 1989, pp 157–70). In law, it is expressed through 'male

laws' and 'male' systems of justice (MacKinnon, 1982; MacKinnon, 1983). The fact that women do not come from a shared social position (and hence may not prioritise issues of sexuality or sexual violence) is not addressed in MacKinnon's work. For MacKinnon, the centrality of sexuality is inherent regardless of whether women consciously consider it as such.

MacKinnon's analysis is based on the assumption that regardless of a woman's material situation, her sexual subordination is intrinsic to gender relations. Rape, sexual harassment and other forms of sexual violence are used to generate gender and the distinction between men as superior and women as subordinate or inferior (Halley, 2002, p 83; MacKinnon, 1982). Heterosexuality has institutionalised the construction of male sexual dominance and female sexual submission. Thus, sexuality becomes the lynchpin of gender inequality (MacKinnon, 1987). Janet Halley points out how MacKinnon, in her early US work, was of the view that recourse to the law in situations of rape would not necessarily provide the solution to women's concerns because the law was male and based on male experiences. A mere reforming of the laws governing rape or other forms of sexual violence would not address the male dominance which informs the legal regulation of sexuality. However, Halley identifies a distinct shift in MacKinnon's later work, where she argues that it is possible to produce a feminist jurisprudence based on a *women's point of view* and women's claims of sexual violence, that exposes how male dominance informs the law and subordinates all women (Halley, 2002, p 86; MacKinnon, 1989). This position marks a radical departure from MacKinnon's complex analysis of sex in terms of power and the relations of male dominance and gender subordination produced in law, to a more liberal one that views the law as a site for solving these problems through the assertion of a women's point of view (Halley, 2002, pp 84–85).

Although there has been a substantive critique of MacKinnon in her own domestic arena, she has succeeded in bringing her analysis into the international arena, largely unmodified (Smart, 1989, pp 76–85). We can find at least three aspects of MacKinnon's domestic scholarship present in her subsequent work on women's human rights. The first is her claim that sexuality – erotic or genital relations – constitutes the basis of inequality between men and women. This argument permits no distinction between 'normal' heterosexual sex and rape either in times of war or peace. Secondly, even though human rights have been a tool of male dominance, there is a possibility for individual women's claims to expose this inequality and write women's voices into human rights discourse. One concrete proposal she makes in this regard is to address issues of sexual violence as questions of equality. Finally, examples of women's rights claims can be understood as a form of resistance, and the claim of one woman can represent the experience of all women. As Halley has pointed out in her discussion of the transformation of MacKinnon's position on the issue of sexual harassment in the domestic context, '[a]s long as her legal cause of action for sex harassment performs the perspective produced by *women's point of view*, it will allow her to interrupt the ontological seamlessness joining male superordination with the law, enabling her to make not only her injury but the injury of all women visible, audible, and interruptible' (Halley, 2002, p 86; emphasis added). Thus, one woman can act on behalf of all women, even if she has not personally suffered any injury, provided her claim is informed by a *women's point of view*.

While MacKinnon acknowledges the multiplicity of women's experience in her work on women's human rights and sexual violence, she remains reluctant to interrogate the extent to which this multiplicity displaces gender as the central category of analysis. She focuses on that which is shared amongst women rather than on their differences. She discusses how the experiences of rape, prostitution and pornography are the primary ways in which women experience a violation of their human rights. In her work on rape in war in Bosnia, she argues that sexual violence is a weapon of war (MacKinnon, 1993a; MacKinnon, 1994). She made similar arguments as lead counsel in a case filed under the US Alien Tort Claims Act 1993 and Torture Victim Protection Act 1991, in which Bosnian Muslim and Croat survivors of Serbian sexual atrocities sought international justice for genocide.<sup>9</sup> She argues that pornography is a tool of genocide and tries to make a direct causal link between pornography in Bosnia and the rapes of Muslim women (MacKinnon, 1993b). She also argues that torture on the basis of sex in the form of rape, domestic battering and pornography should be seen as a violation of the human rights of women (MacKinnon, 1992, p 21).

MacKinnon's analysis of women's rights in the area of human rights is based on the idea that women have been treated as less than human and hence denied their human rights. She argues that a human is not understood as someone who has been sexually and reproductively violated, but is defined as a 'man'. She states that when someone's human rights are deemed to be violated 'he is probably a man' (MacKinnon, 1993a, p 91). This assumption is produced by the fact that rights have been and continue to be based on exclusions, based on difference, and gender has been a basis for excluding women on the grounds that they are naturally inferior, weak and stupid. They need protection rather than recognition of their subjectivity or capacity to choose and make decisions. MacKinnon argues that human rights are therefore intrinsically male defined and that the male reality has become the human rights principle. Using this rationale it is possible for men to take or deny women their liberties and not have this act recognised as a human rights violation. When the rights of men are denied or withdrawn, there is little debate over whether such actions constitute human rights violations. The entire paradigm of human rights has therefore been based on the experiences of men. Although MacKinnon has taken up the issue of women's rights in the context of wartime and specifically within the context of the sexual atrocities inflicted by the Serbs on the Bosnian and Croatian women, she argues that 'men do in war what they do in peace, only more so' (MacKinnon, 1993a, p 94). She suggests that the casualties women endure in times of war are similar to the ones they endure in times of peace. She thus collapses any distinctions made between violence against women in times of war or peace. Pornography, for example, proliferates in times of peace, and in times of war is officially mobilised to commit atrocities against women that men are already conditioned to enjoy. The only difference is that the acts are officially sanctioned. 'It does help that men did these acts in declared military groups, instead of one on one everywhere at once and all the time, or in small packs, murdering, raping, pimping, and breeding, but not recognised as an army of occupation' (MacKinnon, 1993a, p 109). In both times of war and peace, these violations are met with complacency regardless of the laws enacted.

<sup>9</sup> *Doe v Karadzic*, 866 F Supp 734, SDNY, 1994, rev'd, *Kadic v Karadzic*, 70 F 3d 232, 2d Cir, 1995.

MacKinnon supports the emergence of a women's human rights movement in the international arena, which scrutinises and publicises the sexual violence and atrocities that women endure. And this movement, according to MacKinnon, finds its best articulation in the form of the equality law advocated by blacks in the US and the women's movement in Canada in the 1980s and 1990s. They envision equality as moving beyond the Aristotelian understanding of treating likes alike and unlikes unlike, to a more substantive vision of equality which calls for relief against state inaction as well as action, to redress the discrimination to which these groups have been historically subjected. She advocates this more attenuated understanding of equality to address and redress the violence women have experienced at the hands of men globally. Despite their diversity, women everywhere are subjugated to men, primarily in and through some form of sexual violence such as rape, wife battering, prostitution or pornography. She lists a range of diverse countries in which such atrocities continue to take place, in times of peace and war, and argues that equality guarantees should be used in both of these situations to address the problem of violence against women.

The focus on commonality of women's experience places her analysis on a slippery slope where it can easily slide into the essentialist and prioritising category of gender; it can blunt rather than sharpen our analysis of oppression. MacKinnon does not consider the way in which legal systems have been shaped by social, economic or historical forces, such as colonialism, enslavement of non-white populations (including both men and women), or the role of the Christian church. The class, cultural, religious and racial differences between women are collapsed under the category of gender through women's common experience of sexual violence and objectification by men. Differences between women are simply understood as cultural, without exploring or elaborating on how the cultural context was shaped and influenced in and through the colonial encounter – an encounter between the West and 'the Rest'. To miss this part of the argument is to present a narrative of women's exploitation and subordination that does not implicate the ways in which race, religion and imperial ambition constituted the vortex of knowledge that affords us a historically grounded and contextualised understanding of that experience. MacKinnon is one of several scholars, including Martha Nussbaum, Andrea Dworkin, Kathleen Mahoney and Kathleen Barry, who resort to metanarratives in addressing women's rights issues. This approach has a broad appeal – an appeal that lies in the ability to tell a grand story in modernist terms which counters the dominant narratives and creates the possibility for some common basis on which to speak about women's rights (Brown, 1995, pp 41–43).

Despite the appeal of such grand metanarratives, gender essentialism produces a theory that effaces the differences between women. The exclusive focus on violence against women does not reveal the complexity of women's lives, but only the different ways in which they may experience violence. Thus, culture is invoked primarily to explain the different ways in which women experience violence, in the process often reinforcing essentialist understandings of culture and representing particular cultures as brutal and barbaric. This response has not been a liberating one. The tension between accounting for women's multiple experiences of race, gender, culture and class on the one hand, and violence against women as a universal phenomenon on the other, is resolved through the victim subject.

Difference is acknowledged through the different experiences of violence that the victim is exposed to in diverse economic, social and cultural settings. While VAW operates as something of an equaliser, it also sets up a subject who is thoroughly disempowered and helpless. This subject, in turn, becomes the universal subject of human rights discourse for women. VAW either erases diversity or constructs diversities as aggravating experiences of oppression, whereas in reality, the aspects of a woman's life that differ from the essentialised concept may serve to alleviate oppression. As Tracy Higgins says: 'In short, when feminists aspire to account for women's oppression through claims of cross-cultural commonality, they construct the feminist subject through exclusions, narrowing her down to her essence' (Higgins, 1996, p 102).

MacKinnon's account of violence against women and how to address it at the international level coincides with the VAW campaigns. The feminist legal agenda, despite its international complexion, has not sufficiently taken on board the critiques of gender essentialism in formulating the women's human rights project. The VAW campaign has not translated into a complex understanding of the ways in which women's lives and experiences are mediated by race, religion, class, gender and a history of the colonial encounter. Although the issue of violence against women is a critical human rights concern, the analysis of MacKinnon and others is not necessarily contributing to an alleviation or elimination of such violence. Indeed, it may be missing the point altogether. In examining women's human rights, it is not enough to illuminate the ways in which women have been subordinated by men through sexual subordination. Although MacKinnon's theory of power was indeed radical for its time, it has been subsequently translated by her into an exclusively liberal endeavour (Halley, 2002, p 85). Indeed, her analysis of how liberal rights, in particular its focus on formal equality, has justified the exclusion of women is not used as a starting point for challenging the premises of liberalism and its understanding of the subject. Rather, MacKinnon's analysis merely seeks to provide ways in which to *include* women within the discourse of equality without disrupting or challenging the metaphysical foundations and ontological limitations of rights discourse to women's empowerment struggles. My critique is not intended to suggest that rights are not useful. As I set out in Chapters 1 and 2 of this book, my argument is that we need to engage with the discourse of rights differently, in ways that are constantly disruptive. The intention is not to create more uncertainty, nervousness or anxiety, but to ensure that complacency or a surrender to liberalism's lofty and false claims do not become the substitute for a transformative politics and an alternative political vision.

There is no question that women have struggled as victims to subvert power; yet that power has not emanated from a single source – men. In the context of India, resistance to the colonial encounter was central to the experience of subordination for women on the Asian subcontinent. This history cannot be understood simply in terms of the history of gender subordination or sexual violence perpetrated by men against women. It was also about the broader economic and political subordination and expropriation of another nation's labour, resources, land, raw materials and market, and the exclusion of the native – both men and women – from sovereignty and legal entitlements. Resistance therefore had to be understood in terms of resistance to the imperial project and the processes of Empire and not just

opposition to men. Similarly, we need to understand how English women were implicated in the imperial project, deriving their power partly from their status as part of the white race and ruling or colonial power (Stoler, 2002, pp 41–42). They participated in the subordination of the native subject, including men, while simultaneously experiencing a sense of liberation on visits to the subcontinent, an experience not necessarily available to them in the metropolis.

What history tells us is more – it speaks to the construction of the agency of victims through the mechanisms of social, political, cultural and colonial control. We cannot speak of women through a history of common victimisation, nor exclusively in terms of women's lived experiences of violence and subordination. We need to unpack how that victimisation has come to be constructed in different contexts and historical moments, and also how this construction erases the complexity of gender subordination. This construction is a manifestation of the pervasive discourse-power complex. By not focusing exclusively on women's lived experiences, I am not suggesting that the subject simply does not exist. My intention is to highlight what has been missing from the victim-centred politics – the power/knowledge complexes that materially constitute the self, quite specifically from a postcolonial location.

Gender essentialism may be used for a strategic purpose, but the way in which it is being deployed in the international women's human rights arena has had a reactionary effect. The danger of essentialism lies in the way it is deployed in dominant discourses. By not remaining sufficiently attentive to cultural and historical specificities, gender essentialism constructed through a VAW discourse has prompted state actors, non-state actors and donors to embrace universalising strategies in responding to human rights violations against women. It has further obscured differences between women located in very different power relationships. Religion, for example, is of acute significance in many parts of the postcolonial/third world, especially for women located within minority communities (Kapur, 1999a). In postcolonial India, for example, the relationship between gender and religion remains very complex due to the considerable relevance and influence of the Hindu Right's political agenda emphasising the assimilation of religious minorities. Muslim women are caught in the tension between their demands for gender equality within their religious community and their dependence upon and support for the community as a site of cultural and political resistance to Hindu majoritarianism (Kapur, 2002b; Kapur and Cossman, 2001). Religion is also of significance in different Western countries, though its presence remains unaddressed. Religion and culture are frequently cast in the non-Western world as fundamentalist, present and pervasive. However, the religious right in Western (and non-Western) democracies have successfully deployed liberal rights discourse (especially the rights to free speech and equality) to capture the public imagination (Kapur, 1999b). Unfortunately, the VAW agenda has taken up issues of culture and religion in ways that have not only reinforced gender essentialism, but have also essentialised certain features of culture and reinforced racial and cultural stereotypes.

### Cultural essentialism

One response to the critique of gender essentialism's failure to pay sufficient attention to third world women and to the diversity of women's lives has been the reiteration of the need to take account of national and cultural differences among women. Culture and cultural diversity have entered into the women's human rights discourse primarily through VAW campaigns. However, in an effort to avoid the critique of exclusivity and gender essentialism, the move to address violence across difference has sometimes resulted in the reification of culture. I discuss the ways in which cultural essentialism is reproduced through the VAW agenda.

I examine how the issue of culture is often displaced onto a first world and third world divide with the result that colonial assumptions about cultural differences between the West and the Rest, and the women who inhabit these spaces, are replicated. Some cultural practices have come to occupy our imaginations in ways that are totalising of a culture and its treatment of women, and are nearly always overly simplistic or a misrepresentation of the practice. For example, the veil is assumed to be an oppressive and subordinating practice that typifies Islam and its degrading treatment of women. The veil may not be a modern practice, yet the multiple meanings of the veil, through different cultural and historical contexts, get subsumed in rhetoric that focuses almost exclusively on veiling as an oppressive and subordinating practice. It is read in a uniform, linear manner as an oppressive practice because it erases women's physical and sexual identity and is symbolic of the subjugation of women in Islam. Yet, there is no universal opinion as to its function amongst those who wear the veil. For some, it does represent honour, and an effective mechanism to avoid tempting men. More significantly, the veil has also been a very empowering symbol for Muslim women in some countries. In Iran, it was the sign of rebellion and rejection of the Shah and Western imperialism. Amongst immigrant communities in the West, it is the symbol of an exclusive cultural space and a rejection of assimilation. In other contexts, the veil is considered a private space: one in which no one can intrude. The veil also disrupts the public space, where women are often marginalised. The sheer symbolism of the veil brings the woman very visibly into the public sphere – she simply cannot walk by unnoticed (Mernissi, 1994, pp 112–22). However, in the assumptions about the veil that inform refugee cases and opinions outside of Islamic contexts, the multiple readings and functions of the veil are erased and only one stands out: the veil as a tool of oppression and barbarism against women.

Another example is female circumcision, which has been represented as a brutal procedure that is practised by all Africans and receives cultural sanction – a representation that reinforces the inferiority of the African people (Gunning, 1992; Kim, 1993). In the context of postcolonial India, a common image that resides in popular imagination or perceptions about India is the image of the female body in flames.<sup>10</sup> Women are burned to death, and this act apparently has some kind of

<sup>10</sup> Early feminist writings had a considerable influence on the development of this perception. Such writings continue to inform contemporary feminist politics, especially the women's human rights movement: Bumiller, 1990, pp 44–74; Daly, 1978, pp 113–33. Bumiller became a bestseller in the US and has also been included in college curricula. For a critique of these two works, see Lourde, 1984, pp 66–71; Narayan, 1997, pp 105–07.

cultural sanction. The body in flames is invariably associated with ancient Indian cultural practices, without any regard to more obvious political, economic and social explanations. For example, in some texts, the practice of *sati* is collapsed with dowry murders, two practices that are completely unrelated. As Narayan explains, the practice of *sati*, which relates to the immolation of a widow on her husband's funeral pyre, was a traditional practice in *some* communities in India, and exceptional rather than a routine practice (Narayan, 1997, p 106). To attribute the practice to 'Hindu tradition' generally is both inaccurate and misleading. It has been a contested practice and has had a tenuous status as part of 'Hindu tradition' (Narayan, 1997, p 107; Sangari and Vaid, 2001). Dowry murders, as I discuss later in this essay, have no relationship with *sati*, and have never been a part of, nor sanctioned by any tradition in the Indian context. Accounts of these practices are often inaccurate and misleading, and have been frequently essentialised and set up in opposition to liberal rights discourse. Such a binary is more of an obstacle than an aid in providing an understanding of how rights campaigns often serve as a conduit for entrenching cultural stereotypes. What is frequently lost sight of is how the subject in different cultural contexts comes to be constituted through such oppositions, which end up erasing the very subjectivity of the woman whose rights are being denied or implicated. We need to look at how these oppositions contribute to the discursive constitution of the subject and accounts about the cultural atrocities to which she is exposed. The VAW campaign, though constantly asserting that it is dealing with the 'real lives' of women, furnishes accounts of the lives of these victims from the perspective of others, and the victim herself loses control of her own existence. Merely prioritising the victim's voice as a response to this critique risks being equated with 'the truth' and producing an experiential politics that has taken us down the road to identity politics, which have surrendered any commitment to a transformative vision of the world and women's lives in that world. What is missing from the VAW position and the writings of scholars such as MacKinnon who endorse it, is an analysis of how the mechanisms of discursive engagement produce the victim subject and the accounts of violence to which she may be subjected. In other words, an account of the reality of women's lives, though important, cannot adequately explain the social construction of violence and resistance to such violence. These must be examined through an understanding of how women's subjectivity and experiences of violence are partly constituted and constructed, at least in the arena of women's human rights, in and through the discourse of the VAW campaign and the foregrounding of the victim subject.

### 'Death by culture'<sup>11</sup>

The invocation of culture as a way in which to explain the different forms and shapes that violence against women takes has resulted in a reification of culture, especially the culture of people in the postcolonial/third world. In this section, I discuss, by way of example, how dowry murders have been used in the international VAW campaign as an example of the cultural form that violence against women in India/South Asia assumes. I choose the issue of dowry murder primarily because of the vast amount of research that has been conducted and the innumerable international conferences that have been held on this issue. These conferences and research efforts continue to describe dowry murder as an ancient Hindu practice and fail to reflect how this 'practice' is a thoroughly modern and contemporary phenomenon. The VAW discourse bears some responsibility for setting up dowry as a tradition that has been in existence since time immemorial and for reinforcing inaccurate and often racist cultural stereotypes.

Dowry murders in India frequently have been explained through appeals to broad assumptions about Indian women and fire, and the assertion that the burning of women is sanctioned by some kind of Indian cultural or religious tradition (Bumiller, 1990, pp 44–45). The act is cast as a cultural practice, and in turn represents the entire culture as barbaric and uncivilised in its treatment of women. Yet, as Uma Narayan explains, dowry murders are thoroughly modern in their origin (Narayan, 1997, p 85). Dowry was a practice that took place in some communities, such as Punjab, and itself was an economic transaction rather than something cultural which was sequestered in the home or private sphere (Oldenburg, 2002, pp 19–39). It has been characterised at times as a gift, at times as compensation (to the groom's family for taking on the responsibility of providing for a wife), and at times as pre-mortem inheritance, reflecting a daughter's rights to a share in the family property (Narayan, 1997, p 109). However, these explanations do not account for the expectations that the groom's family has some share in the dowry. Narayan explains that this part of the phenomenon is connected to the setting up of a market economy in India since the 1970s and the growth of a consumer-oriented culture. In some communities, this phenomenon has produced a practice known as dowry bargaining, where the groom's family has come to expect certain consumer items at the time of (and indeed for many years after) his marriage (Narayan, 1997, p 111). This expectation is compounded by demands on families to provide large dowries for their own daughters. If a woman and her parents are unable to meet these demands, which can at times take the form of threats, intimidation and even violence, then the woman is deemed expendable. As Narayan points out, there is a failure to understand that dowry violence is a part of domestic violence and that dowry murders are the most extreme form of violence that a situation of domestic violence can take in India (where the method of killing

<sup>11</sup> I borrow this term from Uma Narayan who uses it in her discussion of how dowry murders are cast in first world scholarship as an age-old Indian/Hindu cultural practice, and contrasts it with research on domestic violence murders in the US, which are not similarly cast as practices of 'American culture' through references to Christianity. She argues that the 'death by culture' arguments used to explain the phenomenon of dowry murders are neither accurate nor helpful because they offer very little understanding about the nature and causes of such practices (Narayan, 1997, p 82).



more often than not is by fire). There is also an extraordinary lack of common sense displayed by some writers who attempt to understand violence against women through a cultural spectrum. For example, there is, in the literature, a curious connection made between violence and Hindu women's relationship to fire. Narayan clarifies that fire has the forensic advantage of simply getting rid of any evidence in a society where guns are not as easily available as in the US. According to this mode of murder some kind of spiritual significance misses the most simple, practical explanations that are available. Narayan discusses the conflation between Sita, *sati* and dowry, and how this misrepresentation of 'Hindu culture' has created an exotic representation (Narayan, 1997, p 102). As Narayan has indicated, the cultural explanations offered both by Western and Indian scholars are of little value. She states:

I can therefore only note with irritation the tendency of many discussions of dowry murders, both by westerners and Indians, to be sprinkled with such 'religio-cultural explanations' even when they go on to also provide the sorts of social and economic explanations I have sketched. There seems to be a fairly widespread tendency in discussions of 'Third-World issues' to engage in what I increasingly think of as a 'schizophrenic analysis', where religious and mythological 'explanations' must be woven in willy-nilly, even if they do no real 'explanatory work'. (Narayan, 1997, p 111)

The gratuitous connection between culture and violence is almost invariably brought up in relation to the third world (Jethmalani, 1995). In particular, culture is frequently invoked to explain the kind of violence experienced by women in the third world, though it is not invoked in a similar way when discussing violence against women in various Western contexts.

This perception has been continuously reinforced and reiterated by the women's human rights movement, specifically in the context of VAW campaigns. For example, Charlotte Bunch, a co-organiser of the 1993 Vienna Tribunal on Violence Against Women, stated:

In India, more than 5,000 women are killed each year because their in-laws consider their dowries inadequate. A tiny percentage of the murderers are brought to justice ... Traditions also feed the practice of 'dowry death', in which a woman is killed because she is unable to meet her in-laws' demands for dowry. In India, over a dozen women a day die as a result of such disputes, mostly in kitchen fires designed to look like accidents. (Bunch, 1997, p 41)<sup>12</sup>

<sup>12</sup> It is beyond the scope of this article to provide a comprehensive understanding of the problem of dowry. The simple point I wish to make is that dowry has existed in some Indian (as well as in some non-Indian) communities and is not a helpful lens through which to understand domestic violence and domestic violence fatalities in India. Such a lens obscures more than it reveals and reinforces discriminatory and racist representations of culture, especially in the global arena. Dowry murders are a new phenomenon and cannot be explained as an outcome of religious belief or practices. Accounts, other than those readily available and unexamined assumptions about culture, need to be explored to provide more adequate explanations about the cause of dowry murders and the reasons they have emerged as a relatively recent phenomenon in Indian society.

Such statements add nothing useful to the understanding of domestic violence or female fatalities in India, and they perpetuate inaccurate understandings of culture, dowry and dowry murders. The VAW campaigns are not the only international arenas in which the influential but inaccurate understandings of dowry murder are reinforced. There have been at least four Harvard University-sponsored conferences on bride-burning and dowry deaths in India.<sup>13</sup> The narrative about dowry murder at these conferences typically runs as follows:

the problem of bride-burning stems from the ancient custom of giving a dowry. In India, the dowry is given to the groom's family to ensure the bride gets a good husband. The amount given as a dowry has increased over the centuries ... to the point where today the bride's family often goes into debt, sometimes for generations, in order to put together the dowry ... In some cases, the bride can become something of a hostage as the groom's family demands more and more, sometimes exceeding the original agreed upon dowry. If more money isn't forthcoming, the bride can suffer an 'accident' in the kitchen, where kerosene used for cooking can be spilled on her and lit. (Powell, 1998)

Yet these narrow cultural explanations further skew our understandings of the causes of domestic violence fatalities in India.<sup>14</sup> Dowry murders continue to receive attention from researchers because of their connection with the Other and their misplaced cultural association with fire, which exoticises the practice. This understanding translates into the broader public space in ways that are almost Kafkaesque. For example, *The New York Times*, which has published innumerable articles on dowry murders in India over the past few years, ran a feature titled 'Kerosene weapon of choice for attacks on wives in India'. The article provides an account of 'bride-burning' that conflates culture and domestic violence as an unquestioned fact. Dugger states:

Typically, these women and thousands like them have been depicted as victims of disputes over the ancient social custom of dowry and as symbols of the otherness of India, a place where lovely young brides are doused with kerosene and set ablaze for

<sup>13</sup> See First International Conference on Dowry and Bride-Burning in India, Harvard University, 30 September–2 October 1995; Second International Conference on Dowry and Bride-burning in India, Harvard University, November 1996; Third International Conference on Dowry and Bride-burning in India, London University, November 1997; Fourth International Conference on Dowry and Bride-burning in India, Harvard University, 5 December 1998. A similar international conference was held in New Delhi in January 2001 at the Fifth International Conference on Dowry, Bride-Burning and Son-Preference, 27–30 January 2001.

The contributors to these conferences make the common mistake of collapsing the practice of dowry with *sati*. See also Narayan, 1997, p 41 for a critique on how *sati* has also been cast as an ancient cultural practice, embedded in the notion of a good Indian wife. For an excellent historically grounded explanation and understanding of *sati*, see Sangari and Vaid, 2001, pp 383–440; Sunder Rajan, 1995, pp 15–63.

<sup>14</sup> See Daga, AS, Jejeebhoy, S and Rajgopal, S, 'Domestic violence against women: an investigation of hospital casualty records, Mumbai', presented at the International Conference on Preventing Violence, Caring for Survivors: Role of Health Profession and Services in Violence, SNT Women's University, Churchgate, Mumbai, India, 28–30 November 1998, [www.hsph.harvard.edu/Organizations/healthnet/SAasia/suchana/0929/rh370.html](http://www.hsph.harvard.edu/Organizations/healthnet/SAasia/suchana/0929/rh370.html) (last visited 28 December 2003). This study of victims of domestic violence reveals that most of the women who were victims of domestic violence were kicked, beaten, punched, bitten, choked or strangled. Only 4% had been deliberately burned. The study and statistics suggest that a large percentage of women are beaten or abused for failing to perform domestic tasks such as cleaning or cooking adequately.

failing to satisfy the demands of their husbands' families for gold, cars and consumer goods that come as part of the marriage arrangement.<sup>15</sup>

The exoticism move serves to exonerate the researcher from any responsibility to investigate the issue at a deeper level, by inquiring whether there are more complex stories to tell about dowry, and about domestic violence generally, that elaborate on the material, social and institutional explanations for dowry (Oldenburg, 2002, pp 217–25). Although the author refers to studies conducted by the International Centre for Research on Women in 1999 and 2000, which point to the fact that there has been an overemphasis on dowry as a cause of abuse, and that such emphasis has distorted understandings of the problem of domestic violence, she does not use this information to dispel the myths and assumptions that surround the issue of dowry and culture in India. She simply proceeds to provide more details about kerosene deaths and the importance of dowry in a marriage arrangement in India. She does this by focusing on the account of her main protagonist Geetha, who lies ravaged from burns received from a kerosene attack by her husband and mother-in-law.

Cultural explanations ultimately neither challenge nor arrest the problem of dowry murders. They also deflect attention from the broader and more prevalent crime of domestic violence and the many other reasons why women are beaten, abused or killed in family violence situations. In fact, such explanations reproduce the native subject of colonial discourse, leaving in place the distorted image of the Indian woman in flames and of the practice as something that is both exotic and barbaric. It is necessary to explode the mystery often set up by cultural arguments that obscures the real issues concerning women's human rights. There is a need for economic, social and institutional analysis in order to make certain kinds of politics and strategies feasible in various national settings. Researchers, scholars and women's rights activists must take responsibility for understanding and informing themselves about the complexity of debates that surround issues of women's rights in the postcolonial world. They need to put to rest the search for the native subject and the essential cultural explanations that are used to exoticise the Other. A deeper and more rigorous kind of contextual analysis is essential to protect against simple, unreflective and naive strategies that invariably harm more than help those who are victims of rights violations.

At the same time there is a need to critique the narratives about culture and the native subject produced in and through the VAW discourse. These narratives produce stories about women's experiences of violence globally, and seek to incorporate these experiences into an argument that recognises such violence in terms of human rights. Yet it does not attend to the ways in which violence and subjectivity come to be constituted by the VAW discourse. Women's agency is found in their resistance to violence through rights claims. As MacKinnon has stated:

<sup>15</sup> Dugger, 2000.

It [resistance] is not based on being the same as men, but on resistance to violation and abuse and second-class citizenship because one is a woman. It starts close to home. African women oppose genital mutilation. Philippine, Thai, Japanese and Swedish women organise against the sex trade. Women in Papua New Guinea and the US and workers at the United Nations resist sexual harassment. Brazilian and Italian women protest domestic battery and 'honour' as a male excuse for killing them. Indian women protest 'dowry' and 'suttee' [sic] as a male excuse for killing them ... Women everywhere rise up against rape, even in cultures where women have recently been regarded as chattel. Women in the US, Scandinavia and the Philippines resist pornography. Forced motherhood is opposed from Ireland to Germany to Bangladesh. Female infanticide and objectifying advertising are legislated against in India. (MacKinnon, 1993a, pp 101–02)

Agency is articulated as part of the will of the victim subject, rather than as a discursive effect. I do not intend to argue that women's subjectivity can only be understood in terms of discourse analysis. My argument is that in the area of women's human rights and law, subject constitution has not been sufficiently analysed in terms of how rights discourse has produced a particular understanding of the subject which is a manifestation of the pervasive discourse – power relationship. This relationship cannot be understood in terms of women's rights claims. Rather, it is a relationship that locates these struggles within broader and more complex paradigms of competing discourses. To understand women's human rights claims within this broader normative canvas assists in moving beyond the simple goal of persuading governments to recognise women as humans and sexual violence as a human rights violation. It enables us to understand the human rights terrain as a discursive terrain where competing visions and understandings of women as cultural subjects, moral subjects, wives and mothers, sexual victims and agents, are played out. Acquiring a right to fight rape is important. But a more complex analysis is required if we are concerned with women's rights victories that are based on normative assumptions about women as passive, chaste and upholders of cultural values. For example, in 1999, six years after the VAW campaign was launched in Vienna, the Indian Supreme Court issued a ruling in a rape case that reversed the decision of the High Court of Mumbai and reinstated the conviction of the accused.<sup>16</sup> The bench included Justice Fatima Beevi, the first woman to sit on the bench of the Indian Supreme Court. The decision was in favour of the victim, but I want to draw attention to the reasoning in this case. The court held that corroborative evidence was not required in a case of rape, except in the 'rarest of rare case'. In rape cases, a woman must be believed partly because, according to the justices, 'an Indian woman attaches the maximum importance to her chastity' and hence it follows that she would not lie about rape. The VAW campaign may have helped in securing her victory (though that is not at all clear from the decision), yet the victory did nothing to disrupt the normative assumptions about gender, sexuality and culture in India. The court stated:

<sup>16</sup> *State of Maharashtra v Chandraprakash Kewalchand Jain* [1990] All India Reports 658 (SC) (as discussed in Chapter 2).

Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing (a form of sexual harassment), from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity. (Paragraph 17)

Such reasoning prompts the question, what exactly was gained as a result of the conviction in this instance, and what exactly was lost? Women's rights claims based on sexual violence are forcing women into a regulatory apparatus that simply reinforces assumptions of gender, sexuality and culture. There is no challenge to the normative underpinnings about gender, culture and sexuality, and the historical genealogy of the relationship between culture and sexuality that inform the decision. These can only be understood when read against the impact of the colonial encounter in the 19th-century and how women's sexuality and culture were sites of contest in law between the imperial power and the political nationalists. The relationship is as complex today in the postcolonial present. Such insights and understandings provide the possibility of producing strategies that are not simply confined to formal rights violations. They also challenge the normative dimensions of the law that constitute the subject, frame our understandings of the violence to which she has been subjected, and the colonial power/knowledge complex that have implications on the constitution of the subject and culture.

### ***The imperialist move and reproducing the 'native'***

The VAW agenda is contingent on the victim subject. It is a subject that provides the common foundation on which to build a shared movement and vision. But it is also a subject that is ahistorical, invoked by scholars and activists alike to analyse issues concerning women from the lens of a universal, unemancipated subject. It has invited, at times, imperialist responses towards women in the developing world, by accentuating the difference between first world and third world women. I examine how victimisation rhetoric has reinforced an imperialist response towards women in the developing world whereby the third world subject is represented as the real, or most authentic, victim subject.

There are a large number of 'cultural' practices that have been held out as practices of violence and oppression against women – the veil, female sexual surgeries, and more recently, honour killings. Several scholars have complicated our

understandings of these 'cultural' practices (Abu-Odeh, 1997; Gunning, 1992; Koso-Thomas, 1997; Lewis, 1995; Lewis and Gunning, 1998). Honour killings have become the latest item on the women's human rights agenda. There is a considerable amount of donor funding being made available to address this issue, which is being represented as a 'cultural artifact' of different societies and misrepresented in ways that are similar to dowry murders. Although it is beyond the scope of this chapter to address this issue in any detail, it is an area that deserves to be scrutinised, not exclusively from the perspective of cultural practices that discriminate against women, but also by considering how this issue has become such a popular item on feminist airwaves and conferences, in the same way that female sexual surgeries/genital mutilations were a few years ago. I emphasise that my critique does not endorse these practices nor deny that they take place. My argument is that to cast them as 'cultural' fails to provide us with the insights and information required in order to formulate effective human rights strategies. Cultural explanations are deemed sufficient even though they add little to our understanding of what is going on and why (Volpp, 1994, pp 91–93; Volpp, 1996).

The move to integrate cultural diversity into a gender analysis was intended to counter the gender essentialism that has characterised the women's human rights campaign. However, this move has been approached through the spectrum of violence, which has reinforced cultural essentialism and the construction of the Other as backward and uncivilised. The result is that international feminist legal politics has reinforced the representation of the third world woman as thoroughly disempowered, brutalised and victimised: a representation that is far from liberating for women. Moreover, in some respects it recreates the imperialist move that views the native subject as different and civilisationally backward.

The image that is produced is that of a truncated third world woman who is sexually constrained, tradition-bound, incarcerated in the home, illiterate and poor. It is an image that is strikingly reminiscent of the colonial construction of the eastern woman (Chaudhuri and Strobel, 1992; Mani, 1990). Current scholarship on trafficking and sex-work that takes place in the postcolonial world evokes such imagery. Kathleen Barry's work on trafficking, which has been extremely influential in this debate, recreates this colonial imagery (Barry, 1990). She argues that prostitution (to use her term) is violence against women and that it reduces all women to sex. She states that prostitution is *per se* a violation of women's human rights. Any woman who migrates for prostitution or to work in the sex trade is also a victim of human rights violations. Barry is a co-founder of the Coalition Against the Trafficking of Women (CATW), which exerts considerable influence on the strategies against trafficking being developed at the international level. Her work, and that of CATW, has been subjected, however, to a considerable amount of critique for their colonialist representation of women in the developing world and the imperialist character of the interventions they recommend, especially rescue and rehabilitation (Kempadoo, 1998, pp 11–12; Kempadoo, 2001; Kotiswaran, 2001, p 188).

Barry locates trafficking of women in preindustrial and feudal societies, where women are excluded from the public sphere, and contrasts them with postindustrial, developed societies, where women have been economically independent and prostitution is normalised. The consequence of this kind of

argument is that women in the third world and non-Western world are represented as ignorant, illiterate, tradition-bound, domesticated and victimised. As Kamla Kempadoo states, Barry's representation of the third world woman leaves her not yet a 'whole or developed' person; instead, she resembles a minor needing guidance, assistance and help (Kempadoo, 1998, p 11). In striking contrast to this emaciated image stands the image of the emancipated Western woman; she has 'control over her income, her body and her sexuality'. The analysis is structured along the contours of colonial thought: the assumption being that women in the third world are infantile, civilisationally backward and incapable of self-determination or autonomy.

Similar assumptions justified incursions into the lives of the native and the colony. Empire would assist in the development of the civilisation until it reached a point at which it was capable of self-determination (Mehta, 1999). For example, in Chapter 2, I discuss Mehta's analysis of the relationship between 18th- and 19th-century liberal theory and liberal practice, and how this theory was used to justify colonialism – what he calls the 'inclusionary pretensions of liberal theory and the exclusionary effects of liberal practices' (Mehta, 1999, p 46). A society's treatment of women was itself used as an index of civilisational development. He discusses the work of 19th-century British liberal thinkers, including James Mill and JS Mill, who argued, albeit in markedly different ways, that political institutions such as representative democracy depended on a society having a certain state of development or maturation. The mechanism of Empire operating through colonialism was one way in which to rectify the deficiencies of the past – what has frequently been described as the civilising mission of Empire – in societies that have been stunted by history. Civilisational achievement was a necessary pre-condition for realising progress, and the stage of civilisation was the marker for determining if progressive possibilities would be within the reach of a community at any given point of time. Infantilising women in the third world reproduces the colonialist rationale for intervening in the lives of the native subject (to save those incapable of self-determination) in order to justify the rescue operations advocated by Barry and others.

Even human rights groups and pro-sex-work groups in the first world at times perpetuate this representation of the third world sex-worker as dependent and incapable of making choices. Some human rights groups are also responsible for reinforcing these divisions and feeding into the moralistic and patronising responses of governments to the issue of sex-work. Human Rights Watch has recommended that the South Asian Association for Regional Co-operation should co-operate with Interpol to stem the increase in trafficking in women between India and Nepal (Human Rights Watch, 1995, p 90). Many of the recommendations in the report are directed towards the curtailment and restriction of rights rather than their facilitation. For example, the report criticises the open border policy, which permits people to pass freely between the two countries without a passport, visa or residential permit. Instead of contextualising the strengths and limits of an open border policy in a region closed and isolated from its neighbours, Human Rights Watch states that the policy 'makes it extremely difficult for border police to check illegal activity. Traffickers and their victims move easily across the border and the onus is on individual police officers to stop and question suspicious-looking

travellers' (Human Rights Watch, 1995, p 12). The report thus recommends that Nepal and India should establish a system for strictly monitoring the border to 'guard against the trafficking in women and girls, including the inspection of vehicles'. The suggestion to tighten borders as a way to control trafficking has been enthusiastically adopted by many governments around the world, especially first world governments that fear the spectre of the immigrant.

Although Human Rights Watch claims not to take a stand on prostitution or sex-work in the report, it favours the criminalisation and punishment of owners of brothels, pimps and traffickers (Human Rights Watch Women's Rights Project, 1995, p 86). It also strongly condemns 'laws and official policies and practices that fail to distinguish between "prostitutes" and victims of forced trafficking, treating the latter as criminals rather than as persons who deserve "temporary care and maintenance" in accordance with international human rights standards' and oppose 'laws and policies that punish women who engage in prostitution, but not the men who operate and profit from prostitution rings and who patronise prostitutes: such policies are discriminatory on the basis of sex' (Human Rights Watch Women's Rights Project, 1995, p 198). This statement demonstrates a concern for the human rights of victims of forced trafficking, while refusing to advocate in favour of the human rights of those engaged in prostitution or sex-work. In making a distinction between the two categories of women, Human Rights Watch makes human rights contingent on the subject's victim status.

In a similar report on cross-border trafficking between Burma and Thailand, Human Rights Watch requests donors to ensure that loans for the construction of roads and other infrastructure projects near the border take into consideration the effect of such a project on the trafficking in women (Thomas and Jones, 1993, p 159). The extraordinary assumption implicit in this recommendation is that withholding assistance for the construction of basic infrastructure will help stop cross-border traffic. Indeed, it will curtail, if not entirely stop, border-crossings, both legal and illegal.

The debate on 'voluntary prostitution' and 'coerced prostitution' is frequently displaced onto a first world and third world divide, where the sex-workers in the latter are deemed to be the primary targets of coercion, while those in the first world are deemed to have some rights as well as choices. This dichotomy denies women in the third world the right to self-determination. As Kempadoo argues, the struggle for sex-workers' rights in the postcolonial world is not essentially Western. Sex-workers have historically struggled for rights and against discrimination in the postcolonial world, and they have been involved in insurgent activities outside of their own needs and demands. Veena Oldenburg's work on the Lucknow Courtesans provides an important example of how these women occupied multiple spaces of resistance and power simultaneously (Oldenburg, 1990). In 1976, Oldenburg was examining the civic tax ledgers of 1857–77 and related records in the Municipal Corporation Office in Lucknow, a large city in northern India. Much to her surprise, she discovered in these ledgers the presence of the Lucknow Courtesans, the famous dancing and singing girls of the city who also performed sexual services. She was not only surprised to find them present in the tax records, but they were in the highest tax bracket, with the largest individual incomes of any

in the city. Their names were also on lists of property confiscated by the British from these women for their involvement with the rebellion against the British in 1857. Apparently they were penalised for instigating, as well as providing, pecuniary assistance to the rebels. Their struggle was anti-colonial as much as it was prostitutes' rights. As Kempadoo states, '[s]ex workers struggles are thus neither a creation of a Western prostitutes' rights movement or the privilege of the past three decades' (Kempadoo, 1998, p 21).

The discourse of women in the postcolonial world as being in a state of perpetual victimisation, partly informs the artificial divide and assumption that the struggle for rights and self-determination is a first world phenomenon. This divide and the assumptions on which it is based are in part due to the fact that anti-trafficking has operated along a forced versus voluntary nexus (Doezema, 1998). As Doezema argues, the recognition of the human rights of sex-workers would entail the recognition of voluntary prostitution, and there is a discomfort in taking a position on voluntary prostitution which neither governments nor many feminists are prepared to accept. Doezema observes: 'It is not only governments who prefer saving innocent women to giving rights to guilty ones. Most feminist discourse on trafficking limits itself to the fight against "forced prostitution", the "voluntary" prostitute is condemned - she is ignored' (Doezema, 1998, p 45). The abuse that sex-workers experience at the hands of law enforcement authorities or even in the context of rehabilitation homes or in protective care remains unaddressed. Those who are already in sex-work, regardless of how they got there, are endowed with an agency and choice that remains stigmatised. If a woman continues to choose to remain in sex-work, then she deserves what she gets. It is frighteningly reminiscent of the requirement in rape laws where the victim must prove her chaste history in order to retain her credibility. The division created between forced and voluntary sex-work is further displaced onto the representation of women in the first world and third world. One way in which force is understood is through its association with poverty. The idea that women in the third world, who have no options available to them given their grinding experience of poverty, are 'forced' to go into sex-work is a pervasive one. By equating choice with wealth, and coercion with poverty, no space remains to recognise and validate the choices that women make when confronted with limited economic opportunities.

The consequence of this approach has been that international actors and state and non-state actors condemn forced sex-work in the name of promoting women's human rights. Simultaneously, these actors do nothing about promoting the human rights of sex-workers. The focus on forced sex-work as a violation of human rights leaves voluntary sex-work, or the rights of those who exist and continue to exist in sex-work, unaddressed. There is a greater possibility of securing support for the victims of trafficking than for influencing structures to respond to the human rights of sex-workers. This dichotomy has reinforced the representations of sex-work in the third world as purely exploitative and of the women as abused and victimised. As Doezema states, the 'concern for rights loses out to hysteria over victims' (Doezema, 1998, p 42). The situation of women who engage in sex-work, regardless of how they entered into this work, remains completely unaddressed by a politics that simply states that they should not be there, or that they should not do such

work, and if they do choose to remain, regardless of the reasons, they deserve to be abused and violated and denied their basic human rights.

Contemporary international feminist legal politics has reproduced the subject of colonial discourse in its articulation of the exploited sex-worker in the postcolonial world. The victimised subject is based on the assumptions of the Other as incapable of self-determination, justifying rescue and rehabilitation operations, which are strikingly reminiscent of the British justification for colonisation and the establishment of the Empire. The victimised subject completely ignores the lived reality of the lives of sex-workers in these other parts of the world. As Kempadoo points out, African and Caribbean countries, 'where one can speak of a continuum of sexual relations from monogamy to multiple sexual partners, and where sex may be considered as a valuable asset for woman to trade', are completely ignored in this analysis 'in favour of specific Western ideologies and moralities regarding sexual relations' (Kempadoo, 1998, p 12). And the victimised subject has consequences on the legal strategies being formulated in the international arena and first world countries that have little to do with the rights of 'victims'.

The strategy espoused by Barry and others has invited legal interventions on issues of trafficking in the international arena that reinforce the victim status of women. These proposals fail to draw a clear distinction between consent and lack of consent when it comes to trafficking.<sup>17</sup> For example, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000), which sets out the services that governments should provide to trafficked persons, is not mandatory. This serious gap in the Protocol is partly due to government reluctance to make any commitment to provide services and protections to undocumented migrants, even if they are victims of horrific crime. Protection and assistance are provided under the terms of the Protocol primarily to advance prosecution rather than as part of a state's obligation. Numerous governments expressed the view that trafficked persons are valuable as witnesses, and therefore deserving of protection during trials, but that they should be deported immediately after the trial. This approach has implications for all women, whether they are forcefully trafficked or migrate voluntarily (even if primarily for economic need), and has specific implications for women in the third world. I elaborate on some of these implications in Chapter 5. The issue is linked to organised crime, an understanding that encourages a punitive approach to human trafficking for sexual exploitation. The emphasis is on the purpose of the movement, rather than on the violence experienced by women in the course of being transported, migrating or moving (Chuang, 1998).<sup>18</sup> While women are increasingly encouraged to avail

17 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime, GA Res 55/25, UN GAOR, 55th Sess, Supp No 49, at 60, UN Doc A/55/49 (2000), contains strong law enforcement provisions and the first ever international definition of 'trafficking in persons'. Note especially Art 3, which deals with the issue of consent in relation to trafficking: '(b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.'

18 Recommendation of Comm of Ministers, Eur Consult Ass, 710th Meeting, Doc No R (2000) 11, urging action by member states against trafficking in human beings for the purpose of sexual exploitation.

themselves of opportunities outside the confining domestic familial arrangement, these new approaches send a strong message: women who move are invariably regarded as 'victims' of trafficking, conflating migration (legal or illegal) with trafficking, lending to the notion that the solution lay, in part, in directing governments to draft legislation to keep their people at home.<sup>19</sup>

As demonstrated in the context of anti-trafficking, these representations invite state responses, primarily in the area of criminal law, that perpetuate gender and cultural stereotypes. Moreover, foregrounding the state neither addresses nor accounts for the myriad of actors that have entered the international arena and become contenders in the play for power, or the impact their activities have had on women's lives (Sassen, 1996; Symposium, 1996; White, 1998). Globalisation is challenging the traditional structures of sovereignty and of state power as it simultaneously alters domestic and familial arrangements. What are the implications of these shifting alignments on women's rights, on the rights of third world women, and on feminist legal politics? These questions cannot be adequately addressed within the exclusive matrix of a state/VAW/victim-centred analysis.

### The authentic victim subject and postcolonial feminist constructions

The imperialist responses and victimised representations of women in the third world have been aided by certain aspects of the politics of feminists in the postcolonial world. I discuss specifically the example of India, where feminism has set itself up as anti-Western in order to meet the charge of anti-nationalism. This authenticity move, which is a symptom of postcolonialism, has been played out partly through the victim subject. Ironically, this move feeds into the representation of third world women and the victim subject that dominates feminist legal politics in the international arena.

The prerequisite of authenticity has been integral to the way in which feminism has operated during the modern period in India. This feature is partly the result of the fact that women's issues were integral to the nationalist struggle. In late 19th-century India, women did not play an obvious role in the independence struggle or resistance to colonial rule, but they were the sites of contestations between political nationalists, social reformers and the colonial power. Law was one site at which the meaning and place of certain cultural practices performed by or pertaining to women in the Hindu tradition were fought out (Chatterjee, 1993; Mani, 1998; Sarkar, 1996). The British colonial power used the position of women to legitimise colonial rule by pointing to extreme cultural practices as evidence of the 'barbarity' of Indian society and of its resulting need for colonial intervention. Social reformers sought legal changes by the colonial administration to improve the status of Indian women,

<sup>19</sup> Eg. the US Act 2000, 22 USC ss 7101-7110, noting especially ss 7106 and 7107.

in particular to eliminate social practices such as *sati*, the prohibition on widow remarriage and child marriages (as discussed in Chapter 3). Their interventions were by no means progressive, that is, they were not based on an assumption that women ought to be equal to men. The interventions were protectionist and promoted the image of the ideal Hindu woman as the ideal wife and mother (Kosambi, 2000). The political nationalists opposed these moves by social reformers. They challenged the authority of the law, regarding it as a colonial tool that should not be used to intervene in the domestic sphere. This place was projected as the pure space of 'Indian culture', and had to be protected from colonial intervention. They were not only challenging the legitimacy of engaging with the colonial state through law reform, but were also challenging the colonial power's authority to define Hindu culture and tradition.

In the early part of the 20th-century, women began to participate in the struggle for independence. The turn of the century also witnessed the 'resurgence of Hinduism' and marked a 'clear ideological shift' from the social reform debates of the 19th-century. The Western and 'alien' ideas of the social reformers actually came into disrepute as the political nationalists sought to resurrect the ideals of the Hindu past. Indian womanhood gradually became the embodiment of nationalism, as the nation came to be constructed as a divine mother and as mother India, and women became 'the mothers of the realm'.

### Nationalism and feminism in the postcolonial moment

In the postcolonial period, both nationalism and feminism took on a different meaning. Nationalism was a crucial mobilising discourse at the time of Independence and had a liberatory and emancipatory potential in so far as it was directed against colonial rule. In postcolonial India, however, the state retains its anti-imperialist stance, but this has not necessarily operated in a liberating fashion (Chatterjee, 1993). The nation-state has come into existence, but today nationalism is playing a conservative rather than a progressive role. The negative dimensions of nationalism are baring themselves. The exclusive focus of Indian nationalism a half century ago was the British colonial power. The sub-continent was otherwise characterised by a vast amount of difference and diversity. Today, these differences are asserting themselves in the forms of separatist movements, regional movements and other cleavages along the lines of gender, caste and religion. It is becoming increasingly difficult for a nationalist ideology to keep all of these fragments together.

Religion emerged in the struggle for Independence as the site for the creation of two independent nations. Religion is re-emerging in the postcolonial present as a central attribute of nationalism and national identity. It is not possible to speak about nationalism today without speaking about religious identity and religious community. Hindu nationalism is emerging as the new nationalism of the Indian state, and the most vociferous exponent of this new nationalism is the Hindu Right. In the contemporary period, this new nationalism is a complex phenomenon. As discussed in Chapter 2, the Hindu Right is establishing its ideology at one level through liberal rights discourse, that is, through the discourse of secularism, free speech, and equality. Their strategy at another level involves an emphasis on

