

## Two Notions of Human Rights: 'Modern' and 'Contemporary'

### I. Authorship and Ownership

The very notion of human rights (or the 'rights of *man*') is generally presented as the gift of the West to the rest. The non-Western traditions are usually considered bereft of notions of human rights. Neither did they experience the rise of capitalism with which the origins of 'modern' human rights is thought to be inextricably interlinked; nor did they attain the 'flourishing of theoretical knowledge (*savior*) through which European humanity passed on its way towards its modernity'.<sup>1</sup> Such consciousness of human rights that occurred in non-Western societies is said to be purely due to the patterns of imposition and diffusion of the Enlightenment ideas and ideals among them. It was the mimetic adaptation of these ideas that enabled, even empowered, the non-West communities with the knowledge and power to interrogate their traditions devoid of notions of human rights and to transform these in heroic confrontation with colonization and imperialism. Even today Third World theory and action is thought to be mimetic, picking up cognitive bits and pieces from the smorgasbord of the critique of Enlightenment from Marx, Nietzsche, Freud, Heidegger, Habermas, Rawls, Foucault or Derrida. Overall, human rights discursivity was and still remains, according to the narrative of origins, the patrimony of the West.

To be sure, such things that were the commonplaces of thought in the preceding three centuries are never articulated any longer with such overt epistemic racism. Such attitudes do however persist, and this

<sup>1</sup> Emmanuel Levinas, *Outside the Subject* (1987), 119 (italics omitted).

bodes ill for the future of human rights. The presentation of human rights notions as enclosed in originary Western metanarratives entails many consequences, intended or otherwise.

First, it disables any intercultural, multi-civilizational discourse on the genealogy of human rights. The originary claims concerning the invention of 'human rights' in the West lead to a continuing insistence on the oft-reiterated *absence* of human rights traditions in the 'non-West'. From this it is but a short practical step for the 'West' to impart, by coercive and 'persuasive' means, to others the gift of human rights. This leads to a rank denial, even in a post-colonial and post-socialist age, of equal discursive dignity to other cultures and civilizations. It also imparts a loss of reflexivity, in terms of intercultural learning, for the Euro-American traditions of human rights.

Second, this originary metanarrative leads to imagining *human* futures within which futures of human rights have their being. The 'Enlightenment' epoch that gave birth to the liberal, 'modern' notions of human rights (especially to human rights to property, making the power of a few the destiny of millions of people) in effect globalized Social Darwinism. Planned destruction of 'traditions', cultures, and *peoples* was considered necessary and desirable, during the violence of the long dark night of colonialism, for the ideas and practices of bourgeois legality and rights to flourish worldwide. The project of world socialism, though inspired by very different visions and values, followed the same itinerary for the construction of new human futures. Equally so does the project of contemporary economic globalization, where free trade, investment, and commerce (so free as to cause the state to become a clone of global capital) are presented, in the long run, as the harbingers of a secure future for human rights. Communities in struggle and people in resistance have contested, often at the price of unspeakable human violation, these hegemonic versions of human futures and human rights.

Third, the originary stories about human rights equip dictatorial regimes in the Third World (no doubt supported and shaped by the often obscene Realpolitik of the Cold War) to deny wholesale, and in retail, even the most minimal protection from human rights violations and serves such regimes with an atrocious impunity of power.<sup>2</sup>

<sup>2</sup> See, Malaysia-Human Rights: Reopen East West Debate on Rights, Inter-press Service, 1 August 1997, available on Lexis, cited in Stephen Marks 'From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution', 20 *Human Rights Quarterly* (1998), 459 at 461-2. See also Amartya Sen, 'Human Rights and Economic Achievements', in *The East Asian Challenge for Human Rights* (1999), 88-102.

The future of human rights is serviced only when theory and practice develops the narrative potential to pluralize the originary metanarratives of the past of human rights beyond the time and space of the European imagination, even in its critical postmodern incarnations.

This work does not even begin this task. It needs reiteration however that such an endeavour must rest on the premise that all nations come as *equal strangers* to the task of protection and promotion of human rights. To say this is not to deny that the Euro-American discourse made a headstart from the seventeenth century onwards in elaborating the 'modern' conceptions of human rights. It does, however, imply that these conceptions (as we see later) were 'tradition-constituted' and 'tradition-constitutive'<sup>3</sup> and were consistent with the catastrophic practices of cruelty towards the non-Euro-American Other. Since all concepts are history laden, one also needs to make similar inquiries requiring the invention of non-Western traditions of thought in ways that anticipate and reinforce the contemporary human rights discursivity. The progress of interlocution of non-Western traditions lies, perhaps, on the following paths:

- In what ways did the classical traditions of thought (African, Buddhist, Confucian, Hindu, Islamic and indigenous civilization) configure the notion of what it meant to be *human*?
- How did these entail ideas and ideals of equality, dignity, and justice in social and political relations?<sup>4</sup>
- To the extent that these traditions had no linguistic or semiotic equivalents to the 'modern' notions of rights, what *other* tropes carried the burden?<sup>5</sup>

<sup>3</sup> See, for an elaboration of this insightful distinction, Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988), 1–11, 326–88.

<sup>4</sup> See, for example, the corpus of Han Yongun, especially his *Treatise for the Reform of Korean Buddhism* (1913); An Pyong-Jik 'Han Yougun's Liberalism: An Analysis of the Reformation of Korean Buddhism', 19, *Korea Journal* (1979), 13–18. Yongun traced the complex relationship between the Buddhist notions of equality and salvation in ways that achieved a spiritual foundation for the political practice of the principle of self-determination. Freedom from Japanese rule for Korea was but an aspect of struggle against global militarism and imperialism; a struggle fully warranted by a radical reinterpretation of the Buddhist tradition.

<sup>5</sup> For example, the nearest classical Hindu jural equivalent of rights were: *hak* (akin to legally enforceable claims), *adhiakar* (authority that a right commands), and *lokadhiakar* (close to the notion of 'democratic rights' of the peoples).

- Were there no notions about just governance or the ethic of power?<sup>6</sup> If there were, in what precise ways may these be said to anticipate non-Western lineages of human rights?
- What interplay exists between the 'modern' and 'contemporary' human rights languages and those to be discovered in traditional thought practices? How best may we trace complexity and contradiction among these?

Aside from all this, it is indubitable that these traditions, in confrontation with colonialism and imperialism, which Enlightenment thought sustained for so long, innovated much of Western human rights discursivity. The latter was brutally incoherent of an Indian Lokmanya Tilak who dared (in the first decades of the Christian twentieth century) to enunciate the maxim '*Swaraj* [self-determination] is my birth-right and I shall have it', or a Mohandas Gandhi who challenged the early, but still vicious, forms of apartheid in South Africa. Both these praxes de-traditionalized the Eurocentric traditions of the rights of men. So did, at the turn of the nineteenth century, a freed American slave, Fredrick Douglass. Their heroic resistance may be traced to a multicultural tradition of human rights that resulted decades later in the maturation of *jus cogens* of international law,<sup>7</sup> which delegitimated the Enlightenment legacy more powerfully than critical theory and assorted forms of contemporary postmodernisms may ever accomplish.

When, if ever (given the present mode of production of knowledges about human rights) the originary history of human rights is written from non-Euro-enclosed perspectives, the future of human rights will be more secure than it is now.

## II. 'Modern' and 'Contemporary' Human Rights

I wish to suggest ways of constructing the contrasting paradigms of 'modern' and 'contemporary' human rights. The basic contrasts seem to me to be as follows. First, in the 'modern' paradigm of rights the logics of *exclusion* are pre-eminent whereas in the 'contemporary' paradigm the logics of *inclusion* are paramount. Second, the relationship

<sup>6</sup> For an insightful elaboration of the paradigmatic notions in the Buddhist and Hindu traditions of *rajadharma*, see Stanley J. Tambiah, *World Emperor and Renouncer: A Study of Buddhism and Polity in Thailand Against a Historical Background* (1976).

<sup>7</sup> Now reflected in the UN instruments enshrining the rights to self-determination, elimination of all forms of racial discrimination, xenophobia and intolerance, and proscription of slavery and practices akin to slavery and forced labour.

between human rights languages and governance differ markedly in the two paradigms. Third, the 'modern' enunciation of human rights was almost ascetic; in contrast, contemporary enunciations present a carnival. Fourth, the contemporary paradigm inverts the inherent modernist relationship between *human rights* and *human suffering*.

The terms I use, *faute de mieux*, may mislead. My description of the paradigms is distinctly oriented to the European imagination about human rights. An adequate historiography will, of course, as indicated, locate the originating languages of human rights far beyond the European space and time. I focus on the 'modern' precisely because of its destructive impact, both in terms of social consciousness and organization, on that which may be termed clumsily and with deep human violation, as 'pre-' or 'non-' modern.

Countless variations exist even within European space and time. 'Modernity' was constructed there as oppositional to the 'Ancients' constituted by traditions of Hellenic thought, as any reader of Leo Strauss' germinal essay, *The Three Waves of Modernity*<sup>8</sup> surely knows. What I call 'modern' also embraces a Hugo Grotius with his memorable emphasis on *temperamenta belli* (insistence on minimization of suffering in war) and a Francisco Vittoria who valiantly proselytized against the Church (to the point of heresy) and the Emperor (to the point of treason) the human rights of the New World. However, the pre-eminent notions of European modernity did not, at the end of the day, contest that Idea of Progress under which the politics of cruelty entailed in colonialism stood somehow, and overall, ethically justified.

What I call the 'contemporary' human rights paradigm stands, in some of its major moments, marked by a vision of human rights that confronts the politics of cruelty so far justified, and held justifiable. The 'contemporary' is, however, also heterogeneous. It is characterized by practices of Realpolitik, above all conscripting human rights languages to the brutal ends of superpower rivalry in the phases of the Cold War and of the emergent post-Cold War politics. In many senses, the distinction between 'modern' and 'contemporary' human rights masks continuity in the *raison d'état* regimes, but critical differences remain.

### III. The Logics of Exclusion and Inclusion

The notion of human rights—historically the rights of *man*—has been confronted with two perplexities. The first concerns the nature of *human* nature (the *Is* question). The second concerns the question:

<sup>8</sup> Leo Strauss, *Political Philosophy: Six Essays by Leo Strauss* (1975).

Who ought to count as human or fully human (the *Ought* question). While the first continues to be debated both in theistic and secular terms,<sup>9</sup> the second question, 'Who should count as human?' occupies the centre stage of the modern enunciation of human rights. The criteria of individuation<sup>10</sup> in the European liberal tradition of thought furnished some of the most powerful ideas in constructing a model of human rights. Only those beings were to be regarded as 'human' who were possessed of the capacity for *reason* and autonomous moral *will*. What counted as reason and will varied in the course of the long development of the European liberal tradition. However, in its major phases of development 'slaves', 'heathens', 'barbarians', colonized peoples, indigenous populations, women, children, the impoverished, and the 'insane' have been, at various times and in various ways, thought unworthy of being bearers of human rights.

These discursive devices of Enlightenment rationality were devices of *exclusion*. The 'Rights of Man' were human rights of all men capable of autonomous reason and will; and a large number of human beings were excluded by this peculiar ontological construction,<sup>11</sup> although by no means the exclusive prerogative of 'modernity'.<sup>12</sup>

Exclusionary criteria have provided the signature tune of the 'modern' conceptions of human rights. The foremost historical role performed by these was to accomplish the *justification of the unjustifiable*: namely, *colonialism* and *imperialism*. That justification was inherently racist:

<sup>9</sup> The theistic responses trace the origins of human nature in the Divine Will; the secular in contingencies of evolution of life on earth. The theistic approaches, even when recognizing the holiness of all creation, insist on Man being created in God's image, and therefore capable of perfection in ways no other being in the world is, secular/scientific approaches human beings as complex psychosomatic systems co-determined both by genetic endowment and environment, and open to experimentation, like all other objects in 'nature'.

These differences could be [and have been] described in more sophisticated and wider ways: a task attempted by various naturalist thinkers, see, e.g., Julius Stone, *Human Law and Human Justice* (1965).

<sup>10</sup> See, Bhikhu Parekh, 'The Modern Conception of Rights and its Marxist Critique' in *The Right to be Human* (1988), 1–22; see also Raymond Williams, *Keywords*, (1983), 161–5.

<sup>11</sup> See, Peter Fitzpatrick, 'The Mythology of Modern Law', 92–145 (1992); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996), 62–137.

<sup>12</sup> Religious traditions specialized, and still do, in ontological constructions that excluded, for example, Untouchables, rendering them beyond the pale of the *varna* system: see Upendra Baxi, 'Justice as Emancipation: The Legacy of Babasaheb Ambedkar', in *Crisis and Change in Contemporary India* (1995), 122–49.

colonial powers claimed a collective human right of 'superior' races to dominate the 'inferior' ones. The Other in many cases ceased to exist before the imperial law formations as the doctrine of *terra nullius*, following Blackstone's scandalous distinction between the inhabited and uninhabited colonies, illustrates with vivid cruelty.<sup>13</sup> Since the Other of the European imperialism was by definition not human or fully human, it was not worthy of human rights; at the very most, Christian compassion and charity may fashion some devices of legal or jural paternalism. That Other, not being human or fully human, was also liable to being merchandised in the slave market or to constitute the 'raw material' of exploited labour within and across the colonies. Not being entitled to a right to be and to remain a human being, the Other was made a stranger and an exile to the language and logic of human rights being fashioned, slowly but surely, in (and for) the West. The classical liberal theory and practice of human rights, in its formative era, was thus innocent of the universality of rights though no stranger to its rhetoric.

The natural collective human right of the 'superior' races to rule the 'inferior' ones is the only *juristic* justification, if any is possible, for colonialism/imperialism (and its contemporary neo-imperialist incarnations), and it comes in many shapes and forms. One has but to read the 'classic' texts of Locke or Mill to appreciate the range of talents devoted to the justification of colonialism:<sup>14</sup> and the related but different logics combined to the production of a belief in the collective human right of the well-ordered societies to govern the 'wild' and 'savage' races. All the well known devices of the formative era of classical liberal thought were deployed: the logics of rights to property and progress; the highly manipulable dichotomy between the state of nature and civil society; Social Darwinism combining the infantilization and maturity of 'races' and stages of civilization. The collective human right to colonize the less well-ordered peoples and societies for the common 'good' of both as well as of humankind was also by definition indefeasible, not in the least weakened by the contradictions of evolving liberalism.

#### IV. Human Rights Languages and Power of Governance

The languages of human rights are often integral to tasks and practices of governance, as exemplified by the constitutive elements of the

<sup>13</sup> Fitzpatrick, Note 11 *supra* at 72–91.

<sup>14</sup> Bhikhu Parekh, 'Liberalism and Colonialism: A Critique of Locke and Mill, in *The Decolonization of Imagination* (1997), 81–98.

'modern' paradigm of human rights, namely, the collective human right of the colonizer to subjugate 'inferior' peoples and the absolutist right to property. The manifold, though complex, regime of justifications offered for these 'human rights' ensured that the 'modern' European nation-state (*imagined communities* on one register) and 007 James Bond type *communities* (on another register) was able to marshal the *right to property*, as a right to *imperium* and *dominium*.

The construction of a collective human right to colonial/imperial governance is made sensible by the co-optation of languages of human rights into those of *racist* governance abroad and *class* and *patriarchal* domination at home. The hegemonic function of rights languages, in the service of *governance* at home and abroad, consisted in making whole groups of people socially and politically *invisible*. Their *suffering* was denied any authentic voice, since it was not constitutive of human suffering. 'Modern' human rights, in their originary narrative, entombed masses of human beings in shrouds of necrophilic administration of regimes of silence.

In contrast, the 'contemporary' human rights paradigm (as we see shortly) is based on the premise of radical self-determination. Self-determination insists that every human person has a right to a *voice*, a right to bear witness to violation, a right to immunity against disarticulation by concentrations of economic, social, and political formations. Rights languages, no longer so *exclusively* at the service of the ends of governance, thus open up sites of resistance.

#### V. Ascetic Versus Carnivalistic Rights Production

The 'contemporary' production of human rights is exuberant.<sup>15</sup> This is a virtue, when compared to the lean and mean articulations of human rights in the 'modern' period. In the 'modern' era the authorship of human rights was both *state-centric* and *Eurocentric*; in contrast, the processes of formulation of contemporary human rights are increasingly inclusive and often marked by intense negotiation between the NGOs and governments. The authorship of contemporary human rights is multitudinous. The United Nations and regional networks of collaboration provide an incredible register of diversity of conceptions of human rights. As a result, human rights enunciations proliferate, becoming as specific as the networks from which they arise and also in turn sustain. The 'modern' notion of human rights forbade such

<sup>15</sup> See, for an insightful overview, Burns H. Weston, 'Human Rights', 20, *Encyclopaedia Britannica* (15th edn 1997), 56.

dispersal; the only major movement made being in incremental affirmation of the rights of labour and minority rights. The way collectivities now stand installed in human rights enunciations is radically different: not merely do they reach out to 'discrete' and 'insular' minorities,<sup>16</sup> but also extend to wholly new, hitherto unthought of, justice constituencies.<sup>17</sup>

## VI. Human Suffering And Human Rights

Even at the end of the Christian twentieth century, we lack a social theory about human rights. Such a theory must address a whole range of issues,<sup>18</sup> but for our present purpose it is necessary only to highlight the linkage between human suffering and human rights. The 'modern' human rights cultures, tracing their pedigree to the Idea of Progress, Social Darwinism, racism and patriarchy (central to the 'Enlightenment' ideology), justified global imposition of cruelty as 'natural', 'ethical', and 'just'. This 'justification' boomeranged in the form of the politics of

<sup>16</sup> This historic phrase comes from the famous footnote 4 in *United States v. Carolene Products Co.* 304 US, 152 n.4 (1938).

<sup>17</sup> Contemporary enunciations thus embrace, to mention very different orders of example, the rights of the girl child, migrant labour, indigenous peoples, gays and lesbians (the emerging human right to sexual orientation), prisoners and those in custodial institutional regimes, refugees, and asylum-seekers' children.

<sup>18</sup> By a social theory of human rights, I wish to designate bodies of knowledge that address, (a) genealogies of human rights in 'pre-modern', 'modern', and 'contemporary' human rights discursive formations; (b) contemporary dominant and subaltern images of human rights; (c) tasks confronting projects of engendering human rights; (d) exploration of human rights movements as social movements; (e) impact of high science and hi-tech on the theory and practice of human rights; (f) the problematic of marketization of human rights; (g) the economics of human rights.

The listing is illustrative of bodies of reflexive knowledges. In select areas these knowledges are becoming incrementally available but still remain in search of a new genre in social theory. Even as the era of 'grand theory' in the imagination of social thought seems to begin to disappear, a return to it appears imperative if one is make sense of a whole variety of human rights thought and practice. Daunting difficulties entailed in acts of totalization of human rights stand aggravated by this aspiration, but I continue to feel that the endeavour is worthy.

Valuable beginnings in some of these directions have been made by Richard Falk, *Explorations at the Edge of Time* (1995); Boaventura de Sousa Santos, *Towards a New Commonsense: Law, Science and Politics in the Paradigmatic Transition* (1995); Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (1995); Roberto Mangabera Unger, *What Should Legal Analysis Become?* (1996); Shadrack B.O. Gutto, *Human Rights and People's Rights for the Oppressed: Critical Essays on Theory and Practice from Sociology of Law Perspectives* (1993); Issa G. Shivji, *The Concept of Human Rights in Africa* (1989).

genocide in the Third Reich, often resulting in cruel complicity, unredeemed by even the *Schindler's List*, by 'ordinary' citizens in the worst foundational moments of the present day forms of ethnic cleansing.<sup>19</sup>

The 'modern' liberal ideology that gave birth to the very notion of human rights, howsoever Euro-enclosed and no matter how riven with contradiction between 'liberalism' and 'empire',<sup>20</sup> regarded the imposition of dire and extravagant suffering upon individual human beings as wholly justified. Practices of politics, barbaric even by the standards of the theological and secular thought formations of the Enlightenment, were somehow considered justifiable overall by state managers and ideologues, and the political unconscious that they generated (despite, most notably, the divergent struggles of the working classes).

Making human suffering *invisible* was the hallmark of 'modern' human rights formations. Suffering was made invisible because large masses of colonized peoples were not regarded as human or because a considerable number of human beings were regarded as not fully human, in need of tutelage. Although sentient objects of conquest and subjects of European property rights regimes, the colonial subject was closer to the order of things or beasts whose suffering was not sufficiently important to trump the career of the Enlightenment project. Indeed, their suffering had no voice, no language, and knew no rights. As their Lordships of the Privy Council succinctly put it in 1919, some natives may be 'so low in the scale of social organization as to render it idle to impute to such people a *shadow of rights known to our law*'.<sup>21</sup>

In contrast, the post-Holocaust and post-Hiroshima/Nagasaki *angst* registers a normative horror at human violation. The 'contemporary' human rights discursivity is rooted in the illegitimacy of all forms of politics of cruelty. No doubt, what counts as cruelty varies enormously even from one human rights context/instrument to another.<sup>22</sup> Even so, there are now in place firm *jus cogens* norms of

<sup>19</sup> Is this point of view any more contestable? See Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996); Richard Weisberg, *Poethics: and Other Strategies of Law and Literature* (1992).

<sup>20</sup> Uday Mehta, *Liberalism and Empire* (1998).

<sup>21</sup> In re: Southern Rhodesia (1919) AC at 233-4 (emphasis added).

In contrast, the *insufficiently human* were capable of suffering but their suffering was to be ameliorated by an expansion of the rights (as power) of those who were sufficiently human (thus the *patriae potesta* power of the husband or the father over women).

<sup>22</sup> For example: Is capital punishment in any form and with whatever justification a practice of cruelty? When does discrimination, whether based on gender, class or

international human rights and humanitarian law, which de-legitimize as well as forbid barbaric practices of power in state as well as civil society. From the standpoint of those violated, this is no small a gain; the community of perpetrators remains incrementally vulnerable to human rights cultures, howsoever variably, and this matters enormously for the violated. In a non-ideal world, human rights discursivity seems to offer if not an 'ideal', the 'second best' option.

No matter how many contested fields stand provided by the rhetoric of universality, indivisibility, interdependence, and inalienability of human rights, contemporary human rights cultures have constructed new criteria of legitimation of power. These increasingly discredit any attempt to base power and rule on the inherent violence institutionalized in imperialism, colonialism, racism, and patriarchy. Contemporary human rights make possible, in most remarkable ways, discourse on human suffering. No longer may practices of power, abetted by grand social theory, justify beliefs that sustain wilful infliction of harm as an attribute of sovereignty or of a good society. Central to contemporary human rights discourse are visions and ways of construction of an ethic of power that prevent the imposition of surplus repression and human suffering beyond the needs of regime-survival, no matter how extravagantly determined. The illegitimacy of the languages of immiseration becomes the very grammar of international politics.

The distinction between 'modern' and 'contemporary' forms of human rights is focused on *taking suffering seriously*. In the 'modern' human rights paradigm it was thought possible to take human rights seriously without taking human suffering seriously.<sup>23</sup> Outside the

caste, assume the form of torture proscribed by international human rights and norms? When may forms of sexual harassment at the workplace be described as an aspect of cruel, inhumane, and degrading treatment forbidden under the current regime of international human rights standards and norms? Do non-consensual sex practices within marriage relationships amount to rape? Do all forms of child labour amount to cruel practice, on the ground that the confiscation of childhood is an unredressable human violation? Are mega irrigation projects creating eco-exiles and environmental destruction/degradation acts of developmental cruelty? Are programmes or measures of structural adjustment an aspect of the politics of imposed suffering? This range of questions is vast and undoubtedly more may be added.

For an anthropological mode of interrogation, see Talal Asad, 'On Torture, or Cruel, Inhuman and Degrading Treatment', in *Social Suffering* (1997), 285–308.

<sup>23</sup> See the interesting analysis concerning 'minimization of suffering' in the formative period of modern human rights, Charles Taylor, 'Conditions of Unforced

domain of the laws of war between and among the 'civilized' nations, 'modern' human rights regarded large-scale imposition of human suffering as *just* and *right* in pursuit of a Eurocentric notion of *human progress*. That discourse silenced human suffering. In contrast, the 'contemporary' human rights paradigm is animated by a politics of activist desire to render problematic the very *notion of politics of cruelty*.

## VII. The 'Historic' Processes of Reversal

The processes by which this reversal happens in the 'contemporary' era of human rights are complex and contradictory, and require recourse to human rights modes of reading the histories of the Cold War. While no capsule narrative is ever reliable, I present here, in bare outline, five ways that shaped the theory and practice of 'contemporary' human rights.

### (1) *Fragmented Universality of 'Contemporary' Human Rights*

It would not be too much to say that the defining feature of the contemporary world has been the rise and fall of the principle of self-determination. Beginning, in particular, its career with the historic assertion of the right to self-determination in India, the principle globalizes itself in the early phases of the Cold War, through a radical insistence on the illegitimacy of colonialism. Although severely denied to people living under actually existing socialism, the Soviet Union promoted self-determination abroad, through the grammar of wars of national liberation. Socialist ideology powerfully discredited justifications for imperialism and colonization, while manipulating a startling level of support among the 'new, non-aligned' nations for brutal repression in Hungary and Czechoslovakia.

The division of the rest of the world into two giant spheres of influence (itself a euphemism sheltering unconscionable human violation) had a profound impact on the formation of 'contemporary' human rights. The practices of the right to self-determination became incarcerated in the 'superpower' hegemony and domination.<sup>24</sup> The

Consensus on Human Rights', in *The East Asian Challenges for Human Rights* (1999) at 124, 140–3. Professor Taylor's observation that in contemporary times we have new reasons to minimize suffering but we also lack a reason to override the minimizing of suffering' is, perhaps, best understood in relation to the notion of radical evil discussed in Chapter 1.

<sup>24</sup> The US 'Monroe Doctrine' soon found its counterpart in the 'Brezhnev Doctrine', unredeemed by the principles of *panchshila* in the vision of the non-aligned world.

'self' proclaimed to be entitled to 'determination' thus stood constituted by the play of hegemonic powers. This necessarily implied that the birth of the 'New' Nations was a process also marked by the superpower imposition of enormous suffering and cruelty, justified by either the progress of world 'socialism' or global 'democracy'. In this sense, neo-colonialism is born just when the practices of the right to self-determination seem to succeed.<sup>25</sup>

Neo-colonialism not merely shaped the context for the birth of the 'new' states; it also worked its way to contain the newly found sovereignty of the Third World. The need to maintain 'spheres of influence' provided 'justification' for manufacturing, installing, and servicing regimes and cliques of power in the Third World that engaged over long stretches of time, with impunity, in all kinds of human rights violations.

The task of consolidation of the territorial boundaries of the former colonial states posed another limit situation for the universality of the right to self-determination. The 'new' nations of Asia and Africa somewhat understandably insisted that the right to self-determination extended only to situations of 'classic' colonialism, available to their 'peoples' only once in history: to determine their collective status as sovereign states within the meaning of international law. That right once exercised was extinguished for all times; this presumed that the 'logic' of colonialism, which made all sorts of different peoples, cultures, and territories vessels of imperial unity, should continue in the post-colony. The post-colonial state was somehow to create out of many nations a single 'nation-state'.<sup>26</sup>

<sup>25</sup> Factors and forces other than ideology also influenced politics of superpower rivalry. The spheres of influence also marked the imperial scramble for world resources: for example, fossil fuels, notably oils, minerals, forest wealth, and international waterways. The United Nations Charter was thus obscenely manipulated, for example, in Suez Canal, Algeria, the Congo and the West Asian 'crises-management' in superpower diplomacy. Imperialism incarnated itself all over again in the play of the theory and practice of self-determination. The decolonizing world was in the process, yet again, of recolonization.

<sup>26</sup> Also, within, the ideological recomposition of the world, the initiation by Nehru, Nasser, and Tito, of a 'non-aligned' community of states played a highly creationist role for 'contemporary' human rights. It deployed the symbolic capital of the voting majority in the UN General Assembly to richly improvise the creation of 'soft' international standards of human rights. These envisioned a just international order, but amidst the superpower rivalry created debris of human rights violations. To be sure, the regimes in the 'Third World' too, also and at the same time, deployed the Cold War 'justifications' for violation of human rights. In this period of the Cold War we see the emergence of a contradiction between human rights, norm-creation at the global level (politics for human rights) with a claim, in the title of 'nation-building' to violate these with impunity at home (politics of human rights). The

This enterprise proved hazardous in the extreme both for the new national governance élites and those who professed a radical right to self-determination that now perceived the claims of 'national unity' as a species of neo-colonialism. The Cold War provided both a creative stimulus and a bloody limit to this kind of assertion.

The 'creationist' logic of the right to self-determination gave language to the aspiration to the politics of identity and difference within the 'new' nations. The processes by which the right to self-determination was eventually de-radicalized did not comprise only interpretive or semiotic performances. They were also exercises in near-complete militarization of the ways of governance, as also of resistance. The two Superpowers, and their satellites, be it recalled, contributed heavily to militarization of the Third World states in ways that institutionalized the potential for horrific violations of human rights being perfected in that great normative workshop called the United Nations.

Far from being dead on arrival, the logics and paralogics of the human right to self-determination brought to the 'contemporary' worlds of power new forms of legitimation crises and democratic deficit. At the same time, from the standpoint of those who were denied self-determination, the postulate of 'universality' of human rights emerged as a deeply fragmented notion. The vaunted 'universality' of the right to self-determination thus stands fragmented in the very moment of its enunciation.

## (2) *The Cold War 'Naturalization' of Human Rights Violations*

The politics of human rights in the formative era of the Cold War invented its own ways of naturalizing (or de-problematizing) human suffering. The Cold War, consistent with the traditions of political cruelty in the Euro-Atlantic states, restructured the modernistic criteria of exclusion. Those suspected of being 'communists' in the claimed spheres of 'Free' World and 'bourgeois sympathizers', 'capitalist roaders', or 'enemies of people' in the claimed spheres of the 'socialist' world were subjected to permanent states of emergency, the reign of terror and genocidal practices of politics. Enemies of 'democracy' in one sphere or of 'socialism' in the other were *excluded* from the realm of the newly proclaimed human rights norms and standards, marking a cruel continuity with the 'modern' in the emergent paradigm of 'contemporary' human rights. Human rights acquired a fragmented universality within this emergence.

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'universality' of human rights gets fractured all over again along the axis of norm-creation and everyday violation.

As generations pass, these words lose the sense of lived histories of gulags in the 'liberal' as well as 'socialist' societies. These presented the globalization of US McCarthyism as 'natural' in the systematic massacre of hundreds of thousands of 'communists' (in Indonesia in the sixties, to mention just one example) or reigns of terror in the Soviet Union and associated states.

Not surprisingly, heroic individual and mass resistance ensued, despite the savage face of repression. The 'contemporary' human rights-in-the-making owe much to the practices of resistance and martyrdom, against forces of superpower politics seeking to *mute* the voices of the violated. Politics *for* human rights began to emerge as a force questioning the might of the politics *of* human rights. Not to understand the ways in which this happened is to forfeit the very future of human rights in the third Christian millenium. Those who would write the histories of 'contemporary' human rights only in terms of intergovernmental or the NGO politics of desire do a great disservice to the future of human rights.

### (3) *Outlawry of Racism*

'Contemporary' human rights' normativity' shows a remarkable insistence on the illegitimacy of institutionalized state racism.<sup>27</sup> Its enduring contribution resides in the delegitimation of an overtly racist national constitutionalism, which subsequently, and differentially, spreads into international human rights instruments outlawing intolerance and xenophobia in all their myriad forms. The new regime of human rights is thus aggressively protective of 'minority' rights. The right to self-determination acquired claims to visions of human futures radically different from those proclaimed through mainstream European Enlightenment.<sup>28</sup>

### (4) *The Marxist Critique*

Through the foregoing processes, the Marxian critique of bourgeois human rights formation also universalized itself.<sup>29</sup> It exposed many 'genetic' fault-lines in bourgeois models of human rights. The varieties

<sup>27</sup> The single decade beginning with the UN Declaration on the Elimination of All Forms of Racial Discrimination, 1963, and ending with the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, presents a memorable human rights convergence in a world rife with superpower rivalry and discord.

<sup>28</sup> See, Article 27, UDHR; GA Resolution on the Permanent Sovereignty Over Natural Resources (14 December 1962).

<sup>29</sup> Upendra Baxi, *Marx, Law and Justice* (1993); Wendy Brown, Note 18, *supra*.

of Marxisms (whether Marxist-Leninist or Euro-Marxist) helped to powerfully fashion articulation of lived critiques of the bourgeois human rights paradigm that propagated the sanctity of rights to private property over a minimal satisfaction of the basic needs of the masses. Socialist and radical feminism stressed causal linkages between universal structures of patriarchy and global capitalism,<sup>30</sup> though unable itself to negotiate the contradiction, above all, between class and gender, on the one hand, and the dictatorship of the Party and human rights of women, on the other.

Confronted by its own nemesis the 'Western'/'modern' tradition of human rights came to terms at least in part with its own reactionary rights-violative potential. It did so partly by arriving through a long and tortuous process of construction of a welfare state paradigm within the bourgeois formation in all its contradiction and complexity.<sup>31</sup> The Marxian critique of rights provided a powerful impetus for negotiation of many 'contemporary' international human rights enunciations.<sup>32</sup> Although the 'political' and 'civil' rights were severely compromised by Euro-Atlantic states that vigorously promoted them in the process of the 'export' of a counter-doctrine and practice of 'making the world safe for democracy', these nevertheless acquired saliency in the struggle against the export of socialist revolution that denatured Marxian insights on emancipation into all kinds of gulags. The politics of human rights flourished in this epoch, as a mode of production of models of governance, regardless of how enormous the toll of human suffering it entailed on all sides. If in the 'Free World' it was considered legitimate to promote 'purges' of all those suspected of communist leanings, at home and abroad, the socialist world also engaged in extirpating the 'capitalist roaders', and 'bourgeois' elements at home and within its spheres of influence with equally obscene cruelty. All this led to acute forms of militarization of the leading Western 'democratic' states, rendering, all over again, into killing fields the life of new nations in Asia and Africa, and the revitalized Monroe-doctrine-afflicted nations of Latin America.

<sup>30</sup> Allison M. Jagger, *Feminist Politics and Human Nature* (1983).

<sup>31</sup> Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996).

<sup>32</sup> A mere listing, without adequate historical analysis, may mislead, but for the present purposes the relevant references are: the International Bill of Rights, the 1969 Declaration on Social Progress and Development, the Declaration on the New International Economic Order, the Declaration and Convention on the Elimination of All forms of Racial Discrimination, and the Declaration on the Right to Development.

(5) *New Forms of Global Solidarity*

The brutal ideological competition for global supremacy created, dialectically, the political space for solidarity on both sides for voices of civil society to emerge in a politics *for* human rights. The pattern of solidarity that emerges is overlaid with ideological contradictions, and not only through the contortions of Euro-Marxism. It raises questions about the ways of understanding the birth of a whole new form of global thought and action in which concern with human rights transcends national boundaries and pre-occupation with political thought and theory as a socially and ethically 'neutral' social practice.<sup>33</sup> All this awaits the discovery of a Foucauldian episteme for human rights.

As offering interlocution or a 'critique' for governance of paradigms and state power everywhere, 'human rights' become floating signifiers, not embedded in sovereign territoriality. The 'global institutionalization of human rights'<sup>34</sup> signifies the interpenetration of the world of politics *for* human rights with the worlds of power harnessing the politics *of* human rights. However, the worlds of 'contemporary' human rights, I submit, not merely have their origins in the Cold War formations but will remain conditioned, though no longer as determined, by these.

This capsule narrative is heavily suggestive of the matrices of *violence* within which the 'contemporary' human rights paradigm has emerged. It seems always the case that the emergent discourse on human rights remains heavily parasitic on human suffering.

(6) *The Emergence of Politics Of and For Human Rights*

This capsule narrative also renders legible my insistence that history of 'contemporary' human rights activism has its origins in practices of resistance to the Cold War global formations of the politics of cruelty. The circumstance of globality that gave rise to the manifold expression of 'contemporary' human rights activism, forms the historic script, no matter (though this is enormously important) how the dramatic personae may improvise it. It is always well worth recalling that if resistance is the Other of power, it is power that, after all, ordains the fate of activism, even of self-propelled, transcendent human rights activism.

Global, regional, national, and local human rights struggles and movements in the Cold War era witnessed new practices of the politics

<sup>33</sup> I have in mind here the transaction from Descartes, dictum: 'I think, therefore I am' to Albert Camus' motto: 'I rebel, therefore, we are'.

<sup>34</sup> Ronald Robertson, *Globalization* (1992), 138.

of cruelty to a point that at times the whole world became a 'community' of gulags. Summoning images like 'democracy' and 'human rights' conveyed the reality of aggressive state terrorism. In the practices of resistance is born the distinction between the *politics of human rights* and the *politics for human rights*.

The politics *of* human rights deploys the symbolic or cultural capital of human rights to the ends of management of distribution of power in national and global arenas. 'Human rights' become the pursuit of politics, and even aggression and war by other means. The politics *of* human rights at times becomes associated with terroristic repression of realms of human autonomy and expression, where dissent becomes subversion and the sycophancy of the ruling ideology the commanding height of free expression; and international diplomacy deftly uses in this form of politics visions of global futures for the production of ideological compliance.<sup>35</sup>

No phrase except a romantic one—the *revolution in human sensibility*—marks the passage from the politics *of* human rights to the politics *for* human rights. That new form of sensibility, arising from responsiveness to the tortured and tormented voices of the violated, speak to us of an *alternate politics* seeking, against heavy odds of a traumatically changeful human history; that order of progress which makes the *state more ethical, governance progressively just, and power increasingly accountable*. The struggles which these voices name draw heavily on cultural and civilizational resources richer than those provided by the time and space of the Euro-enclosed imagination of human rights, which they also seek to innovate.

The historic achievement of the 'contemporary' human rights movements consists in positing peoples' polity against state polity, or in the fashioning and articulation of visions of human future, through the practices of politics *for* human rights, that the shrivelled soul of Realpolitik must forever resist.<sup>36</sup>

At the same time, this struggle is overlaid by the historicity of 'contemporary' human rights. I turn in the next chapter to the ways of this happening, which constitute the mood, method, and message of the 'contemporary' human rights movements in deeply heterogeneous ways.

<sup>35</sup> Indeed, to a point that even in this so-called era former officials of the United States and communist party voices full and throatily seek to 'justify' horrors of a Stalin or a McCarthy regime and the various techniques of destabilization of democratic aspirations and regimes as politically 'sensible' programmes!

<sup>36</sup> This distinction gets further articulated in concrete detail. See, e.g., pp. 60–5.