

Flags and Rights

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Can we have rights without the equally compelling presence of power, flag, identity, and laws? Rights need the state to be legitimised, a government to be operational, a nation to be vindicated, and laws to be defined, arbitrated, and strengthened. The claim of rights is both experiential and phenomenological in the sense that rights present themselves to us both in the structure of everyday action and as a category in social interactions. Rights are demonstrated by their daily and recurrent recognition by the individuals and the political society as claims to the conditions of existence, development, and transformation. Rights therefore exhibit a sense of reciprocity and a characteristically recursive nature. They imply agency and a sense of contentious yet reciprocal relationship, which means that they need institutions, agencies, procedures, recognitions, and constraints – all a matter of reciprocity and recurrence. In short, in asserting one's own right one acknowledges the validity of the institutions, actors, and agencies that act as standard setting exercises. With this minimal reciprocity and recurrence (rights and parliament, rights and the judges, one's rights and others' rights, rights and the collective, rights and duties, rights and their denials) we not only have a socialised recognition of claims, we have a shared recognition of these claims also. In this context of shared recognition and commonly agreed upon ends, rights thus invoke the nation form in as much as the political society in the form of nationhood needs the institutionalisation of rights. Rights operate under flags; flags proclaim rights.

Rights are thus conventionally for the members of the political community called the nation. Nation proclaims rights for its members, and its rights against another nation and its members. Wars are fought over rights. Contentious politics is built over rights. Rights are thus never universal in their acceptance; they are marked by contentious circumstances. Yet as we hear more and more of the universality of rights, we must pause and ponder: is the relation between flags and rights being renegotiated and reconstituted now? In this essay we conduct the investigation of the question as framed under post-colonial conditions such as India's in form of commentaries on a set of four related issues:

- First, the two comparative and distinct discourses of rights – global and the local, in this case the specific post-colonial discourse; thus we have on one hand the evolution of the discourse of global rights (the Universal Declaration of Human Rights and the subsequent development of these universal rights), and today's global discourse on democracy and human rights, along with the discourse on transitional democracy and justice; on the other hand there is the specific Indian discourse on constitutional, political, and social rights in the anti-colonial context and the post-colonial context.

- Second, in the post-colonial context where rights often face the paradigm of development, how exactly are we to consider the two theoretical formulations of “development as freedom” and “development as right”? The post-colonial political history of nation building shows the concrete ways in which developmental discourses address the resource question. We speak here of the Indian imperatives and instances, and have to note the “policy explosion” in India in the context of globalisation, which connect the two phenomena – the governmental responses and the rights perspective.
- These interrelated perspectives allow us to see the dynamics in the expansion of the sense of rights in India, which now mean more and more social and economic rights and imply a notion of justice; they also help us to see the impact of this expansion on state institutions and popular politics. In short the working out of the theme of rights in a post-colonial context bears out concrete governmental ways of defining and limiting rights vis-à-vis the emerging issues of justice (thus governmental ways include judicial activism) and the popular ways in which rights assert themselves.
- Finally, if the language of rights is working out its way in this post-colonial context that includes both “governmentalisation” and “popularisation” of rights, we must take note of the principal question with which we began this essay, namely can rights function without a flag? If rights imply a specific politics, we can note two interrelated political trends, namely, globalisation of rights and the globalisation of the politics of autonomy. The latter means the increasing strength of politics – its autonomy - to cope with the global fall out of new discourses, new global political economy, and the emerging issues of rights and justice.

I

Decolonisation: Global and the Local Origins of Rights

We have already begun with the issue of globality and locality in our discussion on rights. Of course in any discussion on the polarity it is wise to remember that the rights revolution in one place has always led to similar revolutions elsewhere. Thus the French Revolution and its declaration of rights swept Europe within sixty years, and the anti-colonial revolt in India encouraged similar resistance in defence of national rights in many colonies. The Soviet Revolution for bread, land, and peace – three fundamental rights today – encouraged uncounted series of revolts for more than fifty years, and if the phrase “rights revolution” has any meaning today, it is namely that, the universality of reason must work in a fractured way I have indicated, reason must work out in form of its split. Local revolts for rights go against certain universality of reason, certain forms of universality, for instance, colonial reason and rule, market rationality, liberal universalism, parliamentary democracy, Western

brotherhood, etc., and in the light of these universal forms local revolts for rights may appear as un-reason, madness, obduracy, etc. On the other hand, these local revolts for rights claim to speak for a certain universality, which they think belongs to them too. Thus, in Haiti after the French Revolution the black Jacobins defended their revolt in the name of revolution, and in face of the punitive army sent by Napoleon sang the Marseilles. How does the split of reason work today?

The global stage is marked by an intense discussion of globalisation today, characteristically at many levels, in many contexts, and in many forms. So, in the first place, the contestation over universality is already on. Can our rights discourse de-link itself from this contentious scene? It cannot. There are several reasons, the primary being the direct impact of globalisation on the nation-state. Free flow of capital, US style electoral democracy, free trade in form of the WTO regime, questions over immigration and flow of labour, and finally monopoly of nuclear weaponry – these issues have seriously impaired the nation-state as a form of defence against western universality and US led globalisation, and as a container of rights. Citizenship, for whom rights are meant, has suffered deficit – as concept, as institution. Two reasons can be cited – First, the nation state is incapable today to ensure many of the rights that citizens demand and think to be legitimate and appropriate. Social and economic rights are particularly impaired by the WTO regime; many of the civil and political rights too have suffered in the new world order. Second is the factor of massive and mixed flows of migration across national boundaries, demanding new responses and new measures of social security. Nations are losing national autonomies. Cultural resistance is not enough. The trans-national corporations override subaltern cultural resistance in many places, because these cultural resistances suffer from the absence of both national and global support and legitimacy. Existing only as local roots they fail in resisting the vast increase in the flow of finance capital and the ruthless play of monetarist forces. Globalisation's putative irreversibility has resulted in two significant consequences – (a) some of the earlier Nehru or Sukarno style alternatives seem more like Disneyland features; (b) local cultures as a resistance to the global onslaught of capital at times assume that there is nothing called "rights within", only rights against the west. Needless to say, with the increasing deficit of the nation-state, both these consequences have been telling on the career of the rights revolution.

One further aspect of globalisation is the expansion of the so-called sphere or culture of consumption, which is finally eating up the social sphere in the developing countries. Thus for instance food security is breaking down in societies faced with a breakdown in consensus over priorities in social consumption.¹ Hunger deaths have reappeared even in parts of India ruled by socially conscious gentry, as in West Bengal.² Suicides among farmers have gone up alarmingly among the peasantry, trapped in high-cost, uncertain return, high yielding variety seeds farming, and a marketing nexus that leads them to increased bondage to banks and traditional usurers.³ Culture does not help in face of the huge expansion of finance capital markets in this milieu (nor do social bonds), because while it tilts its sword at a

windmill called “modernity”, modernity continues to act in this respect primarily as the allegory of free market economics.⁴ Rights are a product of modern politics, yet this modern politics has reached a stage where global modernity has no space for rights revolution except where it arrives as part of a global democratic package carrying the brand of free market, *Pax Americana*, and an interventionist democratic ideology.

How will the rights revolution feature in such scenario? I have already suggested that this scenario cannot be one of Bandung, that is, a replay of the politics of conference of Afro-Asian heads of states in the fifties of the last century in Indonesia where those heads of states thought that they had overcome the “colour burden” and could initiate a new path against colonialism and neo-colonialism through consolidating the sovereignty of the nation-states of Africa and Asia, initiating state capitalism within, undertaking massive state expenditures and committing states to large scale social subsidies, thus institutionalising and guaranteeing certain rights mostly political and civil. Bandung failed, as we know. Neither the nation-states were able to build up independent strong economies, nor were they able to keep their economies free from the debt trap, nor even could they guarantee freedoms to their people. And now in face of globalisation’s latest phase, we cannot simply think of a return to Bandung.⁵ It has to be a *turn* towards something unanticipated and fresh, a *turn* in which fresh and recurring themes interface. If fresh things are let us say, first, re-conceptualising the rights, second, establishing equality between two genre of rights – civil and political on one hand and social and economic on the other, and third, integrating other emerging rights (environmental, generational, group, rights necessary for the challenged, vulnerable and marginal groups of population, rights redefined by the sense of entitlements, etc.) with the traditional ones, the recurring theme in the continuing rights revolution is sovereignty, which has to be redefined now in the light of globalisation and of the need to maintain rights in face of the onslaught of globalisation. Bandung upheld sovereignty as a principle to claim and retain independence, oppose colour divisions and world hegemonies, and uphold social commitments to citizens. But as I have indicated, today we have several new developments in the light of which sovereignty as a principle has to be reassessed and re-formed (shared forms, diffused forms, autonomies, etc.). For instance, rights groups work as networks; rights are anticipated less by law but more by movements, universality has acquired new meanings and new claimants, rights demand a redefinition of sovereignty, and rights, nation, and cosmopolitanism have entered a new phase of interrelation. Political struggles even at the grassroots show network pattern, and a kind of functional unity pervade the struggle for rights. In this new phase, rights advocates particularly in the third world where rights are still not overwhelmed by liberal free market ideology are doing one of the most significant tasks of current politics, namely re-conceptualising sovereignty, because they have to define and establish rights both in a space defined by the legal form of the state as well as in face of a “space-less, faceless” global enemy of rights – namely empires, MNCs, interventionist armies, and flows of finance capital breaking state barriers and attacking domestic economies. Only those

who are powerful can raise barriers and pull up the drawbridges to stop both goods and labour from the developing nations. In short free trade is not bringing freedom as promised.

In such milieu, we require concrete investigations of how the rights politics is shaping up in societies in transition and in turn shaping countries' politics at the same time. On one hand rights politics face a state whose form is derived from the absolutist responses to various insurrectionist and critical traditions often working underground and which is strengthened by the "toxic" ideology of a homogenising exclusionary nationalism, on the other hand it has to interact with a state whose legitimacy is derived from the fact that the state form is the only possible form of democracy, and which must now gradually re-form into a shared shape and an interacting field of autonomies in order to maintain that legitimacy. We need these concrete accounts – the accounts of the other words of politics that state-centric discourses do not tell us. And if we come to think of the conundrum, was not India placed in a transitional situation similar to the one we have been describing now when she declared her rights revolution on attaining independence? Then too, on one hand various strands of protest and claim making politics in the country in the anti-colonial period converged to create the Part III of the Indian Constitution known as the section on Fundamental Rights, on the other hand this formulation and articulation took place in a global milieu – that of de-colonisation, anti-nazism, anti-Fascism, rise of labour politics and welfare ideology in the West, with decolonisation an expansion of mass democracy; and with all these the declaration of the Universal Declaration of Human Rights, and yet there was one more similar element, namely that, India's rights revolution too took place in the form of legitimisation of a centralising state whose judiciary in time would become the only "source" of hope, notwithstanding the fact that this judiciary would not be able always to live up to the trust reposed in it.

As we recount India's rights revolution, we shall encounter the dualities binding rights – global forms of power and local struggles for justice, or the global form of the state and political democracy and the local nature of rights, or economic globalisation and the nation-state, or the universalising nature of the rights discourse which explains differential legitimation (that is certain rights are of higher order) of rights and the claims by local struggles for rights and local origins of rights to universality. All these in the first instance make rights appear as the "gift of the state". Gift of the state is of course the gift of death. Therefore rights take always both state and non-state forms – as state forms they are gifts, as non-state forms (that is not yet legal, accepted, or universalised) they escape the kiss of death. The narrative of rights therefore cannot but be genealogical – an affinity with history, paradox, and an explanation of the "mysterium tremendum" – a *terrifying mystery* – as to its origins. Remember Charles Tilly's famous shooter, "Where Do Rights Come From?" How did they come: from contentious politics or liberal theory, passions and conflicts of claims or gift of the state, democratic theory, and democratic institutions?⁶ As rights everywhere eclipse in the wake of neo-liberalism everywhere,

the originary phase of rights seems to pass into history as a mysterious one, as if we are still grappling with the reason as to why they came and why they vanished gradually. We must hence look into not only the origin of the rights revolution everywhere, but also into the nature of the mystery that made the revolution as primarily one of ideas and not of material politics achieved through blood, violence, and political attritions.

Rights constitute an epoch in politics, by which I mean that we intend to think of a past when there were no rights, and then with the idea of rights the ancient age of politics ended, and anthropomorphism in politics came, which we call the modern age.⁷ This is what I have termed as a mysterious account. In India, as I shall recount shortly, the rights revolution came from the anti-colonial and democratic origins, and less from the idea of nationalism or liberalism. This reversal meant that rights were never taken as assured, but to be always kept alive by sacrificial rites of blood and killings, though the account of its origins and life remained suppressed. The result of this double displacement (first, displacing idea with action, and second, formal narrative of an idea displacing actions at the level of formal politics) is a perpetual tension around the institution of sovereignty, which is to gift the rights to subjects as the test of its responsibility. The presence of rights proves, the thesis of sovereignty says, that the sovereign is responsible. This is the secret of the principle of responsibility now marking the rights discourse and the institutionalisation of this principle of responsibility. To gift is a right (of the state), and therefore for its presence the giver is responsible, responsibility in this way produces power, all these in no way however altering the fact the nature of the gift may change; once given it is no longer a gift but may turn out to be a mark of discontent against the gift giver...

As we revisit the times when the Fundamental Rights were proclaimed sixty years ago in this country, one cannot but notice the air or the atmosphere of utopia marking the time of its declaration. The country had just got independence, the nation had just got freedom, and on its body the marks of shackles were still deep and bleeding, the stench of corpses in the Bengal famine (1943) in which three million people died was still there, yet the rights revolution imparted a feeling of the unreal – as if from tomorrow onward rights would prevail, accountability would be instituted, the delivery of justice would become regular; and rights would mark Indian democracy. Elections, parties, press, judiciary, and the parliament would not be the markers by themselves, if they were to be signs of democracy, it would be only because rights would sit at the heart of all these institutions. In this feeling of arrival, two transformations were at work in making this utopia – again a situation similar to that of today. One, in this declaration poverty, squalor, physical abuses and deaths, became irrelevant; the political revolution was resplendent with the glory of the rights revolution. Two, unparallel wealth of the commercial class, and higher education and consuming finesse of the literati made politics subject to the cultural pleasures of this class to the extent that countless promises of nation-building that went along with the declaration of the rights revolution seemed fantastic and rendered utopian fantasy a mass popular attraction. Thus election campaigns became

popular, radio and newspapers became eagerly sought artefacts of politics, plebiscitary visits by the political leaders were intensely awaited events, and the nation thrived on utopia on the basis of the declaration of rights. But gradually as rights suffered decline and utopia waned as a fundamental symptom of the banality of the populist politics, rights started facing free market fundamentalism from mid-eighties so much so that the political class could now again resort the language of the colonial rulers, namely the language of responsibility. Thus like the colonial rulers, independent India's rulers too had to rebuke the Indians for not being law-abiding, for being irresponsible, for being lax and accommodating to unruly acts, and for not living up to promises. The Emergency (1975-77) thus marked in many ways the redefining of the political society, which dispensed with utopia along with its rights promises, and hereafter politics would become a serious business of administration, government, and ruling.

The question here then: can we make a connection between rights and utopia? Rights promise; utopia is a promised land. Rights are declaratory; utopias embody these declarations. The greatest characteristic of utopia is that the market laws are suspended here; laws are suspended; property relations are suspended; crime, drugs, violence, boredom, degradation, sexism, racism, power, everything is suspended; and in this utopian system rights confer anonymous bliss. In utopia everyone is a citizen, no one is a subject, and the passage from subject-hood to citizenship is complete and without problem. In this again, the rights language had enormous implications, because it addressed in a surrealistic manner the four commanding themes of all utopias, namely the property issue, the continuum of work-leisure-creativity, sexuality with seemingly its only pleasant consequences, and finally nature as conquest or companion. Rights promised the solution of all these problematic. But as these solutions do not make any sense in reality and power realities reassert themselves, the fate of the rights revolution seems to be saying as if in a dying call, "Exterminate benevolence, discard righteousness, we shall be hundred times better in a non-promised land of conflicts, negotiations, bargaining, and struggles, irrespective of what law has assured."⁸ Yet, utopias recur, because rights promise more than what law can afford. Politics again enters its declaratory phase. I think in this combined perspective of utopia-rights, today's phase bears strong resemblance with that of sixty years ago.

What happened then? The basic text declared in 1950 that the Fundamental Rights embodied in it were guaranteed to all Indian citizens. These rights (mostly civil liberties) took precedence over any other law of the land (Art.13). They included individual rights common to most democracies, such as equality before the law (Art. 14), right against discrimination (Arts. 15-18), freedom of speech and expression (Art.19), right to life and liberty (20-21), freedom of association and peaceful assembly, freedom of religion (Arts. 25-28), and the right to constitutional remedies for the protection of these rights (Art. 32); but more significantly they wanted to address the Indian situation in the sense that they were aimed at abolishing the indignities and inequities of past social practices, prohibiting discrimination on the

grounds of religion, race, caste, sex, or place of birth; and forbidding trafficking in human beings and forced labour (Arts. 23-24). These rights went even further – they heralded the arrival of group rights by way of protecting cultural and educational rights of minorities through ensuring that minorities could preserve their distinctive languages and establish and administer their own educational institutions (Arts. 29-30). The combination of political, civil, social, and economic (though very few) was unique at that time.⁹ If these declarations were not enough, through judicial interventions rights widened. Thus, right to life (a negative right) was interpreted positively as indicating the right to means of life. Freedom of speech and expression was generally interpreted to include freedom of the press.

The arrival of group rights was made clearer by Part XVI of the constitution, which on the basis of the constitutional promise of social justice (in the Preamble) declared its promotion by elaborating a series of affirmative-action measures for disadvantaged groups. This was clearly expanding the horizon of rights because fundamental rights are mainly in the nature of rights of individuals as citizens. Thus, the "Special Provisions Relating to Certain Classes" declared reservation of seats in the Lok Sabha and in state legislative assemblies for dalits and indigenous people – the exact words being for “members of Scheduled Castes and Scheduled Tribes”. The number of seats set aside for them was to be proportional to their share of the national and respective state populations. Part XVI also stipulated a special officer for Scheduled Castes and Scheduled Tribes to be appointed by the President to "investigate all matters relating to the safeguards provided" for them, as well as periodic commissions to investigate the conditions of the Backward Classes. In 1969 the Twenty-third Amendment extended the affirmative-action measures until 1980 beyond the original twenty-year period. The Forty-fifth Amendment of 1980 extended them again until 1990, and in 1989 the Sixty-second Amendment extended the provisions until 2000. The Seventy-seventh Amendment of 1995 further strengthened the states' authority to reserve government-service positions for Scheduled Caste and Scheduled Tribe members. Today affirmative actions are not merely administrative measures. They link rights to justice and help us to situate the Part III of the Indian constitution in a refreshing way. Rights are not simply to validate a utopia; by linking justice they become the measure by which utopia would be judged. But if these declarations were not enough, the basic text added the Directive Principles of State Policy, which were to be "fundamental in the governance of the country," although legally not enforceable. These principles were to assist in creating a social order featured by social, economic, and political justice as enunciated in the basic text's preamble.¹⁰ They are guidelines for creating a just social order marked by liberty and equality (Art. 31.C). Some Principles articulate injunctions, for instance, that the state "shall direct its policy" towards securing ownership and control of the material resources of the country in a way so that they serve “the common good”. The State has to "endeavour to promote international peace and security”; it has to secure work at a living wage for all citizens, encourage worker's participation in industrial management, ensure just and humane conditions of work, including maternity leave; “promote educational and economic interests of

Scheduled Castes, Scheduled Tribes, and other disadvantaged sectors of society”, develop a uniform civil code, offer free legal aid to all citizens, and achieve *panchayati raj* (democratically elected village councils to function as units of self-government). The Seventy-third and Seventy-fourth Amendment Acts (1992) achieved this goal. And then there is the most widely known principle, that the state has the responsibility to provide free and compulsory education for children up to age fourteen.

Yet amidst these declarations of the utopia, there was a serpent in the garden. More than the declarations, what caught the notice of the political society was that in each and every case of declaration of right the government was given a free hand by the same basic text and the judiciary to impose curbs in the interests of governing the people, the chosen words or phrases being, "in the interests of the sovereignty and integrity of India", "the security of the State", "friendly relations with foreign States", "public order, decency or morality", "public health", or in relation to "contempt of court, defamation or incitement to an offence". This was the way of managing the utopia, at the same time a strategy of managing the rights by turning these rights into matters of administration, negotiation, rule, and control. Part XVIII of the constitution permits the state to suspend various freedoms and certain federal principles during the three forms of states of emergency: (a) an emergency caused by threat or actual "war or external aggression", (b) an emergency caused by the "failure of constitutional machinery" in a state, and (c) finally an emergency caused by a threat to the financial security or credit of the nation or a part of it. Under the first two forms, the Fundamental Rights, with the exception of protection of life and personal liberty, and some federal principles, are suspended. A proclamation of a state of national emergency lapses after two months if not approved by both houses of Parliament. The State of emergency proclamations has been issued three times since independence (in 1962 during the border war with China, in 1971 in Bangladesh War, and in 1975 in response to an alleged threat by "internal disturbances"). In the second case, the President can issue a proclamation, to be approved by the Parliament, dissolving a state government if it can be determined, upon receipt of a report from a Governor, that the state has become ungovernable. The President's Rule is thereby established, and under such a proclamation the President can assume any or all functions of the state government; and transfer the powers of the state legislature to Parliament. The President's Rule however cannot interfere with the exercise of authority by the state's High Court. Once approved, President's Rule normally lasts for six months, but it may be extended up to one year if Parliament re-approves. In some cases as in Jammu and Kashmir President's Rule lasted for a period of more than five years in early and mid-nineties. Civil liberty activists have argued that the President's Rule has been frequently politically motivated. During the terms of first two Prime Ministers, Pandit Jawaharlal Nehru and Lal Bahadur Shastri (1951-66), it was imposed ten times; under Indira Gandhi's two terms (1966-77 and 1980-84) it was imposed forty-one times. The frequency has gone down now considerably. The real authoritarian powers are to be found not in the basic text, but in various preventive detention measures, the Defence of India Rules,

internal security measures, the Special Powers Acts, and the anti-terrorist Acts. These have been indiscriminately used against workers' strikes (for instance, railways strike, 1974), or against recalcitrant minorities (TADA). In 1984 Parliament passed the National Security Amendment Act enabling government security forces to detain prisoners for up to one year. The 1984 Terrorist Affected Areas (Special Courts) Ordinance provided security forces in Punjab with unprecedented powers of detention, and it authorized secret tribunals to try suspected terrorists. The 1985 Terrorist and Disruptive Activities (Prevention) Act imposed the death penalty for anyone convicted of terrorist actions that led to the death of others. It empowered authorities to tap telephones, censor mail, and conduct raids when individuals are alleged to pose a threat to the unity and sovereignty of the nation. The legislation renewing the act in 1987 provided for in camera trials, which may be presided over by any central government officer, and reversed the legal presumption of innocence if the government produces specific evidence linking a suspect to a terrorist act. By June 30, 1994, more than 76,000 persons throughout India had been arrested under the Terrorist and Disruptive Activities (Prevention) Act. The act became widely unpopular, and the government allowed the law to lapse in May 1995, only to bring in a fresh legislation called the POTA, which again due to severe opposition from forces of democracy ranging from political parties to human rights groups, trade unions and other civil society bodies, was allowed to lapse in 2005.

But to go back to the revolution and not its limits: when India was deliberating on the rights, the UDHR was also being passed. Thus as if by a silent design the UDHR (10 December 1948) remembering the anti-colonial and anti-fascist revolutions spoke of the "equal and inalienable rights of all members of the human family", "All human beings born free and equal in dignity and rights" (Art. 1), "the right to life, liberty and the security of person" (Art.3), "No one being held in slavery or servitude; slavery and the slave trade" (Art. 4), "All are equal before the law and are entitled without any discrimination to equal protection of the law" (Art. 7), "the right to freedom of movement and residence within the borders of each state" (Art. 13), "Everyone having the right to freedom of thought, conscience and religion; this right including the freedom to change his/her religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance" (Art.18), "the right to freedom of opinion and expression" (Art. 19), and "the right to freedom of peaceful assembly and association" (Art. 20).

The universality of the declaration spoke through other provisions. Thus the UDHR declared that "Everyone has the right to leave any country, including his own, and to return to his country", "everyone has the right to seek and to enjoy in other countries asylum from persecution" (Art. 14), that "everyone has the right to a nationality" (Art. 15), and that "no one being arbitrarily deprived of his nationality nor denied the right to change his nationality". Clearly these had trans-border implications, which no nation-state by itself was going to accept in those times, and

the rights revolution needed a more universal agent, though the core of these rights obtained from local sources.

And as I have tried to indicate, these local sources of rights were and are more contentious. One instance would be the worst and the bloody exchanges of opinion and actual deaths on the streets in India on the reservation issue – particularly on the issue of 50 per cent increase of reserved seats in educational institutions funded by the Central government, impacting on about 25 Central universities, the Indian Institute of Technologies, Indian Institutes of Management, and colleges supported by the government. Also the moneyed classes have refused to accept the Mandal Commission's suggestion of 27 per cent reservation for backward classes in mercantile offices, and in general private sector. The Centre has already directed State governments to increase reservation for backward categories in the State-level institutions. There have been several commissions engaged by both the states and the centre to put to effect the constitutional provision of reservation for the scheduled castes, tribes, and the other backward classes – but discontent has remained among moneyed classes on what constitutes backwardness, and the norms of social justice. Other contentious issues have been the right to retain autonomy of cultural institutions of the minorities, state regulations over Articles 19-21 to the extent of taking away life without the due process of law by means of Special Powers Acts. More fundamentally, over the years a conflict has developed over the primacy of commercial interests and the fundamental rights. Few years back the Rajasthan High Court dismissed a review petition of soft drink companies against its directive to them to list contents of their products. Chief Justice Anil Dev Singh and Justice K.S. Rathore had directed “the respondent companies, namely Pepsi and Coca-Cola, and all other manufacturers of carbonated beverages and soft drinks, to disclose the composition and contents of the products, including the presence, if any, of pesticides and chemicals, on the bottle, package or container, as the case may be”. They were asked to comply with the order within a month. The two companies had challenged the order on the ground that it would force their clients to compromise with their “commercial confidentiality”, and that such directive was in the domain of the legislature and the executive, not the court. The Court’s reply was that according to Article 19 (I) (A), people had the right to know about the product they were buying and consuming., and “Commercial interests (were) subservient to fundamental rights.”¹¹

If we go back for a moment to the issue of state restrictions and regulations over Articles 19-21, we are faced with a situation where the sovereign thinks that only “extra-ordinary powers” can make state effectively counter the “global” challenge of terrorism and of efforts driven from outside to undermine the integrity of the country. The state has become in a sense an extra-ordinary state, unbound by rule of law, which on one hand through the constitution grants certain rights to citizens, and on the other hand takes away those rights through arrogating to it extra-ordinary powers. Globalisation is making state “soft” only in one sense, namely in acknowledging rights of the people, but the same state is hard in coming down on

recalcitrant sections of society by assuming special powers. This is a global trend and possibly it has been always so.¹² As a result of the sovereign obligation to command extra-ordinary powers, impunity has been noticeably on the rise. For instance, in the decade 1984-94, Indian security forces tortured, “forcibly disappeared”, killed, and illegally cremated more than 10,000 Punjabi Sikhs in counter-insurgency operations. Many perpetrators of these abuses were hailed as counter-terrorism experts, and were not punished. A flickering hope of justice remains now for survivors of the counter-insurgency abuses. Since December 1996, the Committee for Information and Initiative in Punjab has struggled before the Indian National Human Rights Commission in a landmark lawsuit addressing police abductions that led to mass cremations. The Commission, acting as a body of the Indian Supreme Court, has the authority to remedy violations of fundamental rights in this historic case of mass crime. Its decisions will serve as precedent for victims of state-sponsored abuses throughout India. The commission has received over 3,500 claims from Amritsar alone, one of 17 districts in Punjab. However, during the past eight years the commission has not heard testimony from a single survivor. Guatemala's Historical Clarification Commission registered 42,275 victims in 18 months. El Salvador's Commission on the Truth collected information on 22,000 victims in eight months. The Indian Commission, however, has kept survivors running in circles, limiting its inquiry to one of 17 districts in Punjab. One recent report says that in 1995 the commission drastically narrowed its mandate, stating its plan to resolve the case by determining only whether the police had properly cremated victims -- not whether the police had wrongfully killed them in the first place. With this move, the commission rejected the victims' right to life and endorsed the Indian government's position that life is expendable during times of insurgency. The same report points out that “India's counter-terrorism practices have left a legacy of broken families, rampant police abuse, and a judicial system unwilling to enforce fundamental rights”. The same or worse situation exists in Jammu and Kashmir. In one of the infamous incidents of violation of rights, Ajaib Singh of Punjab committed suicide in 1997 after the Punjab police tortured and disappeared his son and justice failed him. His suicide note read, “Self-annihilation is the only way out of a tyranny that leaves no chance for justice”. If India fails to address its own mass atrocities, it means that the Indian political system is not ready to weigh the devastation and insecurity wrought by a national security policy based on systematic human rights abuses and impunity.¹³

The extremely contentious nature of the rights can be seen from another angle: the amount of bodies, rules, provisions, accession to treaties, law, and constitutional provisions is staggering, in contrast with the intrinsically contentious nature of rights in our current political history, when rights are deriving their legitimacy mainly from popular ideas of justice. I have already spoken of fundamental rights and the directive principles. Then there are the systemic arrangement such as the constitutional separation of powers and federal framework. Then India has signed the UDHR, ICESCR, ICCPR, International Convention of Elimination of all forms of Racial Discrimination, Convention on Rights of the Child, CEDAW, CAT, Convention on the Prevention and Punishment on the Crime of

Genocide, Convention on Suppression of the Traffic in Persons, etc. Besides there are several commissions, such as the National Human Rights Commission, the Minorities Commission, the Commission for Scheduled Castes, the Commission for Scheduled Tribes, and Commission of Women to ensure rights of specific sections of society. At state levels also there are commissions.¹⁴ Strapped by non-availability of resources, and bound by several regulations, these commissions often act as only moral voices, without any substantive powers. Human rights groups point out that these often act as bureaucratic management of the rights agenda, adding to governmental capacity and not citizens' rights. And if these commissions were not enough, India has enacted several legislations such as Child Labour Prohibition Act (1986), Protection of Human Rights Act (1993), Equal Opportunities Act for Persons with Disabilities (1998), and others. In these enactments and the establishment of institutions we have besides their governmental face a history of struggles for justice, for which Part III of the Constitution acts as the source of legitimacy. Rights in the public mind today is increasingly linked with the concept of social justice, therefore rights of the vulnerable sections of society are the test of the existence of rights. With growing pressures from below, after the Emergency Rule ended in 1977, the Supreme Court in its activist role inferred several rights from Art 21 and other articles in the Part on Fundamental Rights. Thus rights must meet today the test of justice, which as a result of judicial intervention now connects for instance with threats to life such as the dangers of atomic energy and radiation, offence against the child, detention without trial of people without means of acquiring legal remedy, delay in bringing to trial, lack of protection of environment adversely affecting life, such as pollution of air and water, or lack of education, etc. Thus, the PUCL Mumbai Branch was the first to file a PIL (Public Interest Litigation) in Bombay High Court on behalf of the pavement dwellers and slum dwellers sought to be forcibly evicted and deported from Bombay by A.R. Antulay, the then Chief Minister of Maharashtra. The combined efforts of the courts, lawyers, and human rights movements led to an expansion of the horizon of human rights. Yet like the issue of extra-ordinary powers of the sovereign, inequality of various kinds pose the biggest threat to the rights revolution in the country. Conscientious jurists are pointing out: "Where is equality of opportunity between the children of the rich and powerful and those of the poor...Where is the right to life of dignity enjoyed by the indigenous population groups, the landless labourers, artisans and other rural and urban poor? (With hunger deaths around)...where do they get potable drinking water, minimum health care and sanitation? Where is the end to discrimination against the Dalits and women, or the minorities? The rich and the powerful are capable of purchasing their human rights today".¹⁵

In this specific discourse on constitutional, political, and social rights in India, and in their dynamics, three things never fail to attract our attention: (a) The rights revolution in India had a global dimension (most articulated by its anti-colonial origins) and had to always find its specific form by negotiating between the given global form of the rights discourse and the local configuration of power at the moment of its specific emergence; (b) the nature of the rights revolution as it was

declared in the constitution was “transitional”, even though the word was never used in the Indian context; (c) And finally, as the rights revolution progressed, it increasingly connected with popular ideas and demands for justice. While we have spoken something on the last characteristic, we must spend few words on first two characteristics of India’s rights revolution before we can discuss the current Indian imperatives and instances of development, rights, and a growing situation of rightlessness.

(A) Let us take the first salient characteristic of the Indian rights revolution. For instance, group rights began with the first moment of constitutionalism India – the Morley Minto Reforms (1909), which then progressed through various phases to find its shape in the constitution of independent India.¹⁶ Or, the issue of affirmative action for the Dalits, which became a contentious issue for the Hindu nationalist leadership in 1929-32 during the two Round Tables convened by the British rulers in London, reaching its climax in form Gandhi’s fast and then ending with an agreement between Gandhi and Ambedkar in form of Poona Pact. With this was achieved the nationalist consensus for justice for the Dalits, though Dalit struggle for justice would continue after that. Similarly the issue of autonomy for the indigenous people had a history of negotiation between the globally given constitutional form (in this case, autonomy) and local struggle for land, and forest, rights, and political power. The issue of autonomy had a like wise pre-history for certain outlying areas also, which again had its origins in the colonial time, when the British had introduced lines of separation in those areas or had agreed to internal autonomy of certain kingdoms and rules, leading finally to the constitutional provisions of Article 371 and the Sixth Schedule. In all these cases (significant here are the Directive Principles too), either colonial models working in Ireland or Kenya successfully were imported to India, or Indian nationalists drew from the successful constitutional experiences in other countries, mostly England, or the result was a mixed product in which colonial constitutional model and indigenous imagination (which itself drew heavily from both liberal and socialist ideas and experiences) worked on each other.

(B) The nature of the rights revolution in India was linked to the transition that India made from colonial subjugation to citizenship. India’s democracy too began as a transitional one as South Africa’s. India was too an emerging democracy, she too was carrying the legacy of repressive state and groups, and she too was faced with the task of redress of past injustices without creating new ones. In other words, Indian democracy too required transitional justice.¹⁷ The new government had the duty to distinguish itself from the old; and the new rule had the obligation of punishing the past perpetrators of injustice such as bureaucrats, police officials, judiciary, members of the armed forces, and public officials under of course the due process. Systems were to be devised, ways were to be found out, and a structure of justice was needed that could orient rights towards meeting the requirements of transition. Nothing happened, for colonialism could withdraw in time before it could be punished. But the society could not escape the universality of everyday horror well beyond the horrors unleashed by the South African or the Israeli states: five

years before the British withdrew, there was genocide through a man-made famine, murders of countless unarmed protesters, children starving to death in many parts of the country, racist discriminations everywhere, a phalanx of draconian rules tightly gagging the entire country, and a civilisation destroyed in an alien rule of little more than one hundred and fifty years. How were rights declared in that time of transition? None of these draconian measures (like the Defence of India Rules) was scrapped, near famine conditions still prevailed in many parts, no one was punished for the holocaust of 1947, social and economic injustices remained as they were, and it was assumed that the country had made the transition from colonialism to independence by the Independence Act, the proclamation of a set of rights along with the new constitution on 26 January 1950. How did people react to this transition, the state of denial, and the unwelcome knowledge of atrocities, and particularly the knowledge that meaningful steps to redress these atrocities would not be taken? Historians have documented today the enormous unrests throughout the country in the decade of independence including the religious wars of partition, in which victims and the perpetrators alike were making their way forward by killing and dying to find out what lay ahead. Hannah Arendt in her analysis of Eichmann's trial made the point that the mendacity of Eichmann's character was integral to the whole of German society, shielding it from reality. This was what she termed as the "banality of evil".¹⁸

The fact is that truth telling, justice seeking, and reconciliation mechanisms are inherently political processes heavily influenced by conflicting interests and access to resources. The nature of the rights revolution and the rights regime therefore has integral connection with the outcome of these political processes. The concept of transitional justice has been made banal today by medicalising the entire process – as if it is primarily a matter of healing battle scarred minds and souls. The significant political dimensions of the concept, such as dialogues between competing sections of the independent polity, digging out the truth and punishing the offenders, establishing a consensus about the specific nature of the rule and system of law to be founded, and the standards of minimal justice (such as recognition, compensation, guarantee, custodianship, etc.) to be made a part of the basic law. All these did not happen. Rights therefore derogated. One of the important discoveries from the Indian experiences is that the quality of the rights revolution depends on successful transitional justice mechanisms contributing to the establishment of democracy in countries emerging from colonial rule.

Yet the issue is not so simple. What we have to ask is that as a technology of democracy, has the transitional justice mechanism anything to do with its supposed universal appeal and relevance? Heinz Klug has asked this question in his significant contribution to a comparative study of constitutionalism in the perspective of South African reconstruction.¹⁹ I think the issue is important in case of India too. First let us remember that like the last decade of the twentieth century, the last part of the forties and the fifties of the same century were a period of constitution-making; then too building democracy was the agenda. But unlike in the nineties, obeying constitution and rule of law as prescribed by laws was the site of emphasis then; building

independent judiciary, obedience to courts, and a dialogic process of constitution making did not have the significance they have today. Nonetheless, the dramatic anti-colonial political transition as in India was accompanied by an equally dramatic “legal revolution” – in the sense that the legal culture of contract as the bedrock of democracy that had started almost a century back at least in India was firmly put in place by the constitution. This legal revolution witnessed the decline of rights in many senses (such as the nationalist demand to get the right to bear arms, to rebel if the rulers in their obligation failed, to get social and economic justice, to scrap all laws carrying marks of colonial injustice, etc.) precisely when the rights were being declared as part of constitution, which meant as part of rule of law. One can thus view rights as a part of rule of law, which is supreme. The faith thus appears extraordinary today when we see that the country had thought at that time that with the success of the new system, rights would become reality, not the other way.

How are we to understand this puzzle? After what colonial law did to this country, this faith in law whose part would be rights? This faith in the constitution that through its mechanisms would make transition to democracy complete and make rights secure? To interrogate this faith, once again we have to take note of the global surge in constitutionalism in late forties and early fifties. Second, because independence arrived through intense negotiations, law remained the only reassuring agency of society, and it was the hand of law that would guide political reconstruction. The decade of the forties was the most turbulent in the last century, not even the sixties compares with that. Quit India movement, famine, RIN mutiny, independence, partition, the religious war, and the massive agrarian unrest – to the political class law was the Noah’s Ark in those stormy years. Therefore to the constitution makers “legal transfer” and the adoption of readymade legal forms seemed the best available option. Thus while the constitution proclaimed fundamental rights, old colonial laws affecting most of the aspects of society, including laws on extra-ordinary powers, remained. In this legal transfer the elites of the country were deeply involved. Law was a prime factor in reconstituting the state. The globally bounded constitutional form and imagination coupled with the strength of the law operated jointly in political reconstruction. Not that there were no counter-hegemonic instance, in fact there were; what is noticeable in this respect is that these counter-hegemonic examples were built around rights in a sense still undefined and unmeasured by law – that is to say, the language of rights but the voice of justice. It is this *excess* or the *beyond*, which would soon start shaping the rights movement in India. Law would catch up occasionally with what justice had demanded. It is only in this way we can understand the huge impetus that the rights movement has received in the wake of massive developmental measures in the country throwing up issues of justice.

II

Bare Life and the Policy Explosion in India on Development

The story of India's development begins as with every nation's dream to develop, be prosperous, and big. This is the dream of modernity, which not only presents to the newly independent and incipient nations the modular form of the nation-state, but also a path of development, which appears as an ideology, as discourse – part mythical, part factual, part distant, and part near, so near that to the nation's leaders it seemed implemental then and there. A stagnant agriculture, a primary commodity extracting economy, low industrialisation, low level and base of skill formation, vast countryside characterised by rural unemployment, semi-feudal property relations, domination of foreign monopoly capital and many more features formed the compelling backdrop in which India as any other nation dreamed not only of development but held that development as the most significant collective right. The first Prime Minister Nehru had declared dams, big irrigation and power works, factories, industrial plants, and new cities, as the temples of modern India. With the National Planning Commission as the driving tool, the nation and the State of India went ahead in the first few decades of independence in frenzy with public construction of steel, chemicals, aluminium, shipyard, machine tools, heavy equipment, oil and oil refinery, multi-purpose (irrigation, power, and flood-control) river projects, and mining projects. With this enormous expansion of public sector, a large-scale modern industrial workforce came into existence. With that came several public welfare measures, protection of the interests of organised workers, an organised workers' movement, strong trade union federations, institutionalised wage revision system, and other features of a quasi-welfare state.

But hunger remained. With inadequate land reforms land relations remained skewed; market vagaries and indebtedness hit the poor peasants severely, agricultural wage labour mostly of dalits and indigenous population groups remained without work through a major part of the year and hungry, deficit financing resulted from large-scale state expenditure; inflation and stagnation of economy combined; food riots periodically appeared, black markets soared, and after a period, reconstruction of the nation seemed to have reached a dead ground. Even though the Directive Principles and the constitutional division of powers and responsibilities (between the union and the states) had envisaged a strong, public driven, industrialised India, the results were stupefying: On one hand hunger spread in mid-sixties subsequently leading economists like Amartya Sen, Jean Dreze, Meghnad Desai, and others to cry for “public action” without knowing that public action had indeed started in form of food riots and agrarian disturbances in large parts of the country;²⁰ on the other hand, “development as right” seemed a mockery, for there was widespread realisation that the nation could develop only as much as the conditions would allow the nation to grow. But could the nation outgrow the conditions? *Development as right* and *development as freedom* – how good these concepts were for the inadequate nation to

make one big try to escape the conditions of underdevelopment, and become adequate? What would be the place of rights in such a vision?

For that we have to go back to the other side of the declaratory politics of development, which presents to us a picture of a profound “rightlessness” of those who do not have the right to claim rights, a picture that acted as the uncomfortable backdrop against which the rights revolution was taking place in the country. For two hundred years famines and deaths had ravaged the country before widespread food riots appeared in the country in the sixties of the last century followed by periodic and scandalous hunger deaths in Chattisgarh, Orissa, Jharkhand, parts of Andhra Pradesh, Maharashtra, Madhya Pradesh, and even West Bengal, and the consequent “right to food” campaign three decades later. In 1770 there was the “formidable” Bengal famine as the economist Jean Dreze put it, followed for the next seventy years by frequent severe famines. In 1881 came out the first report, the Beard Report, on the severe famine of 1861. Famines continued for next twenty years forcing the colonial government to appoint a Famine Commission and introduce the Famine Codes. It seemed for the next twenty years that the colonial strategy of preventing famines was working when again a severe famine erupted in 1899-1900, leading the government to appoint another commission and initiate another round of public activities, and once again it seemed that the strategy was working till 1943 when the Great Famine of Bengal ripped apart the country and destroyed the legitimacy of colonial rule forever.²¹ Famine reappeared in independent India particularly in Kalahandi in Orissa, Gond in Chattisgarh, and Vidarbha in Maharashtra, and in the plains of Bihar. Once again like the colonial government new India’s government claimed that over all food availability was not a serious problem,²² stocks were not going to exhaust soon, and therefore food exports (barring one or two items) could continue, and that only a bit more emphasis of food distribution and public works was necessary to end the famine and near-famine conditions. And once again, near famine condition and outbreak of famine was put, as in these areas and elsewhere wherever hunger deaths were reappearing, to confused information, faulty forecasts, absence of contingency planning, weak local political will and motivation, delays of various types, transport bottlenecks, poor administration, inertia of private trade, and weak irrigation. People spoke of “panic famines”, and the need to continue public works to generate purchasing capacity in the villages to buy food. The premise still today is that the task is to protect food entitlements in a situation where the physical availability of food is itself not problematic, though as in one case in spite of massive imports, a dramatic decline of net food grain availability accompanied the drought in Bihar in 1966-67 – a decline of the order of 30 per cent compared to ordinary levels.²³ Clearly one can see here the relation between the rights approach and the problem.

First, whether the question is one of aggregate food availability or not (which in any case is difficult to decide in a non-market perspective, that is in a non-supply sense), the point is that it is not only that one region or sub-region has insufficient food, but that in modern India certain sections within a region or sub-region may

have insufficient food and may therefore die of hunger. Second, market makes the issue of access or non-access crucial. Third, an “atmosphere of free trade” conveys to the strongly entrenched groups in society that controls are bad, that government has to encourage supply side forces, and that if any administrative measure has to be taken it would have nothing to do with peasants’ local power to determine the conditions of food availability. The right to food demand emerged from such realisation. Thus the fact that dalits and the indigenous population groups, old women, girls, and other vulnerable sections of society suffer particularly in as much as particular areas suffer strongly underpins the concept of right to food. Within an area of food availability there may be non-availability of food for particular groups. Also the fact that this right must cut across the market nexus by any means and all means – thus the issues of delivery, access, and the sensitivity of monitoring and handling food grain prices. Finally, this right means the requirement of lot of autonomy, local self-government, and democracy to engage with the most fundamental issue of life – to eat and survive, and thus live. The “Right to Food Campaign” declares as its reason,

The "Right to Food Campaign" is an informal network of organisations and individuals committed to the realisation of the right to food in India. We consider that everyone has a fundamental right to be free from hunger and under-nutrition. Realising this right requires not only equitable and sustainable food systems, but also entitlements relating to livelihood security such as the right to work, land reform and social security. We consider that the primary responsibility for guaranteeing these entitlements rests with the state. Lack of financial resources cannot be accepted as an excuse for abdicating this responsibility. In the present context, where people's basic needs are not a political priority, state intervention itself depends on effective popular organisation. We are committed to fostering this process through all democratic means.²⁴

The contrast between the relief system and the rights approach is clear. On one hand, there is the emergency rushing in of money and food, and undertaking relief works without touching in general the food grain trading; on the other hand the rights approach will presuppose the existence of the right to work, improvement of the employment guarantee scheme, provision of mid day meal scheme for all school children, and in general children’s right to food, intervention in food trade, improvement in the public distribution system, and finally local democracy. Because of strong tradition of popular movements independent India’s government changed the strategy of famine prevention from one of relief to an entitlement system; but as economists pointed out, the change was not enough. It was still marked by the relief approach, the typical characteristic of a centralised power structure, and thus while some droughts like the Maharashtra drought of 1970-73 did not slide into famine due to effective and persistent government intervention, millions of Indians went to bed hungry, for days and nights with only one meal per day/night. Economists now speak of entitlements, and admit that it is not “economics” of hunger, but hunger’s “political economy”, meaning thereby the significant effect of politics, rights, administration etc. on the food economics of the country.²⁵ The impact of

globalisation and food insecurity on women has been most acute. In 1993-94 about 320.5 million people in India were living below the poverty line – and this was eleven per cent more than the combined population of the USA and Canada. Public distribution system witnessed a decline in this period in the face of pressure of globalisation and structural reforms with adverse effect on cultivators and agricultural labourers of whom about 38 per cent and 26 per cent respectively are women. About 20 per cent of the women now suffer from lack of growth, 33 per cent of the children are born of malnourished mothers, and 50 per cent of the children up to the age of 5 remain malnourished. The National Alliance of Women’s Food Rights – an alliance of more than 30 organisations - demand constitutional guarantee for the food of children and women.²⁶ Some economists have called this situation of “new colonialism”. In eighties and the nineties, while poverty declined by ten points in urban areas and about 15 points in rural areas, the fundamental shift from GATT to Doha changed the situation. Rural development as percentage of GDP was 14.5 in 1985-90 (Seventh plan period); it declined to 5.9 per cent in 2000-01.²⁷ With technological change women workers declined in industries such as the textiles, and the so-called “feminisation of workforce” remained confined to offices only. The only hope for women workers remained the small and medium sector – particularly in the unorganised production. Food became a burning issue for women and children. Here are some figures relevant to this discussion:

Table 1: Annual Food grains Output and Availability, British India, 1891-1946

Period	Net FG avail. 000 ton	Population (Million)	Per output kg.	Capita availability Kg.
1897-1902	43721.84	219.74	201.1	199.0
1903-1908	40030.11	225.79	182.2	177.3
1909-1914	45629.76	231.30	204.5	197.3
1915-1920	44962.31	232.81	194.6	193.1
1921-1926	44403.54	239.18	186.5	185.6
1927-1932	44197.29	253.26	171.1	174.5
1933-1938	43161.46	270.98	154.2	159.3
1939-1944	43224.74	291.03	146.7	148.5
1945-1946	41993.13	307.00	134.8	136.8

Source: Table adopted from Utsa Patnaik, “The New Colonialism” (n. 27). p. 55

Table 2: Annual Per Capita Output, Imports and Availability of Food grains, 1950-51 to 1989-90 (in kilograms)

Period	Net annual availability of food grains per capita		
	Cereals	Pulses	Total
1951-55	129.13	23.59	152.72
1956-60	135.93	24.84	160.77
1961-65	146.32	22.12	168.44
1966-70	140.94	17.78	158.72
1971-75	140.54	15.47	156.01
1976-80	145.79	15.63	161.42
1981-85	151.95	14.34	166.29
1986-90	158.16	14.61	172.77

Source: Calculated from Economic Survey, 1996-97, 1999-2000; adopted from Utsa Patnaik, "The New Colonialism" (n. 27). p. 55

Table 3: Summary of Food grains Output and Availability in India in the 1990s (three –year annual average)

Three-year Period ending <i>in</i>	Average population (Million)	<u>Net output per head</u> <u>imports</u> Food grains	Net availability per head	
			Kg/year	Food grains gms/day
1991-92	850.70	177.65	177.0	485
1994-95	901.02	180.28	174.3	478
1997-98	953.07	175.57	174.2	477
2000-01	1008.14	176.34	163.2	447
Individual year				
2000-01	1027.03	167.43	151.06	414
2001-02	1046.44	177.01	158.37	434
2002-03	1066.22	150.50	150.50	412

Change in per capita availability, per cent

Triennium ending 1991-92 to triennium ending 1997-98	-1.6
Triennium ending 1997-98 to triennium ending 2002-03	-13.6
Total change, 1991-92 to 2002-03	-15.0

Source: *Economic Survey* for years 1999-00, 2002-01, 2002-03 for total net output of Cereals and Pulses, and total net availability of Cereals and Pulses, up to 1999-2000. Population figures for inter-census years derived by applying the growth rate of 1.89 per cent p.a. yielded by the census population totals for 1991 and 2001; Table adopted from Utsa Patnaik, "The New Colonialism" (n. 27). p. 56.

Table 4: Change in Average Calorie Intake Per Diem from All Foods, in Rural and Urban India, 1983 to 1998

<i>Year</i>	<i>Rural</i>	<i>Index</i>	<i>Urban</i>	<i>Index</i>
1983	2,309	100	2,010	100
1987-88	2,285	99.0	2,084	103.7
1993-94	2,157	93.4	1,998	99.4
1998	2,011	87.1	1,980	98.5
Estimated level in 2003-03	1750	83.7	1950 assumed	97.0
	approx			
Change				
1993-94 over 1983	-152		-12	
1998 over 1993-94	-146		-18	
Estimated change, 1998-94 to 2002-03	-261		-30	
Total estimated change, 1993 to 2003	-407		-48	

Source: NSS Surveys on Consumer Expenditure up to 1998. The 55th Round data for 1999-2000 are not comparable with earlier rounds and so have not been mentioned – Adapted from Utsa Patnaik, “The New Colonialism” (n. 27). p. 56

The effect of periodic food crisis on the politics of rights has been singular. It is true as I have argued till now that food crises and hunger deaths in independent India speak of a basic rightlessness of a section of population, which remains beyond the pale of a society (civil or political) to be periodically sacrificed by a sovereign democratic society for the democratic society to re-function after undergoing shocks. To this one has to add something I have drawn attention to also, namely that the utterly vulnerable groups may not be necessarily permanently vulnerable; acute vulnerability may suddenly emerge in a crisis, a breakdown, in a situation of resumed “warfare”, which again can be of various kinds. One can therefore see how marginal groups such as the internally displaced, the refugees, the illegal immigrants, victims of labour and flesh trafficking, AIDS victims, and others who may die without notice, and more important in the present context, may live without the right to claim citizens’ rights, waiting to be sacrificed at the right moment by the sovereign. Hunger deaths offer us the most strategic view of all such deaths due to lack of protection and entitlement, of all such situations of rightlessness.²⁸ Yet notwithstanding all this, the impact of this situation on the rights revolution has been immense, at least in India.

The rights revolution now faces and has to address the substantial, often extreme, inequalities in society, which cause persistence of hunger. Groups now realise that they have to fight for food and must increase their respective ability to command food, and the food battle though fought in the structure of a market economy influences the over all policies of the government on social security. In this case, as expected, the institution of wage labour makes the situation acute. The wagers generally possessing nothing but labour power try to sell for a wage,

but if the wage is not sufficient enough to meet food needs, they are the first and the most persistent to revolt in form of strikes and other forms of agitation. Farmers demand remunerative price. With all these appear the ideas of “entitlements”²⁹ and “claims”, endowments, social security, and demands for social security measures, and most important, the idea of public action and the demands for public actions. The rights language in one more critical way made public action possible. Deprivation has all along gone along well with law. Thus people died of hunger, yet no body could be punished. Markets could function and break down, yet no one was accountable in the eyes of law, and the legal nature of contract seemed so overwhelming to the government that looting of food grains was illegal, trading in a particular way or refusing to trade was not illegal. Sale of child was illegal; dying of hunger was not illegal. The rights language questioned this naturalised world of law and deprivation under market conditions, and made public intervention not only possible, but forced an expansion of its scope. With more organised women’s movements and the increasing demand for gender equality, and all other developments in the rights language (particularly dalits in large numbers joining the agrarian protest movements and claiming dignity), hunger deaths cannot be any more natural. Similarly famine will not be considered natural anymore. People will also not accept the fact as natural that while famines involve deaths by starvation, large numbers die because of ill health due to epidemic diseases caused by eating or drinking non-eatable and non-potable food and drink. In this sense public health movement and the demand to have primary health centres functioning have become significant, because they signify the general promotion of entitlements. Rights have also forced the political class to look into the traditional prevention system and the empirical features of the informal security system. Thus, in the aftermath of the Mizo rebellion in the fifties and the sixties in the last century it was realised that the Mizo famine was a direct cause, similarly was the breakdown of the informal system of protection a cause. Finally, the right to move in search of jobs becomes critical. Members of the sedentary communities too start moving. Migration of single adults in search of work is the signal that the entitlement-security system is breaking down. Typically girls make a move.³⁰

What I am arguing then here can be taken as an inverted reading of Sen of the situation. In my study of the famine and near-famine conditions in the Junglemahals (South West Bengal in the colonial time) I had tried to trace the inter linkages of agrarian misery, disaster, law, debt, relief, deaths, political and economic authority, rent acts, and rebellion.³¹ Sen finds in aberrations in economic behaviour the signals that the system is breaking down, and speaks in that sense of an early warning system that catches those signals (Meghnad Desai indeed builds a model of an early warning system for famines along that line); I try to find in the general political-social milieu the same signals. Sen speaks of entitlements, I find no such permanent category, and I see their emergence under concrete historical conditions, in which a sense of rights and claims generate the concept of entitlements. Sen speaks of public action. I find public actions in form of subaltern protests, behaviour, riots, revolts, and through all these the making of a famine-conscious public and public

authority. Sen sees from the angle of vulnerability. Thus he and his colleague Dreze say, “The minimal ambition of a sound famine prevention system should be to protect (directly or indirectly) the entitlements of all those who are vulnerable to starvation”.³² I connect vulnerability with the social conditions to identify vulnerability, a process in which rights play a big part. Sen speaks of “fiscal social security measures”, “public health care system”, “causal links between public efforts and social achievements”, a combination of “support-led security and growth-led security”, “incentives as necessary to prevent famines and central to the logic of public action”, and finally the constitution of the “public” by government, information, political will, democracy, and respect of entitlements.³³ I look at these not as reasons for preventing famines and hunger deaths but as results of rights revolution, which was born of general political revolutions and still now carry that link, and therefore still instigate revolts, which force the government to become the well intentioned public guardian intent upon preventing hunger deaths. In Sen’s scheme political revolts have no place, in my scheme they induce riots, battles, and unrest, which prevent and end hunger deaths. Rights revolt is the perfect signal and the perfect cure. That this is no hyperbole is borne out by the successive government behaviour on famine prevention issues, where the critical push always came from public unrest.³⁴

The problem of the political is intractable in this case precisely because it leads us back to the issue of law. Clearly the most acute or direct political response to hunger deaths is revolt, and revolt is illegal. On the other hands rights expand as a result of these insubordinations, and though in the short run they may provoke autocratic measures, they make rights substantive by confronting legality with what Michel Foucault called the “illegalities”. By illegalities what is indicated is not of course revolt per se, but behaviours and conducts not permitted by the politico-judicial order. The two decades of 1960s and 1970s are landmark decades in the history of rights – though courts hardly conducted themselves in face of popular protests the way they did later – yet by making revolts and insubordination natural as popular political behaviour (agrarian revolts and protests against the nationwide Emergency) they constitute a break in the historical process of rule in post-colonial India. Near famine conditions and hunger deaths in Bihar, West Bengal, Orissa, and Andhra Pradesh provided the signal of insubordination for the starving peasantry (in all these places armed revolts broke out), and for the State to reform. This genealogy of the first State-declared charter of reforms (Indira Gandhi’s Twenty Points’ Charter) clearly goes back to the unclear but turbulent articulations of rights in the preceding ten years. After the Twenty Points came out, Emergency ended, but the charter did not die. Henceforth governments would be judged on the basis of reform-mindedness. What is this government doing for the poor? Is the administration careful to listen to the rumblings below? What are good regimes? Which regimes are legitimate? What historical regimes can we recognise as satisfactory? Popular consent to rule came at a cost; hereafter revolts acquired legitimacy as much as rule was legitimate. To kill rebels at random was not moral. The government may have summary powers given by the Special Powers Acts, but it will be defeated in the next

round of elections. Thus democracy, rights, peace with rebels, and good conduct (good governance) became the slogans for those who wanted to wrest governmental power. For instance, this happened in 1977 in West Bengal and Bihar, and in 1983 and 2004 in Andhra Pradesh. Illegalities and semi-legalities had come to stay.³⁵ It also signalled that by tolerating illegalities and semi-legalities the pattern of rule was taking a new turn. Governing meant not only abiding by the constitution and other rulebooks; it meant also devising institutions and working out other practical arrangements of negotiations with the people. Conduct could be illegal or semi-legal. But it must not be abnormal. Till date rights had been part of a normal regime; but taking rights seriously and going to any extent for that was abnormal - hence dangerous. The regime must learn to negotiate.³⁶ Rights became a part of governmental business, to be transacted, measured, controlled, tolerated, differentiated, and sermonised. Coping with rights was part of governmental existence, a mark of the politico-judicial order. And here too rights bring in the issue of flags and the globe. The right to food means ensuring a public distribution system (PDS). That would mean less importance to export of food grains, universal coverage of PDS and strengthening of PDS, increased subsidies or at least maintaining the present level of subsidies to marginal farmers, and continued procurement by the government of food grains – all these are national measures to be taken by a national state against IMF and WTO wisdom, while the later wisdom (roughly pro-globalisation lobby) would demand an end to PDS, procurement, and the reliance on free market as the solution to hunger. Who would have anticipated even a decade back that exactly like one hundred years or little more ago, famine prevention measures and the right to food would come up against global forces today?³⁷

There is no doubt that the battle over food, the single most important battle along with the other battle for the right to resettle and get compensation due to displacement, has embroiled all organs of the State. Conceptualised now as “right”, this is no longer a matter of administrative action, but a matter for the Court to realize and legitimate. Thus in the PUCL vs. Union of India & others, Writ Petition (Civil) 196 of 2001³⁸ - the legal action for the right to food - Supreme Court hearings on the right to food have been held at regular intervals since April 2001. Though the judgement is still awaited, interim orders have been passed from time to time. A committee headed by Justice Wadhwa, ex-Supreme Court Judge has been formed to go into various issues relating to the public distribution system. This order discusses a proposal to modify the National Maternity Benefit Scheme. It also asks the State Governments to respond to suggestions and complaints on the Public Distribution System made by the Commissioner's office. The Supreme Court Order of 7 October 2004 relates to the Integrated Child Development Scheme (ICDS). The order discusses measures such as increasing the number of anganwadis from 6 lakhs to 14 lakhs, increasing the norms for supplementary nutrition, abolition of contractors in provision of food, provision of detailed information on ICDS in the website and ensuring full utilization of available finances. In the order of 20 April 2004, the court issued the monumental direction that that all states have to start implementing the mid-day meal scheme latest by Sept 1, 2004. The central government was directed to

make financial provisions for mid-day meal infrastructure, and also reply to Abhijit Sen Committee's suggestion that centre share a part of conversion costs. Dalits were to be given preference in appointment of cooks and helpers and mid-day meals would be provided in schools in summer in drought-affected states.³⁹

Mid-day meal has unleashed the next round of battle in the countryside, at least in West Bengal and other areas. The associated issues are: children's right to get education, dalit children's right to get food and books, the link between food and books, and the involvement of poor households (particularly of mothers) in children's education as an answer to the question, "Who will cook in the schools?" Once again, inter-dining, issues of dignity, and class and caste divisions in the countryside have come up. Rights are becoming ambitious, they now want to redefine economics; they are also impacting on age-old rules of physicality of existence – who will eat with whom, who will sit or sleep with whom, who will cook for whom, who will marry whom, who will touch whom, and finally as a consequence of all these whose blood can mix with that of another.⁴⁰

In this age of physicality of our existences rights have proved to be an enormous embarrassment in the sense that they have broken the hitherto held conditions of human existence. Thus as the effects of globalisation seem to be evermore increasing and encompassing, rights too seem to know no end. In this charged milieu debates appear purely pedantic as to whether some rights are natural that is pre-legal, or they need legal sanction in order to be rights. If the UN general Assembly can pass the right to peace resolution,⁴¹ why cannot the rights group of a country declare rights to food, education, or information, or minimum wages, or resettlement, or way of life, or culture, or forests or common right to water bodies, grass lands, semi-forest areas, or the pastures – rights that are called group rights or survival rights? What does it matter to rights groups if the constitution had envisaged or not envisaged these rights as fundamental? Contentious politics in the perspective of globalisation has made not only resistance an agenda; it has also expanded the horizon of rights growing out of an agenda of resistance. In this background as response to popular politics, government too responds. Like Amartya Sen's prodigal son the government has declared in the last one and half decades policy after policy to expand the scope of "public action" in face of popular demands and claims, policies that claim to reform the country with "a human face", to provide the public with "a safety net", and to link the country with powerful political and economic forces while maintaining economic stability of the country. Public action in this surreal milieu has meant public policies, commissions, statements, declarations, and little real increase in investments in education, health, food, housing, and transport. In this era of "policy explosion" – some of the policies to be given the enabling form of legislation in course – the government is saying that it is expanding the policy-fund, in effect we are witnessing one more concern after another turning into a political issue: citizens claim that these concerns are legitimate as rights, government claims that these concerns are matters of policy, hence for the government to decide, one more aspect of governmentality – a process that indicates that the issue (for instance,

intergenerational equity, clean environment, right to proper resettlement, etc.) is not be resolved through dialogic engagements but through management of governmental practices.

What has happened in this era of policy explosion, so directly linked with globalisation? Amartya Sen could not have asked for more. Not only public action has increased, development is now seen as “freedom”⁴² – that development being judged by certain specific aggregates determined by the government, while the ideology and the promise of development seem to have armed the government with the freedom to close down factories and plants without caring for the retrenched workers, allow the big farmers or traders to export food grains while people at home die of hunger, permit unbridled import of all types of luxury items without caring for consequences, and witness silently the yearly suicide deaths of hundred of farmers in Maharashtra and Andhra Pradesh suffering from successive crop and market failures. Poverty is seen as capability deprivation, therefore the strategy is that the poor (those living “below the poverty line” – BPL being another governmental innovation in the vocabulary of governance, much discussed and contested by politicians, legislators, and judges whoever have to deal with the poor) can and should be maintained while the State will ensure with the help of high technology, high exports, etc. that poverty does not deprive the nation of its capability. Social opportunity is now being combined with state and the market – and again this is done by restricting the social, that is to say, restricting the BPL population groups, the half-citizens and non-citizens from having something to do with “social opportunity” which now resides with software people who can achieve a synergy with the state and the market.⁴³

Women too are exhorted to become entrepreneurs. Famines are prevented, while hunger deaths continue. Thus there is no general breakdown. Individual behaviour in this neo-liberal environment is moulded by social choice which is determined by governmental priorities, constraints, operations by big business groups, cultural firsts, and the global weather in which these variables function. Therefore, we have now a paradox: individual freedom may be a social commitment,⁴⁴ but we have what C.B. Mcpherson had termed long ago, a social consensus on “possessive individualism”.⁴⁵ Democracy will tolerate rights, but will exclude many from this circle of toleration. This is what has been in some sense called a “democratic deficit”. Are we not here back to square one – the poser with which this discussion began, namely, Can we have rights without flags, flags that symbolise national scrutinies, which bound democracies and thus determine who can and cannot enjoy rights at an equal level? Free trade had always followed flags; today’s global atmosphere of freedom is also reinforcing the flag by prescribing the national and other boundaries within which democracies have to function and new rights can be allowed to formulate and take shape.

It is true, as indicated in the beginning that cosmopolitan feelings and ideas have impacted on rights. The development of the international human rights laws acquiring the nature of customary laws in many cases is a significant evolution in the

history of rights. The protection of refugees, stateless people, of immigrant and frontier workers, of non-discrimination against national minorities, international humanitarian protection, laws of war, right against torture, and many other things are inherently international in nature. Yet on one hand the global human rights and humanitarian institutions (UNHCR, UNDP, etc.) cannot do much against mighty sovereignties and those protected by the former; on the other hand, more significant than these rights is the loss of rights and entitlements and capabilities in the global milieu of neo-liberalism.

III

Bare Life, Physicality of Rights, and Justice

We thus arrive at a new phase in the evolution of governmental technologies from the early nineties of the last century. Buffeted from two sides – popular politics of rights and the forces of globalisation, the Indian government hit upon a middle road, essentially a top down technique, that of expounding policies for “protection”, while not conceding the “rights” to the people. This strategy obviously denies a rights-based approach, keeps for the government negotiating space in confronting the rights claiming public, while not being seen at least blatantly in league with dominant global social, economic, and security-centric forces.⁴⁶

In the background of the mounting demand for food, the government declared a national agricultural policy, and promised reinforcement of the public distribution system and ensuring sustaining livelihood. Defending the public distribution system as part of the right to food became on the other hand a popular strategy of democratic politics. As strategy of democratic politics, and as part of the rights corpus, popular movement claimed the right to voice other ways of development, advocated a dialogic strategy in place of the sovereign’s unilateralism, a grassroots approach to development, equitable growth, community’s access to resources, and an ethics of conservation. Right to food brought in the issue of minimum support price to farmers, and more fundamentally the right to work. Thus, while IMF wisdom wanted the government to do away with subsidies, the government had to provide subsidies to assuage the farmers. Here is an intriguing (perhaps not) evidence of the paradox:

Year	(Crores in Rupees)
1996-97	6,066
1997-98	7,900
1998-99	9,100
1999-00	9,434
2000-01	12,060
2001-02	17,612
2002-03 (till December)	24,000

Source: Third report of the Commissioner of Supreme Court, N C Saxena, March 2003 published in Right to Food Volume 1, Colin Gonsalves, et al (eds.) 2004 p 142; cited by Madhuresh Kumar (p. 19; see n. 43)

And then this – not only an evidence of hunger and the demand for food but of the obligations of the State, once again cited by Madhuresh Kumar from the Supreme Court Commissioner’s report:

Table 6: Off take of food grains from central pool (in million tonnes)							
	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03 (till December)
Off take through ration shops	19.66	16.98	18.69	16.97	11.67	12.14	11.9
Off take through other beneficiary schemes	NA	2.08	1.36	1.53	3.23	8.86	9.87
Sub total	19.66	19.06	20.5	18.5	14.9	21.0	20.96
Open market sale		0.06	0.068	4.55	1.49	5.6	4.16
Exports		0	0	0	1.49	4.7	9.68
Total		19.12	20.73	23.05	18.21	31.3	34.8
Source: Third Report of the Commissioner of Supreme Court, N C Saxena, March 2003, reproduced in Colin Gonsalves, Vinay Naidoo, Ramesh Kumar and Aparna Bhat (eds.), <u>Right to Food</u> , Volume 1, 2004, p 142							

We can see the same dynamics in the evolution of the right to work, which led to the National Rural Employment Guarantee Act. The Report of the Second National Commission on Labour had pointed out growing income inequalities in the industrial sector, increasing informalisation of labour, rising unemployment, decline of small scale industries, and the retreat of the government from the responsibility of providing social security provisions for labour. Overall employment growth went down in the 1990s, as globalisation became a part of the Indian reality; it grew at around 1.01% per annum compared to 1.55% per annum in 1980s. There was deceleration in rate of growth in employment in all sectors particularly in the organised sector. Only about 8 per cent of the organised workforce enjoys social security protection, while about 92 per cent remains without any protection, security, and organisation. Casualisation of workforce has increased at the same time. In 1977 the percentage of casual workers in the total workforce was 27 per cent; in 2000 it had gone up to 33 per cent. The proportion of self- employed too had come down in this period - from 59 per cent to 53 per cent. At that time 44 per cent of the labour force was illiterate, and only 5 per cent had required vocational skills. The Commission also pointed out that through the voluntary retirement scheme (VRS) and other schemes about eight lakh workers have lost jobs in one decade. But at the same time it estimated that more and more would be joining the informal workforce, about 30 per cent of them being women and children – an astounding number of 30 million new workers joining by 2004. Many of them would migrate for these jobs, many would lose homes, many would not get the prescribed minimum wages, all

would be staying in slums, some permanent slums and some would be migrant's temporary shanties.⁴⁷ The Commission also noted the almost complete elimination of industry level wage boards and wage bargaining at individual plant level,⁴⁸ and moaned, "Minimum wage was considered a necessary catalyst to advance the social status of the worker even according to our ancient law and treated as an obligation of the State".⁴⁹ The Commission discussed several cases to show how adversely industrial arbitration and laws were affecting the workers, and suggested remedies. The Employment Guarantee Scheme (EGS) began in this kind of dismal scenario – first in Maharashtra way back in 1978. EGS has given attention to rural employment, aims to provide minimum work (100 days) in a year,⁵⁰ proposes to have link roads to villages, and plans to create work in the villages through soil and water conservation, construction of irrigation wells, promotion of sericulture industries, social forestry, horticulture projects and improving dry area farming. Yet with all these and other schemes such as the Employment Assurance Scheme, Jawahar Rojgar Yojana, Sampoorna Gramin Rojgar Yojana, right to work (a Directive Principle in the Constitution) remains a far cry.

Policies have come like this one after another, some turned into Acts: Policy on Resettlement and Rehabilitation (2004), Right to Information Act (2005), National Environment Policy (2004), National Forest Policy (1988),⁵¹ Scheduled Tribes (Recognition of Forest Rights) Bill, 2005,⁵² National Education Policy (1986), National Water Policy (2002), National Health Policy (2002), National Conservation Strategy (1992), National Charter for Children (2003), National Policy for the Empowerment of Women (2001), and the National Policy on the Indigenous Population (2004). Ministries of the government vied with one another on "new thinking" and issue draft policies, appointed commissions, held conferences and seminars, made visits to areas, involved non-governmental organisations, and applauded themselves in putting new shine on the worn walls of the offices of the respective departments. They succeeded in their main business wherever it involved direct governmental intervention as in drought areas, preventing hunger deaths there, setting up primary schools, or in providing mid-day meals, and the state governments took direct interest. Elsewhere, they remained only policies to get more loans, etc. from all possible sources, and acted as governmental responses to the rights movement.

Perhaps by now it should be clear from what I have argued so far in this essay, even though this essay is not exclusively on government policies and their mechanisms, that it is necessary to see the dynamics of policies in the mirror of the rights movement. If the right to food campaign produced a range of policies and judicial decisions, the point is even clearer in the formulation of the resettlement and rehabilitation policy. The Narmada Bachao Andolan is a well-known case of the popular movement for the right to get adequate compensation, rehabilitation, resettlement, and sustainable livelihood.⁵³ Less known cases of movements against displacement also abound. Millions have been on the move because of construction of dams, power stations, hydropower projects,⁵⁴ airports, metallurgical plants, roads,

reserve forests, mining, and special zones in the towns and elsewhere, and of course due to violence. The government does not accept any legal category called the “Internally Displaced Persons” (IDPs); it is suspicious of the Guiding Principles on the Protection of the IDPs, lest it becomes legally compelled to protect the victims of displacement. Here too the idea is to tackle internal displacement with administrative practices but remaining unbound by any law. The policy is for the victims due to development projects, not for victims of displacement due to ethnic violence, state violence, or the mining of borders etc., as for instance in Gujarat or the Kashmir valley (except for the Kashmiri Pandits), or the border villages of Jammu and Rajasthan. The policy claims that the suggested protection measures are mainly for marginal farmers, women, and schedule tribes and castes. Yet it has no idea of what constitutes the test of justice in compensation and resettlement, what can be the method of estimating land value for the purpose of compensation, if land for land policy is at all a viable policy everywhere, and how to measure the World Bank suggested and the neo-liberal atmosphere conducive “impoverishment risk and reconstruction” measures. The result is that everywhere displaced and to-be displaced people are up in protest, and there have been police firings and deaths of protesting villagers. The policy goes to extreme length to convince its readers that it has answers to landlessness, joblessness, homelessness, food insecurity, increased morbidity and mortality, loss of access to common property resources (CPR), loss of common services, and increased vulnerability of women, children, and the old, and all other likely consequences of displacement, in form of providing land, reemployment, house reconstruction, adequate food security, health care, and community protection. Rights have to be re-seen, their presence re-assessed through the mirror of globalisation, development, and state policies. A whole layer of the settled population of the country is on the move, and it will not be wide off the mark to say that the future of the rights movement will be decided by the future of the moving “landmass” or “population mass” in this country.⁵⁵

Considering the huge amount of controversy, interest, and literature internal displacement has produced in recent years in India, the state’s response has been in many forms, policy enunciation being one of them. The Court has got involved, international donor agencies have stake in the resolution of the displacement issue in one way or another. Right to resettlement unsettles many things. For instance: Can the Land Acquisition Act, which is justified on the basis of “public gain” be deployed for private gain, for after all these industrial and manufacturing plants, or offices are for private wealth? Can one say that settlement policy must meet the standard or test of justice? And what then is the test of justice? Pure economics or as is being increasingly said now that public choices are ethical choices first? In the perspective of these overwhelming anxieties and unsettling prospects for an administration, governments have to manage moving populations; therefore temporary solution to one case or another of displacement has to be found out to the relief of industrial houses, and international financial institutions, but a durable solution at present seems highly unlikely – one that would appreciate the rights approach and help formulate a policy of development that takes the human consequences as integral and

therefore emphasises the requirement of elaborate and grassroots measures for alternatives (including compensation, re-formation of relevant skill, re-employment, etc.), and most important, take the potential victims as stakeholders, and co-authors of any policy of development.⁵⁶

Governmental techniques have acquired sophistication in face of persistent rights movement. We can take the case of public health and the rights of the AIDS victims. There are sources in International Guidelines and Law whereby the right to health as a critical human right is established. Articles 55 & 56: of the UN Charter promise to promote higher standards of living, social progress and promotion of health. Article 25 (1) of the Universal Declaration of Human Rights, 1948 declares the right to a standard of living adequate for the health including medical services and right to security in the event of sickness, disability. Article 27 (1) speaks of the right to share in scientific advancements and its benefits. The International Covenant on Civil and Political Rights, 1966 has Article 6, which proclaims the right to life. Art. 12 (1) of the International Convention on Economic, Social and Cultural Rights declares the right to highest attainable standard of health; Article 12 (2) enjoins upon the states to take steps (c) to assure to all medical services and attention in the event of sickness. The General Comment No. 14 in 2000 (By the Committee of Economic, Social and Cultural Right: Monitoring Body) speaks of “Health (as) a Fundamental Human Right”. Yet in spite of all these sources and the domestic adherence to this norm, for the AIDS patients the fact is that due to the pharmaceutical patents held by MNCs, the prices of drugs are high, therefore unavailable and unaffordable. Under TRIPS it is extremely difficult to build up local generic manufacturing capacity for AIDS medicine. The problem here is that health right is a public right, while Intellectual Property Rights are private rights. Once again we face the duality: the public nature of rights and the private nature of the gains (for instance, land acquisition a public act is for setting up a plant of a company, or acquiring patent over the manufacturing capacity of a drug or patent over a software language is once again act for private gain but enabled by a public instrument).

We can then put the problematic of rights in this way: The problem for the rights revolution is the duality; while for the government the problem is the politics of rights itself that unmasks this duality. Arundhuti Ray, the writer-activist when asked about why she had joined the Narmada Bachao movement, had replied with candour to the question,

Q: Are you going to stay involved with the cause of the Narmada Valley?

A: I don't look at these things as something as huge as this as a cause. For me, it's a kind of politics. It's a way of seeing the world. And when I go the valley, I often say, it's not my land or my farm that's being drowned. But if a farmer has land, a writer has a worldview, and that's what's being submerged. So, it's not a cause or a badge that I wear on my coat. Obviously, it's a kind of politics. It's a kind of way of seeing. And you know it was a way of seeing that evolved from long ago and will continue to evolve and mature, I hope, as one goes on. So it's not like you pick this cause up and then chuck it and pick another one and then chuck it. It's not like that. It informs

everything that one does and the way one thinks. And it informs everything about me.⁵⁷

In this contentious scenario made up of public purpose, its definitions, private gains, the sovereign, the claim making public, governmental techniques, and the incipient ideas of justice, the battle lines are being drawn – battle between as Arundhuti Ray would have said, “ways of seeing” and “ways of living”. There is no better way to describe this scenario amidst which the juggernaut of the rights revolution moves on than this one reported by a human rights activist:

It was a sombre rite of passage - the first death in the resettlement colony at Chanera, where the brutally uprooted residents of Harsud have been hastily and chaotically relocated. Prasad, a dalit landless worker, had stepped out of his makeshift hovel in pouring rain, and was electrocuted by a naked electrical wire carelessly strung on bamboo poles.

His grieving relatives and neighbours found that there was nowhere he could be cremated, because the authorities had neglected to provide a cremation ground. They gathered angrily outside the offices of the National Hydroelectric Development Corporation. An official told them contemptuously, you expect us to provide for you when you die. Next you will even expect us to be responsible for more of you when you breed. In the end, Prasad’s body was removed to the abandoned ghost city of Harsud, and amid its uneasy ruins, it was consigned to the flames.

Prasad’s devastated young widow Saroj is unable to even conceive how she will raise her four small children. It was formidable enough when her husband was alive. In Harsud, he used to find regular work, sometimes on construction sites or else in farms. But after they were forcibly evicted, he joined more than three thousand new daily wageworkers, hopelessly searching for casual employment in a village with no factories and saturated agriculture. They had no option except to eat into their compensation. But no are dared to ask what they would live on when that was over...

The resettlement site resembles not a carefully planned township but a haphazardly assembled settlement for fugitives escaping a war-zone. On undulating rocky hillsides, white stones mark undersized house sites for relocated residents. Some are strewn on hill slopes, others in beds of streams. Authorities are deaf to pleas that houses cannot survive in these locations. People desperately build, only to find their walls and foundations washed away in the rains.

There is no drainage, sewerage or clean drinking water. Oustees are forced to defecate in open fields, from where they are beaten back by the original residents. Children are unremittingly hungry and sick. In many homes, the walls are marked by old sarees, the roofs by plastic sheets, defenceless before the merciless monsoon deluge. Rents in Chanera are ten times higher than in Harsud, and land four times more expensive.

The 148-year old graceful town of Harsud today eerily recalls images of the ruins of Bhuj and Latur after they were destroyed by earthquakes, walls collapsed, roofs caved in, the phantom streets strewn with rubble, memories and dreams. Only in Harsud, the destruction was wrought not by nature but a cruel and callous state.

Any forced displacement leaves a trail for generations of human suffering. We have already waited too long to challenge a development model that coercively extracts

such profound sacrifices from powerless people only to augment privilege of a few. Alternatives for irrigation and power exist that do not exact such an enormous toll of human suffering, but they have few takers.

Public authorities charged with the responsibility of forcibly uprooting people, can never eliminate, but they can significantly reduce human suffering, if they share their agony, inform them of their rights, ensure they receive their full dues without harassment and corruption, and assist people to rebuild their homes and livelihoods well in advance of their uprootment.

Instead, in every large project in India, public servants treat ejected people as though they are enemies of the state, not innocent victims of unjust and oppressive development models and state policies. As far back as 1989, state authorities had earmarked Chanera for the resettlement of the residents of Harsud, doomed to submergence in the Indira Sagar reservoir. For 15 years, hardly a stone was lifted to prepare it for its uprooted residents. Barely two months before public authorities chose to vacate Harsud, people were coerced to shift to the barren undeveloped wasteland in Chanera. Batteries of policemen marched the streets, sometimes on horseback, to tame incipient resistance. Electricity and water supply lines were snapped. In a particularly malevolent innovation, residents were paid incentive to destroy their homes with their own hands.

More than a hundred villages have already silently drowned in the Indira Sagar reservoir. The coercive brutality of their uprootment was even more naked, because injustice in rural India is even more resolutely shielded from public conscience. We found police pickets already camping at villages now marked for future submergence.

In one of the resettlement colonies, a woman broke down, what we most cannot bear is to see our children hungry. I wish they had just given us all poison. It would have been better than this living death. It was a cry that we heard echoed wherever we travelled.

Chanera did appear at first like a land of the living dead. Yet we found that outside a hovel, someone had planted a young tulsi plant. Elsewhere we noticed a young couple stealing moments together, away from the eyes of their elders. In many colonies, women spoke of their determination to fight. There are some things that a callous state can never crush. One of these is the human spirit.⁵⁸

In this battle the future of the design of democracy is being decided. Post-colonial politics in India is proving to be as adventurous as the anti-colonial politics. Its dynamics will decide how inclusive will be Indian democracy; how much it will try to make up for its intrinsic deficit, and how much it will live up to the challenge that the rights revolution has posed for it, namely, is it the given structure of democracy that will define rights and its contours and limits, or the rights revolution that will mould and re-mould Indian democracy? One can see how the old liberal problematic of rights is being re-cast today. Post-colonial politics indeed is showing that it has something to offer as a universal lesson of democracy. Nothing could have brought out more vividly the impasse and the possibility of our human rights movement than this report:

If you are a Muslim and Bengali is the language you speak, the Delhi police needs no further proof that you are an illegal Bangladeshi immigrant to be summarily deported

The rising tide of fundamentalist forces all over the world has contributed significantly to the erosion of democratic traditions in the name of 'freedom' and 'security'. Fear and paranoia are being instigated and manipulated to subdue societies into obedience and conformity. Cherished ideals of liberty and social and political equality are being undermined. We believe it to be the responsibility of citizens to resist the onslaught of reactionary and anti-democratic forces and to contribute what they can to preserve, protect, and strengthen democracy. The Citizen's Campaign for Preserving Democracy is, hopefully, one of the many emergent initiatives in this direction within the Indian polity.

We have been working in different areas of concern: with political prisoners, for victims of communal atrocities, and against the oppression of minorities, women, and the so-called lower castes. Recently, we have tried to bring to public attention the propensity of the State to declare certain sections of society as outside the pale of citizenship. Our investigations over the last few months in Delhi, into the issue of the purported "Bangladeshi" have revealed that there has been extensive violation of the rule of law in this matter. Right from round-up and arrest, to the supposed 'hearing' and deportation, no lawful procedure is being followed by the authorities. The entire process contributes to and manifests the criminalisation and communalisation of the state and the corruption of its legal and judicial institutions.

It is not only the human rights of "illegal migrants" that is under threat at present. All marginalised groups, as well as large sections of the informal working class, are being pushed to the edges of society. Much of this is being done in the name of 'protecting the environment' or 'beautifying the landscape' or 'preserving our heritage'. There is at work a systematic process to disenfranchise the poor so that they have no voice in democratic governance or decision-making or constitute a part of the 'political' landscape any more. The Citizen's Campaign for Preserving Democracy pledges itself to the struggle to preserve, protect, and strengthen India's democratic traditions.

The Political Economy of Migration

Human history is, in some senses, about the movement of people in search of making their own history. For centuries, people have moved from one place to the other. Driven by want, needs, aspirations, and dreams, they have overcome enormous odds posed by geography and climate to reach and inhabit the furthest comers of the planet. The world as we know it today owes a great deal to the creative energy unleashed by experiential learning, assimilation, and invention during the course of this movement. The last few centuries of modern and trans-national development have witnessed how people have, either voluntarily or through coercion, broken old ties and relationships and tried to put down new roots. This has also been interpreted as a search for "freedom": freedom to move, to seek opportunity, to make one's fortune.

On one hand, modern (or capitalist) development has given birth to the modern nation state, with its attendant ideologies of democracy and development, whose basic thrust is to homogenise markets and reproduce conditions for the free accumulation and expansion of capital. On the other hand, it has simultaneously moved to restrict the free movement of labour across the political boundaries of nation states. Thus, an entire edifice of legal and constitutional frameworks has been created, aimed at regulation, surveillance and disciplining of the movement of people

across borders. This has created two separate, but closely linked, registers of legal and illegal mobility – both located within the fabric of democracy.

Over the past few decades, this process has intensified. As disparities of incomes and opportunities increase, many more people leave their traditional boundaries to seek better livelihoods. Whether it is IT professionals from South Asia seeking to enter the USA, or Turkish peasants searching for menial jobs in Europe, people are leaving their "homes" in ever-increasing numbers for whatever opportunities that exist elsewhere. However, this free movement of people is treated differentially by governments – some are welcomed; others are dealt with harshly. It is in this context, that this report deals with the specific issue of "illegal" immigration into India, policies that are being made to ostensibly address the problem and the actual manner in which it is affecting large sections of people who may or may not be immigrants.

The Drive in Delhi

Starting from 'Operation Push Back' in 1993, thousands of Bengali-speaking Muslims have been picked up from various working class settlements all over Delhi and forcibly pushed inside Bangladesh. It has never been clearly established whether these people were actually from Bangladesh or not. Instances from various parts of Delhi have shown that Indian citizens from West Bengal and Assam, working as ragpickers in Delhi, were routinely arrested on the charge of being illegal immigrants. An association of concerned citizens, voluntary groups, activists, and lawyers then decided to examine the process of deportation of people to Bangladesh, and a study was conducted between August and December 2004.

The study team consisted of members of Chintan Environmental Research and Action Group, Bal Vikas Dhara, Aashray Adhikar Abhiyan, Aman Trust, and Hazards Centre. During the study over 50 persons were interviewed and fifteen detailed case studies were prepared. The study team visited the respective police stations, the Foreigners Regional Registration Office (FRRO), and the place of detention – to record the processes of arrest, documentation, nationality determination, detention, and deportation. Some cases were individually followed-up. In addition, the national and international laws governing citizenship, immigration, and deportation were also examined. This report details the observations and conclusions of the study.

Identification of Bangladeshis

The Action Plan drawn up in May 1993 by the Government of the National Capital Territory of Delhi (GNCTD) for the deportation of illegal migrants, vests the local police with the job of detection and identification of illegal migrants. The local police, already over-burdened, undertakes this task through a network of local informers, often from within the communities that are targeted, who provide information about suspected illegal migrants. Thus, at the very outset, the Action Plan lies enmeshed in a system that easily lends itself to corruption and manipulation.

The interviews undertaken by the team clearly indicate that these informers wield considerable clout in the locality and all Bengali-speaking Muslims are required to keep them in good humour. Failure to meet the informer's demands – for money or otherwise – could mean loss of nationality. The findings also revealed that, in practice, identification by the informer was the *first* and *final* determination of nationality. The police relied solely and absolutely on the informer's word. All pleas and submission of proof by the detainees – of authoritative documents issued by agencies of Delhi government or the Union government – invariably fell on deaf ears.

It was also seen that there was no scrutiny or enquiry undertaken when documentary proof was submitted. These could range from ration card, election card, school certificate, affidavit from the village panchayat, to certificates from the MLA or MP. In a few cases, these documents were torn up by the state authorities on the specious grounds that they were false and fabricated. Thus, it can be concluded that the Government of India has delegated its sovereign function of identification and deportation of illegal migrants, in the interests of national security, to a few assorted "informers".

Detention and Arrest

The study revealed that the raids, detention and arrests were conducted in marked contrast to the provisions laid down by the Supreme Court and the Constitution. The guidelines issued by the Supreme Court in its landmark judgement in 1997, in *DK Basu v State of West Bengal*, regarding arrest, were observed only in their breach. Even if the citizenship of the persons being arrested and detained is uncertain, they still enjoy the protection of the Fundamental Rights enshrined in Article 14 and 21, which provide that no person shall be deprived of life or personal liberty except according to procedure established by law, and was upheld by the Supreme Court (in *Chairman, Rly. Board v Chandrima Das* [(2000)2 SCC 465]). But, in direct contravention of the law, the raids included swoops on the so-called illegal migrants in the dead of night and rounding up of men, women and children from their *bastis*. People were not even given enough time to get dressed properly or collect their documents. During other times, family members, including minors, caught in the raid were forced to face the situation alone, without being re-united with their families. While the government's own Action Plan requires that the local police records the statements of two independent witnesses, none of the people interviewed during the course of the study had ever seen the police secure this corroborative evidence. On the contrary, many complained of being beaten and threatened when they began to plead their case. The SHO and ACP then routinely signed these poorly prepared cases. All pleas and entreaties of the detainees for a hearing were effectively silenced by physical assaults and verbal abuse.

Legality and Illegality

The issue of identity should be ideally settled by documentary proof. However, in discussions with the police and other agencies, it emerged that commonly used documents - like electoral identity cards, ration cards, school certificates, and certificates from MLAs and *gram panchayats* were not accepted. Informally, the study team was told that only documents showing proof of ownership of land are admissible. Given the economic status of those arrested and the fact that, in India, more and more migrants to Indian metros are landless labour, unable to eke out a living from daily wages, this is an unrealistic demand and cannot be met. Not just by "Bangladeshis", but even by most Indians. It is strange that the Indian government is reluctant to accept other documents issued by its own departments.

One of the most common faces of corruption in India is bribery and it is present during the process of identifying and deporting supposed "illegal migrants" as well. Interviews with those who were set free reveal that identification also operates as a function of payment. Those who had the financial means to offer and pay bribes were usually set free, regardless of any other proof. Interviewees recounted how those unable to pay bribes were detained and then (presumably) sent ahead. A rough calculation based on an average amount of Rs. 1,000 paid per individual to be freed suggests that there are considerable sums to be made, including the amounts extorted by the informer. Conferring arbitrary and extraordinary powers on the police, as has

been done by the government Action Plan, has led to in-built abuse within the deportation process. It is apparent that the government Action Plan confers extraordinary and arbitrary powers on the police. The emergent abuse is inevitable, as it is inherent in the very mechanics of the law, policy and procedure followed.

The Foreigners Regional Registration Office

As per the Action Plan, the Foreigners Regional Registration Office (FRRO)/civil authority acts as the coordinating agency. The notification issued by the Delhi Administration in pursuance of its power under section 3 of the Foreigners Act, 1946, empowers the FRRO to scrutinise the proposals for deportation, and satisfy itself of their illegal status by providing the concerned person with a hearing. However, the study team did not observe the detainees being produced before the FRRO on any occasion during its visits over three months to the FRRO's office, although some ragpickers mentioned that they were sometimes briefly produced before the FRRO. The team noted that while the police vans with the alleged illegal migrants waited in the compound of the FRRO office at Rama Krishna Puram, their papers were taken in and duly signed by the FRRO, and a Leave India Notice issued under the Foreigners Act. It may be pointed out that with a senior police officer, of the rank of DCP, discharging the duty of the FRRO in Delhi, the basic constitutional principle of separation of powers stands seriously undermined.

The Place of Detention

Those arrested on suspicion of being Bangladeshis are detained by the orders of the FRRO, at a place of detention near Shastri Nagar Metro station. This is, in fact, a night shelter or *Ren Basera*, and a *Baraat Ghar* (wedding hall), which have been occupied by the Task Force and converted into a place of detention. It is a double storey building, on a plot of land roughly about 10 meters x 20 meters. The building bears the following information, displayed prominently on its front facade: Slum & J.J. Vibhag, Baraat Ghar (*Bhoo Tal*), Ren Basera (*Pratham Tal*).

Two armed police constables guard the gate, with more police personnel inside. The first floor of the *Ren Basera* is being used for residential purposes by the Task Force. From the accounts of some detainees, it was learnt that the conditions of detention fall far below the prescribed national and international standards:

- In violation of national and international rules, both men and women detainees are kept together in captivity on the ground floor, i.e. the *Baraat Ghar*.
- The basic amenities provided here are woefully inadequate. There are only two toilets in the building, one of which is used exclusively by the police staff, and the other is shared by male and female detainees, in violation of their right to privacy.
- Even to use the toilet facility detainees have to seek prior permission, which is refused sometimes.
- Items of necessity, such as blankets, are inadequate. According to one narrative, a woman detainee who had two children asked for an extra blanket because one blanket was not enough for them. Not only was she refused the extra blanket, but was also slapped across the face for her audacity. Other items of necessity, such as milk for the children, have to be bought from the police at excessive rates.
- No regular visitation rights are available for the relatives of the detainees. Detainees are not allowed to offer prayers (*namaaz*), in direct violation of Fundamental Rights (article 25, Constitution of India, that guarantees freedom to profess and practice religion).

- Detainees are forced to perform odd jobs for the police, like washing their motorcycles, sweeping the floor, cleaning toilets etc., which will attract section 374 of the Indian Penal Code that proscribes unlawful forced labour.
- The team also heard several complaints of detainees being physically assaulted by the police. Slaps, kicks and punches were part of the treatment meted out to detainees. Degrading forms of punishment, like forcing detainees to squat in the *murga* position, were routinely reported.

The Right to Shelter

The misuse of the night shelter and *Baraat Ghar* as a place of detention constitutes a very grave infringement of public policy and State obligations. The diversion of the Slum & JJ (Jhuggi-Jhopdi) Vibhag's unit that should otherwise be made available as a night shelter or a wedding hall as a detention centre is indeed illegal, unlawful, unconstitutional and unjust.

Deportation to the Border

From the FRRO the arrested persons are taken to the MCD *Ren Basera*, where the police are waiting for them. They are kept at the *Ren Basera* until there are sufficient numbers to fill a railway bogie. Subsequently, they are taken to the Old Delhi railway station in closed vehicles and put aboard a train. The Delhi police accompany them to Malda station in West Bengal, from where they are transferred to a Border Security Force (BSF) camp. Diplomatic protocol requires that when deportation takes place, the embassy or high commission or any other representative of the State of the country of origin of the deportee be informed about the decision. This has not been undertaken, resulting in a breach of international protocol.

Since the required procedure has not been followed, care has to be taken by the BSF that their counterparts in Bangladesh (BDR) do not know that the deportees are being pushed across the border. Hence, the deportees have to be released in batches of two, and that too in the middle of the night. Thus, it may take several days for the entire lot of deportees to be evacuated from the BSF camp, and during the entire time armed guards are deployed to ensure that the people remain concealed within the camp. The people, both men and women, remain completely at the mercy and whims of the guards. Several incidents of rape, sexual harassment and physical violence have been reported by those who have somehow returned from the border.

When the people are forced across the border, all their possessions are taken away along with any signs that may point to their Indian origin. If they have any money, that too is taken away. If there is a sympathetic BSF jawan, he may exchange Indian rupees for some Bangladeshi money. When there is sufficient inducement, the jawan may even tell the deportee to come back when the police have gone so that he/she can re-enter India. But the general trend appears to be to forcibly push the people into No-Man's Land, regardless of the weather, the condition of the people, and the terrain (jungle or river). They are warned that if they turn back they will be shot as infiltrators. As parting advice, they are also cautioned to tell the Bangladeshi Rifles, if they are caught across the border, that they are returning from some work or wedding from a particular village. Thus, poor people, deliberately bereft of identity and citizenship, have no option but to again take the path of illegality merely in order to survive.

Violation of Rights at all Stages

Pursuant to an order of the Delhi high court in *Chelan Duff vs Union of India*, (3710/2001, writ petition still pending) the Home ministry formulated a further Action Plan on May 1, 2002 to expeditiously detect and deport illegal Bangladeshi

nationals from Delhi. As per this plan, the commissioner, Delhi Police, is required to set up 10 Task Forces to identify the illegal migrants. Each Task Force is assigned a quota of identifying 100 illegal migrants daily and this number is to be increased later. Every alternate day at least 50-70 persons are to be sent by train from Delhi to Howrah for deportation. This Task Force functions under a monitoring cell in the Home department of the GNCTD, and reports to a high powered nodal authority constituted by the Home ministry. This nodal authority, in turn, is required to submit monthly reports to the Delhi high court. It is indeed ironical that while the Delhi high court is monitoring the functioning of the agencies engaged with the detection and deportation of Bangladesh migrants, there is blatant infringement of fundamental rights guaranteed by the Constitution, gross violation of international human rights, and systematic derogation from due process of law and principles of natural justice, which the court is mandated to uphold and protect. The target quota system has given a further impetus to corruption and coercion at the level of the local police.

Using the by now familiar rhetoric of "national security", the cardinal principles of natural justice are subverted. Thus, no fair and objective inquiry is held in Delhi to establish that the person arrested is a foreign national. The basis on which a person is held to be a Bangladeshi is never communicated to him and he/she is never given a chance to rebut such findings. The right to fair hearing/trial is an essential ingredient of the principle of natural justice. Under the current law and Action Plan, however, the deportation order is passed without any hearing and without disclosing the reasons, which led to the conclusion that he/she is a foreign national. This is then detrimental not only to the process, but to the economically disadvantaged Indian Muslim population too.

The Legal Regime

Admission, deportation, stay and control of movement of foreigners in India is Governed by:

Passport (Entry into India) Act, 1920/ Rules 1950.

Registration of Foreigners Act, 1939/ Rules

Foreigners Act 1946, and subsequent orders issued from time to time.

Indo-Bangladesh Visa Agreement, 1972

The Illegal Migrants (Determination by Tribunals) Act, 1983

The central government, under section 3 (2) of the Foreigners Act, 1946 is empowered to make provisions for prohibiting, regulating or restricting the entry of foreigners into India, or their departure there from or their presence or continued presence therein. The procedure provided by the Foreigners Act, 1946 and the Action Plan formulated by the Home ministry for detection and deportation of illegal migrants from Bangladesh in Delhi, is prejudicial to the affected persons and in flagrant violation of articles 14, 19, 21, and 22 of the Indian Constitution as well as the obligations of the Indian State towards International Conventions and Treaties, inter alia, UDHR, ICCPR, ICSECR, CEDAW, Convention on the Rights of the Child etc.

The Foreigners Act, 1946, in a fundamental departure from liberal jurisprudence, reverses the burden of proof (sec. 9) and places the onus upon the person concerned to prove his citizenship. The police is not obliged to prove its case by the application of any basic standard of proof. It thus replaces the cardinal principle of presumption of innocence with the jurisprudence of suspicion. It would be pertinent to pause here and consider that in a country where a large number of people live and work as migrant workers, working in the burgeoning informal unorganised sector, driven by economic compulsions, it is extremely unlikely that they will hold any documents

certifying them as citizens of India. The growing emphasis in government policy on documentary proof of identity may eventually disenfranchise the poor, and particularly the Muslim minority.

There is no forum for appeal available under the Foreigners Act, 1946, against a determination of nationality by the prescribed authority under sec. 8, thus denying access to judicial remedy against a decision taken in the arbitrary manner described above. The situation is further aggravated by the fact that sec. 15 of the Foreigners Act, 1946 provides protection against legal prosecutions to persons acting under this Act. This provision becomes more ominous, particularly when read in conjunction with sec. 11(2), Foreigners Act, 1946, which authorises the police to use "reasonably necessary" power, in the discharge of its functions under this Act. It thus grants immunity from accountability and in that sense legalises human rights abuses.

Several petitions are currently pending before the courts, challenging the arrest, identification, and deportation process:

Ø *AI Lawyers Forum for Civil Liberties & An. vs. Union of India & Others*, Writ Petition (Civil) No. 125 / 1998, Supreme Court of India

Ø *S. Sonaval vs. Union of India*, Writ Petition (Civil) No. 131/ 2000, Supreme Court of India, (Seeking repeal of the IMDT Act, 1983)

Ø *Jamaith Ulema - E - Hind & Anr vs. Union of India & Ors.*, Writ Petition (Civil) No. 7/2001, Supreme Court of India, (Opposing the repeal of the IMDT Act, 1983).

Ø *Abu Hanif alias Millan Master vs. Police Commissioner of Delhi & Others*, Special Leave Petition (Criminal) No.3778 / 2000, Supreme Court of India, (Quashing of order holding the petitioner to be a foreign national)

Ø *Abu Hanif alias Millan Master vs. Union of India and Others*, Civil Original Jurisdiction, Writ Petition (Civil) No.418 / 2001, Supreme Court of India, (Seeking the establishment of a tribunal and extension of IMDT Act, 1983, in Delhi).

Ø *Shekh Molla vs. S.H.O. Inderprastha Estate & Others*, Criminal Writ No. 382 / 93, Delhi High Court, (Seeking compensation for illegal and unlawful deportation of nine Indian citizens to Bangladesh).

Ø *Chetan Dutt vs. Union of India and Others*, Civil Writ No. 3170/2001, Delhi High Court, (Petition to take effective steps to check influx of and remove illegal Bangladesh migrants from Delhi).

Conclusion

It is true that the physical and cultural similarities of people living on either side of the border makes it difficult for the concerned authorities to distinguish between them. However instead of evolving a judicious mechanism to determine the same the government has accorded legitimacy to an arbitrary and discriminatory procedure. The cumulative impact of this procedure is the systematic and targeted harassment and abuse of a specific religious and linguistic minority, viz. Bengali-speaking Muslims. In a polity where communal prejudice is increasingly manifest in various sections of both the public and government, this deportation drive, in the absence of necessary checks and balances, begins to acquire the colour of ethnic cleansing in contravention of the secular and plural foundations of Indian society.

The central government, under section 3 of the Foreigners Act, 1946, had promulgated the Foreigners Tribunal Order, 1964 for the purpose of determining the question of nationality of a person. Under this order the central government is required to constitute a tribunal to give its opinion after giving a reasonable opportunity to the alleged illegal migrant to make a representation, produce evidence, and after considering such evidence the tribunal is to pronounce its opinion. The central government, despite repeatedly expressing anxiety over the

influx of illegal migrants from Bangladesh, has not constituted any tribunal in Delhi, under the 1964 order.

Similarly, the Illegal Migrants (Determination by Tribunal) Act, 1983, also envisages the constitution of tribunals, composed of judicial officers, to determine, in a fair manner, the question as to whether a person is an illegal migrant or not. But till date the IMDT Act has not been extended to Delhi. It is being alleged that, since this law adopts procedure grounded on principles of liberal jurisprudence and notions of natural justice, it has failed to get rid of the illegal Bangladeshi migrants. Hence, there is a growing chorus by right wing forces and the Home ministry demanding the repeal of the IMDT Act and doing away with principles like the right to equal treatment before the law, right to fair trial, and the right to be deemed innocent until proved guilty. There are even petitions pending before the Supreme Court and the Delhi high court seeking the repeal of this statute.

In the last two decades this kind of critique has captured the public imagination where, instead of examining the root problems of corruption, mal fide and bias that are eroding the system, the demand for efficacy is based on abandoning principles of natural justice and international standards of human rights. As in the case of draconian anti-terrorist laws, liberal principles of jurisprudence are projected as the hurdles that need to be discarded. To silence any criticism, the fear of national security and terrorist attacks is repeatedly raised. At the receiving end of these arbitrary and illegal procedures are poor people, many of whom work as rag pickers and live a life of hardship and poverty. Their poverty and minority status makes them an easy prey for the police.

If democratic norms and procedures are to be preserved for the greater good of the nation and its citizens, it is crucial that citizens resist this vicious cycle of inventing imaginary enemies against whom the nation has to be made secure, in the process of which the ordinary citizen is made more insecure. Through this report, the Citizens Campaign for Preserving Democracy calls upon all concerned people to support all movements to construct a more humane and egalitarian society.

Demands

- All raids, arrests and detention to be strictly in accordance with the law and guidelines laid down by the Supreme Court of India.
- Determination of nationality only through a fair enquiry in accordance with the principles of natural justice, conducted by a judicial tribunal as envisaged in the Illegal migrants (Determination by Tribunals) Act, 1983.
- The Illegal Migrants (Determination by Tribunals) Act, 1983, to be extended to Delhi and other states.
- That the night shelter and wedding hall at Shastri Nagar, Delhi, presently being misused as a place of detention, be vacated immediately.
- Establish and administer a detention centre in accordance with national and international standards.
- That documents issued by state and central government agencies be regarded as valid documents of citizenship.
- The excessive and arbitrary powers given to the Task Force (Police) by the Home ministry's Action Plan, May 2002, to be withdrawn. All determination of nationality only through a legally constituted judicial tribunal.
- Deportation from Indian territories to be in compliance with international law and diplomatic protocol.⁵⁹

This is a unique report, and I have cited this long report, because it shows (a) how the rights movement has turned its back against xenophobia; (b) that the liberal theory of citizenship cannot exhaust the ethos of rights, or to put it in a different way, the path of citizenship has to be charted anew; (c) how legalities and illegalities make this world of law, democracy, and rule of law, (d) and finally, how these cosmopolitan feelings and actions originating from a rights consciousness are able to change democracy in the long run, because as this report and all other reports on the rights to food and resettlement demonstrate the features of the time, namely, the bio-political basis of new activism. In all these respects, one can say that post-colonial experience will make its singular contribution to the democratic story by charting out its own path with own characteristics that would not necessarily follow the laid down script of rule of law, citizenship, and constitutionalism, but may follow a more material path of bio-politics, where the physicality of existence is at stake.

Thus in some cases, in India as elsewhere, the politico-judicial discourse of rights has moved from the rights of citizens to what the noted jurist Upendra Baxi has termed the “rights of the subordinated peoples”.⁶⁰ Group rights are particularly relevant in this context, such as the rights of the indigenous people, rights of various nationalities and communities who refuse to be categorised as minorities and want to be treated as “people” and equal dialogic partners in the reconstitution of the political society. In this context, not only cultural rights are being articulated, but the issue of rights and wrongs is also coming up,⁶¹ in as much speaking of legal pluralism. Those who speak of legal pluralism are not denying that there are some universal standards such as dignity and equality of women with men, but they are making the point that with same legal standards differential rights cannot be protected, or a private-property respecting legal system cannot protect the common property resources (CPR).⁶² In short critical legal perspectives now mark the rights revolution in the country. People who are scared of the surge of group rights and talk of “ethnic futures” have to now listen attentively to the arguments of legal pluralism, which admittedly would have to be adjusted to the Indian situation. With dual ethnic identities⁶³ and moderated by a dialogic politics, ethnic futures with inter-ethnic clashes may not be the only outcome of an identity politics that is being stoked continuously by the states in order to retain their legitimacy. The alternative to dark ethnic futures may be a dialogic one, where rights consciousness is moderated by ideas and perceptions of justice.

One thing apparent from the material presented at some length here is that rights no longer arise from the head of a liberal thinker, or a manifesto, a charter, or a text, they are originating from network/s and then taking shape as a right. Thus for instance one action of the People’s Union for Civil Liberties (PUCL) in a court led to a series of actions and formation of organisations and forums working now in a network of public hearings – culminating in a single call for the right to food. These rights-network/s show the plural and the dialogic basis of this new orientation in the rights movement, and the federal character of the politics of rights. The network narratives only a glimpse of which we could see in this essay provide the new

discourse of rights – plural, dialogic, and hinging on alternative imaginations. To understand this change is important. After the “progressive restoration” of 1989, and the worldwide emergence of neo-conservatism and neo-liberalism, the significance of rights no longer remains confined to old, individual political liberty based significance only. Old democratic set ups are not enough to ensure rights, and rights movement just cannot say that they need the State to guarantee them at a time when the latter is retreating in face of several odds. Rights call for a reorientation of the political society, which would include state and democracy both. Rights today are growing from critiques of neo-liberal policies, whereas it is said that rights had grown from liberal theory in the past. In the midst of the conservative revolution, the challenge is not only to defend the fruits of the past, but also find out new directions, and new ways of articulation. In the classical days freedom of expression, freedom of the press, and the presence of a public sphere were considered guarantees of articulation of rights. Today, this public sphere is utterly manipulated, press is completely monopoly-owned, and the television culture allows only fragments of images and sound bytes so that rights articulation faces crisis today.⁶⁴ Network production of discourse is therefore important today.

IV

Right to Autonomy and the Autonomy of Politics

It is necessary to speak of the autonomy of politics today in the background of the rights revolution, because the final explanation of human rights is the right to do politics. It is this right which ironically is the most globalised right today, and thus while experts keep on talking about the economic content of globalisation, it is time we speak of the globalisation of politics. We saw in the beginning how from the early times in the political life of a colony a distinct local discourse of rights met with a global discourse, and in this case a specific post-colonial discourse of rights basing itself on universality developed an argument of transitional democracy and justice whose value lay much beyond. We also saw that in this specific post-colonial context rights have often faced the paradigm of development, and have quizzed two well-intentioned formulations popular among liberals, namely “development as right” and “development as freedom”. We discussed in this background the “policy explosion” in India as a response to globalisation, a response that connects the two phenomena – the governmental responses and the popular perspective of rights. These interrelated perspectives allow us to see the dynamics in the expansion of the sense of rights in India, which now mean more and more social and economic rights and anticipate the incipient ideas of justice. In short the working out of the theme of rights in a post-colonial context bears out concrete governmental ways of defining and limiting rights vis-à-vis the emerging issues of justice.

The task then with all these in mind is to see if in this post-colonial context marked by both “governmentalisation” and “popularisation” of rights, can rights evolve any further without a flag? My argument is not only it can, it must evolve –

not in the traditional sense of cosmopolitanism and international liberal democracy, but in the sense of globalisation of rights and the globalisation of the politics of autonomy. The latter means the increasing strength of politics – its autonomy - to redesign political society, to solve the problematic of sovereignty in a creative way, to cope with the global fall out of new discourses and the new global political economy, and incorporate the emerging issues of justice in a dialogic mode marked by the mutual engagements of the autonomies of various kinds. I want to end this essay with some lines on that evolving perspective.

To do that is to re-engage one more time, the last time as on this occasion, with the issue of sovereignty and its extra-ordinary powers. The colonial rule developed constitutionalism in a way that it had always in it extra-ordinary powers to deal with protests, insubordinations, and anti-colonial rebellions. Regulations, ordinances, special powers acts, defence (of the realm/India) acts and rules, immunity to intelligence officers to search, kill, and destroy, anti-seditious laws, conspiracy laws, and martial laws – these were some of the instruments in the huge arsenal of what some have described as the “exceptional state”.⁶⁵ Extra-ordinary powers meant the final resort to physically save the sovereign. As long as sovereignty remains, exceptional powers remain – this is not only a colonial story or the philosophical truths of thinkers like Carl Schmitt, Walter Benjamin, or Giorgio Agamben⁶⁶ - this is borne out in the experiences of the independent Indian state. Independence and along with that the new constitution came, freedom’s laws were declared, but old exceptional powers remained and in course added to its volume. Now, in this new century on one hand globalisation takes away the powers of the State to deliver welfare and protection promises to its citizens, on the other hand not only it does not take away the punitive powers of the state, it sets new global standards in torture and punishment, if the current schizophrenia about terrorism, and the rush to pass anti-terror laws and set up Abu Gharebs and Guantanamo Bays are an indication. How would the rights movement advance against this double jeopardy? The relevance of the politics of autonomy in this background merits serious attention.

With so much of sovereign’s energy in India today being devoted to “production of bare life” (think of all those court orders on public provision of food, all those welfare measures, all those public actions to prevent famines, and then controlling rebellious bodies with all those punitive measures), can we say that politics cannot proceed beyond this bio-political moment of production of bare life, which may be the original form of politics, or that politics must proceed beyond this activity of the sovereign by marking out autonomous spheres of activity, resistance, and engagement? In short, is politics all about power or about desire too – desire to chart out flight paths to new ways of existence?

We are of course not talking of personal autonomy here, nor are dealing here with the Kantian problematic. It is of course true that to be autonomous is to be a law to oneself; and autonomous agents are self-governing agents, therefore they can be accountable for what they do, if they act autonomously. In this sense, the value of

autonomy is tied to the value of self-integration, self-accountability, and responsible freedom. Personal autonomy too has connection with the problematic of rights, because one may ask, What conditions must be satisfied in order to ensure that we govern ourselves when we act?

The fact however is that, whatever may be the philosophical conditions of rights, as in India today (the Nagas, Kashmiris, and several other population groups at different times) when some people in a region of the world declare that their group has the right to live autonomously, they are saying that they ought to be allowed to govern themselves. In making this claim, they are, in essence, rejecting the political and legal authority of those not in their group. They are insisting that whatever power these outsiders may have over them, this power is illegitimate; they, and they alone, have the authority to determine and enforce the rules and policies governing their lives. While it is true that in this way the issue of autonomy can be posed for individual self too, in politics individuals demand liberty and not autonomy, because in politics autonomy implies agency, for which the basic requirement is a group – a community, a region, a class, a nation, etc. This group ascribes agency to it, and therefore challenges the sovereignty of the authority. The sovereign's power over bare bodies is contested by the power of the collective agency. Power becomes illegitimate, and exercise of sovereign authority becomes unjustified when popular agency challenges their authority. With this commences self-government, whose particular form is derived from the nature of the agency that the popular collective has claimed. Thus, what distinguishes the autonomy-generating influences is the dynamics of the self-governing process. Political subjects in this way learn to dialogue, mediate, negotiate, moderate, arbitrate, unite, and most significantly, realise that self-government is in the final analysis governing, and autonomy therefore may therefore lie *beyond that*, that is to say beyond the “self-governing power of the collective” (for instance, women's rights in a collective governed by patriarchy through specific land, marital, property, or succession laws, as in the state of Meghalaya in India where autonomy is a crucial issue). This is the story all accounts of autonomy try to describe. Thus, cultural affairs, education, official language, national symbols, health and social services, economy, taxation, resources, environmental policy, transportation, post and communication, law and order, administration of justice, currency and monetary policy, determination of citizenship, foreign policy, defence, customs, border control, immigration, customary laws, ownership of historical memory⁶⁷ – all these issues appear at the heart of the autonomous process. The overwhelming nature of the number and variety of these accounts indicates the value of autonomy in confronting the modular form of the modern state in which sovereignty has traditionally stayed. The value is enormous precisely because it has an endless variety. This is the good point about autonomy; it therefore does not resemble sovereignty, because sovereignty has to remain centralised and cannot have a shared form. The essence of self-government as distinct from sovereign rule is the capacity of the former to constantly examine the process of governing the collective self and the need to be continuously dialogic in order to self-govern.

The Indian experiences of autonomy suggest certain minimum conditions for such a right to emerge.

First of these is the victim's experience of sovereignty in order to be able to make a distinction between the two. Right to autonomy is not a minimal demand. Autonomy is not less self-rule, but more. Thus, it does not mean that a collective has to submit to others' sovereignty and make a minimal demand. Autonomy signifies a fundamental principle along which democracies will have to be restructured. As Indian experiences of autonomy suggest, the right to autonomy is a call that is spreading fast, far and wide (and we are not speaking of India only here), not to be limited to frontier enclaves or seditious groups only as a concession in a democracy, but to be considered as cardinal rule for rebuilding the political society. In India, indigenous groups, women, minorities, sub-regions, villages, in fact various kinds of conceivable collectives have demanded autonomies, some of which horizontal some are vertical in form.⁶⁸

Second, since autonomies can be competing, the emergence of a dialogic politics is necessary for a wide ranging right to autonomy to emerge. Classic is the disputes between the various states, and groups in the Northeast disputing on water sharing, boundary demarcation, resource sharing, common properties along the borders between the two autonomy seeking groups or units. This was the case in colonial India too when in the emergence of the right to self-government, there were disputes for instance between the Hindus and Muslims or between the high caste dominated nationalist party and the party of the dalits over principles of representation, etc. Yet from the middle of the second decade of the last century (the Lucknow Pact between Gandhi and Jinnah, 1916) dialogues between groups began, and with the art of political conversation developing and spreading, the desire for self-government strengthened.⁶⁹ Whatever specific results these competing conversations produce, they all contribute to an understanding of the various ways in which the political subjects play a governing role in their own actions. They articulate an ideal that they realise to various degrees. And in so doing, they shed light on how autonomy becomes a dialogic process, its structure becomes federal, and how it can become a creative form of self-government distinct and different from the other model of regulated from the top local decentralisation and subsidiary functioning.

The final condition for the right to autonomy to be significant is the concurrent emergence of a range of issues of justice, which provide legitimacy to the right to autonomy. Behind each of the Indian demand for autonomy, constitutionally recognised (Articles 370 and 371, the Fifth and Sixth Schedules, etc.) or not, there is a claim for justice that has reinforced the demand. This is the illustrative moment when rights move on to the notion of justice. Autonomies claim that their demands are just. Because the demand is not exhausted by a legal definition of rights, justice becomes the strongest ground on which autonomies try to reconcile they become

dialogic. In that sense, it is not enough to say that autonomies have some minimum conditions to emerge, in order to become significant they must address the issues of justice in a dialogic manner. Throughout the world, it is on this basis, in Canada, Scandinavian countries, Greenland, Thailand, Indonesia, the Philippines, Tibet, India, Sri Lanka, Pakistan, Bangladesh, Palestine-Israel, Algeria, Ethiopia, Sudan, Bolivia, Mexico, the Balkans, Italy, Ireland, South Africa, Guatemala, and in many other countries first nations, erstwhile subjugated people, peasant communities, islanders, women's groups, minority communities have demanded autonomy to satisfy the test of justice.⁷⁰ Broadly six principles have emerged as conditions of minimal justice, which autonomies must be based upon and recognise:

- The principle of compensation for past injustices, wrongs, and gestures on behalf of the national state to convince the other of its desire to continue with the principle of compensation;
- The principle of supervision - this means deciding on the right and agreeable way to supervise the introduction of autonomy;
- The principle of custodianship is crucial to settle the balance between the territorial sovereignty of the state and the autonomy of the dissenting community;
- The principle of guarantee – guarantee against future erosion of autonomy, guarantee of a mechanism for continuous conversation;
- The principle of innovation of federalizing and autonomic practices along non-territorial lines, such as consociationalism;
- The principle of feminisation of relations, which implies federal relation, democratic recognition of the other, recognition of histories of separate existences, and a moral-constitutional guarantee of a variety of forms of co-existence and the guarantee of respecting those forms.

An examination of the historical background of these principles tells us – Why is violence so deeply associated with the demand and mobilisation for autonomy? Can group autonomy be defended unless that group defends women's autonomy within the group? Can we in the name of group autonomy and group control over resources defend a new form of private property, and can legal pluralism be defended if it becomes an accessory to the long-term growth of inter-group inequality? Who can afford autonomy – the propertied or the property less, or is the problem of property irrelevant to the issue of autonomy? Can the juridical idea of a centralised source of law be appropriate for autonomous arrangements? Or, do we need ideas of critical legal pluralism, so that shared sovereignty becomes a political reality? In other words, what are the specific laws of autonomy? Is there a possibility of enriching the notion of autonomy on the basis of critical geopolitical insights, so

that we can transcend the governmental forms of autonomy and speak of “autonomy of the autonomies”, a new vision of a federally organised political society, what Marx had called a “nation of communes”? In course of mapping out the path of transformation of the rights discourse in India, I am aware and confess a sober realisation that this essay has thrown up more questions than the ones it answered. There is no apology, but only an explanation that once rights take the form of what feminists say “embodied politics”, the concern for liberty, freedom, livelihood, autonomy, security, all begin with our bodies and must return there.⁷¹ That is the explanation as to why rights revolution has been grounded in issues of justice. This is also the explanation as to why we have shifted our ground, which readers must have noticed: We were talking of the politics of autonomy; we are now speaking of autonomy of politics, because in this world marked by a long history of states of exceptions⁷² that have with impunity destroyed our bodies only the right to politics can be the response, embodied politics, which the state of exception tries to stop.

Whither the rights revolution in India is thus a colonial and a post-colonial story with some lessons to offer to the global history of rights. The claims and the incipient ideas of justice as I tried to show had all along provided the framework of the continuing rights revolution. In that sense the colonial subjects were fortunate that they did not begin their rights revolution from the works of Bentham, Burke, Mills, or Green. Neither they knew liberal theories, nor they knew the utilitarian framework of good. Yes, they were for long subject to positive law, particularly English law, which still remains the case. But history at times plays the grand jury better than law. Thus the historical experiences of colonialism and post-colonialism have enabled the Indian rights revolution to search alternative paths to carry rights forward. The half-judicial, half-political, and half-ethical idea of justice occupies a crucial place in the rights story, because it has a story of its own not exactly the one of rights, and has provided the fillip from without and within whenever the rights revolution faced stagnation. We need of course a different occasion to write that other story of justice.

But at least this has to be remembered in the light of the recent studies in India on the spread of the right to autonomy in the country⁷³, that the demand for justice arising out of marginal situations is getting translated increasingly in the language of the right to autonomy. This is where finally rights are showing signs of breaking away with flags representing sovereignties by conceiving new solidarities and new modes of alliances and dialogic existences. We have progressed beyond the liberal ideas of “development as freedom” as the solution of the conundrum in which the right revolution found itself in face of the neo-conservative revolution worldwide. To be true, “development as freedom” as an idea and slogan was never taken seriously except by heads of third world states who were always in need of new slogans in order to attract more aid and required new defences against the ideological onslaught of the US led West using human rights vocabulary to prise open closed markets. It never went beyond the UNCTAD and G 77 spirit, which had been hollow within. Amartya Sen’s own arguments were equally dismal; when he tried to show the connection of freedom and justice; justice came out poorer than what it has been

in historical reality in his presentation of the engagement of the two.⁷⁴ Sen drew upon wrong sources, the utilitarian, libertarian, and liberal strands of thinking in Western political philosophy, which had very little to offer on justice (except Rawls, if not for anything at least the title of his book bore the word), whereas if at all Western ideas were to be taken as source, he was to draw from anti-establishment Greek thinking in the classical age, the subversive thoughts during the long Christian age, and the underground illegal thinking among workers', peasants', itinerant, and mendicant sects evident till the middle part of the nineteenth century ruthlessly suppressed thereafter by official liberal thought. These were what Foucault had told once the illegitimate thoughts. In Indian thinking too justice had two sources – one, the inadequate references to justice as a principle of rule enunciated in advices to the king (for instance, *Arthashastra*), the other the millenarian thinking present through the long centuries, which argued that politics had to be just, that is to say responsive to demands and claims of the marginal groups and existences. Sen's Annapurna, the service provider, needs correct information to decide whom to give the work, the dilemma being that all three claimants are in distinctly different vulnerable situations, so that Annapurna now requires information about vulnerabilities in order to make decision. The trouble with Sen's example is threefold: (a) information per se does not provide clue to comparative judgement, pressing claims do, that is what the rights language does; information per se may become a tool of government to deny justice, one more dimension of what is now called, governmentality (b) the Annapurna who gives the work to one of the three seekers of job on a distinct ground of vulnerability will soon give jobs to other two; it is never a zero sum game; and (c) most important, the mythical Annapurna was kind and bountiful, she knew how to attend to vulnerabilities, she would be able to tend to all. Consideration of justice arises from marginalities, it is always historically framed and conditioned by the emergence, existence, and awareness of marginalities; it is specific and relational. Information is important, but not the most critical factor. The critical factor is the dynamics involved in the redress of marginal position. That is why justice has many forms – retributive, restorative, conciliatory, dialogic, punitive, distributive, allocating, etc.⁷⁵ Freedom may flow from achieving justice, which even utilitarian thinking could not anticipate, because it was engrossed in calculations of aggregate happiness in which utility lay.

At a time when in the eighties and nineties economists, jurists, and philanthropists were exploring the basic laws of poverty, deprivation, marginality, and rightlessness, a "rights' history" was taking shape through mass actions, to go back to what Charles Tilly had said, contentious politics and contentious actions.⁷⁶ These actions began as illegitimate actions, but as the history of reforms in India suggests, illegitimacies have produced laws, and rights have reasserted their kinship with the hybrid site of legalities, semi-legalities, and illegalities. Administrations will as always try to normalise the situation with the help of law, but the continuing rights revolution will as always disturb the epistemological field of law where power, status, and economic interests solidify. The rights language therefore will create as consequence a disturbing grid of resistance and desire – with new flight paths away

from sovereignty and power. It will also continuously give rise to the question: Who needs rights? Who is the political subject calling for rights?

Notes and References

¹ West Bengal Land and Land Reforms Minister Abdul Rezzak Mollah's statement in the West Bengal Legislative Assembly on 7 July 2006, in response to a query on acquisition of land by industrial groups for building up "health cities", etc. – Dainik Statesman, 8 July 2006 (p. 1); the Indian newspapers have carried another story around the same time of the union government in a state of loss as to how to check the high rise in food prices because of unbridled export of certain food crops by food traders and kulaks without any compensatory gain in either any manufacturing sector or an expansion of food grain production. The government was forced to temporarily stop such export for six months. But the thesis of "the return of Victorian famines" in India or Pakistan is plausible given the scenario where we witness pockets of permanent poverty, new-famine conditions, hunger parallel to pockets of prosperity because of the skewed nature of national consumption pattern and its internal disparities.

² See for instance the report of hunger deaths in West Bengal by Bhaswati Chakravorty, "The Hunger Game", The Telegraph, 26 April 2005, p. 18.

³ On the suicides by farmers in parts of India see the commentary by Pratapbhanu Mehta, "Durheim at Vidarbha", The Telegraph, 11 July 2006

⁴ Fredrick Jameson reminds us of this in "Globalisation and Political Strategy" in The Global State - Selections from New Left Review, Volume 1 (Kolkata: Seagull, 2006), pp. 53-74

⁵ I do not agree with all the formulations of Michael Hardt and Antonio Negri, Empire (Cambridge, MA: Harvard University Press, 2000), but it is worth considering the reflections of their formulations on the issue of sovereignty and popular politics of rights, which they do not sufficiently elaborate in their succeeding but less concrete Multitude – War and democracy in the Age of Empire (London: Penguin, 2004)

⁶ Charles Tilly, "Where Do Rights Come From?" in Theda Skocpol (ed.), Democracy, Revolution, and History (Ithaca: Cornell University Press, 1998)

⁷ I am using here the insights of Etienne Balibar, "Rights of Man and Rights of Citizen – The Modern Dialectic of Equality and Freedom" in E. Balibar, Masses, Classes, Ideas – Studies on Politics and Philosophy before and after Marx, trans. James Swenson (New York: Routledge, 1994)

⁸ On this see the discussion on utopia by Fredrick Jameson, "The Politics of Utopia" and Perry Anderson, "River of Time" in Other Worlds – Selections from New Left Review, Volume 4, (Kolkata: Seagull, 2006), pp. 56-91

⁹ Originally, the right to property was also included in the Fundamental Rights; however, the Forty-fourth Amendment, passed in 1978, revised the status of property rights by stating, "No person shall be deprived of his property save by authority of law."

¹⁰ The Forty-second Amendment, which came into force in January 1977, raised the status of the Directive Principles by stating that no law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights. The Amendment Act added a new section to the constitution on "Fundamental Duties" that enjoined citizens "to promote harmony and the spirit of common brotherhood among all the people of India, transcending religious, linguistic and regional or sectional diversities." It reflected an emphasis among rulers on the need to impose order and discipline to counteract what was thought to be the unruliness of Indian democracy. After the March 1977 general elections with the defeat of the Congress, the new Janata-dominated Parliament

passed the Forty-third Amendment (1977) and Forty-fourth Amendment (1978). These amendments revoked the Forty-second Amendment's provision that Directive Principles would take precedence over Fundamental Rights. However, the judiciary today agrees that the legitimacy of a state action can be affirmed by the test, namely, if it conforms to a Directive Principle, and if it does, its legitimacy is re-affirmed.

¹¹ The Telegraph, 4 November, 2004

¹² Giorgio Agamben, State of Exception, trans. Kevin Attell (Chicago: University of Chicago, 2004)

¹³ Jaskaran Kaur, 17 July 2005, Globe Newspaper Company; The report on Ajaib Singh, "Frustrated Father Ends Life" came out in The Tribune, 9 July 1997; on the Punjab atrocities for more details, Ram Narayan Kumar, A Complex Denial, SAFHR Paper 9, Kathamndu, 2001; on the extreme bloody nature of the conflict, see Julio Ribeiro, Bullet for Bullet - My Life as a Police Officer, (Delhi: Penguin Books, 1998); J Pettygrew, The Sikhs of Punjab – Unheard Voices of State and Guerrilla Violence (London: Zed Books, 1995); and Gurharpal Singh, Ethnic Conflict in India – A Case Study of Punjab (Basingstoke: MacMillan Press, 2000)

¹⁴ Ranabir Samaddar, "The Juridical Political Claims of Minority Protection in India" in Nanda P. Wanasundera (ed.), Protection of Minority Rights and Diversity (Colombo: International Centre for Ethnic Studies, 2004)

¹⁵ M.A. Rane, "The Ever Expanding Horizon of Human Rights", PUCL Bulletin, January 2004

¹⁶ For this complicated history, Ajit Bhattacharjea (ed.), Social Justice and the Constitution (Shimla: Indian Institute of Advanced Studies, 1997); particularly the essay by A.S. Narang, "Justice for the Minorities"

¹⁷ On the concept of transitional justice the best still date is, Neil J. Kritz, Transitional Justice: How Emerging Democracies Reckon with Former Regimes, 3 Volumes (Washington D.C.: U.S. Institute of Peace Press, 1995)

¹⁸ On this, Stanley Cohen, States of Denial: Knowing About Atrocities and Suffering (London: Polity, 2001)

¹⁹ Heinz Klug, Constituting Democracy – Law, Globalism and South Africa's Political Reconstruction (Cambridge: Cambridge University Press, 2000)

²⁰ The noted economist Meghnad Desai wrote a piece on "Modelling an Early Warning System for Famines" in Jean Dreze and Amartya Sen (eds.), The Political Economy of Hunger, Volume II, Famine Prevention (Oxford: Clarendon Press, 1990), pp. 217-240; Desai speaks of "civil wars, invasions" as likely causes of famines, mentions disturbances in the food delivery system, speaks of the behaviour of public agencies, and of various shocks, but does not mention peasant behaviour (and here I mean political behaviour in form of agitation, rioting, looting, etc.) as a warning for the impending crisis.

²¹ Jean Dreze, "Famine Prevention in India" in Famine Prevention, p. 16

²² The Bangladesh famine of 1974 happened when per head food availability was more compared to 1967 (with that as the base index of 100, it was 106 in 1974, and went down to 99 in 1976); see Jean Dreze and Amartya Sen, Hunger and Public Action (Oxford: Oxford University Press, 1989), p. 27

²³ "Famine Prevention in India", p. 53

²⁴ <http://www.geocities.com/righttofood/>; The Support Group is a small group of volunteers who initially came together to help the People's Union for Civil Liberties (Rajasthan) to argue the case for the right to food in the Supreme Court. The Support Group also performs a basic facilitating role in the larger Right to Food Campaign, which is an outgrowth of the Supreme

Court hearing. At present, the Support Group consists of Aparna Bhat, Jean Dreze, Colin Gonsalves, Harsh Mander, Vandana Prasad and Kavita Srivastava. In addition, the “permanent invitees” are Ashok Bharti, Nikhil Dey, Neelabh Mishra, V.B. Rawat, Dunu Roy and S. Vivek.

²⁵ “Introduction, The Political Economy of Hunger, Volume II, Famine Prevention, p. 2-3

²⁶ Asish Ghosh, “Women Agricultural Workers, Food Security, and Globalisation” in Malini Bhattacharya (ed.), Globalisation – Perspectives in Women’s Studies (Delhi: Tulika Books, 2004), pp. 28-29

²⁷ Utsa Patnaik, “The New Colonialism – Impact of Economic Reforms on Employment and Food Security in India” in Globalisation – Perspectives in Women’s Studies, p. 46

²⁸ On this there has been some writings to draw public attention. For instance, Jayati Ghosh, “Food Insecurity in South Asia”, Asian Age, 27 December 2005; Aruna Roy, “Minds and Intestines”, Tehelka, 10 December 2005; Nistula Hebbar’s four-part serial on wages, grains, and public distribution system, the title of the first part being, “Wages Fail to Come in Time”, Business Standard, 16-19 May 2005; Joel Lee and Sukhadeo Thorat, “Caste Discrimination and Food Security Programme”, Economic and Political Weekly, September 24, 2005; National Human Rights Commission, “Extract from a Hearing on the Right to Food”, 2003; Colin Gonsalves, “The Spectre of Starving India”, <http://www.righttofoodindia.org/data/colin.pdf> ; On Kalahandi, Devinder Sharma, “The Kalahandi Syndrome – Starvation in spite of Plenty”, 19 April 2002, <http://www.mindfully.org/Food/Kalahandi-Syndrome-Sharma19apr02.htm>; and C. Ram manohar Reddy, “Crime of Food Surpluses”, The Hindu, 1 September 2001

²⁹ For a scientific understanding of this and the following terms, see Amartya Sen, Poverty and Famines (Oxford: Clarendon Press, 1981) where some of these concepts were first propounded; for brief enunciations, see Hunger and Public Action, pp. 9-17

³⁰ On this I have written at length. See, R. Samaddar, The Marginal Nation – Transborder Migration from Bangladesh to West Bengal (Delhi: Sage Pub., 1999), Chapter 10, “Agrarian Impasse and the Making of an Immigrant Niche”, pp. 150-61; see also Hunger and Public Action, pp. 77-78

³¹ R. Samaddar, Memory, Power, Identity – Politics in the Junglemahals, 1890-1950 (Hyderabad: Orient Longman, 1998), Chapter 3, “Popular memory and the Politics of Identity”, pp. 62-163

³² Hunger and Public Action, p. 104

³³ Hunger and Public Action, pp. 243-276

³⁴ R. Samaddar, A Biography of the Indian Nation, 1947-1997 (Delhi: Sage Publications, 2001), Chapter 3, “The Dynamics of Passive Revolution”, pp. 80-118

³⁵ In a report on public hearing on “Starvation and Right to Food in Jharkhand” written by Bela Bhatia and Jean Dreze has this line, “When someone at the hearing suggested that the locks of the FCI (Food Corporation of India) warehouses should be prised open, most participants raised their hand in support” (p. 6), <http://www.righttofoodindia.org/data/bhatiadreze.pdf> ; see also, “Right to Food – A Call for Action” – <http://www.sacw.net/2002/Rt2foodcallforactionjan03.html> ; “Dying of Hunger in a Land of Surplus” – Report from Baran, Rajasthan by Luke Harding, Guardian Weekly, 21 November 2002

³⁶ Here Michel Foucault’s reading of the growth of modern psychiatric power is instructive – M. Foucault, Abnormal – Lectures at the College de France, 1974-1975, trans. Graham Burchell (New York: Picador, 2003)

³⁷ In order to comprehend the complex relation between global forces and local famines, see Mike Davis, Late Victorian Holocausts – El Nino famines and the Making of the Third World (London: Verso, 2002)

³⁸ <http://www.righttofoodindia.org/data/wsflegal.doc> January 2004

³⁹ The legal documents mentioned in the above-mentioned URL provide with a comprehensive list of all relevant policy issues.

⁴⁰ On mid-day meal the ruling UPA took a resolution and the National Advisory Council adopted a set of recommendations on 28 August 2004; the first order to provide mid day meal to schoolchildren was passed by the Supreme Court on 28 November 2001. By the end of 2004 out of 35 states and union territories 23 had achieved full coverage of the scheme, while large states such as Bihar, Uttar Pradesh, West Bengal had defaulted. As result only 55 per cent of all children eligible to get cooked day meals had been covered. Paragraph 2 of the “Recommendations on Mid-Day Meals”, National Advisory Council, 28 August 2004 - <http://nac.nic.in/communication/meal.pdf>

⁴¹ “Declaration on the Right of Peoples to Peace”, Approved by General Assembly resolution 39/11, November 12, 1984

⁴² Amartya Sen, Development as Freedom (Delhi: Oxford University Press, 1999)

⁴³ A commentator terms this category as of “dispensable citizens” – Usha Ramanathan, “Creating Dispensable Citizens”, The Hindu, 14 April 2006

⁴⁴ Readers will note that all these are Sen’s concerns (Chapters 4, 5, 7, and 11), I am just taking note here of their inverted form, the inversion being done not by me as an act of malicious humour, but society achieves this inversion, as it has done of all liberal wishes.

⁴⁵ C.B. Mcpherson, The Political Theory of Possessive Individualism – From Hobbes to Locke (Oxford: Clarendon, 1962)

⁴⁶ On a critique of the spate of new policies in the mirror of the rights movement, Madhuresh Kumar, “Globalisation, State Policies and Sustainability of Rights”, Policies and Practices, 6, Calcutta Research Group, Calcutta, March 2005

⁴⁷ Report of the Second National Commission for Labour, http://labour.nic.in/lcomm2/nlc_report.html

⁴⁸ Chapter 12 of the Report, p. 26; I studied this trend at length when it was already apparent in early nineties in the printing sector. See, R. Samaddar, Workers and Automation – The Impact of New Technology in Newspaper Industry (Delhi: Sage Publications, 1994), Chapters 4 and 6

⁴⁹ Report, paragraph 12.215, p. 29; <http://labour.nic.in/lcomm2/2nlc-pdfs/Chap12-IIIfinal.pdf>

⁵⁰ Why 100 days only has no explanation, Madhuresh Kumar calls this a mythical figure (“Globalisation, State Policies and Sustainability of Rights”, p. 21), because if people below the BPL are the target, then they remain without work for about 8 months a year on an average.

⁵¹ On this, R.K. Rao and S.R. Sankaran, “Forest Myths, Jungle Laws, and Social Justice”, Economic and Political Weekly, 15 November 2003

⁵² For a comprehensive discussion on the ramifications of the proposed Bill, Sheela Barse, a jurist, “A Bill that Takes Away More than It Gives”, The Hindu, 1 July 2005

⁵³ Chittaroopa Palit, “Monsoon Risings – Mega-Dam Resistance in the Narmada Valley”, New Left Review, 21, May-June 2003, pp. 81-100

⁵⁴ For instance, eight villagers belonging to indigenous communities died in police firing at Tapkara, Jharkhand on 2 February 2001 when they along with an assembly of villagers tried to stop the construction. See the PUCL report, “The Adivasi Struggle for Land Rights at Koel-Karo”; the report brings out many of the points raised in this essay -

<http://www.pucl.org/Topics/Industries-envirn-resettlement/2002/tapkara.htm>

⁵⁵ In current times this is the most discussed issue in the rights literature in the country and it has dragged every possible political actor in the question. The journal Economic and Political Weekly recently brought out series of reports, articles, analyses, and investigative writings; see for instance issues of 10 July and 31 July 1999; 10 June 2000; 8 February 8 2003. The most comprehensive study till date of internal displacement in South Asia, Paula Banerjee, Sabyasachi Basu Ray Chaudhury, and Samir K. Das (eds.), Internal Displacement in South Asia – Relevance of UN Guiding Principles (Delhi: Sage and Calcutta Research Group, 2005); see also, Samir K. Das, Paula Banerjee, and Madhuresh Kumar, “People on the Move – How Governments Manage Moving Populations”, Policies and Practices, 1, Calcutta Research Group, Calcutta, March October 2004; Madhuresh Kumar, “Globalisation, State Policies and Sustainability of Rights”, Policies and Practices, 6, Calcutta Research Group, Calcutta, March 2005. Besides there are numerous reports of inquiries into displacement and deprivation due to riots also, particularly in Gujarat. See <http://www.indiatogether.org/2004/jan/ksh-denial.htm> ; Madhuresh Kumar, “Incorporating Gender Issues in National Responses”, <http://www.asiapacificforum.net/training/workshops/idp/papers/mcrg.doc>

⁵⁶ On the entire debate on development-induced displacement, see the comprehensive study by W. Courtland Robinson, Rights and Risks – The Causes, Consequences, and Challenges of Development-Induced Displacement (Washington D.C.: Brookings Institution, 2003)

⁵⁷ “Arundhati Roy Discusses the Sardar Sarovar Dam” with host Mishal Husain – Programme Transcript for the “Damned” broadcast on 18 September 2003; Wide Angle on PBS

⁵⁸ Harsh Mander, “What the State Cannot Destroy”, 7 August 2004, www.sacw.net

⁵⁹ “Democracy Endangered”, Human Rights, 11 (105), February 2005; Excerpted from a report, Democracy, Citizens and Migrants: Nationalism in the Era of Globalisation, Delhi 2005, published by the Citizen’s Campaign for Preserving Democracy, Hazards Centre, 92-H, 3rd floor, Pratap Market, Munirka, New Delhi 110 067

⁶⁰ Olivier Mendelsohn and Upendra Baxi, The Rights of the Subordinated Peoples (Delhi: Oxford University Press, 1994)

⁶¹ Colin Tatz, “A Question of Rights and Wrongs” in The Rights of the Subordinated Peoples, pp. 159-177

⁶² See the various papers in Rajendra Pradhan (ed.), Legal Pluralism and Unofficial Law in Social and Political Development, 4 Volumes, Papers of the 13th International Congress, Chiang Mai, Thailand, 7-10 April 2002, published by The Commission on Folk Law and Legal Pluralism, Department of Anthropology, University of New Brunswick, Canada and The International Centre for the Study of Nature, Environment and Culture, Kathmandu, Nepal, 2003

⁶³ On this see the collection of ethnographic studies by Joanna Pfaff-Czamecka, darini Rajasingham-Senanayake, Ashis Nandy, and Edmund Terence Gomez, Ethnic Futures – The State and the Identity Politics in Asia (Delhi: Sage Publications, 1999)

⁶⁴ Pierre Bourdieu increasingly noted this feature in his last days, and in a dialogue with the German novelist Gunter Grass spoke of this while commenting on the antiquated nature of modern democracies in face of the conservative revolution. – Gunter Grass and Pierre Bourdieu: in an exchange titled, “The Progressive Restoration”, published later in New Left Review. The dialogue took place in 1999 and Bourdieu died in 2002. For the text, Powers – Selections from New Left Review, Volume 2 (Kolkata: Seagull Books, 2006), pp. 116-132

⁶⁵ On this I have written earlier; See for instance, “Terror, Law, and the Colonial State”, published text of a public lecture under the same title (Guwahati: Omeo Kr. Das Institute for

Social Change, 2004); also translated and published in French as “Loi et Terreur: Le Constitutionnalisme Colonial”, Diogene, 212, Octobre-Décembre 2005; also published in Intiaz Ahmed (ed.), Terrorism in South Asia – Beyond Statist Discourses (Delhi: Manohar, 2006)

⁶⁶ G. Agamben, State of Exception, tr. Kevin Attell (Chicago: The University of Chicago Press, 2005); also his Homo Sacer: Sovereign Power and Bare Life, tr. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998)

⁶⁷ All these and several others feature in the only compendium on words and texts relating to the theme of autonomy. See, Sabyasachi Basu Ray Chaudhury, Samir Kumar Das, and Ranabir Samaddar (eds.), Indian Autonomies – Keywords and Key Texts (Kolkata: Calcutta Research Group, 2005)

⁶⁸ On this, R. Samaddar (ed.), The Politics of Autonomy – The Indian Experiences (Delhi: Sage Publications, 2005)

⁶⁹ On the relation between autonomy, dialogue, and justice, see the two reports of various participants in the rights movements and organisations in India, Dolly Kikon and Samir K. Das, Fourth Civil Society Dialogue on Conflict, Autonomy, and Peace – A Report (Kolkata: Calcutta Research Group, 2005), also available on <http://mcrg.ac.in/civilsocietydialogue4.htm> ; also the compilation by Sanjay Barbora, Experiences of Autonomy in the East and the Northeast – A Report of the Third Civil Society Dialogue on Human Rights and Peace (Kolkata: Calcutta Research Group, 2003), also available on, <http://mcrg.ac.in/civilsocietydialogue3.htm> ; see also Iftekharuzzaman (ed.), Ethnicity and Constitutional Reform in Asia (Dhaka: University Press Limited, 1998)

⁷⁰ On the globalisation of the right to autonomy, see the UN literature for instance, "Autonomy and Minority groups – A Legal Right in International Law?", E/CN.4/Sub.2/AC.5/2001/CRP.5, 5 March 2001; "Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities", E/CN.4/Sub.2/AC.5/2001/2, 2 April 2001; "Autonomy in the 21st Century – Through the Theoretical Binoculars", E/CN.4/Sub.2/AC.5/2001/CRP.1, 5 March 2001; report "Examples of Autonomy in Finland – The Territorial Autonomy of the Ollen Islands and the Cultural Autonomy of the Indigenous Saami People" submitted to the UN Commission on Human Rights, E/CN.4/Sub.2/AC.5/2001/WP.5, 8 May 2001; Ward Churchill, Struggle for the Land – Native North American Resistance to Genocide, Ecocide and Colonization, revised edition (Winnipeg: Arbeiter Ring Publishing, 1999); Melissa Magliana, The Autonomous Province of South Tyrol – A Model of Self-Governance? (Bolzano: European Academy of Bolzano, 2000); Finally, my study on most of these instances of measures and practices of autonomy is drawn from the 600-page report of the International Committee of Lawyers for Tibet, Forms of Autonomy – The Practice of Autonomous and Self-Government Arrangements (mimeo, 1999). I am grateful to Hubertus Von Welck of the Friedrich Naumann Stiftung, South Asia office, for making this volume of global survey available to me.

⁷¹ Carol C. Gould, Globalising Democracy and Human Rights (Cambridge: Cambridge University Press, 2004), pp. 77-102

⁷² Giorgio Agamben, State of Exception, trans. Kevin Attell (Chicago: University of Chicago Press, 2004), pp. 11-22

⁷³ Two publications are extremely significant in understanding the Indian trend - Indian Autonomies – Keywords and Key Texts and The Politics of Autonomy – Indian Experiences, both researches undertaken by the Calcutta Research Group

⁷⁴ Chapter 3, “Freedom and the Foundations of Justice” of Development as Freedom, pp. 54-86

⁷⁵ I have addressed the issue of dialogic justice in my The Politics of Dialogue – Living Under the Geopolitical Histories of War and Peace (Aldergate: Ashgate, 2004), Chapter 5, “Autonomy and the Requirements of Minimal Justice”, pp. 108-158

⁷⁶ Of Tilly’s many accounts of contentious politics, most relevant to the present discussion is C. Tilly, Social Movements, 1768-2004 (Boulder: Paradigm Publishers, 2004)