

The Cruel Optimism of Human Rights and Legal Justice

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Ratna Kapur, [*Precarious Desires and Ungrievable Lives: Human Rights and Postcolonial Critiques of Legal Justice*](#), 3 **London Rev. Int'l L.** 267 (2015).

In her article *Precarious Desires and Ungrievable Lives: Human Rights and Postcolonial Critiques of Legal Justice*, [Ratna Kapur](#) argues that for the vast majority of subordinated peoples, faith in international human rights and, indeed, in law as a vehicle to achieve equality, recognition, and redress for harm has often been misplaced. For sexual subalterns in particular, liberal legal institutions and laws are part of and promulgate a heterosexist normative order that constantly refashions these precarious desires and their justice claims into conformity with that order. Kapur suggests that instead of investing our energies as activists in law, we should rethink our notions of justice by moving away from the constraints of liberal legalism to more affective and postcolonial registers.

There are three points that make this article particularly important and a welcome addition to the critical literature on international human rights. First, it asks us to question whether human rights activism and the law are the best, let alone only, mode of engagement for subordinated populations. Second, it directs our attention to that which is often lacking in law in general and international law in particular: the affective, lived experiences of the subject of rights. In particular, for LGBT people, the article makes visible the uncomfortable and cruel optimism of human rights in an already dominant heteronormative order. And it reminds of the postcolonial critique of liberalism and liberal rationality.

Kapur's intervention is a welcome addition to a growing body of work that articulates a deep dissatisfaction with the law as emancipation and specifically with an increasingly coopted body of human rights practices, institutions, and vernaculars. But given both that justice has been so bound up with law, and that the human rights lexicon has been the primary means of demanding justice in the international sphere, few legal theorists have sought to offer alternatives. Critiques of human rights abound, but are there other paths of activism than this powerful yet often ambivalent discourse and practice? Kapur's innovative appropriation of affect theory combined with a postcolonial critique of liberal epistemology suggests that for a richer, truly transformative, and more satisfying lived experience of justice, sexual subalterns cannot rely on such a deeply heteronormative framework of legality.

Kapur first lays out the deficiencies in human rights by using Judith Butler to demonstrate how human rights fails to recognize certain sexual minorities and gendered subjects and the harms that these subjects may experience. As Butler theorizes, human rights has not solved the problem of hierarchies of grievability¹ in which some lives are simply not grievable to those at the top of the hierarchy. Regardless of international human rights' theoretical assertion of equality and universality, the political reality has demonstrated that subjects can and do lose the rhetorical and legal protection of "humanity." As Kapur aptly points out, "Those who are considered inhuman or whose subjectivity is effaced in the sense that there was either no human there in the first place or no life, cannot experience injury, or harm or erasure" (P. 269.) The "human" does not exist outside of its political construction as an a priori legal artefact. It is created through social relations and politics and, thus, becomes recognizable by law. Kapur argues that this undermines any notion of a universal human rights subject. There are people who are left out of protections of legal justice that haunt it, reminding us that they

exist: the sex worker and the transgendered, among others.

If justice is conceived of as freedom, Kapur questions whether this can ever be fully realized within liberalism. Tracing the advocacy for LGBT rights and women's rights, Kapur articulates the limits of these interventions in fully achieving "justice". She notes:

To be recognised as a victim of sexual violence in human rights law is important. But such recognition is a part of an already existing process that only recognises certain gender arrangements and performances as legitimate and addresses complaints that emanate from a subject who complies with such arrangements. Justice requires compliance and failure to comply renders an individual a deconstituted subject in law. (P. 271.)

It is not that decriminalization of homosexuality or the passage of stricter rape laws do not matter. Rather that legal moves cannot hope to encompass justice as freedom. The ease with which human rights and legal justice can be coopted into missions of homonationalism or feminist imperialism and the cultural imperialism that often accompanies such projects, she suggests should give us pause. Yet, the difficulty is that justice and human rights is a thing that sexual subalterns and the abject cannot not want. One of the reasons this may be the case is that human rights has become the lingua franca of articulating injury in the international. And as Kapur recognizes, we must sometimes necessarily settle for what human rights offers us—at a minimum, a language (no matter how impoverished) to express our abjection and to demand legibility as humans whose rights should not be contingent on total conformity.

Nevertheless, there are those who cannot conform to the requirements of the law without radical change (sex workers and transgendered people whose sexuality is determined by the state are examples). For those ungrievable lives with their precarious desires, there are few alternatives. For those whose conceptions of justice include such lives, Kapur suggests alternative registers that can be used to make such precarious desires at least socially legible.

Having laid out the critique of the liberal legality of human rights, Kapur very aptly points out "The critiques do not in and of themselves give rise to a strategy, but they prompt an exploration into whether it is possible to turn away from legal justice as a freedom project, and for justice to thrive in an environment outside a liberal imaginary" (P. 282.) She suggests two moves that are required to reorient justice away from its constraints. First, Kapur asks us to interrogate the ways that progressive politics pursued through human rights might actually make some groups even more precarious. Jasbir Puar's work on homonationalism whereby LGBT groups demanding recognition do so at the expense of stereotyping and marginalizing Muslims who are already subject to discrimination in the War on Terror is a well-known example. The second move and perhaps more important move is to turn away from the law, delinking it from justice. She offers two alternative registers that can be the bases for liberation and justice: feminist affect theory and non-liberal, postcolonial epistemologies.

Kapur uses Lauren Berlant's work on affect and her concept of cruel optimism to raise questions about the ways in which justice projects both miss the quotidian oppression of marginalized lives yet hold out hope that the oppression will be redressed.

Engagement with the possibilities of affect foreground how the marginalised or excluded subject continues to live and survive in the face of evidence that life is precarious. Coping takes place through a continued belief in the fantasy and creation of attachments and desires for objects that may in the end serve as obstacles to a subject's flourishing (P. 285.)

By focusing on the present, the daily affective lives of these subjects affords us the opportunity to understand the interplay between justice and injustice that is obscured by the “pursuit of legal justice through human rights” which “may be missing the point altogether” (P. 286.)

As for the turn to non-liberal epistemologies, Kapur turns our attention to postcolonialism as a way to escape the liberal legal order. Postcolonial thought, like that of Gandhi and Tutu with their engagements with forgiveness and truth could offer us a productive non-legal way to think about justice. Kapur ends with an exploration of Western thinkers who take this approach towards the end of their lives: Eve Sedgwick’s turn to Buddhism and Michel Foucault to to the political spirituality underlying the Iranian Revolution. This is not to suggest that a turn to religion as an alternative to liberal secularism is the answer but to point to the different epistemic communities that are often neglected by international law and human rights theorists . Reclaiming these epistemologies is particularly important for those in the Global South who have been underserved by liberal legalism and the justice claims that rely upon it. Kapur’s article offers us new ways of thinking about liberation and our affective attachments to the law as the principle mode of securing it.

1. Judith Butler writes that

[G]rievability is a presupposition for a life that matters...Without grievability, there is no life, or, rather, there is something living that is other than life. Instead, “there is a life that will never have been lived,” sustained by no regard, no testimony, and ungrieved when lost. The apprehension of grievability precedes and makes possible the apprehension of precarious life. Grievability precedes and makes possible the apprehension of the living being as living, exposed to non-life from the start.

Judith Butler, **Frames of War: When is Life Grievable?** 14-15 (2009).

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