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A commentary on “Bare Sovereignty: Homo Sacer and the Insistence of Law” by Peter Fitzpatrick, *Theory & Event*, Vol. 5, No. 2 (2001)

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Peter Fitzpatrick’s 2001 article titled “Bare Sovereignty: Homo Sacer and the Insistence of Law” exemplifies both the widespread allure of Agamben’s concepts and the limits of Agamben’s theorizing. In this piece, I draw upon experiences from the North-East region of India under an extraordinary law to note that the social and political conditions of our times require a return to debates on sovereignty, state power and violence that have not been as central for political theory. The dominance of the Foucauldian paradigm had led to a focus on disciplinary mechanisms and biopower as tools of understanding power in modern times but now such framing appears to be mediated by efforts to re-conceptualize sovereignty, violence and bare life a la Agamben. A particularly creative manifestation of such an effort is to combine a Foucauldian perspective on biopower and sovereignty. Furthermore, thinking with and even beyond Fitzpatrick, I suggest that a focus on this relationship between biopower and sovereignty in recent scholarship has generated new modes of ethnographic thinking that capture the pain and suffering of marginalized subjects and their resistance; as well as theorize the everyday practices of the state.

Peter Fitzpatrick in his piece starts off by stating “It has to be a puzzle how Giorgio Agamben’s evocation of ‘an obscure figure of archaic Roman law’ has assumed such a purchase on recent political and philosophical thought.”¹ He refers of course to *homo sacer* (sacred man) that represents bare life— a life rendered vulnerable and above all embodying the continued power of the sovereign in modern times. It is a life that cannot be sacrificed therefore beyond divine law and cannot be convicted of homicide so beyond human law.² But it is a life that can still be killed by anyone since it is rendered unprotected and laid bare— that, for Agamben, is the originary power of the sovereign because such a life is included in the juridical framework pre-

cisely because of its exclusion.³ The basis of such a theory explicates a conception of law and sovereign power that is indeterminate as well as decisive and specific at the same time, which is one of the primary nodes of criticism for Fitzpatrick. Instead, Fitzpatrick suggests another conception of sovereign power – based on sociologics – constituted through law but not completely predetermined or at the mercy of the sovereign.

Fitzpatrick makes two major points in this essay. First is his reference to Agamben's contention that the concept of bare life emerges as a way to complete Foucault. In other words, Agamben notes that for Foucault there occurs a shift from sovereign power to biopower meaning that sovereign power and legal power cease to be that important. Fitzpatrick does accept that Foucault's conception of governmentality becomes more significant in characterizing the 17th and 18th centuries. To put it differently, the management of life supersedes the right over death. But for Fitzpatrick, Foucault's conception of biopower operates in a much more simultaneous manner and certainly not as a replacement of sovereign power entirely.

Second, Fitzpatrick is also concerned with how Agamben explains the origins and substantive meanings of "bare life," "state of exception" and sovereign power. For example, he questions Agamben's use of *habeas corpus* as an originary example of bare life since the writ of *habeas corpus* was used much before the 18th century and was not actually an "organic lump," rather was a very specific case of "singular legal subject."⁴ Similarly, Agamben's discussion on exclusion linked to the state of exception appears absolute even though law works in a much more ambivalent manner than what he acknowledges. Fitzpatrick takes the example of the refugee who is both included through their exclusion but also experiences a generation of life through some protections under international law.

Over all, Fitzpatrick offers a more socio-logic basis of sovereignty as opposed to an absolute theory of sovereign's power over death. Agamben offers two kinds of models that represent the relationship between bare life and sovereign power in modern societies: one which would envelop all society, and second that is much more specific as represented by a person in a camp, or a refugee. However, Fitzpatrick notes the inherent instabilities of these societal formations that are based on particularities of the agents. Thus, Fitzpatrick replaces the inevitable and totalizing telos of death that Agamben seems to articulate with a more fluid functioning of sovereign power.

In this piece, I discuss the continuing appeal of Agamben's framework in analyzing certain spaces within liberal democratic states such as India and the limits of such a framing. I am particularly interested in whether the argument that Agamben completes Foucault in terms of the relationship between biopower and sovereignty can be leveraged

into an enduring framework of analysis. I focus on the socially and historically specific nature of sovereign power and bare life; and the exclusions and inclusions not in a universalistic sense but in particularly racialized and gendered ways enabled through law. Furthermore, I focus on resistance that is embodied in bare life—a conceptualization difficult to locate in Agamben—but which has been noted by recent political theory scholarship.

Exception, Bare Life, Resistance

In order to think through some of these ideas, I briefly turn to the life of Irom Sharmila who was in the news in August 2016 for having broken her indefinite fast after 16 years against an extraordinary law in the North-East region of India. Irom Sharmila's life and struggles exemplify the utility of Agamben's concepts of bare life and state of exception as well as their inability to account for the historical specificity of her experience and their totalizing quality in invisibilizing resistance. Irom Sharmila went on a hunger strike against the Armed Forces Special Powers Act (AFSPA) operational in certain parts of India particularly Kashmir and the North East.⁵ The AFSPA, based on ordinances that were deemed necessary during WWII by British colonial powers, was introduced in 1958 to crush the demands for self-determination in the North East.⁶ One of the main provisions of the AFSPA is that it allows the armed forces to shoot on mere suspicion. Under this law, the armed forces can arbitrarily arrest, detain, seize property, and use force, including lethal force, based on "mere suspicion."⁷ And in turn the law protects the soldiers from prosecution through an explicit provision to enable immunity resulting in enduring impunity.⁸

In November 2000, the Assam Rifles (a paramilitary force) massacred 10 civilians in Malom, Manipur ostensibly in response to a bomb blast near the military camp by persons unknown. Profoundly disturbed by the incident, Irom Sharmila—a peace activist and poet—decided to go on an indefinite strike against the law that enabled such a horrific state action. Sharmila remained on an indefinite fast against the Act from 2000–2016. The state's response to her protest was essentially to charge her with attempted suicide (an offense under Indian law), detain her in a hospital, subject her to force feeding through a nasal tube and mostly keep her in isolation with very little contact with friends and family.⁹ As Sonia Sarkar noted, referring to the state action to incarcerate her each year, it was as if: "The plastic tube through which she is fed was hanging close to her neck, but that has become a part of her body over the years."¹⁰

Over time, Sharmila has become a symbol of courage and inspiration with many comparing her to Mahatma Gandhi amongst others; due to her inspiring determination she was titled the "Iron Lady

of Manipur.”¹¹ Keeping herself busy with yoga, reading and writing deeply affective poetry and prose, Sharmila remained in this indefinite fast for more than 15 years when she decided to break her fast and continue other forms of struggle.

Sharmila’s struggle occurs against a law that has enabled thousands of extra judicial killings in the North East and is a perfect example of subjects rendered as bare life in a state of exception. The allure of Agamben’s concept of the state of exception (based on Schmitt) and the exception becoming a rule in a constitutional liberal democratic state such as India becomes all the more visible in areas of (permanent) conflict such as the North East and Kashmir. After all, the ability of the army under the AFSPA to kill people on mere suspicion appears to be a painful example of how sovereign power asserts itself by excluding these people as unworthy of rights and legal protections such that they become open to target of the sovereign’s soldiers. Indeed, a number of scholars have turned to Agamben to conceptualize the impunity of state violence. As Namrata Gaikwad notes, the AFSPA is a perfect example of “exception” written into the law as a constitutional provision.¹² Turning to Agamben’s 2005 book referring to the 9/11 US—the *State of Exception*—to expound on his ideas of sovereign power and bare life in sites such as Guantanamo, Gaikwad notes “Further, Agamben argues that the exception, which was previously a provisional measure to deal with specific instances that could not be addressed by the law, now gets transformed into a state (of being) and adopted by democratic nation-states as an instrument or a ‘technique of government’ (2005, 2).”¹³ The fact that the Supreme Court has recently ordered that an investigation be conducted in the 1528 executions under AFSPA in Manipur alone perhaps is the perfect reminder of the impunity with which these acts have been taking place though the Court has finally stated that such impunity should not be allowed even in a disturbed area.¹⁴

Perhaps one of the most horrific symbols of sovereign power of the Indian state on the bare life of a subject is the rape and death of Manorama, a Manipuri woman who was picked up as a suspected militant from her home in 2004 and was found dead in a nearby village in Imphal—the lower part of her body having been shot apparently as a way to hide the marks of rape. As Gaikwad notes, “Her death bore testimony of the most visceral kind, to the unwavering brutality of the security forces.”¹⁵ Recognizing the power of the sovereign in cases from Kashmir and Northeast, Shubh Mathur more generally characterizes the power of the law to be “... this claim to total power is the claim of power over both life and death.”¹⁶ Indeed even the official judicial commission set up to look into the Manorama case stated that “This is one of the most shocking custodial killing of a Manipuri village girl so savagely, that also after inhuman torture.”¹⁷

The concept of state of exception has also been evoked by feminists such as Uma Chakravarti in pointing to the ways in which such subjects are stripped of their rights: from suspected insurgents to specific categories of people considered suspect by association.¹⁸ She notes how in many of these conflict areas, the everyday practices of unexceptional violence against women are linked up to the state practices of rapes and deaths in these states of exception. As she puts it, "In sum, the silent endorsement of impunity by a militarized patriarchal state to acts of power over women in certain regions in India ruled by the declaration of a state of exception and by a state of 'unexception' through a recourse to tradition and culture, which is believed to have granted impunity to men within marriage as a norm, has not only been linked together but also powerfully challenged today in India and it hangs as a thread in the public sphere."¹⁹ Thus, the inability to explain the continuing acts of violence with impunity particularly in certain spaces within liberal democratic states seems to magnify the power of Agamben's theorization of bare life and state of exception that alone appear to capture the inexplicability of certain sovereign actions in modern India.

Yet I suggest that while the totalizing violence of sovereign acts of power over the life and death of these subjects lead scholars to utilize Agamben's concepts to theorize the Indian state, it may not entirely capture either the actions of the state or attempts to use bodies as forms of resistance. As scholars have noted in the context of other such "exceptional spaces" such as Guantanamo—while often the state of exception is thought of as a lawless space—in reality, such a space is actually mired in a network of laws and ordinances such that hyperlegality or aggressive hyperlegality becomes the way through which some of these acts of violence take place. As Nasser Hussain notes, Guantanamo is more of a legal loophole than a "legal black hole." Deploying the term "hyperlegality," he explains, "It is empirically the case that what one witnesses in contemporary emergency is a proliferation of new laws and regulations passed in an ad hoc or tactical manner, administrative procedures, and the use of older laws and cases tweaked and transformed for newer purposes."²⁰ Or as Fleur Johns noted, "Far from being a space of 'utter lawlessness'... one finds in Guantanamo Bay a space filled to the brim with expertise, procedure, scrutiny and analysis."²¹ Laleh Khalili also describes the over bureaucratization and classification of detainees (for instance in Abu Ghraib prison, Iraq) as leading to an additional use of discretion and consequently torture.²² In my own work, I have also introduced the idea of aggressive hyperlegality where the purpose of the hyperlegality is normatively to narrow the protections that were the intent of the law as was done in the torture memos in the post-9/11 United States. Thereby, such state

actions are often a result of constant negotiations by the state to accommodate excess violence within the law, not outside of it.²³

Thus, even in the most horrific case of Manorama, it is actually not surprising that the Assam Rifles that come to arrest Manorama actually agreed to sign an arrest memo (informing the family of the procedures of arrest meant as a means of protection of the detainee against custodial torture and death) and got a “no claims certificate” (a document signed by the family about the proceedings during the arrest) making an effort to follow the routine procedures that activists have demanded over time. Of course, other procedures such as arrest of a female only by a female constable, or taking the detainee to the nearest police station were not followed but that only reasserts the register of procedural legal loopholes rather than lawlessness. Indeed the Upendra Singh Commission that gave a powerful indictment of the Assam Rifles holding them responsible for the murder, torture and rape of Manorama considered her death the result of primarily procedural violations.²⁴ Similarly, the army account of Manorama’s death echoed the standard police versions in extra judicial executions of the detainee being shot while trying to escape.²⁵ Thus, while the exception is meant to capture a suspension of law or a threshold space both inside and outside that is difficult to demarcate, what is accommodated within the law is much more significant than what appears as a state of exception.²⁶

The totalizing narrative of the state of exception also has the effect of marginalizing the narratives of resistance that are themselves indicated by many of the same authors who utilize this concept but don’t necessarily find space in Agamben’s framing. In addition to the resistance of Irom Sharmila, another important protest against the law was organized by a number of Manipuri women who bared themselves in front of the army headquarters and held banners stating “Indian Army Rape Us, Kill us” after the death of Manorama in 2004.²⁷ In any case, forms of everyday resistance continue even in these so-called spaces of exception. As Dolly Kikon notes in the context of the North East, “While there is no denying that violence and coercion form part of the repertoire of the state though mechanisms like the AFSPA, which seeks to bring both disturbed areas and suspicious persons under its control, there is also a tacit realization that administrators and administered, the state and its citizens, constantly challenge the limits of the hierarchies of power.”²⁸ Even in her most trenchant critique of the impunity towards sexual violence in North East and Kashmir, Uma Chakravarti writes, “Even from a no-win situation of a raped body the woman sought to be brutalised can still talk back.”²⁹ Thus, even scholars who find Agamben’s theorization of state of exception and bare life helpful to magnify the power of the sovereign do emphasize the presence of resistance that to some extent is precluded by Agamben’s totalizing conceptualization of bare life in a state of exception becoming a rule.

Concerns of Political Theory

As noted earlier, political theorists in recent years have refocused their energies on questions of sovereignty, violence and bare life following Agamben and some of the innovative work is being done by those bringing Agamben and Foucault in conversation since there is an attempt to study how techniques of governing help construct sovereign power in modern times. In the process, there is a focus on studying the pain and suffering of the citizens/subjects as well as their resistance especially by adopting ethnography as a method of study. Banu Bargu's brilliant attempt to introduce a new concept, the "weaponization of life," to characterize the hunger strikers in Turkey from 2000–2007 for instance helps focus on the resistance of the hunger strikers. Bargu defines "weaponization of life" as a ... "tactic of resorting to corporeal and existential practices of struggle, based on the technique of self-destruction, in order to make a political statement or advance political goals."³⁰ Theoretically, Bargu brings together Foucauldian conceptions of sovereignty and biopolitics to suggest a new formulation of "biosovereign assemblage" that exemplifies how sovereign power is able to increase control by utilizing techniques of biopower. An example of this phenomenon from Manipur would be Irom Sharmila being force fed with a tube for her own protection. Powerfully noting the simultaneity of sovereign power and disciplinary practices observed in the lives of the hunger strikers in prison, Bargu notes the resistance that is made visible in life being forged as a weapon that she terms necroresistance—focusing not on wellbeing but rather the destructive aspects of living.

In some ways, Bargu's book exemplifies some of the important shifts that have taken place in the field of political theory and explains perhaps the question that Fitzpatrick raises at the beginning of the essay of the popularity of the obscure figure of *homo sacer*. First, there is an embracing of ethnography as a method of studying and theorizing the subjectivities of subjects/citizens in ways that may or may not have been central to the theorizing of resistance previously. Second, there is recognition of a need to ethnographically study the state and sites of state power such as police and prisons. Drawing upon Foucault and Agamben among others, for instance, is Guillermina Seri's brilliant work titled *Seguridad: Crime, Police Power, and Democracy in Argentina*.³¹ Taking the police as the site of state and governmental power—the "state's capillary arms," Seri notes the significance of studying the police both theoretically and empirically.³² "Through the prism of the Argentine police, drawing on a large collection of first-hand accounts of police voices, different chapters illuminate seguridad {state protection from crime}'s and police's governing puzzles."³³ The *dispositif* or apparatus through which governing takes place is made visible through this study of the police—where each "agent...as minute replica

of the state opening up legal limbos and — as Giorgio Agamben argues opportunities for sovereign exercises.”³⁴ The actual characterization of these state actions as lawless or accommodated within the law by a more centralized sovereign or petty sovereigns is an ongoing debate.³⁵ But a focus on police categorizations is a recognition of how such acts have tremendous influence on exclusions of delinquents/criminals and inclusions of citizens in everyday discourses and practices that had not been a central area of focus in political theory until recently.

Furthermore, while Bargu invites us to conceptualize “weaponization of the body” as an instance of necroresistance- focusing on the destructive aspects, Sharmila’s own choices suggest a way to consider resistance in multiple ways. Exceptionality as a category is meant to put a subject under absolute control, but from Sharmila deprived the state of its power over her. Even as the state forced Sharmila to live (in true biopolitical form) her resistance continued in repeatedly claiming her right to die, an operationalization of bare life that Agamben may not anticipate.³⁶ And then by deciding to break her fast after 16 year to continue other forms of struggles, she reasserts her power over both life and death. In some ways, the resistance that Foucault mentions in *Discipline and Punish* as one of the primary reasons for the change in the forms of state power becomes important here. In other words, the very act of public executions that was meant to reaffirm the power of the sovereign over life and death becomes subverted when the executed is able to inspire sympathy among the spectators thereby taking away from the sovereign’s absolute power.³⁷ To an extent, Sharmila’s struggles provide us a way to draw on a Foucauldian concept of resistance even in the face of stark exercise of sovereign power.

From Sharmila’s case additionally points to singular acts of resistance, not necessarily inspired by ideology, but emerging from a belief in humanity and opposing injustice. As one of her biographers wrote, “She consciously chose to fast because all other forms of protest such as demonstrations or strikes would harm others; fasting could harm only her, and not anyone else.”³⁸ Her choice to now live (and before that, to die) and marry and perhaps even fight elections in this conflict-ridden area has led to some derision among some of her supporters. This is a distinct mode of resistance much removed from the 16 years of her fast against the AFSPA. It raises a question for political theorists interested in social justice in terms of what Jonathan Spencer has suggested in another context — that of an individual who exhibits a “refusal to act” based on a collective regional or ideological identity.³⁹

The enduring images from north east India today are the scene of Sharmila licking a spoon of honey after 16 years while weeping and committing herself to struggle; and the lack of justice for the death of Manorama- a situation best captured in the slogans of the Meira Paibis (Torch Bearers) who said while protesting, ‘Manorama’s killing

broke our hearts. We had campaigned for the arrest memo to protect people from torture after arrest. Yet, it did not stop the soldiers from raping and killing her. They mutilated her body and shot her in the vagina. We mothers were weeping, "Now our daughters can be raped. They can be subjected to such cruelty. Every girl is at risk." We shed our clothes and stood before the army. We said, "We mothers have come. Drink our blood. Eat our flesh. Maybe this way you can spare our daughters." But nothing has been done to punish those soldiers. The women of Manipur were disrobed by AFSPA. We are still naked.⁴⁰ The stubborn life of the AFSPA (the law) endures and enables violence even as bare bodies generate resistance daily individually and collectively.⁴¹

Notes

1. In the essay, Fitzpatrick is primarily discussing Giorgio Agamben. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford: Stanford University Press, 1995. In my piece, I will be adding the conversation on Giorgio Agamben. *State of Exception*. Translated by Kevin Attell. Chicago and London: University of Chicago Press, 2005.

2. Agamben discussed in Peter Fitzpatrick. "Bare Sovereignty: Homo Sacer and the Insistence of Law." *Theory & Event*. Volume 5, Issue 2, 2001.

3. Ibid.

4. Ibid.

5. For a brief background analysis of the complex history of the North East with India, see Nivedita Menon and Aditya Nigam. *Power and Contestations: Indian since 1989*. London: Zed Books, 2007. There is a strong history of annexation of these areas at the time of Indian independence thereby leading to movements of autonomy and independence that have been responded to by the imposition of draconian laws and structures of impunity. The Armed Forces Special Powers Act (AFSPA) was applied in the North East in 1958 and later extended to the Punjab (1983) and Kashmir (1990). See also Dolly Kikon. "The Predicament of justice: fifty years of Armed Forces Special Powers Act in India." *Contemporary South Asia*. Vol. 17. No 3. September 2009, 271–282.

6. Ibid.

7. Section 4 of the AFSPA grants these powers.

8. Section 6 of the AFSPA states that no legal action can be taken against a member of the armed forces without the permission of the central government.

9. Under section 307 of the Indian Penal code, she was arrested and convicted for one year for an intent to commit suicide and then rearrested each year since then.

10. Sonia Sarkar. "The Iron Lady of Manipur." *Indian Journal of Gender Studies* 20(1) 147–151, p. 148.

11. Ibid.

12. Namrata Gaikwad. "Revolting bodies, hysterical state: women protesting the Armed Forces Special Powers Act (1958)." *Contemporary South Asia* 17. 3, September 2009, 299–311.

13. Ibid., p. 4.

14. "Manipur: 1528 'fake encounters' later, a court rules." *Indian Express*, July 11, 2016.
15. Gaikwad, p. 6. See also *The State and Sexual Violence: Challenging Impunity, Demanding Justice, Women against Sexual Violence and State Repression (WSS)*, December 2012.
16. Shubh Mathur. "Life and death in the borderlands: Indian sovereignty and military impunity." *Race & Class* Vol 54(1): 33–49, p. 38.
17. Report of the Commission on the Judicial Inquiry (Manorama Death Inquiry Commission). Upendra Singh.
18. Uma Chakarvarti. "Introduction-The Everyday and the Exceptional: Sexual Violence and Impunity in Our Times." Zubaan Books, 2016.
19. *Ibid.*, pp. 9–10
20. Nasser Hussain. "Beyond Norm and Exception: Guantanamo." *Critical Inquiry* (Summer 2007): 734–53, p. 739; 741.
21. Fleur Johns. "Guantanamo Bay and the Annihilation of Exception" *European Journal of International Law* 16 (2005): 613–35, p. 618.
22. Laleh Khalili. *Time in the Shadows: Confinement in Counterinsurgencies*. Stanford, CA: Stanford University Press, 2012.
23. Jinee Lokaneeta. "Torture Debates in the post-9/11 United States: Law, Violence and Governmentality." *Theory & Event*, 2010, 13.1.
24. Manorama Inquiry Commission report.
25. Even in very routine custodial death cases, the police give this explanation for the death rather than accepting their role. See People's Union for Democratic Rights reports. www.pudr.org.
26. As Kikon captures this conception, "Under the AFSPA, the state legitimises lawlessness through legal decisions and establishes them as precedents." Kikon, p. 280. The question is whether state actions enabled through a law can be termed lawless.
27. See discussion of this protest in Chakarvarti *op.cit*; WSS report, *op.cit*. At such a moment the baring of bodies that is often used to shame women in society and rape survivors in courts (See Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India*. Delhi, India: Oxford University Press, 2014) is being used by women to shame the state.
28. Kikon, *op.cit.*, 281.
29. Chakarvarti, *op.cit.*, p. 2.
30. Banu Bargu. *Starve and Immolate: The Politics of Human Weapons*. New York: Columbia University Press, 2014, p. 14.
31. Guillermina Seri. *Seguridad: Crime, Police Power, and Democracy in Argentina*. New York: Bloomsbury 2012.
32. *Ibid.*, p. 2
33. *Ibid.*, p. 4– 5.
34. *Ibid.*, p. 12.
35. Leonard Feldman. "The Banality of Emergency: On the Time and Space of Political Necessity." In Austin Sarat (editor). *Sovereignty, Emergency, Legality*, 136–164. See Seri's critique of Leonard Feldman in Chapter 6.

36. I thank James Martel for this brilliant insight.

37. Michel Foucault. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan. New York: Vintage Books, 1977. I thank Kavita Datla for pushing me to develop this great point about Foucauldian concept of resistance.

38. Sarkar, op.cit., p. 148.

39. Jonathan Spencer. 'On not Becoming a 'Terrorist: 'Problems of Memory, Agency and Community in the Sri Lankan Conflict.''' In *Violence and Subjectivity*, edited by Veena Das, Arthur Kleinman, Mamphela Ramphelem and Pamela Reynolds, 120-140. Berkeley: University of California Press, 2000.

40. WSS Report, op.cit., p. 55.

41. I thank Pratiksha Baxi for this extremely important point.