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)

[Even 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. (Greer, 1994)

In postcolonial India, the subject of sex and desire play out in a multitude of cultural spaces: in celluloid fantasy, ‘radio mirchi’ (chilli) charlatan 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 lack of starvation, helplessness and victimisation is remarkably familiar to our imaginations, irrespective of the reality. 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 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 multiculturalism, and how this focus, in turn, is a symptom of the postcolonial condition (Anderson, 1991; Jayaprakash, 1991; Pandey, 1991). 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 location 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 level, and the eradication of all forms of discrimination on grounds of sex are primary objectives of the international community.1

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 agenda (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 subject to human rights scrutiny. Article 38 of the Vienna Declaration provides:

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).2 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, Preambles). 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 Coomarasamy from Sri Lanka was appointed as the UN Special Rapporteur on Violence Against Women. During her tenure, the


submitted a series of annual reports to the UN General Assembly addressing the issue of violence against women.\(^3\) 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.\(^4\)

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 legal and political solutions, 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.\(^5\) 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 testimonial in public tribunals, as at Vienna, or through international video links.\(^6\) These accounts are usually very graphic and horrifying.

---


4 UN General Recommendation No 19, Violence Against Women, UN CEDAW, 11th Sess., UN Doc A/57/38 (1992) provides that discrimination against women includes gender-based violence against women because she is a woman, or violence that affects women disproportionately. It further states that gender-based violence is a form of discrimination that infringes 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 action by state parties. See UN Report of the International Conference on Population and Development, UN GAOR, 49th Sess., UN Doc A/CN.9/171/13 (1994). Furthermore, the failure of the governments participating in this meeting to incorporate sexual rights into their programmes leaves women's rights as mothers and caretakers undisturbed. Their identities as sexual beings entitled to sexual rights, rather than exclusively as victims of sexual wrongs, remains undifferentiated (Lai and Ralph, 1995).


---

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, 1990).

The victim subject also provides a shared location from which women and different cultural and social contexts can speak. It provides women with a subject that redescribes the atomised, decontextualised and abstractive 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, 1999; 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 protecting 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 (Singhara 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.7 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.8 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’ (Graez, 1994, p 94). It is a belief in the real, true essence of things, the invariable and fixed properties, which define the ‘wholeness’ of a given reality (Fuss, 1989, p xii).

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 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 Roger, 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 erase 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; Creemers, 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 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 while 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, religion, 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 173). MacKinnon argues that, as sexual exploitation and sexual violence are experienced 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 prioritize 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 woman'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 85, 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 are not the same as a 'right' to be violated (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 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 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 and peace. Pornography, for example, proliferates in times of peace, and in times of war is officially mobilized 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, pissing, 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. 9

Mackinnon supports the emergence of a women's human rights movement in the international arena, which scrutinizes and publicizes 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 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 including 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 prioritizing 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 equalizer, 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 conceptualised 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 been 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 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 a simplistic liberal agenda (Haley, 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 calls 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, to 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 continent, 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, and 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, where 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 essentialism 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; in some of the women who refuse it or do not wear it in the public sphere, 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 (Gunung, 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.

Women are burned to death, and this act apparently has some kind of
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 obscuring 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"\[11\]

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-marriage inheritance, reflecting a daughter’s rights to a share in the family property (Narayan, 1997, p 108). 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

\[11\] 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 gurus are not as easily available as in the US. According to Narayan, the mode of murder some kind of spiritual significance misses the most simple, practical explanations that are available. Narayan discusses the confusion 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 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 religious-cultural explanations even when they go on to also provide some 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 not form 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 murders are brought to justice ... tradition 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) 12

Such statements add nothing useful to the understanding of domestic violence or dowry murders in India, and 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.13 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 (Fowell, 1996).

Yet these narrow cultural explanations further skew our understandings of the causes of domestic violence fatalities in India.14 Dowry murders continue to receive attention from researchers because of their connection with the Other and their misplaced cultural association with fire, which exotifies 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 dowry, social custom of dowry and as symbols of the otherness of India, a place where lovely young brides are drowned with kerosene and set alight for

12 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 other) domestic violence, and domestic violence studies in India. Such a less obvious point is that the relatively recent and unexamined assumptions about culture need to be explored to provide more adequate explanations about the causes of dowry murder and the reasons they have emerged as a relatively recent phenomenon in Indian society.

13 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 London, London University, November 1997; Fourth International Conference on Dowry and Bride-Burning in India, Harvard University, 8 November 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 and why these events have 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.353-460; Sunder Raja, 1995, pp.15-53.

14 See Dega, AS, Jyothitrayi, S and Rajejapali, 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, SNDT Women's University, Chinchwad, Mumbai, India, 28-30 November 1998, www.hpa.harvard.edu/organizations/healthnet/Asia/suchana/0929/0929.html (last visited 25 December 2003). This study of victims of domestic violence reveals that none of the women who were violently injured admitted to having been beaten by their husbands. The study and statistics suggest that a large percentage of women are beaten or abused for failing to perform domestic tasks such as cooking or washing adequately.
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 raged 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 obscure the real issues concerning women’s human rights. There is a need for economic, social and institutional analyses 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:


It [resistance] is not based on being the same as men, but on resistance to violence and abuse and second-class citizenship because one is a woman. It starts close to home. African women oppose genital mutilation. Filipino, 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 ‘sutee’ [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 protest pornography. Forced motherhood is opposed from Ireland to Germany to Bangladesh. Female infanticide and objectifying advertising are legislated against in India. (MacKinnon, 1999a, pp 301-02)

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 consists 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. 16 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 cases’. 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:

16 State of Maharashtra v Chandra Prakash Kotecha and Jain [1999] 2 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 legal remits 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 perpetrator is available. Courts must also realize that ordinarily a woman, more so a young girl, will not stoke her reputation by dwelling 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 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, unremembered 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; Gunnig, 1992; Koo-Thomas, 1997; Lewis, 1995; Lewis and Gunnig, 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 today's critique do 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 (Volk, 1994, pp 91–93; Volk, 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 Stobol, 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). The story of 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 women 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 emasculated 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 ‘inclusive pretensions of liberal theory and the exclusionary effects of liberal practice’ (Mehta, 1999, p 56). A society’s treatment of women was itself used as an index of civilisation. 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 the 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 79). 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 strength of 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 opposes ‘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 (Thomson and Jones, 1993, p 139). 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, whereas 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 1827–77 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

 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 opposes ‘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 (Thomson and Jones, 1993, p 139). 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, whereas 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 1827–77 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 pro-
courtsans’ rights. As Kemppadoo states, ‘[s]ex workers struggles are thus neither a
creation of a Western prostitutes’ rights movement or the privilege of the past three
decades’ (Kemppadoo, 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 is in part due to the fact that anti-trafficking has
operated along a forced versus voluntary nexus (Doeezema, 1998). As Doeezema
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. Doeezema 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’ (Doeezema, 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
counting 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 Doeezema states, the ‘concern for rights losses out to hysteria over victims’
(Doeezema, 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 Kemppadoo
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 women to trade’, are completely ignored in
this analysis in favour of specific Western ideologies and moralities regarding
sexual relations’ (Kemppadoo, 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.17 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 trafficking
victims, is non-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, 1996).18 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
contains strong law enforcement provisions and the first ever international definition of
‘trafficking in persons’. Note especially Art 4, 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
specified in subparagraph (a) of this article shall be irrelevant wherever any of the means set
forth in subparagraph (a) of this article has 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.
Ape, whose 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.19

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 feminisms 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; Aliani, 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.

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’ ideals 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 abiding 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

19 Eg, the US Act 2000, 22 USC ss 7101-7110, noting especially ss 7106 and 7107.
religion as the real basis of national identity and is therefore quite reactionary. Religion is being deployed as the overarching category to create one people and one nation, and to create a common enemy: the Muslim. The new Hindu nationalism is not concerned with the rights of women. Its agenda for women fits into its overall ideology of creating a Hindu Raj (Hindu rule) or the establishment of a Hindu state in India.

The emergence of the Hindu Right provides the backdrop for the contemporary women's movement in India. The contemporary movement has shifted its focus from women as mothers of the nation to women's individual rights. It has once again sought a redefinition of tradition and gender, this time by revealing and challenging the violence and oppression that women experience. These efforts, like those of the social reformers of the 19th-century, have met with considerable resistance from powerful discourses (Kapur and Cosman, 1996, p 71). The primacy of women's roles as wives and mothers is strongly asserted, and any challenge to these traditional roles within the family are met with cries of 'religion in danger' and of 'the family under attack'. Feminists have had to contend with the fact that the Hindu Right has been appropriating its issues and strategies, as I illustrate later in this section using the examples of beauty pageants and sex-work.

Feminism in India continues to have a tenuous relationship with nationalism and has been cast as Western and imperialist at several historical moments (Radhakrishnan, 1992). Indeed, feminism has been charged with being a product of decadent Western consumerism (see Bhabha, 1994, p 2). For this reason, feminists have had to project themselves as nationalist and anti-Western (as discussed in Chapter 3). They have adamantly denied allegations of being Western, and sought to establish a distinctively Indian feminism: the 'authentic Indian feminist subject'. This distinct subject has been constructed on essentialist notions of the West and Western feminism. The search for the authentic subject has been a cornerstone of feminist politics search for legitimacy in the contemporary Indian context. The unreflective embrace of nationalism, by at least some significant sections of the feminist movement, has led to stumbling and contradictory results.

On several issues that have been characterised as women's rights issues, Indian feminists have sought to distinguish their position from Western feminism - not only in the hope of being heard, but also because of a genuine belief that these issues are different. Two recent examples where this position has been very starkly presented are beauty contests and sex-work.

Beauty pageants and fashion shows have emerged as zones of cultural contest over the past few years. In November 1996, when the Miss World beauty contest was held in the southern city of Bangalore in India, many women's groups opposed the holding of the pageant on the grounds that it degraded and commodified women and was vulgar. Some of them countered the pageant space by proposing to hold a 'Miss Dowdy Victim' pageant that would represent the true plight of Indian women in the country. According to one pamphlet circulated by a large number of women's groups in Delhi that opposed the staging of the pageant, 'beauty contests foster a false notion of "free choice" which obscures the reality of violence against women' (Kapur and Ghosh, 1996, pp 11-12). The Indian woman as victim came to be equated with recognising the distinctness of the Indian nation - the idea that women in India were different from Western women. The 'real Miss India' was represented as someone totally different from the beauty queen. Every four minutes a crime is committed against a woman in India. Every 47 minutes a woman is raped. Every 44 minutes a woman is abducted. Every 17 minutes a woman are killed for dowry' (Kapur and Ghosh, 1996).

In contrast to the argument implicitly ascribed to the Western woman, the Indian woman was represented as a suffering subject, impoverished and violated. The victim image was the message conveyed to women in India, as well as to international audiences, in order to secure legitimacy for Indian feminists.

These groups came to share an uncomfortable platform with different segments of the Hindu Right, who opposed the pageant on the grounds that it was against Indian cultural values (especially the-swimsuit competition). The Hindu Right regarded the swimsuit competition as extremely offensive as it revealed women's bodies in a fashion that was alien to 'our culture'. Similarly, in denouncing the Miss World beauty pageant, the chairperson of the National Commission of Women invoked Indian cultural values. The Commission also focused cultural indignation on the swimsuit competition. This part of the pageant was ultimately flown out of India and held in Mauritius (where ostensibly it was not against Mauritian cultural values). The most extreme form of protest came from women members of the Hindu Right who threatened to crash the pageant and immolate themselves should the pageant be held.

Between 1996 and 2000, Indian women have been crowned beauty queens of the Miss World pageant, Miss Universe pageant and Miss Asia-Pacific pageant. The response from some feminists continues to be to declare these victories as further examples of the commodification of women and of the impact of Westernisation and globalisation. These statements are constantly converge with those of the Hindu Right. In April 1998, Hindu-Right-supported student groups took control of the University of Lucknow, located in the northern state of Uttar Pradesh, to declare a blanket ban on fashion shows and beauty pageants on campus. The government also banned the screening of the Miss World beauty pageant, at a time when Sushma Swaraj, the 'moral police woman' of the previous BJ-led government at the centre, was the Information and Broadcasting Minister. It was contended that such censorship were not in keeping with the profile of India's national image. Shortly after Priyanka Chopra won the title of Miss World 2000, Rajesh Singh, the Chief Minister of her home state, Uttar Pradesh, banned the holding of beauty pageants and fashion shows in the state. He condemned them as a form of Western imperialism that was eroding Indian cultural values and degrading Indian womanhood. According to Singh, beauty contests were part of a 'larger game plan to build a massive cosmetics market in India'. He further stated: 'Beauty contests are nothing more than exhibition of the female body and this is extremely unfortunate. Real beauty lies in one's intellect. I believe that beauty is God's gift and there is no need to put it up for public display.'

---

Sex-work has been another area in which Indian feminists have tried to distinguish themselves from Western feminism. The arguments of some feminist groups have assumed that sex-work in the North or West is an occupational choice (emphasizing thereby the agency of Western women, albeit in a disapproving, if non-supportive manner), but that in India women enter the trade as a consequence of poverty. In March 2001, some groups called for a ban of the first International Sex Workers Carnival held in Calcutta to celebrate the lives and struggles of sex-workers in Asia, and to demand that their basic human rights to mobility, family and work be respected. Opponents of the carnival argued that sex-work in South Asia was a form of exploitation and largely a condition of poverty, and that those who were participating were simply promoting sex tourism. This position has been supported by a large number of feminists and women's groups in India and South Asia.

For example, Ruchira Gupta, who produced the film Selling of Innocence, on trafficking in India and Nepal, argues that in America, pro-choice arguments are used by feminists to make sex-work arguments. However, she states that in rich countries ‘they understand and manage globalization differently from people in poor countries’. In poor countries, ‘when people do choose to be trafficked or get into prostitution, they’re choosing it as a survival strategy for a very limited period of time, under tremendous pressure – economic pressure, pressure from family, from children crying for food, husbands beating up wives, and no income in the village’ (Shifman, 2003, p 128). As Donna Fernandes, activist with a Bangalore-based women’s group, has argued: ‘Hence ... western women may opt for prostitution as an occupational choice ... On the other hand, most Asian women are compelled into prostitution by poverty and deception (in the form of marriage or promises of finding her employment)’ (Kotiswaran, 2001, pp 188-89).

Such critiques are located on an East/West binary (as discussed in Chapter 3). The West is set up as revolving around the needs of the individual. In contrast, Asia or the East is community based. The critique assumes that, although choice is possible in the West, economic oppression in Asia is no less encompassing that the very possibility of choice or agency is negated. Secondly, the critiques are also based on certain cultural assumptions. The culture of Asia is said to be more communitarian, as opposed to the culture of the West, which is more individualistic. Asian women are set up in opposition to Western women: the Asian woman is cast as chaste and vulnerable to exploitation, in contrast to the promiscuous Western woman who is ruled by the (in)morality of the market. The discourse of feminists in this instance is embedded in the idea of an authentic Indian subject and the construction of the woman in sex-work as a victim of the (Western) market. The victim status conferred on women by some postcolonial feminist positions becomes almost indistinguishable from the discourse of the purity of the nation and the preservation of Indian womanhood that characterized the nationalist discourse in the late 19th- and early 20th-centuries. It is a status that invites the state to resort to the criminal law to address women’s issues and, more significantly, coincides with the agenda of the Hindu Right, whose position on women’s rights is very different.

The Hindu Right’s official position on women is filled with commitments to equality and pledges to restore women to a position of equality with men which is accepted as part of the Indian tradition. Their discourse of equality is fused with a more sociocentric revivification discourse that seeks to reclaim a glorious and ancient past. The objective of equality of the more moderate voice in the Hindu Right that is the BJP, is the restoration of women to the position they ostensibly enjoyed in a ‘golden age’. It is critical to understand the Hindu Right’s approach to equality in order to understand its approach to women’s rights. According to the BJP, men and women are equal but not necessarily the same. Since women and men are not the same, then according to the logic of formal equality, they do not have to be treated equally. Thus, the Hindu Right is able to invoke the discourse of equality while at the same time undermine any real entitlement to equality by stating that women are different. The question remains of what equality means in the discourse of the Hindu Right. The answer lies in the BJP’s policies and statements on women.

The BJP policy on women is often focused on the role that they have traditionally allocated to women according to the sexual division on labour. For example, healthcare, particularly maternal and child care, is taken up as an area of policy, as is sanitation facilities for poor, rural and slum women. Policies that reinforce women’s role in the family as mothers and wives are supported as part of women’s equality rights. In so doing, the Hindu Right reinforces the assumption of natural and essential differences between women and men. Women are mothers and wives – they are different – and these differences must be honoured and protected. Women are self-sacrificing and dutiful and in turn they are to be protected from any indignity, harm or violence.

The focus on the authentic victim subject triggered a host of law reform proposals by the previous BJP-led government that were consistent with its policies towards women. The government declared the year 2001 to be the ‘Year of Women’s Empowerment’. They proposed to reform a number of laws in order to promote women’s empowerment. However, a close analysis of this policy reveals that most of the proposed law reforms concerned the criminal law. These included strengthening the punishment for giving dowry, the prevention of sati, trafficking in women, prostitution and obscenity, and the introduction of a law on domestic violence. Even the proposed sexual harassment law was to be brought within the framework of the criminal law. Although many of these proposals touched on issues that concerned women, there were no corresponding proposals to promote women’s civil rights, mobility, freedom, bodily integrity or substantive equality. While there are some tentative proposals to reform some of the laws of religious minority communities that discriminated against women, these strategies were not


designed to foreground women's rights and interests. Rather, they reinforced the law and order agenda of the Hindu Right, their paternalistic approach to women's issues, and their communalising agenda.

The treachery of 'authenticity'

By entering onto the terrain of authenticity, feminists have headed down a treacherous path. Indian feminists' adoption of this anti-Western rhetoric, although often a dictate of political realities, is not necessarily progressive. Moreover, the idea of an 'authentic victim subject' in India operates along two assumptions: that Indian women are a monolithic victim group who are all similarly oppressed, and that there is an essentialised Indian culture and Indian woman. The result is that Indian feminism has essentially the very category of gender that it, along with others, critique Western/first world/white feminism for producing. The position of Indian feminists has resulted in the exclusion of other subjugated identities. Some Indian feminists have also essentialised culture by setting up 'Western culture' against 'non-Western culture' (Narayan, 1998). The essentialising of discourses that have presented such difficulties for the women's movement during the colonial period has produced contradictory results for feminists in postcolonial India. The fact that feminists have come to inhabit a highly contradictory space is not in and of itself problematic, since many spaces feminism inhabits are contradictory. The problem arises when that space is inhabited reflectively.

The failure to reflect on the contradictory nature of nationalism has led to a host of problems. First, the denial of agency, as illustrated by the responses to the beauty pageant and the issue of sex-work, has been articulated by feminists in and through the discourses of nationalism and authenticity. A consequence of such arguments is the construction of a pure place of authenticity. This is remarkably similar to the strategies of the religious right. The contemporary discourse of the Hindu Right around women's rights is based on the idea of modern but not Western. This idea relies heavily on the language of tradition: of returning women to their rightful place of honour and respect that they enjoyed as wives and mothers in some long-lost ancient Hindu past. Their discourse of tradition is a selective and thoroughly modern reinterpretation of the past.

The legitimisation of the Indian feminist position has also demanded a repudiation of the West (in particular the Western feminists), the polarisation of Western versus Indian feminism, and the search for the authentic subject. This is troubling because it fails all too easily within the more traditional relationship between women and nationalism, and is not clearly distinguishable from the contemporary discourse of the Hindu Right on women's rights. The construction of the authentic victim subject position, constantly in opposition to imperialism or the West, seems to be critical to the legitimacy of Indian feminism. As illustrated by the beauty pageant and sex-work examples, the subject is distinguished from the West and the Western feminist subject through her position of victimisation. The closer the association between the Indian feminist and this victim subject (who is projected as the real Indian woman or the authentic subject), the greater the legitimacy for feminists and feminism to operate in India. Yet, this subject has not produced a liberatory politics for women. Indeed, its existence has reinforced both a

protectionist position of the state towards women and the women's rights agenda of the Hindu Right. The denunciation of beauty queens or sex-workers does not create a space for more complex politics; it simply eliminates such experiences and prioritises the victim as the true symbol of Indian feminism and Indian womanhood. In negating women's agency, the complex negotiations and the multiple subjectivities of women are also eradicated. How can we articulate a space for women's multiple subjectivities? What is to be done with Malleswari, who won the bronze medal (the only medal for India) at the Sydney Olympics in 2000 in women's weightlifting? Or with Lara Dutta, who won the Miss Universe pageant in 2000, and has no reluctance to speak explicitly about sex, safe sexual practices, and the issue of AIDS? Or the sex-workers who state, 'We want bread. We also want roses'? Where do we locate these women in a politics that operates along the strict binaries of victim/agent, East/West, first world/third world, or the West and the Rest?

I have discussed how the victim subject informs women's human rights discourse in the international context in ways that reinforce gender and cultural essentialism. I suggest that in order to partly avoid these traps, the engagement with human rights involves more than simply a claim to formal equality. We need to unpack how feminist arguments contribute to the very construction of the subject, reinforce the regulatory project, and reinforce normative understandings about the gendered subject, sexuality and culture. I have also examined some of the rather reactionary, and unanticipated, consequences of promoting the victim subject. Regardless of whether it is a product of the dominance feminism of the West or of the authenticity position of Indian feminism, this subject has become central to the women's human rights movement. The victim subject has become a decontextualised, ahistorical subject, disguised superficially as the downy victim, as the victim of honour killings, or as the victim of trafficking and prostitution. The subject is no longer distinctly Indian or European, let alone Eastern or Western. Oddly enough, this subject has created the basis for an alliance in the human rights arena between Western feminists and Indian feminists, amongst others, in their pursuit for the recognition of women's human rights.

In the context of India, I have argued that the very thing that represents the authentic subject for Indian women - the non-Western subject - bears an uncanny resemblance to the basis of the alliance between Indian women and Western women in the international arena. West and non-West, in effect, become one in the victim - discrete, and yet not. There is a convergence of Indian women's realities with some

23 The event was the women's weightlifting event in the 69 kilogram category. Times of India, 2000. The Indian Express, 2000.
The Tragedy of Victimization Rhetoric

The burning episode is only part of the story. Highlighting the burning incident reinforces her victim status and a cultural stereotype. It excludes significant portions of her story as well as the broad array of human rights that are implicated. The fact that her rights to custody and maintenance were restricted because of her religious identity as a Christian, and not simply because of her gender identity, prompts a deeper understanding and a more sharply tuned response to her situation and her struggle. Her location as a divorced, Christian woman in a Muslim-dominated, nondemocratic Pakistan, where strict laws against rape, adultery and fornication have been enacted, is critical to understanding her story. These facts are also material to understanding the intersections between the politics of her struggle in court and the social context of her family and religious community, where she was both a marginalised and exsanguine subject, and not exclusively a victim of violence.

However, the focus on multiple subjectivities is not in and of itself sufficient. My second point is that it is also necessary to focus on the subject situated at the periphery, as she has the power to bring about normative disruptions. For example, I have consciously highlighted the sex-worker in this essay. She is a ‘speaking’ and ‘animated’ subject who can and does make choices for economic empowerment, which includes migration. She is an unbounded subject who exists outside the supervision of the family. The sex-worker intensifies concerns about the threat to the family as well as to the purity of the nation. Her movement challenges the anti-trafficking regime being advocated as the new international regulatory mechanisms for ostensibly protecting the human rights of women. She exposes how this new regime curtails mobility and economic opportunities for women and other migrants, and intensifies the moral surveillance of women’s sexual conduct. It is a regime that does not necessarily restrict the number of women who are moving or migrating, but simply makes it more dangerous for women to cross borders. It is not directed towards protecting the rights of women who are in the sex industry or who migrate, albeit illegally, for purposes other than sex-work.

The sex-worker brings about several disruptions. Her claims to rights as a parent, entertainer, worker and sexual subject disrupt dominant sexual and familial norms. In postcolonial India, her repeated performances also challenge and alter dominant cultural norms. From her peripheral location, the sex-worker brings about a normative challenge by negotiating her disclaimed or marginalised identity within more stable and dominant discourses, that is, the way in which the intersection of the dominant sexual, familial and market ideologies structure her experience of the

25 Another speaker was Alpana Chandola, who was described as a ‘survivor of dowry violence’. However, her testimony revealed that she was also a survivor of domestic violence, beaten and shaved from the first day of her marriage. Focusing on the dowry demand diverted attention from other reasons for her violence that she experienced. Describing Chandola’s experience of violence through the lens of dowry closed off a more complex socio-economic analysis of her experience and reinforced cultural stereotypes about how women in India experience domestic violence.

26 The theory of intersectionality was developed primarily by black feminist thinkers who explored the ways in which categories of race and gender intersect and suggested that black women’s oppression was not simply racial oppression added to gender oppression (Crenshaw, 1991; Harris, 1990). Postcolonial feminists have also examined the extent to which gender intersects with colonial understandings of the ‘native’ subject (Spivak, 1988). For a more general discussion on the theory of multiple subjectives, see Powell, 1997.
that women may be subjected to in the course of movement, including a lack of
interrogation of the racist, sexist and ‘neo-colonial’ anti-trafficking laws being
advocated by first world governments (and reproduced in some feminist literature).
These initiatives harm more women than they help and reinforce stereotypes of the
third world as barbaric in the treatment of its women.

The beauty queens in the postcolonial world are also peripheral subjects who
might be centred in our analysis. They have provoked serious opposition from state
actors, religious conservatives and some feminists, and at the same time have
opened up the space for Others to redefine the pageant space and understandings
of beauty, culture, gender and the body itself. As the example of the Miss World
1996 pageant illustrates, these subjects are implicated in human rights discourse
because of the opposition – and indeed, the violations – they have encountered. The
response of feminists and the religious right, who together threatened to disrupt the
pageant and force the participants off the pageant stage in Bangalore, created a law
and order problem in the city as well as a harassment threat to the participants.
In the course of the disruption of the cultural spaces inhabited by the beauty
contestants, they were denied recognition of their rights.

Another example would be the migrant woman – the travelling subject, whose
very movement across borders, whether legal or illegal, challenges normative
arrangements of gender, sex and culture. I elaborate on the implications of such
cross-border movements in Chapter 5. Through her cross-border transgressions, she
brings to the fore women’s ability to choose to move, and belies cultural
assumptions that imagine women, particularly third world women, as confined to the
home in an oppressive familial and cultural space. Through the course of travel
and the obstacles she encounters as she crosses borders, she exposes the shape-
shifting of culture and the anti-migrant impact of recent anti-trafficking and
immigrant legislation at the international, regional and domestic levels. She is a
market actor, a trader and a cultural importer, who brings an understanding of
about globalisation to the metropolis.

My third argument is that it is important to illuminate the moments of resistance
of peripheral subjects. This involves more than simply viewing rights claims in and
of themselves as acts of resistance. The claims of peripheral subjects incorporate a
challenge to the normative assumptions about gender, sexuality and culture that
inform human rights. For example, any claims to equality brought by a subject such
as Malteswari, the female weightlifter, would challenge both gender and cultural
essentialism. Malteswari’s location as a working-class married woman, her body,
and her commitment to weightlifting can provide a serious challenge to the
emaciated, linear image of the third world woman that has colonised feminist
imagination. Another example once again is the sex-worker in postcolonial India,
who has been projected primarily in terms of her experience of victimisation and
violence which ignore her struggle for, and claims to, rights in her multiple

world. By renegotiating and occupying dominant sexual, familial and cultural
norms, she brings out the ambivalence of these norms. She simultaneously creates
the potential for a more inclusive politics, opening up a space for subjects who have
remained unaddressed in the women’s human rights politics as it has emerged,
such as single parents, other sexual minorities, and religious and cultural minorities.

The idea that the postcolonial sexual subaltern subject can consent to sex-work,
and that she may consent to move or enter into a consensual arrangement with
someone who arranges her transport from one port to another, free from coercion or
violence, is also challenging at a normative level. Women from the third world can
and do consent to commercial sex, and thus challenge sexual and cultural
normativity, as well as the imperialist representations of women in the third world
that have come to inform the international women’s rights agenda as well as the
policies of first world governments. Women from the third world move to the first
world to engage in sex-work and other practices, such as domestic labour, thus
challenging the dominant assumptions that inform both the contemporary
international legal regime as well as feminist legal politics, which assumes that she
is dragged, beaten, forced, kidnapped or abducted into this work. Women can and
do choose to move and work in the sex industry, and even find clandestine means
by which to enter into another country, searching for other economic opportunities
if legal ones are not open to them. She is a market actor who understands the
economic and other opportunities available to her in other parts of the world. As
a market actor, she challenges the oversimplistic and patronising assumption that
women in the third world enter the sex trade because of conditions of poverty,
which belies the question why all poor women do not opt for sex-work. They can
choose to cross borders in search of better economic opportunities, as do, for
example, educated middle class graduates from the third world. As Jamie Chua
has argued, the focus on the normative question:

... of whether a woman should be able to consent to trafficking and prostitution
overlooks the empirical fact that women actually do consent to these practices, and
moreover, risks neglecting important descriptive facts regarding the quality of a
woman’s consent to these practices ... [I]n the case of a woman forced into prostitution
who was deceived by a trafficker’s lure of an attractive working job abroad, or a
woman who intended to engage in self-regulated prostitution and found herself in a
debt-bondage situation, the source of exploitation might be misinformation or debt-
bondage, respectively. Deeming consent irrelevant to the women’s victimisation:
also risks portraying women as perennial victims of false consciousness, incapable of making
autonomous choices regarding their means of migration and employment. (Chua,
1998, pp 81-85)

The fact that women cross borders, and ought to be able to cross borders, has been
conflicted with the purpose of their journey, rather than with the conditions under
which they cross borders. Recent literature in the area of international human rights
continues to invoke the trope of poor, third world women’s bodies, that is, the body
of the third world subject exclusively as a victim, reinforcing arguments against sex-
work per se as inherently exploitative, rather than supporting the rights of these
women to move. Little attention is being given to the coercive and abusive practices
emerging in the international human rights arena (Phillips, 2000). These performances are not transformative, but placing the erouche on the catwalk, or as a participant in a beauty contest in the Hijra Habba, represents an appropriation of a cultural space. It also brings to the fore the material realities and differences within these different sexual subgroups. While the peripheral location of these subjects exposes at least one basis on which legal and economic entitlements and distributions operate, class advantage can have a distinct impact on the level of vulnerability to human rights violations of these sexual subjects (People’s Union for Civil Liberties, 2003). At a normative level, in each location, dominant meanings are challenged as the subject blurs the line between that hegemonic call to normalising gender and its critical appropriation (Butler, 1993, p 127). And at the international level, these spaces and subjects challenge cultural and gender stereotypes that have come to inform the politics of the women’s human rights movement.

Foregrounding the resistance of the peripheral subject scatters hegemonic understandings of culture and gender that are reproduced at the international and domestic levels. The reproductions are invariably essentialist and invite imperialist, conservative or protective interventions. However, the claims made by the peripheral subject may not necessarily be successful or even heard. In fact, the more marginalised and subordinate her politics, the more resistant the state will be to order her any ground. In particular, it will be reluctant to grant her human rights. Carol Smart has argued that the more conformist feminists are in their legal arguments (by resorting to the language of individual rights, motherhood or sexual morality), the more likely they are to succeed. Thus, she says, the strength of radical or cultural feminists is that they deploy common sense notions, such as sexual and gender difference, in ways that seek to rearrange them rather than to challenge how we think about these categories (Smart, 1995, p 110). The success or failure of the peripheral subject is contingent on the interplay of dominant familial, cultural and sexual ideologies and the particular claims she puts forward. She may fail because of social, economic or historical constraints and oppositions. Her claims will not redefine gender or even culture instantaneously. Feminist efforts to destabilise dominant meanings have also encountered real oppositions firmly inscribed in dominant institutions and structures. Such oppositions cannot be countered through a single engagement. Feminist engagements with human rights require a consistent and careful consideration of the way in which feminist claims may be


[28] The disruption of the pageant space is not necessarily confined to the postcolonial world; see Butler’s discussion of Paris Is Burning and the practice of voguing and theatrical among poor black and Hispanic drag queens in Harlem and Brooklyn (Butler, 1993, pp 121-40); Beautiful Clandestine (Castle Rock Entertainment, 2000), where the main protagonist, an undercover cop, is sent to secure the pageant space from a terrorist threat, but proves incapable of conforming to the cast-iron gender mould and performance required by the pageant. All of these representations move beyond the Barbie doll images of the beauty queen and are equally challenging of cultural and gender essentialism.

[29] At the level of popular culture, such challenges have been posed by the representation of drug queens in the opening sequences of the 1996 film, A Million Pono, Thanks For Everything, Julie Neumair (Ambros: Entertainment, 1993), where Patrick Swazye and Wesley Snipes prepare themselves to participate in the annual transgenders beauty pageant by applying makeup and wearing commercially available. Their performance inscribes the pageant space with notions of beauty, gender and sexuality that challenge the traditional pageant space. The performance is still limited, however, and does not necessarily lead to liberation from hegemonic constraints. See Judith Butler’s discussion of the challenges posed by Venus Xtravaganza, who is represented in Paris Is Burning as a transgendered woman who has an added ‘desire to become a whole woman, to find a man and have a house in the suburbs with a washing machine’ (Butler, 1993, pp 233-34). She does not appear to rethink the heterosexual framework, indicating that the question of denormalisation of gender and sexuality may not lead to a complete rethinking of normality.
transformed through the powerful and complex interplay between dominant social relations and competing discourses. However, centring the peripheral subject and her moments of resistance is a disruptive move, destabilising universalised and naturalised claims made about women, poor women, third world women, or the culture from which these women emerge. The production and subjugation of identities are processes that go on simultaneously through legal engagement. The victim subject counters the atomised, ahistorical subject of liberal rights discourse, but it is not sufficiently disruptive of naturalised and universalised assumptions about gender and culture. The challenge is to disrupt and dispute the naturalness and originality of the victim subject.

Conclusion

The victim subject has highlighted that women suffer violence in the home and that such violence constitutes a human rights violation that is the responsibility of states to prevent or remedy. This is a very significant victory. Nonetheless, the creation and remaking of a victim subject has not necessarily proved to be empowering for women. In fact, there are hidden normative and regulatory traps that might result in a setback to the broader recognition of women’s human rights. Nor is it sufficient to argue that rights claims by victim subjects constitute acts of resistance and are informed by a ‘woman’s point of view’. The rights claims by victims of sexual violence, though important, have in part constructed the terms on which women can claim and enjoy human rights: through reinforcing gender and cultural essentialism and without disrupting the normative assumptions about gender, sexuality and culture that inform these claims. The VAW campaign and the focus on the victim subject have led to a proliferation of rights for women, but it has not resolved the problem of gender subordination. Indeed MacKinnon was correct to point out in her early work that rights claims would serve to reinscribe the terms of male dominance in the law, mitigating the harms to which women are subjected without transforming the very terms under which they continued to be subjugated. Yet resorting to a ‘women’s point of view’, whether by VAW campaigners who have lobbye for the recognition of violence in the private domain as a human rights issue, or as the grounds from which to build a feminist law or jurisprudence, has not brought about the political transformation that initially inspired the women’s human rights campaign. This discussion reveals the consequences of a victim centred approach and the focus on VAW discourse for women’s human rights claims. Such claims cannot be detached from the normative and discursive frameworks in which they are made and deployed.

In this chapter, I reveal the downsides of VAW discourse and a victim subject politics for women. The focus on the authentic subject as a victim in Indian feminist discourse has not produced a liberated subject, but rather one that is based on a questionable authenticity and set up in opposition to the Western subject. This subject risks denying women the agency that they in fact demonstrate throughout their lives, whether by leaving an abusive relationship, soliciting for the purpose of sex work, participating in a beauty pageant, or performing as a weight lifter.

In the international arena, the victim subject and the primary focus on violence against women, creates an exclusionary category built on racist perceptions and stereotypes of third world women. This category is disempowering and does not translate into an emancipatory politics. It produces the fiction of a universal sisterhood, bonded in its experience of victimisation and violence. There is no space in this construction for difference or for the articulation of a subject that is either empowered or provides a normative challenge to the gender, sexual and cultural assumptions that underlie the campaigns for women’s rights or human rights discourse. Indeed, the victim subject collapses easily into Victorian/colonial assumptions of women as weak, vulnerable and helpless. It also feeds into conservative, right-wing agendas for women, which are protectionist rather than liberating (Russ, 1998; Herman, 2001). Additionally, it encourages states to resort to the criminal law to address women’s rights issues, an arena of law in which nation-states enjoy powers of moral surveillance and regulation.

Challenging the universalising and disempowering implications of foregrounding the victim subject in feminist legal politics, I do not seek to revert to the fragmenting politics of identity. Instead, I argue in favour of recognising different subjectivities and peripheral subjects, primarily to counter the fictitious homogeneity and sisterhood created through the victim subject. The challenge for feminists has been to think of ways in which to express their politics without subjugating other subjectivities through claims to the idea of a ‘true self’ or a singular truth about all women. The re-envisioning of the subject of women’s rights discourse leads to a reformulation of the notion of agency and choice. It is an agency that is neither situated exclusively in the individual nor denied because of some overarching oppression. It is situated in the structures of social relationships, the location of the subject, and the shape-shifting of culture. My arguments emanate from a postcolonial context. Although there have been some critiques of liberalism and rights discourse by feminist legal scholars in the West, it has rarely been amplified to address the ways in which the colonial encounter problematised rights discourse from its very introduction into the former colonies. Rights have not been received unequivocally as a liberating and emancipating project. Nor has ‘inclusion’ been regarded as the antidote for the subordination and exclusion that have constituted and sustained the boundaries of human rights and law projects. A postcolonial feminist position on human rights advocated in this essay accepts the value of rights without celebrating the colonial processes that justified imperialist intervention, and that continue to justify similar interventions in the postcolonial world. Also, it is engaged at the center with bringing normative challenges to the regulatory edifice that entrenches assumptions about gender, sexuality and culture in law and continues to justify exclusions and subordination. Women cannot be
incorporated into the human rights project through intervention strategies that replicate imperial interventions and the victimisation of women by the cultural Other, nor can they be recuperated through a project that seeks to distance itself from the West through the construction of an authentic subject, which is also thoroughly victimised and impoverished. There is a need to interrogate the normative assumptions about gender, sexuality and culture that remain in place and are partly reinforced in and through the VAW campaign and its focus on violence against women. This campaign continues to fall back on an uncomplicated position on rights, despite the critique of rights, and offers mitigation rather than transformation as a solution. The challenge lies in exposing the normative aspects of human rights discourse as it applies to gender, culture and sexuality, rather than merely consolidating the regulatory effect of these rights. This requires a revisiting of the women's rights strategies and claims, and bringing a normative challenge to human rights discourse. The recognition that the postcolonial subject can return the gaze and force an unpacking of the regulatory norms that underlie women's human rights claims and practices can perhaps provide the alternative and possibly transformative cosmology we are seeking to move towards.

Chapter 5

The Other Side of Universality: Cross-Border Movements and the Transnational Migrant Subject

Before professors in business schools were talking about global economics, illegals knew all about it ... The illegal immigrant is the bravest among us. The most modern among us. The prophet ... The peasant knows the reality of our world decades before the Californian suburbanite will ever get the point. (Kumar, 2001, p 203)

The current moment of globalisation is witnessing an extraordinary movement of people, legitimate and illegitimate, across national and international borders. These movements are exposing the porosity of borders, the transnational reality of subaltern existence and the contingent foundations of international law. I examine how encounters with these constitutive Others, quite specifically the transnational migrant subject, disrupts and disturbs the universalist premise of international law. At the same time, these cross-border movements are countered, curtailed, restricted and even resisted, by a modernist narrative of international law, the legitimacy of which is constructed along the axis of progress, relations between sovereign nation-states, and the sovereign subject.

The contours of legitimacy in international law are re-shaped, altered and conferred according to the view one takes about the modernist narrative of human progress and development. One view is that international law constitutes a narrative of progress, the coming together of nations and the recognition of the need for a globalised legal order. It is a narrative sustained along legitimate borders of nation-states that participate in the global project through consensus. It is driven by a persistent belief that history has a purpose and direction coupled with an assumption that the world has emerged from a backward, more uncivilised era. International law reflects the metamorphosis of civilisation from the primitive into a modern and evolved form, and this progress has emanated from the heart of Europe.

This position has been challenged by those who do not regard international law as such an uncomplicated and linear project (Anglic, 1996; Engle, 1998; Kennedy, 2000; Koskenniemi, 2002; Marks, 1997). As I discuss in Chapter 2, some view modernity’s thesis of ‘history as progressive’ as a fiction and exclusive, and law as the mechanism for sustaining unequal structures of power, whether in the form of slavery or Empire and a subordinating or ‘civilising’ (colonial) of the superior power. Indeed, when Europe was in the midst of a struggle for liberty, equality and freedom, Europe’s Others continued to be subjugated under the weight of colonialism and slavery. Even within Europe, gender apartheid established a hierarchy of what and who constituted the liberal subject: the white propertyed male. These critiques expose what Wendy Brown describes as ‘so much history and so many histories’ of the world (Brown, 2001, p 5).

Another view is that international law is a corrosive tool that has eroded the legitimacy conferred or exercised through sovereignty, national and social cohesion, and the normative family. According to this view, the era of historical progress, coherence and totality has ceased, and we have entered the age of uncertainty and