

Commentary

Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse

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How does neo-liberalism change the way we understand rights, law, and justice? With postcolonial and post-liberalization India as its focal point, this article attempts to disrupt the linear, progressive equation that holds that more laws equals more rights equals more justice. This is an equation that has informed and been informed by fundamental rights jurisprudence and law reform, the enactment of legislation to guarantee socio-economic rights, and many of the strategies of social movement activism in contemporary India. This article argues that while these developments have indeed proliferated a public culture of rights, they have simultaneously been accompanied by the militarization of the state and the privatization of state accountability. The result is a cruel paradox in which rights operate as spectacles that make the poor and the disadvantaged continue to repose faith in their emancipatory potential while the managerial and militarized state uses these spectacles to normalize its monopoly over violence. By looking at selected literary, legal, popular, and subaltern texts, the article proposes a radical reimagination of emancipation that is not trapped in the liberal narrative of rights, but rather is embedded in and embodied by the everyday and ordinary struggles of the poor.

En quoi le néolibéralisme change-t-il la façon dont nous comprenons les droits, le droit et la justice? En se penchant sur l'époque post-libéralisation de l'Inde postcoloniale, cet article tente d'ébranler l'équation linéaire progressive voulant qu'un plus grand nombre de lois entraîne un plus grand nombre de droits et par conséquent plus de justice. Cette équation repose sur la jurisprudence des droits fondamentaux et la réforme du droit, l'adoption de lois visant à garantir les droits socio-économiques et de nombreuses stratégies de l'activisme social de l'Inde contemporaine, et l'inspire à son tour. Cet article fait valoir que bien que ces développements aient effectivement disséminé dans le public une culture des

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droits, ils se sont accompagnés de la militarisation de l'État et de la privatisation de la responsabilisation de l'État. Il en a découlé un paradoxe cruel selon lequel les droits agissent comme un prisme qui fait que les personnes pauvres et désavantagées continuent de croire en leur potentiel d'émancipation, alors que l'État gestionnaire et militarisé à travers ce même prisme normalise son monopole sur la violence. En examinant certains textes choisis littéraires, juridiques, populaires et subalternes, cet article propose de jeter un nouveau regard radical sur l'émancipation qui ne reste pas prisonnier de la narration libérale des droits, mais qui fait plutôt partie intégrante des luttes quotidiennes ordinaires des pauvres.

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|--|-----|
| I. USTAD MANGU'S FAITH AND FATE | 528 |
| II. GLIMPSES INTO INDIA'S SPECTACULAR PRESENT | 536 |
| III. READING RIGHTS DIFFERENTLY | 543 |
| IV. DYNAMICS OF DISENCHANTMENT | 550 |
| V. PRIVATIZING EMANCIPATION | 563 |
| VI. THE CURIOUS CASE OF HANS DEMBOWSKI | 566 |
| VII. LETTING HOPE ELOPE WITH JUSTICE? A POETIC DETOUR..... | 569 |

I. USTAD MANGU'S FAITH AND FATE

The new constitution is going to be like boiling hot water is to bugs who suck the blood of the poor... .¹

MANGU THE TONGAWALA (horse-cart driver) is the protagonist in Saadat Hasan Manto's short story "The New Constitution."² The story is set in 1935 in Lahore in what was then the undivided Indian subcontinent. The satirical provocations in this humorous story are an apt preface to concerns that I wish to share and explore in this essay.

Because of his ability to wax eloquent on anything under the sun, Mangu was endearingly given the salutary title of Ustad (the Great One) by his fellow *tongawalas*. Ustad Mangu hated the British. Once after getting into an argument with a drunken *gora* (white man) who was abusing him, Mangu told one of his friends:

I am sick and tired of these offshoots of monkeys. ... Every time I look at their blighted faces, my blood begins to boil in my veins. We need a *new law* to get rid of these people. Only that can revive us, I swear on your life.³

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1. Saadat Hasan Manto, "The New Constitution" in Khalid Hasan, ed, *Bitter Fruit: The Very Best of Saadat Hasan Manto* (New Delhi: Penguin Books, 2008) 206 at 209.
 2. *Ibid* at 206-15.
 3. *Ibid* at 207-08 [emphasis added].

Ustad Mangu's faith in the imaginary power of law to end colonial oppression and resist the colonizer was strengthened when he heard two of his passengers talk about the *Government of India Act, 1935*⁴ (the precursor to the *Constitution of India (Constitution)*⁵) to be passed on 1 April, which was only a few days away. The news about the new constitution elated Ustad Mangu—he just could not control his excitement and wanted to get back to his *tonga* stand as soon as possible and share it with his friends:

He was very happy. A delightful cool settled over his heart when he thought of how the new constitution would send these white mice (he always called them by that name) scurrying back into their holes for all times to come.⁶

As 1 April approached, he overheard good and bad things about the new constitution from his passengers, but his belief in its transformative potential remained unshaken:

The new constitution ... appeared to him to be something bright and full of promise. The only thing he could compare the new constitution with was the splendid brass and gilt fittings he had purchased after careful examination a couple of years ago When the fittings were new, the nickel-headed nails would shimmer and where brass had been worked into the fittings it shone like gold. On the basis of that analogy ... it was essential that the new constitution should shine and glow.⁷

On 1 April, Ustad Mangu woke up early and took his *tonga* out for business with an irrepressible thrill in his demeanor. He decorated his horse's head with a new plume to celebrate the birth of the new constitution. He tried to spot newness in everything he saw. However, except for the new plume made of colourful feathers, everything looked old. He was not disappointed and told himself that as the day progressed things would look different.

Sometime later, he heard someone call out to him. Mangu turned around to find that it was the same *gora* he once had an argument with. A feeling of intense hatred grew in his heart, and he wanted to go away without responding to his call. But he controlled his anger and turned his *tonga* around—he did not want to miss the fare, and he had no reason to fear the British on 1 April. He stopped the *tonga*, gave the *gora* a defiant look, and, emboldened by the promise of liberation that the new constitution would usher in, quoted five rupees for the trip. Without intending to get into a confrontation with Ustad Mangu, the *gora* raised his cane

4. *Government of India Act, 1935* (UK), 25 & 26 Geo V, c 42.

5. *India Const*, 1950, art 366(25) [*India Const*].

6. Manto, *supra* note 1 at 209.

7. *Ibid* at 210.

and instructed him to move so that he could board the *tonga*. In this gesture, the cane touched Mangu's thigh a few times. In response, Mangu landed a powerful blow on the *gora's* chin. The *gora* was taken by utter surprise but could not do anything to save himself. Mangu kept at his blows and screamed:

"The same cockiness even on 1 April! Well, sonny boy, it is our Raj now." A crowd gathered ... [and he declared to them:] "Those days are gone, friends, when they ruled the roost. There is a new constitution now, fellows, a new constitution."⁸

Two policemen emerged from the crowd, rescued the *gora*, and took Ustad Mangu away to the police station. The closing lines of the story are telling:

All along the way, and even inside the station, he kept screaming, "New constitution, new constitution!" but nobody paid any attention to him. "New constitution, new constitution! What rubbish are you talking? It's the same old constitution." And he was locked up.⁹

Ustad Mangu's faith and fate sets up the metaphor of what I call "spectacles of emancipation," which is the gap between the vision of emancipation that the law promises and the reality of violence that the law performs. Faith in the law emerges from two sources: one is the lived experience of knowing that the law *delivers* justice; the other is the perception of the law *as* justice.¹⁰ This article will attempt to disrupt the linear, progressive equation that holds that more laws equals more rights equals more justice. This is an equation that has informed and been informed by fundamental rights jurisprudence and law reform, the enactment of legislation to guarantee socio-economic rights, and many of the strategies of social movement activism in India. My goal is not to disparage or to dismiss the law. That would be both an exercise in futility, given the hope that people's struggles rest in the law, and intellectually dishonest, given my own contingent belief in the ability of the law to at least deliver a semblance of justice. Rather, I aim to better understand how the spectacles of law's emancipatory potential are accompanied by an anesthetization of the subaltern's resistance through the deployment of governmental tactics that discipline conduct, not by using overt coercion but by cajoling consent out of the subaltern with the promise of welfare.

8. *Ibid* at 214.

9. *Ibid* at 215.

10. Oishik Sircar, "The Fallacy of Equality: 'Anti-Citizens', Sexual Justice and the Law in India" in Ashok Agrawal & Bharat Bushan, eds, *Justice and Law: The Limits of the Deliverables of Law*, vol 2 (New Delhi: SAGE, 2009) 210 at 210.

Ustad Mangu's comparison of the new constitution to the glittering nickel and brass fittings on his *tonga* was the spectacularized image of what the new law promised to deliver. His unshakeable belief operated as a psychological anesthetic, preventing him from understanding that the *Government of India Act, 1935* was actually an "imperial event."¹¹ It merely permitted limited self-government to Indians at the local and provincial levels and guaranteed no rights to colonized subjects. Without a bill of rights, the new constitution allowed the British government to take back total control whenever the need arose. But the impact of this anesthesia did not last long, and bolstered by the strength of the new law, Ustad Mangu exercised a corporeal act of rebellion. The consequence was incarceration and a reminder that despite the new constitution, nothing had changed.

This story is an important "lesson in the discrepancy between subaltern struggles and bourgeois aspirations."¹² The constitution's birth served as the aspirational markers for civilization, sovereignty, and the rule of law for the nationalist Indian elite. But for the subaltern, it was a blinding spectacle. As Aamir Mufti puts it in his reading of the short-story:

Manto highlights the differing relationships between the subaltern and the bourgeois nationalists to colonial political 'reform'. Half understanding [or blinded by] the nationalist interpretation of the law, the subaltern is willing to act and claim the new dignity and status ('citizen') he thinks it is promising him, only to be roundly disabused by that illusion.¹³

In postcolonial India the narrative of the law's relationship with the subaltern remains as fraught with contradictions as it was during Mangu's time. Manto's story sets up a pithy challenge to the spectacularization of constitutionalism—rule of law, development, democracy—as the panacea not only for injustices, but also for the so-called unreasonable demands of 'unruly' populations who conduct their engagement with the state on their own terms, rather than on the civic-legal terms that the state demands. The constitution ends up serving a pacifying, de-politicizing role in achieving the promise of emancipation.

In this article I will show how the constitutional framework that is used to claim and gain guarantees to fundamental rights is being compromised through the use of the very same constitution and the courts. The poor place faith in the

11. Andrew Muldoon, *Empire, Politics and the Creation of the 1935 India Act: Last Act of the Raj* (Surrey: Ashgate, 2009) at 3.

12. Aamir R Mufti, "A Greater Story-Writer Than God: Genre, Gender and Minority in Late Colonial India" in Partha Chatterjee & Pradeep Jeganathan, eds, *Community, Gender and Violence: Subaltern Studies XI* (New York: Columbia University Press, 2000) at 21.

13. *Ibid* at 22.

law to deliver them from injustice, and the law holds them captive while they are without rights. The cruelty of this experience is aptly captured in the term *Pharmakon*. The Derridian reading¹⁴ of this expression, first introduced by Plato, means medicine that is cure and poison at the same time. This is precisely what makes negotiating law's spectacular promises of justice both an unsettling and exasperating experience for the subaltern.

Faith in the spectacle of legal justice and the resultant fate of the rightsless bear cruelly disproportionate outcomes. Using spectacles to represent emancipation and justice is a necessary tactic of liberal statecraft and marketcraft, both of which operate through a seamless intersection of managerial and militarized agendas. This tactic makes us believe in the benevolence of the state towards citizens, in the commitment of the state to national security, in the ideals of constitutionalism and the rule of law, and, of course, in human rights. It bolsters our faith in the constitution and the judiciary as the ultimate source, giver, arbiter, and interpreter of rights and makes us look at law as the primary legitimizing discourse concerning rights and emancipation. Spectacles of constitutionalism work as a process of mobilizing and sustaining what Upendra Baxi calls the "will to stateness," a "totalizing formation"¹⁵ in which legal recognition of communities and rights postures as the *telos* of justice-seeking enterprises within liberalism. In so doing, spectacles of constitutionalism put constitutional law on a hallowed pedestal worshipped by the state, the market, and citizens alike.

The themes of promise and performance of law as an emancipatory tool, on the one hand, and the law as tool of domination and emancipation, on the other, have been explored in the Indian context in great depth by many scholars across disciplines. This article does not rehearse those arguments and does not claim to make any path-breaking revelations on that front. Rather, this article attempts to identify some of the emancipatory incantations at work in contemporary India. In so doing, this article establishes an argument about the ways in which the law's spectacle works to maintain the rightsless citizens' continuous faith in the state (and now the market)—even as they are left disappointed by the constitution's promises of emancipation.

Commenting on this "double vision" and what I would call a double bind of the law's position in Indian society, Marc Galanter wrote in a 1983 essay:

14. Jacques Derrida, *Dissemination*, translated by Barbara Johnson (Chicago: The University of Chicago Press, 1981) at 61-172.

15. Upendra Baxi, "The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism" in Zoya Hasan, E Sridharan & R Sudarshan, eds, *India's Living Constitution: Ideas, Practices, Controversies* (Delhi: Permanent Black, 2002) 31 at 32.

India is a society in which law (in the conventional sense of authoritative general rules propounded by official agencies) is called upon to play a major role in maintaining order, effectuating social control, implementing deliberate change, and adjusting the accompanying strains and tensions ... In its adherence to legal forms and loyalty to legal procedures, India is quite unusual among third world countries. Upon closer observation, this reliance upon and loyalty to law turns out to be more ambiguous than it first appears. In place of the image of India as a *Rechtsstaat*, we might substitute a double vision in which law in India is at once elaborated but attenuated, pervasive but precarious.¹⁶

In India today—when we have recently marked six decades of the *Constitution* with much fanfare—the double vision persists. But the image of India as a *Rechtsstaat* has not subsided; rather, it has only strengthened. In contradistinction to Galanter's observation, which was made close to three decades ago, the idea of rule of law in India today is elaborate and pervasive; the state, in a mode of legislative overdrive, projects new laws and law reform as primary forms of good governance. What have become attenuated and precarious are the entitlements and lives of the marginalized.

The advent of the politically-organized liberalization of the Indian economy in 1991 and the accompanying privatization of the socio-political practices of statecraft and citizenship have given emancipation a whole new meaning in which promises of emancipation do not remain the privileged preserve of the state and *Constitution* alone. The ostensible power to create and determine access to human rights is being championed as rigorously, if not more, by the market, and we are all invited to participate. In a traditional *Rechtsstaat* polity, governmental power is limited by the law and by the constitution. In the *Rechtsstaat's* post-1991 avatar in India, power is further limited by the market. The abrogation of state accountability is accompanied by increasing state withdrawal, and this state of affairs is thought to be most conducive for the flourishing of liberal ideals of emancipation. It is useful to quote Baxi at length in this context:

What is new ... about contemporary economic globalization is that it encases the Indian constitution within the emergent paradigm of *global economic constitutionalism*. This paradigm creates many-sided impacts, principal among which is the transformations of notions of accountability/responsibility. The Indian state ... is placed in a situation where internationally assumed (or imposed) obligations to facilitate the flows of global capital, trade and investment command a degree of priority over the order of constitutional obligations owed to Indian citizens and peoples. The three Ds of economic rationalism (de-regulation, disinvestment, and denationalization), for example, favour many development policies that threaten, and at times nullify, achievements of rights and justice discourse.¹⁷

16. "Making Law Work for the Oppressed" (1983) 3 *The Other Side* 9.

17. Baxi, *supra* note 15 at 41 [emphasis added].

I would actually go a step further than Baxi to contend that the three Ds of economic rationalism operate as spectacles that lead us to believe that they strengthen the rights and justice discourse rather than nullifying it. Global Economic Constitutionalism (GEC)—the practice of constitutionalism using the logic of neo-liberalism¹⁸—operates as a history-vanishing moment or as what David Kazanjian, in a different context, refers to as a “flashpoint”: “a centripetal turbulence of illumination so powerful that it may blind the past even as it spotlights the present and lights up the future.”¹⁹ This history-vanishing moment blinds us to the contested and insurgent origins of our *Constitution* and the cultures of dissent that have shaped our constitutional character. The pre-Independence, anti-colonial struggles and the post-Independence struggles by subaltern populations are considered aberrations in public memory and are not counted as contributions to the making of India’s constitutional democracy.²⁰ As this article tries to show, the celebratory march of the nation from a colonized country to a neo-liberal power that is responding commendably to the global demands of economic restructuring is the only narrative of history that the courts have been responding to.

In other words, the logic of GEC, to invoke Susan George, “gives the impression that all people from all regions of the globe are somehow caught up in a single movement, an all embracing phenomenon and are all marching towards some future Promised Land.”²¹ The image of this future “Promised Land,” I argue

18. A definition of neo-liberalism that I wish to work with is by David Harvey, who writes:

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture.

See *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 2. For a detailed account of the consequences of the spread of neo-liberalism globally, see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Toronto: Alfred A Knopf Canada, 2007).

19. See Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007) at xviii.
20. Hasan, Sridharan & Sudarshan, *supra* note 15; Partha Chatterjee, ed, *State and Politics in India* (Oxford: Oxford University Press, 1997); Ranabir Samaddar, *The Materiality of Politics: The Technologies of Rule*, vol 1 (London: Anthem Press, 2007); and Ranabir Samaddar, *The Materiality of Politics: Subject Positions in Politics*, vol 2 (London: Anthem Press, 2007).
21. “Globalizing Rights?” in Matthew J Gibney, *Globalizing Rights* (Oxford: Oxford University

in this article, is scripted by the liberal rights discourse of the Indian *Constitution* and the courts as one that is secular, nationalist, heterosexual, meritorious, multicultural, and market-friendly; it is one that will effectively remedy inequality, subordination, exclusion, and annihilation. As a history-vanishing moment, this works to depoliticize histories of struggles that upset the neatness with which the celebratory and linear narratives of the journey from repression to emancipation operate in India's post-liberalization legal and judicial discourse.²²

My signification of these phenomena through the expression 'spectacle' is borrowed from the work of French situationist Guy Debord. Debord, in his influential *The Society of the Spectacle*, refers to "spectacle" as the accumulation of capital to the point of collapse, where capital itself becomes an image.²³ In this article, I argue that the idea of emancipation has become a spectacle—a site of accumulation and commodification.²⁴ I attempt to illustrate how 'products' (in this case judgments or laws that promise emancipation for rightsless peoples) are forms of spectacle that ensure their sustenance as landmark precedents, without doing much to dismantle the structural causes of rightslessness. Spectacles can ascribe excess value to the law or judgment in question. Akin to Debord's idea of "commodity fetishism"—in this case judgment or legislation fetishism—spectacles seduce people into believing that judgments are cultural markers of legitimate recognition of injustice for the disenfranchised. Spectacles effected through ostensibly emancipatory judgments or laws are a tactic through which people's struggles against injustices are pacified and depoliticized.

The article explores some ideas about how the miscegenation between the state and the market creates technologies through which the *Rechtsstaat* image of India is produced, consumed, and sustained. The article also highlights the ways in which assemblages and deployment of the liberal language of legal rights creates spectacles that make the rightsless believe in the state—and then, inescapably, in the market—to deliver them their economized share of emancipation.

Press, 2003) 15 at 16.

22. On modernity, the violence of modern constitutionalism, and its connection to colonialism and imperialism, see Upendra Baxi, "Constitutionalism as a Site of State Formative Practices" (2000) 21 *Cardozo L Rev* 1183. He writes, "Much of the business of 'modern' constitutionalism was transacted during the early halcyon days of colonialism/imperialism. That historical timespace marks a combined and uneven development of the world in the processes of early modernity. ... [C]onstitutionalism inherits the propensity for violent social exclusion from the 'modern'" (at 1184-85).
23. Guy Debord, *Society of the Spectacle* (Detroit: Black & Red, 1993).
24. Cindi Katz, "Childhood as Spectacle: Relays of Anxiety and the Reconfiguration of the Child" (2008) 15 *Cultural Geographies* 5 at 5.

The scope for this paper is restricted to the years between 2000 and 2010. I make brief references to a select set of judgments, legislation, activist strategies, and privatized representations of emancipation from this time period to further my argument about how these operate as spectacles that have the ability to discipline the ways in which we memorialize justice. The truncated timeline and sources have been selected to signify a dense period in the history of contemporary India, one in which “critical events”²⁵ have collided and converged, giving the polity a unique hybridity that has blurred the line between state and market. It is necessary to note that this blurring has not diluted the position of power that state or the market wield; however, when critically examined, it exposes the intimate way in which they collude to simultaneously promise emancipation and maintain monopoly over violence. This article makes a modest attempt at mapping the contours of this disciplinary tactic, which operates as the *leitmotif* of democratic and juridical governance in India today.

II. GLIMPSES INTO INDIA’S SPECTACULAR PRESENT

Before I get into the thick of conceptually unpacking the aforementioned arguments, it is necessary to consider some of the contemporary manifestations of the Mangu experience in postcolonial India. The illustrations that I share below are merely indicative of the trend I am trying to identify.

For the first example, imagine that Ustad Mangu is a homosexual person in a post-section 377 scenario²⁶ who, drawing strength from the Delhi High Court’s decision to decriminalize sodomy in *Naz Foundation v Govt of NCT of Delhi and others*,²⁷ openly declares his sexual orientation. He would surely not escape societal stigma. Stigma attached to sexual minorities continues to be legitimized through the legal excess in constructing a public culture of homophobia that section 377 of the *Indian Penal Code, 1860*²⁸ has embedded in our socio-political and cultural consciousness.²⁹ The state can and does continue to use a plethora of

25. Veena Das, *Critical Events: An Anthropological Perspective on Contemporary India* (Oxford: Oxford University Press, 1995). Borrowing from Francois Furet, Das characterizes “critical events” as those that institute “a new modality of historical action which was not inscribed in the inventory of that situation” (at 5) [emphasis in original].

26. Section 377 is the anti-sodomy provision in the Indian Penal Code of 1860, which was read-down by the Delhi High Court on 2 July 2009. This judgment decriminalized sodomy between consensual adults, in private.

27. [2009] WP(C) No.7455/2001 (H Ct Delhi) [*Naz Foundation*].

28. Act 45 of 1860, India Code.

29. The argument that the very existence of section 377 on the law books for over 150 years

other laws, including the *Police Act*,³⁰ *Railways Act*,³¹ and public nuisance laws, to target the sexually marginalized. The case of Doctor Siras from the Aligarh Muslim University (AMU)—who was secretly filmed in an act of consensual sex with another adult man in the confines of his residence and whose employment was then terminated by the university authorities—is a rude reminder of the fact that nothing has changed, despite the judgment. A cruel consequence of this incident was that Doctor Siras was found dead under mysterious circumstances a few days after the Allahabad High Court ordered AMU to reinstate his appointment.³²

In a similar vein, imagine that we substitute Ustad Mangu with Doctor Binayak Sen, Arun Ferreira, or Soni Sori—just a few of the many human rights defenders in India who were or are in jail because of their alleged anti-national activities.³³ We realize the limitations inherent in the constitutional guarantees of freedom of speech, due process, and the right to life and liberty. It does not take much state strength to keep individuals incarcerated despite flimsy evidence or to subject them to torture in the name of extraordinariness under special security laws (such as the *Chhattisgarh Vishesh Jan Suraksha Adhiniyam, 2005*³⁴). Such laws effect a return to emergency-like conditions in present day India and establish a normalized order of “Gulag constitutionalism” that “represents dissent as treason”³⁵

in India has normalized non-legal forms of homophobia and discriminations against homosexuals and other sexually marginalized persons draws on Ryan Goodman’s work on South Africa in which it was shown that despite the South African Constitution’s recognition of the right against discrimination on the basis of sexual orientation, homophobia continues in ways that the law cannot detect or prosecute. See “Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics” (2001) 89 Cal L Rev 643 at 651-53.

30. No 5 of 1861, India Code.

31. No 24 of 1989, India Code.

32. Urvashi Sarkar, “Mystery shrouds death of AMU professor” *The Hindu* (8 April 2010), online: <<http://www.thehindu.com/news/national/article391265.ece>>. Manjari Mishra, “Aligarh Muslim University professor suspended for being gay” *The Times of India* (18 February 2010), online: <http://articles.timesofindia.indiatimes.com/2010-02-18/india/28118769_1_shrinivas-ramchandra-siras-rickshaw-puller-amu-campus>.

33. The arrests and charges against those who have been released on bail were done on mere suspicion based on either their work with indigenous people’s movements and against indiscriminate corporate mining, or their religion. A complete list of such ‘prisoners of conscience’, who are presently in custody of the Indian state, is available online: “Fabricated. in – National Campaign Against the Fabrication of False Cases” <<http://www.fabricated.in>>. For testimonies by those who have been arrested and tortured under anti-terror laws in India, see Preeti Verma, *The terror of POTA and other security legislation in India* (Delhi: Human Rights Law Network, 2004).

34. No 14 of 2006, India Code.

35. Baxi, *supra* note 15 at 33.

Likewise, consider that the fate of several victim-survivors of the Union Carbide Corporation (UCC) explosion in Bhopal in 1984 has been sealed not only by the cross-generational devastation that the explosion unleashed, but also by the victim-survivors' committed attempt to place faith in the judiciary to bring them justice. This has resulted in many activists, including women and children, being arrested and brutally beaten by the police.³⁶ In a show of paternalism, immediately after the tragedy took place the state unilaterally decided to act as *parens patriae* for all victims; in so doing the state attempted to mask and escape accountability for its own collusion in the event. To save itself from being made tortiously liable in US courts by the many American personal injury lawyers who flew in after the explosion, the state in its capacity as *parens patriae* passed the *Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985*³⁷ to take over and pursue the claims of the victims in and outside India, ostensibly because the victims would not be able to do so. Non-state human rights groups and victims themselves lost all legal standing to claim compensation. While this move seemed as if the state was taking its obligations to remedy the violations faced by its citizens seriously, in effect this enabled the state to evade responsibility by taking on the persona of the victim. The constitutionality of the law was challenged but ultimately upheld by the Supreme Court (SC).³⁸ The spectacle that this benevolent posturing created overshadowed the state's plan both to allow Warren Anderson, CEO and Chairman of UCC at the time of the disaster, safe passage out of India and to save itself and UCC from being targeted by mass compensation lawsuits. The case moved to the United States in 1986, but it was dismissed on the ground of *forum non conveniens*. This dismissal worked well for UCC because it meant that the case had to be tried in India where the law of compensation for industrial disasters and corporate crimes was not well developed.³⁹ The latest travesty—taking the form of a judgment, issued on 7 June 2010, that criminally convicted some of the accused of Union Carbide India Limited—pays mere lip

36. Greenpeace, Press Release, "Bhopal activists brutally assaulted and arrested for demanding clean drinking water" (19 May 2005) online: <<http://www.greenpeace.org/india/en/news/bhopal-activists-brutally-assa>>; "Bhopal Activists Freed" *BBC News* (26 November 2002), online: <http://news.bbc.co.uk/2/hi/south_asia/2513883.stm>.

37. No 21 of 1985, India Code.

38. *Charan Lal Sahu v Union of India*, [1990] AIR 148.

39. See Bridget Hanna, Ward Morehouse & Satinath Sarangi, *The Bhopal Reader: Remembering Twenty Years of the World's Worst Industrial Disaster* (Goa: The Other India Press); M Galanter, "Law's elusive promise: learning from Bhopal" in Michael Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (London: Butterworths Tolley, 2002) 172; Kim Fortun, *Advocacy After Bhopal: Environmentalism, Disaster, New Global Orders* (London: The University of Chicago Press, 2001).

service to the cause of justice and reparation for which the Bhopalis have been struggling for over twenty-five years now.⁴⁰

The impunity with which urban evictions continue in big cities in the name of beautification, cleanliness, development, and now security (especially in the wake of events like the 2010 Commonwealth Games in Delhi) is another instance of the abrogation of rights by the state at the demand of market actors⁴¹ and of a modern-day Mangu-like experience. Even though the judgment in *Olga Tellis v Bombay Municipal Corporation*⁴² recognized that the homeless have a constitutional right to shelter and livelihood, these evictions continue to occur. The courts, showing more concern for the rights of privileged citizens to drive on roads cleared of beggars and the homeless, have unapologetically suffocated the expansive and pro-human rights interpretations given to the right to life and liberty under Article 21 through a progressive history of judicial activism. The violence unleashed by anti-poor judgments like *Almitra H Patel v Union of India*⁴³ has been a cause of celebration by elite citizens for whom homeless people are encroachers and an eyesore to potential investors in Delhi. In this case, while commenting on the government's policy of rehabilitating slum dwellers, the SC remarked that "the promise of free land at the tax payers [*sic*] cost, in place of a jhuggi [slum], is a proposal which attracts more land grabbers. Rewarding an encroacher with free alternatives [*sic*] sites is like giving a reward to a pickpocket."⁴⁴ As a commentator notes, "the likening of a slum-dweller to a pickpocket was a definite statement of prejudice and contempt emanating from the court."⁴⁵ Over the past years, millions of slum dwellers from the Yamuna Pushta and other Jhuggi colonies of Delhi have been removed on the orders of the Supreme Court and rendered homeless or sent to Bawana without any sanitation, water, electricity, or even drainage.⁴⁶ The courts' allusion to 'development'

40. Karuna Nundy, "A Traffic Accident in Bhopal" *The Hindu* (9 June 2010), online: <<http://www.thehindu.com/opinion/op-ed/article450106.ece>>.

41. Housing and Land Rights Network, *The 2010 Commonwealth Games: Whose Wealth? Whose Commons?* by Shalini Mishra, Shivani Chaudhry & Miloon Kothari (New Delhi: Housing and Land Rights Network, 2010).

42. [1985] AIR 180 at para 83.

43. [1998] 1 SCR 220 (India).

44. *Ibid.*

45. Usha Ramanathan, "Of Judicial Power," *Frontline* 19:6 (March 2002) online: Frontline <<http://www.frontlineonnet.com/fl1906/19060300.htm>>.

46. Prashant Bhushan, "The Judiciary: Cutting Edge of a Predator State" *Counter Currents* (7 December 2006), online: <<http://countercurrents.org/hr-bhushan071206.htm>>; see also Kalyani Menon-Sen & Gautam Bhan, *Swept off the Map: Surviving Eviction and Resettlement in Delhi* (New Delhi: Yoda Press, 2008).

in their decisions has been seen to represent their commitment to turning Delhi into a world-class city; there has been little appreciation of the anti-poor positions that have deeply informed the ideology behind these judgments.

As another illustration, the so-called socialist move to abolish a fundamental right to private property was accompanied by the introduction of the principle of eminent domain, which has allowed the state to acquire land for any public purpose. The havoc that laws like the *Land Acquisition Act, 1894*⁴⁷ and the *Forest Act, 1927*⁴⁸ (until its new version came into being) have wreaked on the lives of *Adivasi* (Indigenous) communities does not need reiteration here. What is crucial about such a move is that in the name of abolishing private property, the state turned itself into the rightful owner of all landed property, which facilitated its unilateral decision to acquire land whenever there was an industry-induced demand for it.

Yet another example is the recent enactment of the long-overdue *Right of Children to Free and Compulsory Education Act, 2009*⁴⁹ (*RTE Act*), which also works as a spectacle. It guarantees something unprecedented in India's fundamental rights history—it translates for the first time a Directive Principle of State Policy⁵⁰ not only into a fundamental right but also into legislation. However, with respect to children beyond the age of fourteen, the state absolves itself of all accountability to guarantee education. Only those with the economic capacity to afford education beyond age fourteen can avail themselves of it; the rest must be satisfied with this token guarantee. What is interesting is that along with the enactment of the *RTE Act*, the state is also introducing the *Foreign Education Institutions (Regulation of Entry and Operations) Bill, 2010*,⁵¹ which will allow a complete takeover of higher education by private universities. Only those who have the private capital to afford these universities will benefit—which is a negligible proportion of university aspirants in India.⁵² In other words, the spectacle of the *RTE Act* is used as a convenient cover for the state to privatize higher education.

Another example is the way in which the courts avoid the issue of structural exclusion in the hope that heightened forms of punishment will work as spectacles to keep the disadvantaged happy about the courts' pronouncements. Take the case of the *Khairlanji*⁵³ judgment in which the Ad Hoc Sessions Court

47. No 1 of 1894, India Code.

48. No 16 of 1927, India Code.

49. No 35 of 2009, India Code [*RTE Act*].

50. *India Const*, art 41.

51. No 57 of 2010, India Bill.

52. Anil Sadgopal, "Right to Education v. Right to Education Act" (2010) 38 *Social Scientist* 17.

53. Criminal Confirmation Case No 4/2008.

in Bhandara District, Maharashtra, awarded the death penalty to six upper caste men for the massacre of four Dalits (the ‘untouchable’ caste) of the Bhotmange family in Khairlanji village on 29 September 2006. The verdict, delivered in 2008, was hailed as historic by the Dalit community, despite the fact that the court reduced the event to just a grave crime and completely ignored the caste character of it. When the case went to appeal to the Nagpur bench of the Bombay High Court 2010, the death penalty was commuted. Dalits were disappointed, but the caste question still did not come up. In the progressive legal imagination, the *Khairlanji* decision represents speedy justice, and the fact that, culturally, it marked an erasure of a history of deep-seated violence and caste prejudice did not matter—that was the spectacular potential of the death penalty.⁵⁴

A recent illustration of spectacle politics is the government’s response to veteran Gandhian Anna Hazare’s hunger strike. He demanded the constitution of a joint committee comprising state and civil society members to finalize the *Jan Lokpal Bill*⁵⁵ (a national ombudsman law for fighting corruption) before its enactment. The fact that the Manmohan Singh government actually accepted all the demands made by Hazare and his team is a spectacular move by the state to promote itself as pro-people, human rights friendly, and committed to rooting out corruption. In contrast, it is necessary to ask why the state has not responded with equal urgency to Irom Sharmila’s⁵⁶ more than decade-long fast demanding the repeal of the draconian *Armed Forces Special Powers Act, 1958*.⁵⁷ Does this have anything to do with the strong nationalist narrative that was inherent to Hazare’s campaign, with regular refrains of “Jai Hind;” a huge flexi-banner reading “Bharat Mata” (Mother India) adorning the stage at Delhi’s Jantar Mantar where he was fasting; and the patriotic waving of the tricolour after the government conceded to all demands? Why have the many fasts by Medha Patkar not stopped the Supreme Court from allowing the height of the Sardar Sarovar Dam to be raised, even though this decision will result in more areas becoming submerged

54. S Anand, “Understanding the Khairlanji Verdict” *The Hindu* (5 October 2008), online: <<http://www.hindu.com/mag/2008/10/05/stories/2008100550090400.htm>>; Anand Teltumbde, *The Persistence of Caste: The Khairlanji Murders and India’s Hidden Apartheid* (New York: Zed Books, 2010).

55. No 39 of 2011, India Bill [*AFSPA*].

56. Irom Sharmila Chanu is a human rights defender from India’s northeastern state of Manipur where she has been on hunger strike for the past 12 years in protest against the *AFSPA*, which gives the army extraordinary powers. For more on Irom Sharmila’s protest, see Deepti Priya Mehrotra, *Burning Bright: Irom Sharmila and the Struggle for Peace in Manipur* (New Delhi: Penguin Books, 2009).

57. No 28 of 1958, India Code.

and more people being displaced? The state's manoeuvre has created a spectacle that has blinded us to the ways in which it selects the facts that it wants to end.⁵⁸

For a final example, Manto's prophetic reading of the constitution's spectacle returns as a rude awakening when we remember 1 July 2010, when Cherukuri Rajkumar, also known as Comrade Azad, a spokesperson for a left-wing extremist group, was killed extrajudicially by state forces. In January 2011, the SC of India made a surprisingly sensitive assertion in response to a request for a judicial probe into the killing: "We cannot allow the republic killing its own children." The bench added: "We hope there will be an answer. There will be a good and convincing answer."⁵⁹ On 19 July 2010, around three weeks after his killing, *Outlook* magazine⁶⁰ posthumously published Azad's last work, written in response to an article by veteran journalist B.G. Verghese. In this piece, Azad rejects Verghese's celebratory belief in India's constitutional democracy. Verghese wrote: "The Maoists will fade away, democratic India and the Constitution will prevail, despite the time it takes and the pain involved."⁶¹ In response Azad wrote:

In which part of India is the Constitution prevailing, Mr Verghese? In Dantewada, Bijapur, Kanker, Narayanpur, Rajnandgaon? In Jharkhand, Orissa? In Lalgarh, Jangalmahal? In the Kashmir Valley? Manipur? Where was your Constitution hiding for 25 long years after thousand [sic] of Sikhs were massacred? When thousands of Muslims were decimated? When lakhs of peasants are compelled to commit suicides? When thousands of people are murdered by state-sponsored Salwa Judum gangs? When adivasi women are gangraped? When people are simply abducted by uniformed goons? Your Constitution is a piece of paper that does not even have the value of toilet paper for the vast majority of the Indian people.⁶²

In just one paragraph, Azad's words captured the essence of the sham that the *Constitution* may be for most of India's poor and disenfranchised people. The cruel reality of his words was reinforced when two weeks before Manto's 100th birthday, the court dismissed the petition seeking a judicial probe into the killings.⁶³

58. See generally Teresa Rehman, "Gaga over Anna, mute over Irom Sharmila," *The Hoot* (25 August 2011), online: <<http://www.thehoot.org/web/home/story.php?storyid=5468&pg=1&mod=1§ionId=19§ionname=ISSUES%20IN%20MEDIA>>.

59. J Venkatesan, "Our Republic must not kill its own children: Supreme Court" *The Hindu* (14 January 2011), online: <<http://www.thehindu.com/news/national/article1092489.ece>>.

60. Chemkuri Azad Rajkumar, "A Last Note to a Neo-Colonialist" *Outlook* (19 July 2010), online: <<http://www.outlookindia.com/article.aspx?266164>>.

61. Chemkuri Azad Rajkumar, "A Last Note To A Neocolonist", *Outlook* (19 July 2010) online: Outlook <<http://www.outlookindia.com/article.aspx?266164>>.

62. *Ibid.*

63. "Supreme Court Refuses Judicial Probe in Azad case" *The Hindu* (May 3, 2012), online: <<http://www.thehindu.com/news/states/andhra-pradesh/article3380271.ece>>.

After this order, the SC's bleeding-hearted concern about the death of the 'republic's children' will forever be part of its spectacular history.

III. READING RIGHTS DIFFERENTLY

*Rights emblemize the ghostly sovereignty of the unemancipated individual in modernity.*⁶⁴

Liberalism's spectacle was best described by the young Karl Marx in his 1844 essay "On the Jewish Question," where he complicated the notion of emancipation and offered a critique of liberal rights that we can ignore today only at our own peril.⁶⁵ Marx questioned why the state should be regarded as the end of all emancipation and suggested that political emancipation by the state is only a masquerade to numb man's consciousness as a species. By distinguishing "political emancipation" from "human emancipation," Marx pointed out that the rhetoric of liberal rights ("the rights of man") that the secular state foregrounds is in effect not human emancipation: "[M]an was not liberated from religion; he received religious liberty. He was not liberated from property; he received the liberty to own property. He was not liberated from the egoism of business; he received the liberty to engage in business."⁶⁶

Wendy Brown, in a trenchant reading of "On the Jewish Question," writes:

[T]he ruse of power peculiar to liberal constitutionalism centers upon granting freedom, equality and representation to abstract rather than concrete subjects. The substitution of abstract political subjects for actual ones not only forfeits the project of emancipation but resubjugates us precisely by emancipating substitutes for us—by emancipating our abstracted representatives in the state and naming this process "freedom." ... If ... the bourgeois constitutional state is premised upon depoliticized inegalitarian social powers, if it depends upon naturalizing ... abstract representations of equality and community, then *rights* are the modern political form that secure and legitimate these tendencies.⁶⁷

The abstraction of the citizen-subject and the constitutionally guaranteed rights afforded to the intricately manufactured image of the citizen-subject work as a spectacle that blinds us from the violence of constitution making and the

64. Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 110.

65. Karl Marx, "On the Jewish Question," in Robert C Tucker, ed, *The Marx-Engels Reader* (New York: WW Norton & Company, 1978) 24.

66. *Ibid* at 45.

67. Brown, *supra* note 64 at 106, 109-10.

practices through which a *Rechtsstaat* polity is sustained by the state-market collusion in a neo-liberal democracy. While the state creates the rights-bearing, abstract citizen-subject, the market creates the abstract figure of the merit-driven, rational, consuming, and entrepreneurial citizen-subject with individualized desires and privatized ways to satiate those desires. To quote Brown again, “Liberal equality guarantees that the state will regard us all as equally abstracted from the social powers constituting our existence, equally decontextualized from the unequal conditions of our lives.”⁶⁸

Clearly then, from a Marxist perspective, engaging the state as the only arbiter of emancipation strengthens the state to make the playing field further conducive for capitalism. French historian Fernand Braudel captures this phenomenon sharply when he says, “Capitalism only triumphs when it becomes identified with the state, when *it is* the state.”⁶⁹ This is especially the case when the responsibility to make and unmake abstract citizen-subjects is shared between the state and the market, and when, on occasion, the market manufactures more idealized forms of citizen-subjects—who are committed to individualized, self-disciplined practices of desire and consumption—than the state.

Human emancipation, thus, can only be achieved when we question the state as strongly as we question the market and when we pay acute attention to the ways in which one feeds off the other. We cannot be blinded by what liberal rights guarantee us, and we need to constantly question the paradigm of liberal rights, which normalizes the rule of the market and makes the rule of law work in synchronization with it—in effect normalizing inequalities. It is for this reason that we need to read rights differently, to wrest them out of the captivity of rule of law discourses. This task is upon us because of the spectacular potential that the project of liberalism (and neo-liberalism, its more advanced avatar) possesses to depoliticize the struggles of the rightsless—as has been the case both pre- and postcolonialism.

As Nivedita Menon asks, “What are the implications for the liberatory potential of rights once their meaning is fixed by law?”⁷⁰ This question is especially significant as most struggles for rights in liberal democracies are about gaining fixed legal recognition for excluded communities. John and Jean Comaroff call this focus on legal recognition a “fetishism of the law,” where:

68. *Ibid* at 110.

69. Michael Hardt & Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000) at 3 [emphasis added].

70. *Recovering Subversion: Feminist Politics Beyond the Law* (Delhi: Permanent Black, 2004) at 26.

“[T]he law” ... is objectified, ascribed a life-force of its own, and attributed the mythic capacity to configure a world of relations in its own image. ... It is a faith owed largely to the fact that the promulgation of a *new Legal Order*, in the upper case, signals a *break with the past*, with its embarrassments, its nightmares, its torments, its traumas.⁷¹

This break with the past is representative of the logic within which legal rights operate, and the New Legal Order (NLO) is the spectacle that sustains this logic—it is the flashpoint (the history-vanishing moment), or the spectacle that announces our journey towards the Promised Land. This promise of a break with the past masks the ways in which the NLO continues to unleash violence with impunity; even if one is able to call the law’s bluff, the NLO has amassed enough surplus authority from the faith that people repose in it to sustain the spectacles of emancipation that continue to make us fetishize the law and its seductive promise of delivering us from all evil. The NLO works to sustain capitalism’s illusion of progress despite the acute disadvantage it breeds in the institutions of governance and in the delivery of justice.

The Comaroffs point out the way in which the pervasiveness of neo-liberalism across the world, especially in less industrialized countries of the global south, has been accompanied by a pervasiveness of constitutionalism. They note that faith in constitutionalism creates a “culture of legality” that infuses everyday life almost everywhere, “even when both the spirit and the letter of the law are despoiled, distended, desecrated; even as more regimes suspend it in the name of emergency, expediency, exception; even as they expropriate its sovereignty unto themselves; even as they franchise it out.”⁷²

This phenomenon is most paradigmatically reflected in the way in which the United Progressive Alliance (UPA) government of India is celebrating its pro-*Aam Aadmi* (common man) commitment by going into legislative overdrive—by passing laws like the *National Rural Employment Guarantee Act, 2005*,⁷³ *Right to Information Act, 2005*,⁷⁴ *Protection Of Women From Domestic Violence Act, 2005*,⁷⁵ *Right of Children to Free and Compulsory Education Act, 2009*,⁷⁶

71. John L Comaroff & Jean Comaroff, “Reflections on the Anthropology of Law, Governance and Sovereignty” in Franz von Benda-Beckmann, Keebet von Benda-Beckmann & Julia Eckert, eds, *Rules of Law and Laws of Ruling: On the Governance of Law* (Surrey: Ashgate, 2009) 31 at 32-33 [emphasis added].

72. *Ibid* at 33.

73. No 42 of 2005, India Code.

74. No 22 of 2005, India Code.

75. No 43 of 2005, India Code.

76. *RTE Act*, *supra* note 49.

Scheduled Tribes And Other Traditional Forest Dwellers (Recognition Of Forest Rights) Act, 2006,⁷⁷ and, in the pipeline, the *Jan Lokpal Bill*. These legislative projects stand in stark contrast to the government's ongoing commitment to the project of divestments, the privatization of natural resources, the incarceration of anyone who challenges the state's brutal policies, and the resort to violent military means to achieve the ends of corporate capital's demands on the state. The state's response of "hyperlegality"⁷⁸ is adequately buttressed by the demands of citizenship claims made by civil society that lead "politics to migrate to the court."⁷⁹ Particularly in India, the Comaroffs describe Julia Eckert's observation that "the 'use of the law' now 'complements or replaces' other species of counter-politics."⁸⁰ This state of hyperlegality is poignantly captured by the Comaroffs when they say:

[C]lass struggles are giving way to class actions in which people are drawn together by material predicament, culture, race, sexual preference, residence, faith and habits of consumption become legal persons as their common complaints turn them into plaintiffs with common identities. Citizens, subjects, governments, congregations, chiefdoms, communities and corporations litigate against one another in an ever-mutating kaleidoscope ... often at the intersections of tort law, human rights law, constitutional law and criminal law. Even democracy has been judicialized: few national elections these days go by without some resort to the courts.⁸¹

This phenomenon of rights-in-the-era-of-hyperlegality is about the emergence of governance mechanisms that promote the withdrawal of the state—"the outsourcing by government of many conventional operations, including those integral to the management of 'bare life'"⁸²—and that simultaneously install regulatory governance through legislation. Courts complement this trend by acting as legislators that mete out rights by classifying population groups demanding legal recognition, much like shopping malls providing customized responses to consumer feedback. This legalism is promoted equally by the left, which regrettably has not been critical of the ways in which hyperlegality can entrench and normalize disadvantage by institutionalizing it.

This is an interesting shift in the left's position. In the past, the left was concerned more with methods of collective bargaining and other species of counter-politics; it viewed the rights problem as important because of its

77. No 2 of 2007, India Code.

78. Nasser Hussain, "Hyperlegality" (2007) 10 New Criminal L Rev 514.

79. Comaroff & Comaroff, *supra* note 71 at 35.

80. *Ibid*, citing Julia Eckert, "From Subjects to Citizens: Legalism From Below and the Homogenisation of the Legal Sphere" (2006) 53 J of Legal Pluralism 45 at 45.

81. Comaroff & Comaroff, *supra* note 71 at 35.

82. *Ibid* at 37.

emphasis on freedom of contract and private property rights.⁸³ Now, the left is engaging in what Wendy Brown and Janet Halley call “left legalism,” in which the left “invoke[s] the liberal state’s promise to make justice happen by means of law.”⁸⁴ While these observations are particular to the situation in United States, they are also applicable to the experiences of present day India.

The recent set of social justice statutes in India, some of which I mentioned above, is a product of engagement with the law by very large, left-leaning, people’s movements. But what are the consequences of left legalism in an era of the NLO and GEC? Does the stream of legislation reflect how human rights friendly the state is, or does it operate as a spectacle that blinds us to the state’s militarized efforts to forcibly take away *Adivasi* land?⁸⁵ How do those who engage in left legalism gain faith in the rule of law that has historically been the tool for their exclusion and annihilation, both during colonialism and later? What is the left legalist’s vision of emancipation? Are these statutes universally emancipatory, or do they mask the violence inherent in their form and operation? Is the state actually committed to the emancipation of its marginalized citizens? Or are these statutes a means to make India look like an advanced democracy that has bravely embraced the NLO and adapted well to the needs of GEC by foregrounding its capacity to legislate on issues like “‘good governance’, ‘rights’ and ‘development’ not so much with a solicitude for the nation-peoples as for the community of foreign investors”?⁸⁶ Is constitutionalism in India being “held hostage by movement of global capital?”⁸⁷

Wendy Brown characterizes this set of paradoxical questions well when she asks, “When does legal recognition become an instrument of regulation, and political recognition becomes [*sic*] an instrument of subordination?”⁸⁸ In her analysis:

[h]istorically, rights emerged in modernity both as a vehicle of emancipation from political disenfranchisement or institutional servitude and as a means of privileg-

83. Duncan Kennedy, “The Critique of Rights in Critical Legal Studies” in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Durham: Duke University Press, 2002) 178 [Brown & Halley, eds, *Left Legalism*].

84. Wendy Brown & Janet Halley, “Introduction” in Brown & Halley, eds, *Left Legalism, ibid.*, 1 at 7-8.

85. For the Indian state, corporate, and military nexus, particularly in the context of *Adivasi* land acquisition for mining, see Arundhati Roy, *Broken Republic: Three Essays* (London: Penguin Books, 2011).

86. Upendra Baxi, “Outline of a ‘Theory of Practice’ of Indian Constitutionalism” in Rajeev Bhargava, ed, *Politics and Ethics of the Indian Constitution* (New Delhi: Oxford University Press, 2008) 92 at 96.

87. *Ibid.*

88. Brown, *supra* note 64 at 99.

ing an emerging bourgeoisie class within a discourse of formal egalitarianism and universal citizenship. Thus, they emerged both as a means of protection against arbitrary use and abuse of sovereign and social power and as a mode of securing and naturalizing dominant social powers—class, gender and so forth. Not only did bourgeoisie rights discourse mask by depoliticizing the social power of institutions such as private property or the family, it organized mass populations for exploitation and regulation ...⁸⁹

Rights, then, are a hydra-headed organism, and all rights-seeking enterprises—especially those on the left—need to be careful when using the law to claim them. While rights emerged as a means to limit sovereign power, once they are enshrined within a constitutional document, their interpretation, implementation, and desecration remain in the hands of the sovereign only. If we are captive in our articulation of what rights we demand, especially under conditions where our vocabulary is manufactured by the state, then what hope do we have for the future of emancipation for subaltern struggles?

A potentially useful starting point for responding to the paradox posed by Brown is to probe how liberalism disciplines our histories and memories of justice. How do we interrogate a political economy that promotes justice as a commodity where its cost is dependent on the language in which you ask for it and in the ways in which you publicly and privately ‘perform’ the rites and rituals of disciplined citizenship? When every governmental articulation of rights can become a spectacle for masking the tactic that is used to construct the ideal rights-bearing subject, which kind of citizen, according to the sovereign, qualifies for emancipation in the spheres of the family, polity, and market? And, to return to Marx, what kind of counter-political engagement is required on the part of people’s struggles to create a politics of ‘human emancipation’ that does not require the scaffolding of the legalistic limits of liberal rights? These are pressing challenges to a justice system that is only be made available to those who frame their requests in the language of rights approved by the state and who live as citizens in ways that are approved by the state.

I find instructive the work of postcolonial historian Dipesh Chakrabarty in this regard. In concluding this Part, I will make a brief reference to a theoretical schema that Chakrabarty sets up in his book *Provincializing Europe: Postcolonial Thought and Historical Difference*.⁹⁰ He offers a sophisticated analysis of Marx in order to understand the life process of capital through two historical trajectories. In one (History 1), capital’s universal narrative deals with historical difference by

89. *Ibid.*

90. (Princeton: Princeton University Press, 2000).

temporizing it and has the ability to subsume all progress under its logic. In the other (History 2), the totalizing thrusts of capital constantly interrupt and make room for the politics of human belonging and diversity.⁹¹

Following in the steps of Chakrabarty, this article works through two histories of emancipation in contemporary India. One of these (Emancipation 1) follows the liberal teleology of repression to emancipation of the rightsless—a narrative that feeds into and reproduces the magic of modernity. In the other (Emancipation 2), emancipation is inhabited and performed through bodily habits and unselfconscious collective practices of the everyday and ordinary that are not automatically aligned with the logic of capital. For sake of brevity, the rest of this Part focuses more centrally on understanding Emancipation 1, and the article concludes with some provisional glimpses into what Emancipation 2 might look like.

As I have already argued, one powerful tool for the propagation of Emancipation 1 is the legalistic language of human rights, which has become inescapably desirable, despite a critical consciousness about the cruelly liberal history of its idea and practice. For us, human rights remain, to use Gayatri Spivak's expression, "what one cannot not want."⁹² Wherever one might be placed on the ideological map of the left, even the idea of revolution, inscribed within the political and social practices of liberalism, cannot escape using the vocabulary of rights.⁹³ This consciousness has constituted each of us as 'desiring' nationalist, heterosexual, able-bodied, and entrepreneurial subjects to whom liberalism offers means like the market, secularism, merit, multiculturalism, and, of course, human rights law, as remedies for inequality, subordination, and exclusion.

What has also become apparent is that the most legitimate currency of negotiation for social and people's movements today is the language of liberal human rights as a means of righting wrongs, rather than solving or contesting oppressive paradigms.⁹⁴ As a result of this, states respond to issues of rights violations, through the practice of Emancipation 1, by promulgating a plethora of 'new' human rights—in effect characterizing human rights enunciations as the telos of justice-seeking projects. While this results in more law, it also

91. *Ibid* at 47.

92. *Outside in the Teaching Machine* (New York: Routledge, 1993) at 46.

93. See generally Oishik Sircar, "Sexing Spaces of Emancipation: The Politics and Poetics of Sexuality within the World Social Forum Process" (New Delhi: CACIM, 2010), online: <http://cacim.net/twiki/tiki-pagehistory.php?page=Publications%2FOishik%20Sircar&diff2=3&diff_style=sideview>.

94. Wendy Brown, "Suffering the Paradoxes of Rights" [Brown, "Suffering"] in Brown & Halley, eds, *Left Legalism*, *supra* note 83, 420 at 422.

co-opts claimants into nation-building projects and into a political economy that promotes justice as a consumptive product. It is within the market that the horizon of justice is established today. To ask for justice or recognition has become, thus, a particular manner of being in the world: It not only confines us into a particular language, it also forces us to perform our claims in a particular way, that is, as the good, nationalist, heterosexual, respectable, able-bodied, and entrepreneurial citizen.

So what would a politics of Emancipation 2 look like? For that, can we engage the law without falling into the trap of liberalism? Can we afford to completely disengage with liberal rights? At what cost do we move beyond the legalese of human rights? Does speaking the liberal language operate as a strategy for people's movements, or is it a co-optation of it? What does the left's turn to legalism hold for the future of Emancipation 2? And as Wendy Brown enquires, "[H]ow might the paradoxical elements of the struggle for rights in an emancipatory context articulate a field of justice beyond 'that which we cannot not want'?"⁹⁵

IV. DYNAMICS OF DISENCHANTMENT

*According to the fable of their constitution, Indians today are all "citizens."*⁹⁶

Chakrabarty's provocation is troubling at this point in history when we are still buoyant about the recent sixty-year milestone of the Constitution of India. On national television we were comfortably consuming Gulzar's⁹⁷ mellifluous rendition of why each citizen needs to defend the *Samvidhan* (Constitution) on one hand, and the prime time coverage of the state's manufactured constitutional legitimacy for an armed offensive against the "Maoists" on the other. This despite the fact that the SC has categorically disapproved the arming of the Salwa Judum, an illegal, state-sponsored paramilitary group in the state of Chattisgarh,⁹⁸ and has snubbed the government for raising the bogey of Naxalism⁹⁹ against human

95. *Ibid* at 432.

96. Dipesh Chakrabarty, "Postcoloniality and the Artifice of History: Who Speaks for 'Indian' Pasts?" (1992) 37 *Representations* 1 at 8.

97. Gulzar is an award-winning Urdu poet and a songwriter for several critically acclaimed Hindi films.

98. J Venkatesan, "Supreme Court Disapproves of Arming Salwa Judum" *The Hindu* (1 April 2008), online: <<http://hindu.com/2008/04/01/stories/2008040161000100.htm>>.

99. Naxalism is a militant ideology that emerged out of the 1967 peasant uprising for land redistribution from the Naxalbari district in the state of West Bengal, India. Naxal movements are still active where struggles against land acquisition by the Indian state exist. Naxalites are interchangeably also called Maoists because they organize under the

rights activists.¹⁰⁰ While India's corporate actors were proudly declaring how the Indian economy braved the recession, they were also condoning the incarceration of Doctor Binayak Sen¹⁰¹ because his politics would have undermined the credibility of the mining industry's promises of foreign direct investment into India.

The poetics of constitutional magic, the politics of constitutional markets, and the polemics of constitutional coercion make us believe in the fable of citizenship. The power of this fable also disciplines us to almost unquestioningly accept anything that carries the tag of constitutional legitimacy attached to it, such as special security legislation, disinvestment policies, large industrial projects that lead to mass scale displacement, rights articulated in the language of privacy, and, of course, the twenty-one-month long Emergency that was declared in India between 1975 and 1977.

The "dynamics of disenchantment"¹⁰² are partially allayed by the trust that the rightsless have placed in the Constitution because of the creative activist interventions by the SC over the last several years in the form of Public Interest Litigation (PIL) or Social Action Litigation (SAL) to protect and uphold the human rights of a range of disadvantaged communities and individuals. The diamond jubilee of the Constitution thus cannot be celebrated without acknowledging the thirty years of "judicial populism"¹⁰³ in India spearheaded by the SC. As Justice Dwivedi observed in *Kesavananda Bharathi v State of Kerala*:

The Constitution [of India] is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.¹⁰⁴

Communist Party of India (Maoist). For a historical account, see Sumanta Banerjee, *India's Simmering Revolution: The Naxalite Uprising* (Zed Books: London, 1984).

100. Press Trust of India "Supreme Court Snubs Govt. for Raising Naxal Bogey Against Rights Activists" *The Hindu* (22 February 2010), online: <<http://beta.thehindu.com/news/national/article111511.ece>> [PTI].

101. Binayak Sen is a medical doctor, human rights activist, and member of the People's Union for Civil Liberties. He has been involved with public health work in remote areas in the state of Chattisgarh for several years, and has been critical of the government's policies on land acquisition and eviction of poor peasants. In May 2007, he was allegedly falsely arrested by the police on charges of sedition and for being an alleged Naxalite. After several failed attempts, the SC of India finally granted him bail in March 2011. A final decision on his conviction is pending (as of 2012). See generally Minnie Vaid, *A Doctor to Defend: The Binayak Sen Story* (Delhi: Rajpal & Sons, 2011).

102. Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" (1985) *Third World Legal Studies* 107 at 107.

103. *Ibid.*

104. *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr*, [1973] AIR 1461 at

If the legitimacy of the *Constitution* has remained intact for sixty years, this fact is almost singularly owed to the SC's efforts (in response to claims by people's movements and social action groups) through half its life span. As Baxi noted in 1985, "The Supreme Court of India is at long last becoming ... the Supreme Court *for* Indians."¹⁰⁵ Baxi's optimism, however, has waned over time, and he wrote in 2002:

This disenchantment is now more fully voiced when the *still* rightless peoples ... have to say even to the Supreme Court of India: 'Physician heal thyself'. The new zamindari [landlordism] of public interest by courts appears to them no different from its earlier forms and incarcerations, although it provides a career path for many an entrepreneur in the market for human rights activism.¹⁰⁶

The impetus for the "charismatic inaugural moment"¹⁰⁷ of judicial populism was the Emergency, during which the SC's role in protecting Constitutionally guaranteed fundamental rights was itself suspect. In the landmark 1976 case of *Additional District Magistrate, Jabalpur v Shivakant Shukla*,¹⁰⁸ individuals detained without trial challenged the constitutionality of a presidential order suspending the right to challenge detention orders for the duration of the Emergency. They argued that the presidential order and their detentions violated Article 21's guarantee that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."¹⁰⁹ The SC denied the petitions and upheld the presidential order, opining that "in times of emergency the Executive safeguards the life of the nation" and that during such times its actions cannot be challenged as arbitrary or unlawful.¹¹⁰ As Ashok H. Desai and S. Muralidhar note:

[The case] granted virtual immunity to any action of the executive affecting the life and liberty of the citizen. ... The judgment brought into question the role of the Supreme Court as the guardian of citizens' liberties. The vigorous growth of PIL was in some measure a reaction to this criticism.¹¹¹

para 2013 [*Kesavananda*].

105. Baxi, *supra* note 102 [emphasis added].

106. Upendra Baxi, "Preface" in SP Sathe, *Judicial Activism in India: Transgressing Border and Enforcing Limits*, (New Delhi: Oxford University Press, 2002) i at xvi-xvii [emphasis in original] [Sathe].

107. *Ibid.*

108. *Additional District Magistrate, Jabalpur v SS Shukla*, [1976] SCR 172 (India) [*ADM Jabalpur*].

109. *India Const*, *supra* note 5.

110. *ADM Jabalpur*, *supra* note 108 at p 219.

111. "Public Interest Litigation: Potential and Problems" in BN Kirpal et al, eds, *Supreme But*

Justice H.R. Khanna dissented, arguing that “detention without trial is an anathema to all those who love personal liberty.”¹¹² Justice Khanna’s observation in the *Kesavananda* judgment about why the *Constitution* needs amendments to ensure that the right to life cannot be suspended under any circumstance was a brave act of dissent in the spirit of the *Constitution*’s revolutionary past:

No generation has a monopoly of wisdom nor has a right to place fetters on future generations to mould the machinery of Governments. If no provisions were made for amendment of the Constitution, the people would have recourse to extra-constitutional method like revolution to change the Constitution.¹¹³

Today, recourse to extra-constitutional means to change the *Constitution* is active, as evidenced by the militant turn that several peasant movements have taken in the country over the past few years. The sovereign in India still holds absolute authority to declare a state of emergency.¹¹⁴

The *New York Times* published an editorial two days after the *ADM Jabalpur* dissent as a tribute to Justice Khanna, stating:

If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first 18 years as an independent nation, someone will surely erect a monument to Justice H. R. Khanna of the Supreme Court.

It was Justice Khanna who spoke out fearlessly and eloquently for freedom this week in dissenting from the court’s decision upholding the right of Prime Minister Indira Gandhi’s government to imprison political opponents at will and without court hearings ... the Indian Supreme Court’s decision appears close to utter surrender.¹¹⁵

Although India has seemingly found its way back to freedom and democracy, the SC remains subject to the will of the sovereign and extracts public reverence through spectacles. In its post-Emergency decision in *Maneka Gandhi v Union of India*,¹¹⁶ the SC affirmed that the doctrine of due process cannot be divorced

Not Infallible: Essays in Honour of the Supreme Court of India (New Delhi: Oxford University Press, 2004) 159 at 161.

112. *ADM Jabalpur*, *supra* note 108 at 264.

113. *Kesavananda*, *supra* note 104 at para 1445.

114. Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005).

115. Dhananjay Mahapatra, “Dissenter Judge During Emergency Forgotten” *The Times of India* (3 March 2008), online: <http://articles.timesofindia.indiatimes.com/2008-03-03/india/27760185_1_fundamental-rights-constitution-judgment>, citing “Fading Hope in India” *New York Times* (30 April 1976) A26.

116. *Maneka Gandhi v Union of India*, [1978] 2 SCR 621 (India) [*Maneka*].

from the operation of the fundamental rights to equality, freedom, life, and liberty,¹¹⁷ in effect expanding the SC's power to strike down legislation and to include the inspection of a statute's commitment to substantive due process.¹¹⁸ Further, pursuant to Justice Khanna's dissent in *Kesavananda*, the forty-fourth amendment to the *Constitution* was passed, excluding Articles 21 and 22 from suspension during times of emergency.¹¹⁹ In 2009, former Chief Justice of India M.N. Venkatachalliah said at a public lecture that the majority decision in *ADM Jabalpur* should be consigned to the "dustbin of history."¹²⁰ So much so that in January 2011, a bench of Justices Aftab Alam and A.K. Ganguly said that the *ADM Jabalpur* decision was "erroneous."¹²¹

Yet, even after a spectacular history of judicial activism, PIL, and SAL in India, the SC has time and again upheld the constitutionality of notorious special security statutes like the *Terrorist Activities and Disruptive Activities (Prevention) Act, 1987*,¹²² the *Prevention of Terrorism Act, 2002*,¹²³ and the *Armed Forces Special Powers Act*,¹²⁴ and has found no substantive due process anomaly with these laws.¹²⁵ None of the precedents mentioned above stopped former SC judge Arijit Pasayat from publicly stating in 2009 that terrorists are animals and thus not deserving of human rights—in effect lending legitimacy to the extrajudicial killings and torture that are carried out with legal impunity in the name of protecting national security.¹²⁶ Similarly, the celebratory spectacle of Article 21 and its creative interpretations stopped us from rigorously critiquing Article 22,

117. *India Const*, arts 14, 19, 21.

118. Desai & Muralidhar, *supra* note 111 at 160.

119. *The Constitution (Forty-fourth Amendment) Act, 1978*, online: <<http://indiacode.nic.in/coiweb/amend/amend44.htm>>.

120. Press Trust of India "SC: Emergency-era order violated rights" *The Asian Age* (3 January 2011), online: <<http://www.asianage.com/india/sc-emergency-era-order-violated-rights-496>>.

121. *Ramdeo Chaubhan at Rajnath Chaubhan vs Bani Kant Das & Ors*, No 1378 of 2009 (review petition), online: <<http://www.indiankanoon.org/doc/1656850/>>.

122. No 28 of 1987, India Code.

123. No 15 of 2002, India Code.

124. No 28 of 1958, India Code.

125. These three laws have been declared constitutional by the SC—despite widely recorded evidence of how they have unleashed and legitimized police and army brutality, particularly against 'suspect' populations—in the following three cases: *Kartar Singh v State of Punjab*, [1994] 3 SCC 569 (India); *People's Union for Civil Liberties & Anr v Union of India*, [2004] AIR 456; *Naga People's Movement, of Human Rights v Union of India*, [1998] AIR 431.

126. Kranti Kumara & Keith Jones, "India: Supreme Court judge advocates 'animal rights' for alleged terrorists" World Socialist Web Site (20 February 2009), online: <<http://www.wsws.org/articles/2009/feb2009/indi-f20.shtml>>.

which legitimizes “preventive detention based on jurisdiction of suspicion ... as a just order of exception to the precious fundamental rights to life and liberty.”¹²⁷

What, then, has allowed the highest court to maintain its avowed position as the “Supreme Court *for* Indians”¹²⁸ after having compromised on the “basic structure”¹²⁹ element of fundamental rights that was ceremoniously asserted as non-derogable through any legislative measure or amendments to the *Constitution* itself in celebrated cases like *IC Golaknath v State of Punjab*,¹³⁰ *Kesavananda*,¹³¹ and *Minerva Mills Ltd v Union of India*?¹³² In other words, what has sustained our faith in the SC as the ultimate arbiter of fairness and justice when many of its own judgments have grossly compromised basic guarantees of constitutional fundamental rights? What role has an activist judiciary played in representing the *Samvidhan* to the common people to make them “love it” and “prize it”?¹³³

The sixty-third year of the *Constitution of India* provides an opportune moment to reflect on what sustains our faith in this document and the institutions that interpret it. The ambitious nature of this reflection demands both time and space that are unavailable for this article. However, I will focus on some critical events in courts’ interpretations and applications of the *Constitution*, paying specific attention to the question of socio-economic rights, primarily between 2000–2010. The inquiry is prompted by a need to find out how the Indian economy’s liberalization in 1991 impacted the way the courts responded to rights questions. Did they build on the trail-blazing history of judicial activism from the 1980s, or did they give in to the corporatized demands of the NLO to keep pace with the march of global capitalism? In other words, how do we understand the trajectory of Emancipation 1 in the history of post-liberalization Indian judicial-constitutionalism?

One trend suggests that in deciding PIL cases where the litigant is seeking redress for socio-economic rights violations judges have become “reluctant

127. Baxi, *supra* note 15 at 37.

128. Baxi, *supra* note 102.

129. The “basic structure” doctrine is a judicial safeguard against amendments to certain portions of the *Constitution of India* by the legislature that form its basic structure, like the chapter on fundamental rights. For the debates on this, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (New Delhi: Oxford University Press, 2009).

130. [1967] AIR 1643.

131. *Kesavananda*, *supra* note 104.

132. [1980] AIR 1789.

133. *Kesavananda*, *supra* note 104.

to strongly penalize the government even when the state fail[s] to fulfill its statutory obligations. Instead, courts adopt ... *weak remedies*, such as setting up committees and [commissions].”¹³⁴ This emphasis on weak remedies marks a peculiar characteristic of legislative democracies like India, where most socio-economic rights are enumerated in the *Constitution* but are never on par with civil and political rights. This status makes socio-economic rights non-justiciable and only progressively realizable. Given their constitutionally vulnerable status, socio-economic rights are further at a “systemic risk in legislative democracies because those who would benefit from them lack political power.”¹³⁵ In effect, while we might have rights-enhancing judgments from courts that interpret the *Constitution* expansively, these judgments do not transform structures of injustice—rather, they often normalize these structures.

A plain reading of the *Constitution* sets up the spectacular potential of its design. Here I do not refer to the “expanding horizons of Article 21”¹³⁶ that have enabled the SC to use the article creatively to read several rights into the *Constitution*, but rather to the commonsensical distinction between Fundamental Rights (FRs) and Directive Principles of State Policy (DPs). As is evident from the language used, there is a clear hierarchy between these two sets of entitlements. FRs like equality (Article 14) and life (Article 21) are worded in a way that imposes a positive limitation on state action, namely that “the state shall not deny to any person ...” or “no person shall be deprived.” On the other hand, the DPs such as work (Articles 41 to 43), education (Article 45), health (Article 47), and environment (Article 48A) are preceded by aspirational language—“the state shall promote with special care ...”; “the state shall take steps by suitable legislation ...”; “the state shall ... make effective provision for ...”; “the state shall, within the limits of its economic capacity and development ...”; or “the state shall endeavor to secure ...”. The distinction between the two, then, is a matter of the intention with which they were inserted in the *Constitution* in the first place.

Regarding the DPs, B.R. Ambedkar noted during the Constituent Assembly Debates that it was

the intention of the Assembly that in future both legislature and the executive should not merely pay lip-service to these principles enacted in this part but that

134. Shylashri Shankar & Pratap Bhanu Mehta, “Courts and Socioeconomic Rights in India” in Varun Gauri & Daniel M Brinks, eds, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge, NY: Cambridge University Press, 2008) 146 at 147 [emphasis added].

135. *Ibid.*

136. For a discussion on the “expanding horizons of Article 21,” see Mahendra P Singh, *VN Shukla’s Constitution of India*, 9th ed (Lucknow: Eastern Book, 1994) at 176.

they should be made the basis of all executive and legislative action that may be taken thereafter in the matter of governance of the country.¹³⁷

Yet, the DPs were, from the beginning, imagined as entitlements that would be progressively realized, contingent upon the economic ability of the state. While the state under the leadership of Jawaharlal Nehru always put rights enshrined in the DPs on the backburner by hiding behind the fig leaf of economic incapacity, it continued to pump money to arm the state—to the extent of investing enough monetary resources to orchestrate the Emergency. Progressive realization, it was discovered after the scandal of the Emergency, was a myth. As already mentioned, it was with the intention of undoing the damage of decisions like *ADM Jabalpur* that the SC engaged in judicial populism and started interpreting a range of ‘new’ human rights into the framework of FRs. This liberalization of constitutional interpretation was also accompanied by the relaxation of the rule of *locus standi*, giving rise to the marvel called PIL/SAL. As Baxi notes, this marked the moment when the SC started “taking suffering seriously.”¹³⁸ Unfortunately, the SC could not sustain the seriousness for very long.

As Radha D’Souza notes, during the first phase of the PIL/SAL years (1977–1987) the SC “emphasized human rights and facilitated access to justice for marginalized classes and groups.”¹³⁹ In the second phase (1988–1998) it started engaging with PIL primarily on issues of governance.¹⁴⁰ And during the third phase, which began in 1998,

the [SC’s] responses to economic legislation in the wake of neo-liberal reforms, which include privatization, liberalization, withdrawal of the state from critical areas of decision making, and increased federal intervention in the states among other things ... raised concerns about the ramifications of PIL in the era of globalization.¹⁴¹

Since the beginning of this phase, “the [SC] has upheld liberalization and privatization but declined to intervene in matters of redistributive justice.”¹⁴² In doing so, the SC fashioned itself as an organ of neo-liberal governance, and according to Balakrishnan Rajagopal started “sharing the biases of many of the goals and methods of [neo-liberal] governance itself ... [like] market fundamentalism, state fetishism, and the culture-ideology of consumerism.”¹⁴³

137. Shankar & Mehta, *supra* note 134 at 148.

138. Baxi, *supra* note 102 at 107.

139. Radha D’Souza, “The ‘Third World’ and Socio-Legal Studies: Neo-Liberalism and Lessons from India’s Legal Innovations” (2005) 4 Soc & Leg Stud 487 at 488.

140. Sathe, *supra* note 106 at 18; *ibid.*

141. *Ibid.*

142. *Ibid.* at 506.

143. Balakrishnan Rajagopal, “Pro-Human Rights but Anti-Poor? A Critical Evaluation of the

This turn has been substantiated through an empirical study by Varun Gauri, which shows that between 1961 and 2008, the SC's response to socio-economic rights questions increasingly became pro-middle class and anti-poor. Among other things, success rates for disadvantaged social classes in selected FRs cases before the SC decreased drastically from 71.4 per cent (1961–1989) to 47.2 per cent (2000–2008). Conversely, the success rates for claimants from advantaged social classes increased from 57.9 per cent (1961–1989) to 73.3 per cent (2000–2008).¹⁴⁴ As he notes in his conclusion:

The data here constitute a prima facie validation of the concern that judicial attitudes are less favorably inclined to the claims of the poor than they used to be, either as the exclusive result of new judicial interpretations or, more likely, in conjunction with changes in the political and legislative climate.¹⁴⁵

Clearly, the 'break with the past' occurred in the period following the flashpoint year of 1991.

In another survey of the SC's docket, Nick Robinson "finds a court overwhelmed by petitions not from poor or ordinary people but from those with money and resources. In fact, these more privileged litigants very often swamp the court using the very mechanisms that were historically justified to make it more accessible to the less fortunate."¹⁴⁶ In 2007, 40 per cent of the SC's regular hearings were on tax, arbitration, and service issues: "A disproportionate number of appeals are made up of these cases, which generally involve the more affluent litigants or government lawyers (who do not bear the cost of the appeal themselves)."¹⁴⁷ Robinson's findings show that in the 1970s, around 10 per cent of the cases before the SC were fundamental rights writ petitions, of which 5 per cent were admitted, and in 2008, the numbers dropped drastically to 2 per cent, of which none were admitted:

In 2008, the court received 24,666 letters, postcards, or petitions asking its intervention in cases that might be considered public interest litigation. Of these, just 226 were even placed before judges on admission days, and only a small fraction of these were heard as regular hearing matters. The rest were rejected.¹⁴⁸

Indian Supreme Court from a Social Movement Perspective" (2007) 8 Human Rights Review 157 at 180.

144. Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* (Working Paper No 5109) (Washington: The World Bank, 2009) at 16.

145. *Ibid* at 13.

146. Nick Robinson, "Hard to reach" *Frontline* 27:3 (12 February 2010), online: <<http://www.hindu.com/thehindu/fline/fl2703/stories/20100212270304600.htm>>.

147. *Ibid*.

148. *Ibid*.

This drop might have had a lot to do with an articulated stand by successive governments and many political parties that have frowned upon judicial activism allegedly usurping turf of the executive.¹⁴⁹ The present UPA government has even proposed a national litigation policy to claim damages from those who file frivolous PILs. This move comes at a time when it is well known that it is neither poor communities nor the human rights activists who file PIL/SAL on their behalf but rather the state that is the most active litigant.¹⁵⁰ The troubling concern here is that PIL/SAL has turned into the proverbial Frankenstein that the state is unable to control—which is why the state needs to discredit it forcibly. This is bad news for the rightsless, for whom PIL/SAL seemed to be the most powerful means of gaining at least recognition and visibility, if not emancipation and justice.

Through what he calls the “conditional social rights” approach, Madhav Khosla’s reading of the way in which the SC has approached questions of socio-economic rights might help us understand this situation better. As he notes, “Rather than focusing on the inherent nature of measures undertaken by the state, the conditional social rights approach focuses on their implementation. No judicial review is conducted on the former question, making the rights *conditional* upon state action.”¹⁵¹ He also observes that the conditionality emerges from the fact that many SC judgments have named ‘new’ rights but have not elaborated on their content.¹⁵² Thus, the articulated right becomes a hollow spectacle: You can celebrate its naming, but will eventually mourn its non-realization.

This reinforces to my earlier point that petitioning the SC to respond to, correct, undo, or remedy violations of FRs holds little meaning for the rightsless because the judgment will remain a mere spectacle, and the realization of the right—even when it is upheld by the court—is conditional on political will. Furthermore, the political will to implement a judgment on social rights is

149. Seetha, “Turf Tussle – ‘Judicial pronouncements have ranged from the divine to the comical’” *The Telegraph* (24 December 2006), online: <http://www.telegraphindia.com/1061224/asp/insight/story_7168959.asp#>; TNN, “Judiciary Shouldn’t Undermine Executive PM” *The Times of India* (7 February 2011), online: <http://articles.timesofindia.indiatimes.com/2011-02-07/india/28377720_1_judiciary-justice-kapadia-democracy>.

150. Anindo Dey, “Government the Biggest Litigant in the State” *The Times of India* (10 February 2009), online: <http://articles.timesofindia.indiatimes.com/2009-02-10/jaipur/28004985_1_cases-biggest-litigant-lawyers>.

151. Madhav Khosla, “Making Social Rights Conditional: Lessons from India” (2011) 8 *Int’l J of Const L* 739 at 5 [emphasis in original].

152. *Ibid.*

contingent upon the state's ostensible economic capacity. The faith in the spectacle of PIL and the resultant fate of resorting to constitutional remedies are thus deeply restricted by a double conditionality.

Although compelling, the conditionality argument must be used cautiously. This approach can absolve the courts of their complicity in crafting a jurisprudence of GEC, which in actuality has been the situation where "the constituency on whose behalf the enhancement of judicial power has been strengthened [through PIL/SAL jurisprudence] began to emerge as the casualty of the exercise of that power."¹⁵³ In two scathing articles in the *Economic and Political Weekly* written in 2004 and 2009, senior SC lawyer Prashant Bhushan traces a set of SC judgments on issues ranging from national security to development that have gravely undermined the FRs tenets of the *Constitution*.¹⁵⁴ Many of these judgments can be characterized as "pro-human rights but anti-poor,"¹⁵⁵ further enabling the spectacle of Emancipation 1 to thrive. These judgments represent a narrative that endorses the idea that conditions of capitalism will better human rights guarantees.

As Bhushan angrily notes:

Since the liberalisation of the Indian economy, even the [SC's] rhetoric on socio-economic rights have [*sic*] been weakening. Very often the court has itself ordered the violation of those rights ... [This] seriously calls into question the commitment of the Indian courts to the rights of the poor and to the constitutional imperative of creating an egalitarian socialist republic. ... Part of the reason for this, undoubtedly, lies in the class structure of the Indian judiciary. The higher judiciary in India almost invariably comes from the elite section of the society and has become a self-appointing and self-perpetuating oligarchy. ... [T]here is no accountability of the higher judiciary ... Even public criticism of judges has often been held to be contempt of court.¹⁵⁶

Bhushan's observations are reiterated by Baxi in his reading of the SC's post-liberalization turn. In what he calls the "structural adjustment of judicial activism,"¹⁵⁷ Baxi provides five paradigmatic illustrations of what this turn means.

153. Ramanathan, *supra* note 45.

154. Prashant Bhushan, "Supreme Court and PIL: Changing Perspectives Under Liberalisation" *Economic and Political Weekly* 39:18 (1 May 2004) 1770 [Bhushan, "Supreme Court"]; Prashant Bhushan, "Misplaced Priorities and Class Bias of the Judiciary" *Economic and Political Weekly* 44:14 (4 April 2009) 32 [Bhushan "Misplaced Priorities"].

155. Balakrishnan Rajagopal, "Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective" (2007) 8 Human Rights Review 157 at 157.

156. Bhushan, "Misplaced Priorities," *supra* note 154 at 37.

157. Upendra Baxi, "Structural Adjustment of Judicial Activism" (Inaugural Lecture delivered at West Bengal Academy of Juridical Sciences, 10 June 2006), [unpublished].

First, he points to the way in which the SC gave short shrift to a petition that claimed that India's accession to the World Trade Organization violated both FRs and the basic structure doctrine.¹⁵⁸ Baxi notes that the SC "asked the petitioners to return to its powers as and when any such deleterious impact [violation of FRs] became more manifest!"¹⁵⁹ His second example is the infamous 1989 Bhopal settlement (which may have started the trend Bhushan refers to), in which the SC not only reduced the compensation amount from 3 billion US dollars to 470 million US dollars in full and final settlement, but also provided Union Carbide Corporation full immunity from criminal proceedings.¹⁶⁰ As Baxi writes, "The settlement orders mark[ed] the beginnings of a judicially induced/managed Indian transition from the paradigm of the universal human rights of all suffering peoples to that of trade-related, market-friendly human rights paradigm."¹⁶¹ Baxi's third illustration refers to the dilution of labour rights by the SC. He points in particular to a 2006 case in which a judge goes as far as to "suggest that his predecessors labored under the misimpression that ours was a *socialist* constitution!"¹⁶² Fourth, he comments on the SC's "meandering jurisprudence" on the *Narmada* case:

At one decisional moment, we are told that the height of the dam may not be raised without the utmost solicitous regard for the human rights, and human futures, of the ousted project affected peoples. At another decisional moment stands enacted the mysterious *pari passu* principle under whose auspices, submergence may actually occur with some indeterminate regard for relief, rehabilitation, and resettlement. At a third moment, the affected peoples stand somehow assured of that the Court is not powerless to render justice to the adversely affected peoples even as submergence occurs. Who knows what a fourth moment may after all turn out to be?¹⁶³

The fourth moment Baxi refers to in this passage is the SC's dismissal of the plaintiffs' petition and its order allowing the height of the dam to be increased. Since then, the door to the SC for the Narmada Bachao Andolan (the plaintiffs)

158. *Ibid* at 23.

159. *Shiva Kant Jha v Union of India*, WP (C) No 1357 (2007). For the text of the initial petition files in the Delhi High Court, see online: <http://www.shivakantjha.org/openfile.php?filename=pil/writ_petition_226.htm>. See also Yogesh Tyagi, "The Denunciation of Human Rights" (2008) 79 *The British Yearbook of International Law* 86 at 95.

160. *Union Carbide Corporation v Union of India and Others, etc*, 1989 SCALE (1) 380 (India).

161. *Supra* note 106 at 24.

162. *Ibid* at 25 [emphasis in original].

163. *Ibid*.

has been closed. And this instance also provides a lesson for social movements blinded by the spectacle of PIL/SAL: Rather than thinking of the SC as the court of first option in cases of FRs violations, it should be considered a last resort. For his fifth illustration, Baxi points to the SC's approval of urban demolition drives "that cruelly [impose themselves] on the bloodied bodies of the urban impoverished."¹⁶⁴ He references, among other cases, the deeply prejudiced *Almitra Patel* judgment discussed by Bhushan.

Needless to say, both Bhushan's and Baxi's choice and critique of cases are selective. However, they establish those critical events that paradigmatically mark the SC's embrace of the NLO. Both authors try to illustrate how the SC is constantly pitting the rights of the powerless against the rights of the powerful, ultimately favouring the latter even as it uses the language of rights itself. As Usha Ramanathan comments on the SCs confrontation with conflicting interests:

The right of over 30 per cent of residents of Delhi to their shelter in the slum settlements was pitted against the need to 'clean up' the city. The right to a relatively unpolluted environment by means of the relocation of industries was pitted against the right of the working classes to their livelihood. The right to life, livelihood and protection from immiseration and exploitation of communities displaced along the Narmada was pitted against the right to water that the dam was expected to reach to the people in parts of Gujarat; it was also pitted against the enormous amounts of money that had already been expended on the dam. Even the right of the victims of the Bhopal gas disaster to receive compensation was pitted against the bureaucratic imperative of winding up the processing of claims.¹⁶⁵

Outside of the judicial realm, since the 1990s, state policies on social justice have also been designed in such a way that they portray the state as human rights-friendly. However, this image crumbles when the human rights of the powerless come into conflict with the corporatized and militarized agendas of the state. A trend that has accompanied this process is the individuation of the rights question, whereby the state speaks of rights issues in the individual—and no longer in the collective—sense. If the collective question of entitlement comes up for consideration, it is addressed not as a rights issue that will attract state accountability but rather as an issue of service delivery, which can also be outsourced to non-state actors. Classic examples are the rights to food, education, and health, among others—all of which are being litigated, but only to put in place service delivery mechanisms and not necessarily to make structural transformations to institutions of subjugation. The dynamics of disenchantment seem more alive than ever before.

164. *Ibid.*

165. Ramanathan, *supra* note 45.

V. PRIVATIZING EMANCIPATION

*Publicity is the very soul of justice ...*¹⁶⁶

Reading beyond Bhushan and Baxi's lament, one might refer to the 2009 *Naz Foundation*¹⁶⁷ judgment of the Delhi High Court (HC) as an example of the progressive impact liberalization has had on judicial imagination. The decriminalization of same-sex relationships is clearly an outcome of the gradually increasing cultural acceptance of diverse sexualities that has taken place as a result of liberalization and globalization, as is evident from the court's constant allusions to international human rights law and case law, and precedents primarily from the United States. These references made apparent the cultural logic behind the court's judgment: India needs to live up to the progressive developments in other parts of the (Western) world by decriminalizing sodomy. As Anjali Gopalan, founder of petitioner *Naz Foundation*, said after the judgment was delivered, "Oh my God, we've finally stepped into the 21st century."¹⁶⁸ This exclamatory declaration seems to be a history-vanishing moment, where the ostensibly progressive present contributes to queer emancipation at the cost of blinding us to a historicized understanding of the cruelly liberal genealogies of present-day India.

While on the face of it this might be a convincing perspective, it must be noted that the *Naz Foundation* judgment is built upon on the foundations of the liberal virtue of privacy. Above, in Part II of this article, I argued that the idea of emancipation in the NLO has been privatized and that the *Naz Foundation* case is a classic example of this phenomenon. While at first look the judgment is progressive, and indeed historic, it seeks to recognize only the rights of those homosexual men who have the privilege of access to private space. The primacy put on private sex is clearly an elitist qualifier to read down the law because it excludes from its purview a whole range of non-elite and Indigenous sexually marginalized people who do not enjoy the privilege of private space.¹⁶⁹ The privacy standard is a myth because those who have access to private space were already outside the reach of the law. As Ashley Tellis asks, "What is the point of allowing consensual sex between private adults of the same sex when most violations are of us in the public realm: in institutions, on the streets, in

166. John Bowring, *The Works of Jeremy Bentham*, vol IV (Edinburgh: Tait, 1843) at 316.

167. *Naz Foundation*, *supra* note 27.

168. Elizabeth Flock, "The Law Breaker", *Forbes India* (26 December 2009),
online: <<http://business.in.com/printcontent/8082>>.

169. Oishik Sircar, "Questions of Visibility" (2008) *Plainspeak* 10.

parks, toilets and wherever else?”¹⁷⁰ Jason Fernandes has noted that the judgment prioritizes the interests of urban, English-speaking, middle-class leaders of the queer rights movement in India by overshadowing those very sexually marginalized (Hijras, Kothis, Panthis)¹⁷¹ who they claim to represent.¹⁷² My argument is not a dismissal of the judgment or the fact that it will truly empower the queer community, but rather that the trope of privacy is a contentious one that can be more damaging than helpful. Privacy arguments also have the tendency to promote privatized forms of governance among sexually marginalized citizens through practices of individuation.

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

Privacy, for example, is for many feminists a site that depoliticizes many of the constituent activities and injuries of women: reproduction, domestic assault, incest, unremunerated household labour, and compulsory emotional and sexual service to men. Yet for those concerned with sexual freedom, with welfare rights for the poor, and with the rights to bodily integrity historically denied racially subjugated peoples, privacy generally appears unambiguously valuable. ... Like rights themselves, depending on the function of privacy in the powers that make the subject, and depending on the particular dimension of marked identity that is at issue, privacy will be seen variously to advance or deter emancipation, to cloak inequality or procure equality.¹⁷³

The lesson, then, is to not treat the liberal virtue of privacy as a universal emancipatory category but, rather, as one that has the ability to disenfranchise many sexual rights agendas that consider, following Bentham, that publicity is at the very heart of justice.

The privatization of emancipation in the NLO has also taken place in the realm of other socio-economic rights such as education. Let me use two examples from the world of advertisements and charity work to explain how this works. As mentioned in Part I of this article, the right to education, which was originally a

170. Ashley J Tellis, “Nothing to celebrate about 377” *Daily News & Analysis* (27 June 2010), online: <http://www.dnaindia.com/lifestyle/comment_nothing-to-celebrate-about-section-377_1401765>.

171. These are identity categories that non-elite, sexually marginalized men in India use instead of the category of gay. Culturally, the performance of these identities is also very different from being gay or only homosexual.

172. Jason Keith Fernandes, “The Dilemma after the Decision: Strays thoughts after Gay Liberation” *Tehelka* (14 August 2009), online: <http://www.tehelka.com/story_main42.asp?filename=Ws220809The_Dilemma.asp>.

173. Brown, “Suffering,” *supra* note 94 at 428.

DP, has now been made justiciable through legislation and through its migration into Part III of the *Constitution* (as Article 21A). A print advertisement that formed part of the hugely publicized Teach India (TI) campaign (launched in 2008 by the *Times of India*, a private newspaper company and India's largest circulating English daily) posed the question, "What is the perfect solution to illiteracy?" In the next line there are two options: "Govt." and "You." The "Govt." option is scratched out, and there is an affirmative tick mark beside "You." After this, the advertisement goes on to detail how "You" can join the TI campaign to "help change the future of a child forever." Choosing "You" over "Govt." can imply two things. One is that the government is useless and that it has not been able to ensure education for all children, which is why we should abandon the government and take it upon ourselves to eradicate illiteracy. The other implication could be that providing education to children is not something that the state should do at all and that it is upon private actors—not just individual citizens, but corporate actors and non-governmental entities—to impart education. This call by a corporate entity sends out the message that the protection of children's rights (in this case education) needs to be privatized. This advertising strategy "engage[s] its audience aesthetically, with promises of pleasure and self-realization."¹⁷⁴ The pleasure being offered is that of providing education to a hapless child, which benefits the donor's sense of self-worth as well as the recipient child.

The question of the right to education is completely hollowed out, and education for children turns solely into a matter of individualized compassionate concern. The more you can arouse compassion, the more educated India's children will become; it does not matter whether the right to education is a justiciable right or not, nor whether the state is being held accountable or not. Of course, the *Times of India* cannot be held accountable if it fails to provide universal education. It is their compassionate gesture, outside of their profit-making concerns, that makes them worthy of popular praise and raises their corporate goodwill. This outsourced strategy of privatized and packaged emancipation fuels a thriving compassion industry and creates a culture of impunity that allows the state, as well as those who claim to replace the state, to do away with accountability.

Private capital's campaign to end inequality and discrimination has taken another interesting turn and has given Emancipation 1 another dimension altogether. An announcement on the matrimonial pages of the *Times of India* appealed to advertisers to "drop social pre-conditions like caste, religion or

174. William Mazzarella, *Shovelling Smoke: Advertising and Globalization in Contemporary India* (Durham: Duke University Press, 2003) at 68.

dowry requirements,” in return for a 15 per cent discount on advertising rates. Ostensibly, this move appears progressive. But it asks the potential advertiser to privatize the practices of what Amartya Sen calls “identity disregard,”¹⁷⁵ the implication being that in the consumptive markets of neo-liberalism, identities don’t matter—which, Sen notes, is a myth. What gets passed off as progressive in the present instance is actually a move towards privatizing the practice of non-discrimination as a public issue. For instance, some progressive-thinking liberal person might believe strongly in the message that the advertisement is conveying and accordingly drop identity-based marriage preconditions. But will the same person support affirmative action as a state policy in private organizations in India? Identity disregard, then, is a privatized issue of self-governance that necessarily has no connection to ending structural prejudice—be it cultural, social, economic, or sexual. Emancipation 1 seduces people to end discrimination through the economic incentive of discounts. This is another dimension of the operation of Emancipation 1, and it is at the heart of how the NLO functions.

VI. THE CURIOUS CASE OF HANS DEMBOWSKI

*Judicial process and institution cannot be permitted to be scandalized or subjected to contumacious violation in such a blatant manner... Vicious stultification and vulgar debunking cannot be permitted to pollute the stream of justice.*¹⁷⁶

In this penultimate Part, I share an anecdote about what happens when the spectacle of emancipation is resisted and punctured. There could be very many ways of doing this—perhaps, for example, by publicly burning copies of anti-poor judgments, taking inspiration from Ambedkar’s burning of the *Manu Smriti*¹⁷⁷ at the Mahad Satyagraha in Maharashtra in 1927. I, however, will examine a very benign form of resistance.

In 2001, German sociologist Hans Dembowski’s book *Taking the State to Court: Public Interest Litigation and the Public Sphere in Metropolitan India*¹⁷⁸ was

175. Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: WW Norton & Company, 2006) at 20.

176. *Narmada Bachao Andolan v Union of India and Ors*, [1999] 4 SCR 5 at 3 (India), Anand J.

177. The *Manu Smriti* is an ancient Hindu religious text that lays down, among other things, the operations of the caste system and the punishments for lower castes if they do not follow their caste diktats. See Wendy Doniger & Brian K Smith, *The Laws of Manu* (London: Penguin Books, 1991).

178. Hans Dembowski, *Taking the State to Court: Public Interest Litigation and the Public Sphere in Metropolitan India* (Oxford: Oxford University Press, 2001), online: Asia House <http://www.asienhaus.de/public/archiv/taking_the_state_to_court.pdf>.

published by Oxford University Press (OUP) in India. Soon after its launch at the 2001 Kolkata Book Fair, the Calcutta High Court started contempt-of-court proceedings against Dembowski, the publisher, and others, and OUP discontinued distribution of the book.¹⁷⁹ To this day, the contempt proceedings have not been heard, and the book has not been re-introduced into the market—despite that fact that Dembowski apologized to the court. The book is, however, freely downloadable on the Internet.¹⁸⁰

In a 1999 order reprimanding Arundhati Roy for insulting the SC in her essay “The Greater Common Good,”¹⁸¹ Justice Anand made it amply clear that the court will not tolerate anyone polluting the “stream of justice.”¹⁸² So what was in Dembowski’s book that the court saw as having the potential to pollute? *Taking the State to Court* is a dense sociological and ethnographic reading of environmental cases in the Calcutta High Court. While a detailed discussion of the contents of the book is beyond the scope of this article, suffice to say that apart from the book’s research being based in Kolkata and Howrah, its theoretical insights are aimed at examining the relationships between civil society and the judiciary in fashioning a public sphere. The book also provides a very useful sociological discussion of the history of judicial activism in India. Until chapter six, the book discusses various facets of the cases that it studies. It is in chapter seven that Dembowski offers a more personalized ethnographic reading of judicial and court culture in Kolkata. And this, it seems, was the central ‘pollutant’ for the court.

As Dembowski mentions in a paper that he presented at a conference at Jawaharlal Nehru University, Delhi, in 2008:

So why were some judges obviously unhappy with the book? The answer probably lies in chapter 7, which moves on from “hard” case-study facts derived from court orders, government plans and other written documents. Chapter 7 examines day-to-day life in the High Court and civil society, including rumours of corruption. The image that emerges of the High Court is one of an institution that does not enjoy undivided popular trust. While this image may not be favourable, I would still insist

179. “Taking the State to Court?” *Outlook India* (18 June 2001), online: Outlook India <<http://www.outlookindia.com/article.aspx?212107>>.

180. For the full text of the book, see Hans Dembowski, *Taking the State to Court: Public Interest Litigation and the Public Sphere in Metropolitan India*, online: <http://www.asienhaus.de/public/archiv/taking_the_state_to_court.pdf>.

181. *Outlook India* (24 May 1999), online: <<http://www.outlookindia.com/article.aspx?207509>> [*Outlook India*].

182. Prashant Bhusan, “Judges in their own cause-I” *The Hindu* (4 September 2001), online: The Hindu <<http://www.hindu.com/2001/09/04/stories/05042524.htm>>.

that it was true at the time and that my description would hardly seem unfair to critical readers without personal stakes in the matter.¹⁸³

He concludes the book by stating, “Public Interest Litigation has, several times, made a difference in people’s immediate surroundings. While it does not provide an easy road to official accountability and democratic deliberation, it does raise hope for change.”¹⁸⁴

My reading of chapter seven does not provide me with any poisonously pollutant material that can do any harm to the court’s stream of justice or injustice. In my view, what Dembowski has written does not qualify as contempt under the *Contempt of Courts Act, 1971*.¹⁸⁵ Rather, it falls squarely within the exceptions of “fair and accurate report[ing]” and “fair criticism.”¹⁸⁶ Yet the court’s censorious response to a book that did not in any militant way call the judiciary’s spectacular bluff is a brutal affront to academic and creative freedom in this country. Is the spectacular façade of the judiciary so fragile that the only way it can stop people from scratching its surface is by criminalizing them?

The curious case of Hans Dembowski brings home the fact that the high court and the SC in India may use the spectre of contempt to muzzle resistance to the spectacles of emancipation that judicial imagination manufactures for us.

It is apt to close this Part by quoting at length that part from Arundhati Roy’s “The Greater Common Good” that made her guilty of contempt, leading to a day’s incarceration:

I stood on a hill and laughed out loud

...

Why did I laugh?

Because I suddenly remembered the tender concern with which the Supreme Court judges in Delhi (before vacating the legal stay on further construction of the Sardar Sarovar Dam) had enquired whether tribal children in the resettlement colonies would have children’s parks to play in. The lawyers representing the government had hastened to assure them that indeed they would, and, what’s more, that there were seesaws and slides and swings in every park. I looked up at the endless sky and down

183. Hans Dembowski, “Academic Freedom Only for the Online Avatar? – Calcutta High Court Puts Limits on Sociological Debate” (Paper delivered at the LASSNet Inaugural Conference, Jawaharlal Nehru University, New Delhi, 10 January 2009), online: <<http://www.lassnet.org/2009/readings/dembowski2008academic-freedom.pdf>> at 4.

184. *Ibid* at 211.

185. No 70 of 1971, India Code.

186. *Ibid*, ss 4-5.

at the river rushing past and for a brief, brief moment the absurdity of it all reversed my rage and I laughed. I meant no disrespect.¹⁸⁷

VII. LETTING HOPE ELOPE WITH JUSTICE? A POETIC DETOUR

*Your courtroom turns into an ominous circus.
Two shows everyday, entry free. As the
High Priestess you let hope elope with justice...*

*And to make sure that you never turn blind,
Or bored, or fall asleep, each plaintiff applies
A paste of bloodred chillies on your open eyes¹⁸⁸*

I will end this article with a set of stray thoughts—a poetic detour of sorts—that will provide hopeful glimpses of what Emancipation 2, as I imagine it, might look like. Detours are necessary, as they allow us to traverse uncharted paths to arrive at our favoured destinations. Sometimes detours make us re-imagine our destinations and lead us to places that we did not plan to go to. Detours are inevitable in any ethical voyage because our journeys are concerned not just with the destination but also with every bit of the journey itself, which is why I think it is apt to begin the concluding Part of this article by sharing Naxal ideologue and poet Srijan Sen's poem "Das Kapital":¹⁸⁹

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

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

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

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

187. *Outlook India*, *supra* note 181.

188. Meena Kandasamy, *Ms Military* (New Delhi: Navayana Publishing, 2010) at 28-29

189. Srijan Sen, "Das Kapital" in Sumanta Banerjee, ed, *Thema Book of Naxalite Poetry* (Kolkata: Thema, 2009) 72 at 72.

This poem for me is not one that denounces Marxism; rather, it calls for a more rigorous engagement with it. It cautions us about unquestioningly believing in the political emancipation promised by the liberal incantations of constitutionalism. The poem urges us to interrogate rights as constitutive of oppressive systems of power rather than as a body of knowledge or a tactic of management that is outside of it.

Judicial pronouncements are also texts of emancipation, and they hold the cruel capacity to unleash brutal violence. As Robert M. Cover states:

Legal interpretation takes place in a field of pain and death. . . . A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.¹⁹⁰

What is required, then, is a re-imagining of emancipation by searching for and archiving material practices of being that embody insurrectionary knowledge: knowledge that brings an understanding of rights as embodied practices of resistance that disturb the linear trajectories of constitutional narratives of emancipation; and knowledge that reproduces the magic of modernity and normalizes inequality. What comes to mind from the recent history of contemporary India is the July 2004 protest outside the headquarters of the Assam Rifles in Imphal, the capital of the northeastern state of Manipur, where groups of middle-aged women, stripped naked, shouted slogans and carried banners that read, "Indian Army Rape Us!" The protest was a spontaneous response to the arbitrary abduction, rape, and murder of Manorama Devi by the armed forces on mere suspicion of being an insurgent.¹⁹¹ What does the corporeality of this protest do to our constitutional morality in a location where the law has been central to the normalization of state violence? The violent letter of the law (the *Armed Forces Special Powers Act, 1956*¹⁹²), which allows the army to kill on suspicion, and the fragility of our spectacular hope in constitutional protection was powerfully

190. "Violence and the Word" (1986) 95 Yale LJ 1601 at 1601.

191. Teresa Rehman, "Why I screamed, rape us, take our flesh" *Tehelka Magazine* (31 May 2008), online: Tehelka Magazine <http://www.tehelka.com/story_main39.asp?filename=Ne310508rape_us_our_flesh.asp> and Human Rights Watch, "These Fellows Must be Eliminated: Relentless Violence and Impunity in Manipur" (29 September 2008), online: Human Rights Watch <<http://www.hrw.org/reports/2008/09/29/these-fellows-must-be-eliminated>>.

192. No 28 of 1958, India Code.

shattered by the protest that questioned not only the perverse masculinity of the state but also the very structure of the law that perpetuates the state's monopoly over violence through constitutional sanction.¹⁹³

Do we abandon Emancipation 1? Where do we look for Emancipation 2? How can we stop hope from eloping with justice? Nivedita Menon provides an inspirational direction:

I understand emancipation as a process without closure, it is not a goal that we can reach. Each victory becomes the site of a fresh cooptation, but conversely too, each defeat releases new potential to resist oppression. To move away from legal and state-centered conceptions of political practice is to recognize political practice as the perpetual *attempt* to eliminate oppression rather than the *achievement* of this elimination. Nevertheless “emancipation” remains a horizon that should drive our political practice.¹⁹⁴

Emancipation 2 thus lies in the contested cultures of the quotidian, the cacophonous politics of the street, and the mundane negotiations of the everyday and ordinary, or what Asef Bayat calls “nonmovements”: “the collective endeavors of millions of non collective actors, carried out in the main squares, back streets, court houses, or communities.”¹⁹⁵ Emancipation 2 is about the unrelenting journeys full of detours for finding new meanings for our human condition beyond greed and civilizational domination.

I will end, finally, with another poem. This one is called “Right” and is written by Naxal poet Cherabandaraju:¹⁹⁶

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

193. Despite the *Protection of Human Rights Act, 1993* that established the National Human Rights Commission, section 19 of the *Act* denies the NHRC any authority to investigate into human rights violations by the armed forces. The NHRC, on receipt of any complaint can only seek a report on the alleged violation from the central government. *Protection of Human Rights Act, 1993*, No 10 of 1994, India Code.

194. Menon, *supra* note 70 at 20 [emphasis in original].

195. Asef Bayat, *Life as Politics: How Ordinary People Change the Middle East* (Stanford: Stanford University Press, 2009) at ix.

196. In Banerjee, *supra* note 189, 62.

Our constitutional rights vocabulary is woefully inadequate in responding to this deeply unsettling paradox. I, for one, would unflinchingly support the extension of Cherabandaraju's poem to a hypothetical but altogether conceivable claim by a company that we must keep hacking down trees "... because – we need a factory." I can imagine the company going on to wax eloquent about how the factory will help people build concrete houses, hospitals, and schools. Huts—they are primitive! Their prototypes can adorn exotic resorts that are built by cutting down trees in forests, destroying beaches, defacing hills, and displacing people, but 'real' huts, and the real people who inhabit them, should become extinct.

In the second half of 2011, while the state was caught in one of modern India's most complicated governance crises—that of governmental corruption—the SC restored some hope. A most unexpected spectacular moment came on 5 July 2011, when the SC, hearing a petition on human rights violations carried out by a civilian group called Salwa Judum,¹⁹⁷ ordered that the vigilante civilian group be disbanded and declared that it was unconstitutional on the part of the state of Chattisgarh to carry out, in the name of fighting Maoism, armed operations that resulted in grave violations of human rights of poor tribal peoples.¹⁹⁸ In a rare acknowledgement of the devastating consequences of neo-liberal economic policies of the state and, in particular, the mining industries, the SC noted in unambiguous terms:

The culture of unrestrained selfishness and greed spawned by modern neo-liberal economic ideology, and the false promises of ever increasing spirals of consumption leading to economic growth that will lift everyone, under-grid this socially, politically and economically unsustainable set of circumstances in vast tracts of India ...

Predatory forms of capitalism, supported and promoted by the State in direct contravention of constitutional norms and values, often take deep roots around the extractive industries.¹⁹⁹

Most of us on the left of the ideological spectrum praised the judgment, and we celebrated the achievements of those who fought the legal battle and of those who have bravely resisted the state's violence in Chattisgarh and other places in India where mining industries have devastated the lives and livelihoods of poor Indigenous populations. This was a classic instance of left legalism's triumph.

197. Also referred to as Special Police Officers (SPOs)—tribal youth trained to fight Maoist insurgents, armed and aided by the state of Chattisgarh.

198. *Nandini Sundar & Others v State of Chattisgarh*, [2007] Writ Petition (Civil) No 250 of 2007 (India).

199. *Ibid* at 9.

This seemed like a repeat of the act of historical rectification that the SC carried out in the wake of the Emergency. Our faith in the law, like Ustad Mangu's, was seemingly restored. But the celebration was temporary. On 18 November 2011, in response to a challenge to the SC order by the state, the Court clarified that the ban on Special Police Officers and the declaration that they were unconstitutional were confined to the state of Chattisgarh.²⁰⁰ There was hardly any questioning of this shift in the SC's stand that can now, in effect, allow the state to replicate the formation of vigilante groups in other parts of India ostensibly facing the Maoist threat. The spectacle of the SC's strong indictment against neo-liberalism-induced state violence was ultimately truncated.

In November 2011, the Chattisgarh government declared that it had complied with the SC judgment and had disbanded all SPOs. On 26 January 2012, India's Republic Day was celebrated to mark the anniversary of the 1950 adoption of the *Constitution of India*. On the same day, the President honored Ankit Garg, a police officer from Chattisgarh, with a gallantry medal for his relentless fight against left-wing extremism in the state. Ankit Garg has been accused of torturing and sexually abusing Soni Sori, a tribal school teacher from Dantewada who is in custody for allegedly having Maoist links. Sori has alleged that Garg watched as junior police personnel stripped her naked, administered electric shocks, and assaulted her: "According to her lawyers, a medical examination found two stones in Ms. Soni's genital tract and another in her rectum."²⁰¹

New constitution, new constitution ... What am I talking about? It is the same old constitution.

200. J Venkatesan, "SPOs Ban Will Apply Only in Chattisgarh: Court" *The Hindu* (18 November 2011), online: <<http://www.thehindu.com/news/national/article2639134.ece?css=print>>.

201. Aman Sethi, "Activists shocked at gallantry award for Chattisgarh cop" *The Hindu* (26 January 2012), online: <<http://www.thehindu.com/news/national/article2834675.ece>>.