

**EXPLORING STATE AND GENDER RELATIONS  
IN INDIA THROUGH THE LENS OF  
REPRODUCTIVE RIGHTS AND THE RIGHTS  
TO INHERITANCE**

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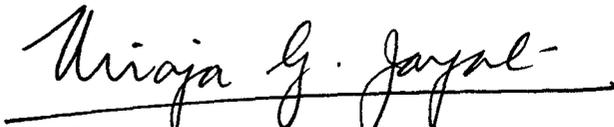
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CERTIFICATE

Certified that the dissertation entitled '**EXPLORING STATE AND GENDER RELATIONS IN INDIA THROUGH THE LENS OF REPRODUCTIVE RIGHTS AND THE RIGHTS TO INHERITANCE**' submitted by SUMI MADHOK is in partial fulfilment for the award of the degree of MASTER OF PHILOSOPHY of this university. This dissertation has not been previously submitted for the award of any other degree to this university or any other university and is her own work.

We recommend that this dissertation be placed before the examiners for evaluation.

  
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## **Contents**

- Chapter 1** Introduction: a theoretical insight into issues of equality autonomy and women's rights.
- Chapter 2** Reproductive rights: towards evolving a gender sensitive population policy.
- Chapter 3** Population Policy: The 1994 policy draft revisited.
- Chapter 4** Rights To Inheritance: an examination of some theoretical issues involved.
- Chapter 5** Conclusion.

## **For My Parents**

For giving me the security to question and  
the freedom to find my own answers.

## **INTRODUCTION**

### **A theoretical Insight into Issues of Equality, Autonomy and Women's Rights**

The problem of this research is essentially to look at the relationship between the State and gender in India through the lens of reproductive rights and the rights to inheritance.

The question that immediately comes to mind is why look at this relationship at all and it is the answer to this question that would express the researchers discomfiture with the equation existing between the state and its women citizens.

The Constitution which lays down the law of the land upholds the principle of equality before law (articles 14-18) but this equality becomes a misnomer when confronted with the question of women's rights. Therefore there is a need to make a study of the Indian state's position on equality and see how it falls short of acceding complete legal and moral equality to women.

I wish to argue that there is a discrepancy in the State's policy which arises from its treatment of women as non autonomous subjects, comprising that part of the citizen body

which is essentially "Non Decision making".

This ambivalent position of the Indian State on the question of Women's Rights is substantially a reflection of an existing tension between the concepts of Autonomy and equality in liberal democratic theory .

Therefore it is manifestly inadequate and ineffectual to discuss the equality Thesis without also looking at the notion of Autonomy and its pre suppositions and identifying the points of tension between them.

Why focus on the rights to inheritance and the reproductive rights in particular? These two indices prove to be very useful in highlighting the tension laden relationship between the notions of Equality and Autonomy and are in fact policies which display this relationship. For example an examination of the laws governing property rights of women together with the Constitutional Assembly debates and the Lok Sabha debates leading to the formulation of the Hindu Marriage Acts and Hindu succession acts strongly suggests a perception of women as largely non autonomous subjects. I will argue, comes to inform and influence the position on equality of the Indian state and facilitates the creeping in of a gender bias in policy formulation as well as in implementation.

The reason for using the reproductive rights framework for analysing the population Policy is because reproductive rights broadly reflect, outcomes of governmental policies over which most women have no control whatsoever. Moreover employing a reproductive rights perspective proves to be a useful corrective to any idea that women's autonomy (in terms of domestic relationships) by itself can ensure that her reproductive goals are achieved\* The reproductive rights approach also makes it far more advantageous for women seeking to exercise their reproductive choices, for these choices get exalted to the status of a right and hence gain protection. Apart from the security aspect, it would also lead to a shift in the evaluation guidelines of the family planning program, in the sense that it would lead to an emphasis being laid on the enhancement of the recipient's own decision making capacity as "being the first priority of the family planning efforts."<sup>1</sup> And finally a rights based evaluation of reproductive regulation constitutes the critical first step in changing the pattern of discrimination against women which deny them basic control over their

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\*Robin Jeffrey and Alka M. Basu edited " Girls Schooling, Women's Autonomy and Fertility Change in South Asia" New Delhi Sage, 1996.

<sup>1</sup> Barbara Stark "International Human Rights and Family Planning: A Modest proposal"; Denver Journal of International Law and Policy; Vol 18, NO. 1, Fall 1989.

lives. These rights must however come to be defined with reference to women's dissimilar reproductive experiences. Although there are problems with the rights based approach which arise both out of culture<sup>2</sup> and out of the tensions prevalent in mainstream Political Theory, the emergence of the concept of reproductive self determination for women has truly come to represent a theoretical paradigm shift in the evaluation of population policies. However due to the pervasive gender discrimination against women, reproductive self determination for women cannot be achieved without a redefinition of the relationship between the State and its Women Citizens.<sup>3</sup>

The libertarian view of the meaning of Rights "is for each to own all for herself and no part of any one else." So talk of rights is also inherently linked with property. In other words autonomy as the basis of rights is also viewed as "self ownership" which in turn is excessively proprietary in its nature, therefore resulting in the connection of private property

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<sup>2</sup>Cultural traditions which deny the very principles upon which women's self determination rest are not readily accessible to legal change. For example, Sajida Amin and Sara Hossain in "Women's reproductive Rights and The Politics of Fundamentalism; A view From Bangladesh", 44 Am U L Rev. 1319, 1335 (1995) Cite the views of the Islamic Foundation and I quote "Free Distribution and easy availability of contraceptives to unmarried, even married people away from families, is illegitimate. The uncontrolled distribution of contraceptives has opened the floodgates of adultery and fornication..... for turning our women folk, particularly of our high class society, into half prostitutes as in the west, and be condemned to the most perpetual hell....".

<sup>3</sup>Paula Abrams " Reservations About Women; Population Policy and reproductive Rights"; Cornell International Law Journal. 1 (1996)

with rights.

"The concept of Self ownership is the thought of an individual having the final say over the disposal of her bodily resources within a system of property rules. The important point of concern here is that the concept of self ownership "affirms the view that people can be subjects of private property rules, and allows them to do whatever they wish with their own property, the thesis permits thus voluntary slavery and subjection to absolute power."<sup>4</sup> For women therefore who have had no stake in Private Property come to be denied not only rights but also autonomy.

The notion of autonomy has both an "external as well as internal dimension".<sup>5</sup> Externally it implies that individuals require some space in order to shape their lives as they choose. However the idea of autonomy has a more significant connotation than that of Ability, of regarding individuals as being capable of arriving at decisions and being able to make choices thereof. Respect for the autonomy of persons is absent or diminished not only by "external barriers to their acting on their decisions but also by mechanisms which interfere with

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<sup>4</sup> "A political Theory of rights", Attracta Ingram, Clarendon press, oxford, 1994.v

<sup>5</sup> "Rights", Peter Jones, "Issues In Political Theory", Series editors, Peter Jones and Albert Weale, Macmillan, 1994.

their ability to make those decisions and choices.”<sup>5</sup> Furthermore, autonomy may be thwarted also by the absence of facilities necessary for the development of that ability in the first instance.

Thus autonomy is all about the recognition of ability and capability; in the sense that autonomous beings are “capable of making choices and of forming purposes so that they themselves are the originators of what they do”<sup>6</sup> Secondly autonomy is about equality in other words it talks of equal respect for that capacity for making life choices, and in doing so it brings about a difference in the concept of equality itself Thus, a concept of equality which is informed by a deep respect for autonomy is one in which equal respect for persons flows not from the belief that others are due the respect we claim for ourselves because they are like us, but that they are to be accorded equal respect because they too are capable of discerning and adopting the idea/ideas of the good.

No single postulate of equality is to be found in classical liberal theory, but at least two main strands can be identified.. The first is represented by a group of thinkers who adhere to the principle of equality on the basis of equality in respect of

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<sup>6</sup> See Peter Jones

human passions, chief amongst whom are the utilitarians and Thomas Hobbes. The second stream of thinkers uphold the equal rationality assumption in justifying human equality and include Immanuel Kant and John Locke.<sup>7</sup>

The foundations of liberal egalitarianism consist of these two general characterizations of individuals as equal beings. The hallmark of rationality in the context of autonomy comes to be impartiality and independence of thought.

Finally, autonomy is about difference. A substantive notion of equality which is informed by a commitment to autonomy, rather than to any principle of self ownership accepts a plurality of conceptions of the Good, as well as a notion of interdependence such that autonomous beings have a shared interest in advancing that plurality. This can be ensured by providing these autonomous agents with the material means which would enable them to author their own lives in a manner that is free. Therefore, "to treat someone with equal respect requires acknowledging her as a rightful claimant to a fair share of the social assets"<sup>8</sup> along with instilling in them a notion of "undominated interdependence." In the context of

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<sup>7</sup>Amy Gutmann "Liberal equality", Cambridge University Press, 1980.

<sup>8</sup>Attracta Ingram "A Political Theory of Rights". Clarendon Press, 1994.

women's rights, autonomy as a respect for difference would entail the construction of a "positive category", of women as different from men, corresponding to the equation A:B which would challenge the dichotomy; A/-not A. (the various dichotomies of Nature/ culture, Mind/body etc. have been the targets of Feminist scrutiny)

In philosophical thought, it is the category "A", which gets defined in positive terms, in the sense that all the qualities that it possesses are adequately defined, whereas its opposite comes to be "negatively defined, non-A, becomes defined by the fact that it lacks the properties of "A".<sup>9</sup> To quote an example from Marilyn Frye, if " 'Vanilla' is assigned as 'A', then not-A includes not only strawberry, chocolate and peppermint ripple but also triangles, the square root of two, the orbit of Haley's comet, and all the shoes in the world" ..... This undifferentiation does not lend to "not -A", a category status, so is the case with the man/ not-man dichotomy, which goes a long way in explaining how "natural " it becomes to lump women indiscriminately with children in "women and children", "it also illuminates the fact that women are so easily

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<sup>9</sup> Moira Gatens "Feminism and philosophy; Perspectives on Difference and Equality", Polity Press, 1991.

associated with disorder, chaos, irrationality, and impurity".<sup>10</sup>

There seems to be a link between rationality (autonomy) Equality (masculinity) and proprietorial relations (which excludes women from its ambit especially those regarding inheritance).

There are three important ways in which one can make a reference to the notion of autonomy ; the first is the Kantian notion of autonomy which amongst the three upholds the link between rationality and autonomy. Autonomy for Kant was the property of the wills of all human beings "insofar as they are viewed as ideal moral legislators, prescribing general principles to themselves rationally, free from causal determinism, and not motivated by sensuous desires"<sup>11</sup> Two inferences can be derived from such a conception. These are first, that possessing autonomy means that one is able to exercise ones judgement by adopting an Archimedian position, in other words by detaching one self from one's particular desires, loves,aversions etc. Secondly, this conception highlights the embeddedness of the ideas of independence and impartiality in the ideal of autonomy

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<sup>10</sup>Marilynn Frye " The Necessity of Differences; Constructing a Positive Category of Women".Signs 1996, volume 21,no.4

For Luce Irigaray. women's autonomy implies women's right to speak and listen as women.

<sup>11</sup> Thomas E Hill Jr " Autonomy and Self Respect", Cambridge University Press, 1991.

which have always caused discomfort to feminist concerns. For Kant, every individual had the potential for human dignity based upon reason. "Human dignity and autonomy are manifested not by the exercise of freedom of choice but by a freedom from inclination,----- a freedom constrained by the dictates of reason that stipulates ends valid for all men as rational beings as ends in themselves".<sup>12</sup>

The second way in which one can view the notion of autonomy is to look upon it as a right that each responsible person has without any undue interference from others.. In other words, such a view point does not eliminate persons from the list of "autonomous beings" on the basis of characteristics that they may possess or not possess instead it bestows or "grants rights" to people to take control over their own lives. The significant point to be inferred from this conception is the availability of the conditions which would make possible the exercise of ones rights in an autonomous manner.

Finally autonomy is also seen as self government.

Autonomy as self government is about determining our own purpose and identities as well as participating as equals in discussions and decisions affecting the quality of our lives. According to Attracta Ingram, the idea of people as self

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<sup>12</sup> Amy Gutmann "Liberal equality", Cambridge University Press, 1980.

governers can be traced to the theory and practice of republican self government in the cities of Italy and elsewhere, as well as to Kant, and has since been a fundamental tenet of liberalism<sup>13</sup>

The hallmark of autonomy in liberal theory is rationality. Reason becomes the basis of according rights especially those of a political nature to individuals. Liberal theory has moved from a belief in metaphysical dualism to one in normative dualism, both however espousing a belief in rationality to be essentially a "mental capacity". They believe in the equal capacity of reason to be prevalent in all men. For Rousseau and Kant rationality represented the ability to grasp the rational principles of morality; for Hobbes and Bentham it was something instrumental in calculating the best means towards individual ends. John Locke and contemporary liberals like Robert Nozick and John Rawls attempt at maintaining a balance between the moral and the instrumental aspects of rationality arguing that the establishment of the State as they construe it, is rational because it is morally acceptable and in the "self interest" of those who are subject to it. However only a few liberal philosophers like Hobbes and Bentham put forward the claim that people were guided above all by their self

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<sup>13</sup> Attracta Ingram "The Perils Of Love: Why Women Need Rights", *Philosophical Studies*, Volume, XXX11(1988-1990).

interest. Most of the others such as Kant, Locke, Mill, and Rawls. conceive people as being able to act on moral principles of impartiality which requires them to refrain from placing their own self interest before the interest of others.

Such a conception of rationality and its accompanying notions of self interest, impartiality, independence etc. strongly suggest an underlying notion of the abstract individual, who is in complete control of his faculties and are therefore removed from any notion of social conditioning. The State, which is regarded as rational, is said to represent the self interest of the individuals who comprise it, in other words, its citizens. The question here is that who is this citizen that we are referring to? this citizen who finds self fulfilment in the state is definitely not the female citizen, who in order to exercise her citizenship rights finds basic prerequisites (which would make such an activity possible) absent at the behest of that very rational institution, the State which in the guise of impartiality, neutrality and all the other accompaniments of liberal rationality adopts a truly irrational posture when confronted with the question of women's rights. Let us examine this proposition by looking at the rationality thesis itself . Impartiality and independence of action are the distinguishing

features of an autonomous agent, who comes in turn to be known as a rational being and it is due to his rationality that he comes to acquire the status of a citizen belonging to the rational institution ; the State.

Liberal democratic theory lays down certain conditions for citizenship rights to be fulfilled and these conditions are to be fulfilled by the State. For example, the hallmark of liberal democracies is that citizens speak in their own voices , independently and impartially.<sup>14</sup> This independence and impartiality is sought to be safeguarded by the provision of physical as well as economic guarantees by the State. Thus in the face of physical threats or harm the law upholds a punishment against the perpetrator. Thus you have the Indian state upholding the doctrine of "Equality" in its list of inalienable rights (articles 14-18) but falling far short of according complete legal and property rights to its citizens. Moreover it has also failed to provide security from physical harm by not recognising the category of sexual violence.

For example, the Indian Penal Code does not consider "wife rape" a crime and in fact protects the perpetrator , the husband

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<sup>14</sup> "The Good Enough Citizen; Female Citizenship and Independence", Susan James in "Beyond Equality and Difference; Citizenship, Feminist Politics and Female Subjectivity", Routledge, 1992.

,under the "Marital Exemption clause". Rape as defined by Section 375 of the Indian Penal Code states that sexual intercourse by a man with his own wife , the wife not being under 15 years of age is not rape. It does not take into account the "consent" of the wife in the act. Fear of sexual violence both within and outside of the home acts as the greatest impediment to the exercise of citizenship rights. Non-recognition of the different kinds of sexual violence, especially within the family is often seen as an example of how the law upholds the distinction between the Private and the Public which runs through liberal theory.

Our task however is to go beyond the public - private debate into the realm of autonomy and equality and see how the tensions between the two reflect in state policies. The tensions come to the fore when the State's discomfiture with its Equality assumptions lead it to strike at the foundations of the notion of equality itself, which is , autonomy. Thus, you have the state engaged in denying autonomy to its women citizens, for example by perpetrating violence on their bodies in the name of family planning, by denying them access to health care and information about their bodies. All of this leads one to question the whole idea of the rational state representing the

self interest of its citizens.

There seems to be an unhappy marriage between the State and its female citizens, which results in them being treated as non autonomous subjects within the policy discourses, however it does not stop at that but extends further with the State actually being engaged in weakening the women;s autonomy.

### **Towards Planning for Gender Needs:**

An important rationale underlying gender planning is that women not only have distinct levels of control over their resources but that they have different gender needs. Planning for the women of the developing world must mean a planning based on the interests of women. However it becomes important to distinguish between women's needs and gender needs, strategic gender needs and practical gender needs. For the purposes of planning, this gains significance because within the planning discourse, an interest is usually defined as a "prioritized concern", which then gets translated into a need, which in turn is defined as the "means by which concerns are satisfied".

Maxine Molyneux distinguishes between women's interests and

gender interests The former essentially assumes concurrence of interests based on biological similarities, whereas women have varying needs and interests depending on the socio- economic as well as ethnic backgrounds they hail from. Gender Interests on the other hand are "those that women (or men for that matter ) may develop by virtue of their social positioning through gender attributes. Gender interests can be either strategic or practical each being derived in a different way and each involving differing implications or women's subjectivities." The importance of this distinction in any policy analysis is that policy makers tend to use the term Women's needs rather than the concept of gender interests which results in the former being of limited utility and even misleading when translated into specific planning interventions. For the task of gender planning it is the distinction between practical gender needs and strategic needs that assumes importance. "Strategic gender needs are the needs that women identify because of their subordinate position to men in their society. strategic gender needs vary according to particular contexts. They relate to gender divisions of labour, power and control and may include such issues as legal rights, domestic violence, equal wages and women's control over their own bodies. Meeting strategic gender needs helps women to achieve greater equality. It also changes

existing roles and therefore challenges women's subordinate position"<sup>15</sup>

Further, "practical gender needs are the needs women identify in their socially accepted roles in society. Practical gender needs do not challenge the gender divisions of labour or women's subordinate position in society, although rising out of them. Practical gender needs are a response to immediate perceived necessity, identified within a particular social context. They are practical in nature and are often concerned with inadequacies in living conditions such as water provision, health care and employment". Therefore evidently, practical gender needs arise from women's immediately perceived realities, in other words their immediately perceived necessities. There is found to be a concurrence between women's practical gender needs and State policies directed towards women's welfare. Thus in planning terms, policies under the umbrella head of "women's needs" come to usually focus on income activities, community level requirements such as housing, water, food etc. but in reality these are the needs of

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<sup>15</sup> "Gender Planning and Development: Theory, Practice and Training", Caroline O.N. Moser, Routledge, 1993.

Moleneux identifies some of the strategic gender needs to be the following: The abolition of sexual division of labour, the alleviation of the burden of domestic labour and child care, the removal of institutionalized forms of discrimination such as rights to own land or property, or access to credit, the establishment of political equality; freedom of choice over childbearing; and the adoption of adequate measures against male violence and control over women. (1985, 233)

households, rather than comprising the practical gender needs. Such a classification helps the policy makers to carve out developmental objectives and when these objectives coincide with the local level needs, as is usually the case (practical gender needs), women's needs are said to be met. The failure to distinguish between practical gender needs and strategic needs often leads to the formulation of myopic policies which refuse to touch the social matrix within which is embedded the systemic subjection of women and in fact they at the same time make it more difficult for women to reformulate their strategic gender needs, by leaving very little political space for the strategic gender needs to be formulated much less pursued.

The distinction between practical and strategic gender needs also becomes indispensable in preventing the usage of the term "feminist" in a loose manner in policy documents for referring to any policy or programmes related to women, especially in the light of the fact that feminist terminologies are increasingly finding their way into the policy documents, thus further blurring the distinction between practical gender and strategic gender needs. An obvious example of this appropriation would be the population policy drafted by the Indian state which has over the years come to use terms like "Reproductive Health", "Reproductive Choice", which in fact have been on the

feminist agenda for years, and which on finding their way into the state discourse lose their original content.

In feminist discourse, they are associated with strategic gender needs whereas in their translocation in State policies they come to be as practical gender needs only.

Feminists have been involved in numerous debates on the nature and extent of the control of the State over women. Despite several hues and shades involved in different feminist positions they all concur on the family being the core site of women's oppression, and therefore it is in the regulation of the family by the state that the nature of state- gender relations are sought to be explored. It is the family that provides the boundary between the public and private and it is in its policy towards the issues related to the family that the state intervenes most powerfully in the lives of women.

The intervention of the state is not always physical and therefore visible, but it exists in its silences and supposed neutrality of the state as well as evident in its refusal to regulate discriminatory religious personal laws and bring them in consonance with the the stated objective of legal equality. Notions of secularism and pluralism often assist the state in letting different communities pursue their particular

conception of the "Good", and often lets it off the hook as it were of, providing some mechanism whereby the "Good" of the women as perceived by the women themselves in those communities is also sought to be adequately met.

However one of the best known circumstances where the state has demonstrated its willingness to intervene inside family rights is the area of women's reproductive rights, including its control over female fertility. In India for example the anti natalist policy is justified in terms of economic growth priorities and the built up fear that a "Population Explosion" could offset this. The result has been that the family planning policy whose hallmark has been coercion has facilitated an increased in the urban areas in incidences of amniocentesis (testing for foetal abnormalities) and the aborting of female foetuses. A study conducted in 1982 by the women's centre in Bombay found that 7,999 out of 8000 abortions were of female foetuses.<sup>16</sup>

The developing world has seen a proliferation of policies and Programmes targeted at women in the last fifteen years or so, though interventions with respect to women's welfare and their Policy expressions can be traced to the nineteen fifties. There

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<sup>16</sup>Article by S Mathai "Women and new Technologies- an organizing manual, in The Tribune, no.34,(1990) New York International Women's Tribune centre. Also Quoted in Caroline o.N Moser.

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have not been many detailed studies on the nature of women centred policies. However M. Buvinic has in her work made an analysis of the shifts in the policy approaches towards women in the developing world, by categorizing different policies according to their objectives into "Welfare", "Equity", and "anti Poverty".<sup>17</sup> Caroline N.Moser adds two additional categories to the ones enumerated by Buvinic and these are "efficiency" and "empowerment". All of these categories seek to trace the shifts in the policy approaches from "Welfare" to "Efficiency", which have resulted due to the changes in the perspectives on development "from modernization policies of accelerated growth , through basic needs strategies associated with redistribution, to the more recent compensatory measures associated with structural adjustment measures."<sup>18</sup>

The welfare approach introduced in the 1950's and 70's was based on the three assumptions of women being passive recipients of development rather than beings contributing to the process in any way, of the advocacy of "Motherhood" as a role for women and finally child rearing as the most effective role for women in all aspects of development. The MCH

<sup>17</sup> " Women's Issues in Third World Poverty; A Policy Analysis", in M Buvinic, M. Lycette and W McGreevey, "Women, Poverty and The Third world" Baltimore, Johns Hopkins University Press, 1983.

<sup>18</sup> "Gender, Planning and Development, Theory Practice and Training", Caroline M. Moser, Routledge, 1993.

(Mother - Child Health) programmes, as well as the Family Planning Programmes which have as their objective the curtailment of population have come to be the hallmarks of the welfarist approach<sup>1</sup>. These approaches have been directed towards meeting practical gender needs relating to reproductive roles, have been top down in approach and finally identify "women" and not the lack of resources as the chief cause of the ever growing numbers. Thus they place the onus of family welfare into the hands of women without making any efforts to alter the conditions within which women come to exercise control or even choice in fulfilling their reproductive roles

The equity approach was introduced in the UN Decade for women(1976-85). It seeks to achieve Equity for women in the development process and essentially seeks to address women's strategic gender needs by requiring Governments to introduce legislation according basic legal and economic equality to women, such as those of divorce, credit, property Rights, custody of children and other citizenship rights.

The Anti Poverty Approach was introduced from the 1970's onwards and linked economic inequality between men and

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<sup>1</sup> See Caroline M Moser.

women to poverty and not only to subordination or addressing poverty as a way of addressing subordination. Therefore it aimed to increase the employment and income generating options of low-income women through better access to productive resources.<sup>20</sup> This approach failed to make a distinction between women's reproductive and productive roles. Moreover barely augmenting women's incomes by concentrating on their practical gender needs, does not in any way increase their autonomy and hence falls short of meeting their strategic gender needs.

The Efficiency Approach came to acquire centre stage particularly since the 1980's debt crises and was a result of the policies of economic structural adjustment that had to be undertaken by many in the developing world." Its approach is to ensure that development is more effective and efficient through women's economic contribution. .It seeks to meet practical gender needs while relying on all of women's three roles and an elastic concept of women's time. Women are seen primarily in terms of their capacity to compensate for declining social services by extending their working day. It is very popular as an

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<sup>20</sup>The preoccupation of basic needs strategies with population control also resulted in the increasing recognition that education and employment programmes could simultaneously increase women's economic contribution and reduce fertility", Caroline m Moser, pp68.

approach".<sup>21</sup>

The Empowerment approach is yet to find a concrete place for itself within policy documents. The approach seeks to question the underlying assumptions of previous approaches regarding the interrelationship between power and development. "It seeks to identify power less in terms of domination over others ( with its implicit assumption that a gain for women implies a loss for men) and more in terms of capacity of women to increase their own self reliance and internal strength. This is identified as the right to determine choices in life and to influence the direction of change, through the ability to gain control over crucial material and non material resources."<sup>22</sup>

In the context of India, Bina Aggarwal in her book " A Field of One's Own", states that "the idea that development is not gender neutral has gained wide acceptance though there is no consensus on the cause of the gender gap or how it can be bridged". She goes on to say that at the level of policy, the acceptance of a biased developmentalism reflects itself in a) The

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<sup>21</sup> see Caroline M Moser.

<sup>22</sup> Same as preceding. The most important amongst the empowerment advocates have been the NGOs especially DAWN (Development Alternatives For women in a new era) which apart from other things has been involved in Reproductive rights campaigns as well as in situating the reproductive rights debate in the third world context, See Sonia Correa.

setting up of separate cells, departments or ministries in government bureaucracies to "monitor and coordinate women's concerns in the development process, b) the incorporation of policy directives on women and development in the planning as in the Sixth Five Year Plan (for the first time in the history of planning) and, c) the initiation of special programmes or women targeted at women, especially income generating and literacy schemes." The underlying rationale of all of the programmes and policies is that it treats women as an "additive Category", to be added to the existing ones, rather than "seeing gender as a lens through which the approach to development should itself be examined".<sup>23</sup>

#### **Towards A Politics of Needs;**

A traditional Society having two norms for the lives of men and women produces a strongly enforced actual division of activities and ways of living. Accordingly, these different sets of norms create different needs and the division of opportunities actually occur on the basis of the differently perceived needs<sup>24</sup>.

Thus, what you may have is the state which as the chief policy

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<sup>23</sup> See Bina Aggarwal

<sup>24</sup> Julia Annas "Women and the Quality of Life: Two Norms or one" in "The Quality of Life", Amartya Sen and Martha Nassbaum edited. Clarendon Press, oxford, 1993.

maker upholds the existence of the two 'norms' as well as the needs that go along with it, and thus creates opportunities that correspond to the different sets of needs created by the two 'norms'. It becomes important to state at the outset that although this politics of difference that is being talked about is essentially contextualised in a traditional society wherein women have a very little stake in the decisionmaking process, for example in India, women who constitute roughly half the electorate comprise less than 7% of the total seats in the parliament. Thus their say in the formulation of needs and the resulting opportunities is minimal or even absent and at "odds with the gender and ethnic makeup of the society they represent , this is clear evidence that certain voices are being silenced or suppressed"<sup>25</sup> The Politics of difference which insists upon taking "sexual difference as its starting point", is in fact based on a very strong notion of autonomy, which propels women to articulate their needs in relation to their different lived in experiences. This articulation of needs as an indicator of autonomy needs some explanation.

Alan Gewirth in his 'Human Rights: Essays in Justification and Application',<sup>26</sup> regards needs to be related to the capacity

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<sup>25</sup> Anne Phillips "Democracy and Difference", Polity Press, 1993.

<sup>26</sup> Alan Gewirth "Human Rights: Essays In Justification And Application", Chicago. 1982.

for moral agency. According to him all moral traditions recognise a place for action and action necessarily presupposes certain needs; those of well being and autonomy. Thus autonomy belies the notion of action and thus of moral agency

According to Raymond Plant the 'claims of needs on politics',<sup>26</sup> may be countered on a number of points, such as those of universality and rationality. He states that "needs do not provide any objective for moral beliefs", in fact, it is the belief that leads to the perception of certain goods as constitutive of basic needs. He questions whether the recognition of another human being also includes within it an obligation towards his need fulfilment?

For the purposes of this study, it shall be argued that rights must include within them a perception of needs.

For rights which are based on the needs of individuals having different life experiences would help legitimise the demand for rights raised by different voices in this case the demand for reproductive rights. Further, a needs based approach to rights would facilitate not only moral pluralism but also a strong notion of equality ( based on a recognition of equal capacities.) Finally, the recognition of different needs arising out of the

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<sup>26</sup> Raymond Plant "Modern Political Thought", Basil Blackwell, 1991.

different lived in experiences would infact lead to extending equal subjecthood, to peoples who had been non recognised so far,due to their having a different set of beliefs and hence different set of needs. <sup>27</sup>

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<sup>27</sup> The non recognition of subjectivities of the indigenous peoples on the basis of their harbouring different beliefs which gives rise to their own 'peculiar' needs is often sought to be corrected by introducing them to a set of recognised beliefs and following from that needs, The whole approach is one of assimilation and not of recognising their difference

## Chapter2

### **REPRODUCTIVE RIGHTS**

#### **Towards Evolving A Gender Sensitive Population Policy**

My concern with reproductive rights is essentially to essay a critique of the population policy of the Indian State. There is no denying that there is considerable discomfort with the unqualified usage of the term and I shall try and and engage myself with some of those discomforts, with a view to putting forward a case for non western strategic rationales for the espousal of these rights, which would be resonant with the experience of the Indian woman in ways that would then necessarily involve a shift of analyses from the individual to that of the family, the community and the State.

In this chapter, I, advance a critique of the concept "the right to choose" which has been appropriated from the feminist discourse into that of the official population discourse, which in turn has led to the contradictory ways in which motherhood and mothers are treated within the policy discourse. (Which is

to say that) Motherhood as a role for women is given a visibility and the significance that is not attached to fatherhood as a 'role' for men. It is treated as the reason, rationale and realization of women's nurturing instincts , and most policy concerned with family welfare and family planning tends to be targeted at women. At the same time, women as mothers or would be mothers are rarely perceived as competent actors, capable of making responsible choices in their own and in their families interests. Instead they are subjected to agendas which have been determined elsewhere by policy makers who have little or no accountability to them.

The concept Reproductive Rights is of recent and of North American origin .Due to its categories of "bodily Integrity" "sexual self determination" and "control over ones own body" , of its Possibly having cradled the Western Feminist Movement, and of its employing essentially 'western Liberal ' categories that , it has attracted attacks upon it, Furthermore it has also been argued that the appearances and eclipses of the feminist demand for 'self determination' in reproduction and sexuality , or for 'control' of these matters imply ideas of isolated subjectivities operating in an impossibly free terrain of choice "and consequently that these concepts may indicate a

politically misconceived affirmation of pre- social subjects" .<sup>1</sup>  
and finally the question has also been raised of whether the language or even the concept of reproductive rights has any real meaning for many women, especially in the Southern countries where more fundamental questions of survival arguably take priority. Moreover given the diversity in how women perceive their health needs, one has to ask whether reproductive rights has any universal content. It has been suggested that any attempt to impose universalized norms and principles will end up subordinating local meaning to those of the dominant (Northern) groups. In spite of these criticisms, I shall argue that, however abstract and uncertain the philosophical discourse on Reproductive Rights, may be, they are constitutive expressions of critical refusals to leave the power of decision making to external authorities, to either the medical establishment or the government, and therefore the political significance of this refusal must override objections to the right "to choose" which are based only on the critiques of the slogans apparent implications of a free individual operating on an uncircumscribed terrain, in an ideal of isolated choice. There is absolutely no denying the Western categories that inform the

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<sup>1</sup> see Denise Riley *Feminist Thought and Reproductive Control; The State And the Right To Choose* in "women and society" interdisciplinary essays- the Cambridge women' studies group- Virago press 1981.

debate, but the need for such language of Rights has not to be given away in the face of an opposition of such a kind, but instead has to involve efforts to contextualize the debate in order to erect strong resistances in the wake of the abuse of women's bodies for the implementation of Population policies.

It was with the emergence in the late 1970's and early 1980's of Women's health movements in Asia, Africa, Latin America, that the concept of Reproductive Rights underwent a redefining of sorts , wherein it came to be no longer synonymous with merely the right to choose but it came to be defined in terms of diversity of female experiences to include both a broader range of issues than fertility regulation including for instance maternal and infant mortality; infertility; unwanted sterilisation, malnutrition of girls and women, female genital mutilation, sexual violence; and a better understanding of the structural understanding that constrain reproductive and sexual decisions such as reductions in social sector expenditures resulting from structural adjustment programme; lack of transportation; water; sanitation and child care; illiteracy and poverty.<sup>2</sup> Thus reproductive rights have come to be now defined increasingly in the terms of power and resources

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<sup>2</sup>see Rosalind Petchesky and sonia correa in Gita Sen ,Adrienne Germaine and Lincoln C Chen eds.

; that is power to make informed decisions about one's fertility, child bearing etc and resources to carry out such decisions safely and effectively. While this involve notions of bodily integrity and control over ones own body, it at the same time involves social relationships with children, family members, communities and the society at large.

Feminists have directed their considerable attention to the ways in which attempts are made to control womens bodies , whether this control takes the form of restrictive contraception; sterillisation or abortion laws or of violence directed against women;- pornography; sexual harassment; rape; women battery etc. Reproductive freedom is no longer simply a matter associated with the development of sophisticated techniques , but has moved over to the realm of the political over which women have found it necessary to mobilize.

The ethical bases of Reproductive and sexual rights comprises four component principles;- bodily integrity, personhood, equality and diversity. while briefly going over these I shall try and express my discomfort with these.

1. **Bodily Integrity**: The principle that grounds womens'

reproductive freedom in a right to bodily determination or "control over ones own body , has three distinct but related bases;- Liberalism , Neo marxism and biological contingency.<sup>3</sup> Its Liberal roots can be traced to the Levellers idea of a "property in ones own person" i.e. a person to be a person must have control over himself or herself in one own body as well as in mind. in other words being an individual with needs and rights is a concept which in turn is perhaps the most powerful legacy of the Liberal Political tradition.

The NeoMarxist lineage of Reproductive Freedom is also traced to the writings of Herbert Marcuse ,in particular to his "Essay on Hedonism"and its analyses of the contemporary forms of domination and suppression which result in the Alienation of the Individual from a sense of connectedness with his or her body and thus with the physical and social world. Marcuse arrives at hedonism as containing a liberatory element - that element is a sense of "complete immediacy" of "sensuality" which Marcuse suggests is a necessary precondition for the "development of personality" and the participation of individuals in social life. The link between eroticism and politics is a "receptivity that is open and that opens itself to experience;- control over one own body is a fundamental aspect of of this sense of immediacy, this receptivity a requirement of

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<sup>3</sup> See Rosalind Petchesky in 'signs' 1980 , vol 5, no. 4.

being a person and engaged in conscious activity.

Finally Reproduction is said to affect women in a way that transcends class divisions and that penetrates every thing, work; political and community involvements, sexuality, creativity, dreams etc. and comes to constitute the "shared female experience".

**2 Personhood :-** this means treating women as principal actors and decision makers in matters of reproduction and sexuality- as subjects , not merely as objects and as ends, not only means, of population and family planning politics . At the clinical level , personhood would require , providers to take seriously womens desires and experiences ,concerning for example contraceptive side effects. It would also entail that clients be offered a complete range of safe options , fully explained , without major discrepancies in cost or government subsidization. At the level of the national and the international a respect for women personhood would require that womens organisations are represented and heard in the processes where health and population policies are drawn up and that effective mechanisms of public accountability ,in which women participate are established to guard against abuse. Finally there

is required a need to distinguish between supportive or empowering conditions from coercive incentives.

3. **Equality**:- The principle of equality applies to reproductive rights in two main areas ; relations between men and women , and relations among women (conditions such as class, age , nationality or ethnicity that divide women as a group)

4. **Diversity**:- While the Equality principle requires the mitigation of inequities among women in their access to services or treatment by health providers and policy makers , the diversity principle requires respect for differences amongst women-- in values, culture, religion , family , medical condition and so on. In her study of market women in Ile -Ife , Nigeria, anthropologist Tola olu Pearce found that the high value placed on womens fertility and the subordination of individual desires to group welfare in Yoruba tradition made the notion of a womans' individual right to choose 2

It is keeping in mind the varied experiences of women within the family and the community that the notion of reproductive rights has discarded some of its Individualist baggage, for an argument which appeals essentially to the 'individual'

inhabiting the female body is ridden with problems, many of which have been substantially problematised in feminist political theory<sup>4</sup> In the development of the Liberal tradition , the Individual is deemed to be deliberately abstract and the distinction between the essential individual and the accidental comes to acquire centrality in Liberal theory. Unveiling rudely as it were the false abstractions of the liberal individual , the Socialists emphasised upon the class realities through which individuals lead their lives. However , even to them specific biological differences were not attractive enough to merit consideration and therefore inequalities of wealth and power accounted for virtually all the supposedly biological difference of ability , height , strength etc. The Liberal language of individual rights and freedoms has always held a tremendous resonance for women , in the nineteenth and much of the twentieth century, much of its appeal lay in in its espousals of claiming the" space to choose who and what you are - not to be defined , contained and dictated by notion of "woman". In other words , the idea that it should not matter who or what you are rather what does matter is that you should be treated as individuals, as persons, as independent of the contingencies of sex. This argument priveleged the emergence of the notion of

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<sup>4</sup> see Anne Phillips 'Democracy and Difference, Polity Press.

the abstract degendered individual who was to be subjected to abstract notions of equality. Feminism has shifted recurrently between the emphasis on equality and the focus on difference; between a politics that points out the irrelevance of sex and insists we should be treated the same , and an alternative that takes sexual difference as its starting point.<sup>4</sup>

An increasingly preferred alternative which challenges the false abstractions of the " individual" and grounds its perspectives in moral and political beliefs in the experience of specific communities is that of "communitarianism" . Feminists have expressed the ideal of the community for predominantly two reasons;- one is the initiative towards the mutual identification and mutual affirmation in feminist groups as against the alienation and individualism inherent in capitalist patriarchal societies, and secondly the belief in women culture of care and mutuality as being the best bet for the realization of the "ideal of the community"<sup>5</sup> the parallel between Feminist and mainstream developments has been noted as has the major distinction , which is that only the feminists deal with the specificities of sex". However fundamental divergences between

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<sup>5</sup> 5 Iris Marion Young in Linda J Nicholson eds 'Feminism and Post Modernism', Routledge, 1990

the two have also been pointed out. For example Alasdair Macintyre in his celebration of Aquinas and Aristotle, his preoccupation with the concept of "virtue", which is not a "no strings attached" concept and has resonances of 19th century Victorian moralities and his projection of tradition in its most flattering light can hardly be referred to as the "Feminists best friend."<sup>6</sup> Iris Marion Young points to the authoritarianism inherent in the ideal of the community. According to her the ideal of the community "privileges unity over difference, immediacy over mediation, sympathy over recognition of the limits of ones understanding of others from their point of view".<sup>5</sup> She further goes on to say that "liberal individualism denies difference by positing the self as a solid, self sufficient unity, not defined by or in need of anything or any one other than itself. Its formalistic ethic of rights denies difference levelling all such separated individuals under a common measure of rights. Community, on the other hand, denies difference by positing fusion rather than separation as the social ideal."

The notion of the Public Good as against the Private leads

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<sup>6</sup> Alasdair Macintyre --'After Virtue' London ;Duckworth , 1981.

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communities more often than not, to appropriate for themselves the female subject, periodically apotheosising them towards their own ends<sup>7</sup> (the nationalist movement is an example where the Indian nation came to be compared to the "new woman") denying to the women within communities, rights which they claim for themselves from the State; and more often than not in many traditional societies the community and the State (through the upholding of personal laws or the insensitive introduction of reproductive technologies) collude towards the oppression of women. Gender and community and at times class are the primary sites of socialization. It is the community identity, however, which is overriding and encompasses gender identity within its fold . Thus more often than not, women come to view themselves in the primary instance as Muslims Hindus etc. to be followed by various other identities (relationships) finally to being a woman. This socialisation within the community is so intense that women are led to in the name of correct behaviour to forfeit their material interests, lead lives of self denial etc. For example Muslim women have independent access to money, yet women are kept financially dependent, "the motivation for a

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<sup>7</sup> Partha Chatterjee in Nation and its Fragments, oxford University Press. also reproduced in Kumkum Sangari and Sudesh Vaid eds ' Recasting Women. Essays In Colonial History'.

state of dependence are related both to "ghar ki izzat" and to an understanding of local versions of identity". There are three primary sources whereby Muslim women have access to property or money (1) an earned wage (2) inheritance (3) a marriage settlement in the form of Mehr. Therefore despite legally inheriting the property, her independent access to these resources is carefully controlled on the grounds of appropriate behaviour or is viewed as morally cheating her male familial relations of what is rightfully theirs.<sup>8</sup> Widow immolation amongst the Hindus is another example of the extent to which the "institutions, beliefs, ideologies which cluster around widow immolation act to transform widow immolation into "sati". They function simultaneously as structures of representing consent of the Woman, Family, the community and of wresting the consent from the same. <sup>9</sup>

Joseph Raz defines autonomous persons as those who "can shape their lives and determine their course. They are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop

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<sup>8</sup> See Elizabeth A Mann in Zoya Hasan ed 'Forging Identities'- Gender, Communities and the State, Kali For Women.

<sup>9</sup> See Sudesh Vaid and Kumkum Sangari in 'Institutions, Beliefs, Ideologies', EPW April 24, 1993.

relationships and accept commitments and causes, through which their personal integrity and sense of dignity and self respect are made concrete. In other words they are creators of their own moral world".<sup>10</sup> Though the notions of 'autonomy' and that of 'choice' are powerfully evoked in the Reproductive Rights debate, it becomes problematic to conceive of the Indian woman as an autonomous individual in the Liberal sense of the term, which is not to say that women are deprived of their 'agency', but rather to say that they exercise 'choices' the nature of which are essentially defined by familial and community contexts.

Moreover the content of reproductive rights in the Indian context would not revolve so much around "women's choices", for the right to choose means very little when women are powerless and illiterate. The issue of 'choice' is highly affected by the power relationship within the family and the community, which is linked to questions of 'status' and 'social security', which is further linked to the 'son bearing' and the 'barren woman' syndrome. All of this in essence goes to explain the popularity of reproductive technologies.

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<sup>10</sup> Joseph Raz 'Liberalism, Autonomy, and the Politics of Neutral Concern', in Liberalism edited by Richard J Arneson - Aldershot, Edward Elgar Publications, 1992.

Dyson and Moore define female autonomy as the "capacity to manipulate one's social environment". according to them , female autonomy is high when women have relatively high freedom of movement , strong post- marital links with their natal kin , possibilities of inheriting and retaining property and some control over their sexuality.<sup>11</sup>

Alka Basu in the context of South Asia, notes that the important comparison " is not between the decision making powers of women versus the male patriarch , but between the younger wife and the older woman , usually the mother in law" She argues that " the real pity is often not that men wield so much of domestic power", but that it is "during the prime reproductive years that female power is at the lowest".<sup>12</sup>

At this point, let me provide an illustration as to how , the fertility of a woman becomes an important issue within the family and the community for myriad reasons and I do so by recounting the case of Lali (not her real name) a 25 year old woman belonging to the Kumhar caste, living in the Kishpur

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<sup>11</sup> T Dyson and M Moore ' on Kinship Structure, Female Autonomy and Demographic Behaviour in India' Population and Development review 9(1) ;35' 60' 1983.

<sup>12</sup> Roger Jeffrey and Alaka Basu eds"Girls schooling , Women's Autonomy and Fertility Change in South Asia", New Delhi Sage.

district of Jaipur, Rajasthan. <sup>13</sup> Lali was married at the age of seventeen years and lived in her parents in-laws house for a period of two years. on discovering the impotency of her husband , she returned to her mothers house, where it was decided that she would be sent in “nata”(custom of remarriage of women , socially sanctioned by certain communnities, after dissolving of the first marriage) When her husbands family came to hear of her proposed “nata” , nineteen members of her family and caste Panches went to Kishpur and in an incident involving considerable violence abducted her and brought her to their village. This was seen as a issue of involving the IZZAT of the Family and the community, for it is the woman who is deemed to be be barren and never the man, and therefore she was forced into sexual acts with a number of men so as to induce conception. According to Lali “I was locked up in a room with other men and my husband and father in law would sit outside the room. the family was not just allowing one man , but used to encourage two or three men at a time who were known to the family”. The family view was that if Lali got pregnant , it would prove to the community that their son was not impotent and it was also ensure that Lali did not go into “Nata”.

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<sup>13</sup> Working Paper on 'Reproductive Health and Empowerment ' a Rajasthan Perspective-- IDS , Jaipur.

There are different routes through which a change in the decisional power of women in relation to their "reproductive choice" may be brought. For instance, there exist statistical correlations between women's education and women's opportunities to earn an outside income, on the one hand (Since her labour within the home does not beget any or little recognition and is often cited as one of the reasons of little autonomy) and lower fertility rates on the other.<sup>14</sup> However considering that more than half of all rural females in the 10-14 age group in India are illiterate and that the proportion of rural females aged 12-14 who have never been enrolled in any school is above one third as a whole ,and above two thirds in Uttar Pradesh , Madhya Pradesh and Bihar and as high as 82% in Rajasthan, the case for enhancing female autonomy in India seems rather bleak.

#### Consideration of the relations between the State, Population

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<sup>14</sup> See Jean Deze, Anne Catherine-Guio and Mamta Murthy "Demographic outcomes, Economic Development and Women's Agency" Discussion Paper, Centre For Development Economics, Delhi School of Economics, 1995.

Research also shows that birth rates declined in most countries where socio - economic development was relatively advanced and family planning programmes were strong (Costa Rica, Korea and Singapore), and roughly equal where , in countries where one but not the other of the two conditions held(World Bank). Thus there were only modest declines in birth rates where (a) Development levels were low, but family planning provisions were strong (India and Indonesia) and (b) development was strong but family planning relatively weak (Brazil and Turkey) see , also 'Reversed Realities', Naila Kabeer, cited earlier.

control and Feminist theory produces questions about what is to count as a population Policy, How strictly is coercion to be defined? Should the lack of employment opportunities for women and a persuasive familial rhetoric be counted as constituting coercion as well as the more obvious pressures of restrictive legislation on access say to abortion and contraception ? Is any form of governmental intervention in the sphere of reproduction-- encouraging or discouraging - to be understood as antagonistic to the 'interests' of women and so to be opposed on the principle ? or is it instead, necessary to allow for 'Population Planning' under political conditions but to argue that the task of implementing such planning should be carried out in a way somehow congruent with Feminist Politics - whatever that might be" and finally there is also the " practical question of how far , anyway, womens' fertillity is susceptible to State Policies , and if so in what ways , and under what circumstances exactly". 14

Population policies of the last few decades have been excellent examples of why merely targetting women for the achievement of demographic goals without paying adequate attention to the broader social contexts within

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<sup>14</sup> See Denise Riley in 'Women In Society' Interdisciplinary Essays- The Cambridge Women's Studies Group, Virago Press 1981.

which women live, is unlikely to either change their lives or to achieve intended goals. (Kerala is a stark example of the cooperative approach to family Planning, while the total fertility rate for India as a whole is as 3.7%, Kerala fertility has now fallen below the "replacement level of 1.8, even lower than China's fertility rate of 2.0 .there is considerable evidence that Kerala's high level of female education is responsible for it )<sup>15</sup> As the pressure of population is seen to impinge upon the limited resources and as synonymous with world poverty , women are being seen as both the cause and therefore the potential solution.<sup>15</sup>

Professor Amartya Sen distinguishes between authoritarian Population Policies and those which are based on cooperative norms. While the cooperative approach works through the empowerment of persons involved and through "increasing their effective freedom,"<sup>16</sup> the coercive option works through treating people especially women as technological fixes . Coercion can take on various circuitous forms for example through regulations that seek to debar

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<sup>15</sup> See Naila Kabeer ' Reversed Realities '-- Gender Hierarchies in Development Thought', Kali For Women, 1995.

<sup>16</sup> Amartya Sen 'Population Policies- Authoritarianism versus Cooperation' Lecture for the Mac Arthur Foundation.

parents of more than a specified number of children from seeking a number of public benefits, Sometimes medical attention is provided only on the condition that the recipient also accepts a particular kind of birth control, for example in a study of a family planning programme, it was found that women with two children were denied abortion unless they agreed to to a sterilisation procedure at the same time.<sup>17</sup> another form of effective coercion entails the the use of uninformed consent of women , when the nature and consequences are not fully explained to the recipient women. thus the trial on women of inadequately tested injectable and implantable contraceptives such as norplant and depo provera as well as the forced sterilization of women undertaken by governments in order to meet targets set by the world bank or the other aid agencies, and about the way targets actually encourage the killing of girl babies.<sup>18</sup> in an astounding example of the collusion between traditional culture and the State in the ratification of gender violence it was found that 51% of the families in the Salem district of Tamil Nadu had

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<sup>17</sup>Jyotsana Gupta in ' People Like You Never Agree to Get It'- An Indian Family Planning Clinic- 'Reproductive Health Matters (1993) no. 1 May.

<sup>18</sup>This is in fact the implication of the NRR(net reproductive rate) within the official policy on population. The N R R is a gendered measure . it is equivalent to the number of daughters borne by the average woman who then manage to survive to the mean age at childbearing to begin producing the next generation.In India the State agreed , in 1983, to a target of a net reproductive rate of 1 by the year 2001. Nrr of 1 means that each woman would at the end of her lifetime would be replaced by just one daughter. in a country where there is pressure to produce sons, and where there are already a large number of babies killed , this amounts to encouraging female infanticide.

committed female infanticide in the last two years, and such acts were facilitated by the health and education programmes of the government which provided information and access in offering incentives for sterilisation.<sup>19</sup> Economic incentives offered to poor people to accept sterilisation or hormonal implants make genuine reproductive choice a fiction. For, how can the acceptance of sterilisation or contraceptives in order to collect money to buy food constitute reproductive freedom.

Targets in themselves may not be wrong, but, the pressure put on family planning workers to meet targets, that is predetermined number of 'acceptors' for specific contraceptive method, often results in violations of reproductive rights as well as corruption and fraud. Today, the pharmaceutical companies selling contraceptives, medical and scientific community developing new technology, demographers producing the numbers, bureaucrats at USAID, the World Bank, the WHO, etc are designing programs, public relations experts marketing family planning and lobbyists raising funds are the leading actors in the global population control and they all work closely together. Within individual countries too, the hierarchical population control establishment is reproduced

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<sup>19</sup>A case cited in the International Women's Rights Action Watch(IWRAW)

power spreading from elites in the Third World Capital cities to distant regions, communities, villages, and individuals and amongst all of them mostly to poor women, the ultimate targets of population control.

### Chapter3

## **Population Policy**

### **The 1994 Policy Draft Revisited**

The phrase "population policy", immediately becomes synonymous with a policy designed for birth control. Images of the overburdened State, making grand forays into the "domestic Sphere" predictably with the announced aim of alleviating the low status of women by freeing them from the shackles of repeated and more importantly numerous pregnancies, thus taking upon itself the achievement of this task through drastically reducing its numbers through forced sterilisations, provision of a limited number and a particular kind of contraceptives, masquerading them in the name of "Free Choice", Targeting women (the Targets have been officially been removed)as they constitute the "soft option", both in terms of operationalising the targets and more importantly the abuse of their bodies constitute a significantly less threat electorally.

A population Policy should be about the populace and the

factors contributing to their wellbeing. It should be about peoples " access to livelihood, health care, clean drinking water, sanitation, food, education, awareness and natural resources"<sup>28</sup> While it is true that population is inextricably linked to contraception and subsequently to numbers, it becomes important to examine the social context within which the acceptance or non acceptance which ever the case may be of contraceptives takes place, as well as, locate the factors which influence the family size. Such a focus would inevitably lead to a complex set of studies relating to what has come to be termed as the "locus of reproductive decision making".<sup>29</sup> Such a study would look at women as subjects who either possess or do not possess the ability to say "no", or "enough" in decisions regarding family size. Studies of such a nature have pre-empted an interest in academic research and debates on the positions and roles occupied by women in social structures, their empowerment and more recently their reproductive rights.

There has occurred a major shift in emphasis which has resulted in the replacement of the old politics of population by

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<sup>28</sup> Vimala Ramachandran "Population Bomb Fizzles out", The Hindu, 12-05-152  
996.

<sup>29</sup> Michael A. Koenig and Gillian H.C. Foo "Patriarchy, Women's Status, and Reproductive Behaviour in Rural North India", Demography India, Vol 21, No. 2, 1992 pp. 145-166.

the politics of family planning.<sup>30</sup> The debate no longer rests on whether family planning programmes should be set up but rather on the strategies to be adopted for their effective implementation. The questions that raise their heads fiercely now are no longer confined to demography and its related fields but have now spilled over and occupy centre stage in feminist, religious and environmentalist debates. They have led to a raising of ethical debate within the scientific community researching on contraceptives and importantly so, have come to become standards against which gender policies of States are increasingly being measured.

Most feminists regard an active state ordained population policy as operating on a principle which negates the very idea of women's autonomy. They regard population Policies to be 'classically utilitarian', as they seek to manipulate birth rates or desired demographic goals. "As such a tension exists between Populations Programmes and reproductive self determination".<sup>31</sup>

Population has been defined so narrowly that important

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<sup>30</sup> Jason L. Tinkle and C. Alison McIntosh editors "The New Politics of Population: Conflict and Consensus in Family Planning", Population and Development Review, Supplement, to volume 20, 1994, The Population Council, New York, 1994.

<sup>31</sup> Paula Abrams "Reservations About Women: Population Policy and Reproductive Rights", Cornell International Law Journal; 1, 1(1996)

factors like the declining sex ratio, morbidity and malnutrition are not considered significant variables in demographic studies. Moreover, the only demographic sector which has received an overdose of policy attention is fertility and even this has been restricted to an absolute obsession with sterilisation, contraception and abortion (which is viewed as fertility control) while access to health care has been ignored. Further, "population Policies have been frequently charged with being insensitive to women's reproductive Rights and indifference to women's reproductive needs."<sup>32</sup>

The emphasis on the efficacy of contraceptives rather than on their resulting impact on women's health, the abuse of women in clinical trials of hormonal contraceptives such as long acting hormonal injectables and sub -dermal implants, the safety of developing anti fertility vaccines ( these are under research) compounded with dismal infrastructure and back up services all have led to questions being raised and protests being launched with regard to the resources being invested towards developing new contraceptive technologies to be introduced in resource poor settings (the developing world is the locus of ever increasing numbers) without the making of substantial efforts

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<sup>32</sup> Naila Kabeer "Reversed Realities: Gender Hierarchies In Development Thought", Kali For Women, New Delhi, 1995.

to improve the existing infrastructure.<sup>33</sup>

Population literature has come to regard women as important determinants of fertility. This recognition has led to a number of researches to be undertaken on the impact of women's role and position in different societies and the ensuing result of it on fertility levels. There is near consensus on the fact that patriarchal social structures support high fertility patterns, and it is this relationship between patriarchy and fertility which has been given major theoretical perspective in the works of John Caldwell, Mead Cain, Tim Dyson and Mick Moore.

According to John Caldwell, Patriarchy and its support of a system of hierarchies within the family based on gradations of age and sex, reposes the reproductive decision making in the hands of the older males in the family who in fact are the ones who benefit from high fertility levels. Thus for Caldwell ".....the material advantages of these decision makers would tend to be undermined by limited fertility resulting in smaller families with a less broad based pyramidal structure"<sup>34</sup>

Mead Cain and Dyson and Moore on the other hand, account

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<sup>33</sup> Jyotsana Agnihotri Gupta , Phd dissertation, Published, 1996.

<sup>34</sup> John C. Caldwell, "A Theory of Fertility: From High Plateau To Destabilization". Population And Development Review, Volume, 4, No. 4, (1978), pp. 553-577.

for a high fertility preference among women which arise out of the special incentives generated by patriarchal settings in them. Apart from the pronatalist patriarchal societies foster in women, Cain et al <sup>35</sup> so contends that women have sufficient power over reproductive decision making so as to translate their stronger pronatalist preferences (in comparison to men) into higher fertility. He makes this argument along the lines of his "risk insurance", framework, wherein he argues that the more sons a woman produces the more secure she finds herself in the face of widowhood, abandonment, divorce etc.<sup>36</sup>

Dyson and Moore view the manifestations of powerlessness of North Indian women as central factors behind the low levels of fertility control and high levels of fertility in India.<sup>37</sup>

While it is quite clear from the literature available that women's social and economic power relations have important implications for fertility, it is yet unclear as to whether men and women have different reproductive goals?<sup>38</sup>.

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<sup>35</sup>Mead Cain "Perspectives on Family and Fertility in Developing Countries", Population Studies, Volume 36, No. 2, (1982).

<sup>37</sup>Tim Dyson and Mick Moore "on Kinship Structure, Female Autonomy, and Demographic Behaviour in India", Population and Development Review, volume 19, No. 1, March 1983, pp. 35-60.

<sup>38</sup>Karen Oppenheim Mason, Anju Malhotra Taj "Differences between Men and women's Reproductive Goals in Developing Countries", Population and Development Review 13, No. 4, December 1987.

one of the ways in which gender differences in reproductive goals is measured is through the calculation of what is known as the KAP gap,<sup>39</sup> (Knowledge of contraceptives, attitude and practice) also referred to as the unmet need of family planning wherein a considerable number of women who do not want to have any more children fail to use contraceptives to this end.

Apart from the different physiological experiences of men and women during the process of reproduction which is said to contribute to their differing fertility goals, the social and economic relationship that men and women share with their children, together with the vast differences in the level of exposure between men and women in a family to modernising influences are said to result in differing fertility goals of men and women.

Several circumstances have been identified under which men and women are said to hold different family size preferences. These conditions are :

- a) when patriarchal systems are strong
- b) when economic conditions are pre modern
- c) when the kinship system is lineage oriented, and,
- d) when certain demographic conditions- a high level of fertility, a large difference between the partners obtains and a

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<sup>39</sup> Ronald Freedman and Lolagene.C. Coombs "Cross Cultural Comparisons: Data on Two Factors In Fertility Behaviour. New York, The Population Council. 1974.

low rate of widow remarriage is prevalent.<sup>40</sup>

a) In patriarchal societies, male adults display higher fertility desires primarily because child costs and benefits accrue disproportionately among the two sexes.<sup>12</sup> Other reasons why this may be so varies from the exercising of control over women's bodies to regarding high fertility as an evidence of masculinity. Mead Caine however argues that it is the women who display higher fertility goals in patriarchal settings primarily because of the fact that these societies rest on the premise of derecognizing the ability of women to be self supporting and hence in the absence of property rights and absence of any means of livelihood in the event of ruptures in the conjugal bonds then male children are the sole source of security both social and economic. It is also argued that due to the seclusion of women and the discouragement of their obtaining secular educations, they are likely to hold traditional views regarding fertility in comparison to the men.

b) Pre monetary settings are sites where women are said to display lower fertility goals than men because here women's costs in child bearing costs increase due to their reliance on

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<sup>40</sup>See Anju Malhotra Taj and Karen Oppenheim Mason in Population and Development Review.

household goods and services, as well as due to poor nutrition and inadequate presence of health services.<sup>41</sup>

c) According to Caldwell, lineage oriented systems, with their emphasis on weak conjugal ties encourage higher fertility goals among men for lineage ties proceed from the bottom upwards that is from the children to the male elders.

However, the cataloguing of all the possible conditions within which the asymmetry in the fertility goals of men and women occur cannot overlook the role of tradition which minimises the difference in the fertility desires between men and women, despite the prevalence of optimum conditions(Taj and Mason).

All of these studies locate the reasons for the lack of control that women exercise over their fertility at the realm of culture and society . I attempt at pushing this debate a little further by including the role of the State in further reducing the autonomy of women in their day to day to day lives which includes a lack of autonomy in matters relating to their fertility. This I plan to do so by looking at the role of the State

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<sup>41</sup> It should however be kept in mind that modernization leads to a greater accumulation of wealth in the hands of adult men and hence the shift from a premodern to a modern economy will only bridge the gap between the fertility goals of men and women i structural changes occur in the society side by side wherein women are assured equal shares in property as well as provided oppurtunities to seek their own means of livelihood.

in the formulation and Implementation of the Population Policy. I will concentrate in reviewing the Population Policy draft of 1994, for this is one which in its own words represents a "Paradigm Shift", and try and locate the sites of this shift and analyse the extent to which it represents a departure from the previous policy of birth control pursued by the Indian State.

The Indian family Planning programme formally began in the 1950's with the adoption of the first five year plan which clearly spelt the linkage between Population and development when it said "a rapidly growing population was apt to become more a source of embarrassment than of help to a programme for raising standards of living. In other words, the higher the rate of increase population, the larger the efforts needed to raise per capita living standards".

The first ten years of the family planning programme covered by the first and the second five year plans did not result in any spectacular achievements for the health infrastructure which formed the delivery system for the family planning programme which was still developing; the choice of contraceptives was limited and sterilisation for males and females was still not a popular contraceptive choice.

The 1961 census showed a rise in population growth rate from 1.2% to 2% over the decade and in response to which the third plan intensified the pace of development of health infrastructure, created a separate department of Family Planning in 1966 and adopted an extension approach as against the 'Clinic approach' of the previous two plans, to increase the outreach of services and improve awareness and knowledge about family planning amongst the masses. The 1971 census showed an all time high rate of population growth which led important policy decisions to be undertaken, important among which was the inclusion of the maternal and child health (MCH) services as part of the programme.

The sixth Five year plan specified population control as one of its objectives and integrated it with other development programmes like the 20 point programme. The draft statement on population policy issued in parliament in 1976 led to a number of decisions being taken such as the increasing of the legal age of marriage from 15 to 18 years for girls and from 18 to 21 for boys, freezing of the population at the 1971 level until 2001, and devolution of central assistance to states for

development etc.<sup>42</sup>

The seventh plan (1985), led to a revised strategy being adopted by the family planning programme, which now laid an emphasis on tackling the socio cultural determinants of fertility. Thus there were renewed calls for increasing the marriage age for women, increasing literacy amongst women, enhancing their status by taking steps to increase their participation in labour force, improving the health of mothers and of children, increased coordination and linkages with poverty alleviation programmes and greater involvement of non governmental organisations in the family planning

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<sup>42</sup> I.C, Tiwari, "Plan Perspectives", Seminar, 410, October 1993.

Data on demography and health: (reproduced from I.C.

Tiwari)

- \* The 1991 census results indicate that the acceleration in the pace of population growth has reversed (though marginally from 24.1% to 23.5%) or the first time since India's independence. However, India's population of 844 million (1991) showed an absolute increase of 161 million over the decade. A particularly disquieting feature is the sex ratio from 934 in 1981 to 929 in 1991.

- \* The four northern states which account for 40% of the country's population depict gloomy statistics for almost all socio economic and health indicators, with low literacy, high mortality and high fertility.

- \* There are significant regional and interstate differentials in fertility and mortality. For example the statistics of socially advanced Kerala (birth rate 22.9 and death rate 6.4) provide a stark contrast to those of Uttar Pradesh (birth rate 38 and death rate 15).

- \* Although the infant mortality rate has declined from 106 in 1985 to less than 90 in 1990, significant regional, urban, caste and gender differentials still remain.

- \* Of the 25 million births that occur in India each year more than half are considered high risk. Some 125,000 women die each year of child birth each year and approximately 1.6 million suffer from illnesses related to pregnancy and child birth.

- \* Indian women carry an enormous burden of 'invisible' unrecognized reproduction related morbidity. A study in Maharashtra reported that 92.2% women surveyed had gynaecological and/or sexual diseases with an average of 3.6 conditions per woman.

programme,(I.C. Tiwari,1993)

Thus, there has been a change in the packaging of the family planning programme, though the inherent logic of all of these continues to be the same, i.e. fertility reduction. Thus from the 'clinical', approach adopted in the first two plans which rested upon providing couples information regarding various methods of contraception available at that time such as diaphragms, foam tablets, jellies, as well as on the rhythm method, as and when the couples visited the clinic, to the 'extension' approach which emphasised the changing of peoples knowledge an attitude regarding family planning ( Nandita Gandhi and Shah 1993) to the time bound programmes for achieving low birth rates through adopting a target oriented - incentive based approach and finally, now to the the so called 'paradigm shift' that the 1994 population draft involves ( i.e. drawing effective linkages between the population stabilisation goals and gender equity) are all driven by the common logic of, curtailing the ever growing numbers.

The National Population Policy Draft of 1994, is not one that can be strictly called a "Policy". It is more on lines of a utopian vision of the Future. It accounts for the ills plaguing the state

of the Indian population and catalogues especially well those affecting the Status and emanating from that the health of the women of India. Possibly, the only tight Policy statements that it does make relates to the administrative structures to be set up for the purposes of policy coordination and formulation. It calls for the setting up of a professionally managed statutory body called the Population and Social Development Commission to "implement this new paradigm of population stabilisation based on environmental sustainability, economic replicability and social equity, both in terms of gender and economic status".<sup>43</sup>

The concept of the PSDC as it is stated in the draft is akin to the other action oriented commissions set up by the Government of India, like the Space or the Atomic Energy commissions. The PSDC is to be under the charge of the Prime minister headed by a full time Chairperson who will be an eminent social worker or a Population expert who will enjoy the Status of a minister of a cabinet rank as well as four full time members ranking equivalent to the Ministers of State. The chairperson will be in charge of overall policies, strategies and coordination. There will be a member in charge of research, development, monitoring an evaluation, a second responsible

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<sup>43</sup> The National Population Policy draft Statement 1994.

for gender development, corporate sectors, community participation, Zilla Parishads, Panchayats, and Nagarpalikas. The third full time member is to look after information, education, communication and training including organisation of computerised data bases and multimedia information systems. Fourthly, a member is to be responsible for finance, management and State liaison.

The Commissions responsibilities are to include:

- a) Formulation and implementation of policies and strategies and achieving convergence and synergy among on going programmes, so as to consolidate and enlarge the gains already achieved.
- b) Ensuring effective task implementation, monitoring and evaluation.
- c) achieving linkages between gender equity and population goals and initiating steps to counter discrimination against women.
- d) Formulating special programmes directed at the specific needs of vulnerable sectors of population including minorities, scheduled castes and tribes and other socially and economically underprivileged sections of the society,
- e) Ensuring integrated and coordinated attention to the quality, adequacy and accessibility of services.

f) Laying guidelines or foreign aid programmes in the field of population, based on direct interaction with donor agencies.

g) Initiating steps for strengthening TV research backup or implementation of the population policy and for restructuring the existing network of population research centres and training institutes so that they function in an environment of academic freedom.

h) Consideration of demographic issues in a wider context including international migration (Legal, illegal and refugees), internal migration, AIDS, urbanisation, aging population and other demographic aspects of planning or sustainable human development

i) Preparation of a report on population and social development for being presented to the parliament every year giving status of ongoing programmes and of achievement of constraints.

The finances of the PSDC shall be managed by the Population and Social Development Fund (PSDF) to be set up for the purpose. The sources of revenue flowing to the PSDF shall accrue from;

a) Government of India funds, including the amount now spent on incentives

b) Bilateral Donors.

c) Foundations, multilateral donors and UN agencies including

the UNFPA.

d) Corporate and cooperative sectors, and

e) Voluntary contributions from within the country as well as from non- resident Indians and foreign nationals.

In keeping up with the principle of decentralisation, each Nagarpalika and Panchayat shall be encouraged to prepare a "socio demographic charter" for the village/town area setting in it specific goals for population stabilisation in accordance with the land and resource use of the area. This charter is to include a blue print for action to be taken in order to weed out social evils like dowry, female foeticide and infanticide, illiteracy etc, together with enumerating the technical and financial support required.

At the District level a District Population and Social Development Committee will be set up to be headed by the chairman of the Zilla Parishad or a social worker of high repute, which will also have as its members all elected members of Parliament, Legislative Assemblies, and Municipal Corporations/ Councils from the district. The important task of this committee would be "achieving convergence and synergy among all ongoing governmental and non governmental programmes in the areas of population containment and social

development"as well as to monitor the implementation of the socio demographic charters of the village and town areas.

Finally, at the State level there shall be a State Population and Social Development Committee comprising elected representatives from different political parties, professionals, representatives o NGO's, women's and youth organisations and mass media. This committee shall also prepare a socio demographic charter for the State as a whole on the basis of the area wise charter prepares by the local self governing bodies. The responsibility for ensuring the availability of safe and effective contraceptive delivery systems on the basis of informed choice together with adequate information, education and the development of the required infrastructure shall receive top- priority of the the committee. Most importantly "effective linkages between gender equity and population goals will have to be established to serve as a basis or a better life as a whole", the measures suggested towards this end includes changes in the inheritance laws .

Finally, the State cabinet will establish a standing committee on population and social development to be chaired by the Chief minister, which will submit an annual report to the legislature.

Another structural change is the call for restructuring the ministry of health and family welfare, such that the centrally sponsored family planning programmes as well as other vertical programmes such as those relating to Malaria, Tuberculosis, Leprosy etc will now be integrated into a new holistic health package, such that now there will be one health package including within it the MCH programmes as well as schemes for the diseases mentioned above. The policy planning responsibility of the department of Family Welfare together with its task of evaluating and monitoring of the family welfare programme would now come to rest with the PSDC.

Thus what the draft is essentially suggesting is that the democratic institutions at the village level are to be the appropriate vehicles to articulate the needs of their respective populations. The solution suggested is that every village should prepare its own socio-demographic charters, the ideas of which are to eventually move up and culminate in a consolidated programme of action and travel down again for implementation.

The underlying assumption of such a scheme does not take into account the tensions that exist in India's villages between castes, communities and gender, within both of these. Such a

naive conception of a cooperative commonwealth can only lead to perpetuation of the dominant ideologies with respect to contraceptive acceptance, female literacy, sexual division of labour etc.

Despite the rhetoric of decentralisation, the immediately implementable suggestion is the creation of the PSDC which is to be "similar to the action oriented commissions" such as the atomic energy commission or the Space Commission. However these commissions which serve as a role model for the PSDC are ones with clearly stated goals and objective such as setting up of an atomic power station etc and most importantly they can be achieved by a single minded deployment of experts and resources in already earmarked locations. It remains to be seen how far the ambiguously stated objective of achieving "population stabilization based on economic replicability and social equity both in terms of gender and economic status" becomes an implementable reality. For, here we are not dealing with setting up of technological units but rather with the relationship of technology with human beings wherein, the single indicator of successful technology transfer is the increased acceptance by people of the role and need of technology in their lives. This can occur not through decisions made by a few experts in atomic technology but by the bringing

about of a change in peoples values and preferences.

Moreover, the draft policy in according a crucial place to the panchayat and nagar palika institutions fails to recognise the necessary preconditions which are required for the village panchayats in many states and even the panchayat samitis at the block level, including technical know how to draw up such socio demographic charters in most states is absent. Moreover the recommendation of the district level PSDC to be headed by a social worker of a reputed standing goes against the spirit of democratic functioning. Finally, the representatives of the village panchayats (Pradhans, Sarpanches etc,) and of the Panchayat Samiti or Zilla Parishad do not find a mention in the policy draft.<sup>44</sup>

A significant announcement in the draft statement is the seemingly innocuous proposal of initiating steps for "strengthening research backup for the implementation of the population policy and for structuring the existing network of population research centres and training centres an training institutes so that they function in an environment of academic freedom". This recommendation assumes significance in its inherent recognition of the role of social scientists in the

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<sup>44</sup>George Mathew "The Swaminathan Group Report ", The Hindu. 26 - 08 - 1994.  
Page No 71

process of policy formulation. An assumption of this nature, upon translating itself into a viable proposition must be aware of the 'baggage' that comes with social science research, an important component of which is, destabilizing theory and as a fall out of that, destabilizing policy.

Therefore taking cue from the proposal in the policy draft, the question that essentially come up is, the role of the social scientists in addressing issues related to the population policy. Social science can hope to influence policy by bringing to light important information as well creating new bodies of knowledge which would expand the intellectual frames within which policy has been sought to be analysed and executed hence far, contributing thus to a climate of vigorous academic activity, the hallmark of which is the creation of spaces for the continuously evolving perspectives in population studies.

Social Science is the study of societies and the social scientists involved in the study of societies involve themselves in the understanding of the 'arrangements' that human beings create for facilitating interaction amongst themselves as well as among the groups that they have formed themselves into. These arrangements being figments of human imagination are amenable to change, and to the extent, other social scientists can review the existing arrangements, point out the existing

lacuna together with putting forth viable alternatives , and most importantly when they become conscious of researching towards this end they not only contribute towards bringing about this change but transpose social science research into policy research.<sup>45</sup>

Interestingly it was social science which created a need for the emergence of the population industry in the first place, little did it realise at that point of time that its own prescriptions would marginalise its influence on the very industry whose setting it provided impetus to. According to Paul Demeny(1988), it was Frank Notestein's prediction of the world population at the turn of the century which were in fact realised only in a decade after his pronouncement, that led the demographers to engage themselves in hectic "political arithmetic" and thus, supporting themselves with sophisticated economic models accosted policy makers on the possibility of an imminent economic pitfall in the face of an unchecked population growth especially in the developing world. An important recommendation of this package was the means defined to bring about fertility reduction which was the setting up of family planning programmes, the important fallout of this recommendation was the rationalisation of a "statist social

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<sup>45</sup>Paul Demeny "Social Science and Population Policy", Population and Development Review, Volume 14, No. 3, September 1988.

engineering conception of policy making".(Demeny, 1988)  
Further their espousal of the high per capita criteria for intervention in policy led to a number of consequences which would raise their heads in time to come.

Thus the sixties witnessed the adoption of the family welfare programmes by most of the developing world and population now became a government 'sector', largely funded and exclusively run by it and driven by goals and targets set by it. As a consequence, the population question transformed itself into a government funded industry and the policy concerns and needs of this new industry led it to become the official patron of all the social science research on population. The research that ensued henceforth was shackled by the logic of the very industry that it laid the intellectual foundations for. Thus the kind of projects that came to be funded were essentially those relating to 'programme evaluation', or what has now come to be increasingly referred to as 'operations research', wherein the social scientists were required to use their social science kits to collect data and on the basis of that , within the received policy line make attempts at redesigning the family planning programme in order to lend some efficiency to them. For example, the researches that were carried out by the National Institute of Health and Family

Welfare between 1977 and 1990 , one finds that they essentially consist of evaluations falling strictly within the the received policy of the government on family welfare and health schemes set up by the government of India, covering areas like family welfare performance, community health workers, mobile medical teams(MMT) schemes,School health services, Population, Education and Welfare activities in TV industrial sector, augmentation of employees state insurance corporation medical benefit scheme, mass mailing units, media reach and effectiveness, laparoscopic sterilisation, central government health scheme, health guide scheme, assistance to voluntary organisations, Rehbar-I- Sehat Scheme, family welfare services , urban revamping scheme, all India hospital post partum programme, operational research on mobile eye camps, training in family welfare in medical colleges of India, national immunisation programme etc<sup>46</sup>

Thus when the draft statement on population (1994) states that it will take steps to initiate “strengthening research backup for the implementation of the population policy and for restructuring the existing network of population research centres and training institutes so that they function in an academic freedom”, it evicts not only a skeptic response, but

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<sup>46</sup>Directory of researches carried out under the aegis of the NIHF 1977-1990.(NIFHW)

also a disturbing one , not only in the light of the previous experiences with regard to state sponsored research but also in the realisation that the population setup not being entirely satisfied by the contribution of social sciences to its cause, adopts an altruistic stance in order to bring under its wings research perspectives which had emerged as alternatives ( the glaring example of this is the reproductive health perspective) to the existing state sponsored perspective[s]. In doing so, the population establishment, in a way, succeeded in stealing the wind from under the sails of these 'independent' perspectives by baptizing them as its own and including them as intellectual reference points within its policy discourse.

Let us look at one such reference point, that of reproductive health.

The 1980's witnessed the emergence of a new perspective on family planning and this was the concept of reproductive health. This concept includes within it both a rights as well as a health component, and the underlying premise of this perspective is that "every man has a right to reproductive health , that is , to regulate her fertility safely an effectively; to understand and enjoy her fertility; to remain free of disease, disability or death associated with her sexuality and

reproduction; and to bear and rear healthy children".<sup>47</sup>

The Beijing Declaration of September 1994, defined reproductive health as a "state of complete physical, mental and social well being and not merely the absence of disease or infirmity , in all matters relating to the reproductive systems and to its functions and processes. Reproductive health therefore implies that people are able to have a safe and satisfying sex life and that they have the capability to reproduce and the freedom to decide if when and how often to do so. Implicit in this condition are the right of men and women to be informed and have access to safe, effective and affordable and acceptable methods of family planning methods of their own choice as well as other methods of their choice for regulation of their fertility which are not against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant."<sup>48</sup>

Reproductive health encompasses both mortality and health for maternal mortality, often considered to be the main indicator

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<sup>47</sup>Ruth Dixon Mueller "The Sexuality Connection in Reproductive Health", Studies in Family Planning; Volume 24, no.5, September/October 1993.

<sup>48</sup>World Conference on Women; The Beijing Declaration and the Platform for Action on Women and Health. 4-15 September, 1994.

of women's health , according to some studies comprises just one of the multiple problems caused by sexuality and reproduction.<sup>49</sup>

India's maternal mortality ratio is estimated at 400-500 per 100,000 live births, which is about 50 times higher than that of many industrialized countries and 6 times as high as that of Sri Lanka. Using this estimate although several studies ( Mari Bhat et al), project higher estimates at 555, even so using the UNICEF estimate, maternal deaths accounts for 1% all the deaths and 2% of all female deaths annually , but this translates itself into over 10% of all deaths among women in the reproductive ages and 13.2% among rural women in 1987. Thus the lifetime risk of dying from a pregnancy related causes in India with a TFR of 4-5 and a maternal mortality ratio of around 500 per 100, 000 live births is as high as one in 27.50

The population policy draft states reproductive health to be a 'priority area' and that a "holistic and comprehensive approach

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<sup>49</sup>Fred T. Sai and Janet Nassim "The Need for a Reproductive Health Approach", International Journal of Gynaecology and obstetrics, (supplement), 3:(1989)103-113.

<sup>50</sup>Shireen J. Jejeebhoy and Saumya Rama Rao " Unsafe Motherhood: A Review of Reproductive Health" in Monica Dasgupta, T.N. Krishnan and Lincoln C. Chen edited "Women's Health In India: Risk and Vulnerability", oxford University Press, 1994.

on alternative estimates on maternal mortality see P.N. Mari Bhat, K Navaneetham and S.I. Rajan "Maternal Mortality : Model Estimates of Levels, Trends and State Differentials" in Monica Das gupta etal , 1994.

to health would be identified and implemented beyond maternal and child health and family planning services to cater to gynaecological problems, safe abortion services and reproductive health."

The rights component of reproductive health has turned out to be a contentious issue with many feminist groups locking horns over it. Many feminists in the developing world have come to disregard it from the standpoint of it being lower down as it were in the 'priority list' of the gender reforms to be won from the government. The argument thus, often runs along the lines of branding the whole notion of reproductive rights as being essentially an echo of the demand (in the developing world) of the second wave western feminists who had it stressed, first won nearly equal legal and political rights for themselves and therefore, in the Indian context "women who do not even have a parity of rights regarding divorce, custody, guardianship and like matters cannot realistically be expected to make demands for the autonomy to control sexuality or the right to the inviolability of their bodies. This almost equal legal status of western women permits them to focus on alternative strategies for ending the oppression of women."<sup>51</sup>

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<sup>51</sup>Archana Parashar "Women and Family Reform in India", Sage, New Delhi, 1992.

Another source of criticism stems from the seemingly liberal roots of the reproductive rights debate, its equation of the body with private property and hence by implication , exclusivity.<sup>52</sup> Reproduction is not an exclusive experience at all it is argued, and by relying on biology alone, the role and responsibility of the male partners as well as that of the State is minimised and even disregarded and that is something that runs contradictory to the feminists demands for an egalitarian setup.

At the International conference on population and Development held at Cairo, many women's groups from the developing world decried the inclusion of the phrase "reproductive rights", for according to them, women's economic rights and a just international economic order were far more important issues to take on.<sup>53</sup>

Its not only some of the women's groups which have expressed their reservations against the underlying assumptions of the concept, the State (Indian) too has shied away from using it, although interestingly it does not hesitate from espousing even vehemently so (in its population draft) the right of a woman to exercise her 'choice' in matters relating to her reproductive health. Considering that the term "choice" is regarded to be

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<sup>52</sup> Nandita Gandhi and Nandita Shah, "The Issues at Stake; theory and practice in the contemporary women's movement in India", Kali For Women, New Delhi, 1992.

<sup>53</sup> Kalpana Sharma "What Did Cairo Achieve?", The Hindu, 24 - 09 -94.

synonymous with reproductive freedom, quite obviously the State would not want to straddle itself to a commitment towards securing a right so fundamental whose very endorsement would challenge the very assumptions of its laws and policies and in a way the whole framework which governs the relationship between the State and the female subject, The concept of "reproductive self determination is truly a theoretical paradigm shift both in population policy and in the social perception of women. Because of pervasive gender discrimination against women, reproductive self determination for women cannot be achieved without a redefinition of the relationship between the State and women".<sup>54</sup>

Therefore a mere talk of 'choices', without taking a stock of the structural context within which choices get crystallised is not going to lead very far. This is the difference between feminist and the State discourses on reproductive rights ,whereas the former explicitly refer to the presence of "enabling conditions" in order for reproductive decisions to be made freely these enabling conditions being "material and infrastructural factors such as reliable transportation, child care, financial subsidies,or income supports,as well as comprehensive health services that are accessible, humane and well

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<sup>54</sup> Paula Abrams "Reservations About Women: Population Policy and Reproductive Rights", Cornell International Law Journal (1996)

staffed.....cultural and political factors such as education, earnings, self esteem and to channels of decision making"<sup>55</sup> and the policy discourses of the latter whose endorsement of the right to 'choose' in reproductive matters is coupled with its unwillingness to acknowledge the constraints prevailing upon the articulation of this choice, let alone its operationalization and thus seeks to presents a picture of women exercising their options on the already existing terrain of free choice! Thus it steers clear from any changes which would make the exercise of these choices by women a greater possibility, while at the same time, making use of feminist vocabulary in order to shield itself from criticism coming from that quarter together with using these terms to throw a cloak over its population control strategies.

The 1994 Population Policy draft recommends the integration of the MCH and the family planning services with those health, making for a "holistic and a comprehensive approach to health to be identified and implemented beyond maternal and child health and family planning services to cater to gynaecological and sexual problems, safe abortion service and reproductive health". The objective behind strengthening IEC (Information

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<sup>55</sup> Sonia Correa aaand Rosalind Petchesky "Reproductive and Sexual Rights: A Feminist Perspective" in Gita Sen, Lincoln C Chen edited "Population PoliciesReconsidered"

Education and Communication) efforts is said to be the strengthening of the notion of free and informed choice. For "informed choice is a pre requisite to a radical paradigm shift ..... Providing full information and supportive counselling that enable informed choice of methods is the only way for sustained motivation".<sup>56</sup>

However this right too a choice in matters relating to one's reproductive health and needs can be easily manipulated and distorted by pharmaceutical industry, the doyens of reproductive technologies as well as by the State in pursuance of its population control programme.

Reproductive technologies derive their philosophical basis from the concept of "choice",, however it has been pointed out time and again that this choice is not an expression of women's autonomy and that the access to these technologies is socially controlled and so is its use and application. In principal they lead to the widening of women's choices but in reality they often take the control out of women's hands. "In varying degrees they also have a potential to reduce women's roles in in procreation and carried to the extreme and carried to an extreme they may take the production of human life away from

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<sup>56</sup>National Population Policy Draft 1994.

human bodies altogether".<sup>57</sup>

The freedom to make Choices as it is conceptualised in State policy assumes these decisions to be made in a condition of social vacuum. The refusal of the State to dwell upon the structural conditions which lead to certain kind of choices being made( if they are made by the women at all) allows for assumptions of this kind. An example of this notion of choice is evident from the legislative response to the sex determination test clinics flourishing all over the country .<sup>58</sup> The State introduced a law known as the - Pre Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, which is based on the premise that it is the pregnant woman who avails of this technology and is thus sought to be punished suitably under the law. while its true that it is the body of the pregnant woman which becomes the site of the physical execution of the test, however, it is by no means the case that the woman herself who is solely responsible for permitting this test on her or in other words for exercising this choice. Nowhere in the act is there a recognition of this fact, nor is there visible a "concern

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<sup>57</sup>Jyotsana Agnihotri Gupta "New Freedoms, New Dependencies. New Reproductive Technologies, Women's Health and Autonomy", PhD Dissertation, Published at Universtitair Grafisch, Leiden, University of Leiden, Netherlands. 1996.

<sup>58</sup> According to one estimate, between 1978-1982, nearly 78,000 female fetuses were aborted after sex determination tests, and between 1986-1987, the estimates were around 30,000 to 50,000. Between 1982-1987, the number of sex determination clinics multiplied from 10 to 248, in Bombay alone. Between 1986-87, nearly 13,000 sex determination tests were carried in seven of Delhi's clinics (Source: Saheli, Delhi).

towards identifying the forces which contribute to/or reinforce son preference and devalue women in the broader socio economic and social context".<sup>59</sup> Moreover it does not question the very ethics behind the carrying out of such tests but restricts itself to regulating the use of these and finally, completely "misses the relationship between technology serving the ends of social prejudice and commercial interests taking advantage of it".( Dolly Arora, 1996).

Moreover reproductive technology is seen by the advocates of women's rights as providing women with some control over their fertility and consequently over their lives , however this is not the status it is accorded in official population policies, though it is often used as a means by which women can exercise their choices not in order to possess control over their bodies but in order to fulfill the demands of the fertility reduction policies of the government and in doing so "official population policy has frequently operated as a denial of women's choice rather than as an enhancement"<sup>60</sup>. For example the imparting of selective information in order to popularise a particular method represents a distortion of the notion of choice. Similarly so does the masquerading of

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<sup>59</sup> Dolly Arora "The Victimising Discourse: Sex Determination Technologies and Policy", Economic and Political Weekly, February 17, 1996.

<sup>60</sup> Naila Kabeer "Reversed Realities", Gender Hierarchies in Development Thought', Kali For women, New Delhi, 1995.

contraceptives which pose potential health risks to women in the name of choice.

This selective dissemination of information and even the withholding of it was brought to light in the Indian case especially in the campaign against injectable contraceptives and implants, such as Depo Provera (DMPA), Norplant, Net-en etc. In the campaign against Net-en which is a bimonthly injectable which not only needs a careful screening of the acceptors (and according to the Who, these include weeding out women with liver disorders, those with suspected pregnancy and breast and genital cancers) but also is one proven to have considerable side effects, The activists of the Hyderabad based Stree Shakti Sanghatana upon addressing 50 volunteers at the 12 month Net-en trial camp at the Patancheru village in Andhra Pradesh found that women had simply been informed that if they took this injection they would not have children, they were nether told that they were participating in an experiment, whose outcomes were fairly uncertain and most importantly they were not apprised of the possible side effects

of subjecting themselves to these trials.<sup>61</sup> ( Nandita Shah and Nandita Gandhi,1992).

Perhaps the concept of choice itself contains within it an individualist absolutist assumption in the sense that, to have made a choice in a matter , say in a matter concerning reproduction, does not by itself call for a questioning of the conditions under which and the purposes for, the particular choice has been made. The term choice seems to assume the prevalence of more than two options and the option so picked is out of reasoned deliberations, thus making it appear to be the handiwork of individual reasoning, the logic of it almost always lying in the domains of instrumental rationality. It seems that the same refusal to relate to the question of social contexts within which choices are made colours the work of many feminist scholars as well ,and it is this inability which leads them to speak in terms of contradictions involved in talking of free choice say in matters to the abortion issue while in the same breath demanding that law be used to restrict

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<sup>61</sup>The side effects of Net-en include disruptions in the menstrual cycle leading to irregularity together with heavy bleeding,spotting or amenorrhea. It also affects other bodily functions such as body temperature, hunger, sexual unctions and emtional changes resulting in headaches, dizziness, hypertension,decreased libid, fatigue etc ( these symptoms were cited in the writ petition f iled in the Supreme Court of India by the Stree Shakti Sanghatana (Hyderabad), Saheli (Delhi). Chingari (Ahmedabad) together with iv doctors and a journalist in 1986 against the ICMR, Ministry of Health and the Government of Andhra Pradesh. The petitioners have argued that the trials violate women' fundamental rights under article 21.

women from choosing specifically to abort the female fetus.<sup>62</sup>

Closely related to the question of reproductive choice is that of reproductive safety. "Within the official family planning discourse, notions of 'risk' and 'safety' are applied to pregnancies associated with contraceptive failure, rather than with the effect of contraceptives on women's health."(Nalla Kabeer 1995) This line of thinking is dominated by the often repeated rationale that living with these side effects is better than dying of repeated pregnancies.

The 1994 population policy draft makes use of the terms 'enabling environment' and 'empowerment mechanisms", when it states that "An enabling environment and empowerment mechanisms are both needed to accelerate the march towards the goal of population stabilisation by achieving a Total Fertility Rate of 2.1 by the year 2010" .It thus goes on to enumerate as to what falls within the ambit of these enabling conditions and these happen to be a) safe drinking water and good sanitation b) ensuring the health of families, c) providing opportunities to plan the size of one's family, d) education to children, with particular attention to the girl child, e) provision

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<sup>62</sup>See Nivedita Menon in "The Impossibility of 'Justice': Female foeticide and and Feminist Discourse on Abortion". Contributions To Indian Sociology (n.s.) 29,1 and 2 (1995), Sage Publications, New Delhi.

of creches and child care services to support working mothers, and f) increasing the income earning capacity of both men and women. This talk of working towards the creation of 'enabling' structures is a recognition of the importance of providing people with a minimum quality of life, for only when people are sure of their survival, can they start planning for a future, which includes the future of their families as well. These postulates however seem to be noble citations for the steps adopted to achieve these is nowhere prescribed. Moreover since the pursuance of these is so desired in the larger interest of fertility reduction, and presumably towards the empowering of women so that they can play an active role of regulating their fertility, the overlooking of new evidence pointing towards the 'non deliverance of many of these postulates' in the absence of other empowering process which would call for radical restructuring is indeed striking.

Two amongst these particularly stand out and these relate to the education of children particularly of the girl child and the second one relates to the increasing of earning opportunities for men and women.

The clubbing of men and women together for the purposes of creating greater income opportunities for both overlooks the fact that men and women benefit from income earning

activities in different ways, and thus any policy programme directed towards improving the economic condition of women must be evaluated on the basis of the ways in which it challenges underlying or structural inequalities and not just limit itself to documenting the kind of work done and the income earned. There is a need thus to relate and reappraise the value and status to women's work, infact research has shown that work is a necessary but not a sufficient condition for high female status <sup>63</sup>.

Moreover merely increasing work participation does not on its own lead to the empowerment of women "in a situation where not only does the labour market favour men over women, but the division of labour within occupations is sex biased."<sup>64</sup> Thus even in jobs where equal remuneration is paid , women's subordinate positions within the household more often than not gets carried forward in to the work place, and thus devaluation of women's work within the home, finds expression in the work place as well. (Jesani, 1990) In addition their low bargaining power in the work place (they can ill afford

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<sup>63</sup> Kalpana Bardhan "Women's Work, Welfare and Status" Economic and Political Weekly, 20 (21-28) December, 1985.

<sup>64</sup> Amar Jesani " Limits of Empowerment : Women in Rural Health Care" , Economic and Political Weekly, May 19, 1990.

It should be kept in mind that although the principle of formal equality was recognised in the constitution, the principle was put into effect through a legislation 29 years ( Equal Remuneration Act, 1976) after the cnstitution was adopted. It still awaits uniform implementation by the government.

to lose their jobs) their vulnerability to sexual exploitations does not make their being gainfully employed an enabling condition. Another thing that must be taken into consideration is the fact that in jobs where equal remuneration is paid are almost always those which are considered 'feminine jobs', (Jesani, 1990), which makes those occupations not only lower in status than other traditionally 'male' occupations but also leads women to be subordinate to superiors who are usually male. ( an example of this can be the nursing profession, where the role of doctors who outnumber women by leaps and bounds in their profession eclipses the role of nurses who are almost always women),

Thus income generating employment must be combined with empowering women through attending to their strategic as well as their practical needs. Such a process will involve an "exploration of who controls women's labour and moves the question back into the household and the issue of patriarchy"<sup>65</sup>.

New findings on the positive correlations between women's education and low fertility, infant mortality etc. have captured

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<sup>65</sup>See Irene Tinker in " The Making of a Field: Advocates, Practitioners, and Scholars", in Irene Tinker edited "Persistent Inequalities: Women and World Development", oxford University Press, New York, 1990.

the imaginations of policy makers. However a critical assessment of the role of education needs to be taken for schooling is known to perpetuate existing societal biases and is often regarded as an unlikely locus of radical restructuring of attitudes relating to sexual division of labour, popular perceptions regarding gender equity etc.

Therefore, Policy makers need to keep in mind that because social structures harbour such deep seated beliefs regarding gender inequity, these correlations positive though they may be, must be complemented by findings of research on "institutional arrangements and social ideologies to explain how systems perpetuate the status quo and how they may be transformed".<sup>66</sup>

The National population policy recognises the correlations between female literacy and lower fertility and even seems to be aware of the not so liberatory role of education when it states

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<sup>66</sup> See Susan C. Bourque and Kay B. Warren in "Access Is Not Enough: Gender Perspectives in Technology and Education", In Irene Tinker edited, 1990.

John Dreze and Amartya Sen in their book "India : Economic Development and Social opportunity"(oxford, 1996), observe three reasons for the dismal level of female literacy in the country which are linked to the deep rooted features of gender relations within the social structure. Female education comes to be considered as pointless, a) due to the prevailing gender division of labour, wherein the woman spends most of her adult life attending to domestic activities including those of reproductive and child rearing, and partaking in family labour on agricultural land. b) the norms of patrilocal residence and village exogamy, undermine economic incentives that parents may have in sending their daughter to school and, c) Hypergamous marriages together with the high prevalence of dowry, patrilineal inheritance all make or female education not a viable alternative for parents. Thus in the case of female education it is particularly important to "address the conservatism of social attitudes and parental inertia".

that the "emphasis of the Information, Education and communication efforts (IEC) will be equally on men and women. Such an emphasis will be nurtured through various steps including the removal of gender bias in text books and in print and electronic media". of course it conveniently omits describing the nature of these existing biases as well as the strategy to be adopted to eradicating gender bias .

Moreover the mere recognition of the association between female literacy and low fertility in policy is inadequate and even misleading for such a correlation fails to take into account the levels of education needed for a perceptible change in fertility to take place. T.K. Sundari Ravindran in her study of contraceptive acceptance in a fishing community in Tamil Nadu concludes that "It is not female literacy alone but the level of female education which affects a woman's use of contraceptives",<sup>67</sup> The study showed that while about 25% of illiterate women practice family planning, the figures were 37% and 45% for women with primary education and high school diploma. of the 56 women with primary education , only 13 accepted family planning. Thus the study reveals that a few years of education may make negligible difference and that

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<sup>67</sup>T.K Sundari Ravindran "obstacles to The Adoption of Family Planning Practices by Women in Tamil Nadu : Report of the first phase of the UNESCO/UNFPA ISS project : "Women's Awareness of their Rights and Remedial Measures" February 1991.

education has a bearing on contraceptive acceptance and consequently on fertility rates only after five years of school. The study also revealed that contraceptive acceptance even amongst those armed with a secondary education was dependent upon the number of live births as well as the number of years of marriage.

Moreover the draft continues to address women's health issues within their broad roles as married mothers, therefore there is no mention of the need to make available contraceptives to unmarried men and women, especially in the wake of the fear of AIDS assuming epidemic like proportions.<sup>68</sup>

A glaring feature in the population draft 1994, is the relative absence of the role of men in bringing about the "effective linkages between goals of population stabilisation with gender equity". There is undoubtedly a lot to be desired in areas of female literacy, reproductive health, employment opportunities for women, contraceptive acceptance amongst women etc. but

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<sup>68</sup> There has been an alarming increase in HIV/AIDS in India since the first case was reported in 1986. The infection has spread to almost all states and has travelled from the large metropolitan cities to the hinterland. The major mode of transmission is heterosexual. Estimates indicate that there are some one million infected persons in India. This figure is expected to rise to 5 million by the year 2000. About 50,000 unblown cases are likely to emerge by 1995. Approximately 25-30% prostitutes in Bombay and Vellore and about 10% men attending STD clinics were reported sero positive. (Source: Seminar, 410, 1993).

equally important is the impact of similar factors such as literacy, employment income, age of marriage etc on the attitudes of men regarding benefits of having a small family or even on contraceptive acceptance ?

## Chapter 4

### **Rights to Inheritance**

#### **An Examination Of Some Theoretical Issues Involved**

The Indian constitution guarantees equality of rights of men and women. Article 14 guarantees equality before law while 15 and 16 prohibit discrimination, including on the basis of sex. However, the constitutional guarantees tell us very little about the nature of this equality. What does non discrimination on the basis of sex mean? How should it be interpreted in the light of 15(3) of the constitution, which provides for the special treatment of women and children? Does equality mean treating all the individuals the same? (Ratna Kapur and Brenda Crossman, 1996) More importantly, should equality clauses providing for special provisions for women be so worded so as to invoke their dependent status? For a conception of equality which is guided by goals of uniformity and which then bestows rights upon sections of society which had been denied rights so

far without challenging the rational which informed this denial is a weak interpretation of equality. It is weak, for in its overwhelming quest of achieving uniformity, it accepts the standards and measures as well as social relationships prevalent in society as given and seeks to accommodate those who have been excluded from traditional power structures within those very structures through the employment of the modern language of rights, but steers clear of instituting changes in these structures which have perpetuated unequal social and gender relations in the first place.

It is Possible to see contradictions between the proposed constitutional clause promising freedom of religious practices and propagation ( which could be read to include religiously sanctioned in egalitarian property laws) and the aim of social reform towards gender equality. Religion plays an important part in the lives of most women by virtue of it's bearing on personal matters, through religious personal law. These laws are thus intimately linked to an analysis of the position of women and the role played by the state in maintaining and changing that position. However, it has been argued that there has been no consistent line of thinking adopted by the State with regard to its relationship with religion as well as to the question of its rightful place in society. This inconsistency in

behaviour is sought to be explained in terms of how newly independent nation States adopted constitutions modelled around western paradigms and in the process got caught between the universalistic appeals of western values and the allegiance to their own traditional social dynamics<sup>69</sup>. Thus there have been identified areas where religion comes to be regarded as a patriarchal ally of the modernising State and areas where its role has been underplayed<sup>70</sup>. According to Archana Parashar while the constitution guarantees the freedom of religion as a fundamental right it retains the power to impose certain restrictions upon the free exercise of that right , In the same way, the Indian state also took it upon itself to abolish certain religious practices considered to be in contravention of the 'modern values of the constitution', but at the same time proceeded to introduce measures to ameliorate the conditions of Hindu women only and not of women belonging to other faiths who were equally oppressed if not more under personal laws. This according to her is evidence enough of the position of religion as a patriarchal ally of the state.

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<sup>69</sup>Archana Parashar " Women, and Family Law reform in India", New Delhi, Sage, 1992.

<sup>70</sup>Archana Parashar " Women, and Family Law reform in India", New Delhi, Sage, 1992.

Moreover, provisions relating to inheritance laws, have been kept in the Concurrent List. If the State genuinely committed to gender equality, these laws which are of such significance in terms of gender equality should have been placed in the Union List. In the present case, various states can introduce a legislation on these laws so long as these do not conflict with the laws made by the State (union), In these case, since the State itself has not introduced comprehensive legal reforms granting complete equality for women, the State legislatures are under no duress to take it upon themselves to pass bills in order to make changes in the property rights of women. Even if they do, it shall be their prerogative to determine the nature of such an endeavour, For example, Karnataka introduced a law in 1994, granting equal rights to daughters in coparcenary property, as well as provided for interest to devolve by survivorship on death, and preferential right to acquire property in certain cases, under 6A, 6B, and 6C of the Hindu Succession (Karnataka Amendment) Act,1994. However, the law is not retrospective, that is, it does not apply to decisions on women's property rights before 30-7-1992. This represents a great sham in the name of gender justice, for these laws to be non retrospective, amounts to a conscious denial of the rights of women by the State, and such a denial in essence amounts to a

denial of the equality clause in part 3 of the constitution which was adopted about 42 years earlier.

The concessions that the law does grant to women in the name of honouring the equality postulate enshrined in our constitution are rendered on the grounds of women's supposed incapacities and consequently their dependent status.(such a characterisation of rights on the basis of vulnerability, passivity,dependence etc. marks a severe blow to the notion of the active, choosing, meaning-conferring, in other words the autonomous subject).

Moreover,the legal discourse concerned with women's rights and their equal status, especially in relation to their property rights, is often framed in terms of women's supposed dependent status, For example, some of the property rights are granted to women by virtue of their being perceived as economically dependent. It is this sort of legal discourse which needs to be attacked, for it in effect rests upon the denigration of women's capacities (as is prevalent in society) and in turn their subjectivities , and when laws intended to bring about equality are informed by such a denial of subjecthood, they work in any direction except the one that they are designed for. Therefore,

the important point is not just getting compensation from the law or benefits from some of the clauses which have been designed for the purpose, but rather to examine the terms under which such benefits are derived. Thus, equal recognition of subjectivities is important, equal not in terms of being measured upto the other, considered to be the 'standard, but equal in terms of perceived capacities, different though these may be, with all of them occupying a horizontal space rather being set vertically along a prescribed hierarchy. In other words, what Iam trying to say is that law cannot afford to be a mirror of society, if its self perceived role is to bring about changes in the social structure.

Treating law as discourse, "calls attention to how law establishes regulations, thoughts and behaviour and institutes expectations of what is legitimate and illegitimate behaviour, what is acceptable or unacceptable, criminal and legal, what is rational and irrational, what is natural and unnatural."<sup>71</sup> Law operates as a "great reservoir of emotionally important symbols", and more often than not the "justificatory language of law parades as the the unquestionable embodiment of reason and

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<sup>71</sup>Zillah R. Eisenstein "The Female Body and the Law", University of California Press, 1988.

universal truth".<sup>72</sup> Therefore looking upon law as a discourse does not limit itself to studying specific cases or judgments but moves beyond towards looking at 'symbols' in law of whatever is just, honourable and natural in society." Thus the 'symbolisation of law', involves the study of more than the language of law.

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According to Ratna Kapur and Brenda Crossman, there are in the context of constitutional law and equality two theories or approaches are clearly identifiable in political and legal discourse. One is a formal approach to the question of equality and the other is a substantive approach.

According to the formal approach, all those who are the same must be treated as the same. "Accordingly, when two groups are not similarly situated, then they do not qualify for equality, even if the differences among them are the product of historic or systemic discrimination"<sup>73</sup> Substantive Equality is directed at the elimination of individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and

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<sup>72</sup> Lewis A. Kornhauser "The Great Image of Authority", Stanford Law Review, 36, January 1984.

<sup>73</sup> Martha Minow: Learning to live with the dilemma of difference", Bilingual and Special Education, 1985, Law and Contemporary Problems).

systemic discrimination against disadvantaged groups which effectively undermines their full economic, social and cultural participation.

Further according to them three approaches to the question of gender difference can be identified:

- a) Protectionist: regards women to be naturally different from men and hence in need of protection.
- b) Sameness: here, any legislation aimed to treat women differently is viewed as a violation of the basic principle of equality
- c) Corrective: This approach argues that gender differences must be taken into account in order to produce substantial equality for women.

The law of property is one area of legal regulation where formal equality has not yet been guaranteed. Laws that apply equally to men and women are often interpreted in and through the lens of familial ideology, with the effect of inscribing women's identities within the family as wives and mothers with less than equal rights.

The patrilineal assumptions of dominant familial ideology together with economic dependency assumptions inform the laws of succession.

Brenda Crossman and Ratna Kapur<sup>74</sup> look at how the approach of the judiciary to the question of gender difference has been informed by familial ideology and how the influence of this ideology has worked towards obstructing the use of the doctrine of equality to strike at laws discriminating against women. According to them "The dominant discourse of equality has been one in which equality is equated with sameness, whereas the dominant discourse of gender has been that of difference. The judicial approach to sex discrimination is overwhelmingly influenced by a formal approach to equality, and often a protectionist approach to gender difference which has operated to preclude any entitlement to equality. This problematic approach to gender is informed by familial ideology and an understanding of women's gender differences in terms of the sexual division of labour within the family".

The majority of India's people, including all those defined as Hindus, Buddhists, Sikhs and Jains are governed by the Hindu Law. It was under the British rule that Hindu Law was sought to be codified. Before the exercise was undertaken, the Hindu community residing in different parts of the country was

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<sup>74</sup> Brenda Crossman and Ratna Kapur "Women, Familial Ideology and the Constitution: Challenging Equality Rights," in "Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India", edited by Ratna Kapur, Kali for Women, 1996.

governed by differing systems of laws such as the Mitakshara school of law together with its many factions, the Dayabhaga in Bengal, the Marumakkattayam, Aliyasantana and other kinds of matrilineal law operating in different parts of South India. A number of Legal treatises including the Smritis and various commentaries on them, ranging from about the second century BC to the eighteenth century AD, were recognised as authoritative in different regions.

Mitakshara and the Dayabhaga Systems of law were patrilineal, with property being divested in the sons, whereas the Marumakkattayam law prevailing in Kerala, ordains for matrilineal and a matrilineal division of property.

Under Mitakshara law, joint family property was vested in the males of the male descendants alone. Thus, the sons born as well as still in the womb became members of the coparcenary, of which their fathers, grandfathers and great grandfathers were constituents. Although property devolved to the males in the male line alone, some monies were allocated for the needs and expenditures of the female members of the joint family. Daughters of the father or of the son, as well as sons of the daughter were excluded from the membership of the coparcenary.

Under Dayabhaga Law, sons do not become coparceners at

birth, it is only at the death of the father that they become coparceners.

#### Hindu Succession Act 1956 : Provision<sup>75</sup>

- \* The act overrides all earlier prevailing laws and customs.
- \* When a male Hindu having an interest in a Mitakshara coparcenery dies, his interest in family property shall devolve by survivorship and not by succession, on the other coparceners. But if he has any female relative in the female line specified in class one of the schedule attached to the act, then his share in the Mitakshara property will be separated. and will devolve by succession on his heirs. The heirs in class one of the schedule are: son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son.

- \* A man may make a will leaving his interest in the coparcenery property to anyone he wants to leave it to. This is a new addition to the existing mitakshara system of laws introduced

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<sup>75</sup> The provisions of the Hindu Succession Act have been extracted from Maine's Hindu Law.

by the 1956 Act.

\*When a Hindu to whom the Marumakkattayam or Nambudri or Aliyasantana law applies dies, his or her interest in the property is separated and descends according to intestate succession on the heirs in class one of the schedule and not by survivorship.

\*The separately owned property of a male Hindu devolves either according to his will or, if he dies without making a will, it devolves first on the heirs in class one of the schedule, and, if there are none, on the heirs of the class two schedule (father, grandchildren, brother, sister, nephew, niece, grandparents, and so on), and if there are none of these either, on relatives through males known as agnates, such as cousins on the male side, and lastly on relatives through females, known as cognates such as cousins on the mothers side; those more closely related being preferred.

\*All property owned by a Hindu woman is her absolute property. The Act abolishes the concept of limited estate. However, a man may in his will create a limited estate.

**\*The property of a Hindu woman who dies intestate devolves on a different set of heirs, in the following order, each category inheriting only if no heir in the earlier category exists:**

**a) Her children and husband, taking equal shares. If any child has died earlier, leaving behind children, these grandchildren between them take one share, that of their dead parent.**

**b) Her husband's heirs.**

**c) Her parents.**

**d) Her father's heirs.**

**e) Her mother's heirs.**

**However if the property was inherited by her from her parents, and she has no children or grandchildren, the property shall be inherited by her father's heirs. If the property was inherited from her husband or her father in law, and she has no children or grandchildren, the property will be inherited by her husband's heirs.**

**\*People who were earlier governed by the Marumakkattayam or Aliyasantana Law, a special provision has been made, in recognition of the matrilineal system under which they lived, that agnates (relatives related through males) shall not be preferred to cognates (those related through females) in the list of heirs to those dying intestate. Further, a woman's heirs in**

these communities are the following , each category inheriting only if one does not exist in the earlier category.

a) Her children and her mother, taking equal shares, and any children of the predeceased children taking between them one share of their deceased parent.

b) Her father and husband.

c) Her mother's heirs.

d) Her father's heirs.

e) Her husband's heirs.

**\*When a Hindu man or woman dies without making a will, and leaves a house occupied wholly by members of the family, if he or she has both male and female heirs specified in class one of the schedule, then the female heirs have the right to live in the house but do not have the right to demand partition of the house until the male heirs decide to divide it. If they do divide it each female heir gets her share; if they do not she cannot demand for her share. However, a married daughter has no right to claim residence in the parental house, unless she is separated, deserted or divorced.**

**\*The Act allows any law contravening its provisions to be passed with the purpose of preventing fragmentation of**

agricultural holdings or of fixing ceilings or for devolution of tenancy rights. As agricultural land is a state subject, the states have passed different laws in these respects.

#### Limitations of the Inheritance Laws;

The retention of the Mitakshara Coparcenary, an institution of traditional law, the State failed to live upto the expressed goal of sexual equality in its very first attempt at making provisions for the same. The Hindu succession act retained the structure of the Mitakshara Coparcenary, making a concession in the name of reform to women by making the daughters heirs in the fathers share in the mitakshara joint family property. In effect, this means that the daughters do not by virtue of their conception in the womb become members of the coparcenary, like the sons and the fathers amongst other possible combinations, she is only entitled to the share of her father's property once he is deceased. Thus, the retaining of the mitakshara coparcenary meant that daughters and the mother would be kept out of the joint family and all of its benefits that

were cited as reasons for retaining it.<sup>76</sup>

The decision of the first ever democratically elected government of free India to retain the mitakshara coparcenery despite the recommendations of the select committee of the constituent assembly to abolish it all together was sought to be explained on the grounds that it would lead to a sudden disruption of things as well as affect the transactions already taken place under the guidelines of the existing joint family system and that it would not be appropriate 'in the name of doing justice to women' that action should be taken to reverse these transactions.<sup>77</sup> Not only did the retention of the mitakshara coparcenery, constitute a major setback to the goal of securing equal property rights to Hindu women, it also marked the first of a series of reversals which would result in the serious questioning of the commitment of the subsequent popularly elected governments of independent India to the goal of securing gender equality.<sup>78</sup> ( I am here, not merely referring to

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<sup>76</sup>Archana Parashar in her book "women and Family Law Refom in India", points to the fact that the opposition to the abolition of the mitaksharacoparcenery was based on the importance of the joint family as an institution which was the basis of the Hindu society, especially its role in providing the necessary cushioning effect in the struggle for existence. Moreover it was said to impose a check on the indiscriminate willing away of property by the father. Finally it was considered that the abolition of the mitakshara coparcenary would lead to fundamental changes in the Hindu law.

<sup>77</sup> Pataskar, LSD, 2.v.56,col.6996. Also quoted in Parasher, Sage, 1992, page 127.

<sup>78</sup> The governmnt stand on the Shah Bano case, the dithering on the 81st constitutional amendment bill, providing or 33% reservation or omen in legislatures and the Parliamnet is to name only two of the several instances.

the value of equality as sameness only, but also to corrective endeavours undertaken to bring about the desired and much dreamed of goal of sexual equality)

For Flavia Agnes the retention of the coparcenary concepts within the Hindu succession act narrowed the property rights of women to an equal share in the father's self earned property and according to her this was done in order to appease the Hindu revivalists in parliament who were opposed to giving women property rights in the first place.<sup>79</sup>

The provision of two separate schemes of succession for both men and women together with the absence of a clause which deals with the self acquired property of women, not only reflects the apparent refusal of the State to treat 'men and women at par',<sup>80</sup> but also casts a deep shadow of doubt on the dominant perception of the State (and through the State in its laws dealing with women's rights) as being informed by notions of women as economically dependent on the property of their male kin. Implicit in such an assumption is the supposed incapacity of women making reasonable decisions regarding the dispensing

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<sup>79</sup> flavia Agnes " State , Gender and the Rhetoric of Law Reform", paper presented at the National Workshop on Gnder Just Laws, Bombay, 30 th May to 2nd June 1996.

<sup>80</sup>ArchanaParashar, "women and Family law Reform in India", New Delhi, Sage, 1992.

as well as management of their property, but more significantly the perception of them as incapable of acquiring property through their own industry.

The scheme of succession for the heirs of women lays a great deal of emphasis on the source of the woman's property (Parasher, 1992) and seeks to devolve it upon her heirs accordingly. Thus, if a woman is not survived by her husband and her children who are her preferential heirs, the property inherited from her father or mother would go to the heirs of her father, and if the instance be that the property be acquired from her husband or her father in law then the property devolves to the heirs of the husband. Therefore even if the property is acquired through her mother, the heirs to the mother's property do not find a place in the preferential heir list, (class 1 heirs) and is automatically inherited by the heirs of the father.

With regard to the rights of the female as the co-heir to a dwelling house, the law makes a distinction between, married, unmarried, widowed and divorced daughters. Thus the female heir had a right of residence in the family house only if she was unmarried, divorced or separated or if widowed, had not been left a house by her husband. If a daughter is subject to torture

within a marriage , she cannot even hope to find a shelter in the parental house <sup>81</sup>. More importantly, women were barred from asking for a partition of the dwelling house if it was in use as a family residence, whereas the same clause did not apply to the male heirs, who in partitioning the dwelling house through a sale of the property could render the female heir homeless.

The Hindu Succession Act allows a person full testamentary power over his or her own property, which is the right of persons to will away their property as they wish. Further "this made it easy for men to turn their self earned property into a joint property and deny women property right."<sup>82</sup> Thus this right is often used for disinheriting daughters and no restrictions have been imposed upon this right despite the prevailing gender discrimination. Inherited wealth is a significant source of inequality not only between different families (headed by males ) but between men and women( with women kept systematically out of the familial shares in property ).

The argument that is sought to be constructed here essentially

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<sup>81</sup> Lotika Sarkar "empowering Women", Seminar, Novmber 1989.

<sup>82</sup> Flavia Agnes " State Gender and The Rhetoric of Law Reform", paper presented at the National Workshop on Gender Just Laws, Bombay, 30 -31 May to 1 - 2 June 1996.

revolves around the liberal notion of self ownership and the concept of the individual which arises thereof. Liberal individualism which is predicated upon ownership; both over the self as well as of over property necessarily excludes women from being categorised as owners. This is because the concept of ownership locates itself within a system of property rules operating in a market economy. Since domestic labour is not counted as production in a public place for public consumption and nor is it counted as wage labour, women's work is not regarded as being subject to the prevailing property rules.

The concept of self ownership goes on to inform the idea of autonomy, in the sense that all those who are owners come to be autonomous as well. Thus women come to be perceived not only as 'non owners', due to the nature of work that they perform but following from that come to be perceived as non autonomous as well.

The treatment of women as non autonomous, comes out clearly when one looks at the Lok Sabha Debates on the Hindu Succession Act, 1956. For example, on discussions on the clause where a daughter is a co-heir and inherited a share in the dwelling house, but could not demand a partition of the house (if it was solely being used as a dwelling house, but a son could demand as well as initiate a partition in the dwelling

house as and when he wanted), as well as the distinctions introduced between claims of married, unmarried and divorced daughters with regard to the right of residence in the dwelling house. The State sought to explain its stand by using arguments such as how " a married daughter was more likely to act under the influence of her husband and presumably could not be trusted to act prudently".<sup>83</sup> There was of course no mention of sons acting under the influence of their wives!

Thus, after enactment of the Hindu Succession Act, 1956, women continue to be excluded as coparceners as the act retains the system of Mitakshara coparcenery and the sons in addition to being the the joint owner of the coparcenery property gets an equal share of the property of the deceased along his widow and daughter. Thus the law has fallen short of granting complete legal equality to women but even in areas where it does treat her equally, the equality so established is done so by evoking her dependent status, rather than on the basis of her capabilities as well as her rights as an autonomous agent capable of forming her own ideas and exercising her own judgement over conditions of her own choosing.

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<sup>83</sup> See Archana Parashar, 1992, page129.

### **Questioning inheritance rights in liberal political theory**

A closer look at liberal theory reveals an ambivalence towards the question of inherited wealth, and this ambivalence finds reflection in the State Policies especially with regard to inheritance rights granted to women.

The liberal egalitarian theorists have adopted both an individualist as well as an egalitarian posture, making for a great deal of inconsistency in the treatment of the subject of inheritance an inherited wealth within the property rights debate.<sup>84</sup>

Liberalism and its commitment to the maximisation of liberty, rights and opportunities toward the end of self development of individuals as well as its espousal of tolerance of different conceptions of the good life have led the egalitarians within the liberals to accept the principles of private property and exchange within market economies. The question essentially is if property and market are allowed to exist then where does the notion of inherited wealth derive its legitimacy from? The liberals involved in debating the justifications of inherited wealth found themselves in the camps which came to be known

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<sup>84</sup> Michael B Levy.

as the "accumulationist" and the 'confiscatory' camps.( Michael B Levy, 1983).

The accumulationist tradition dominated the liberal thinking on inheritance in the late eighteenth century into the early nineteenth century and continues to inform neoclassical writings.<sup>85</sup> The confiscatory strand in liberalism used the language of equal opportunity, equal liberty etc. within the context of a free market economy to argue for confiscatory estate taxes. Hal R. Varian, speaks of the concept of 'people's capitalism', within which private property is one which is essentially productive in nature and where "all the incentives of capitalism are present, as are all the liberties, with one exception-the liberty to transfer wealth to others".<sup>86</sup>

Moreover Liberal equality and its espousal of the principles of merit and equality of opportunity seem to read a case against the idea of inherited wealth. For equality in the liberal scheme of things is associated with the prerequisites of self development and the idea of inherited wealth upsets the equal

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<sup>85</sup> An example of this work is Gordon Tullock's " Inheritance Justified", Journal of Law and Economics, 16,

<sup>86</sup>Hal R. Varian "Distributive justice, Welfare Economics, and the the Fairness", Philosophy and Public Affairs, 4,3 ( Spring 1975) page 244.

rights equal opportunities paradigm of liberal egalitarianism.<sup>87</sup>

Individual liberties are often expressed as proprietary in nature, which is to say, individuals are said to have “full property rights over their body, skills and labour”<sup>88</sup>. In other words people are said to own themselves or to exercise the principle of self ownership. Egalitarians (such as John Rawls and John Cohen) find the principle of self ownership problematic to its assumption of a free and unrestrained exercise of talents and skills in an unrestrained, free and hence competitive environment which are inherently different and are found at different levels in different individuals. This natural inequality in talents and skills is said to result in severe ‘market inequality’ ( John Christman, 1991) and as a solution to the inevitable inequality resulting out of the subscription to the principle of self ownership is the call for the “public ownership of skills”<sup>89</sup>.

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<sup>87</sup> Michael B Levy “Liberal Equality and Inherited Wealth”, Political Theory, Volume 11, number 4, November 1983, 545-564.

<sup>88</sup> John Christman “Self ownership, Equality and Property Rights”, Political Theory, Volume 19, number 1, February, 1991.

<sup>89</sup> John Christman uses the term public ownership, but the term obviously originates from the Rawlsian idea of skills and talents as being socially owned, see also John Rawls, ‘ A Theory of Justice’, Cambridge, MA., Harvard University Press, 1971.

One view on property in the liberal scheme of things derives from the doctrine of self ownership. Private property ownership when justified on the basis of self ownership<sup>90</sup> has an important implication for inheritance rights which is, that the principle by itself does not provide for exclusive ownership of private property<sup>91</sup> According to the Lockean principle of self ownership, "people should be left free to do whatever they choose unless their actions ( or threaten to cause) harm, in specified ways to non consenting ways".( Richard J. Arneson,1991)

It should be pointed out at the very outset that the right to bequeath one's property at the time of one's death is acceptable within the self ownership tradition. However, there is a condition to be met, and that is the condition of abundance. Criticising this qualification of Locke to justify rights to transfer one's property and resulting from this the right to inherit property, Plamenatz argues that individual liberty enjoyed by all in the state of nature allows for appropriating

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<sup>90</sup> Arneson uses the term property to mean full private ownership which includes :1) The right to use it oneself, 2) exclude others from its use, 3) consume or destroy it, 4) earn whatever income one can gain from it by contracts form ther persons, & 5 sell it or give this entire package of rights to someone else. Under 5) is included the right to bequeath the thing or any part of it at one's death.

<sup>91</sup> Richard J. Arneson "Lockean self ownership: Towards a Demolition", Political Studies, (1991) XXXIX, 36-54.

objects exclusively for personal use and does not entail the right to bequest property upon others.<sup>92</sup>

However a subscription to the principle of self ownership, which is essentially doing what one pleases as long as one refrains from harming others, would provide a justification to the act of bequeathing one's property to another. For not doing so would result in 'harming' people's life plans if they consisted of increasing one's assets in order to leave behind substantial assets for their heirs; or it may also be the case that individuals might use this right in order to secure their well being and care by their heirs in their twilight years. Therefore it becomes clear from these examples that self ownership allows people to own property privately and exercise ownership rights over it which include the rights to transfer their property to whomsoever they chose upon their death.<sup>93</sup>

However, from the standpoint of the primary issue under question, which is that of inheritance rights of women, the notion of self ownership results in causing harm to women, for

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<sup>92</sup> John Plamenatz "Man and Society: a critical examination of some important social and political theories from Machiavelli to Marx, vol 1, ( London, Longman, 1963, 244). He says " a man's right of exclusive use is in no way curtailed if he has not also the right to bequest.", quoted in Arneson, 1991.

<sup>93</sup> Richard J. Arneson

it is informed by a system of property relations over which individuals were said to exercise control rights over. However as a result of which the doctrine of self ownership did not extend to them and therefore they were denied the benefits accruing from the principle of self ownership, important among them being the right to inherit property.

Self ownership in the liberal scheme of things did not extend to women for it was informed by a system of property rules or ownership rules which functioned against an assumed backdrop of market relations and in “neither a legal nor in an economic sense could women be seen as sole proprietors of their persons or capacities in a market relation”<sup>94</sup>. That it did not extend to women becomes more apparent if one reads through C. B. Macpherson’s account of the main assumptions of liberal theory, principal among them being the doctrine of ownership. He writes:

The relation of ownership, having become for more and more men the critically important relation determining their actual freedom and actual prospect of realising their full potentialities, was read back to into the nature of the individual. The individual, it was thought, is free inasmuch as he is the proprietor of his person and capacities. The human essence is freedom from dependence on the wills of others, and freedom is a function of

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<sup>94</sup> Moira Gatens “Feminism and Philosophy: Perspectives on Difference and Equality”, Polity Press, 1991.

possession. Society becomes a lot of free and equal individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise. Society consists of relation of exchange between proprietors. Political society becomes a calculated device for the protection of this property and for the maintenance of an orderly relation of exchange.<sup>95</sup>

Thus Macpherson was arguing that the freedom of an individual (which can even be read as autonomy) is predicated upon her being a proprietor within a system of market relations. However, since these relations are essentially based on wage relations, and a mode of public production recognising only wage labour and not domestic labour,<sup>96</sup> the exclusion of women from the liberal construction of the 'public' as well as of the individual took place and as a fallout of both of these, women were rendered as 'non owners', both of themselves as well as of property.

The master right of self ownership<sup>97</sup> (which informs other rights including the right to property,) apart from presuming the existence of a system of private property which leads to individuals becoming owners of themselves as well as their property, in fact violates the principle of autonomy which

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<sup>95</sup> C.B. Macpherson "The Political Theory of Possessive Individualism, Hobbes to Locke", oxford University Press, 1962.

<sup>96</sup> According to Moira Gatens (1991), "The relations of exchange that govern a capitalist economy are, implicitly, relations between men that have as their support and guarantee a domestic and familial organisation that defies description in 'free market relations terms'".

<sup>97</sup> Attracta Ingram "A Political Theory of Rights"

includes a respect for heteronomy (Attracta Ingram 1994) and the non acceptance of antecedent givens, including the recognition of property relations as given (in this case the given is ownership of private property which then becomes the source of rights,) Moreover a notion of equality informed by the idea of self ownership leads eventually to inequality in the ownership of external resources as well as to an inequality in 'developed talents' (to be distinguished from natural talents, for these are related to impoverishment resulting from disparities in ownership external resources) which come to be construed as 'non capacity'. On the other hand, the conception of equality based upon the doctrine of autonomy which affirms the equal capacities of individuals and recognises equal capacities encompasses provisions allowing for special treatment in cases where these capacities have not been realised.

According to Richard Arneson, The implications of self ownership for the ownership of private property (which includes within it the right to bequeath and transfer one's property) need to be analysed hypothetically, by locating these in a state of nature. It must be noted that whatever the historical absurdity of locating an argument in the state of nature maybe, for the purposes establishing the moral equality of all, such a

location proves to be useful.

Within the state of nature, the applicability of the principle of self ownership towards justifying private property rules may be inferred by testing it in the following situations:

- 1) From the standpoint of there being available abundant land in the state of nature,
- 2) Secondly, there being available scarce land with a fixed number of individuals deriving benefit from it for all time to come, and,
- 3 Lastly in the eventuality of there being scarce land ,which is to be a source of rights for subsequent generations.

In the situation where land is abundant in supply, the appropriation of land for private purposes does not violate the harm principle. However, the principle of self ownership legitimises private ownership only to prevent 'interference in the private owners projects', and does not generate an exclusive right to own property which implies having rights and, following from these the power to prevent the use of one's property by others even if such a use is not harmful, or affecting the owner in any way in other words what Arneson refers to as "harmless parasitism".(self ownership is said to, in general, encourage harmless parasitism).

In the second case, of scarcity of land and a given population

whose numbers are fixed for all time to come, private appropriation of land in times of scarcity is problematic a fact recognised by Locke and according to Arneson for his resorting to the argument of 'tacit consent'. According to Arneson, though, appropriation of scarce land deprive people of their liberty to use that available, though certain circumstances under which the appropriation of private use in conditions of scarcity is consonant principle of self ownership, these are:

- 1) If appropriation of land in scarce conditions occur process of fair competition
- 2) If the appropriation takes place after the obt consent or the purpose by all the non appropriating
- 3) Appropriation is permissible if ' compensation is p harmed non appropriators'
- 4) private appropriation of scarce land is morally imp for in conditions of land scarcity the initial rights inhabitants are such that that do not include the appropriate property for private use. Thus, the only k appropriation that is allowed is public ownership geared towards the common good. The point to be taken note of here, is the extent to which a commitment to self ownership involves within it a commitment to private ownership, despite the

prevailing external conditions such as scarcity of land. According to Arneson, public management of property as a response to the scarcity condition is incompatible with the principle of self ownership and its commitment to private property despite the harm to non appropriators<sup>98</sup>. However situations of scarcity, which have called for the setting up of the public management schemes, a commitment to the principle of self ownership would require the insertion of the "opting out" provision, whereby individuals have the right to opt out of the collective ownership and management of property.

In the third case, the hypothetical state of nature is marked by scarcity of land , and an indefinite number of generations to follow the initial appropriators of land. Such an appropriation of land for private purposes becomes hard to justify given the requirements of the self ownership principle, mainly avoidance of harm to others. To put it differently, the appropriation of property or of land in this case, deprives not just the non appropriators but also those who are yet to be born of the opportunity of appropriating land as well as of reaping benefits thereof, and following from this, the question that comes up is

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<sup>98</sup> Self ownership preaches that people should be free to do whatever they choose as long as they do not cause harm to the nonconsenting others. In this case appropriation of land in conditions of scarcity results in the obvious harming of those who do not own any land by virtue of the fact that there is not any available.

that of appropriate compensation to be given to those generations who have been harmed by the appropriation of property by the first inhabitants of the state of nature.

John Christman analyses the concept of self ownership which informs the structure of property rights. He splits it into its component parts of income rights and control rights, and goes on to make a case for separating the institutions of private property from the concerns of distributive justice, thus weaving an argument which justifies the essential claims of self ownership by instituting mechanisms for maintaining 'equality of condition'. According to him, both of these, though parts of the doctrine of self ownership and its justification of the rights to private property, need to be looked at as two distinct features of self ownership, each exercising its distinct impact on the equality of resources. Theorists espousing the cause of distributive justice seem to have overlooked this distinction in voicing their discomfort with the idea of self ownership and its resultant conflict with equality.

For Christman self ownership contains within it both a social as well as a private element. The former is to be found in the component Christman refers to as the income rights to be derived from property, and the latter is contained in the rights

of control over one's own property.<sup>99</sup> Income rights are those which are exercised in order to receive increased benefit from ownership by means of a contractual transaction.

Here individual preferences do not alone come into play but become conditioned by the "natural factors and social institutions", which are beyond the control of individuals and these rights of individuals are dependent upon a certain kind of distributive system prevailing in the society.<sup>100</sup>

Therefore, income rights are sought to be justified on the basis of the prevailing principles regarding the distribution of resources. An important way in which the State plays a important role in allocating income rights is through tax policies (Christman, 1991) and in socialist economies through State regulated market structures. In the case of Welfare States, the dispensing of social security to the unempl

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<sup>99</sup>Christman defines ownership to include : a) rights to possess, use, manage, alienate, transfer, and gain income from property. Derivative from these are (b) rights to security in ownership, transmissibility (after death), and absence of term (specifying absence of temporal limitations on ownership). Note in this definition of ownership the unproblematic inclusion of inheritance rights.

<sup>100</sup> The factors affecting the distribution of resources in an economy according to Christman are: " transaction costs faced by potential competing trading partners, bargaining power of others in the area, and surpluses created by the efficiency of the market structures and information gathering mechanisms.

well as ensuring employment for the underprivileged,<sup>101</sup> including the doctrine of the right to work, can be said to comprise income rights in a broad sense.

Control rights, on the other hand, are justified on the basis of individual interests such as "liberty, autonomy and self determination"( Christman, 1991) and this element is the one said to be most intimately connected with the doctrine of ownership and hence to its fundamentals of autonomy and agency. It is but obvious that control rights over capital including control over one's talents are essentially private and held by the individual only whereas income rights are collectively held.

According to Christman, egalitarians aim wrongly at control rights in their crusade for distributive justice and go so far as to propose the curtailment of property rights as a whole . However, in his view such proposals are misplaced for the concern for distribution of resources should be aimed at the income rights component of ownership rather than at the doctrine of self ownership (on the premise that it conflicts with the postulate of equality) and in ensuring that factors making

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<sup>101</sup> In the Indian case the State has embarked upon ambitious projects such as the Jawahar Rozgar Yojana , etc, thus proceeding upon the course of fulfilling its commitment to the providing of employment to its citizens. The right to work is mentioned in the Directive Principles of State Policy.

for an efficient distribution of surplus in the economy are present and functioning at an optimum level.

I wish to extend this control/income rights distinction in property rights in making the claim that individual rights are essentially proprietary in nature and necessarily derive from the principle of self ownership . Self ownership as an expression of the notion of individual autonomy operating within a system of market relations necessarily excludes women not only from the category of autonomous beings but also effectively results in a denial of their property rights. According to Alan Ryan, property ownership for both Kant and Hegel was absolutely essential for autonomy and resulting from that for the exercise of political rights. "Non owners became passive citizens", and were therefore not entitled to suffrage and since they had no property they were forced to sell their services to others and in doing so they came to be regarded as dependents.<sup>102</sup>

### **Self ownership : Income Rights and Rights of Control**

John Christman talks of two kinds of property rights: rights to income and the rights of control over one's property. He makes

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<sup>102</sup> Alan Ryan " Self ownership, Autonomy and Property Rights", Social Philosophy and Policy, Volume 11, No. 2, Summer 1994.

a case for the provision of regulating mechanisms which would work towards distributing the resulting surplus from utilising one's private capital and for the preservation of control rights (which are the rights to own one's private property ) for such rights over one's own capital are indicative of the possession of autonomy.

However, for the purposes of this study, the issue is really that of control rights, for it is these rights which have been denied to women and constitute in fact the foundational basis for the subsequent discrimination meted out to them. For example, in the eighteenth century, ownership of private property became the basis of citizenship<sup>103</sup> Thus, Kant regarded all those who were economically dependent to be unsuitable for citizenship and in listing all those who by virtue of their subservience and due to the fact that they had "no civil personality"<sup>104</sup> are to be excluded from claiming political rights, he includes 'women in general'. Thus, it becomes clear from this that only men of property enjoyed the right to vote. Further, the foundations of liberal egalitarianism according to Amy Gutmann, consist in the generalisations of people being equal because of their

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<sup>103</sup> Teresa Brennan and Carole Pateman " Mere Auxillaries To The Commonwealth: Wmen and the orgins of Liberalism", Political Studies,27, no.2, 1979.

<sup>104</sup> " Kants Political Writings", edited by Reiss, Cambridge Unuversity Press, 1971.

possessing similar passions as well as possessing adequate rationality. However, since the notion of rationality is said to be tied to that of self ownership morally as well as factually for "people are rational beings and they can be assumed to be responsible for their own actions"<sup>105</sup> and through ownership to the idea of autonomy, the treatment of women as 'non owners' not only results in denying autonomy to them , but also more significantly, denying equality to them.

The Indian State, recognising the historic discrimination of women, sought to extend political rights to women on the basis of the doctrine of equality. However, by not extending equality in terms of access to economic resources, it fell far short of not only living upto the postulate of equality adopted by the State in its constitution but in a way carried forward the liberal construction of women as non autonomous and "non rational" agents who were to be excluded from the " status of free and equal individuals" and hence regarded as unfit for public life.<sup>106</sup> Being informed by such an essentially liberal understanding, the Indian State denied control rights over property to women, and instead sought to bring about

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<sup>105</sup> Amy Gutmann "Liberal Equality, Cambridge University Press, 1980.

<sup>106</sup> Teresa Brennan and Carole Pateman, 1979.

superfluous legislation and measures which were careful enough to steer away from addressing, much less providing radical solutions to the existing structural inequality of women.

Realising of course that legal equality is only a part of sex equality<sup>107</sup>, and it is not sex equality itself, it however marks a significant step towards achieving sex equality for it means a recognition for the first time, of women as bearers of rights and in instances of progressive laws as bearers of equal capacities, as autonomous and hence as a consequence of this, as equal.

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<sup>107</sup> According to Catherine Mackinnon the term sex equality represents an oxymoron of sorts, for the sex in sex equality is perceived as difference in politics, law and social construction and the equality bit is perceived as sameness, therefore "sex is socially constructed and equality epistemologically, therefore a " built in tension exists between the concept of equality which presupposes sameness and the concept sex which presupposes difference, sex equality thus becomes a contradiction in terms. See Catherine A Mackinnon " Feminism Unmodified", Discourses on Life and Law, Harvard University Press, 1987.

## **Conclusion**

The purpose of this study was to locate two specific gender issues in the Indian context viz; reproductive rights and inheritance rights for women within mainstream political theory. Both of these issues are concerned with the concept of 'ownership' found in liberal political theory. The concept of reproductive rights evokes a concept of ownership over one's own person in other words over internal resources, while the issue of claiming inheritance rights for women is for extending ownership rights to women over external resources.

The point however is that ownership in liberal theory is so conceptualised that ownership over one's self is dependent upon ownership of external resources. Thus when individual autonomy comes to be seen as synonymous with ownership, the concept of equality that it gives rise to conflicts with the idea of autonomy itself. For not only does it naively assume the existence of equal talents, it also suggests that all 'owners' who come to be recognised as autonomous beings are essentially owners of property within a system of market relations.

The non recognition of domestic labour has ensured that women obtain the status of non owners, and following from that, of non autonomous beings.

Why look at the reproductive rights perspective in studying the population policy of the Indian State? likewise why look at property rights ( in this study, the inheritance rights women have been the focus) while analysing the relationship between State and Gender in India. The second question concerns the rationale behind looking at these two rights together in the same study.

Employing the reproductive rights framework helps to expose ways in which the Indian State denies autonomy through its population policy. In other words reproductive rights have come to be important indicators of the role played by states in broadening women's rights. Robin Jeffrey and Alka Basu<sup>108</sup> speak in terms of reproductive rights being in a broad sense "outcomes of government policies", According to them, the whole notion of women's autonomy becomes meaningless, if there are no institutional set ups facilitating the exercise of autonomous choice.

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<sup>108</sup> Robin Jeffrey and Alka Basu " Girls Schooling. Women's Autonomy and Fertility Change", New Delhi, Sage, 1996.

Another reason why the reproductive rights perspective assumes significance is because it seeks to displace 'fertility control', as the overriding concern in population debates, replacing it by a concern for providing conditions for women to exercise fertility control in the manner they choose. Apart from this, this perspective also pays attention to other indicators of fertility such as mortality rates among women and children, malnutrition, etc. Finally, the concept of reproductive health which came to dominate feminist literature (when) found itself being appropriated by the literature and policies of state departments on family planning and population control.

Thus reproductive health came to be regarded as an effective slogan in the population policies of recent times to counter feminist critiques of state sponsored population policies as well as to silence their demands for providing health care facilities for women.

According to the the UNFPA (United Nations Population Fund)) 1997 report on 'The State the World Population', initiative needs to be taken in two sectors. These are:

Firstly, the establishment of broad human rights which "enable sexual and reproductive rights and create the conditions for their exercise" and

Secondly, making information and services " that meet the full

range of requirements for sexual and reproductive rights". These enabling rights, covered under the heading 'broad human rights, are to include especially those issues which are concerned with the equality and empowerment of women. The fulfilment of these rights will require the reformation of laws and and better enforcement of existing rights, mechanisms to document human rights violations, education both general and specific education on sexual and reproductive health, and development of alliances among institutions working towards furthering the cause of people's rights.<sup>109</sup>

The importance of using the language of rights in making reproductive health claims against the state is because dressing these claims in rights-language presents them as being at par with any of the basic rights and claims that citizens may make on their governments. Moreover, rights language also puts into perspective the close relationship which exists between reproductive self determination and the nature of the state. In some cases, in order for these rights to be recognised, let alone met, there has to take place a complete "redefinition of the relationship between the state and women".<sup>110</sup>

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<sup>109</sup> "The State of the World Population, 1997", UNFPA

<sup>110</sup> Paula Abrams "Reservations About Women: Population Policy and Reproductive Rights", Cornell International Law Journal, Volume 29,

The second question we have posited is why look at women's property rights in examining the relationship between state and gender in India. Women's property rights are an important indicator of evaluating the equality claims enshrined in the constitution, for despite the espousal of equal rights for all citizens irrespective of their sex, the Indian state has fallen short of according complete legal equality to women and perhaps nowhere is this better reflected than in respect of property rights accorded to women. Thus, even after the enactment of the Hindu Succession Act, of 1956, women continue to be excluded as coparceners as the act retains the system of Mitakshara coparcenery and the sons in addition to being the the joint owner of the coparcenery property get an equal share of the property of the deceased along his widow and daughter. Thus the law has fallen short of granting complete legal equality to women but even in areas where it does treat her equally, the equality so established is done so by evoking her dependent status, rather than on the basis of her capabilities as well as her rights as an autonomous agent capable of forming her own ideas and exercising her own judgement over conditions of her own choosing.

Finally, the study of two issues namely, reproductive rights and property rights within the same framework and study assumes

significance given the fact that reproductive rights can most effectively be realised when women are granted economic rights as well as complete legal rights in matters of familial property.

The argument in this dissertation has been to try and locate this existing inequality in the disparity between property rights as they accrue to men and women in India within liberal democratic theory itself. Liberal theory with its proprietorial notion of rights which emanates from the foundational liberal principle of self ownership, results in denying property rights to women. In other words, self ownership assumes the existence of a system of private property rules, as self ownership can operate only within a system of private property rules and the rules of private property in this context are based on the principle of exclusivity<sup>111</sup>,

Moreover "the right of the individual to the pursuit of liberty and progress is acted out in liberal theory against an assumed background of certain kinds of labouring and ownership relations. These relations are implicitly and historically

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<sup>111</sup> Attracta Ingram " A Political Theory of Rights", oxford University Press, 1994.

According to her, the owner of an object is a person who does not have to seek consent from others in order to make use of her resources and, whose consent others have to seek to gain an access to the resources owned by her.

relations between men"<sup>112</sup>. At this point, two different conceptions of autonomy may be invoked. These are:

- 1) Autonomy as informing an equal respect for persons on the grounds of their being similar,
- 2) Autonomy as resulting in an equal respect for persons on the basis of their possessing equal capacities.

Autonomy as a respect for persons on the basis of sameness, finds expression in the principle of self ownership, which in turn leads to a development of a proprietary notion of rights. This principle of self ownership while assuming moral equality of all, essentially comes into conflict with the principle of equality. Therefore, this conception of autonomy leading to the extension of equal respect to all on the basis of sameness, and to the doctrine of self ownership in effect comes to be in dissonance with the issue of women's rights. This is so because, the principle of self ownership operates within a system of private property rules, which creates within itself a mechanism to sieve sections of the population out of the system, which further serves to explain the existence of slavery and lack of property rights given to women. It must be clarified, however that, the principle of self ownership by affirming the

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<sup>112</sup>Moira Gatens "Feminism and Philosophy: Perspectives on Diference and Equality", Polity Press, 1991.

view of people as subjects of property rules , allows them to deal with their property in any manner they choose, including the right to dispose property vested in their own selves, and hence the notion of voluntary slavery.<sup>113</sup> Such a sieving out is done on the basis of their being given the status of 'non owners' as they are perceived as lacking the 'same' qualities as 'owners'. These qualities which are found lacking in women have come to inform the dichotomous categories used in explanation which are found in philosophical thought.

Viewing autonomy as leading to an equal respect doctrine based on the respect for equal capacities, includes within it a respect for moral pluralism and differing conceptions of the good.

It is this moral pluralism which embraces within its fold the rights of all, not because they measure upto any preset standards, but because they all possess equal capacities to make decisions regarding the good life..

A positive idea of autonomy together with that of doctrine of equal respect, require a plural moral universe where, there exist a number of conceptions of the good. Moral pluralism comes to be important because it does not privelege one standard of what is constitutive of good life, and in accomodating various

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<sup>113</sup> See Attracta Ingram, "A Political Theory of Rights", oxford Universit Press,1994. It is not so difficult to extend the voluntary slavery argument to women.

goods does away with all standard and measures including that of the autonomous subject who is essentially male.

For a strong notion of equality to exist it must be informed by a positive conception of autonomy based on a celebration of difference, one which accrues to people not by virtue of their being 'owners' but by a recognition of their possessing equal capacities. Further, a commitment to equal capacities is also a commitment to recognition of difference, for equal capacities does not mean possessing similar capacities, rather it implies possessing different capacities all of whom come to command equal respect. It becomes imperative to move away from a concept of autonomy which is informed by the principle of self ownership, not only because of the conflict that exists between the doctrine of equality and self ownership which relates to the assumption of equal talents, but also because the principle has privileged the male subject who has come to be perceived as autonomous primarily because of his status as an 'owner'.

Further, a positive notion of equality is constitutive of two elements which may be referred to as the 'ideational' aspect and the 'operational' aspect. The ideational aspect of equality as the name suggests, would evoke the belief in the idea of equality as referring to the ideas of equal capacities of all, rather than being merely a belief in equal passions (Hobbes, Bentham) or in

equal rationality ( Kant, Locke), whereas the operational constituent of the equality postulate (having recognised the prevalence of equal capacities,) would include within it correctives that would go a long way in making the doctrine of equal capacities a functional concept in terms of not only providing equal opportunities to all, but also creating conditions wherein the doctrine of equal opportunity becomes a reality.

Moral pluralism does not only becomes a condition for the prevalence of a positive notion of autonomy but also becomes indispensable to the politics needs. Infact the politics of needs has a stake in maintaining this moral pluralism, because ut is the needs which create different conceptions of the good.

Moreover, rights which are based on the needs of individuals having different life experiences help legitimise the demand for rights raised by diferent voices in this case the demand for reproductive rights or the demand for equal ownership rights for women. Finally, the recognition of different needs arising out of the different lived in experiences would infact lead to extending equal subjecthood, to peoples who had been non recognised so far.

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