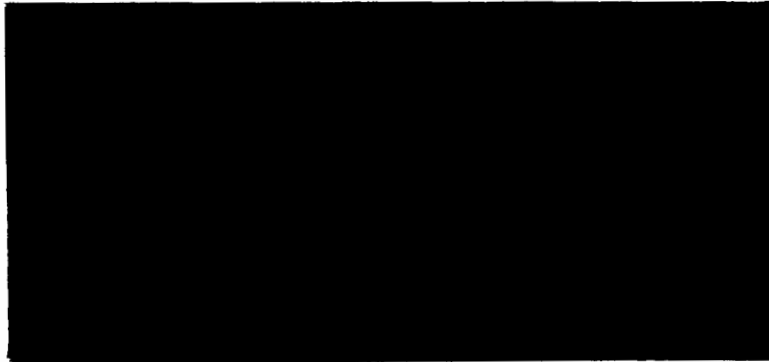




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**"Rights, Bodies, and the Law: Towards a
Feminist Ethics of Justice"**

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It is generally assumed that law should be the institutionalised pursuit of justice. While it is accepted that there would always be an excess of justice which cannot be captured by the law, counter-hegemonic political practices reflect the belief that however weakly, incompletely or unwillingly, the processes of the law can be forced to reflect the ideal of justice.

The questions this paper addresses are - does law have the capacity to pursue justice, and more fundamentally, can "justice" be conceived of in a universal sense as suggested for example, by the term "social justice". Both questions seem to require a negative answer.

The first assumes that power, the unequal dynamics of which constitute injustice, is juridicially derived. But as Foucault points out, while many of the juridical forms of power continue to persist, these have "gradually been penetrated by quite new mechanisms of power that are probably irreducible to the representation of the law...We have engaged for centuries in a type of society in which the juridical is increasingly incapable of coding power, of serving as its system of representation" (1984:89). This is why, I would argue, our attempts to transform power relations through law tend rather, to resediment these relations and to reassert dominant values.

The second question can be addressed in the following way. In the course of this paper I will attempt to displace the assumption underlying understandings of rights, that these are universal and based on a generally accepted moral order. I argue rather, that rights come into being within specific sets of shared norms of justice and equality. However, legal discourse, through which rights are sought to be institutionalised, is marked by the movement towards certainty and exactitude. What are the implications for the liberatory potential of rights once their meaning is fixed by law? If, as I seek to establish, rights are constituted by the values derived from specific moral universes, there is a singularity to justice, a uniqueness which as Derrida puts it, must always concern "individuals, irreplaceable groups and lives, the other or myself as the other in a unique situation" (1990:949. Emphasis in original). This uniqueness however, is at odds with law, which must take a general form, as norm and as rule.

In Derrida's understanding of justice, the very condition of justice is that one must address oneself to the other in the language of the other. There is violence involved in judging persons in an idiom they do not share, perhaps even understand. But this violence is obscured by the appeal to "justice" as a universal value, as to a third party "who suspends the unilaterality or singularity of the idioms" (1990:955). Derrida emphasises that to recognize this is not to abdicate before the question of justice or to deny the opposition between just and unjust. Rather, it involves a responsibility to a "historical and interpretative memory"

(1990:955). That is, to recall the history, the origin and subsequent direction, of concepts of justice and the law. In this way we would be desedimenting the values embedded in the idea of justice as a universal concept. These values have assumed the status of natural presuppositions and the violence of the moment of their imposition has been rendered invisible through a kind of historical amnesia. To interrogate points of origin constantly, to question the grounds of the norms which underlie notions of justice at historically specific moments, is not to surrender an interest in justice. On the contrary, it "hyperbolically raises the stakes of exacting justice" (1990:955). C

The answer then, to the second question that this paper engages with is that the achievement of justice in a universal sense is an impossibility. At particular historical moments "justice" is constituted by specific moral visions, but the discourse of the law is predicated upon the assumption that justice can be attained once and for all by the fixing of identity and meaning. The meaning delivered by law as the just one then gets articulated in complex ways with other discourses constituting identity, and tends to sediment dominant and oppressive possibilities rather than marginal and emancipatory ones.

I will engage with the two questions that I have outlined above, through an examination of the issues of abortion and sexual violence. Unproblematized notions of "body" and "self" are embedded in feminist discourse on these two issues. The understanding is that "the body" is a natural and physical object and that "sex" is a phenomenon which exists prior to all discourse, simply distinguishable from other kinds of human interaction.

However, what we need to take on board in our struggle to develop a feminist sense of self is that "the body" and "sex" are not "natural" but produced by discourses. This is not to deny their "reality" but to question the assumption that this "reality" can be accessible outside of particular contexts. It would then become necessary to rethink the attempt to universalise one particular "reality" through law.

Legal discourse produces the "body" as an object that has to be one or the other of a series of binary oppositions - male/female, healthy/diseased, heterosexual/homosexual. On the other hand, the experience of "self" and "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. The issues of abortion and sexual violence in particular, cast women as "bodies" for both feminist and legal discourse. An examination of these issues would therefore be fruitful in terms of the questions raised above.

Questioning Rights

Both at a conceptual as well as at a political level, Rights and Law are quite distinctly connected. On the one hand, a social movement operating in the realm of law is constrained to use the language of rights because legal discourse is animated by the weighing of competing rights. In other words, to enter into the realm of law, rights-talk becomes obligatory. On the other hand, when a social movement makes claims based on rights, at some level these claims are predicated on the assumption that these rights should be protected by law. The language of rights thus tends to privilege the sphere of the state and its institutions.

We can trace the evolution of the understanding of rights from the first systematic development of the concept in ancient Rome, when rights were created by the law. For Roman jurists rights, law and justice were inseparable, and the law was considered to be an expression of the community's conception of justice. Nevertheless rights did not imply absolute control, nor were they unlimited in scope. Rights operated in the realm of civil society, not in the realm of the state or the family, and governed relationships between individuals, not between individuals and the state. During

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the centuries of feudalism in Europe, rights continued to be conceived of in much the same way, with both individuals as well as communities and groups being the bearers of rights. Indeed, the "individual" was not clearly demarcated from his community, work or land. The process of individuation which was to be both empowering as well as severely alienating, began later. Moreover, rights were derived from customs and traditions as well as from law, and all sources of rights had equal validity.

From the seventeenth century rights began to be seen as inhering in individuals, rather than in groups or communities. This individual was detached from his social context and conceived of as constituted by the limits of his body. The Individual as the bearer of rights was also male, as feminist critiques have pointed out, for male bodies were considered perfect, being clearly bounded. Female bodies were seen as permeable, subject to cyclical changes and with unlimitable boundaries. They could never be the rational, indivisible, unambiguous individual (Landes 1988).

The source of rights shifted to the civil law, with customs, traditions and usages being gradually marginalised. Most significantly, the scope of rights changed radically at this time. The natural world was no longer part of a whole in which human beings acquire their sense of self. Rather, it was external and alien to the individual who was to master it and tame it to his ends. This meant that everything in the external world was an object over which men could have rights. Not only the external world, but each of his capacities became quantifiable and alienable while at the same time, man had somehow to be considered separable from his capacities so that his "self" could remain "his" even as he sold or alienated aspects of himself. Man's "self" then, was seen to reside in his capacity to choose, and as long as he chose freely, he was an autonomous individual, regardless of the ways in which his ability to choose was constrained (Parikh 1987:5-9).

We see then, that the idea of individuals as bearers of rights in their own capacities is barely four hundred years old. These centuries have seen the expansion of democratic rights to more and more sections of people, and the discourse of rights has empowered social movements of different kinds. Thus, while Marxists have critiqued "rights" as juridical conceptions which mask substantial inequality, they have argued that the rights themselves are not illusions. The formal recognition by the doctrine of equal rights of the equal dignity of all human beings, embodies what Poulantzas calls the "real rights of the dominated classes", which are the "material concessions imposed on the dominant classes by popular struggle" (Poulantzas 1978:84). The struggle then, is to transform these empty juridical rights into real rights by transforming the structural conditions which disempower the labouring classes. Rights are considered to have a powerful emancipatory potential, both at the level of rhetoric and symbol as well as substantively, with the revolutionary transformation of material conditions. Christine Sypnowich argues that any worthwhile socialist society would require legal institutions to adjudicate disputes between socialist citizens and between citizen and community. A socialist jurisprudence must draw from the liberal tradition, she holds, and herself using Ronald Dworkin's phrase, argues that it must retrieve the idea of the individual with rights which "trump" society's policies (Sypnowich 1992:86-87). Thus Marxist critiques attack the illusory nature of rights in capitalist society, not the understanding that the concept of "rights" has emancipatory potential.

A powerful and influential critique of rights, law and the state has come from Catharine MacKinnon who argues that liberalism supports state intervention on behalf of women as abstract persons with abstract rights while in reality "the state is male in the feminist sense." Abstract rights only "authorise the male experience of the world." As a result, she holds, feminist understandings of the world have been "schizoid" - on the one hand

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recognizing the world as patriarchal and oppressive, and on the other, turning to the law to make the law less sexist. She sees the state as embodying and ensuring male control over female sexuality even while it juridically prohibits excesses. In fact the legal prohibition of and controls over pornography and prostitution are meant to enhance their eroticism - "if part of the kick of pornography involves eroticising the putatively prohibited, pornography law will putatively prohibit pornography enough to maintain its desirability without making it unavailable or truly illegitimate" (MacKinnon 1983:643-644). MacKinnon's critique of the law and her understanding of gender as dominance of women by men (MacKinnon 1987:32-45) has certainly served the purpose of radically questioning the myth of the neutrality of the law which continues to have a powerful hold over the feminist imagination.

Yet MacKinnon herself makes the law the focus of her feminist politics in the USA. She has been the pioneer of legislation against sexual harassment and pornography, formulated in terms of employment rights and civil rights respectively (See MacKinnon 1987:103-116, 163-197). Her critique of abstract rights is based on an understanding of "the intractability of maleness as a form of dominance" (MacKinnon 1983:636) which leaves no space for women let alone for feminist politics. If male dominance is so dauntingly seamless then indeed, "it may be easier to change biology than society" as she gloomily concludes (MacKinnon 1983:636). But in that case, where is the feminist critique of MacKinnon herself generated? Clearly there cannot be a perfect fit between the "intention" of male dominance as MacKinnon sees it, and its effect.

Ultimately, MacKinnon's rejection of abstract rights and their illusoriness in an overarching system of male dominance from which nothing escapes, can only leave feminist politics in a state of paralysis. Given her analysis, it is impossible to justify or understand her legal activism, where she continues to expect to be able to force "women's experience" into the law. It would seem that so state-focused has our vision of political transformation become, that the most radical critiques of the state and its institutions end up merely realigning themselves once again on its territory.

This is particularly characteristic of analyses which suggest that the purposes of justice would be served better by stressing the relative importance of "needs" as compared to "rights". Upendra Baxi, counterposing human rights to basic human needs, problematizes the liberal conception of rights in a situation of mass poverty. He argues that the notion of Human Rights must be fused into a discussion of developmental processes - development in the sense of value for human dignity, both in an economic as well as in a political sense. He recognizes that needs are socio-genic and culture-specific, and therefore that questions will arise about the hierarchy of needs, who determines this hierarchy, and the conflict between human rights and needs. Nevertheless he holds that the needs-approach is still the most just way of understanding the possibilities of a just society. However, Baxi's analysis continues to focus on the State as the agent of change. For instance, he asks, "Should not continued drought or famine in one state in India ... justify a nation-wide ban on the conspicuous consumption of food on social events?" (Baxi 1987:190-95). There is an inability here to come to terms with the State and the law as deeply implicated in the processes which make famines, uneven development, and enclaves of wealth intrinsic parts of the Indian system.

Nancy Fraser believes that needs-claims can balance the competing claims of mutual responsibility and individual rights even though there exists the danger of playing into the hands of conservatives who prefer to distribute aid as a matter of need rather than right precisely to avoid any assumption of entitlement. Since her analysis is geared towards retrieving aspects of the Welfare State while critiquing its paternalism and androcentrism, she is quite unambiguously state-focused. Moreover she concludes by

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arguing that "justified needs claims" must be translated into social rights. This suggests a hierarchy - that needs must graduate into rights if they are to be taken seriously. It would seem then, that she sees needs-claims not as an improvement on rights-claims but merely as a preliminary stage to making rights-claims (Fraser 1989:182-183).

The only arguments that consistently reject the state-centric implications of "rights" and "law" come from a position that rejects individualism, but at the cost of valorizing "the community". Scholars of the Critical Legal Studies (CLS) Movement hold that rights discourse magnifies social antagonism by pitting one set of rights against another and question whether it can facilitate social reconstruction. Rather they urge recognition of consensus building mechanisms within the community. Such an understanding obscures the fact that "the community" is marked by exclusion along the axes of caste, gender, class and so on. "Social antagonism" can only be rendered invisible, not obliterated. Feminists in particular, find this position deeply problematic because the CLS critique of individualism installs the family as beyond justice, as a sphere embodying love, generosity and unselfishness, qualities that are above justice.(1) This mystification of the family as a sphere of love and harmony has been one of the primary foci of feminist critique over the last three decades. The family has been identified as one of the primary sites of oppression for women, based on inequality and injustice which are gender-based. If the rejection of rights as individualistic entails reinstating the family as moral community, clearly it would be self-defeating for feminism.

Feminists therefore, have attempted to redefine rights so that they need not be understood as purely individualist. For example, Martha Minow and Nancy Fraser have both tried to conceptualise rights so that they embody connectedness between autonomy and responsibility (Minow 1985a, 1985b, 1983, discussed in Schneider 1991:311; Fraser 1989:312-316). Similarly, Elizabeth Schneider argues that the experience of the women's movement has shown that a claim of right is a moral claim about how human beings should act towards one another.

Analyses of this kind, which attempt to rescue the emancipatory impulse of the rights discourse from its individualistic thrust, can only do so by introducing the dimension of morality.

The Moral Basis of Rights

The idea that there are rights sanctioned by a moral order whether or not they have legal existence is not a new one (Weinreb 1991; Feinberg 1992). Agnes Heller for example, argues that rights are "the institutionalised forms of the concretization of universal values". A value is universal if opposite to it cannot be chosen as a value in this sense. Freedom is a universal value because "no one is publicly committed to it as a value by everyone". She says "the free advalue of life is another value which 'comes close' to it by retaining a universal status." These are derived from these values and stem from the conception of distributive justice. Therefore rights language should be concluded, "the language of freedom and democracy (Heller 1984:1384). Similarly, Ronald Dworkin's work on the conception of rights is consistent with this, certain "trumpable individual rights" - redoubtable moral authority the way to overcome what is perceived as the community's interests based on the unavailing shared sentiments (Dworkin 1977).

However, the morality of "universal values" is clearly the kind of morality feminists have in mind when they reinscribe rights on to moral terrain. Such a move not only obscures the power dynamics but also obscures the fact that values are graded and others are re-marginalised and need. This kind of analysis also allows us to conceive of conflict among universal values as a struggle.

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Nancy Fraser puts it, rights talk is not necessarily
individualistic and androcentric. It becomes so "only when
societies establish the wrong rights, for example when the
(putative) right to private property is allowed to trump other,
social rights" (Fraser 1989:183, emphasis in original).

Clearly, what one "ought" to do, or what constitutes a "moral"
action, makes sense only within shared sets of understandings on
"justice", "equality" and so on. Thus, rights are constituted by
shared moral boundaries. What happens to them in the realm of legal
discourse? Appeals to the law are made on the assumption that
rights are self-evident, universally comprehended and universally
applicable, but some slippage in meaning takes place once they are
in the legal arena where diverse discourses of rights converge.
That is, what appears to be a right empowering women within
feminist discourse can have entirely the contrary effect once it is
materialised in the legal realm. The manner in which this
transposition takes place will be explored with reference to the
issues of rape and abortion in later sections.

Elizabeth Kingdom's feminist critique of rights questions the
desirability of generalizing on a whole range of issues grouped
together under the heading of "women's rights". She urges instead
that specific legislations be analysed from both "feminist" and
"socialist" perspectives. She argues that this model allows for a
more complex analysis of the issues covered by "women's rights".
She takes up as an instance, the case of protective legislation
(restrictions on the employment of women in hazardous work, night
work, overtime, and so on), in which the protection of women's
rights is inseparable from the struggle to improve working
conditions for both men and women (1991:26-45).

While Kingdom recognizes the problematic nature of "women's
rights", she fails to take her analysis far enough by
problematizing the notion of "rights" itself. As a result, she
assumes that it would always be possible to apply a "feminist" or
a "socialist" understanding to specific legislations without the
possibility of conflict between the two. For instance, the example
she suggests, that of protective legislation, has been the focus of
other socialist-feminist studies as exemplifying the conflict
within the working class between the rights of male and female
workers (Alexander 1976; Barrett 1984). Michele Barrett, discussing
the position taken by British trade unions on protective
legislation, that such measures should be retained, argues that
this was a deliberate strategy to reduce competition for male
workers. She notes that such legislation was introduced in areas of
competition rather than in all areas of work (1984:171).

A more thoroughgoing feminist critique of rights is provided
by Carol Smart (1989). She holds that first-wave feminists needed
the concept of equal rights to fight against legally imposed
impediments but that in the late twentieth century, while law
remains oppressive of women, it no longer takes the form of denial
of formal rights reserved for men. Continuing the demand for formal
rights now is problematic. She suggests that "the rhetoric of
rights has become exhausted, and may even be detrimental"
(1989:139). Rights can be appropriated by the more powerful, for
example, the Sex Discrimination Act may be used as much by men as
by women, to challenge affirmative action for women. She also points
out that rights are often formulated to deal with a social wrong,
but in practice become focused on the individual who must prove

that her rights have been violated. Any redress too, will affect only that particular woman (1989:145).

Posing a problem in terms of rights simply transposes that problem into one that is defined as having a legal solution. While accepting that rights do amount to "legal and political power resources", Smart holds that the value of these resources seems to be ascertainable more in terms of the losses if such rights diminish, than in terms of gains if they are sustained (1989:143). This distinction that Smart makes is crucial to developing any critique of rights, for it forces a confrontation of the fact that while the existence of a given right does not guarantee its realisation, its denial will negatively affect the people who had held that right.

However, Smart's critique remains in the terrain of the state, for she urges in place of rights, a reformulation of "demands" grounded in "women's experiences" rather than in "abstract notions like rights" (1989:159). What form will these "demands" take and on whom will they be made? It is not clear how Smart's "demands" will differ from "rights" after all. Moreover the formulation of rights-as-abstract versus experience-as-concrete is misleading. We have seen how rights are derived precisely from within a universe of shared "experiences". The difference between "rights" and "experience" cannot be sustained.

The next section will examine the manner in which legal discourse operates, seeking certainty and exactitude and bringing to a halt the play of meaning and contexts which give rise to rights.

Legal Discourse and the Fixing of Meaning

In India the understanding of "law" was fundamentally changed with the British conquest - Legality replaced Authority. Whereas in the classical system the judgement had no other object but to put an end to the dispute, it now began to constitute a precedent, a source of law. Even in the mediaeval period, there was great flexibility in the attachment of particular regions to one or the other school of interpretation. Sastric law was as likely to modify its principles to match local custom as custom was, in deference to Sastric law. Islamic law too, was based on revelation as Dharma was, and in neither were decisions of the court the source of law. In both, interpretation and custom had the same importance (Altekar 1952; Lingat 1973; Baxi 1986).(2)

Under the British system the judge fixed interpretation once and for all, and further development of the law could take place only through cases. Even where custom was accepted as prevailing over Sastric law, it was fixed as legal rule. Once identified, "custom" was understood to be fixed, and rigidly codified. Thus, the dynamic interplay between custom and Sastric law was halted. Upendra Baxi argues that it is with "ascendant capitalism and its Siamese twin colonialism" that the state appropriated to itself the legitimacy of being the sole source of law. All other forms of dispensing justice then began to be seen as inferior - these became designated as "custom", "community justice" or "unofficial adjudication". He holds that these should instead be called "non-state legal systems" because to deny them the status of law is to accept the colonial devaluing of indigenous institutions (Baxi 1992:251-252).

However modern legal systems are marked by "a quest for...certainty, consistency and uniformity", as Baxi himself points out elsewhere (Baxi 1986. Emphasis in original). This is not characteristic of pre-colonial indigenous justice-dispensing institutions, and the universal use of "law" to refer to all forms of "prescriptions, prohibitions, punishments" (Baxi 1992:251) would blur this crucial distinction. Baxi does not consider the goals of certainty and uniformity to be desirable and urges in fact, departures from them to ensure "legal growth". However, he does not address the question of how such departures are to be effected. The legitimacy of the law rests on the concept of Rule of Law, that is,

the due observance of the procedures prescribed for making a valid decision. Thus when Ronald Dworkin questions the rationalist and positivist certainties of law, affirming law rather, as interpretation and meaning, he is clear that such interpretation has to follow "the injunctions of a grammar of principles". Such principles are drawn from the moral ideals of a subject assumed to be universal (See discussion in Douzinas et al 1991:24-30). Clearly, any attempt to build into the law, an openness to multivalence, would have to be institutionalised if it is to be legitimate. The paradoxical nature of this formulation itself points to its impossibility. Without such institutionalisation, departures from consistency and uniformity can only be at the whim of individual judges.

Such departures are in fact, precisely the focus of one school of feminist critique of the law. The perspective of "legal realist rule scepticism" is that in actual practice, decisions are at the mercy of individual judges who make "law" through their interpretation of ambiguous and open-ended practices. These interpretations reflect social and individual biases and practices, and the law is thus distorted from its purpose of neutral arbitration in the interests of social justice (Sachs and Wilson 1978; Atkins and Hogget 1984). This understanding has been attacked from within feminism for reinstating the assumption that bias and prejudice are external to the law, that law proceeding from its Parliamentary source is just and untainted by the values which influence individual judges (Kingdom 1991; Brown 1991).

The fixity of meaning required by legal discourse has generated a dilemma for feminists which has come to be formulated as the Difference-versus-Sameness approach. When "equality before the law" is interpreted as men and women being the same as each other, courts do not uphold any legislation intended either to compensate for past discrimination or to take into account gender-specific differences like maternity. Thus the Sameness approach cannot distinguish between "differential treatment that disadvantages and differential treatment that advantages" as Kapur and Crossman put it (1993:61). Liberal feminists who subscribe to the sameness approach however, continue to insist that the only way for women to achieve legal recognition of their equal status to men is to deny the legal relevance of their difference to the degree that it exists. Women should be recognized as gender-neutral legal persons.

The opposing position from within feminism is that this accepts the masculine as the norm, and prevents the visibility of the unique experience of women. To consider ourselves as gender-neutral "persons" can only marginalize us and devalidate our experience. However, the Difference approach in law has at best been protectionist, thus denying women the claim to equality altogether. It has also been used by courts to justify discriminatory treatment on the grounds that women are different from men (Kapur and Crossman 1993; Frug 1992). To put it in Frug's words, "Sameness feminists have been thwarted by the repeated recognition of difference; difference feminists by the devaluing of women's difference" (Frug 1992:xv. Emphasis in original).

In other words, feminists seeking social justice through the law have come up against the limits set by the criterion that law be uniform and consistent. It can either recognize sameness (which disadvantages women) or difference (which justifies discrimination). An alternative approach suggested is that of "substantive equality" (Kapur and Crossman 1993:20-21). The focus of this approach is not on equal treatment under the law, but on the impact of the law. This is an attempt to make the law more sensitive to a more complex notion of equality which takes into account the comparative disadvantages of persons under existing unequal conditions. Its proponents hold that in some contexts, the substantive model will require a sameness approach, in others, a corrective approach to take into account difference as well as

disadvantage.

This model quite clearly, is an understanding of how the law ought to function, and bears out the argument that is central to this paper, that rights are constituted within shared moral universes. The "substantive equality" approach is an attempt to universalise one such moral universe through law. However, both conceptually as well as in terms of political practice, this approach is illustrative of the problematic nature of the discourse of legal rights. It assumes, to begin with, the independence and separateness of the judiciary and legal system from the institutions of the state and the economic and cultural practices which constitute present conditions of inequality. It seems to suggest that all that is required is for judges to be sensitized to the notion of substantive equality, and social conditions will be gradually transformed by law.

To put one objection to this simply, if the morality underlying the notion of substantive equality were so self-evident and unthreatening to the dominant social order, we would not need the law to bring about social justice. One feminist teacher of law and legal activist has come to the conclusion that legal method may be "impervious to a feminist perspective" (Mossman 1991:297). She urges coming to terms with the fact that "... because there is so much resistance in legal method itself to ideas which challenge the status quo, there is no solution for feminists ... except to confront the reality that gender and power are inextricably linked in the legal method we use" (1991:298).

In the context of the Canadian Charter of Rights and Freedoms of 1982, Judy Fudge makes a similar point. She concludes that once the demand for substantive equality for women is translated into legal rights, it becomes divorced from broader political demands - "Instead of directly addressing the question of how best to promote women's sexual autonomy under social relations which result in women's sexual subordination, feminists who invoke the Charter must couch their arguments in terms of the rhetoric of equality rights." And courts interpret "equality" as formal equality rather than contextualising it within a historical framework of current inequalities (Fudge 1989:49-50).

At a conceptual level, the substantive equality model presents the problem of privileging rights, which once made legally enforceable, acquire a fixity of meaning that can undermine the very morality on which they are based. For instance, Kapur and Crossman cite the right to own land as a "basic civil and political right" in relation to which the sameness approach should be used, that is, gender should be considered irrelevant. It bears repeating here that the norms validated by law become relevant and binding in all cases in which similar issues are raised. What then, would be the implications of using the sameness approach towards the right to own land, in the context of land reform legislation? Here gender identity would be complicated by class, and the sameness approach would disadvantage the weaker party, in this case, the landless.

Marc Galanter's work (1984) is an acknowledgement of the need to confront the tendency of the law to fix meaning. He attempts to build into the law a conception of "identity" not as a fixed, natural or inherent quality, but as something constituted by interaction and negotiation with other components of society. It is Galanter's view that this understanding of identity would require courts to adopt an "empirical" as opposed to a "formal" approach. The latter sees individuals as members of one group only, and therefore, as having only the rights which that group is entitled to. Thus, for example, one who attains caste status loses tribal affiliation as far as the law is concerned. The empirical approach on the other hand, does not attempt to resolve the blurring and overlap between categories and accepts multiple affiliations. It addresses itself to the particular legislation involved and tries to determine which affiliation is acceptable in the particular context. Galanter accepts that in this approach, some slippage is

inevitable between judicial formulations and actual administration, for the courts must make subtle distinctions which must be translated into workable rules capable of being administered at lower levels.

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It is clear that Galanter applies his understanding of identity as relative and shifting only to "people", not to "courts" or "government". The latter are assumed to be outside this grid of affiliations, to have a superior understanding of it, and to be capable of choosing the "correct" perspective, whether empirical or formal. For example, he writes, "It is beyond the courts to rescue these policies (reservation policies) from systematic cognitive distortion, for courts cannot control the way that various actors and audiences perceive judicial (and other) pronouncements" (1984:357). Moreover, government intention in framing and implementing reservations is assumed to be identical with the official stated intention - that is, promotion of social justice. Groups are then seen to relate to these policies in their own particularistic ways, while apparently, the government and courts have the overall and universal picture.

Thus, Galanter's attempt to contest law's rigid codifying procedures is unsuccessful as he must retain the notion of the state and of law itself as the unified and self-transparent agency which will interpret the multiplicity of identities around it.

If as I have attempted to demonstrate, law functions through the assertion of certainty and the creation of uniform categories, and rights are constituted by particular discourses, this resituates rights in a realm of complexity, ambiguity and undecidability. We come then, to a point where we must go further than saying simply this: the language of rights can be alienating and individualistic but since it refers to some desirable capacities and powers the oppressed should have, it can be empowering. Rather we need to recognize that the experience of feminist politics pushes us towards the understanding that social movements may have reached the limits of the discourse of rights and of "justice" as a metanarrative. That trying to bring about positive transformation through the law can in fact run counter to the ethics which prompt entry into legal discourse.

I will now move on to a discussion of the issues of abortion and sexual violence in the context of the women's movement in India, in the light of the issues raised above.

Female Foeticide and Feminist Discourse on Abortion

In India the issue of abortion has been placed on the feminist agenda in a manner quite different to its positioning in the West. Since the dominant discourses construct poverty as being created by over-population, abortion has long been accepted as a measure of family-planning. The Medical Termination of Pregnancy (MTP) Act was passed in 1971 amidst Parliamentary rhetoric of choice and women's rights, but it was clearly intended as a population control measure, as several MPs pointed out during the debate on the Bill. The Act was not passed as a result of campaigning by women's groups, nor did there emerge any concerted anti-abortion stream of opinion in the public arena.

Abortion has become an issue for Indian feminists for quite a different reason over the eighties, with the growing practice of selective abortion of female fetuses after sex-determination (SD) tests during pregnancy. The response from the women's movement has been to urge the state to end the practice through law.

Two crucial questions arise for feminists from the issue, debate on which is far from closed within the movement. One, at the level of politics, the contradiction involved in pushing for legislation which can restrict the access to abortion itself. Two, at the level of feminist philosophy, if abortion is a right over one's body, how are feminists to deny this right to women when it comes to the selective abortion of female fetuses?

An examination of the history of feminist responses to the

practice itself as well as to the government's interventions illustrates the contradictions and dilemmas involved in negotiating these questions. (11)

The Forum Against Sex Determination and Sex Preselection (FASDSP) was formed in 1984, and it has been lobbying for legislation to ban the practice. In 1988, the state of Maharashtra passed an Act banning prenatal diagnostic practices. The FASDSP, a broad forum of feminist and human rights groups, was disappointed with the Act because it was full of "loopholes" and had not taken on the various recommendations the Forum had made. FASDSP then continued its campaign in the form of pressing for Central legislation which would be more effective. Parliament passed the Prenatal Diagnostic Practices (Regulation and Prevention of Misuse) Act in 1994, and it awaits Presidential assent.

Women's groups are dissatisfied with this Act, and in August 1994 urged the President to send it back for reconsideration to Parliament. Some of the points that their memorandum raised are as follows (Saheli Newsletter, January 1995:11-13)-

- a) All ultrasound machines and other equipment which can be used for SD tests should be registered. The Joint Committee had earlier considered this suggestion and rejected it as unfeasible because such equipment is used for various purposes other than pre-natal testing. (Report of Joint Committee, 1992:20-21).
- b) Future techniques for sex determination as well as for sex pre-selection should be brought within the ambit of the Bill.
- c) The Act punishes the woman if it can be proved that she was not coerced and that she went in for the test and the abortion of her own will. The memorandum says that punishing the woman is misguided, even on the presumption that she was coerced unless proved otherwise. This is unjust in a context where women rarely take autonomous decisions. The Act in this respect is anti-women, and would create conditions that would limit its effectiveness.

It is unlikely that Presidential assent will be withheld, and the Bill is expected to be gazetted soon. It is clear that most of the loopholes of the Maharashtra Act of 1988, as perceived by women's groups, persist. However, if SD tests are sought to be entirely delinked from female foeticide, which is necessary in order to protect the MTP Act, they cannot be effectively curbed, because most of the equipment is used for other purposes as well. Only by closing off all possibilities of "misuse" of existing equipment and technology can the practice of female foeticide be effectively controlled. But this would mean bringing all abortions under legal scrutiny as well. This is the double bind into which, I argue, legal discourse pushes social movements like feminism - the more narrow the focus of a piece of legislation, the less it serves its purpose, and the broader it is, the more it subverts the ethics underlying the very demand for legislation. We will find similar dynamics at work when the issue of rape/sexual violence is explored further on.

Another important problem arises from the point about women's culpability in the memorandum of women's groups to the President. It is true that women may be implicated by families being prosecuted by the state, although women rarely are in a position to make choices. Nevertheless, what are the implications of denying agency altogether to women on the grounds that they are never responsible for their decisions and therefore, should not be considered culpable at all? Within the realm of legal discourse, it is dangerous for feminists to construct women as incapable of taking autonomous decisions - the consequences for women's struggles against legally sanctioned discrimination in other spheres could be fatal.

The FASDSP's position is that women who make this choice are constrained by family and social pressures and are not really exercising their free will. This argument leaves unproblematised the decisions to abort in all other circumstances - illegitimacy, economic constraints and so on: surely these are equally informed

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by social and cultural values? Why is it assumed that only when a woman chooses to abort a female foetus is she not acting on her "own" will? If we unravel the underlying thread of reasoning which makes this position a persuasive one for many feminists, we would arrive at an argument which looks like this: Negative female-to-male ratios in a population are invariably corelatable to the low status of women. So the very constraints of a patriarchal society which make abortions necessary in most cases (including the low priority given to research on safe contraceptive methods) would be much greater if fewer and fewer women were born. Therefore abortion must be available to women who want it, while selective abortion of female foetuses must be stopped.

Clearly "the right to abortion" and the "right to end female foeticide" are in a complex interrelationship within feminist discourse. "Rights" over one's "own" body then, are not natural, timeless and self-evident. They are constituted as legitimate only within specific discursive political practices. Social movements cannot expect therefore, that rights can be unproblematically realised on a terrain where their specificity cannot be retained.

Further, the FASDSP calls for a ban on all technologies which could be used for sex-preselection at the time of conception, and for the regulation of all new technologies in future. What does it mean for feminist democratic politics to demand legal and bureaucratic control over entire areas of science and knowledge?

Finally, the new legislation and feminist responses to it establish that we remain unable to confront the ethics of condoning abortions when they are specifically due to "abnormalities" in foetuses. The FASDSP is clear that it does not want a blanket ban on pre-natal testing, and thus endorses such testing for the purpose of detecting "abnormalities" and the subsequent abortion of such foetuses (Ravindra R. P. 1990:30). However, once we accept there can be a hierarchy of human beings based on physical characteristics, and that it is legitimate to withhold the right to be born from those at lower levels of this hierarchy, then this reasoning can be extended to other categories, whether "females", "inferior races" or others. The work of Rayna Rapp and Veena Das points to the recognition that it is not inscribed in the nature of things that a physically or mentally retarded individual should have a poor quality of life. It is the great value placed on individual autonomy and on competition that makes this seem like a self-evident fact (Rapp 1987, 1993, 1994; Das 1986). Neither Das nor Rapp offers facile solutions to the dilemmas involved, but their argument foregrounds the moral and ethical vision of feminism, with all its rich ambivalence and self-doubt, a vision which it would be impossible to straitjacket into the certainties of legal discourse.

Feminist outrage over technologies to control the sex of foetuses, and over the practice of the selective abortion of female foetuses, arises from the ethical and moral vision of feminism. However, to translate this concern into the language of rights and the law appears to threaten this very vision.

Sexual Violence and Feminism

There are two simultaneous impulses at work in feminist analyses of rape. The one revealing the limitations of the law and its inability to encompass the lived experience of women; the other seeking to legitimate this experience precisely through having it recognized by the law as authentic.

In other words,

a) Certain experiences assumed to be clearly recognizable as "sexual", are posited as having a reality and an existence prior to legal discourse, and the latter is seen as limited and incomplete to the extent it is incapable of recognizing these experiences, but at the same time

b) These experiences need to be authenticated by law to have social value and be recognized as "real". To this extent then, they

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are to be constituted as real and legitimated by legal discourse. What are the implications of this, that is, of reinforcing the status of Law as the primary legitimating discourse?

Recourse to the law is seen as necessary and inevitable because it is believed that designing a law around an experience proves "it matters"; law is "the concrete delivery of rights through the legal system" (MacKinnon 1987:103). However, dominant modes of constituting the self - as woman, as criminal, as victim - are maintained and reinforced through the conventions of legal language. The rejection of these categories can come about in fact, only through resistance to legal discourse (Bumiller 1991:96). As Foucault points out, judgement is passed not only on the "crimes" defined by the code, but on "the shadows lurking behind the case" - "on passions, instincts, anomalies..." In short, on the deviations from dominant norms (1977:17). Thus, what the law legitimates ultimately, is precisely what feminist practice contests.

Moreover, in post-colonial societies, the establishing of law as the only legitimating discourse has meant the marginalizing and devalidating of other legitimating discourses. A uniformity was imposed which radically transformed indigenous notions of ownership, equity and justice. This is not intended as an exercise to valorize pre-colonial communitarian values as egalitarian and just. On the contrary, "the community" is marked by exclusion along the axes of caste, gender, class and so on; inegalitarian power relations are the fulcrum on which "the community" turns. Nevertheless it would be simplistic to assume the neutrality of the modern legal system. Social movements tend to work on the belief that even if law is as enmeshed in the power structures of society as "the community" is, it can be forced into the service of progress and change by the pressure of democratic movements. However, as Upendra Baxi points out, underlying the concept of "Rule of Law" (the due observance of the procedures prescribed for making a valid decision) is the idea that power should become impersonal and be constrained through rules applied by an independent judiciary and autonomous legal profession. But this formal legal rationality does not always constrain the arbitrary exercise of power; Baxi argues that on the contrary, it often helps to camouflage it (Baxi 1982:36-7).

What does it mean for feminists to insist that this "formal legal rationality" should delimit the contours of a particular experience, and that it should legitimate this experience? Do we not, by implication, accept that without such validation, the experience itself has no reality? We need to recognize that legal rationality cannot comprehend the complex ways in which sexual violence is constituted.

An analysis of judgements in rape trials which have come up on appeal to High Courts and the Supreme Court of India, and of legal discourse on rape reveals the impossibility of capturing the complexity of what Carol Smart calls the "binary logic" of the law. There is no room within legal discourse to conceive of women's sexual experience except in terms of consenting/not consenting to male pressure. "Consent" itself, a state of mind constituted in a complex way, has to be rigidly pegged to a linear notion of physical growth if it is to make sense within legal discourse. Below the Age of Consent a woman cannot be expected to have agency in sexual interaction, she can only be understood as Victim or Dupe. Above this age, even if it is by a few months, she is radically transformed from Victim to Accomplice. Thus, while recognizing the relative powerlessness and lack of autonomy that characterise women's relations with men, the point is to question the possibility of addressing this experience in the realm of legal discourse.

Even when justice appears to be done, that is, when conviction is secured, the very demonstration through legal discourse of the violation of the woman re-enacts and resediments patriarchal and

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misogynist values. In India, feminists have begun to view with concern judgements which take a progressive position on the issue of corroborative evidence in rape trials, but based on notions of women's "chastity" and "traditions of Indian society". The implications however, are more serious than feminist critiques tend to recognize - it is not simply that in such decisions the court passively accepts rather than challenges patriarchal values. The seriousness lies in recognizing that if it is assumed that tradition bound Indian society would make "innocent" women reluctant to level false accusations of rape, the same factor can be expected to motivate "promiscuous" women to hide their promiscuity precisely through such accusations. In other words, convictions can be secured only at the cost of turning the case once more on the axis of the "guilt" or "innocence" of the raped woman.

This paradox is what underlies the statement made by a feminist lawyer at a workshop in Delhi, that she would rather lose a rape case if in the process the right kind of debate was made possible. But are these two eventualities compatible with each other? The overwhelming hegemony of the law ensures the synonymy of law with justice. If the case were conducted in such a way that the "right" issues were raised from a feminist perspective, and conviction was not secured, would this not "prove" to society that these values are not right but wrong? It would appear to be impossible to engage with legal discourse except on its own terms. At the heart of any exercise to locate sexual violence within the law lies the irresolvable conflict involved in defining the harm of sexual violence so exactly that legal discourse can comprehend it, and so retaining ambivalences that the ethical impulse of feminism is undamaged.

Disembodying the Self

We have so far assumed as "natural" the symbolic order which produces this identity, which inscribes the body as body, as separate from other bodies, as healthy/unhealthy and so on, and which constructs the gendered and heterosexual body as the norm. Can we begin to conceive of a feminist politics which radically contests the production of this identity?

It is useful to consider here Judith Butler's discussion of Freud's *The Ego and the Id* (1923) in which Freud argues that the body does not precede and give birth to the idea of the body but rather it is the idea that makes the body accessible as a body. If we work on the belief that it is the idea that makes the body phenomenologically accessible, feminist practice would be liberated from the stranglehold of the discourse that designates the body as the site of selfhood. The boundaries of the stable, gendered, heterosexual self would be seen to be cultural and historical constructs, and not the natural immutable "reality" that we are apparently irrevocably faced with.

What can this mean for us in our very real struggle against constant dehumanisation and humiliation through our reduction to our bodies? The discussion in this paper seems to point to the tentative recognition that the possibility of realising the emancipatory impulse of feminism lies, not in concretizing and more fully defining the boundaries of "our bodies" through law, but in accepting "the self" as something that is negotiable and contestable. The indeterminacy of identity need not lead to political paralysis - on the contrary, it could dislocate feminist practice productively, from sterile engagement with legal discourse and hegemonic cultural productions of selfhood, to a realm of radical doubt and constant negotiation of what constitutes "me" as a "woman" in some contexts. Emancipation itself must be recognized as disaggregated, split along different axes, just as identity is not just a positive conglomerate of different subject positions, but an ever-temporary construction, forming anew at the intersections of shifting subject positions.

It might be possible then to see the feminist project, not as one of "justice" but of "emancipation". It is a characteristic of the discourse of justice that it has to operate on the same terrain as the harm it seeks to redress. The key terms upon which the injustice rests are not problematized, rather, these are in fact legitimised by showing that in the particular case in question, they are interpreted inadequately or non-inclusively.

The term "body" is one such key category in the issues we have discussed. In the case of sexual violence, it is assumed by all the discourses that circulate around and produce "sexual violence" as a category (including feminist discourses), that the body of woman is rapable. Women can always be raped, and rape is an attack on the very self-hood of woman. The issue then becomes one of "proving" that rape did in fact take place, and ensuring justice through securing conviction by law. This leaves the ever-open possibility of other (all) women continuing to get raped.

Similarly, with female foeticide and its relationship to "women's rights over their bodies", we have seen how it becomes necessary to destabilise given notions of "bodies" and "women" to understand apparently contradictory positions taken by feminism. Could it be that the way out of this dilemma too, requires a relocation of "selfhood" outside the body?

What if our struggle were to emancipate ourselves from the very meaning of "rape" and "abortion" - indeed, of hegemonic conceptions of what it means to "be a woman" ? Does the ever-present threat of sexual violence and of other gendered violence (directed at women whether born or unborn), flow from the locating of the "female" self inside the sexually defined body of woman? The attempt then should be to redraw the map of our body to make it accessible to new codes, to new senses of the self, so that at least some of these selves would be free of the limits set by the body.

NOTES

(1)CLS scholars include Roberto Unger (1983), Michael Sandel (1982), Peter Gabel and Paul Harris (1982-3). For a feminist critique of the CLS position on the family, see Susan Moller Okin (1993:Chapter 6).

(2)Tahir Mahmood (1965) argues that custom is not an independent source of law in the legal theory of Islam. He claims that British administrators misunderstood custom to have the same significance as within Hindu law. The references to "usages" may have been inspired, according to him, by the practices of Hindu converts to Islam, who continued to follow certain aspects of Hindu law and custom. But if this was prevalent, then to what extent did a pure Quoranic law operate for Muslims any more than Sastric law did for Hindus? It was only at the beginning of the Twentieth century that the ulema began to compulsorily enforce Shari'a law.

