

Review Essay: Recovering Subversion: Feminist Politics beyond the Law

Nivedita Menon, Urbana and Chicago; University of Illinois Press; 2004; 288 pages; \$25.00 paper; ISBN: 0252072111

Dania Thomas

Lecturer, School of Law, Keele University, Staffordshire ST5 5BG. E-mail: d.thomas@law.keele.ac.uk

In this book, Nivedita Menon develops a persuasive critique of contemporary feminist politics in India that looks to the law to further its emancipatory goals. This critique is based on what Menon refers to as ‘the paradox of constitutionalism’. Constitutionalism is the “specific method adopted by modern democracies of safeguarding the autonomy of the individual self” (p. 1¹). The problem for contemporary radical politics lies in what Menon refers to as the ‘paradox of constitutionalism’- “... 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” (p. 2). In this vein, Menon argues that “the language of rights and citizenship is thus no longer unproblematically available to an emancipatory politics” (p. 2).

It is in this context that Menon re-assesses the aims of the women’s movement ranging from demands to criminalise sex-selective abortions, the reform of rape law and for law prohibiting sexual harassment in the workplace and the reservation of women in political institutions. She develops a trenchant critique of legal reform as the dominant strategy adopted by the women’s movement premised as it is on a conflation between the category ‘women’ as a subject in the law with ‘woman’ as the subject that concerns feminist politics.

Menon destabilises the ‘paradox of constitutionalism’ by replacing women as universal category with local, specific and particular categories constituted through political practice. Importantly, the latter must be located in political not civil society. Thus radical feminists must ‘recover subversion’ in political society through “a politics which involves long term struggles to reclaim meaning at the level of common sense, work within communities to challenge local structures of power [and] the building up of alternative structures in opposition to the family and other hegemonising institutions” (p. 216). For Menon’s radical political agenda, the delineation between civil and political society is pivotal as discussed below.

Menon adopts Partha Chatterjee’s description of civil society in India as a small section of society ‘shaped by the normative ideals of western modernity’. Civil society is composed of citizens and political society is composed of ‘population’. Population groups, unlike citizens are not the product of rational contractual association, but rather are the target of the ‘policy’ of the legal bureaucratic apparatus of the state. The civil society of citizens, on the other hand, shaped by the normative ideals of western modernity, excluded the vast mass of the population, towards which it assumes “a pedagogical mission of enlightenment” (p. 217). To articulate her radical political agenda, Menon unlinks Chatterjee’s notion of political society from the welfare function of the government and relocates it as the realm of struggles to produce a common sense alternative to the common sense of civil society. Thus the counter-hegemonic values required to engender a radical feminist politics that successfully destabilises the ‘paradox of constitutionalism’ can be found (if at all) in political society.

Menon examines contemporary feminist politics spanning a period of over twenty years, a period in which the Indian economy was liberalised in 1991 and in the process subjecting Indian

¹ All page numbers refer to Menon, 2004, unless otherwise stated.

society to the economic imperatives of both domestic and global capital. Though these events are outside the purview of Menon's concerns, her 'paradox of constitutionalism' is a useful tool to comprehend the profound changes wrought by liberalisation. It is true that the adoption of market capitalism pushes back the state and privatises legal relationships and technically this changes the predominant regulatory framework but Menon's paradox also allows us to appreciate the danger that the emancipatory aims of a radical feminist politics and the economic imperatives of radical market fundamentalists can come together in their opposition to the state, both offering alternatives to "the universalizing drive of constitutionality and the language of universal rights" (p. 2). For example, both seek to uplift women from oppressive social conditions – one empowering women through increased market access and the other through engendering "long term struggles to reclaim meaning at the level of common sense..." (p. 2). More disturbingly this solution has chilling parallels with the ideologues of market fundamentalists such as Milton Friedman who in the 1960s argued for self-regulating markets that exist for all intents and purposes beyond the law, to maximise the generation of wealth (and emancipate society in the process)². In some sense, if it is not the law then a radical feminist politics must at the very least deal with the possibility that their emancipatory goals may be co-opted by the market.

In any event, Menon's concerns open up new areas of inquiry, issues, political agendas, legal strategies, frameworks and social formations that negotiate the incongruent coupling between radical feminist politics and radical market fundamentalism. For instance, does economic liberalisation destabilise state-centric, rights-based theorisations of the law? Is constitutionalism subject to the imperatives of capital? If so, what new role does the law play? However, the engagement with the political and social implications of proliferating market capitalism through Menon's work destabilises the distinction she makes between civil and political society. More specifically, the possible twinning of radical political emancipatory projects with radical market fundamentalist agendas strains Menon's attempt to confine 'women' as a legal subject to civil society as markets destabilise the boundaries between civil and political society: in a liberalising economy, society (political or civil) is in transition where markets become the predominant means of generating wealth, (which in turn justifies the market fundamentalist mantra – wealth emancipates).

This raises particular problems for Menon's radical political agenda as in the absence of a distinction between civil and political society, there is no realm 'beyond the law' where a radical politics can arise. In other words, in a liberalising economy, the autonomy of the individual self is safeguarded by particular, local and specific market transactions, that can (under specific conditions and always at a cost) empower and emancipate. Thus to the extent that the latter is possible, it is imperative that a radical politics engage with the law. Some work in this area has been done, for instance Rosalind Petchesky relies on the human rights framework to articulate a politics of subversion from within the law. For instance, Petchesky's endorsement of DAWN's (an activist NGO) 'holistic'³ approach is telling. This approach combines rights and needs to specifically address the impact that privatisation and commodification has had on woman. This activist approach developed from the ground up requires a recognition that economic liberalisation does not merely displace the law but irremediably distorts it (sometimes becoming oppressive but also opening up new radical possibilities). Secondly, these distortions lay bare social practices that are

² In his 1962 book, *Capitalism and Freedom* Friedman advocated minimising the role of government in a free market as a means of creating political and social freedom. Interestingly, Friedman also called for an end to the compulsory licensing of medical practitioners. Friedman, M. (1962) *Capitalism and Freedom* (University of Chicago Press, 1962) pp. 17-20.

³ The holistic analysis of reproductive health and rights has been developed by the NGO Development Alternatives with Women for a New Era. In contrast with existing human right initiatives, this analysis links women's health needs –for "access to contraceptive information and methods and legal abortion,...STD and cancer prevention, prenatal care and mental health services"-to a wide range of enabling condition, including "access to housing, education, employment, property rights and legal equality in all sphere's..." (Petchesky, 2000; p. 16) This holistic analysis of rights is not restricted to constitutional right claims against the state but include claims that women may have as market actors.

not only as oppressive as the state but those that exacerbate the impact of flawed legal interventions. Finally, these distortions continuously inform the conditions in which markets flourish. The last two being ways by which to comprehend, to account for and to resist fulfilling the economic exigencies of capital at the cost of human lives.

The following section analyses the statute legalising abortion in India in the context of contemporary concerns with rapidly decreasing female to male child sex ratio. This analysis proposes an alternative reading to Menon's critique of constitutionalism. This is followed by conclusions.

Sex-selective abortions, the Medical Termination of Pregnancy Act 1971 and transactional subjectivity

In the decade since the 1991 census, India has recorded the lowest inter-census growth rate for the past fifty years. However, India's maternal mortality rate is the second highest in the world. 22 percent of this is due to abortions, of which only 10 per cent are performed through licensed safe medical services. In *Recovering Subversion*, Menon relies on an estimate of about 660 thousand women that die every year due to illegal abortions, that is, abortions performed by unqualified personnel,⁴ despite abortions being legal for nearly 30 years.

Given this, it is surprising that maternal health, reproductive choice and emancipation do not form part of contemporary concerns over the significantly decreasing female to male child sex ratio (CSR) in contemporary India; a phenomenon widely believed to account for the current slow down in population growth. In contemporary debates, the increasingly predominant concerns have been about foetal rights and not about whether or not women are making the right choices or about maternal health as decreasing CSR necessarily involve increased and frequent abortions.⁵ In other words, women are missing in the contemporary debate on declining CSR. Where have all the women gone? It is clear that the phenomenon of decreasing CSR cannot be understood independently of illegal abortions and reduced maternal health. This is neither a limitation of women's demands for legal reform nor of the law. In fact, the problem may not lie with the law, rights or even the state. Contemporary demographic trends in decreasing CSR and widespread sex-selective abortions implicate the fast paced project of market liberalisation. The analysis of the Medical Termination of Pregnancy Act 1971 (MTP) in this section links illegal abortions and declining CSR coherently (and not problematically) with the ongoing project of economic liberalisation. This raises a new challenge for a feminist politics that seek to address the anti-female bias inherent in the practice of sex-selective abortions⁶: one that moves away from demands for (or a critique of) rights or pro-life/pro-choice concerns, to one that questions the supposed gender neutrality of the legal foundations of the market economy.

Economic liberalisation in the Indian context inter alia opened up most sectors of the Indian economy to foreign investment.⁷ In their ebullient assessment of structural adjustment, in the ten year period after liberalisation, Vijay Joshi and Little, for instance note that the derestriction of

⁴ These figures are from the Parivar Seva Samstha which runs the Marie Stopes clinics offering licensed abortions. *op cit* Menon p.74.

⁵ Menon is an exception.

⁶ The practice of sex-selective abortions, female foeticide or femicide is a two stage process. The first stage involves the determination of the sex of the foetus in one of three ways: amniocentesis, chorionic villus sampling, or ultrasound. The second stage consists of the therapeutic abortion. Patel, Rita (1996) 'The Practice of Sex Selective Abortion in India: May you be the Mother of a Hundred Sons' *Caroline Paper Series – International Health*, Fall 1996, No. 7.

⁷ Joshi V. and I.M.D. Little *India's Economic Reforms 1991-2001* (Oxford University Press, Delhi, 1997). In their overview of Macroeconomic policies and performance since 1991, the first priority of the government after committing to a program of structural reform was to stabilise the economy: reduce inflation, improve the balance of payments position, and reduce the fiscal deficit, to minimise the adverse impact of stabilisation on real income and output, and to place the economy on a high-growth path as rapidly as possible, p 16.

domestic production and investment has gone a long way. “Foreign trade has been extensively decontrolled...Tariffs have been greatly reduced... and foreign direct investment is now more welcome...a good deal has been done to increase the role of the price mechanism, raise efficiency, reduce bureaucratic control, and increase the role of private initiative” (Joshi and Little, 1997; p 3). The impact of these macroeconomic changes on the provisions of reproductive service especially the availability of pre-natal diagnostic services was significant. It is arguably the case that the market for reproductive services was now linked to a global market.

More generally,⁸ structural adjustment programmes have introduced aims such as ‘cost-effectiveness’, ‘cost-recovery’ to improve the quality of services, governments have been urged to reintroduce user fees and social marketing schemes; “promote the role of the private sector in service delivery and in the production and distribution ...of high quality reproductive health and family-planning commodities” and “review legal, regulatory and import policies ...that unnecessarily prevent or restrict the greater involvement of the private sector.”⁹ It is in this context that the recent trends: declining CSR on account of the proliferation of the market for reproductive services, are examined in this section.

The MTP legalised abortion as a population control measure. Thus abortions were legalised independent of the women’s movement. The MTP has since been followed by the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 (PNDT) that regulates and controls techniques for sex-selection and is mainly concerned with regulating the commercial procedures to detect the sex of the foetus. Unlike the MTP however, the PNDT was prompted by a political movement (partly feminist) concerned about the increasing use of prenatal sex-determination leading to female sex-selective abortions.¹⁰ In 2003, acting on the orders of the Supreme Court, the PNDT Act was amended. It is now known as the Pre-Conception and Pre-Natal Diagnostic Techniques Act and regulates the use of all kinds of pre-conception and pre-natal diagnostic techniques. The PNDT (refers to the amended Act) criminalises the use of pre-natal diagnostic procedures. In addition to the statutes specifically concerned with reproductive issues, this area is policed by sections 312-316 of the Indian Penal Code, 1860 (Code). The Code criminalises miscarriages without consent; death caused by acts done with intent to cause miscarriage and the practice of female infanticide or acts done with intent to prevent children being born alive or to cause death after birth.

Given legislative oversight in this area for over twenty years, the law offers surprisingly little to women seeking an abortion (abortion-seeker) in contemporary India. As mentioned earlier, the MTP legalised abortions to control population growth. This is the larger welfare goal of the state, justified in the public good. The justificatory premise of the MTP is as follows: population control will trump all other rights including those of an abortion-seeker. In other words, an abortion-seeker does not have a pre-emptory¹¹ right to an abortion. Her rights are subject to an overriding good namely population control. Pregnant women cannot avoid giving an explanation set out in the MTP to avail of an abortion. She cannot simply state that it is an unwanted pregnancy. “She is required to furnish explanations that fit into the broad liberal – and yet restrictive – conditions listed in the Act” (p. 85). These conditions frame the transactions between a medical practitioner and an abortion-seeker. Further, the identity of both – a service provider (the medical practitioner) and the

⁸ Though there is some evidence of the extent to which the market for reproductive services has proliferated since liberalisation in 1991, the exact extent requires further empirical research.

⁹ Petchesky’s critique of the Program of Action formulated at the International Conference on Population and Development in Cairo reveals how generally issues involving reproduction have been affected by liberalisation. *op cit* Petchesky p.20.

¹⁰ A campaign against the practice of pre-natal sex determination was launched by women’s groups as well as civil liberties and health movements. *op cit* Menon pp 74-81.

¹¹ The right to an abortion in India does not possess “pre-emptory force” in that it does not outweigh population control, an overriding concern of the state. See Simmonds, N. *Central Issues in Jurisprudence: Justice, Law and Rights* pp 258-260.

consumer of a service (abortion-seeker) are defined by the transaction. The rights and liabilities of both the service provider and the consumer are local, particular and specific to the transaction. In other words, their individual subjectivity is transactional, this transactional subjectivity defines their relationship. The MTP sets out the parameters of transactional subjectivity. In the absence of any concerns raised by either party to the transaction, each will assume their identities until such time as the service is provided, consumed and compensated. After which the relationship will come to an end and raise no legal concerns.

It is useful to use Wesley Hohfeld's terminology to clarify the nature of transactional subjectivity engendered by the MTP. The MTP confers on the consumer a claim-right¹² to an abortion and confers upon the service provider two corresponding duties. First to ascertain whether the consumer fulfils the conditions set out in the MTP and second to ensure that the consumer consents to the abortion.¹³ The economic transaction or contract providing a service (abortion, sex-determination etc) establishes the claim-rights a consumer has. Also this transaction only imposes a corresponding duty on the service provider and on no other person (or state).¹⁴

As discussed, abortion is a claim right that imposes an actionable duty only against a medical practitioner and not against the state. Therefore the MTP legalises abortions by registered medical practitioners only and thereby renders illegal any emergency operation by the woman herself or any layperson.¹⁵ An abortion that does not meet the conditions set by the MTP Act is an offence under the Indian Penal Code, 1860 (IPC).¹⁶ The MTP requires a medical practitioner to decide whether a woman seeking an abortion fulfils the conditions laid down in the Act. For instance, during the first twelve weeks of pregnancy, termination is available on the certification of one registered gynaecologist or obstetrician. From twelve to twenty weeks, termination requires two registered gynaecologists or obstetricians to certify either that the pregnancy involves a risk to the life of the women or would cause grave injury to her physical or mental health, or alternatively, that there is a substantial risk that a seriously handicapped child would be born. After twenty weeks a pregnancy can be terminated only if two registered gynaecologists or obstetricians testify that it is immediately necessary to save the life of the pregnant woman.

Once the service provider is satisfied that the consumer fulfils the conditions set out in the MTP, she must obtain her consent. Section 3.4(b) of the MTP imposes a duty on the service provider to obtain the consumer's consent. Consent is not defined in the MTP, and in the absence of any guidance on what would constitute legally acceptable consent, it can be interpreted to be contractual consent as defined in Section 13 of the Indian Contract Act, 1872, as follows – "Two or more persons are said to consent when they agree upon the same thing in the same sense". Thus, in addition to transactional subjectivity, the MTP allows for transactional normativity, where the norms that regulate the parties to the transaction are determined locally and are specific to the transaction. More significantly, the specific nature of the normative framework in these transactions is defined by the bargaining power of the service provider and the consumer.

The significance of transactional normativity is clarified in the context of Menon's observation that the MTP does not define the terms 'health' 'substantive risk', 'seriously handicapped', 'abortion, miscarriage, 'termination of pregnancy' and, as discussed above, consent. Given that the MTP

¹² *op cit* Simmonds discussion on Hohfeld's analysis of rights pp 275-280.

¹³ The PNMT also gives women a claim-right to access a diagnostic technique, say ultrasound, and the medical practitioner has two corresponding duties imposed on him. First, a duty not to reveal the sex of the foetus and second a duty not to perform a sex-selective abortion once the sex of a child has been determined.

¹⁴ This analysis is based on evidence that reproductive services are increasingly privately provided and at a minimum cost if provided by the state. Either way the state will only have a duty to the woman with a claim-right and does not owe the duty to its citizens at large.

¹⁵ This is more restrictive than section 312 IPC which permits any person to terminate a pregnancy to save the life of a woman.

¹⁶ Under section 312 of the IPC causing miscarriage even with the consent of the woman, is punishable by law unless it is to save the life of the woman. Sections 313-316.

requires a medical practitioner to decide whether a woman seeking an abortion fulfils the conditions laid down in the Act, it is arguably the case that the interpretation of these terms is left to the medical practitioner. The bargaining power of the service provider is such that she has an ability to specify particular and local transactional norms. Using Hohfeldian terminology, transactional normativity is such that the service provider has powers¹⁷ that the abortion-seeker does not. A woman seeking an abortion is liable to having her legal rights and relationships altered by a medical practitioner subject as she is to the powers guaranteed to him by the MTP.

The preceding analysis of the substantive content of abortion law indicates that women seeking abortions have limited claim-rights. This entitles them to two or three well defined duties owed to them by the medical practitioner to whom they are contractually bound. Moreover, a woman seeking an abortion is liable to having her legal rights and relationships altered by a medical practitioner subject as she is to the powers guaranteed to him by the MTP. How does this inequality play out in the implementation of the MTP? Does this inequality raise any concerns?

The MTP gives medical practitioners the power to decide whether or not women seeking abortions can have one. This decision also determines whether or not a woman can access the legal market for reproductive services. If in the opinion of a medical practitioner, a woman seeking an abortion does not fulfil the requirements of the MTP, she is denied access to the legal market for reproductive services. The nature of her disadvantage is not fully described by her socio-legal position: unequal bargaining power in her contract with the medical practitioner. It is also not fully described by her economic position: denial of access to the market for reproductive services. The disadvantage she faces is intersectional, arising as it does at the intersection of socio-legal and economic processes. It is in this context that the inequality entrenched in the MTP has the following implications.

The right to an abortion in India is a claim-right entailed by at least one economic exchange. A woman is entitled to an abortion only if a medical practitioner certifies that she fulfils at least one of the conditions set out in the MTP. The MTP defines a 'medical practitioner' and a woman can avail of the service of a medical practitioner either freely through a government hospital or by paying a fee, through a registered medical practitioner. The service of ascertaining whether a woman seeking an abortion fulfils the enabling conditions in the MTP can be refused and she has no right to challenge this refusal.

Moreover, even if she pays for a service and the medical practitioner opines that she does not fulfil the conditions for an abortion, he can refuse to grant her one, overriding her objection to having a child. Thus the autonomy or self-determination of the women is not an enabling condition for a woman seeking an abortion under the MTP.

However, the MTP does require the consent of the women who fulfils the conditions set out in the Act and is deemed to have a claim-right to an abortion. In other words, a woman has a right not to be coerced into having an abortion if she doesn't want one, but it is legal for her to have no choice but to have a child, if a medical practitioner is satisfied that she does not fulfil the conditions laid down in the Act. The MTP does not inquire into whether a person can consent to having a child if she does not have the choice of refusing to have one. If a woman is pregnant, the law assumes that she has given up a right to refuse to have a child. Therefore, the only concern of the state lies in protecting the women from coercive interventions to abort her child and her choice to have a child.¹⁸ The law provides no protection for a pregnant woman choosing not to have a child. For the

¹⁷ Hohfeld called 'powers' abilities to alter legal rights and duties or change legal relationships. Powers differ from claim rights because they are not correlative to a duty in someone else. Hohfeld describes them as being correlative to a 'liability' in the other party, by which he means that the party is liable to have his legal situation altered by an exercise of his power. *op cit* Simmonds

¹⁸ As discussed in the previous section, the Indian Penal Code offers protection against coercive interventions.

purposes of the law, absent any coercion, her pregnant condition is evidence of her consent to have a child, even though she may not want to have a child.

Further, given that a majority of medical services are privately provided the impact of the foundational inequality in the MTP is exacerbated as follows. The MTP gives women access to abortion through at least one of two economic exchanges: one requiring a medical practitioner to provide a service, namely his advice on whether a woman seeking an abortion satisfies the conditions set out in the MTP and second the performance of the abortion itself. When viewed in this light, the MTP gives a medical practitioner the power to decide whether or not a woman seeking an abortion can access the market for reproductive services.¹⁹ Since increased access to the market for reproductive services is in the financial interests of the medical practitioner, a thin description of consent benefits the medical practitioner at a cost that a woman's body bears. This cost is not accounted for. In other words, the MTP legalises the use of a woman's body as an instrument that benefits the medical practitioner (increases his profits) and in this way sustains the market for reproductive services.

Moreover, since it is imperative for a medical practitioner to determine whether or not a woman can access the market for reproductive services, in the event of a determination that a woman does not fulfil the conditions of the MTP, she is denied access to the (legal) market for reproductive services. She must get an illegal abortion. On the other hand, if a medical practitioner was required to establish not only that a woman was agreeing to terminate a pregnancy but was also required to establish that she consents to having a child, this would raise the threshold of consent and counter the power of a medical practitioner that the MTP confers. Thus for all intents and purposes the foundational inequality in the MTP normalises the practice where women's bodies are used instrumentally, to further the interests of the medical practitioner, fulfil the exigencies of capital at an unaccounted cost to maternal health.

The further clarification required here is whether this dominant cultural norm only informs the context in which economic exchanges between a medical practitioner and a woman seeking abortion occur. Is this an implementation problem or a foundational one? In other words, is there evidence of this norm in the justificatory foundations of the MTP itself?²⁰ In the debates in Parliament on the MTP Bill, "the overwhelming majority supported the Bill, and insisted on making the point that the real objective was clearly population control" (p. 74). Though, population control is often cited as the larger goal of the MTP, an examination of the way in which the MTP works reveals that both population control and the sustenance of the market for reproductive services are premised on a view that a woman's body is instrumental to the achievement of the larger goals of the state.

Is it the case that the foundational inequality in the MTP, can be traced to the cultural norm where Indian women are expected to sacrifice their autonomy and bodies for the good of her family, nation and community? Should the cultural specificity of a woman's experience necessarily inform an analysis of the MTP to assess why it has failed to ensure safer abortions, improve maternal health or increase reproductive choice? Consequently, is it the case that the predominance of this cultural norm normalises what may otherwise be viewed as exploitative contracts and unethical medical practice?²¹

¹⁹ It is telling that an abortion will be denied if the medical practitioner concerned has otherwise acted in good faith. This further limits the possibility of her availing of the service and her claim as a consumer against the state.

²⁰ A classic explication of this theme can be found in 'Breast Giver' Mahashweta Devi where the mother is sacrificed for the benefit of her community and in Mother India in a larger framework of sacrifices for the nation.

²¹ See Thomas, D.(2007) 'Contract, Context and Contest: Re-visiting *Tito v. Waddell*' Vol. 58 No. 4 *Northern Ireland Legal Quarterly* Winter 2007 Interestingly, this situation exposes the literature on implicit dimensions

The analysis of the MTP in this section, indicates that unlike Menon's claim, abortion law does not articulate a universal subjectivity, namely 'women', but instead facilitates the proliferation of specific, local and particular transactional subjectivities and normative frameworks that are not confined to either civil or political society. However, it is possible to agree with Menon (albeit with qualifications) that instead of an abstract universal subjectivity, local, specific and particular subjectivities must be mobilised to engender a radical politics. This must not only account for transactional subjectivity and normativity that are specific, local and particular but must also delineate the radical implications of these new subjectivities and specify radical agendas that are clearly marked from the economic exigencies of capital (both global and domestic).

Conclusions

On the other hand, though Nivedita Menon shares the activist Sabu George's sentiment that women are devalued, she locates the problem with the law (that George relies on to solve the problem). For Menon, "legal reform offers no challenge to the social and systemic basis of the oppression of women" (p. 207) and more importantly the "functioning of legal discourse tends to subvert the ethical impulse of subordinate groups and to reassert dominant values" (p. 207). The only solution according to Menon is subversion from beyond the law. This not only misses the shift described above: markets have co-opted the welfare aims of the state making inept any reliance on an unreconstructed rights discourse.

Moreover, an agenda of radical politics overlooks oppression normalised by social practices that operate beyond law. This is especially relevant in deconstructing the dominant social understanding that a woman's body is (again unproblematically) instrumental in the achievement of larger goals whether these may be the aims of the state, the family, community, caste (and now markets) (Devi, 1997). The failure of abortion laws do not reveal the failure of feminist political strategies as Menon suggests but reveals that increasingly social norms that take an instrumental view of women are normalised in the 'regulatory free zones' essential to the functioning of a liberalised economy.

The crux of the matter is that economic liberalisation requires us to adjust to the idea that markets are social practices. However, this is not as innocuous as it sounds; unlike other social practices markets require people to submit their resources and in the case of women their bodies to the simple imperative of demand and supply. This submission is necessary not merely to fulfil everyone's individual interests (as market capitalists requires us to believe) but to achieve goals (mainly profit of powerful market players, the goals of the state mainly population control and wealth maximisation) more worthy than their own. This becomes a problem for abortion law when with profit we have to accept the view that women's bodies are necessarily instrumental in achieving it and that the state is thereby fulfilling its role in making this possible.

The analysis of the law in this article has resonances with Martha Mies' analysis of 'global capitalist patriarchy' which finds that reproductive technology is yet another manifestation of 'technopatriarchal' control over women (p. 91). Mies suggests that the international battle over women's bodies has entailed a dual strategy of discouraging poor women from the South from breeding poor people, while middle class women of the North are encouraged to breed because they add to consumption demand, which drives capital accumulation. It is true that most Indian women do not have the luxury of choosing to consume the services afforded by the market as the majority of medical services are privately provided. It is not clear however that the market continues to distinguish between women in the North and those in the South as Mies suggests. The changing demographic of sex-selective abortions in India reveals how the law ensures that women's bodies

of contract to criticism as the danger here is that potentially, exploitative, contextual cultural norms may be introduced into the contractual framework.

are part of the demand and supply continuum that sustains the market for reproductive services both nationally and arguably globally. This could be a feature of women's experience in the North.

The proliferation of markets for the provision of reproductive services broadens Menon's radical political agenda to include the recognition that women do not have full and unmediated access to the market for reproductive services. More specifically, there is scope for a demand for a thicker description of consent in their market transactions. A description of consent premised on the view that a woman can choose to have an abortion even if a medical practitioner opines that she does not fulfil the conditions of the MTP. This demand for autonomous market access is distinguishable from a pre-emptory right of self-determination. The demand for autonomous market access addresses the peculiar disadvantage that woman seeking abortions in India face subject as they are to the MTP that aims to achieve the larger welfare aim of population control.²²

This is still unsatisfactory as it reinforces the justificatory premise of the MTP: the instrumentality of a woman's body, a socially entrenched cultural norm. This requires a radical political strategy that not only works beyond the law, but more specifically one that disrupts the normalisation of the instrumentality of a woman's body in the demand and supply continuum in the realm beyond the law. One way in which this can be done is by imposing distributive goals on the market. This can potentially destabilise the demand-supply continuum (Trubek and Santos, 2006; 16-17). Another way in which this can be done is by explicitly accounting for 'non-economic' issues such as the impact on maternal health as an economic cost.²³ Finally, apart from the formal law, there needs to be more conceptual clarity on 'lawlessness' or the realm of private orderings that exist beyond the law to underpin the market for reproductive services with women's bodies.²⁴

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²² Whether or not the right to a thicker description of consent is one that trumps the larger welfare concerns of the state is not examined here.

²³ In an earlier work, I articulate the exploitative, economic consequences of situations in which the common law fails to incorporate specific social practices into the contractual framework. *op cit* Thomas

²⁴ The work of the Indian Council for Child Welfare (ICCW) offers several examples of direct interventions in the realm of private orderings, one direct intervention, for example, required the workers of the ICCW to open crèches where women could leave their children before they went to work in the fields. This gradually opened up a dialogue between the women leaving their children in the crèche about issues like health and eventually female infanticide. *op cit* Aravamudan, pp 26-28.

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