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# CARCERAL FEMINISM AND WOMEN'S RIGHTS: RE-EVALUATING THE USE OF CRIMINAL LAW TO TACKLE GENDER-BASED VIOLENCE

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## *“Does Harsher Punishment Really Protect Women?”*

### Introduction

The growing reliance on criminal law in India to prevent gender-based violence exemplifies a complicated interplay between feminism, governmental authority, and legal reform. Over the last decade, notably since the 2012 Delhi gang rape (also known as the Nirbhaya case), public outcry has constantly pushed legislators to change legislation and strengthen punitive measures. These improvements are frequently defended in terms of safeguarding women, discouraging future crimes, and providing justice. Despite these advances, violence against women continues to increase, and the criminal justice system remains plagued by systemic inefficiencies.

This dichotomy between feminist campaigning and carceral tactics has given rise to what scholars refer to as "carceral feminism"—a type of feminism that increasingly interacts with state power to accomplish gender justice through the criminal justice system. The basic premise of this study is that, while punitive measures have symbolic value and may provide victims a sense of justice, they frequently fail to address the structural imbalances that contribute to gendered violence in the first place.

India's legal history on women's rights is rich and changing, but the disproportionate emphasis on prosecution over social transformation poses serious concerns. Does a stiffer punishment actually make society safer for women? Or does it only perpetuate cycles of violence and exclusion under the pretext of protection? This study seeks to critically examine this paradigm by investigating the limitations of carceral feminism and advocating for alternative models of justice based on community engagement, restoration, and revolutionary social change.

## **Understanding Carceral Feminism in Context**

Carceral feminism is a theoretical paradigm that criticizes the relationship between feminist movements and punitive state agencies such as police, prosecutors, and prisons. Elizabeth Bernstein, a sociologist, popularized the term after researching how certain strands of feminist action, particularly in the Global North, began to prioritize legal reforms and criminal prosecutions over larger social change. This kind of feminism seeks justice by expanding the state's punitive powers, often without properly understanding the ramifications for marginalized communities.

In India, carceral feminism has gained traction as a result of high-profile cases that caused widespread indignation. The 2012 Nirbhaya case marked a watershed moment. In response, the Justice Verma Committee was established, which proposed a fundamental revision of sexual assault laws. While many of these recommendations centered on gender sensitization and police accountability, the most visible reforms implemented by the Criminal Law (Amendment) Act of 2013 were those that increased penalties for sexual offenses, including life imprisonment and the death penalty in aggravated cases.

Similarly, the 2018 changes increased the punishment ceiling by introducing the death penalty for rape of females under the age of twelve. Certain feminist and media circles welcomed these amendments as wins, although they did not lessen the frequency or impunity of similar crimes.

Carceral feminism in India has been promoted by media narratives that define justice in retributive terms—"justice for Nirbhaya," for example, has come to mean the execution of criminals. However, this narrative ignores the actual realities of many women whose stories never make news and whose offenders are never prosecuted. It also ignores concerns about the effectiveness, fairness, and inclusivity of the justice system.

The carceral trend in Indian feminism must be seen not only as a reaction to violence, but also as a multifaceted phenomena impacted by neoliberal government, media sensationalism, and popular desire for vengeance. It is a sort of feminism that risks losing its transformative power in exchange for the punitive state's perceived legitimacy.

## **The Limits of Harsher Punishment: Ground Realities in India**

India's recent criminal law modifications are a textbook example of how, despite their good

intentions, punitive reforms can fail to produce significant change. Longer sentences and harsher fines are widely assumed to be deterrents. However, criminologists and feminist legal scholars have long criticized deterrence theory for failing to account for the structural and sociological variables that contribute to crime.

Consider the death penalty provisions for minor rape enacted by the Criminal Law (Amendment) Act, 2018. While this provision received public support, particularly in response to events like the Kathua rape, there is little evidence that such draconian sanctions deter future offenses. According to data from the National Crime Records Bureau (NCRB), rape and sexual assault cases have continued to grow, with 31,677 reported in 2021 alone. Simultaneously, conviction rates remain abysmally low (about 27%), demonstrating a significant disparity between legal requirements and their execution.

These data highlight the inefficiency and insensitivity of the criminal justice system. Victims are frequently humiliated at police stations, face continuous cross-examination in court, and receive little to no psychological help. Furthermore, the delay in judicial proceedings, despite the establishment of fast-track courts, undermines confidence in the system. The actual perception of justice is thus defined by the procedure preceding it, rather than the harshness of the penalty.

Furthermore, strong sanctions can have unfavorable consequences. Victims of child sexual abuse or incest may hesitate to disclose the crime for fear that the accused—often a family member—will face the death penalty. In rural or poor communities, the emphasis on punitive justice may clash with local mediation or conflict resolution processes, further deterring survivors from accessing justice.

This discrepancy highlights a larger issue: criminal law operates inside a patriarchal and caste-based framework. Its mechanisms—policing, inquiry, and trial—are built into social systems that frequently discriminate against the most disadvantaged. As a result, carceral measures can often exacerbate the very inequities they profess to combat.

### **The Marital Rape Exception: A Gender Justice Failure**

The marital rape exception under Indian criminal law is perhaps the most egregious example of punitive changes failing to adequately protect women. This clause, codified under Exception

2 to Section 375 of the Indian Penal Code and retained in the Bharatiya Nyaya Sanhita, 2023, states that sexual intercourse between a man and his own wife, if she is over the age of 18, does not constitute rape.

This exclusion has long been a target of feminist legal advocacy, which sees it as a clear infringement of women's bodily autonomy and marriage equality. International human rights organizations, particularly the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), have frequently urged India to remove this provision. However, Indian lawmakers have been hesitant, frequently citing concerns about abuse or potential disruption to the "institution of marriage."

The Delhi High Court's divided verdict in *RIT Foundation v. Union of India* (2022) reflects the contentious nature of this debate. While Justice Rajiv Shakti held the exception unconstitutional for violating Articles 14 and 21 of the Constitution, Justice Hari Shankar upheld the provision, emphasizing legislative intent. This judicial split mirrors the larger societal ambivalence on the issue—an ambivalence deeply rooted in patriarchal conceptions of marriage as a domain of male control.

Notably, criminalizing marital rape is more than just creating a new offence. It necessitates a reassessment of how the state defines marriage, consent, and sexuality. Critics of criminalization believe that it can overreach and be abused in marriage disputes. While this is a valid concern, it should not overwhelm the fundamental premise that consent cannot be presumed based on marital status.

What carceral feminism overlooks in this context is the revolutionary power of legal reform beyond punishment. Rather than focusing merely on enacting additional punitive measures, feminist legal discourse must advocate for a more comprehensive reworking of family law, public health policies, and educational curricula to foster a culture of consent and mutual respect in intimate relationships.

### **Restorative and Transformative Justice: An Alternative Approach**

Given the apparent failings of punitive frameworks, feminist scholars and activists are increasingly turning to restorative and transformative models of justice. These strategies promote healing, accountability, and community involvement over punishment. Restorative

justice entails convening victims, offenders, and affected community members in moderated discussions to acknowledge harm, accept responsibility, and agree on ways to make apologies.

Transformative justice takes a step farther by attempting to transform the social conditions that enable violence in the first place. It questions the state's monopoly on justice and stresses community initiatives, economic empowerment, and cultural shifts.

In India, community-led efforts have shown early evidence of such options. The "Nari Adalats" or Women's Courts, which have been formed in various parts of rural India, have given local forums for women to seek redress for domestic violence and marital conflicts. Though informal and frequently without legal status, these courts reflect a growing demand for justice processes that are accessible, compassionate, and anchored in lived experiences.

Restorative justice approaches have also been tested by NGOs such as Prayas and CEHAT, particularly in cases of domestic violence. These groups prioritize counselling, survivor support, and reintegration over legal retaliation. However, these attempts remain marginal in the lack of explicit governmental sponsorship or incorporation into criminal procedural rules.

Integrating these ideas into conventional legal frameworks necessitates legislative innovation. The Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023 may have provided a possibility to establish mediation or healing circles as pre-trial remedies for specific gender-based offenses, but it has primarily maintained the adversarial system. Nonetheless, the expanding discussion about trauma-informed justice, community accountability, and victim-centered initiatives indicates a growing desire for alternatives to carcerality.

### **The Way Forward: Beyond Criminalization**

To overcome the constraints of carceral feminism, India's judicial system must take a comprehensive, feminist approach to justice. This entails not only punishing abusers, but also changing the socio-legal structures that normalize and sustain violence.

Criminal justice changes must prioritize the needs of survivors. Police, prosecutors, and judges must be trained in gender sensitivity, trauma-informed interviews, and legal empowerment. The focus should shift from conviction rates to survivor well-being and dignity.

The law must recognize intersectionality. Dalit, Adivasi, Muslim, and LGBT women frequently suffer special vulnerabilities and are unfairly targeted or ignored by governmental institutions. Feminist legal reforms must be sensitive to these multiple oppressions. Public policy must supplement criminal legislation with strong social support systems such as shelters, mental health services, job opportunities, and education initiatives. Legal reforms will be ineffective unless they address the socioeconomic factors that keep women stuck in abusive relationships.

Feminist movements must recover their revolutionary mission. Rather than legitimizing the carceral state, feminists must advocate for structural reform, which includes removing impunity, redistributing resources, and confronting patriarchy in all its forms.

## **Conclusion**

Carceral feminism provides a partial and often problematic answer to the underlying issue of gender-based violence. While the criminal justice system remains an essential means of redress, particularly in extreme circumstances, an over-reliance on punishment fails to provide justice in its broadest sense. India's post-Nirbhaya reforms, while progressive in spirit, have not resulted in increased safety or empowerment for women.

A justice system based on empathy, inclusion, and transformation is more likely to bring about long-term change. This paper proposes for a move away from retributive paradigms and toward restorative and transformative frameworks, citing feminist jurisprudence that prioritizes survivor agency and community rehabilitation.

To truly safeguard women, we must address not only crimes against them, but also structural violence such as inequality, poverty, and isolation. Only then can the law be used to liberate people rather than only punish them.

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