

# The "Other" Side of The Legal Regulation of

RATNA KAPUR

*Cet article explore les façons dont l'avènement de l'économie mondiale a déclenché une vague contemporaine d'émigrations, légales et illégales et les réactions à l'échelle locale et*

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*internationale à ce phénomène. L'auteure explique comment les stratégies politiques et légales mises en œuvre actuellement relativement aux mouvements outre-frontières sont diamétralement opposées aux droits des femmes et de tous les migrants, réfugiés ou ceux qui demandent asile.*

The current moment of globalization is witnessing an extraordinary movement of people, legitimate and illegitimate, across national and international borders. These movements are exposing the porosity of borders, the transnational reality of subaltern existence, and the contingent foundations of international law. And this global movement of people has created a panic across borders—a panic which is manifesting itself in the strengthening of border controls, tightening of immigration laws and casting of the "Other" as a threat to the security of the (First World) nation-state. In this essay, I discuss how the issue of cross-border movements is being displaced onto a first world/third world divide, designed to keep the "Rest" away from the "West," and premised on liberal exclusions and understandings of difference. I also examine how laws encounter with these constitutive "Others," quite specifically the transnational subaltern subject, disrupts and disturbs the universalist premise of international law.

This essay is divided into three sections. In the first section, I discuss how the global economic processes have triggered a contemporary wave of migration, legal and illegal, and the international and domestic responses to this phenomenon. In the second section, I discuss how the anti-trafficking initiatives in the public and private sphere of law have impacted on women, especially on their rights to mobility. Thirdly, I discuss how recent legal responses

to cross-border movements have been informed by the "War on Terror," which has converged with the discourse of the conservative Right building on the xenophobia predating September 11<sup>th</sup>, and turned it into a hostile antagonistic fear of the "Other" who is threatening the security of the nation (Human Rights Watch).<sup>1</sup>

My analysis exposes how the political and legal agenda that is currently being pursued in relation to cross-border movements is diametrically opposed to women's rights and others who cross borders in their capacities as migrants, refugees or asylum-seekers. The legal interventions in the lives of the "transnational subaltern subject" are being articulated primarily from the perspective of the host country and within the overarching concern for the security of the nation.

Throughout this text I use the term "transnational subaltern subject." In using the term "subaltern" I borrow from the insights of postcolonial theory and the subaltern studies project which have highlighted the fact that certain voices have been excluded from the dominant narratives and telling of history.<sup>2</sup> The subaltern studies project regards hegemonic history as part of modernity's power/knowledge complex, which in the context of colonialism, was deeply implicated in the "general epistemic violence of imperialism" (see, for example, Spivak; Otto). It reads the official archive against the grain and focuses on "listening to the small voice of history" including peasants, women, and even religious, sexual, and racial minorities (Guha 1996; Ahmad).

The history of subaltern studies is neither linear nor consistent. It is an area of scholarship that has undergone several permutations and transformations. The project was initially launched in Britain in the 1960s when Gramsci's writings exercised a significant influence on the shape of English Marxism. This period triggered an analysis of peasant societies based on the position and location of the subaltern subject—that is the location of the peasant. This project of writing history from below was subsequently taken up within postcolonial contexts, including in India.<sup>3</sup> Although the project was initially grounded in historical materialism and a search for an essential peasant consciousness, for some, this approach seemed too limited and restrictive for contesting the Eurocentric, metropolitan and bureaucratic systems of knowledge. The influence of Michel Foucault came to affect the subaltern project, producing subaltern critiques,

# Globalization Cross-Border Movements

which challenged scholarship and political activism that continued to adhere to the “Enlightenment ideals.” The project splintered into those who continued to write histories from “below” and those who adopted a more Foucauldian analysis (Chakrabarty). The new tradition that emerged was concerned with challenging all traditions and disciplines that were defined within the logic and rationale of the Enlightenment project. This dimension of the scholarship was concerned with unmasking the universal project spawned by the Enlightenment—its focus on reason, the atomized, ahistorical subject of liberalism, and the idea that history was a linear movement of progress emanating from the metropolis that spread across the globe. It shifted away from economic analysis as the primary zone of power, and began to unpack the multiple sites and locations of power through a discursive and textual analysis. Subaltern studies no longer remained preoccupied with the idea of a peasant rebel as an autonomous political subject who wrote his/her own history. The project did however continue to adopt the rich tradition of historical materialism that was spawned in its earlier incarnation. The scholarship expanded and began to address and challenge the neo-imperialism of the late twentieth century and problems of agency, subject position, and hegemony in an era of globalization.<sup>4</sup> In this essay, I draw on the insights of the subaltern studies challenge to the assumptions about universality; neutrality, and objectivity on which legal concepts are based, exposing such concepts to be products of the ruptures produced in and through the colonial encounter (Mehta; Anghie; Darien-Smith & Fitzpatrick). Quite specifically, I reveal how the legal regulation of cross-border movements is contingent on law’s understanding of and engagement with difference:

## The Context

Nearly 150 million migrants are crossing borders in our world today—from rural towns to urban centers, from the periphery into the metropolis, from the global south into the global north (IOM). And these crossings are profoundly challenging our most basic notions of women’s reproductive labour, family, community, nation, culture, and citizenship. Transborder and in-country movements and migrations are occurring for a plethora of reasons: the reconfiguration of the global economy, the ability to

travel, displacement and dispossession of marginalized populations, the awareness through consciousness raising that there are better options elsewhere, armed conflict and

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of course the basic human aspiration to explore the world.

A growing number of floating migrants are squatting on “global borderlands” having been forced from their own homelands by powerful forces of exclusion and disadvantage (Sanghera). Countries of the global north and the global south are pockmarked with these global borderlands and their alien inhabitants are practically invisible to those who reside in and manage the business and defense of homelands (Sanghera). And these inhabitants are gendered subjects, consisting of large numbers of young women and adolescent girls.

Globalization is invariably used to refer to the free flow of capital, deemed as critical to the efficiency of the market and intrinsic to the globalization process. It is a ubiquitous process that has challenged the fixed borders of the nation state and the autonomy of the sovereign subject. The market also triggers a global flow of labour, yet the free flow of labour is not addressed within the discourse of market management. It is addressed in and through the international legal order by initiatives dealing with trafficking, human smuggling, border controls, terrorism, and sexual morality. The impact of these different initiatives on cross-border movements is mediated by gender, class, religion, sexual, and marital status.

What remains to be addressed in these responses is how countries of origin and destination stand to gain in significant economic ways from migration, including from clandestine migrant-mobility. In the context of globalization, migrations do not just happen—they are produced. The countries of destination and the sites of employment are determined by the demand on the part of the market and capital for an increased rate of profit. This demand is partly fulfilled by depressing the wages of

labour and decreasing the costs of production. The specific demand for an abundant supply of low wage labour and a shrinking supply of a local workforce especially in the global North also helps to sustain the economy of the global metropolises and the continuing processes of migration. At the same time, remittances in the form of gifts and cash remittances to countries of origin have registered extraordinary increases over recent years. Estimates of migrants' remittances have been recorded at over one hundred billion U.S. dollars of which 60 per cent goes to developing countries (Buch, Kucklenz and Le Manchec). Some studies reveal that over the last decade, remittances have actually provided a larger source of income for

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developing countries than official development assistance (Hamburg World Economic Archives). They also appear to be a more stable source of income than private flows which can be volatile and only flow into a limited number of companies. A good portion of these remittances are invisible as they do not flow through regular channels of the economy. Yet some studies in the Asia-Pacific reveal that the remittances flow back through informal and underground conduits, and sustain household, community, and sometimes even local and national economies.<sup>5</sup>

Although migration is a fact of a globalized economy, the response of the international legal order to what is cast as the *migration dilemma* is either incomplete, or one that aggravates the situation of those who cross borders. The issue is a politically charged one as it exposes the porosity of national borders, and reveals the "other" side of globalization. In recent years the avenues for regular, legal, and safe migration have decreased worldwide, due to increased border controls, and restrictive migration and immigration policies adopted in countries of transit and destination. This phenomenon has given rise to a growing market for clandestine migration services under the migrant-mobility regime (Sanghera). The clandestine regime is produced in part by a legal structure that fails to recognize the need for marginalized groups to migrate on the one hand and the demand for cheap, exploitable labour, on the other. The regime that has emerged consists of providing a host of "services" to those who cross borders, including the facilitation of smuggling, illegal migration and underground travel, and the provision of false passports, visa permits, and identity papers. The presence of this regime constantly threatens to rupture and force the rearticulation of the

nation-state and the uniformity of the liberal subject. The regulatory edifice of the law with its punitive consequences is being confounded by the emergence of this clandestine migrant-mobility regime.

### Gendered Aliens

The response to migration is highly gendered. Female migration is not addressed within the framework of the global economy, the search for better economic opportunities or the demand for women's reproductive labour. Women's cross-border movements continue to be addressed primarily through anti-trafficking discourse at the international, regional, and domestic level. Under these initiatives, a woman's consent is irrelevant and her subjectivity denied. She is addressed primarily as a victim, to be rescued, rehabilitated, and repatriated. At times her consent is acknowledged only to implicate her in the discourses of immorality, (for such migration is consistently and erroneously conflated with sex work), and criminality, to be penalized together with traffickers, and terrorists for exposing the porosity of borders and the vulnerability of the nation-state. These responses do not engage with the premise that migration is a manifestation of globalization—that it is indeed globalization. The responses are constructed along the binaries of the "West" and the "Rest." And women, especially from the postcolonial world, are cast as either victims, incapable of decision-making or consenting, sexual deviants, disrupting the moral and social fabric of the sexually sanitized West and/or dangerous "Others," threatening the security of the nation state (Kapur).

Women are the primary squatters of the new global borderlands that constitute part of the contemporary transnational, transmigratory world. Half of nearly all migrants are women and girls, and many of these are migrating independently rather than as part of a family (Sadiqu).<sup>6</sup> The process of women's movement is determined by a number of factors that render them amenable to migration and vulnerable to human rights violations. Women move and are moved with or without their consent for a variety of reasons. The insecurity of food and livelihood and the growing economic reliance of households on earnings of women and girls; the erosion of social capital and the break down of traditional societies; the transnationalization of women's labour in sectors which do not comply with labour or human rights standards and often rely on exploitative labour, forced labour, and slavery like practices (Sanghera). And this movement is rendered vulnerable as a result of several normative assumption about gender and sexuality, quite specifically, the normative assumption that women's primary work is in the home, underscored by the sexual division of labour. The fact that women's movement is impelled by a number of economic push and pull factors remains largely unaddressed in schemes that focus on

anti-trafficking, restrictive immigration regulations at borders, and the penalizing, criminalizing, and deportation of alien migrants as a response to the growing “problem” of transnational migration and trafficking. Closing doors to keep the individual migrants out by resorting to the tools of deportation or incarceration, ignores the economic engine that drives transborder and female migration.

Women migrants constitute a substantial pool of workers, offering their reproductive labour in the form of work in the sex trade, domestic work, and/or marital bliss. And she becomes more attractive to the global economy if her status as a migrant is illegal, in which case her social and economic options and demands are constrained. The disadvantaged migrant woman becomes the *ideal worker* from the standpoint of capital and integral to sustaining the current structure of the economy. This situation of illegality and disadvantage also renders migrant women vulnerable to exploitative and forced labour like conditions of work.

The choice of the female migrant to cross borders is conditioned by the push and pull factors that induce movement. This choice is not facilitated nor protected by international legal mechanisms, which are triggered once she steps across the line that separates “here” from “there.” Instead, the moment of border crossing also marks the moment when her choice is determined primarily within the framework of anti-trafficking discourse.<sup>7</sup> This discourse fails to distinguish between women’s migration, sex work and trafficking. In fact, trafficking has come to be variously and integrally interwoven with migration (mainly illegal), clandestine border-crossings, and the smuggling of humans. And on a parallel plane, the trafficking in women and girls is routinely conflated with their sale and forced consignment to brothels in the sex industry. This conflation of trafficking with various manifestations of migration and mobility on the one hand, and sex work on the other, lies at the core of the confusion that underpins women’s cross-border movements and the legal response to these movements.

Equating trafficking with migration leads to simplistic and unrealistic solutions—in order to prevent trafficking there is a conscious or inadvertent move to stop those who are deemed vulnerable from migrating. Even when curbing migration is not a stated programmatic focus, an inadvertent impetus is to dissuade women and girls from moving in order to protect them from harm. Conflating trafficking with migration results in reinforcing the gender bias that women and girls need constant male or state protection from harm, and therefore must not be allowed to exercise their right to movement or right to earn a living in the manner they choose.

Secondly, curbing migration will not stop trafficking, but merely drive the activity further underground, and make it more invisible. This lesson has been learnt from states who have proceeded to enforce increasingly strin-

gent immigration controls as a response to heightened trafficking in persons and narcotics. Borders cannot be impermeable, and stricter immigration measures have resulted in pushing the victims further into situations of violence and abuse.

Thirdly, when no clear conceptual or operational distinctions are drawn between migration and trafficking, and in fact, when migration is considered equal to trafficking, then it logically follows that the number of victims of trafficking is equal to the number of those who have migrated voluntarily. This logic operates particularly in the case of adolescent girls and women migrants, and not in the case of men. This practice has resulted in an

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extremely flawed methodology for conducting baseline surveys on trafficking in “risk-prone” and “affected districts” in different South Asian countries. Absence of women or girls is routinely considered tantamount to “missing persons,” and therefore, trafficked. This logic has resulted in the viewing all consensual migrant females as trafficked.

And finally, there has been a continued persistence among anti-trafficking players to conflate trafficking with sex work/prostitution. By collapsing the process with the purpose, the abuse and violence inherent in trafficking is mistaken for the actual site of work and form of labour. Furthermore, trafficking for all other purposes is largely ignored, and targeting trafficking for prostitution becomes the principal agenda of anti-trafficking interventions, policies, and laws.

The focus of anti-trafficking initiatives at the domestic, regional, and international level rarely focus on providing women who move with human rights—the tools that are critical to fighting abuse, violence, and harm they may experience in the course of movement. Instead, some of these measures are morality measures that conflate women’s cross-border movement with sexual corruption and contamination. Other initiatives assume that the problem exists over “there” in the “third world” or postcolonial world and suggest strategies that reinforce the image of a truncated seriously battered, culturally constrained, and oppressed subject that needs to be rescued and rehabilitated by a civilizing west (Mohanty). More recently, trafficking initiatives have been obscured by an overarching concern with security, particularly on the part of the industrial world, which perceives the “outsider” as dangerous, from which the nation must be protected.

## Migration and Terrorism

The issues of trafficking and migration are now being taken up within the overarching concern with security of the nation and the global "War on Terror." The War on Terror has acquired a supernatural life and existence outside of the international legal order, while simultaneously pursued in and through the processes and institutions of the international regime. The Security Council and the General Assembly have been deployed to foreground the security and sovereignty of some nation-states through the abrogation of the security and sovereignty of other nation-states. The legal mechanisms endorsed in

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pursuit of this endeavor have resulted in the enactment of laws at the domestic and international level that have further cauterized cross-border movements, and justified going after anything and anyone one does not like.

Globally, we are witnessing a heightened anxiety about the "Other," who is perceived as a threat or someone who is dangerous to the security of the nation. The boundary line of difference is being redrawn along very stark divides—between friend and enemy, those who are good and those who are evil. Although these concerns are most explicitly voiced by the extreme right or religious right, less noticed is the more uniformly pervasive emergence of similar forms of conservatism within mainstream discourses. The "alien migrant" has become one of the primary casualties of the failure to define either the purpose or limits of the War on Terrorism. And this failure forces migrants to continue to move through illicit channels, and remain vulnerable, stigmatized and illegitimate.

Across Europe and North America, the conservative voice is building on the fear of the "Other" crossing borders, the threat they pose to the nation-state and the values of "western civilization." Pat Buchanan voices this fear when he predicts the death of the west from immigrant hoards amongst others in his recent book *Death of the West*. He argues that the very survival of the west is under threat, as a result of depopulation, surrender of nationhood, and the flood of Third World immigration.

Now that all the Western empires are gone, Western Man, relieved of his duty to civilize and Christianize mankind, reveling in luxury in our age of self-indulgence, seems to have lost his will to live and recon-

ciled himself to his impending death. Are we in the twilight of the West? Is the Death of the West irreversible? (1)

And these fears have been accentuated post-September 11<sup>th</sup>. Buchanan argues that the events of September 11<sup>th</sup> exposed a new divide.

Suddenly we awoke to the realization that among our millions of foreign-born, a third, are here illegally, tens of thousands are loyal to regimes with which we could be at war, and some are trained terrorists sent here to murder Americans. (2)

There is the fear of some fanatical, uncontrolled migration from places that have nothing in common with America's history (all 200 years of it), heroes, language, or culture and there are some specific races or ethnic groups that are particularly averse to changing, or assimilating. And that "Other" is mostly "Arab looking" and Muslim. Their cultures are constantly essentialized and pitted against universal norms and values such as freedom or liberty.<sup>8</sup>

The new War on Terrorism has created space for a more strident and alarming response to the global movements of people, reducing it at times to nothing more than an evil threat. If terrorism is defined as a transnational crime, then by merely committing the crime of seeking illegal movement and illegal entry these people could be defined as terrorists. Because the smugglers offer travel services to illegal migrants, they would easily fall within the category of transnational organized crime, criminals, and potential terrorists. At the very worst they are terrorists and at best they are criminals who have sought to cross the border illegally. These simple equations again led to a disjuncture between reality of the illegal migrant and the issue of terrorism. The conflation of the migrant with the terrorist is not new, but it has received greater attention since September 11.<sup>9</sup> It has afforded more space for the representation of the "Other" as a fanatic and dangerous and opposed to freedom (Porras).<sup>10</sup>

The mass movements of people have produced responses at the international and domestic level that fail to account for the factors that have triggered such movements. At the international level, cross-border movements have been addressed within the framework of trafficking and smuggling. As discussed, this approach has had a particularly adverse impact on women pushing them further into situations of violence and exploitation. At the domestic level, these movements have been addressed through appeals to assimilation and tests of fealty to the nation,<sup>11</sup> through the criminal law and the othering of the "alien migrant," who fails to assimilate and continues to enter countries through illegal means. Since September 11<sup>th</sup>, security has become the overarching concern, and enabled some governments to use the fear of threats to the nation to detain the "Other"

in ways that fan the flames of hatred and intolerance and fail to make a distinction between the migrant, terrorist and trafficker (Volpp).

These responses fail to engage with the transnational, transmigratory processes that have been triggered by new global processes. Cross-border movements have become a feature of the contemporary moment and an integral aspect of globalization. Although a new legal arrangement has been established to deal with and facilitate the cross-border movement of capital, there has not been a simultaneous movement to deal with the concomitant cross-border movement of people and labor through legal processes that accommodate this new reality. Instead states have sought refuge in traditional notions of nation-state identity and sovereignty to resist cross-border traffic. And this assertion of national identity is being constituted and buttressed through assimilationist moves as well as through the creation of fear of the “Other” as a threat to the nation’s security.

The War on Terror has resulted in legal reforms that alienate those who have been cast as the “new enemy” and justifies the resort of punitive measures on the grounds that these people are evil or dangerous and not entitled to due process or rights. The recourse to border controls, ethnic purity, cultural values and nationalism, are constructed along the anxieties of dealing with difference and serve to stigmatize, penalize and criminalize those who cross borders. These responses push us further away from addressing the complexity of cross-border movements and the equally complex legal and political responses required to address the issues raised by such movements.

The space for the migrant is being eroded through the discourse of trafficking and through the discourse of terrorism and threats to the security of the nation. Both justify initiatives designed to keep the “Rest” away from the “West.” This shift is troubling given that movement and migration is partly a phenomenon of the current phase of globalization and hence it is and will continue to be a feature of our transnational world. Criminalizing or victimizing those who cross borders forces these people to continue to move through illicit channels, and remain vulnerable, stigmatized and illegitimate. It seems unlikely that the security of what’s left of the nation-state can be achieved at the cost of the security of the alien migrant. Indeed it will only serve to encourage the construction of a paradox, where the security of the alien migrant is perhaps less threatened by people smugglers than by the current international system of protection offered to people who move as migrants, refugees, or asylum-seekers

### **Re-configuring Responses to Cross-Border Movements**

The legal interventions in the lives of the alien migrant have been articulated primarily from the perspective of the host country. The subaltern voices are omitted from these

conversations and yet these are the voices that can assist in untangling the confluences and confusions that are taking place between trafficking, migration and terrorism in the international and domestic legal arenas. The voice of the subaltern needs to be foregrounded—not as a terrorist, nor as a victim, but as a complex subject who is affected by global processes, and seeking safe passage across borders. They are exposing the need to think about international law and rights in ways that are not confined to the boxes of sovereignty, the nation state and the autonomous subject of liberal rights discourse. Their stories provide a very different narrative about why people move and how to accommodate that movement. For example, as Saskia

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Sassen has demonstrated, the evidence indicates a patternizing in the geography of migration, and receiving countries get migrants from countries and places that form or did form a part of their zone of influence (Sassen). This would explain some of the patterns of migrations to the United States and the United Kingdom. It is partly an outcome of the actions of a government’s foreign policy and their economic involvement in countries of origin. Earlier colonial patterns also inform current migration patterns, captured in the slogan, “We are here, because you were there.” One of the most obvious ways in which to alleviate the injustices and harms that occur during the course of movement is to alter immigration laws in order to accommodate these cross-border movements. The fear of a flood of “Others” is neither grounded in statistics nor a self-evident negative process. The fear of change or survival of one’s culture and identity is based on a false assumption that cultures are static and fixed and frozen in time (du Gay and Hall). Yet the colonial encounter is evidence of the fact that a return, the retrieval of a pristine and culturally authentic space is not possible (Grewal and Kaplan).

Yet the legal reform of immigration laws is neither adequate nor sufficient to address the broader concerns I have set out in this paper. The transnational subaltern subject also brings a normative challenge—to the porosity of national borders, the notion of fixed, stable, autonomous, sovereign subject, and the emergence of non-state entities as a significant force in the international arena. The sovereign state and the sovereign subject are being laid bare through the challenges posed by the world’s constitutive “Others.” The liberal state and the liberal subject are based on the idea of fixed borders, with clearly

identifiable interests and identities. They are imbued with the power to decide, choose, and act autonomously. Yet globalization, which produces the challenge of migration and non-state actors to the legitimacy of the borders of the sovereign state and the autonomous subject, indicates otherwise. The complexity of new global formations and the dynamic character of transnational subaltern subjects, challenge any notion that the state and individual are hermetically sealed and capable of exercising control through self-contained power (Brown). The inability to distinguish those who constitute national subjects from those who are alien or foreign is blurred reflecting the uneasy location of a distinct national entity with distinct borders and a distinct, clearly delineated national subject. The legitimizing tools of cohesion, unity and sovereignty become blunt in the face of a more complex and integrated world and global economy and the challenge posed by the transnational subaltern subject.

The role of law, at the international and domestic level, should be to address how broader transnational processes affect flows or movements of people and are an integral feature of globalization. And this in turn requires radical rethinking. As long as these issues are not viewed through the complex lens of globalization, market demand and the in/security of the nation-state, the rights and legitimacy of these people will remain unaddressed or compromised, and contribute to the growing instability of both the host country and this itinerant population. Cross-border movements have been caught within the framework of a "War" fought along the simple binaries of good versus evil, civilization versus barbarism. A response to border crossings cannot be adequately addressed through such binaries. Indeed this myopic response will do little to discourage the illegal crossing of borders or the determination of those who want to move.

The agency of women also needs to be foregrounded. She is currently invoked as either a victim in need of rescue from the conniving, manipulative, culturally primitive subaltern family or is herself equated with the demonized or contaminating "Other." Her complex subjectivity remains unaddressed in the legal and policy approaches being pursued at the national and international levels. Women's choice or agency remains either non-existent, questionable or tainted. Her choice to move must be distinguished from other situations where her consent is absent or her movement is compelled by strife or conflict.

To provide protection to women who are moved or choose to move across borders, a distinction must be made between the abuse and human rights violations committed during the entire process of transport and subjection to exploitative labour conditions, and the form of employment or the purpose of the movement. Exploitation in marriage, domestic work, or the carpet industry, has not resulted in the elimination of these arenas of work. Interventions focus on targeting the abuse, violence, and violation of rights that these workers endure. Similarly,

eradicating the sex industry in a bid to prevent the harm of trafficking is unworkable. Sex work as the exclusive purpose of trafficking is an untenable definition of trafficking as not all victims of trafficking are sex workers nor have all sex workers been trafficked.

Women's choices to cross borders need to be viewed within the context of empowerment and their search for better economic market opportunities. Their consent must be located in the matrix of the global economy, market demand, and cross-border migrations. Currently, their cross-border movements are largely located and addressed within normative understandings about women's sexuality, the security of the nation, and the criminal law. Her choice is re-configured through international legal processes, and she is either rendered a victim, to be repatriated to her home country, or as a criminal, a trespasser, to be prosecuted along with traffickers and terrorists for having exposed the porosity of national borders. Legal barrier methods fail to attend to the complex factors that induce migration, and instead, target the individual, as being exclusively responsible for the problem of transnational migration. The receiving country is not implicated in this migration phenomenon, and is justified in resorting to methods of containment and confinement. These punitive measures constitute migrant women as outlaws, and compel them to live illegal lives. The international legal order has failed to facilitate women's freedom of mobility and safe migration, especially though not exclusively, from the south to the north. Her consensual movement is rendered illegal, through the foregrounding of the security of the nation-state, the conservative sexual morality that informs anti-trafficking laws, and the xenophobic responses to global movements that increasingly inform immigration laws. These "overground" legislative measures are supplemented by a parallel "underground migrant-mobility regime," where travel agents and transporters, complete with route maps, directions, and a list of the least vulnerable points of entry, negotiate how their human cargo will cross borders, avoiding apprehension by state agents and border patrols.

Regardless of why women move, their assertion of the right to mobility, self-determination and development, must not be confused with the violence, force, coercion, abuse or fraud that may take place in the course of migration or transport. The crime rests in the elements of abuse and violations, which are committed against women along the continuum of women's migration and not because of the movement or mobility per se.

In order to address the issue of cross-border movements, we cannot simply remain confined to the domestic arena, where regulatory enforcement is focused on the individual and the border. Nor can this process be addressed in the international legal arena purely in terms of criminality or trafficking. These responses fail to understand the global context in which such movements are occurring. In order to understand and respond to the

relationship between such global movements and the law, it is necessary to revisit this issue as not one that is cast in terms of binaries—the security and cohesion of the state, versus the invasion of hordes of “Others.” It must be addressed against this broader canvass of transnationalism. Transnational movements require a transnational response and analysis—they cannot be caught within older frameworks. We need to complicate the global-local, center-periphery which is based on a purely locational politics. The transnational subaltern subject is living the global reality and evidence of the fact that global and cultural flows are not unidirectional nor uniform. They reverse and displace the original aims of most legal responses, which are directed at securing and policing the borders of the nation state, and the stability of the sovereign subject. The transnational subaltern subject is exposing the unstated norm from which such responses are emanating, and returning the gaze in a way that forces us to revisit current legal responses to cross-border movements, and to acknowledge the fact that people will move illegally if legal means are not made available to them.

The transnational subaltern subjects are moving—across national, regional, and international borders. And they are simultaneously drawing attention to the disparate arenas of power with which we must engage in order to understand the global movement of people and the normative and political significance of the transnational subaltern subject.

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

*Ratna Kapur is Director of the Centre for Feminist Legal Research, New Delhi, and a Global Visiting Faculty at New York University School of Law. She has taught and written extensively in the area of feminist legal theory, human rights, and postcolonial studies.*

<sup>1</sup>Some of this fear or aversion is expressed in the enactments of anti-terrorist legislation around the globe which are vaguely drafted, over inclusive and are likely to be used to target protest which is legitimate but may be disapproved.

<sup>2</sup>See, for example, Guha 1982a, 1982b, 1997; Guha and Spivak; Chaturvedi; Beverley; Chakrabarty. See also Chatterjee 1983, 1986.

<sup>3</sup>See also Sarkar's *A Critique of Colonial India* who best represents the focus of the earlier efforts of subaltern studies. Sarkar argues in favor of a theoretical framework capable of capturing the nuances of the agency of the colonized by foregrounding the spaces of resistance in the colonialist-nationalist discourse.

<sup>4</sup>The subaltern project took on several other incarnations. In North America, it became influential partly because it coincided with the emergence of multiculturalism, but more importantly, because it converged with postcolonial theory (see Said). The project in merging somewhat with postcolonial scholarship continued to challenge the metaphysical foundations of the Enlightenment, and highlighting the production of knowledge through the relationship of power—that is—through moments of crisis, ruptures, fractures and conflict

<sup>5</sup>There are equivalents of the well known hawala system in all regions of the world. The hawala system, emanating out of India, is a massive and efficiently organized system within the underground parallel economy that specializes in money transfers within and across borders. It is also one of many informal systems currently being targeted by the current “War on Terror.”

<sup>6</sup>See Lim and Oishi's article “Interantional Labour Migration and Asian Women: Distinct Characteristics and Policy Concerns,” where the authors state that in most countries of Asia, the transnational migration of women has increased from 15 per cent to 27 per cent, resulting in Asian women outnumbering Asian men as overseas migrants (87).

<sup>7</sup>See the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Girls supplementing the Convention on Transnational Organized Crime, 2000; the Convention on Preventing and Combating Trafficking in Women and Children from Prostitution, adopted by the South Asian Association for Regional Cooperation, January 2000; the Asian Regional Initiative Against Trafficking (ARIAT), Regional Action Plan Against Trafficking in Persons, Especially in Women and Children, March 2000; Thailand's Memorandum of Understanding on Common Guidelines for Agencies Concerned with Cases where women and children are the Victims of Human Trafficking, June 1999; U.S. Protection of Victims of Trafficking Act, 2000; the Victims of Trafficking and Violence Protection Act of 2000.

<sup>8</sup>In his address to the nation on September 11<sup>th</sup>, President Bush concluded that the U.S. had been attacked by “evil” because “we're the brightest beacon for freedom and opportunity in the world” (President George W. Bush, Statement in Address to the Nation, Sept. 11, 2001, available from Office of the Press Secretary, The White House). “This will be a monumental struggle of good versus evil. But good will prevail” (President George W. Bush, Remarks Following Meeting with National Security Team, Department of State 12 September, 2001, available at [www.usembassy.org.uk/bush73](http://www.usembassy.org.uk/bush73) visited on 28th of August). The Italian Prime Minister, Silvio Berlusconi, is reported to have “praised Western civilization ... as superior to that of the Islamic world and urged Europe to reconstitute itself on the basis of its Christian roots” (Erlanger A8). “I think the world increasingly will understand that what we have here are a group of barbar-

ians.... So it's an attack not just upon the United States but upon, you know, civilized society.... We also have to work, through, sort of the dark side, if you will... That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically to achieve our objective. And I think we have to recognize we are the strongest, most powerful nation on Earth" (Vice President Cheney, Text of Remarks on Meet the Press, 17 September, 2001, on file, <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html>). See also recent comments by religious right leader Pat Robertson describing Islam as a violent religion that seeks "to dominate and then if need be destroy" ("Islam is violent in nature").

The broad scope and breadth of the legislation that has been enacted by some states attests to the fact that they are using the legislation for purposes other than merely targeting terrorism. See especially Human Rights Watch, World Report. The report criticizes legislation enacted immediately after the September 11<sup>th</sup> attacks, as being over inclusive and compromising on civil liberties. For example, it states that the emergency legislation rushed through the U.S. Congress, the so-called U.S.A Patriot Act, permits the indefinite detention of non-deportable non-citizens once the attorney general "certifies" that he has "reasonable grounds to believe" that the individual is engaged in terrorist activities or endangers national security. These broad and vague criteria could allow the attorney general to certify and detain any alien in the United States who had any connection, however tenuous or distant in time, with a group that had once unlawfully used a weapon to endanger a person" (xxiv). The report is critical of several other measures by governments in different parts of the world that feed an anti-immigrant agenda rather than an anti-terrorist concern. Similar human rights compromises could be found in other aspects of the global response to terrorism. Australian Prime Minister John Howard, stoking post-September 11 fears of foreigners, built his candidacy for re-election in November around his summary expulsion, in blatant violation of international refugee law, of asylum-seekers who had reached outlying Australian territory. Proposed European Union-wide security measures included a broad definition of terrorism that threatens freedom of association and the right to dissent; a European arrest warrant to facilitate transfer of terrorist suspects without fair-trial safeguards; and a "re-evaluation" of the right to seek asylum in Western Europe in light of new security considerations. Proposals by the British government would permit the prolonged arbitrary detention of foreigners suspected of terrorist activity and severely curtail the right to seek asylum. The Indian government used the new focus on terrorism to push for sweeping new police powers of arrest and detention—powers last used to crack down on political opponents, social activists, and human rights defenders. The U.S. government detained over 1,000 suspects

following the September 11 attacks, but threw a shroud of secrecy over the cases that made it impossible to determine whether criminal justice powers were being appropriately applied.

<sup>10</sup>See Nelan: "The clash between Islamic religious and political authority is more widespread and in some places more threatening now than it was then.... This is the dark side of Islam, which shows its face in violence and terrorism intended to overthrow modernizing, more secular regimes and harm the Western nations that support them. Its influence far outweighs its numbers. ....these disparate cells of angry young men seem to boil up from the broad opposition growing in the largely undemocratic countries of the region, in a self-proclaimed war to force pure, undiluted Islamic law on the societies that have failed them." See also, Church's article, "The Terror Within," where John Bolton, the former secretary of state is quoted as stating that "I think the U.S. is viewed as principal target of Islamic terrorists who are trying—at a minimum—to get the U.S. in effect to withdraw from the Middle East." See also Hardy.

<sup>11</sup>See White Paper of the British Government, Safe Borders Secure Haven, February 2002, proposing that people who want to become UK citizens take a compulsory English language test and an exam on the ways of British life, British society and British institutions. The sole previous requirement was just a passport. They will also be required to take a citizenship pledge. These measures are justified by the home secretary in the following terms: "Our future social cohesion, economic prosperity and integrity depends on how well we rise to the global challenge of mass migration, communication and flight from persecution." Some of these measures have been incorporated into the recently enacted British Nationality, Immigration and Asylum Act, 2002.

## References

- Ahmad, Aijaz. "Fascism and National Culture: Reading Gramsci in the Days of Hindutva." *Lineages of Present: Political Essays*. New Delhi: South Asia Books, 1996.
- Anghie, Anthony. "Francisco de Vitoria and the Colonial Origins of International Law." *Social and Legal Studies* 5 (3) (1996): 321-336.
- Beverly, John. *Subalternity And Representation: Arguments In Cultural Theory*. Durham, NC: Duke University Press, 1999.
- Brown, Wendy. *Politics Out of History*. New Jersey: Princeton University Press, 2001.
- Buch, Claudia M., Anja Kucklenz and Marie-Helene Le Manchec. *Worker Remittances and Capital Flows*. Kiel Institute for World Economics, Working Paper No. 1130, 2002.
- Buchanan, Pat. *Death of the West: How Dying Populations and Immigrant Invasions Imperil Our Country and Civilization*. New York: St. Martin's Press, 2002.

- Chakrabarty, Dipesh. "Radical Histories and Questions of Enlightenment Rationalism: Some Recent Critiques of Subaltern Studies." *Mapping Subaltern Studies and the Postcolonial*. Ed. Vinayak Chaturvedi. London: Verso, 2000. 256-280.
- Chatterjee, Partha. "More on Modes of Power and the Peasantry." *Subaltern Studies II: Writings on South Asian History & Society*. Ed. Ranajit Guha. Delhi: Oxford University Press India, 1983. 311-349.
- Chatterjee, Partha. *Nationalist Thought and the Colonial World: A Derivative Discourse?* London: Zed Books, 1986.
- Chaturvedi, Vinayak. Ed. *Mapping Subaltern Studies And The Postcolonial*. London: Verso, 2000.
- Church, George J. "The Terror Within." *Time* July, 5 1993: 32-37. Retrieved online www.time.com Friday, September 21, 2001.
- Darian-Smith, Eve and Peter Fitzpatrick. Eds. *Laws of the Postcolonial*. Ann Arbor: University of Michigan Press, 1999.
- Du Gay, Paul and Stuart Hall. *Questions of Cultural Identity* London: Sage Publications Reprint Edition, 1986.
- Erlanger, Steven. "Italy's Premier Calls West Superior to Islamic World." *New York Times* 27 September 2001: A8.
- Grewal, Inderpal and Caren Kaplan. "Introduction: Transnational Feminist Practices and Questions of Postmodernity." Eds. Inderpal Grewal and Caren Kaplan. *Scattered Hegemonies: Postmodernity and Transnational Feminist Practice*. Minneapolis: University of Minnesota Press, 1994.
- Guha, Ranajit. "On Some Aspects of Historiography in Colonial India." *Subaltern Studies I: Writings on South Asian History and Society*. Ed. Ranajit Guha. Delhi: Oxford University Press India, 1982a. 1-9.
- Guha, Ranajit. "Preface." *Subaltern Studies I: Writings on South Asian History and Society*. Ed. Ranajit Guha. Delhi: Oxford University Press India, 1982b. vii-viii.
- Guha, Ranajit. "The Small Voice of History." *Subaltern Studies IX*. Eds. Shahid Amin and Dipesh Chakrabarty. Delhi: Oxford University Press India, 1996.
- Guha, Ranajit. Ed. *A Subaltern Studies Reader 1986-95*. Minneapolis: University of Minnesota Press, 1997.
- Guha, Ranajit and Gayatri Chakravorty Spivak. Eds. *Selected Subaltern Studies*. New York: Oxford University Press, 1988.
- Hamburg World Economic Archives-IDP. Migration and Remittances, Dossier No. 3, April 2003.
- Hardy, Roger. *Islam and the West: An Unholy War?* Retrieved online www.bbc.co.uk August, 21 1998.
- Human Rights Watch, World Report 2002. Available online at <http://www.hrw.org/wr2k2/> Retrieved August 28, 2002.
- International Organization of Migration (IOM). *World Migration Report*, 2000.
- "Islam is violent in nature." *New York Times* 23 February 2002: A8.
- Kumar, Amitava. *Passport Photos*. Los Angeles: University of California Press, 2000.
- Kapur, Ratna. "The Tragedy of Victimization Rhetoric: Implications for International/Postcolonial Feminist Legal Politics." *Harvard Human Rights Journal* 15 (1) (2002).
- Lim, Lin Lean and Nana Oishi. "International Labour Migration and Asian Women: Distinct Characteristics and Policy Concerns." *Asia Pacific Migration Journal* 5 (1) (1996).
- Mehta, Uday Singh. *Liberalism and Empire: A Study in Nineteenth Century British Liberal Thought*. Chicago: University of Chicago Press, 1999.
- Mohanty, C. Talpade "Under Western Eyes: Feminist Scholarship and Colonial Discourses." *Third World Women and the Politics of Feminism*. Eds. Chandra Talpade Mohanty, Lourdes Torres and Ann Russo. Indiana: Indiana University Press, 1991.
- Nelan, Bruce W. "The Dark Side of Islam." *Time* October 4, 1993. Retrieved online www.time.com Friday September 21, 2001.
- Otto, Diane. "Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference." *Social And Legal Studies* 5 (3) (1996): 337-364.
- Porras, Ileana. "On Terrorism: Reflections on Violence and the Outlaw." *Utah Law Review* 119 (1994)
- Sadiqu, Nafis. "Undocumented and Irregular Migration in the Asia-Pacific Region." United Nations Population Fund, Paper presented at the International Symposium on Migration, "Towards Regional Cooperation on Irregular/ Undocumented Migration." Bangkok April 21-23, 1999.
- Said, Edward. "Foreword." Eds. Guha Ranajit and Gayatri Chakravorty Spivak. *Selected Subaltern Studies*. New York: Oxford University Press, 1988. v-x.
- Sarkar, Sumit. *A Critique of Colonial India*. Calcutta: Papyrus, 1985.
- Sanghera J. "Enabling and Empowering Mobile Women and Girls: Strategy Paper on the Safe Migration and Citizenship Rights of Women and Adolescent Girls." ASEM meeting on "Gender, Migration and Trafficking," sponsored by Swedish Department for International Cooperation and UNIFEM, Bangkok, October 2002.
- Saseen S. *Globalization and Its Discontents: Essays on the New Mobility of People and Money*. New York: The New Press, 1998.
- Spivak, Gayatri Chakravorty. "Three Women's Texts and a Critique of Imperialism." *Critical Inquiry* 12 (1) (1985): 243-261.
- Volpp, Leti. "The Citizen and the Terrorist." *University of California Law Review* 49 (1575) (2002).