

Gendered States: Rethinking Culture as a Site of South Asian Human Rights Work

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ABSTRACT

This article explores recent critiques in feminist theory to examine how gender-based asylum cases and human rights reporting on South Asia rely upon the most static and patriarchal understandings of culture to establish a basis for intervention or advocacy. It argues that while cultural practices indeed reflect upon women's status, for gender-based asylum cases the emphasis may be more effectively placed upon a particular political system's denial of women's rights, or upon the interface between culture and the political system, rather than upon "culture" itself.

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Acknowledgements: My thinking on this subject originates from the experience of writing expert testimony as an anthropologist for South Asian gender asylum cases, and from work as a domestic violence advocate for South Asian women. In 1998, Shamita Das Dasgupta and I initiated a network of scholars willing to provide expert testimony for South Asian gender asylum cases called "Project Zameen" with Manavi. A version of this paper was given as the keynote address for the First Annual Conference of South Asian Women's Organizations in the United States, Aarohan: South Asian Women Rise Up Against Violence, New Brunswick, N.J., 14–15 September 2002. For their thoughtful responses to the this paper, I would like to thank audiences at the Conference on Critical Issues in Asian Human Rights, University of Colorado, Boulder, 7–8 April 2000; Conference on the Language of Crisis, the State of the Field: South Asia, Sexuality and Violence, University of Chicago, 21 April 2000; Conference on Religion and Human Rights: Ideology, the Rhetoric of Hate, and the Languages of Reconciliation, Cornell University, 8–11 November 2000; Conference on Feminist Futures,

I. INTRODUCTION

Pick up any recent Amnesty International Report for South Asia and the titles are arresting: *Women in Afghanistan: The Violations Continue*; *Bangladesh: Institutional Failures Protect Alleged Rapists*; *India: Amnesty International Campaigns Against Rape and Sexual Abuse by Members of the Security Forces in Assam and Manipur*; *Pakistan: Honor Killings of Girls and Women*.¹ More recently, consider the newspaper headlines on the plight of Afghan women which were so readily generated by the current administration as a justification for going to war in Afghanistan in October 2001. I have drawn the title for this article from the way particular nation-states: Afghanistan, Bangladesh, India, Pakistan, Sri Lanka, often are reduced to a set of cultural practices deemed violent for women in human rights reporting. In this essay, I examine the transparency with which human rights claims are made about South Asia by exploring how the language of universal feminism and human rights recreates patterns of cultural deviance which fall disproportionately upon some nations and geographical areas, and not upon others.

How is culture gendered so that particular countries or nation-states are marked by their crimes against women, so that they assume certain identities, not as democracies or dictatorships, but as bride-burners or honor-killers? In the process, how is it that women become exiled, not from their nations of origin, but from their communities of birth or affiliation? By asking such questions, the objective is neither to reject nor condemn feminist human rights work (which we urgently need), but rather to explore some of its (unintended) consequences as a mode of subjectification when women's rights are divorced from community or nation-state and relocated in an abstract international realm. Liberal human rights discourses recapitulate a nineteenth century "woman question" when first world human rights activists depict brown women in need of saving from brown men. To paraphrase Gayatri Spivak's famous sentence,² I want to address how a

University of Lancaster, 14 March 2001. I also wish to thank Deborah Anker, Jacqueline Bhabha, Barbara Hines, Gail Pendleton and especially Leti Volpp for sharing work and references with me; Rajasvini Bhansali, Robert Jensen, Ali Mir, and members of Saheli (Austin) for help with statistics and engaged responses to the essay.

1. AMNESTY INTERNATIONAL, *WOMEN IN AFGHANISTAN: THE VIOLATIONS CONTINUE* (June 1997); AMNESTY INTERNATIONAL, *BANGLADESH: INSTITUTIONAL FAILURES PROTECT ALLEGED RAPISTS* (July 1997); AMNESTY INTERNATIONAL, *INDIA: AMNESTY INTERNATIONAL CAMPAIGNS AGAINST RAPE AND SEXUAL ABUSE BY MEMBERS OF THE SECURITY FORCES IN ASSAM AND MANIPUR* (Nov. 1998); AMNESTY INTERNATIONAL, *PAKISTAN: HONOR KILLINGS OF GIRLS AND WOMEN* (Sept. 1999).
2. Gayatri Chakravorty Spivak, *Can the Subaltern Speak? in MARXISM AND THE INTERPRETATION OF CULTURE* 297 (Cary Nelson & Lawrence Grossberg eds., 1988). The original phrase is: "White men saving brown women from brown men."

current debate in feminist theory: the critique of feminist universalism (or gender essentialism)—the idea that women all share something in common, regardless of race, class, sexuality or national origin—founders when it comes to human rights work in South Asia. This paper examines how culture brings human rights talk on South Asia into crisis.

The critique of gender essentialism, of course, posits that women share nothing in common as women that warrants the attempt to understand women's condition as a universal one. Women become women in ways as complex and diverse as the world's sexual orientations, class, and religious and cultural formations might suggest. If the second wave feminism of Robin Morgan posited a global sisterhood based on shared victimization, and Mary Daly catalogued a list of cultural practices from footbinding to sati as instances of women's universal degradation, feminists like Bernice Johnson Reagon and Chandra Mohanty were quick to assert shared survival as the basis of feminist solidarity and resistance. These writers also have made it clear that claims to the very category of experience reified woman as a universal subject. Yet, most feminist human rights work locates the foundation of feminist internationalism in women's shared experience of oppression, constructing a transnational identity of "woman." With respect to the feminist legal scholarship on human rights, Vasuki Nesiah has written cogently:

Most feminist human rights theorists posit the experience of the denial of women's human rights across the globe as proof of, and grounds for, an international sisterhood. They emphasise that although women are "one half of humanity," they suffer oppression all over the world. They thus illustrate a gendered gap between rights theory and action. The attraction of the human rights framework is notable If "woman" could become "a name for a way of being human," then the gap between the rights women have as women, and the rights they should have as humans would be eliminated."³

Nesiah warns that this form of feminist universalism masks global structural contradictions in gender oppression—a point to which I return. At this juncture it is important to note that there are times when the *critique* of feminist universalism, when it rests upon the axis of cultural differentiation, is indistinguishable from a form of cultural essentialism that uses gender as the logic of articulation. Contemporary human rights discourse on women is one such example, producing the "Female Subjects of Public International

3. Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, in *FEMINIST TERRAINS IN LEGAL DOMAINS* (Ratna Kapur ed., 1996); see also Inderpal Grewal, *Women's Rights as Human Rights: Feminist Practices, Global Feminism, and Human Rights in Transnationality*, 3 *CITIZENSHIP STUD.* 337 (1999).

Law” through a notion of the “Exotic Other Female.”⁴ On the one hand, legal instruments such as gender asylum rely upon an understanding of universal rights that give women venues for redress against gender discrimination outside their nation-state of origin. On the other hand, such human rights “instruments” also depend upon the naming of culturally specific practices such as dowry harassment, honor killings, or female genital mutilation (FGM) as a means of validating universal principles of justice, precisely by pointing to how violence against women is culturally constructed, resulting in what philosopher Uma Narayan has called “death by culture.”⁵

While most feminist theorists would acknowledge that gender subordination is a feature of all known societies, some, like the political philosopher Susan Okin, assume an implicit scaling for understanding women’s rights cross-culturally. Thus, “[i]n many cultures in which women’s basic civil rights and liberties are formally assured, discrimination practiced against women and girls within the household not only severely constrains their choices, but also severely threatens their well-being and even their lives.”⁶ Lest one think Okin might also be referring to women in the United States or Europe, she clarifies, “Western majority cultures, largely at the urging of feminists, have recently made substantial efforts to preclude or limit excuses for brutalizing women”⁷—the presumption here is that other societies have not made similar efforts. A recent article in *The New York Times* on the United Nations Children’s Fund (UNICEF) campaign on Violence Against Women also aptly illustrates the point:

In some countries, even when laws defending the right of men to use violence against women are repealed, the culture that created them continues to exert a tremendous influence over behavior. . . . The situation is worst across a swath of countries stretching from the Mediterranean to the edge of Southeast Asia, especially Pakistan, India and Bangladesh (sic).⁸

Knowing something of the strength and vibrancy of feminist movements in South Asia—movements that can produce remarkable documents, such as the 1996 apology from Pakistani feminists to Bangladeshi women for the

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4. Karen Engle, *The Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 210 (Dan Danielsen & Karen Engle eds., 1995).
 5. UMA NARAYAN, *DIS-LOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD-WORLD FEMINISM* (1997).
 6. Susan Okin, *Is Multiculturalism Bad for Women? in IS MULTICULTURALISM BAD FOR WOMEN?* 22 (Joshua Cohen et al. eds., 1999).
 7. *Id.* at 19.
 8. Barbara Crossette, *UNICEF Opens a Global Drive on Violence Against Women*, *N.Y. TIMES*, 9 Mar. 2000, at A8.

rapes and abductions of the 1971 war⁹—the move to assign particular atrocities to cultural norms rather than political conflict is one that bears scrutiny. Clearly the articulate and outspoken women who organize to change the unjust conditions that affect their lives also find support and sustenance from the cultures that produce them as individuals.¹⁰

Although this article focuses on one particular legal instrument (political asylum) as it relates to human rights, UN, and newspaper reports, it bypasses a conventional definition of human rights founded in international protocols. My understanding of what constitutes human rights operates not only at the level of international conventions, but includes refugee and immigration law as it operates within particular nation-states, local dispute resolution practices which function largely outside the domain of formal courts, and grassroots activist movements, or what are now called “transnational advocacy networks.”¹¹

The overall aim is to stage a conflict between the recognition of civil rights or liberties in the national realm and human rights in the international realm, to describe what Michael Hardt and Antonio Negri have called a “juridical formation.”¹² Flexible networks of authority/sovereignty and mechanisms of command would establish continuities through the horizontally-linked institutions of the new world order: the International Monetary Fund (IMF) and the World Bank; non-governmental organizations (NGOs) such as Amnesty International and Human Rights Watch; the global health organizations (like Médecins Sans Frontières); as well as the new regional political-economic structures: General Agreement on Tariffs and Trade (GATT); the North American Free Trade Agreement (NAFTA); the European Union (EU); the Organization Of African Unity (OAU); and the South Asian

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9. WAF would like to use this opportunity to build public awareness on the issue of state violence and the role of the military in 1971. At the same time there is the need to focus on the systematic violence against women, particularly the mass rapes. While we try to focus the nation's attention towards a period in our history for which we stand ashamed, Women's Action Forum, on its own behalf, would like to apologise to the women of Bangladesh that they became the symbols and targets in the process of dishonoring and humiliating people.

Women's Action Forum Apologises to Women of Bangladesh, *Women Living Under Muslim Laws*, 14/15 DOSSIER 7–8 (1996). By one estimate, more than 200,000 Bengali women were raped by West Pakistani soldiers, and some were held in military brothels. Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 667 (1995).

10. See Sayantani Dasgupta & Shamita Das Dasgupta, *Journeys: Reclaiming South Asian Feminism*, in OUR FEET WALK THE SKY: WOMEN OF THE SOUTH ASIAN DIASPORA 123 (Women of the South Asian Descent Collective ed., 1993).
11. Cf. MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).
12. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000).

Association for Regional Cooperation (SAARC).¹³ If we are to locate human rights in the world system, I assert that we need to understand its increasing linkage to structural adjustment policies on the one hand, and as Saskia Sassen urges, the overlap and contradiction between global and national arenas on the other hand. This overlap is not seamless, but rather causes disjunctures and displacements amenable to the analytic cartography this paper also undertakes.

As some analysts have observed, the international community created two distinct legal regimes for the articulation of human rights: the regime of international human rights law to monitor and deter abuse, and the refugee law regime to provide surrogate state protection for those crossing borders.¹⁴ Some have seen these two bodies of law as mutually reinforcing, with refugee law able to absorb Nuremburg human rights jurisprudence,¹⁵ or in the vanguard of affording protection for certain kinds of persecution (sexual orientation asylum) in advance of changes made to international treaties and protocols;¹⁶ while others have seen these bodies of law as more distant from each another, in part because international refugee law is seen to be imbedded in the domestic law of particular countries.¹⁷ The United States for example, is not a party to the 1951 UN Convention Relating to the Status of Refugees, but Congress did pass the Refugee Act of 1980 to bring the United States into compliance with its ratification of the 1967 UN Protocol Relating to the Status of Refugees. Tensions also emerge between international and domestic refugee law however, as when the United States initiated its "expedited removal process" for asylum applicants under the terms of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, putting domestic policy in conflict with the Refugee Convention's principle of "non-refoulement" imbedded in the 1967 Protocol.¹⁸

The emergence of gender-based asylum as a category of political asylum is a good example of how international human rights law and refugee law regimes come into contact in particular regions of the world.

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13. See Madhavi Basnet, *South Asia's Regional Initiative on Human Rights*, 4 HUM. RTS. BRIEF 2 (1997).
 14. See Deborah Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 135 (2002).
 15. See Ryan Goodman, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, 105 YALE L.J. 255 (1995).
 16. See Timothy Wei & Margaret Satterthwaite, *Symposium, Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 505-06 (1997).
 17. Anker, *supra* note 14.
 18. See Cathleen Caron, *Asylum in the United States: Expedited Removal Process Threatens to Violate International Norms*, 6 HUM. RTS. BRIEF 2 (1999).

Perceived failures in the workings of law internal to South Asian nation-states become the basis for a displacement of women's rights into unenforceable international protocols such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁹ This process in turn places pressures upon refugee law to "open up," so that refugee law, as a subset of the immigration laws of particular countries, becomes the means for realizing human rights precisely because most international conventions cannot be enforced.²⁰ In other words, there is a displacement of women's rights from the national realm to the international, resulting in their reintroduction into another, explicitly national realm, creating simultaneous moments of disarticulation and rearticulation.

II. THE EMERGENCE OF GENDER-BASED ASYLUM

About 20 percent of the one million immigrants to the United States are political refugees, pointing to displacements at the level of international refugee law and creating a new immigration regime in the United States where human rights discourse becomes the means of defending "illegal immigrants." In the last several years, increasing numbers of gender-based asylum cases have been heard in the United States. Women filing such claims often have been victims of domestic violence, and their immigration status is usually contingent upon their husband's visas. If the woman's husband is a US citizen or legal permanent resident, the woman can file a "battered spouse waiver" under provisions of the Violence Against Women Act (VAWA) in order to stay in the country. If, however, a woman is unmarried, or her spouse is not a citizen or permanent resident, an asylum claim may be the only thing standing between her and deportation.²¹

In recent years, new forms of political asylum have emerged to contend with issues of sexuality and violations of women's human rights. Though more than half the refugees in the world are women (and 80 percent of all refugees are women and children), gender-based (or gender) asylum is a

19. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1980) (*entered into force* 3 Sept. 1981), 1249 U.N.T.S. 13, *reprinted in* 19 I.L.M. 33 (1980) (hereinafter CEDAW).

20. See Anker, *supra* note 14, for a different formulation of this point.

21. Recent changes to the Violence Against Women Act of 1994, 103rd Cong. 2nd sess., 29 Sept. 1994, under the reauthorization of VAWA of 2000, Violence Against Women Act of 2000, 106th Cong. 2nd sess., Rept. 106-891, 20 July 2000, created two new visa categories: the T visa and U visa, which may be granted to women victims of domestic violence regardless of marital status.

recent concept under US immigration law, emerging in part from the difficulties women had in filing successful claims for political asylum. The UN High Commissioner for Refugees, the 1951 Convention Relating to the Status of Refugees, and the 1967 Protocol Relating to the Status of Refugees define refugee as a person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”²² Women who fell out of the first four categories usually sought asylum under “membership in a social group.”

Historically, women had little success obtaining political asylum in the United States when facing gender-based persecution arguing under membership in a social group. In the 1980s for example, Salvadoran women who petitioned that rape had been used as a political tool to intimidate them and their families were denied asylum because immigration judges understood rape to be a private act or an expression of random, “spontaneous sexual impulses” committed by individual military officers or guerrillas in their own self interest. In one case, even the chanting of political slogans during a rape did not persuade the judge that the act was public/political in nature.²³ Women were thus unable to prove they had been singled out for rape because of membership in a particular social or political group.

Though rape frequently has been used as a political weapon during times of war and ethnic or communal conflict (most recently in Rwanda and Sierra Leone, but also during the Partition of India in 1947,²⁴ and the Bangladesh War for Independence in 1971), it has not always been seen as a form of persecution. The mass rapes of Bosnian women by Serbian forces during 1991–1992, and the insistence of the international community that rape be treated as a human rights violation and war crime, has helped to establish it as a form of gender persecution.²⁵

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22. Convention Relating to the Status of Refugees, art. I(A)(2), *adopted* 28 July 1951, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (*entered into force* 22 April 1954), *reprinted in* 3 WESTON III.G.4; Protocol Relating to the Status of Refugees, *signed* 31 Jan. 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (*entered into force* 4 Oct. 1967) (*entered into force for U.S.* 1 Nov. 1968).
 23. See Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213 (1995).
 24. See Purushottam Agarwal et al., *Legitimising Rape as a Political Weapon*, in WOMEN AND THE HINDU RIGHT 29 (Tanika Sarkar & Urvashi Bhutalia eds., 1995); Urvashi Bhutalia, *Muslims and Hindus, Men and Women: Communal Stereotypes and the Partition of India*, in *id.* at 58.
 25. See Niarchos, *supra* note 9, at 350; Todd Salzman, *Rape Camps as a Means of Ethnic Cleansing; Religious, Cultural and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348 (1998); Judith Gardham & Hilary Charlesworth, *Protection of Women in Armed Conflict*, 22 HUM. RTS. Q. 148 (2000); Christine Strumpfen-Darrie, *Rape: A Survey of Current International Jurisprudence*, 7 HUM. RTS. BRIEF 2 (2000).

Following the 1991 United Nations High Commissioner for Refugees (known now as UNHCR) *Guidelines for the Protection of Refugee Women* and the 1992 UNHCR Handbook which holds that circumstances surrounding women's fear of persecution may be "unique to women," Canada, in March 1993, became the first country to issue "Guidelines on Women Refugee Claimants fearing gender-related persecution." These guidelines have been the model for US law on the subject.

A person seeking asylum must establish actual or well-founded fear of persecution, which hinges on two elements. First, the harm apprehended has to amount to persecution. The claimant may be the victim of violent crime, but that does not necessarily count as persecution. Second is the question of state accountability for the infliction of harm. If the state is unwilling or unable to control the perpetrators of persecution, a case for asylum can be made. The March 1995 INS Memorandum on "Considerations for Asylum Officers Adjudicating Asylum Claims from Women," like the Canadian guidelines, defines two broad areas of gender persecution which can be argued under "membership in a particular social group": 1) the persecution is a type of harm that is specific to the applicant's gender (such as domestic violence, rape, sexual abuse, genital mutilation, bride burning, infanticide, forced marriage, forced sterilization or forced abortion), and 2) the persecution is imposed because of the applicant's gender (as in violation of social norms defining women's roles, or refusal to accept restrictions of women's rights).²⁶

An example of an asylum claim meeting the first criteria for gender persecution might be that of an Indian Hindu woman who has faced physical or sexual abuse from her husband or in-laws for inability to meet continual dowry demands. Despite the fact that the giving and receiving of dowry is illegal in India, and recent legislation exists with the intent of making it easier for women to file dowry harassment complaints, dowry harassment in India frequently results in death or severe injury in the form of "bride burnings." Since the state fails to protect women by enforcing its own laws, the claimant could plead that her forced return to India would be life-threatening.

Another example of gender persecution argued under the first criteria might be the case of a Pakistani woman who has been raped by an outsider or family member. Under the Hudood Ordinances, a woman must corroborate her complaint with the testimony of four male witnesses. Failure to prove that sexual contact occurred without her consent makes the woman herself subject to criminal prosecution for adultery or fornication. False

26. Memorandum of the INS, Considerations for Asylum Officers Adjudicating Asylum Claims for Women (26 May 1995) (on file with author).

cases of Hudood offenses may also be registered against women who are seeking divorce, who choose to marry against their parents' wishes, or who are related to men who are wanted by the authorities for other reasons.²⁷ Although the UNHCR Guidelines state that the line between discrimination and persecution is unclear, and that a woman seeking refugee status cannot base her claim solely on being subject to laws she objects to, the Hudood Ordinances can be seen as a form of legal discrimination which is persecutory because, though all Pakistani citizens are subject to these laws, they are disproportionately applied to women with more devastating consequences.

An example of an asylum claim filed under the second criteria might be an Afghan Muslim woman who refused to veil in public, although the Taliban interpretation of Islamic law in Afghanistan required women to do so. Since the punishment or social sanctions for a woman who defied this aspect of the law might be severe or life threatening, she could make a case for being awarded gender asylum in this country. In fact, asylum was granted on these grounds for twelve of the nineteen cases I reviewed that were filed by Afghan women in the United States as of August 2000. The Clinton administration opposition to the Taliban regime had resulted in the State Department doubling its resettlement quota for South Asian refugees from 4,000 to 8,000 specifically to allow more Afghan women into the country.²⁸

III. WOMEN AS A SOCIAL GROUP AND "ESSENTIAL" PERSECUTIONS

Although the above three examples of South Asian gender asylum cases establish gender persecution under "membership in social group" in different ways, one of the difficulties with the case law developed around gender asylum is that it tended to naturalize a collapsing of gender with "women" so that all the persecutions faced by women became de facto examples of gender persecution. Rape and domestic violence, harms typically identified with women, also have male victims or may involve

27. See HUMAN RIGHTS WATCH, *DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN* 47-94 (1992); Macklin, *supra* note 23, at 230.

28. HUMAN RIGHTS WATCH, *ANNUAL REPORT* (2000). Here one might also note that Iran and Pakistan have absorbed the vast majority of Afghan refugees, yet the asymmetry of the world system means that the refugee-selecting countries of the North where asylum law operates are in a position to formulate both international and national laws while refugee-receiving countries are not; witness US instructions to Pakistan to reopen its borders to Afghan refugees when the bombing of Afghanistan began on 7 October 2001.

same sex partners, but appeared in the law review literature as predominantly heterosexual women's concerns.²⁹

The narrow understanding of gender in gender asylum cases eventually led to the emergence of a series of "sexual orientation" asylum cases³⁰ that faltered on the definition of social group used by a number of courts for adjudicating gender asylum cases. This definition came from a 1985 Bureau of Immigration Appeals (BIA) decision, *Matter of Acosta*,³¹ which held that a social group consisted of those who 1) share a common, immutable characteristic or 2) share a characteristic that is so fundamental to one's identity of conscience that it ought not be changed. The BIA also named sex as an "immutable characteristic" which was seen as critical for women fearing gender-based persecution, especially for the landmark Fauziya Kasinga FGM case of 1996.³² Thus, the notion of social group operating in *Acosta* led to a fairly essentialist notion of gender operating in the idea of "gender persecution" which some theorists would also see as a conflation of (biological) sex with (socially constructed) gender.

Although *Acosta's* first definition of social group has been effective for many gay male asylum applicants,³³ the immutability criteria implies a narrow and essentialist definition of sexuality that prevents asylum seekers from defining their sexuality as entirely or partially chosen. The second definition in *Acosta* might similarly require the applicant to prove that sexual orientation is fundamental to his or her identity.³⁴ In the case of a gay transgender male who dressed effeminately, for example, the court, relying upon a distinction between identity and conduct, found that his membership in a social group was not immutable because he chose to dress in

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29. See, e.g., Patricia Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804 (1995). "Since men are generally not persecuted by means of rape, domestic violence or FGM, biases against (recognizing) such forms of violence exist among adjudicators." *Id.* at 1824.
 30. See Goodman *supra* note 15; Wei & Satherwaite, *supra* note 16. According to one 1997 assessment, the US has accepted over one hundred sexual orientation asylum applications since 1994; the number of successful sexual orientation asylum applications in 1996 was fifty-seven. See Tracy J. Davis, *Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States*, 6 HUM. RTS. BRIEF 3 (1999).
 31. 19 I & N. Dec. 211, 233 (BIA 1985), rev'd in part on other grounds by *In re Mogharrabi*, 19 I & N. Dec. 439 (BIA 1987).
 32. See Andrea Binder, *Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, at 179 (2001); *In re Fauziya Kasinga*, Int. Dec. 3278 (BIA 1996).
 33. Interestingly, it has informed the recent House of Lords decision in *R. v. Immigration Appeal Tribunal and another, ex parte Shah* of 1999; see Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391 (2001).
 34. See Davis, *supra* note 30.

women's clothes, drawing a distinction between identity and conduct.³⁵ The Ninth Circuit Court of Appeals, however, ruled in favor of Geovanni Hernandez-Montiel's asylum petition, adding a test of voluntary associational membership to the immutability and fundamental identity criteria, leading to a more expansive definition of "particular social group."³⁶

Before the recent emergence of the more expansive definition of social group, its narrow application of gender also led to the erosion of any standard to hold the state accountable for the persecution of women because they were members of distinct ethnic or religious communities. Early arguments for gender asylum held that "[t]he failure to recognize women as a social group persecuted on account of their gender either ends in the denial of otherwise valid claims, or results in the incorrect tailoring of a claim to fit into one of the other specified groups of persecution."³⁷ Yet defining women as a "social group" also meant that the specific political conditions tended to be sidelined in favor of emphasizing cultural practices like *pardah*. For example, while opposition to the Taliban restrictions on Afghan women could be argued under other asylum group categories, many have been decided using "particular social group" criteria. In other words, though the Taliban, which was largely dominated by the Pashtun community, also persecuted Afghan religious and ethnic minorities like the Hazara or Tajik, a Tajik woman was more likely to have asylum granted as an Afghan woman facing "repressive social norms" than as a member of a persecuted religious or ethnic minority.³⁸

Here we can see how the need for international intervention might be signaled by how violence against women stood for a community's oppression, but the successful gender asylum application might ignore the role of the state in perpetrating gender violence as part of its strategy for waging

35. This conflict between sexual orientation being seen either as primarily about identity or conduct is also mirrored in other sexual orientation legislation in the US. See Sonya Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97 (2002).

36. The 1st, 2d, and 7th Circuit Courts of Appeal apply "particular social group" in a way that mirrors *Acosta*. The 8th and 9th Circuit Courts construe "particular social group" to require a "voluntary associational relationship" among members. The 2d Circuit has adopted a variation that includes external perceptions, immutability, and voluntary associations. See Davis, *supra* note 30.

37. Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution* 4 CARDOZO WOMEN'S L.J. 33, 58 (1997).

38. Consider, e.g., the case of a Tajik Afghan woman who details extensive violence she faced as a Shia; yet the immigration judge, citing *Kasinga*, emphasized her membership in a social group of women who were badly affected by the Taliban, available at www.uchastings.edu/cgrs/summaries/1-50/summary9. There are many other ironies in the processing of Afghan women's asylum applications: a number were granted to women who were members of the communist party or Najibullah government, a shift in the application of asylum to those fleeing from communist regimes from the 1950s through 1980s.

ethnic or communal violence, because women were understood to be a part of a social group with immutable characteristics that were all shared regardless of differences of community or culture of origin.

Asylum cases typically have a "state action" component for establishing persecution: the harm has to be inflicted by the government or by persons or organizations the government would normally control. Yet the trend in gender asylum cases has been precisely to push for a recognition of harm by non-state actors so that domestic violence has come to be seen as the paradigmatic example of gender specific abuse committed by private actors. It was the combination of serious harm in conjunction with inattention and inaction of the state (or "state failure") that established battering as a systematic discriminatory practice.³⁹ However, the gap between the law and the state's will to either make or enforce it inevitably was filled by culture. In other words, the state's failure to draft legislation protecting women, or to enforce existing laws protecting women, was often attributed to the force of culture, rather than to inadequate state policy or lack of political will. Despite the routine use of anthropologists to provide evidence of harmful cultural practices in gender asylum cases,⁴⁰ cases filed on behalf of Muslim women claiming to hold a political opinion ("feminism" or membership in women's organizations) at odds with state laws,⁴¹ suggest that many South Asian cases might be more ably explained through an analysis of state-level practices, and not by a cultural description of oppression. This would still not answer the question however, of why it is that the preference seems to be to grant gender and sexual orientation asylum cases under the "social group" category, rather than the "political opinion" category, which are more frequently turned down. Does the United States, as a refugee receiving country, have a preference for women asylees who are cultural victims, rather than political dissidents?

39. See Anker, *supra* note 33.

40. See Lisa Gilad, *The Problem of Gender-related Persecution: A Challenge of International Protection*, in *ENGENDERING FORCED MIGRATION: THEORY AND PRACTICE* 334 (Doreen Indra ed., 1999); Sidney Waldon, *Anthropologists as "Expert Witnesses,"* in *id.*, at 343; Charles Piot, *Representing Africa in the Kasinga Asylum Case* (Duke University 2001) (on file with author).

41. In a 1993 appeal, however, a young Iranian woman who claimed that her feminist beliefs and her unwillingness to veil would put her at risk if she were deported for Iran, was considered ineligible for asylum because, though she was a member of a particular social group (which included supporters of the former Shah), and her feminism qualified as a political opinion, she had not demonstrated that she would be harmed solely because of her gender. Still, the case did show that "an applicant who could demonstrate a well-founded fear of persecution on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion." Memorandum of the INS, *supra* note 26, at 11.

IV. CULTURE AND THE PROBLEM OF THE STATE

One of the difficulties with “gender persecution” as a condition of asylum, is that the shift from active state persecution to “state failure to protect” required to understand rape, domestic violence, or FGM as forms of persecution established a relationship between a “failed state” and patriarchal culture, subjecting the cultures of the South to new forms of surveillance and scrutiny. Asylum cases typically use country reports done by the US State Department or human rights organizations like Amnesty International to help document the persecutions being addressed. Given the heavy traffic between human rights reporting and asylum adjudication, it makes sense to turn to this reporting in more detail.

The title of a recent Human Rights Watch Report, *Crime or Custom? Violence Against Women in Pakistan*, suggests that the possibility exists that violence against women might be the result of state policy rather than social “custom.” Yet while the report makes clear that the Islamization of the law was a policy decision undertaken by the Zia regime, it also makes blanket assertions such as “Pakistani women remain . . . second class citizens as a result of . . . social and cultural norms and attitudes” which are all too frequently reproduced in asylum cases.⁴² The slippage between government “institutionalized misogyny” and religious/cultural ideas is also illustrated in the following argument on gender persecution by a feminist legal scholar:

The definition of refugee should be expanded to include those with a well-founded fear of persecution because of their gender. This would protect women from institutionalized misogyny in which the government carries out sanctions, or ignores oppression of or violence against women because they are women. The most notorious example of such persecution is probably Islam with its strict rules regarding the status and behavior of women. However, similar conditions exist in India under the Hindu religion, in Africa under tribal laws, and in Latin America under the tradition of machismo.⁴³

In this passage, we can see how government sanctions are conflated with the “strict rules” of Islam, Hinduism, and tribal laws, though all societies have “rules regulating the status and behavior of women.” Regional and country-specific differences in the interpretation of Islamic traditions are obliterated, so that Islam is seen to be universally bad for women,⁴⁴ with parallels drawn to Indian Hinduism, African tribalism, and Latin American machismo.

42. HUMAN RIGHTS WATCH, *CRIME OR CUSTOM? VIOLENCE AGAINST WOMEN IN PAKISTAN* (Aug. 1999), available at www.hrw.org/reports/1999/pakistan/Pakhtml-03.htm#P324_45508.

43. See Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 513 (1993).

44. See Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7 (2000).

Gender asylum cases often straddle the line between communal violence and domestic violence, forcing us to confront the continuities between these forms of violence, and to be attentive to recognizing active state persecution of women as members of minority or oppressed communities. This requires a rigorous analysis of state level practices, rather than detailed cultural description. Yet in a review of 120 case summaries through the year 2000 available from the Center for Gender and Refugee Studies, clearly particular countries became associated with particular persecutions: of sixteen cases filed in the last five years concerning genital mutilation, all except four were in West Africa, the majority in Nigeria. Of forty-three cases filed under the category "Repressive Social Norms," twenty or almost half were filed for Afghanistan, while fifteen (almost one third) were filed for Irani women (one each was filed for Pakistan and Nepal). Honor killings, on the other hand, have come to be associated primarily with Jordan and Pakistan.

The thirty-five cases filed under rape/sexual violence were spread out over several countries, as were twenty-five cases categorized as domestic violence cases, with five from South Asia (one Nepal, one India, three Pakistan). Yet most of the successful asylum cases concerning women who had experienced some form of gender-related violence were actually granted on the basis of race, religion, or political opinion and not membership in a social group. In one Indian case, a Sikh woman who was a member of the All India Sikh Student Federation and who was arrested and raped by Indian police, received asylum on the basis of political opinion and religion. Similarly, a Bangladeshi Christian woman and her daughter who had been harassed and raped by Muslim men and whose house had been burned to the ground, were granted asylum on the basis of religious persecution in 1999. Likewise, a Christian Anglo-Pakistani woman married to a Muslim, a Nepalese Christian woman married to a Hindu, and a Tamil Christian Sri Lankan woman married to a Buddhist were all granted asylum based on race and religion.

That a number of these cases involved the communalization of marriage in South Asian plural societies under various forms of religious nationalist regimes is notable. In other words, in a country like Sri Lanka where the Sinhalese majority state and Tamil militants have been engaged in long-term violence, inter-caste and inter-faith marriages are subject to more cultural pressure and become vulnerable targets of political attack. The same would be true (in different ways) for India and Bangladesh.⁴⁵

45. In Bangladesh, where one analysis links state-sponsored women's development programs to a backlash against women and to a rise in Islamic fundamentalism, mixed marriages, or non-Muslim marriages are subject to attack. In an explicitly Hindu nationalist state like India, which is hostile to its Sikh, Christian, Muslim, Dalit, and tribal

In the five cases described above, rape, sexual harassment and/or domestic violence did not constitute the basis for an asylum ruling, membership in a persecuted minority group (Sikhs or Christians) provided the claim. This strategy appropriately puts the emphasis on state practices or ideology, and not upon culture.

While unprecedented lobbying by feminists at the Vienna World Conference on Human Rights in 1993 resulted in the UN Declaration on the Elimination of Violence Against Women (DEDAW), and the notion that “women’s rights are human rights”⁴⁶ (the rallying cry of the 1995 Women’s Conference in Beijing) seems so commonsensical as to warrant no comment, the call for mainstreaming women’s rights into human rights protocols⁴⁷ often works to condemn cultural practices without analysis of state-level involvement in those practices. On the face of it, the call for western countries to recognize rape, sexual harassment and/or domestic violence as valid reasons for an asylum claim seems an enabling gesture. Yet a pernicious double-movement is enacted whereby universalist criteria are asserted at the expense of culture (women constitute a social group apart from membership in a culture), at the same time that culture is used as a means to specify the qualitative nature of violence,⁴⁸ so that heterogeneity and diversity within communities is downplayed in order to establish evidence of persecution. The notion of culture itself remains strangely one-dimensional and static—a caricature of its worst patriarchal tendencies.⁴⁹ Shereen Razack, in her criticism of Canadian gender asylum cases, has noted that the successful asylum seeker must cast herself as a cultural other, “fleeing from a more primitive culture,” and Anita Sinha has similarly shown the tendency to grant gender-based asylum in the United States only when a strong “cultural hook” (persecutory practices seen to be cultural in nature) exists for US cases (a phenomenon also true of gay gender asylum cases).⁵⁰

communities, intercaste and interfaith marriages become vulnerable to criticism and attack.

46. See WOMEN’S RIGHTS/HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (Julie Peters & Andrea Wolpers eds., 1995); Radhika Coomaraswamy, *Reinventing International Law: Women’s Rights as Human Rights in the International Community*, in *DEBATING HUMAN RIGHTS* 167 (Peter van Ness ed., 1999).
47. See Anne Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, 19 *HUM. RTS. Q.* 283 (1997); Avronne Fraser, *Becoming Human: The Origin and Development of Women’s Human Rights*, 21 *HUM. RTS. Q.* 853 (1999).
48. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *YALE J. L. & HUMAN.* 89 (2000); Volpp, *Feminism Versus Multiculturalism*, 101 *COLUM. L. REV.* 1181 (2001).
49. Bonnie Honig, *My Culture Made Me Do It*, in *IS MULTICULTURALISM BAD FOR WOMEN?* *supra* note 6, at 12.
50. Anita Sinha, *Domestic Violence and U.S. Asylum Law: Eliminating the Cultural Hook for Claims Involving Gender-Related Persecution*, 76 *N.Y.U. L. REV.* 1562 (2001); SHEREEN

Yet most host states offering surrogate protection can no more protect asylees from rape or domestic violence than can their home states. One feminist legal scholar has suggested that since most states cannot protect people from domestic violence, this should become the operating assumption in refugee law, and evidentiary hurdles for claimants seeking to demonstrate failure of state protection should either be lowered or eliminated entirely.⁵¹ The contradictions of South Asian women immigrants who have experienced domestic or sexual violence in the United States (as a continuation of the violence they have experienced in the subcontinent) applying for asylum in the United States are immense. Asylees fleeing domestic violence, rape, or other persecutions in their home country, are often confronted with the same set of harms in the host country through institutionalized sexism, racism, or homophobia. As Saeed Rahman puts it:

One of the things that I learned during my asylum process, and one that I hope lawyers are aware of, is that the language around asylum applications is rooted in imperialism. The ways in which the asylee and his or her country were constructed, in fact, the entire discourse was at times problematic for me. It is incredibly difficult as a colonized subject not to feel discomfort when colonial language is being produced to describe your country of origin. When lawyers use terms like intolerant, police brutality, Islamic fundamentalism, etc. images of the Third World, underdeveloped folks, backwardness and fanaticism are evoked. . . . However for some asylees this can be a difficult discussion. . . . We are also aware of the ways in which our histories are shaped by the U.S. For instance, in my case, I grew up under a military dictatorship in Pakistan which was strongly supported and maintained by the United States. . . . It would not have worked out to my advantage if I gave an introductory class to my immigration officer on U.S.-Pakistan relations. . . . It needs to be clear that although there are homophobic practices in different parts of the world, the ways in which they are talked about in front of the INS works within a highly problematic framework It needs to be acknowledged that we do not all come to the table with the same types of negotiating power in determining historical, political and cultural context. It is also important to know that universal human rights do not seem to include the violations that happen in the U.S. It is still legal in certain states to fire, evict and harass queers. . . . Even though there are important laws in this country to fight homophobia, granting asylum does not mean that the same kinds of homophobic practices will not

RAZACK, LOOKING WHITE PEOPLE IN THE EYE: RACE AND CULTURE IN COURTROOMS AND CLASSROOMS 88, 92 (1998). See also Sonya Katyal, *Exporting Identity*, 14 YALE J. L. & FEMINISM 97 (2002) for an analysis of the *Hernandez-Montiel* sexual-orientation asylum case.

51. See Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 284 (2002).

happen here. When standard are placed on other nations, they should be consistently maintained here.⁵²

As Rahman's narrative suggests, the deployment of apparently culturally specific descriptions of violence thus does not result in the strategic use of an essentialism one should endorse. A more sound tactic would be to try to distinguish between gender enabling and gender discriminatory practices within South Asian cultures; in this way the emphasis is upon particular values, institutions, or practices within a culture that are patriarchal, so that no one culture or community is characterized as exclusively patriarchal. This distinction recognizes that gender norms within cultures are frequently contested by women themselves, and that cultures also carry feminist traditions of resistance and rebellion. A mischaracterization of women's complex relation to patriarchy elsewhere leads to a misrecognition of patriarchy in the United States, which has profound consequences for feminist movements in this country. The hyper-visibility of culturally constructed violence to women is linked to the continued pervasiveness and invisibility of violence against women in the United States.⁵³

The double movement between the universal and the culturally particular in human rights discourse pits women's rights against her community's rights, as if they were separable elements, for the very articulation of the category "women as a social group" depends on splitting women from their cultures. It is in fact the very success of mainstreaming a particular form of feminism into human rights culture that leads Michael Ignatieff to proclaim,

Human rights is the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal and tribal societies; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices—arranged marriages, purdah, genital mutilation, domestic slavery and so on, that are ratified by the weight and authority of their cultures.⁵⁴

Yet the critique of gender essentialism also teaches us that a woman's rights are often not separable from her community's rights, so surely moral agency is generated as much through those communities as through the discourse on human rights. This is also literally true in India, where a women's civil rights are imbedded in the personal laws of her community. That this situation is inherited from colonial times does not make it any less

52. See Wei & Satterthwaite, *supra* note 16, at 517–18.

53. See NARAYAN, *supra* note 5.

54. MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 68 (2002).

a subject of debate and critique.⁵⁵ Indeed this situation is one of the major issues facing the civil rights community in India today.

For countries like India, with long histories of democratic contestation, the current practice of recognizing gender-based persecution as it occurs with regard to membership in a social group based upon religion or ethnicity is probably a better alternative than arguing that domestic violence should be seen as a form of gender-based persecution.⁵⁶ The standard used to show that the Indian state is negligent in enforcing its own laws, or that a woman facing harassment cannot reasonably move to another part of the country, rarely takes into account the considerable resources provided by women's groups and lawyers who are working not only to change laws, but to see that they are enforced. In other words, successful US gender asylum cases argued on the basis of domestic violence might have the unintended effect of undermining the civil rights movement and feminist democratic politics in India.⁵⁷ Ironically, international law would not have changed without the influence of those feminist movements, and yet the successful application of asylum law in a domestic context must assume that those movements either do not exist, or are too weak to provide protection and sustenance to women victims and survivors who have galvanized those very movements.⁵⁸ Why is it that feminist legal scholarship finds its surest footing in portraying South Asian women as victim subjects but is less able to deal with the agency of South Asian feminist theorists and activists?⁵⁹ At this

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55. See FLAVIA AGNES, *LAW AND GENDER INEQUALITY* (1999); FEMINIST TERRAINS IN LEGAL DOMAINS (Ratna Kapur ed., 1996); RATNA KAPUR & BRENDA CROSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (1996); Nivedita Menon, *Rights, Bodies and the Law: Rethinking Feminist Politics of Justice*, in *GENDER AND POLITICS IN INDIA* (Nivedita Menon ed., 1999); JANAKI NAIR, *WOMEN AND LAW IN COLONIAL INDIA* (1996); ARCHANA PARASHAR, *WOMEN AND FAMILY LAW REFORM* (1992).
56. Here, however, the metonymic identification of women with community is not automatically altered. The rape of women may be seen as THE defining mode of a community's subjection, as in the mass abductions and rapes of women during Partition, or through the detention of Panjabi Sikhs by the Indian state over the last twenty years.
57. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 3 *EUR. HUM. RTS. L. REV.* 245 (2001), for a similar observation.
58. See RADHA KUMAR, *A HISTORY OF DOING* (1995); NANDITA SHAH & NANDITA GANDHI, *ISSUES AT STAKE: THEORY AND PRACTICE OF THE INDIAN WOMEN'S MOVEMENT* (1992); AMRITA BASU, *THE CHALLENGE OF LOCAL FEMINISMS: WOMEN'S MOVEMENTS IN GLOBAL PERSPECTIVE* (1995); Vasantha & Kalpana Kannabiran, *Looking at Ourselves: The Women's Movement in Hyderabad*, in *FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES* (M. Jacqui Alexander & Chandra Mohanty eds., 1997) for recent accounts of feminist movements in India.
59. See Nesiah, *supra* note 3; MARY E. JOHN, *DISCREPANT DISLOCATIONS: FEMINISM, THEORY AND POSTCOLONIAL HISTORIES* (1996), for related critiques. Susan Moller Okin, *Feminism, Women's Human Rights, and Cultural Differences*, in *DECENTERING THE CENTER, PHILOSOPHY FOR A MULTICULTURAL, POSTCOLONIAL AND FEMINIST WORLD* (Uma Narayan & Sandra Harding eds., 2000) productively marks the disjuncture between the theoretical critique of gender essentialism by "Third World feminists" and of universalizing tendencies of feminist

moment structures of accountability that operate between women's groups in the United States and South Asia can pose an important challenge to human rights discourse, allowing us to ask about the politics of culture in human rights feminism.⁶⁰

Despite the tremendous and growing influence of transnational feminist movements through mainstream and non-mainstream sites, the language of universal human rights works to recreate patterns of deviance which fall disproportionately upon some nations or geographical areas and not others. In the case of gender asylum, culture or community collapses back upon the state.⁶¹ Particular states then assume certain identities, not as democracies or dictatorships, but as bride-burners, honor-killers, or genital mutilators. These states are the classic "weak states" of international relations and dependency theory—unable to separate culture from politics, or to muster adequate political will to contain the vicissitudes of culture. The characterizations of such gendered states work to obscure both the pervasiveness of domestic violence in the United States as well as other US human rights violations.

When are nation-states still the legitimate arbiters of women's rights? At what moments should "universal" or international rights instruments be applied? In India and Sri Lanka, for example, it matters that civil wars and ethnic conflict have been endemic to both countries for the past thirty years. It matters that India is a democracy, and that Pakistan and Bangladesh have seen almost as many years of military dictatorship as democratic governance.⁶² It matters that Indian gender asylum cases emerge from a complex colonial history that established the personal laws of different communities as sites of non-intervention, and substituted a uniform penal code as a default civil code. It matters that US support of Zia al-Haq in Pakistan, and the mujahideen in Afghanistan undermined the People's Democratic Party

human rights discourse, but mistakenly holds that the former was confined by its postmodern excesses to the academy while the latter was better realized through the politics of grassroots NGOs.

60. See Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS/HUMAN RIGHTS*, *supra* note 46, at 167.
61. See Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 *HUM. RTS. Q.* 316 (1996). In one of the few attempts to analyze the place of the state in human rights discourse, Pollis criticizes human rights scholars for failing to develop "a conceptual framework within which to analyze whether a state's claims of cultural distinctiveness are consistent with that culture's conceptions of rights, dignity and justice, or whether it is a wanton exercise of power by the elites." *Id.* at 323. While her points are well-taken, they are less relevant for plural societies, which contain a number of cultures. They also illustrate the degree to which culture and state are too frequently collapsed.
62. See Hamza Alavi, *The State in Post-Colonial Societies: Pakistan and Bangladesh*, 74 *NEW LEFT REV.* 1 (July/Aug. 1972).

of Afghanistan (PDPA), and gave rise to fundamentalist forms of Islam that led to the erosion of women's rights in both Afghanistan and Pakistan.⁶³ While a recent Human Rights Watch report on Pakistan notes that "the militarization of politics have had a profound impact on the trajectory of women's advancement,"⁶⁴ it fails to mention that the notorious Zina Ordinances were brought into law during the US backed Zia regime; a regime that was the beneficiary of millions of dollars of aid in the form of US military contracts. Gender asylum cases in both Pakistan and Afghanistan thus need to be seen as the direct result of US cold war policies of intervention in the region. According to Amnesty International, Afghans are the single largest refugee group in the world.⁶⁵ Yet neither the recent Amnesty report *Women in Afghanistan: Pawns in Men's Power Struggles*⁶⁶ or *Pakistan: Honor Killings of Girls and Women*⁶⁷ makes mention of the effects of US policy in the region. When these reports specify the myriad ways in which women were made victims, one would never know that women in the People's Democratic Party of Afghanistan fought the political agenda of the mujahideen (who opposed, among other things, universal education for women),⁶⁸ or that Pakistani feminists have been organized against both the Islamization of law and its unfair application for almost two decades.⁶⁹

In states where formal legal equality pertains, the problem lies with implementation of the law and enforcement—and that is true in the United States as well. In the United States, 1.3 million people are stalked each year,

63. See Diana Cammack, *Gender Relief and Politics During the Afghan War*, in *ENGENDERING FORCED MIGRATION*, *supra* note 40, at 94.

64. See HUMAN RIGHTS WATCH, *CRIME OR CUSTOM*, *supra* note 42, § III.

65. See AMNESTY INTERNATIONAL, *REFUGEES FROM AFGHANISTAN: THE WORLD'S LARGEST REFUGEE GROUP* (1999).

66. AMNESTY INTERNATIONAL, 11 Nov. 1999, AI Index ASA 11/011/1999.

67. AMNESTY INTERNATIONAL, *supra* note 1.

68. See VALENTINE M. MOGHADAM, *MODERNIZING WOMEN: GENDER AND SOCIAL CHANGE IN THE MIDDLE EAST* 207 (1993); Valentine M. Moghadam, *Nationalist Agendas and Women's Rights: Conflicts in Afghanistan in the Twentieth Century*, in *FEMINIST NATIONALISM* 75 (Lois A. West ed., 1997).

69. Two exceptions are notable: HUMAN RIGHTS WATCH, *CRIME OR CUSTOM*, *supra* note 42, mentions the formation of the Women's Action Forum in 1981, as does a September 1999 Amnesty Public Statement. See AMNESTY INTERNATIONAL, *PAKISTAN: AFGHAN WOMEN'S DAY PROTESTERS MUST BE PROTECTED* (1999). This report also calls for protection of women activists in the Revolutionary Association of Women (RAWA) at International Women's Day protests. For more information on feminist organizing in Pakistan, see KHAWAR MUMTAZ, *WOMEN OF PAKISTAN: TWO STEPS FORWARD: ONE STEP BACK* (1987); Ayesha Jalal, *The Convenience of Subservience: Women and the State of Pakistan*, in *WOMEN, ISLAM AND THE STATE* (Deniz Kandiyoti ed., 1991); Shahnaz Rouse, *Gender, Nationalisms and Cultural Identity*, in *EMBODIED VIOLENCE* (Kumari Jayawardene & Malati de Alwis eds., 1996); Khawar Mumtaz, *Identity Politics and Women: Fundamentalism and Women in Pakistan*, in *IDENTITY POLITICS AND WOMEN* 228 (Valentine M. Moghadam ed., 1994).

and yet stalking laws exist on a piecemeal basis, and are difficult to enforce. An “Order of Protection” is only a piece of paper—it cannot stop an enraged partner from perpetrating further violence and harm. Yet no one argues that the difficulty in enforcing these laws is a reason for American women to claim gender asylum in France or India. Culture, then, makes its appearance in gender asylum cases in troubling ways. The problem cannot be solved simply by avoiding the use of cultural stereotypes, as some feminist asylum advocates urge.⁷⁰ This approach ignores the ways in which culture itself increasingly is assumed as the grounds for human rights work in general, and gender asylum claims in particular. One must, therefore, insist on marking the asymmetry of the very production of cultural explanation, even as one recognizes that this asymmetry emerges from the interface of the international economy and liberal theory.

The point is not to force a choice between universalistic or relativistic criteria—to my mind, that debate has stalled, and it need not be rehearsed here.⁷¹ I want rather to reinstitute questions of culture and community in South Asian human rights work by moving beyond a universal human rights versus cultural rights dichotomy to examine the antimonies of displacement that emerge from the confrontation of the two as they move unevenly though national and international arenas. The task is to understand at what points the application of universalist criteria forces the emergence of culturalist explanation, and conversely to identify those points at which we mistakenly attribute a cultural explanation when a “universal” one might serve as well.

Consider one example: the South Asian languages of honor and shame have been used to explain why rapes go unreported and women are reluctant to share stories of sexual violence even with close family members. The argument is that intense cultural shame about bringing further dishonor to their families prevents women from talking about rape or

70. See Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155 (2002); Anker, *supra* note 14, at 152.

71. See, e.g., Alison Dundes Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 HUM. RTS. Q. 514 (1985); Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56 (1988); ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* (1990); Ann-Belinda Preis, *Human Rights as Culture Practice: An Anthropological Critique*, 18 HUM. RTS. Q. 286 (1996); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136 (1997); Annette Marfording, *Cultural Relativism and the Construction of Culture: An Examination of Japan*, 19 HUM. RTS. Q. 431 (1997); Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUM. RTS. Q. 461 (1997); John J. Tilley, *Cultural Relativism*, 22 HUM. RTS. Q. 501 (2000).

sexual violence.⁷² This issue has been raised for Sikh women fleeing state violence in the Panjab who are seeking asylum in the United States and have been reluctant to recount their experiences to asylum officers. Yet, domestic and sexual violence specialists know that victims of sexual violence anywhere may feel intense shame and reluctance to talk about what they have experienced. In this instance, something not understood as a universal experience might effectively be applied as one, and the attempt to use culture as a form of explanation is employed as an essentialist tool to make the case for gender asylum.

Given the sensationalized reporting of such cases by the international media, there is both a stereotyping of non-western cultures as oppressive to women, and a presumption that patriarchal norms, discriminatory laws and gender-related violence are not also features of western societies. Yet the observation that “the UN sometimes uses sexist human rights language and does not consistently include a gender perspective in human rights reporting and gender expertise in field visits and operations” as well as the call by Amnesty International and others for the United Nations “to bring women’s human rights from the margins into the mainstream by adopting gender-sensitive language”⁷³ also has resulted in the highlighting of cultural difference to reinforce stereotypic assumptions in human rights reports. For example, a recent News Release by Amnesty International on the twentieth anniversary of the Women’s Convention began with this lead: “Pakistan 1999. Ghazala was set on fire by her brother in the name of honor. Her burned and naked body lay unattended on the street for two hours as nobody wanted to have anything to do with it.”⁷⁴ The report continues, “Pakistan has ratified the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (Women’s Convention). The government is failing to take serious measures to safeguard and protect women’s human rights.”⁷⁵

Amnesty International also singled Pakistan out for a special report on CEDAW in March 1997, *Pakistan Women’s Human Rights Remain a Dead Letter: No Progress Towards the Realization of Women’s Rights After the Ratification of the Convention on the Elimination of All Forms of Discrimination*

72. This issue also has been raised with regard to the Partition of India. See Veena Das, *National Honor and Practical Kinship: Of Unwanted Women and Children*, in *Critical Events* 55 (Veena Das ed., 1995); Ritu Menon & Kamla Bhasin, *Abducted Women, The State and Questions of Honor: Three Perspectives on the Recovery Operation in Post-Partition India*, in *EMBODIED VIOLENCE*, *supra* note 69, at 1.

73. Press Release, Amnesty International, *International Women’s Day—50 Years of Women’s Rights?* (6 Mar. 1998).

74. *Id.*

75. *Id.*

Against Women.⁷⁶ Yet the United States is the only state in North America and Europe that is not a signatory to the Women's Convention.⁷⁷ All nations of South America have signed. The South Asian countries of India, Pakistan, Bangladesh, Bhutan, Sri Lanka, and Nepal have signed. CEDAW was also the basis of providing for constitutional protections for women's rights in Nepal and Sri Lanka; while feminists in Bangladesh were successful in reducing the number of the country's reservations on CEDAW. India ratified CEDAW in 1993, but also specified reservations on Articles 5(a) relating to cultural and customary practices, and 16 (1) relating to equality in marriage and family relations.⁷⁸ It is important to realize however, that these reservations are not necessarily regressive in the sense that the state is refusing to protect women from their communities (though many would argue that this is indeed the case), but can be seen as accountable to the tremendous ferment in the country about the merits of having a uniform civil code versus having reforms generated by women's rights activists within those communities.⁷⁹ In other words, the supposed failure to observe international law—the point at which national sovereignty is either challenged by or exercised through the woman question—may also be the space where democratic civil libertarian politics emerge to hold the nation-state accountable.

CEDAW might eventually become an effective alternative to gender asylum. It calls for UN member states to ratify sixteen articles which pertain

76. AMNESTY INTERNATIONAL SPECIAL REPORT (1997).

77. President Carter signed the treaty in 1980, but the US Senate failed to ratify the treaty in 1994 and again in 2002. See Lester Munson, *CEDAW: It's Old it Doesn't Work and We Don't Need It*, 10 HUM. RTS. BRIEF (2003).

78. CEDAW, *supra* note 19. The government of India issued a declaration, stating that it would follow a policy of non-interference in the personal affairs of different communities when implementing these provisions, as well as a reservation:

With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

With regard to article 16 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.

Reservation:

With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article.

Available at www.hri.ca/forthecord1999/documentation/reservations/cedaw.

79. See Flavia Agnes, *Redefining the Agenda of the Women's Movement Within a Secular Framework*, in WOMEN AND THE HINDU RIGHT, *supra* note 24, at 136; Nivedita Meon, *Women and Citizenship*, in WAGES OF FREEDOM 241 (Partha Chatterjee ed., 1998); Rajeshwari Sundar Rajan, *Women Between Community and State: Some Implications of the Uniform Civil Codes Debates in India*, 18 SOCIAL TEXT 5 (2000).

to women's social, economic and political rights. Article 19 specifies gender-based violence as a form of discrimination. At this moment, only 165 of 188 member nations have signed. In 1999, the United Nations also established an Optional Protocol to the Women's Convention which would allow women to bring complaints against states that have failed to uphold their commitments to the Women's Convention.⁸⁰ Only twenty-eight states have so far signed the Optional Protocol. The Women's Convention also establishes a committee of twenty-three independent experts, which reviews the reports that state parties are required to submit indicating measures taken to implement the Women's Convention.

V. US DOMESTIC VIOLENCE AS A HUMAN RIGHTS ISSUE

In a recent Human Rights Watch Report on Pakistan, it was estimated that eight women were raped every twenty-four hours, and 70–95 percent of all women had experienced domestic or familial violence.⁸¹ Those are rather shocking statistics. Still, the recitation of such statistics also works to obscure certain facts about the United States where:

- As many as four million women are abused by their husbands or live-in partners each year.
- A woman is raped every two minutes (or according to another estimate, 1.3 women are raped every minute, resulting in seventy-eight rapes each hour, 1,872 rapes each day, 56,160 rapes each month, and 683,280 rapes each year).⁸² Between 1995 and 1996, more than 670,000 women were the victims of rape, attempted rape, or sexual assault. Yet for that same year, it was estimated that only 31 percent of rapes and sexual assault were reported, less than one in every three.⁸³

80. CEDAW, *supra* note 19, art. 12; *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Draft Report of the Open-ended Working Group*, U.N. ESCOR, Comm'n on the Status of Women, 40th Sess., Agenda Item 5, U.N. Doc. E/CN.6/1996/WG/L.1 and Add.1 (1996).

81. HUMAN RIGHTS WATCH, *CRIME OR CUSTOM*, *supra* note 42, § V.

82. NATIONAL VICTIM CENTER AND CRIME VICTIMS RESEARCH AND TREATMENT CENTER, *RAPE IN AMERICA: A REPORT TO THE NATION*, 23 Apr. 1992 (on file with author). Another estimate from the FBI, US Dept. of Justice, Uniform Crime Reports 1992, held that a woman was raped every five minutes, resulting in 105,120 rapes per year. Revised estimates from the Bureau of Justice Statistics at the US Dept. of Justice put the number of sexual assaults against women at 500,000 for 1992 and 1993, including 170,000 rapes and 140,000 attempted rapes. These numbers would mean that a woman was sexually assaulted almost every minute for 1992–1993. See ASSOC. PRESS, *Survey Questioning Changed, FBI Doubles its Estimates of Rape*, N.Y. TIMES, 17 Aug. 1995, at A18.

83. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY (1997).

- In 1992, the United States had the world's highest rape rate of the countries that publish such statistics: four times higher than Germany, thirteen times higher than England, and twenty times higher than Japan.⁸⁴
- 31 percent of all rape victims develop Rape-Related Post-Traumatic Stress Disorder (RR-PTSD) at some point during their lifetimes. Based on US census reports, it has been estimated that 1.3 million currently have RR-PTSD, 3.8 million women have had RR-PTSD and roughly 211,000 will develop RR-PTSD each year.⁸⁵

Violence against women has reached epidemic proportions in the United States. Yet, one will never see any of these statistics cited in a Human Rights report.⁸⁶ The Human Rights Watch webpage on "Domestic Violence" states that "[u]nremedied domestic violence essentially denies women equality before the law and reinforces their subordinate social status. Men use domestic violence to diminish women's autonomy and sense of self-worth. States that fail to prevent and prosecute domestic violence treat women as second-class citizens and send a clear message that the violence against them is of no concern to the broader society"⁸⁷ and goes on to list fifteen states, including Nepal and Pakistan where domestic violence is a problem.⁸⁸ The United States is not mentioned.

Examining the percentage of women who have been physically assaulted by an intimate partner, the rate is 22 percent for the United States (based on a 1993 survey, and remember that one in three rapes go unreported), 26 percent for India (based on a study of six states for 1999), and 47 percent for Bangladesh (based on 1992 study). By one set of estimates, then, the United States and India share much more in common in terms of rates of domestic abuse (certainly a "quality of life" issue) than might be supposed by perusing the United Nations Development Programme Human Development Index in which the United States is ranked second, and India is ranked 134. (Sri Lanka is ranked 97, Pakistan 128, Bangladesh 146, Nepal 151, Bhutan 160, and Afghanistan 170 in 1995.)⁸⁹ Attempts to

84. *Id.*

85. NATIONAL VICTIM CENTER REPORT, *supra* note 82.

86. Though abuses against women in US prisons have been the subject of special investigations.

87. Human Rights Watch webpage, Domestic Violence, *available at* www.hrw.org/women/domesticviolence.html.

88. Similarly in its webpage for Sexual Violence the lead sentence reads "women everywhere are sexually assaulted, and their primary attackers are granted impunity" but the primary examples on the page are Russia, India, and Pakistan. *Available at* www.hrw.org/women/sexualviolence.html.

89. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 155–57, tb. 1 (1995).

use such measures,⁹⁰ or country reports issued by the US State Department⁹¹ to assess the degree to which women in non-western countries possess rights thus deploy a very flawed yardstick. The “woman question,” once a marker of colonial and nationalist discourses, now stands literally as a signifier of the neo-liberal economy not only of the extent to which “developing nations” have successfully adopted structural adjustment development policies.

VI. CONCLUSION

In several ways culture brings human rights talk in South Asia into crisis. First, culture is gendered and violently masculinized so that particular countries or nation-states are marked by their crimes against women: to say India is to think dowry deaths, to say Pakistan is to think honor killing, to say Bangladesh is to think of acid-throwing disfigurement. These forms of description do the work of characterizing weak states in a neo-liberal economy, and as the cultural face of globalization both constitute and are constituted by human rights discourses on the region. One has only to remember the call for the World Bank to undertake “rights-based development” to actualize this connection.⁹² The mainstreaming of human rights norms into multi-lateral lending institutions should give us pause. While the imposition of international human rights norms upon the global South⁹³ may on the surface be appealing to many, they may also mask the ways in which lending policies exacerbate or even help to create the social divisions implicated in the very human rights violations international lending institutions seek to monitor.

The link between domestic violence and globalization may not appear to be a direct one, but it is possible that human rights discourse works to obfuscate, if not sever that very linkage. As Nesiah reminds us, the universalization of women’s oppression in feminist human rights discourse works to mask global structural features.⁹⁴

90. See Clair Apodaca, *Measuring Women’s Economic and Social Rights Achievement*, 20 *HUM. RTS. Q.* 139 (1998).

91. See Steven C. Poe et al., *Global Patterns in the Achievement of Women’s Human Rights to Equality*, 19 *HUM. RTS. Q.* 813 (1997).

92. See, e.g., Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 *HARV. HUM. RTS. J.* 228 (2002); Dana Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 *HARV. HUM. RTS. J.* 205 (2002).

93. See, e.g., *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 12 (Thomas Risse et al. eds., 1999) which seeks to understand “the conditions under which international human rights norms are internalized in domestic practices” and develops a series of models to understand nation-state “instrumental adaptation to pressures.”

94. Nesiah, *supra* note 3, at 18–19.

Feminist scholars have productively established that domestic violence is not a private, familial matter; it cannot be separated from an understanding of public attitudes toward women. In a like vein, violence against women cannot be separated from the violence of the international economy. "In a world in which women perform two-thirds of the hourly labor and receive ten percent of the income and hold barely one percent of the property, disempowerment is clearly economic."⁹⁵ It is thus important to understand domestic violence as part of the structural violence wrought by liberalization and structural adjustment policies. Liberalization has impoverished millions, and there are indications that structural adjustment policies have hit women the hardest,⁹⁶ with some evidence that women in urban as well as rural areas are working multiple jobs and two to three shifts per day. More work does not mean economic freedom—it means deepening subjection to already entrenched forms of male authority. Just as many theorists are now arguing that economic rights should be considered human rights,⁹⁷ so too should domestic violence be understood as a part of the structural violence against women produced by the international economy.

Finally, while one might expect the critique of gender essentialism to suggest that women cannot be partitioned from their communities, the discourse on women's human rights forces a separation of women's rights from community rights that reinstates gender as the primary determinant of a women's identity. What does it mean when the language of gender asylum creates the conditions for women's exile not only from her national origin, but from her community of affiliation? Does human-rights feminism, as an instance of a universalizing discourse, re-enact a form of cold-war citizenship with hidden consequences for how we understand the process of claiming rights? What role does the South Asian diaspora play in redefining women's rights on the subcontinent? What are the consequences for the feminist and civil libertarian movements of South Asia when scholars, legal critics and activists in diaspora must resort to human rights "instruments" that inevitably incite talk of negative cultural difference? I cannot claim answers to these questions, but if one remembers that women are not only victims, but also agents with the capacity to effect political change, then the contradictions of gender asylum should teach us to pay more attention to feminist democratic politics in South Asia and how we reflect on the

95. Gayle Binion, *Human Rights: A Feminist Perspective*, 17 HUM. RTS. Q. 509, 511 (1995).

96. See Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda*, 19 HUM. RTS. Q. 630 (1997).

97. See Wesley Milner et al., *Security Rights, Subsistence Rights and Liberties: A Theoretical Survey of the Landscape*, 21 HUM. RTS. Q. 403 (1999); Craig Scott, *Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights,"* 21 HUM. RTS. Q. 633 (1999).

relationship between the movement to end domestic violence in the United States and those movements in South Asia.

I end with two questions. First, what would it mean to understand domestic violence in South Asia and its narrative production, as a product not only of culture, but of state-level policy and the neo-liberal economy? Second, what would it mean to speak of a culture of violence against US women, and to understand domestic violence in the United States as a human rights issue?