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INTRODUCTION*

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Constitutionalism and the Feminist Subject

This book addresses a particular dilemma as I see it, for radical politics – in particular, feminist politics – in India. The dilemma has become visible over the last two decades, and arises at the interface of radical political practice with the logic of constitutionalism. By 'constitutionalism' I refer to a specific method adopted by modern democracies of safeguarding the autonomy of the individual self. In a classic formulation, Carl Friedrich in his study *Constitutional Government and Democracy* saw the core objective of constitutionalism as that of safeguarding each member of a political community[1]. It is now generally recognised however, that this objective is achieved by a process of enforcing universal norms that marginalise, render obsolete and de-legitimize contesting worldviews and value systems. This particular method of organising democracies has a specific history and arose in a particular geopolitical location – that is, in Europe in the seventeenth century. By historicising this method, we remind ourselves, to use Upendra Baxi's words, that 'much of the business of "modern" constitutionalism was transacted during the early halcyon days of colonialism/imperialism. That historical timespace marks a combined and uneven development of the world in the process of early modernity... [C]onstitutionalism inherits the propensity for violent social exclusion from the "modern".'[2] Constitutionality is driven towards the erasure of any kind of normative ethic which differs from its own unitary central ethic – precisely in such a denial of subjective ethics and the assertion of 'objectivity'

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1 C. Friedrich, *Constitutional Government and Democracy*, Ginn, Boston, 1950.

2 U. Baxi, 'Constitutionalism as a Site of State Formative Practices', *Cardozo Law Review*, 21 (February 2000), 4, pp. 1184-5.

lay its emancipatory potential four centuries ago. That moment may have passed.

Four centuries later, the dilemma that faces radical politics is what I term the 'paradox of constitutionalism' – that is, the tension in which the need to assert various and differing moral visions comes up against the universalising drive of constitutionality and the language of universal rights. The language of rights and citizenship is thus no longer unproblematically available to an emancipatory politics – this is the heart of the argument I will unfold over the pages that follow.

Specifically in the context of feminist politics, it has become difficult to sustain 'woman' as the subject of such a politics, despite (or perhaps because of) the explosion of 'gender' as a category of analysis in official state and NGO discourse. Susie Tharu and Tejaswini Niranjana point to one aspect of the dilemma when they say:

> For all those who invoke gender... 'women' seems to stand in for the subject (agent, addressee, field of inquiry) of feminism itself. There is a sense therefore, in which the new visibility is an index of the success of the women's movement. But clearly this success is also problematic. A wide range of issues rendered critical by feminism are now being invested in and annexed by projects that contain and deflect that initiative. Possibilities of alliance with other subaltern forces (Dalits, for example) that are opening up in civil society are often blocked, and feminists find themselves drawn into disturbing configurations within the dominant culture.[3]

Here they refer to the phenomenon of the 1980s and 1990s, where the active presence of women in right-wing movements (against the Mandal Commission recommendations on reservations for Backward castes and in Hindu right-wing mobilisations), and the use of feminist slogans by these, forced feminists to rethink many old certainties.[4]

The French feminist Michele Le Doeuff highlights another aspect of what appears to be a global phenomenon when she uses the term 'state-organized feminism', which, she suggests, is replacing feminist politics on the ground in France and elsewhere: 'If people

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[3] S. Tahru and T. Niranjana, "Problems for a Contemporary Theory of Gender", in N. Menon (ed.), *Gender and Politics in India*, Delhi, Oxford University Press, 1999, p. 495.

[4] Gabriele Dietrich addresses this phenomenon in "Women and Religious Identities in India After Ayodhya", in K. Bhasin, R. Menon, and N. Said Khan (eds), *Against All Odds: Essays on Women, Religion and Development from India and Pakistan*, New Delhi, Kali for Women, 1994.

think that there is now a feminism from above, a kind of state-organized feminism, you may find the area you want already occupied.' This kind of feminism from above has happened before in history, Le Doeuff points out, citing the examples of Turkey under Ataturk and the Soviet Union. Nor is it to be rejected out of hand: '[I]ntroducing literacy for girls and abolishing polygamy are important steps. But it is never enough. Moreover, it has an important drawback. It discourages ordinary women from taking the initiative. In the long run culture is not altered without individual and collective action "from below".'[5]

We encounter another question altogether regarding the proper 'subject' of feminist politics, with the growing recognition that 'women' do not simply exist to be mobilised by feminism. The controversies over Shah Bano and the Muslim Women (Protection of Rights Upon Divorce) Act in the late 1980s, and over the Women's Reservation Bill in the late 1990s, have revealed the impossibility of appealing to 'women' as a category unmediated by other identities like religion and caste. Even in issues like femicide of foetuses and sexual violence, where the existence of the female body and its violation in different ways appears to be incontestable, I shall argue that the intersection of feminist notions of the body with legal discourse produces dilemmas of a nature that feminist politics has not fully confronted. The experience of feminist politics in the arena of law not only raises questions about the capacity of the law to act as a transformative instrument but more fundamentally, points to the possibility that functioning in a manner compatible with legal discourse can radically refract the ethical and emancipatory impulse of feminism itself.

Feminist Critique of Law as Strategy

Feminist theories of laws have developed considerably over the last two decades. Early feminist work (from the 1960s onwards) saw laws in instrumental terms as the potential source of equal rights and the emancipation of women. Society being steeped in patriarchal values and practices, the law and the state were seen as the only

[5] M. Le Doeuff, "Feminism is Back in France – Or Is It?", *Hypathia* 15 (2000), 4.

agents with the power and the legitimacy to bring about egalitarian social transformation. Gradually, especially by the 1980s, the experience of women's movements all over the world has led to an increasingly critical engagement with legal discourse. Four interlinked strands of argument can be discerned in this engagement:

- Most legal systems have features which are actively discriminatory to women, denying them equal rights to property, to certain kinds of employment, and so on.[6]
- Even where there is *de jure* equality, law in its actual functioning discriminates against women because legal agents interpret laws in patriarchal ways.[7]
- Even when law treats men and women equally it is discriminatory to women because men and women are located in an unequal and hierarchical manner in cultural, social and economic formations. In other words, it is unjust to treat unequals equally.[8]
- The law and the state render invisible women's subjective experience of oppression since objectivity is installed as the norm. In this sense the law is essentially Male and can only ever partially comprehend the harms done to women.[9]

This kind of critical analysis of the law underlies feminist campaigns all over the world. The goals are to redress the discriminatory nature of particular laws, to create new laws in areas of 'judicial void',[10] that is, in the 'private' realm of the family, and consistently to expose the patriarchal bias in the interpretation and implementation of existing laws.

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6 N. Haksar, *Demistifying the Law for Women*, New Delhi, Lancer Press, 1986; V. Dhagamwar, *Law, Power and Justice*, New Delhi, Sage, 1992; A. Parasher, *Women and Family Law Reform in India*, New Delhi, Sage, 1992.

7 A. Sachs and J.H. Wilson, *Sexism and the Law: A Study of male Beliefs and Judicial Bias*, Oxford, Martin Robertson, 1978; L. Gonsalves, *Women and the Law*, New Delhi, Lancer Paperbacks, 1993.

8 R. Kapur and B. Cossman, "On Women, Equality and the Constitution: Through the Looking Glass of Feminism", *National Law School Journal*, (1993), 1. (Also available in N. Menon, ed., *Gender and Politics in India, op.cit.*)

9 C. MacKinnon, "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence", *Signs*, 8 (Summer 1983), 4; C. Smart, *Feminism and the Power of Law*, London and New York, Routledge, 1989.

10 T. Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence*, Oslo, Norwegian University Press, 1987, p. 75.

In India there has been over a decade of feminist engagement with the law on the issue of violence against women. Particularly in the 1980s the women's movement reacted to almost every instance of violence against women by demanding legislative action. These efforts have been successful in that every campaign resulted in legislative changes such as the Criminal Law Amendment Act 1983, Dowry Prohibition (Amendment) Act 1984, Indecent Representation of Women (Prohibition) Act 1986, Commission of Sati (Prevention) Act 1987.[11] This success however, raised a new set of questions: why did the implementation of these law remain conservative and partial? In fact, as Flavia Agnes points out, since most of the new laws provide for more stringent punishment, there have been fewer convictions than before.[12]

The legal campaign as strategy has always been accompanied by debate within the Indian women's movement and the major lines of criticism that have emerged are:

- That the law is not enough. Nandita Gandhi and Nandita Shah for example, hold that no part of the women's movement is under any illusion that the law is a genuinely transformative instrument. At most, women's groups see legal campaigns as a broad strategy to achieve legitimacy, to create public awareness on specific issues and to secure some short-term legal redress. The struggle to transform the patriarchal nature of existing laws can only be part of a wider struggle. Similarly, Nandita Haksar urges the incorporation into legal practice of an understanding of the political and social basis for gender injustice. Without this, no law reform can be effective. She gives the example of a question in the Criminal Law examination when she was a student – an impotent man kills a prostitute who laughs at him for his infirmity. Can he take the defence of provocation? Haksar says that neatly all the women students held that he could not, and did badly in the examination.[13] The point that Haksar's account underscores is that law reform cannot be divorced from the more fundamental struggle to transform social values.

[11] N. Gandhi and N. Shah, *The Issues at Stake*, New Delhi, Kali for Women, 1992, pp. 213-72.

[12] F. Agnes, "Protecting Women Against Violence? Review for a Decade of Legislation 1980-9", *Economic and Political Weekly*, 25 April (1992).

[13] N. Haksar, "Dominance, Suppression and the Law", in L. Sarkar and B. Sivaramaya (eds), *Women and the Law: Contemporary Problems*, New Delhi, Vikas Publishing House, 1994.

- That constant recourse to the law creates a series of new legislations which often mean the increase of the state control, while implementation remains unsatisfactory. This misgiving has been consistently expressed by Madhu Kishwar, Ruth Vanita and Flavia Agnes.[14]
- Gail Omvedt holds that lobbying for legal reform by urban-based groups wastes energy without achieving much. Such a strategy offers little challenge in her opinion, to the social, systemic basis of increasing atrocities against women. The real challenge can only come from mass-based militant politics.[15]

In a recent significant essay Nandita Haksar considerably complicates her own earlier position. She focuses on the conflict between feminist and human rights ethics, on the basis of her experience as a lawyer in both fields, and presents a complex account of the contradictions involved in moving within both discourses simultaneously. Taking up the issues of obscenity/pornography, the rights of the accused in rape cases, and property rights within customary laws of tribal peoples, she comes to the deeply challenging conclusion that 'we should resort to the law only when the movement is strong enough to carry the law reform forward'. This is a statement that goes far beyond the familiar litany of 'the law is not enough' – rather, Haksar is clear that continual recourse to the law is 'a substitute for the other harder option of building a movement for an alternative vision'. She is particularly critical of feminist initiatives to press for property rights for tribal women, because she sees this as being predicated on 'classical human rights arguments' which are incapable of comprehending the complex practices which make up tribal jurisprudence. She urges the need for a struggle within tribal communities to evolve new customs which are more egalitarian – 'a far more difficult task than filing a petition under Article 14[16] or

[14] F. Agnes, "A Critical Review of Enactments on Violence Against Women", in M. Krishna Raj (ed.), *Women and Violence: A Country Report*, Bombay, SNDT University, 1991; also, "Protecting Women Against Violence?"; M. Kishwar and R. Vanita, 'Why Can't We Report to Each Other?', *Manushi*, 37 (1980-1); "Using Women as a Pretext for Repression: The Indecent Representation of Women (Prohibition) Bill", *Manushi*, 37 (1986).

[15] G. Omvedt, *Violence Against Women: New Movements and New Theories in India*, New Delhi, Kali for Women, 1990, pp. 39-40.

[16] Article 14 of the Indian Constitution guarantees the Fundamental Right to Equality.

getting the support of women who have no stakes in the survival of tribal societies'.[17]

Another notable recent intervention is an essay by Vina Mazumdar, one of the matriarchs of the women's movement in India, who charts her own and the movement's journey over the last five decades. The essay reflects the confidence and optimism that characterised social movements in the early years after independence, but is even more remarkable for its honesty and evident rethinking over the years. In a significant footnote, discussing the confidence that the new constitution gave women of her generation, she talks of her father, 'a self-confessed conservative', resolving her dilemma over the conflict between maternal and professional responsibilities. He introduced a missing 'third factor' – her responsibility not to waste the resources the country invested in her training. This sense of responsibility to the nation-state, and correspondingly, the expectation of progressive transformation through it, is characteristic of the generation which came of age through the anti-imperialist struggle. This confidence began to unravel after the Emergency years, and as Mazumdar tracks the changes, gradually the women's movement began to focus on economic issues, particularly from the 1980s. Thus a new identity was asserted by the movement, breaking out of dominant perceptions of women's issues as mainly social, not political and economic. What is notable is that this new identity was posited in opposition to the state, not in the spirit of partnership of the early years. In the course of this journey, says Mazumdar, 'I may have lost the sense of certainty which I shared with the earlier generations of the Indian women's movement ... in viewing legislation as the major instrument for ushering in changes in social order.'[18] Later in the same essay she tries to limit her criticism to a particular moment, holding that the law's 'historical failure at a particular point of time should not be generalised ... to an impossibility'.[19]

Thus the legal campaign as strategy has always been accompanied by doubts and questions among Indian feminists, all the more

[17] N. Haksar, "Human Rights Layering: A Feminist Perspective", in A. Dhanda and A. Parasher (eds), *Engendering Law: Essays in Honour of Lotika Sarkar*, Lucknow, Eastern Book Company, 1999, pp. 71-88.

[18] V. Mazumdar, "Political Ideology of the Women's Movement's Engagement With Law", in A. Dhanda and A. Parasher (eds), *op. cit.*, pp. 339-74.

[19] *Ibid.*, p. 351.

so in recent years. So it is untenable to hold as Archana Parasher does, that feminist critiques of law reforms only come from societies where women already have won formal equality in legal rights:

> Feminist writers who point to the drawbacks of law reforms all live in societies in which women have already gained formal equal legal rights ... Their concerns shifted beyond law reform and equal rights only after they had virtually achieved legal equality with men.[20]

Parasher thus suggests a simple hierarchy – first, 'formal legal rights' for women which must historically precede 'demands for the autonomy to control their sexuality or the right to the inviolability of their bodies.'[21] Further, Parasher evidently sees this as a process which would proceed by similar stages in all societies, that is, legal equality followed by other kinds of transformation.

There are two problems with this argument. First, the disquiet about law reform among feminists in the West is not simply a matter of looking 'beyond law reform' after equal rights have been achieved, as Parasher sees it, but a realisation that law reform itself has worked against feminist interests.[22] A second, in my view more fundamental, problem is that in postcolonial societies such as ours where the law was a product of the exigencies of colonial administration, it cannot be granted the same emancipatory force it might have had in Europe during the transition from feudalism to capitalism. While some kind of notions of justice and rights did exist in pre-colonial Indian communities, 'rights' in the modern sense were produced by the colonial transformation of indigenous judicial discourse and administrative institutions. The fact that this encounter with modernity occurred through a political system that was at its core, violent, distinguishes 'our' modernity (to use Partha Chatterjee's evocative phrase)[23] from modernity as it emerged in Europe.

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20 A. Parasher, *Women and Family Law Reform in India*, p. 34.

21 *Ibid.*

22 The critique made by western feminists is discussed at length in Chapter One. See also Carol Smart; I. Snider, "Legal Reform and Social Control: The Dangers of Abolishing Rape", *International Journal of the Sociology of Law* 13(4); J. Fudge, "The Public/Private Distinction: The Possibilities and Limits to the Use of *Charter* Litigation to Further Feminist Struggles", *Osgoode Law Journal*, 25 (1987), 3.

23 From the title of Chapter 11 of *A Possible India: Essays in Political Criticism*, Delhi, Oxford University Press, 1997.

The dislocation caused by modernity in Europe four centuries ago was equally brutal, but in Asia and Africa there was a double violence involved – the simultaneous disruption caused by modernity and colonialism. This is the encounter suggested by the term 'postcolonial' as I use it here. Postcolonialism thus begins from the very first moment of colonial contact. As one set of scholars puts it, 'It is the discourse of oppositionality which colonialism brings into being.'[24]

The emergence of this modern language of rights certainly empowered many subaltern sections against indigenous elites, but contrary to the claim of this language to universality, was not unambiguously emancipatory for all. Indeed, it had devastating consequences for many subaltern sections which were drastically marginalised and disciplined by the operation of modern codes of identity and governance.[25]

Despite misgivings, however, the women's movement, like other social movements in India, continues to retain the vision of the law as a transformative and emancipatory instrument, flawed and recalcitrant though it may be. Vina Mazumdar as we saw above, despite her rethinking over the decades, continues to retain faith in regenerating the law's transformative role. Further, the critiques that have emerged have yet to confront the full implications of a radical problematising of legal discourse. For example, what happens to notions of 'public' and 'private' – a distinction central to designing the legitimate scope of the law – in the course of feminist critique? The next section will point to some kinds of impasse that such critiques have reached.

The Public-Private Dichotomy

In liberal theory the distinction between 'public' and 'private' answers the question of the legitimate extent of the authority of the law. The public realm is understood in this context to be open to government regulation while the private realm is to be protected from such action – sexuality and the family being understood to be private. In Marxist theory too, this distinction is central, although

[24] Editorial note by B. Ashcroft, G. Griffiths and H. Tiffin in *The Post-colonial Studies Reader*, London, Routledge, 1999, p. 117.

[25] I explore this idea at length in the first chapter.

from a different point of view. Engels argued that women are oppressed because 'the administration of the household lost its public character ... It became a private service.'[26] The 'private' here is the arena of oppression and only when women emerge into the sphere of production will they become truly emancipated. Since, for Engels, the motor force of history is provided by changes in the relations of production (defined, in the context of capitalism, as the relations between capital and labour), housework is not 'work'. Women participate in history only to the extent that they emerge from the 'private' and enter the industrial workforce.

Feminist scholarship emerging from both liberal and Marxist traditions have contested this distinction as being conceptually flawed and politically oppressive., from within the liberal tradition comes the argument that the dichotomy assumed between 'public' (non-domestic) and 'private' (domestic) has enabled the family to be excluded from the values of 'justice' and 'equality' which have animated liberal though since the seventeenth-century beginnings of liberalism. The 'individual' was the adult male head of the household, and thus his right to be free from interference by the State or Church included his rights over those in his control in the private realm – women, children, servants. Thus, oppression within the family was rendered invisible to political theory.[27]

In addition to sharing this view, socialist-feminist critique the public-private distinction in Marxist theory produced by the model of political economy based on 'production', defined as economic production for the capitalist market. This model, they argue, ignores the 'private' sphere of reproduction, where women are responsible for reproducing both humans and labour power. A very influential analysis has been that of Juliet Mitchell who uses the Althusserian notion of overdetermination to express the complexity of women's situation. She sees the key structures of women's situation as *Production, Reproduction, Sexuality* and *Socialisation of Children*, and reject

[26] F. Engels, *The Origins of the Family, Private Property and the State*, Moscow, Progress Publishers, 1977, p. 73.

[27] For instance, see A. Phillips, *Engendering Democracy*, Cambridge, Polity Press, 1991, especially Chapter 4; Susan Moller Okin's critique of John Rawls, "John Rawls, Justice as Fairness – For Whom?", in C. Pateman and M. L. Shanley (eds), *Feminist Interpretations of Political Thought*, Blackwell, Polity Press, 1991, and Okin's *Women in Western Political Thought*, Princeton, Princeton University Press, 1979.

therefore, the idea that 'women's condition can be deduced derivatively from the economy' as Engels would have it.[28]

Another socialist-feminist, Michele Barrett, arguing against the view that women's oppression is located solely at the ideological level, says many of the categories which are called economic are in fact constituted historically in ideological terms – for example, the wage form in capitalism. Thus, the limitations of women's participation in wage labour are related to familial ideology; wage bargaining rests mostly on definitions of skill, which incorporate ideological assumptions, for example, the view that women's wages are secondary because of the ascription to all women of the destiny of wife and mother.[29] Similarly, Nancy Hartsock argues that to the extent that Marxism is grounded in men's activity in production and ignores women's activity in reproduction, Marxian categories themselves require critique.[30]

A more fundamental point is made by Linda Nicholson who establishes that the public-private distinction forms the very core of the Marxian understanding of production in so far as 'production' is understood to be conceptually different from 'reproduction'. This distinction historically evolves with capitalism since in pre-capitalist societies, child-rearing practices, sexual relations and 'productive' activities were organised conjointly through the medium of kinship. The Marxian model of political economy therefore, falsely universalises aspects peculiar to capitalism. Thus according to Nicholson, the Marxist theory of history is fundamentally flawed to the extent that it assumes class to be the primary basis of exploitation when the very distinction between class and gender is an aspect of capitalist relations of production alone.[31]

Clearly, feminists across the political spectrum are agreed that the public and the private are not two distinct and separate spheres, for the 'public' is enabled to maintain itself precisely by the construction of certain areas of experience as 'private'. As Gayatri Spivak puts it, the feminist reversal of the public-private hierarchy is more

[28] J. Mitchell, *Women Estate*, Harmondsworth, Penguin, 1971, p. 100.

[29] M. Barrett, "Rethinking Women's Oppression Today: A Reply to Brenner and Ramas", *New Left Review* 146 (July-August 1984).

[30] N. Hartsock, *Money, Sex and Power: Towards a Feminist Historical Materialism*, New York, Longman, 1983.

[31] L. Nicholson, "Feminism and Marx: Integrating Kinship with the Economic", in S. Benhabib and D. Cornell (eds), *Feminism as Critique*, Cambridge, Polity Press, 1987.

than a reversal – it is a displacement of the opposition itself. 'For if the fabric of the so-called public sector is woven of the so-called private, the definition of the private is marked by a public potential since it is the weave, or texture of public activity.'[32]

However, the consequences of this understanding for feminist practice are not so clear. From one kind of position it is possible then to argue that many claims important to feminists, from reproductive rights to protection against sexual harassment, are most effectively grounded on claims to privacy.[33] In fact the rhetoric of the individual's right to privacy has been used to secure some rights for women against the patriarchal family. For example in the USA, the landmark judgement on abortion in *Roe v. Wade* (1972) is based on the belief in the individual woman's right to privacy.[34] So was the judgement in 1965 that the right of married couples to use contraceptives is part of 'a right to privacy older than the Bill of Rights'.[35] Feminists who support privacy as a ground for securing rights for women, while they also challenge the traditional public-private dichotomy, make the argument that the virtues of privacy have not been available to women since they did not have the status of individuals in the public sphere. In this view therefore, the task of feminist practice is to transform the institutions and practices of gender so that a genuine sphere of privacy, free of governmental and legal intrusion, can be ensured for both men and women.[36]

Diametrically opposed to this is the position arising from the slogan 'the personal is political' which has brought into the public arena issues such as domestic violence against women, child abuse and marital rape. Adherents of this position do hold that the state is paternalistic and masculine, but they are confident that if a law is designed by feminists from the standpoint of women, it can be of advantage to women. The law should intervene therefore, in the recesses of the 'private' to ensure gender justice. From this point of view, the right to privacy is only a means to protect the existing

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[32] G. Spivak, *In Other Worlds*, New York and London, Methuen, 1987, p. 103.

[33] A. L. Allen, *Uneasy Access: Privacy for Women in a Free Society*, Totowa, NJ, Rowman and Littlefield, 1988.

[34] Discussed in C. MacKinnon: *Feminism Unmodified*, Cambridge and London, Harvard University Press, 1987, p. 96.

[35] S. Moller Okin, "Gender, the Public and the Private", in D. Held (ed.), *Political Theory Today*, Cambridge, Polity Press, 1991, p. 86.36.

[36] S. Moller Okin, *ibid*.; Anita L. Allen, *Uneasy Access*.

structures of power and access to resources in the private sphere. For example, Catharine MacKinnon argues that by sanctioning abortion as a right of privacy, the state has ensured that the control women won out if this legislation has gone to men. She holds that when women get abortion as a 'private privilege', not a 'public right', in effect it is men – husbands, fathers – who end up controlling the decision to abort. Further, when abortion is framed as a right of privacy, the state has no obligation to provide public funding for abortion.[37]

Feminists in India generally function from the second point of view, seeking legal intervention in more and more areas of 'judicial void'.[38] However, the focus on legislation is restricted to the realm of the 'private', that is, family and sexuality. There has been no nationwide feminist campaign for legislation comparable to this on any issues relating to the 'public' sphere, such as for the enforcement of the Equal Remuneration Act of 1976, or for crèche facilities at the workplace and so on. In effect, the only national-level feminist legal campaigns conducted have been on issues related to the family and sexuality. This is not surprising or unique to India. As Mary Fainsod Katzenstein points out, 'body politics', that is, sexual/reproductive issues, reach the public agenda only when women's groups organise independently of the state. Government initiatives on gender issues are likely to be in the arena of economic issues because economic issues have always been 'public' in the sense of being accessible to reflection by society, and therefore very much on the agenda of the state, while sexual/reproductive issues have not.[39] Naturally, then, the feminist project has been to combat the privatisation of the latter.

However, 'to make public' can be understood in two senses, to use a distinction formulated by Seyla Benhabib – 'making public' in the sense of questioning life forms and values that have been oppressive for women, making them accessible to reflection and revealing their socially constituted character, and 'making public' in the sense of making these issues subject to legislative and state ac-

[37] C. MacKinnon, *Feminism Unmodified*, cit., pp. 93-102.
[38] T. Stang Dahl, *Women's Law*, cit., p. 75.
[39] M. Fainsod Katzenstein, "Getting Women's Issues on the Public Agenda: Body Politics in India", *Samya Shakti*, vol. 6, 1991.

tion.[40] It seems to me that much of the experience of feminist politics all over the world has been that we have tended to conflate the two. That is, sexual/reproductive issues have been put on the public agenda *in the form of* demanding legislative action. In the Indian context Nandita Gandhi and Nandita Shah suggest that women have found it easier to fight against the state, or against social custom through the state, than to fight for their rights within the family or on 'personal' issues which 'bring us closer to the starkness of the inegalitarian and oppressive relationship between men and women'.[41] Is it precisely the intractability of the oppression at the level of 'the body' which leads feminist practice to attempt to comprehend and contain it in the discourse of coherence and uniformity offered by the law?

It is time to re-examine the relationship between legal discourse and the public-private distinction. Is 'the private' private because the law cannot intervene and influence it? But consider also that it is the law that constructs the private by refusing to intervene, by closing off that arena as inappropriate for its own intervention. Take, for instance, the judgement of the Delhi High Court, later upheld by the Supreme Court, that 'introduction of Constitutional law into the ordinary domestic relationship of husband and wife will strike at the very root f that relationship' and that ' in the privacy of the home and married life, neither Article 21 (Right to Life) not Article 14 (Right to Equality) has any place'.[42]

Evidently, the law sees the protection of 'the ordinary domestic relationship' as its business. Formulating the public-private distinction in this manner seems to resolve what Frances Olsen sees as the 'incoherence' of the language of intervention and non-intervention. Olsen's argument is that if 'the private' is defined as that unregulated by law, it is difficult to hold simultaneously that the private is in fact, indirectly regulated by law.[43] As the judgement mentioned

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[40] S. Benhabib, "The Generalized and the Concrete other: The Kohlberg-Gilligan Controversy and Feminist Theory", in S. Benhabib and D. Cronell (eds), *Feminism as Critique*, cit., Cambridge, Polity Press, 1987, p. 177.

[41] N. Gandhi and N. Shah, *The Issues at Stake*, cit., p. 271.

[42] 1984 *All India Reporter* 66 Delhi. Discussed in Nandita Haksar, *Demystifying the Law for Women*, cit., p. 58.

[43] F. E. Olsen, "The Myth of State Intervention in the Family", in F. E. Olsen (ed.), *Feminist Legal Theory Volume II: Positioning Feminist Theory Within the Law*, Aldershot, Dartmouth Publishers, 1995, p. 185.

above illustrates, the state's abdication of regulation is precisely a form of regulation.

If 'public' and 'private' have no existence prior to legal theory but are constructed by the functioning of legal discourse, what is the implication for feminist practice? Both strategies discussed – that of valorising the private as providing a sphere of individual freedom which has been denied to women, as well as that of opening up the oppression within the private to the public scrutiny of the law – fail to overcome and deconstruct the public-private dichotomy. The first reinscribes the separation of the two on the very site that this separation is being critiqued. It assumes that something called 'privacy' can be made to exist by using the law to limit its own jurisdiction, when the existence of 'privacy' is dependent on the same discourse which sets up 'the public' as the arena of political virtue. For example, Jean Cohen argues for the right to abortion in terms of 'new privacy rights', that reproductive rights are to be justified in terms of individual control over the symbolic interpretation of the body.[44] However, this argument assumes precisely what any project to radicalise reproductive freedom should confront, that is, that symbolic order which inscribes the body as body, as separate from other bodies, as gendered, as healthy/unhealthy, and so on. Cohen's argument for reproductive freedom in terms of individual rights assumes the individual to be the arbiter of what shall be understood as her 'own' body. However, 'the individual' does not simply occur in nature, as it were. Is not the very idea of individual as separate self, generated by the same discourse which legitimates privacy rights and which constructs the gendered and heterosexual body as the norm? Surely a feminist consideration of reproductive freedom should work to contest the production of this identity?

The second strategy sees liberatory potential in using the force of law to illuminate the darkest recesses of the private, in effect pushing the law to define with greater and greater exactitude the contours of legitimate and illegitimate modes of sexuality, the family and conceptions of the body. Does this effectively plug in the interstices in dominant discourses through which the intended meaning of 'the body' escapes, precisely those interstices in which subversive

[44] J. Cohen, 'Democracy, Difference and the Right of Privacy', in Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, NJ, Princeton University Press, 1996.

discourses like feminism operate to recuperate meaning? As Foucault points out, 'silence and secrecy are a shelter for power, anchoring its prohibitions; but they also loosen its holds and provide for relatively obscure areas of tolerance'.[45] For example the experience of feminists in Canada after rape law reforms has been that feminist proposals became part of a package of grater regulation over sexual behaviour deemed undesirable – such as homosexuality and under-age sex. So feminist legal reforms coincided with other demands for greater control over sexual beaviour, and the overall impact has been to tighten regulation by the state.[46]

The public-private divide is characteristic of modernity, as we saw in the argument of Linda Nicholson earlier in this section. In postcolonial societies like India therefore, there persist modes of social interaction which do not attempt to categorise in these terms. Simultaneously there is the continuous move by the arch instrument of modernity, the law, to render these alternate, more ambivalent modes of perception illegitimate. Upendra Baxi holds that as far as dispute settlement is concerned, in India there are two broad complexes of norms, institutions and processes – state legal systems and non-state legal systems. The first are marked by the quest for certainty and exactitude and are predicated upon the assumption of a clear demarcation between public and private. The second work on shared traditional perceptions of family honour, kinship ties and caste relations, and the public and private are not distinct categories in their understanding.[47]

In this context it is illuminating to consider studies of 'abducted' women and children in the Partition riots on the Indian subcontinent.[48] The governments of India and Pakistan set up administrative machineries to recover on behalf of their families, those women and children. However, in the Indian case, which these studies examine, many of the (now Pakistani) Muslim women who had been abducted by (Indian) Hindu and Sikh men had been absorbed into

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45 M. Foucault, *The History of Sexuality, An Introduction*, Harmondsworth, Penguin (Peregrine Books), 1984, p. 101.

46 I. Snider, "Legal Reform and Social Control: The Dangers of Abolishing Rape".

47 U. Baxi, *Toward a Sociology of Indian Law*, New Delhi, Satvahan, 1986, p. 77.

48 U. Butalia, "Community, State and Gender: On Women's Agency During Partition", *Economic and Political Weekly*, 24 April (1993); R. Menon and K. Bhasin, "Recovery, Rupture, Resistance: Indian State and the Abduction of Women During Partition", *Economic and Political Weekly*, 24 April (1993).

the families of their abductors. However, the government insisted on 'recovering' these women and repatriating them to Pakistan regardless of the pleas of their new families and of the women themselves that they be allowed to remain in India. As Veena Das insightfully comments, 'It was not the order of the family which was scandalized by the threats to purity that the presence of Muslim women posed, for the strategies of practical kinship knew how to absorb them within the family itself, but rather, the ideology of the nation that insisted upon this purification.' Das points to the variety of strategic practices within the family, which were flexible enough to accommodate a wide variety of behaviours, in contrast to the order of the state in which identity had to be firmly fixed. Let me emphasise the fact that both orders were repressive for women – this is not in question here. The point is that the entry of the state into a realm it prohibited to itself under 'normal' circumstances necessitated the freezing of identities into exact categories that were non-negotiable. For the state, the identity of the women could be cast only in terms of citizenship, whereas 'the exigencies of practical kinship' allowed for considerable flexibility under extraordinary conditions.[49]

The general argument I make in this book is that there is a contradiction generated by the mutual interaction of the language of rights and the law. This contradiction arises from the belief of social movements that they are articulating the universal values required by legal discourse when they use the language of rights, when in fact rights are constituted differently by the moral perspectives of different discourses. This opposition between the universality and uniformity required by the law on the one hand, and the multi-layeredness of rights on the other, becomes particularly problematic when feminist politics attempts to use the law, through the language of rights, to liberate 'women's bodies' from the oppression of patriarchal structures and institutions.

The Body and Law

[49] V. Das, "National Honour and Practical Kinship: Of Unwanted Women and Children", in V. Das, *Critical Events: An Anthropological Perspective on Contemporary India*, Delhi, Oxford University Press, 1995, p. 80.

Both mainstream (non-feminist) and feminist political theory see 'the body' as a natural object situated in the realm of the 'private', and the 'making public' of the body through legal discourse is assumed to be a transformative step. However, since 'rights over bodies' have their particular significance only within the specific discourses that generate them, the clarification and containment of 'the body' by legal discourse can run counter to the feminist vision. The body is not a simple physical object but rather, is constructed by and takes its meaning from its positioning within specific social, cultural and economic practices. The dominant discourses impose heterosexual and reproductive sexuality as the only morally sanctioned order. The assumption that bodies are naturally gendered and that the category of *sex* exists *a priori* imposes a duality and uniformity on bodies. This violence of categories is embodied in law through, for example, laws against homosexuality, laws regulating marriage and procreation and laws on what constitutes rape. Joan Scott points to the influence of law on perceptions of 'nature' when she argues that, 'By a kind of circular logic a presumed essence of men and women became the justification for laws and policies when in fact this "essence" (historically and contextually variable) was only the *effect* of those laws and policies.'[50]

Primarily for these reasons, feminist politics centering on the law may not have the liberatory potential intended. On the contrary, constant referral to the law to legislate on issues relating to 'the body' becomes in effect a revalidation of legal norms on what this body is, and on what it is that rights over 'our' bodies can be. The question will be asked – is everything 'only discourse' then? What about 'real' bodies? The point here is precisely that the multiplicity of 'real' bodies is rendered invisible or illegitimate through the functioning of hegemonic legal and cultural codes. To suggest only a few instances – infants born with no clear determining sexual characteristics, eunuchs, or men and women who have characteristics that are 'non-masculine' or 'non-feminine' respectively. All these have to be disciplined into normalcy (through methods ranging in severity from cosmetic to surgical intervention), or declared to be abnormal or illegal. Our very language, held implacably as it is in

[50] J. W. Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man*, Cambridge MA, Harvard University Press, 1996, p. ix.

the grip of a bipolarity of gender, falters in attempting to refer to such bodies.

Take for instance, a revealing letter to the medical columns of a Sunday paper from 'A grieving mother', who seeks advice about her eighteen-year-old son whose sudden depression she traced to the fact that 'his nipples and breasts are bulging out, which disgust him'. The doctor's reassuring reply is that *nearly 30 per cent* of men have 'suffered' from what is termed 'gynecomastia' at some time or the other. In some cases, the cause could be tumours or malnutrition, but this is rare. *The most common cause* of 'gynecomastia', says this doctor, is simply this – 'pubertal', due to the fact that breast tissue, normally dormant in boys, is 'super sensitive to the minuscule amount of circulating female hormones'. The doctor says that once the 'rare causes' have been ruled out by an endocrinologist, either the condition is self-limiting, or if it is not, *may require surgery*. In other words, nearly a third of the male population can have 'breasts', and if it is not due to rare endocrinological causes, the condition is perfectly normal. It seems to have no other ill effects than causing 'disgust', but nevertheless, it is pathologised ('gynecomastia'), and surgery is recommended when other serious illness are *ruled out*.[51]

The hormonal conception of the body is now one of the dominant modes of thinking about the root of sex differences. Nelly Oudshoorn points out that the hormonal conception of the body in fact allows for the possibility of breaking out of the tyranny of the binary sex-difference model. That is, if bodies can have both female and male hormones, then maleness and femaleness are not restricted to one kind of body alone. However, the biomedical sciences have preferred increasingly, to portray the female, but not the male, as a body completely controlled by hormones. In this process, a clear nexus has emerged between the medical profession and a huge, multi-billion dollar pharmaceutical industry. All sorts of 'disorders' in women – such as the ageing of the skin, depression, menstrual irregularities – are prescribed hormonal therapy.[52] This pathologisation clearly extends to male bodies that react to the 'mi-

[51] Letter on file with author.

[52] N. Iudshoorn, *Beyond the Natural Body: An Archaeology of Sex Hormones*, London, Routledge, 1994.

nuscule amounts' (as the doctor in the letter above firmly qualifies) of female hormones circulating in them.

Or consider the startling study in the USA of intersexed infants (babies born with both ovarian and testicular tissue or in whom the sex organs were ambiguous) which showed that medical decisions to assign one sex or the other were made on cultural assumptions rather than on any existing biological features. Thus, a baby might be made into a female but then still requires hormonal therapy all her life to make her stay 'female'.[53] Again, 'gender verification' tests for the Olympic games were suspended in 2000 after enough evidence had emerged that 'atypical chromosomal variations' are so common that it is impossible to judge 'femininity' and 'masculinity' on the basis of chromosomal pattern alone.[54] In other words, maleness and femaleness are not only culturally different, they are not even biologically stable features at all times.

Biomedical language is often adduced to buttress legal discourse in order to produce the body as a natural given object that has to be one or the other in a series of binary oppositions – male/female, juvenile/adult, healthy/diseased, heterosexual/homosexual. On the other hand, the experience of self and the body validated by feminism as 'real' acquires meaning precisely through an interplay of contexts, a movement that is halted by the rigid codifications required by legal discourse. It would seem that the juxtaposition of rights as understood to be discursively constituted (hence ambiguous, felxible in significance) and the law (which demands certainty and exactitude) is especially problematic for feminist practice in the realm of the 'private' where the body is located.

Two caveats before we proceed further. One, I must emphasise that the focus of this book is squarely on the law and the state as engaged with by feminist practices. The non-state domain of dispute settlement – which is vast and powerful – remains unexplored here. It is also a realm that feminist politics has not taken seriously except to criticise as embodying patriarchy and traditional power re-

[53] S. J Kessler, "The Medical Construction of Gender: Case Management of Inter-sexed Infants", in A. C. Herrmann and A. J. Stewart (eds), *Theorising Feminism: Parallel Trends in the Humanities and Social Sciences*, Boulder, Westview Press, 1994.

[54] Anonymous, "Gender Hurdles", *Economic and Political Weekly*, 3 June (2000), p. 1877.

lations. Whether that domain offers any emancipatory potential at all is a question that remained to be asked.

Two, a note on my use of the idea of 'emancipation'. I understand emancipation as a process without closure, it is not a goal that we can reach. Each victory becomes the site of a fresh cooptation, but conversely too, each defeat releases new potential to resist oppression. To move away from legal and state-centres conceptions of political practice is to recognise political practice as the perpetual *attempt* to eliminate oppression rather than the *achievement* of this elimination. Nevertheless 'emancipation' remains a horizon that should drive our political practice.[55]

I explore the implications of these arguments in the light of the experience of the women's movement in India particularly since the 1980s. The focus is specifically on three issues: (a) abortion and femicide of foetuses; (b) sexual violence; and (c) the campaign for reservations for women in Parliament. All three issues illustrate the central question raised by this book: Who is the subject of feminist politics? It seems to me that we have tended to assume this subject to be already existing, in a body that is self-evident. But whether it is Woman as choosing to abort a female foetus, as resisting/surviving sexual violation, or as seeking political representation, the experience of feminist politics shows up the gaps in the constitution of this Subject. In this work I suggest that the creation of 'women' as subject should be understood to be the *goal* of feminist politics, not its starting point. If this is so however, appeals to the law, necessarily based on the assumption of an already existing subject – 'Women' – about whom the law shall speak, are bound to produce disjunctures between feminist ethics and legal transformations.

In the process of engaging with these specific issues I expect to reveal a more fundamental set of questions about the issues of citizenship, representation, and the subject of radical politics in general, for I do not suggest by any means, that only Woman is proble-

[55] In this as in many other formulations (particularly on the notion of hegemony) my intellectual debt to the work of Ernesto Laclau and Chantal Mouffe will be evident. I have cited them at many places, and the bibliography lists that part of their work that I am familiar with. However, although I may not have cited them at every point, it will be clear that their pioneering efforts to build up a 'post-Marxist' mode of analysis has been formative for my thinking. Mouffe, of course, has moved in a somewhat different political direction since her joint work with Laclau, but I continue to find her questions and mode of engaging with them provocative and productive.

matic to constitute as Subject. These are questions I will attempt to take forward, if not precisely to answer, by the last chapter of this book.