CHILDREN NO MORE? A FEMINIST CRITIQUE OF THE JUVENILE JUSTICE TRANSFER SYSTEM IN INDIA

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The ‘transfer system’ envisioned under the provisions of the Juvenile Justice Act, 2015 is purportedly meant to address the commission of heinous offences, particularly sexual assault by adolescent boys. It is worth noting that the provisions of the Juvenile Justice Act, 2015 and criticisms thereof are majorly based on the principles of the best interest of the ‘child’ and ‘society’. This paper undertakes a different route, providing a feminist critique of the transfer system with reference to the best interests of women, particularly survivors of sexual assault. It argues that the problem is not that children are increasingly committing sexual assault but that sexual violence overall remains prevalent. The transfer system, in this context, is part of a project of ‘governance feminism’ which seeks to divert attention from institutional failures at preventing sexual violence to external ‘sexual predators’. It operates on assumptions of hegemonic masculinity by treating child offenders as inherently ‘deviant’. Consequently, current rehabilitation measures are framed in accordance with masculine norms and do not specifically address sexual offending behaviour. Further, they provide no agency to the victim. This paper proposes a ‘restorative justice’ approach as an alternate solution. This not only gives victims the opportunity to seek closure and decide methods of restitution but also involves the use of multi-systemic methods to ensure specific redressal of juvenile sex offending.

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I. INTRODUCTION

Severely violent acts of sexual assault and physical abuse inflicted on a twenty three year old woman in New Delhi, on December 16, 2012 (‘Nirbhaya case’) generated outrage and renewed discussions about violence perpetrated against women in India.¹ A recurring narrative which emerged in the media reports of the incident was that the accused juvenile perpetrator was the ‘most brutal’ in conduct amongst the six rapists.² In light of the incidents which transpired in relation to the Nirbhaya case, separate petitions were filed before the Supreme Court in 2013 by Dr. Subramanian Swamy,³ and the victim’s parents⁴ praying that the definition of ‘juvenile’ under the Juvenile Justice (Care and Protection of Children) Act, 2000 (‘JJ Act, 2000’) should be understood in terms of mental maturity and not age, and that juveniles who have committed heinous crimes “against women in particular”, should be tried as adults.⁵ However, the petitions were ultimately dismissed.⁶ Subsequently, two acts of sexual assault, reminiscent of the Nirbhaya case, occurred in Mumbai. In this incident, the same group of five men gang-raped

³ Subramanian Swamy v. Raju, (2013) 10 SCC 465. (Special Leave Petition filed by Dr. Subramanian Swamy as the first appellant (Supreme Court of India)).
⁴ Subramanian Swamy v. Raju, (2014) 8 SCC 390 : AIR 2014 SC 1649. (Writ Petition filed by parents of the victim of the incident on 16 December 2012 (Supreme Court of India)).
⁶ The Supreme Court held that the JJ Act, 2000 is a beneficial legislation enacted to conform with India’s international obligations, and the provisions of the JJ Act, 2000 could not be ‘read down’ to exclude juveniles in specific cases given that the language of the JJ Act, 2000 was clear and unambiguous in providing for a separate scheme of investigation and trial for all persons aged under 18. “The avowed object is to ensure their rehabilitation in society and to enable the young offenders to become useful members of the society in later years.” Subramanian Swamy case, ¶ 39, 42, 46.
a telephone operator and a photo journalist on two separate instances, in July and August 2013 respectively. Out of these five perpetrators, two were juveniles. It is worth noting that in both of the cases discussed above, the juvenile accused were approaching adulthood.

As a response to protests and the emerging discussion surrounding the appropriateness of sending juvenile perpetrators of serious offences to correctional homes instead of sentencing them at par with co-accused adults, the Ministry of Women and Child Development introduced the Juvenile Justice (Care and Protection of Children) Bill, 2014. The Bill sought to enable the substitution of age as a determinant factor with the consideration of maturity of the perpetrator, as sought by victim’s rights advocates, by providing for a procedure for the trial of sixteen to eighteen year old individuals who have committed ‘heinous offences’ as adults, in case of satisfaction of the Juvenile Justice Board (‘JJB’) based on a ‘preliminary assessment’ that the juvenile had the capacity to commit the offense (‘transfer system’). The Parliament approved the Bill in 2015 and the result was the Juvenile Justice (Care and Protection of Children) Act 2015 (‘JJ Act 2015’).

The new JJ Act 2015 has faced stiff opposition from child rights’ advocates who argue that it violates constitutional and international law principles of the right to equality and non-discrimination of children in conflict with the law. The counter-argument could be that children who commit heinous crimes, if released will pose a danger to society. Yet in this tussle the question remains as to whether girls and women, who are the ones that are susceptible to sexual assault by ‘children’, actually stand to benefit from such legislation.

This paper seeks to critique the transfer system for children in conflict with the law (‘CICL’) aged 16-18 years old, under the JJ Act 2015, and the existing institutional framework for juvenile sex offenders from a feminist perspective.
tive. It argues that first, the transfer system is part of a larger project of ‘carceral feminism’ to divert attention from institutional and societal failures in preventing and responding to sexual violence. Second, it posits that the transfer system is gendered in so far as it constructs and reinforces stereotypes of masculinity and male juvenile offenders. Third, it is put forth that the transfer system does not bring any tangible benefit in the prevention of sexual assault. This is because the existing infrastructure for the rehabilitation of CICL is not only woefully inadequate but fails to account for the specificities of cases involving juvenile sex offenders. Further, it provides no stake to the victim. Therefore, the paper advocates for a restorative justice approach that reconciles victims’ need for retribution and accountability with the rehabilitation of CICL.

The paper first, asks the woman question by studying how women’s experiences and perspectives have been left out of consideration while framing this legislation.14 The JJ Act 2015 provides that the implementation of the Act is to be guided by the principles of the best interest of the ‘child.’15 Further, it provides for the principle of ‘diversion’ i.e. measures for dealing with CICL without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the ‘society as a whole’.16 Evidently, while the issues of the other stakeholder, namely CICL, is sought to be dealt with, neither of these principles is specifically oriented to be looking at the best interests of victims of sexual assault, who are overwhelmingly women. The purpose of a feminist legal method is not to formulate a response which is exclusively in favour of women’s interests but to critique systemic disadvantage based on gender bias.17 Therefore, this paper aims to study the problem of juvenile sex offending from the perspective of remedying the concerns of women who are vulnerable to or have been subject to sexual assault as well as the failure to rehabilitate and reform juvenile offenders due to the gendered stereotypes operating within the transfer system.

Second, the paper uses feminist practical reasoning to discuss solutions for rehabilitating juveniles who have committed serious crimes. Again, it seeks to avoid drawing a ‘dichotomized conflict’18 between children’s rights and women’s rights, and retributive and restorative justice. The objective of the paper

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14 Katharine Bartlett identified three components of a feminist legal method, namely (1) identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups (asking the “woman question”); (2) reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives (feminist practical reasoning); and (3) seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative (consciousness-raising). Bartlett additionally formulated a fourth component—“positionality”—which aims at seeking truth that is provisional and situated in experience rather than external and final. Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 837 (1990).
15 The Juvenile Justice (Care and Protection of Children) Act, 2015, §3(iv).
16 The Juvenile Justice (Care and Protection of Children) Act, 2015, §3(xv).
17 Bartlett, supra note 14, 846, 848.
18 Id., 851.
is to find “imaginative integrations and reconciliations”\textsuperscript{19} that can mutually benefit all stakeholders in the juvenile justice process, including victims. The paper specifically adopts the stance of ‘positionality’ advocated by Bartlett which aims at incorporating opposing or unseen perspectives in feminist analysis instead of an exclusive women’s standpoint epistemology.\textsuperscript{20} Therefore, this paper attempts to critique the transfer system and suggest a solution from a perspective that benefits not only victims of sexual assault but juvenile offenders as well. Finally, the paper seeks to engage in raising consciousness by drawing attention to the experiences of children in conflict with the law in the juvenile justice system, as well as the realities of sexual assault in India and how those impact the criminal justice process.

The paper however, restricts itself to studying the gendered nature of the existing juvenile justice system and the impact of the transfer system on juvenile sexual offending behaviour. It does not provide a comprehensive overview of the causes of juvenile sex offending and redressal methods for the same. Further, since the paper is undertaking a feminist analysis, it will not be engaging in an extensive critique based on constitutional or international children’s rights law principles. Another limitation of this paper is the absence of empirical data and research on the experiences of female CICL in the Indian juvenile justice system.\textsuperscript{21} The paper uses this as a point of critique for questioning the assumptions underlying the JJ Act, 2015.

II. AN OVERVIEW OF THE TRANSFER SYSTEM UNDER THE JUVENILE JUSTICE ACT, 2015

Under the Juvenile Justice (Care and Protection of Children) Act, 2000 (‘JJ Act 2000’), the maximum possible ‘sentence’ for a juvenile found guilty of committing an offence was to be sent to an observation home for three years.\textsuperscript{22} Alternatively, the JJB could direct the juvenile to participate in group counselling, community service or be released on probation.\textsuperscript{23} There was no categorisation of offences or offenders under the JJ 2000. Under the JJ Act 2015, three categories of offences have been provided, namely heinous offences, serious offences and petty offences.

Heinous offences are ones for which the maximum punishment under law is seven years or more.\textsuperscript{24} The JJ Act 2015 provides that with respect to children aged sixteen years and above who have allegedly committed heinous

\textsuperscript{19} Id.
\textsuperscript{20} Id., 883.
\textsuperscript{22} The Juvenile Justice (Care and Protection of Children) Act, 2000, §15(g).
\textsuperscript{23} The Juvenile Justice (Care and Protection of Children) Act, 2000, §15(b), (c), (e).
\textsuperscript{24} The Juvenile Justice (Care and Protection of Children) Act, 2015, §2(33).
offences, the JJB shall conduct a preliminary assessment of the child’s mental and physical capacity to commit the offence.25 The preliminary assessment is ‘not a trial’,26 but on the basis of the aforesaid assessment the JJB may transfer the case to the Children’s Court,27 and the Children’s Court may subsequently order the trial of the child as an adult.28

Thereafter, if the child is found guilty he is to be sent to a place of safety till he attains twenty one years of age.29 When he turns twenty one, the Children’s Court shall either release the child if it feels that the child ‘can be a contributing member of society’ or order that the child shall complete the remainder of the sentence term in jail.30

A. CRITICISMS BY CHILD RIGHTS’ ADVOCATES AND INDIAN FEMINIST RESPONSES

It is to be noted that juvenile justice advocates have responded negatively to the JJ Act 2015. They have argued that research in developmental psychology clearly shows that adolescents lack psychosocial maturity compared to adults.31 Hence, they are less culpable for poor decision-making than adults are.32 Another criticism of the transfer system is that adolescents are unable to make trial-related decisions and are vulnerable to pressure from the police, lawyers and their families.33

The transfer system has also been impugned on grounds of Articles 14 and 21 of the Constitution of India, as assessing whether a child has ‘reformed’ and ‘can contribute to society’ is an inherently arbitrary process.34 Further, it is to be kept in mind that the Convention on the Rights of the Child (‘Convention’) provides that imprisonment of a child shall be used only as a ‘measure of last resort’ and ‘for the shortest appropriate period of time.’35 Additionally, the Convention detained children must be separated from adults.36 Under the transfer system, underage CICL found guilty of committing heinous offences would be in the company of others who are completing their stay till the time they turn twenty one.

27 The Juvenile Justice (Care and Protection of Children) Act, 2015, §18(3).
28 The Juvenile Justice (Care and Protection of Children) Act, 2015, §19(1)(i).
29 The Juvenile Justice (Care and Protection of Children) Act, 2015, §19(3).
30 The Juvenile Justice (Care and Protection of Children) Act, 2015, §20(2).
31 See Pillai & Upadhyay, supra note 12, 53-55.
32 Id., 61.
34 Id.
36 Convention on the Rights of the Child, Art. 37(c).
Prominent Indian feminists and women’s rights advocacy organisations have publicly denounced the transfer system. The main focus of these responses has been on highlighting the extent of prosecution of consensual acts of sex between children under the Protection of Children from Sexual Offences Act (‘POCSO’). Some responses have also highlighted how such an amendment shifts away blame from socio-economic structures that disadvantage women and violence within the home to criminal ‘strangers’.

The author acknowledges the validity of the aforementioned criticisms. However, neither of these is looking at the gendered nature of the system per se, the rights of victims in the juvenile justice process or specific solutions for juvenile sex offenders.

III. A FEMINIST CRITIQUE OF THE TRANSFER SYSTEM

A. ONLY RAPE IS BAD

The Cabinet press note on the introduction of the JJ Act 2015 as a bill in the Parliament stated that the transfer system balances the legitimate interests of the child while simultaneously being conscious of the need to deter crimes, especially brutal ‘crimes against women’. However, it is to be kept in mind that the term ‘heinous offences’ only encompasses crimes such as rape and murder, for which the maximum punishment exceeds seven years of imprisonment. Non-penetrative forms of sexual assault (such as sexual harassment) and marital cruelty are not covered within its ambit, as these are crimes punishable with less than seven years in prison.

Further, though the JJ Act 2015 is supposedly meant to protect women from juvenile sexual offenders, it continues to reflect the centrality of penetration to rape law. Sexual assault is defined in terms of violation of men’s

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39 The Centre for the Child and the Law, NLSIU has framed certain additional recommendations for juvenile sexual offenders. However, these have been proposed within a child rights’ framework. See Manoharan & Raha, supra note 21, 11.

40 Press Information Bureau of India, supra note 9.

41 Indian Penal Code, 1860, §498A includes relatives of the husband, who may be juveniles.
exclusive penetrative access to women rather than the loss of dignity or autonomy which women experience. 42 Therefore, a child who fondles a woman’s breasts, or ejaculates onto her face or body would be eligible for a JJB inquiry and detention in a child’s home as opposed to a child who has raped a woman, even though both women may have experienced equal degrees of violation. 43 Therefore, the transfer system does not address all crimes against women, but only selectively deals with crimes perceived to be brutal, without accounting for women’s subjective experiences of these crimes.

Further, it may be argued that the transfer system provides a sufficient number of safeguards to ensure that it is only the ‘rarest of the rare’ who are tried as adults given that the assessment of whether the child possesses ‘capacity’ to have committed a heinous offence is a two-stage process (preliminary assessment and Children’s Court assessment). Further, the JJ Act 2015 provides that the child will be provided with reformative services till the age of twenty one, and it is only if the child subsequently fails to reform that he will be sent to jail. The Juvenile Justice Model Rules also provide for the preparation of individualised care plans (‘ICP’), social background reports and social investigation reports (‘SIR’) 44 to assist in the assessment of the rehabilitation process of CICL. However, these reports take into consideration factors such as religion, ‘habits of the child’, ‘history of involvement of family members in offences’, which not only have no bearing on the offence committed but may in fact, predispose the child to prejudicial assessment.45 Therefore, the transfer system does nothing to specifically address the brutality of the crime committed, particularly in the case of juvenile sex offenders.

B. DO WOMEN ACTUALLY NEED THE TRANSFER SYSTEM?

Even assuming that the classification of offences is valid, from the standpoint of ‘positionality’, feminists working towards the prevention of sexual offending or juvenile crime generally must first understand whether the problem is of such a magnitude as to warrant a separate procedure that treats juvenile offenders as adults, given the resulting severity of consequences. The latest available data from the National Crime Records Bureau (‘NCRB’) shows that the propensity of juvenile crime is eight for every one lakh children.46 The data indicates that overwhelming majority of cases reported related to theft, followed by criminal

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43 This distinction has also been critiqued with respect to adult offenders. See Shraddha Chaudhary, RECONCEPTUALISING RAPe IN LAW REFORM, 13 SOCIO-LEGAL REVIEW 156, 161 (2017).
45 Juvenile Justice (Care and Protection of Children) Model Rules, 2016, Form 21.
trespass and burglary. Neither of the two are heinous offences under the scope of JJ Act 2015.

Out of 35,849 CICL cases reported in 2016, 1,903 cases reported were rape cases, out of which 102 were gang rapes. Further, the share of juvenile crimes to total cognizable crimes under the Indian Penal Code (“IPC”) has remained steady in the range of a miniscule 1.0-1.2 percent in the period from 2002 to 2012. Moreover, the highest increase in crimes committed by children from 2012-2014 has been for offences such as dacoity, causing death by negligence, criminal breach of trust and counterfeiting. Except for dacoity, the other offences mentioned are not heinous offences under the JJ Act 2015.

The number of the overall rate of sexual offences reported (including ‘non-heinous’ forms of sexual assault) has increased from 41.74 to 55.2 per 1 lakh female population from 2012-2016. The number of reported rape cases involving CICL has increased steadily from 485 in 2002 to 1,175 in 2012 and a jump to 1,903 in 2014. The number of non-rape sexual assault cases reported has also increased in the period from 2012 to 2016. Data reflects that it is juveniles in the age group sixteen to eighteen who are reported for committing the maximum number of crimes overall, as well as sexual assault in particular. However, this has to be seen in the light of the overall increase in the number of rape cases reported, given that the share of CICL rape cases to overall rape cases reported has remained the same from 2012-2016. It must also be kept in mind that the commission of heinous crimes by CICL is not a nationwide phenomenon, with the commission of murder, rape and sexual assault being concentrated in metropolitan areas, particularly Delhi, Mumbai and Pune.

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47 Id. Out of 35,849 cases reported, 7,717 were theft cases and 2,747 were of criminal trespass and burglary. It should be kept in mind that this data relates to number of FIR’s registered and not actual convictions. The actual conviction rate is 86 percent.

48 Id.


50 Id.

51 Id.

52 The number has increased from 613 in 2012 to 1,540 reported cases under IPC, §354 in 2016. However it is to be kept in mind that prior to 2013, IPC, §354 only covered ‘assault with intent to outrage modesty.’ After the Criminal Law Amendment Act, 2013, IPC, §354 has been expanded to include new offences such as sexual harassment, voyeurism, stalking, etc. which were not specifically punishable earlier.

53 National Crime Records Bureau, supra note 46; National Crime Records Bureau, supra note 49.

54 National Crime Records Bureau, supra note 46, 245, 247, 249. This is not to suggest however that urbanization leads to a greater incidence of rape. Rather what must be looked at is whether there is a geographical clustering of rape in particular areas. See Sudhir Krishnaswamy et al., Urban-Rural Incidence of Rape in India: Myths and Social Science (Law, Governance and Development Initiative, Azim Premji University, Working Paper 1/2013, 2013), available at
Feminist positionality requires that social conflicts must be resolved by reference to existing social realities and not abstract external ‘truths’ or theories.\(^55\) Data reveals that the majority of CICL are reported for committing property based offences. Admittedly, the seriousness of juvenile sexual assault cannot be brushed aside only because its proportion to the overall crime rate is miniscule. Especially given that Indian women remain hesitant to report sexual assault, the actual incidence of sexual assault is unclear.\(^56\)

Government spokespersons have argued that the transfer system is necessary to provide for punishment that is proportional to the severity of the crime.\(^57\) However, data shows that the Nirbhaya case and the Shakti Mills case are anomalies. Both National Crime Records Bureau data and the most recent National Family Health Survey show that it is mostly family members and acquaintances who are the perpetrators of sexual assault.\(^58\) The problem is not therefore, the heinousness of crimes committed by children specifically, but the general prevalence of sexual assault both before and after the introduction of the transfer system in 2015. Thus, women need a system which can provide a solution by providing deterrence against and redressal of all forms of sexual assault, and not a system which is specifically targeted at offenders engaged in ‘heinous crimes’. Unfortunately, the Indian State’s response has been geared towards the latter as outlined in the subsequent section.

**IV. WHY THE TRANSFER SYSTEM FAILS IN CORRECTING SEXUAL VIOLENCE**

**A. THE TRANSFER SYSTEM AND CARCERAL FEMINISM**

The Indian State’s response to violence against women or ‘governance feminism’\(^59\) and the media narrative surrounding sexual assault mirrors the rise of ‘carceral feminism’ in the United States.\(^60\) Post World-War II, the FBI and law enforcement agencies, together with media and citizen’s groups created

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\(^{55}\) Bartlett, supra note 14, 884.


\(^{58}\) National Crime Records Bureau, supra note 46, 146-147; International Institute for Population Sciences, supra note 56, 580.

\(^{59}\) Vidhu Verma, Gender, rights and the justice gap: Going beyond the politics of difference in.), DISCOURSE ON RIGHTS IN INDIA: DEBATES AND DILEMMAS (Bijayalaxmi Nanda & Nupur Ray ed., 2019).

a wave of national hysteria over sex crimes. Media reports sensationalized the commission of brutal acts by teenagers, even though there was no evidence of any significant increase in juvenile crime. The ‘sexual psychopath statutes’ which were resultantly enacted were never applied to large numbers of offenders—their primary purpose was symbolic—and they did nothing to actually reduce the incidence of crime.61

The conflict between conservative criminal justice policies and liberal advocates in the United States in the 1950s shifted the focus of concern away from victims.62 Due to concerted agitation by feminists, particularly radical feminists, rape and domestic violence re-emerged as major national issues in the 1970s.63 The 1980s were marked by rape law reforms that ‘redefined the offense of rape and limited the admissibility of evidence concerning the character and sexual history of the victim.’64 This is strikingly similar to the introduction of the Criminal Law (Amendment) Act 2013 (‘CRLA’) which redefined rape to include non peno-vaginal penetration and introduced new rape shield laws.65 Unfortunately, these reforms, both in the United States and in India, were also accompanied by tougher law and order policies and increases in sentencing, including imposition of the death penalty.66

Lois Wacquant has located this turn in criminal justice policies as part of a greater neoliberal ‘remasculinization’ of the State where resources are sought to be diverted from the ‘soft’ welfare state to a ‘hard’ penal apparatus that can contain disenfranchised populations.67 Women’s groups both in the United States and India have co-opted into the legal apparatus so as to ensure the mainstreaming of feminist demands.68 A significant difference as compared to feminist scholars in the United States is that Indian feminists have historically been wary of criminal law reform due to the prevalence of violence inflicted by the State itself.69 However, the opposition to criminal law has watered down in the past three decades from suspicion of all criminal law reform to opposition to criticism of only extreme forms of punishment such as the death penalty.70 Another complication is the rise of ‘state feminism’ which consists of political appointees

62 Id.
63 Id.
64 Id., 121-122; 130.
66 Id., 131. In India an example of this is the newly introduced §376E of the Indian Penal Code, 1860 which enables the death penalty for repeat offenders of rape.
68 Bartlett, supra note 14.
70 Prabha Kotiswaran, Governance Feminism in the Postcolony: Reforming India’s Rape Laws in GOVERNANCE FEMINISM: AN INTRODUCTION 102 (Janet Halley et al. ed., 2018).
(often women) who espouse women’s causes even though they do not identify as feminists.\textsuperscript{71} Examples of this among recent political position holders are Maneka Gandhi\textsuperscript{72} and Kiran Bedi,\textsuperscript{73} both of whom have advocated for the transfer system as necessary to address crimes against women.

Since neoliberal criminal justice policies are based on the support of the liberal professional middle-classes, rape law reforms are premised on the assumption that the family is a safe space, and that the sexual predator is located outside of the home.\textsuperscript{74} Instead, masculinist institutions such as the State and the police are painted as allies and responsibility is shifted to individual sexual offenders as dehumanised criminals, who are usually viewed as out of control (racially or ethnically coded) evil strangers who randomly attack victims.\textsuperscript{75} This is illustrated in the Shakti Mills case in which two of the adult accused had previously been found guilty of theft by the JJB as juveniles, but had been later released on bond of good behaviour.\textsuperscript{76} Instead of inquiring into why the juvenile justice system had failed to correct their deviant criminal tendencies, the Sessions Court concluded that they were habitual offenders beyond reformation.

Prosecutors also capitalise on these moral panics by calling for punitive action against offenders in sensationalised sexual offence trials, which are boosted by media reports of brutality against women.\textsuperscript{77} Unfortunately these trials end up reinforcing myths about rape and rapists as driven by sadistic impulses.\textsuperscript{78} The victim is promoted as angelic, innocent and upper-class, and her story is considered to be relevant only in terms of verification of the injuries to her body.\textsuperscript{79}

\textsuperscript{71} Id., 181.
\textsuperscript{74} Elizabeth Bernstein, \textit{Carceral Politics as gender justice: The traffic in women and neoliberal circuits of crime, sex and rights}, \textit{41 Theory and Society} 233, 244 (2012).
\textsuperscript{75} Id.; Kotiswaran, \textit{supra} note 70, 129-130; \textit{See also} State of Maharashtra v. Mohd Ashfaq Dawood Shaikh, Sessions Case No. 914 of 2013, decided on 21-3-2014 (‘Shakti Mills Case 1’).

“But then the same system does not make everyone the criminal. It is individual only responsible for the way, he conducts himself. We can have several instances where individuals coming from lower and poor strata of society have achieved the success. Therefore the society or system or anything as such cannot be blamed thoroughly.”

\textsuperscript{76} State of Maharashtra v. Vijay Mohan Jadhav, Sessions Case No. 846 of 2013, decided on 4-4-2014 (‘Shakti Mills Case 2’).
\textsuperscript{77} GOTTSCALK, \textit{supra} note 61.
\textsuperscript{78} Id.
\textsuperscript{79} In cases of confirmation of the death penalty for rape and murder, a common narrative is that of the rapists being beastly predators taking advantage of an innocent victim. See Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1, ¶ 356

“it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish.
Those who cannot live up to his ideal are sacrificed.\(^{80}\) This can be witnessed in the contrast between the urban middle-class rage in response to the Nirbhaya case and the relative silence over the rapes of Dalit, Adivasi and North-Eastern women.\(^{81}\) Similarly, in the Shakti Mills case, the prosecutor called for the death penalty, while arguing that ‘rape is an attack on a victim’s mind and self-honour which can never be healed.’\(^ {82}\) Therefore, it is posited that the transfer system is situated in a larger project of governance feminism and carceral feminism which aims to address sexual assault through punitive reforms while avoiding issues of structural violence and the continued persistence of low conviction rates and overall inaccessibility of the legal system to women.

**B. THE CONSTRUCTION OF HEGEMONIC MASCLUNITIES BY THE TRANSFER SYSTEM**

MacKinnon argues that the State is male jurisprudentially, and that gender acts as a means of social stratification.\(^{83}\) Though she makes this argument in the context of subordination of women by men, it is also important to consider how the State enforces gender as a means of social stratification through stereotyping about the male gender. NCRB data reveals that overall 43,089 boys were reported as opposed to 1,082 girls in 2016 (for IPC and special offences), and a majority of the boys were aged between sixteen years and eighteen years.\(^{84}\) A press note on the introduction of the transfer system tellingly states that the proposed legislation is meant to address “increasing incidence of heinous crimes by young boys” (emphasis added).\(^ {85}\) However, studies of adolescent male violence, especially sexual violence, are gender blind.\(^ {86}\) There is relatively little research on

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\(^{80}\) KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE 9 (2008).

\(^{81}\) Debolina Dutta & Oishik Sarcar, India’s Winter of Discontent: Some Feminist Dilemmas in the Wake of a Rape, 39 FEMINIST STUDIES 293, 297 (2013).

\(^{82}\) State of Maharashtra v. Vijay Mohan Jadhav, Sessions Case No. 846 of 2013, decided on 4-4-2014, 295.

\(^{83}\) MACKINNON, supra note 42, 163.

\(^{84}\) National Crime Records Bureau, supra note 46, 240.

\(^{85}\) Press Information Bureau of India, supra note 9.

\(^{86}\) Bernstein, supra note 74.
the impact of gender and the social construction of masculinity and male sexuality on adolescent violence.87

Raewyn Connell argues that gender is the way in which social practice is ordered, and intersects with other social structures such as race and class.88 Therefore, in the same way that ‘woman’ is not an essential category, there can exist multiple masculinities such as white, working-class, black, white and middle-class. Amongst these, ‘hegemonic masculinity’ is one which at any given point of time guarantees the dominant position of men and the subordination of women.89 It is not fixed but a historically mobile relation, depending upon the currently accepted power structures. As opposed to this, working-class and queer masculinities are ‘marginalised.’ However the construction of this hegemony is an ‘ideal’ which may not correspond to men’s lived experiences.90

There is considerable amount of literature on how boys who are situationally defined as belonging to subordinate masculinities respond by reconstructing or ‘performing’ the dominant masculinity through aggression and criminal activities.91 NCRB data for the years 2012-2016 shows that the majority of juveniles apprehended belonged to low-income level families, and were illiterate or only educated up to primary level.92 This particularly explains why theft is so prevalent amongst CICL as material objects are viewed to be symbols of masculine power.93

Hegemonic masculinity also explains the criminalisation of consensual sex between children under the POCSO and the IPC. The CRLA increased the age of consent to eighteen. Since only men can be prosecuted for rape under the IPC, the law denies underage women sexual autonomy by assuming lack of consent for them based on their age.94 It also assumes that it is the male in the relationship who is the aggressor, though the female partner may be in a socio-economic position of dominance. Indian feminists have been hesitant to challenge

88 Raewyn Connell, Gender, Men and Masculinities, available at https://www.eolss.net › Sample-Chapters (Last visited on March 20, 2019).
91 Messerschmidt, supra note 87; Keva Miller et al., Gender, Racially and Culturally Grounded Practice in Juvenile Justice Sourcebook 587 (Wesley T. Church II et al. ed., 2nd ed., 2014).
92 National Crime Records Bureau, supra note 49 (2013). This paper does not mean to suggest that it is only children from low-income groups who offend but rather it is children belonging to these groups that are brought within the ambit of the juvenile justice system, due to failure to conform to dominant middle class masculinity.
94 MacKinnon, supra note 42, 175-176.
the male-female dichotomy in the theorising of patriarchal violence. This results in the labelling of underage men who engage in consensual sex with underage women as juvenile sex offenders who may be processed by the transfer system.

C. HEGEMONIC MASCULINITY AND THE INADEQUACY OF THE TRANSFER SYSTEM IN BRINGING ABOUT REFORMATION

The logical corollary to this discussion would be that there is a need for the State to attempt to address issues around masculinity in correctional programmes for CICL. Instead, the juvenile justice system as a gendered system operates upon assumptions about masculinities and reflects the norms of the hegemonic masculinity. The system treats boys, particularly those belonging to subordinate communities, as inherently dangerous and violent, and denies the social construction of male attitudes towards violence, particularly violence towards women. Therefore, the system for the punishment and rehabilitation of boys, particularly if modelled after adult punitive institutions, is likely to end up reinforcing traditional essentialist notions of masculinity instead of reshaping them. The transfer system is based on the assumption that subjecting sixteen to eighteen year olds to trial as adults will instill deterrence. However, the labelling of young male offenders as ‘deviant’ and specialised sanction in the form of the transfer system may instead end up causing them to define themselves in terms of the socially constructed label of the juvenile offender, leading to a self-fulfilling prophecy of juvenile delinquency.

The gendered nature of the juvenile justice system means that institutions and programmes, including rehabilitative plans, are shaped along masculine lines. Therefore, while there is focus on employment, sport and other recreational activities, caring and emotional needs remain unmet, and are only discussed in a therapeutic environment. A study conducted by the ECHO Centre for Juvenile Justice found that observation homes resemble jails and that children are beaten and scolded like in a police station. It is to be noted that the Justice JS Verma Committee Report on amendments to criminal law post the Nirbhaya case had already taken note of these institutional failures under the JJ Act 2000.

95 Kotiswaran, supra note 70, 95-96.
96 Stephen Case, Youth Justice (2018).
97 Nancy Dowd, Boys, Masculinities and Juvenile Justice, 8 J Korean L 115, 117, 131-32 (2008); Laura S. Abrams et al., Constructing Masculinities in Juvenile Corrections, 11 Men and Masculinities 22 (2008); Cunneen & White, supra note 93, 72.
98 Case, supra note 96; see infra note 99, 100.
99 Cunneen & White, supra note 93, 72.
Justice Verma Committee noted that the State had failed to establish observation homes and existing homes had a hostile atmosphere, and children were vulnerable to sexual abuse. The Committee had also rejected the lowering of juvenile age to sixteen, observing that there was little guarantee of reformation inside adult prisons, and that the State breeds more criminals by “ghettoising them in juvenile homes” instead of attempting to bring about transformation. Unfortunately the situation has not changed much from 2012 to present.

Following the UNICEF regional conference on the implementation of the JJ Act 2015, extensive efforts are being undertaken to enable access to mental health services, drug de-addiction centres and collaborate with NGOs for the provision of rehabilitative services. However, earlier studies have also pointed out that the SIRs are prepared without sufficient inquiry within the framework of the juvenile justice system, and are not individualised. ICPs are rarely prepared for CICL. If prepared, they are neither scientific nor comprehensive. There is a shortage of probation officers to undertake these duties and no training programs are available for instructing them. This lack of infrastructure also means that there is lack of expertise to carry out a preliminary assessment under the transfer system.

Further, it is to be noted that most states in India have not yet identified the ‘places of safety’ where the CICL is to be kept till he is aged twenty one, and existing homes have untrained staff and insufficient infrastructure. The overall implementation of the JJ Act 2015 and rehabilitation plans for children guilty of sexual offences is therefore, in a bad shape. Children once released from the juvenile justice system also face challenges in societal re-integration. This is especially because the JJ Act 2015 provides that children aged sixteen to eighteen who are guilty of heinous offences will face the same disqualifications under the law as adults post-conviction. In the light of these challenges, it is unclear as to whether JJBs can even properly assess who is capable of committing heinous crimes and to what extent a CICL can ‘reform’ prior to being sentenced to imprisonment. Moreover, the problems relating to juveniles who commit ‘less’ aggravated forms of sexual assault or younger juveniles who commit heinous offences is...
not addressed by this system as the JJB may release the child on probation or after only advice or admonition with no further provision of reformatory services.\textsuperscript{109}

The failure of the juvenile justice system can also be witnessed in the aftermath of the Nirbhaya and Shakti Mills cases. The juvenile in the Nirbhaya case is now reported to be working as a cook.\textsuperscript{110} Though the NGO responsible for his rehabilitation claims that he has turned over a new leaf, the counsellor at his rehabilitation home alleges that he displayed no remorse.\textsuperscript{111} The victim's parents are yet to achieve closure and fear that he has not reformed.\textsuperscript{112} The juvenile in the Shakti Mills case too has been arrested three times post release.\textsuperscript{113} The police allege that he is a habitual offender. However his parents claimed that he had displayed remorse while at the observation home. In fact, he had scored well in his Class 10 examinations and had undertaken vocational courses for ‘two-wheelers, air-conditioner and refrigerator repairs. Yet reports also suggest that the juvenile has claimed that the tag of a ‘rapist’ has impacted his community reintegration and pushed him further into crime.\textsuperscript{114} Thus, it can be seen that the gendered nature of the juvenile justice system results in the evaluation of post-rehabilitative outcomes in masculinist terms of the juvenile’s occupational skills and not in terms of their emotional and psychological rehabilitation and their ability to re-integrate into society. This results in their alienation from the community, increasing the probability of relapse into criminal behaviours.\textsuperscript{115}

Proposed solutions continue to be framed in masculine or exclusively child rights centred terms. Regional level consultations have recommended solutions ranging from provision of mental health experts to de-addiction centers, vocational training and ‘sports and recreational activities.'\textsuperscript{116} However, as the NCRB data indicates, these are general solutions which do not specifically address the prevalence of sexual assault. Further, these provide no space for victims to articulate their voice.

\begin{footnotes}
\item[109] The Juvenile Justice (Care and Protection of Children) Act, 2015, §18.
\item[111] Id.
\item[114] Hindustan Times, \textit{Rapist tag has not let me move on, it pushed me into crime, says Shakti Mills gangrape convict}, June 11, 2018, available at https://www.hindustantimes.com/mumbai-news/rapist-tag-has-not-let-me-move-on-it-pushed-me-into-crime-says-shakti-mills-gangrape-convict/storyKd8x8r6sUDopkJd0zMS61H.html (Last visited on March 18, 2019).
\item[115] See \textit{MacKinnon, supra} note 42.
\item[116] UNICEF, \textit{supra} note 103, 49-50.
\end{footnotes}
D. TOWARDS RESTORATIVE JUSTICE

Due to its flawed structure and inherently problematic core principles, the juvenile justice system ultimately relegates victims, offenders, and their families to a passive role or excludes them altogether.\(^{117}\) It does not address the stigma caused to the child’s family by the label of sexual violence, and the potential of the family to act as a rehabilitative agent. Current therapeutic approaches are also problematic in so far as victims cannot count on any reparation or even acknowledgement from offenders (even after they have been released), and conversely the offender has no means of making amends to the victim.\(^{118}\) Further, the opinions of mental health experts are privileged over those of offenders and family members in formulating treatment plans, and the community is expected to rebond with perpetrators without addressing the fear and anger caused by their crimes.\(^{119}\)

The restorative justice approach is a process “whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”\(^{120}\). Therefore, it goes beyond looking at the crime as an offence against the State and looks at its impact on victims and others who are directly affected.\(^{121}\) Commonly used restorative practices are victim-offender mediation, family group conferencing or community conferencing, which is a wider meeting between victims, offenders, family members and peers, and ‘peacemaking circles’ which are used in indigenous contexts.\(^{122}\) Though these are not meant to completely substitute the traditional criminal process, they can serve either as an alternative pre-trial or parallel dispute settlement mechanism or a post-conviction process.

The restorative justice approach is being widely used for the resolution of juvenile crime across jurisdictions such as Australia, New Zealand, Canada, United States and the United Kingdom.\(^{123}\) The biggest advantage of restorative justice processes from a feminist perspective is that they empower the victim to directly participate and deliberate in achieving the outcome that she desires. Since rape laws are built on the ubiquity of the male sex drive, the question is not whether men should have been following this drive but whether the woman ‘consented’ i.e. whether she effectively regulated and signalled refusal of access

\(^{117}\) Case, supra note 93.
\(^{121}\) Adam Crawford & Tim Newburn, Youth Offending and Restorative Justice: Implementing Reform in Youth Justice 22 (2003).
\(^{123}\) Justice J.S. Verma, supra note 101.
to her bodily integrity. In such a system, women can only succeed if they can conform to the stereotype of the vulnerable rape victim. In restorative justice conferences, victims can insert a narrative which would not be possible in a formal hearing. She has the option to tell her story in her own words instead of being compelled to use legal language.

Since the conference takes place outside of a formal adversarial trial, the offender is motivated to accept responsibility for what he has done and empathise with the victim, as he is not bound by legal defense strategies to maintain innocence, and must listen to the victim directly voice the impact of the crime. The presence of family and community members in community conferencing also offers the victim the chance to have her experience validated by others.

Therefore, the restorative process offers the victim an opportunity to not only repair the material harm caused by the crime through mediation with the offender but also provides symbolic reparation. The victim’s ability to accept or reject the offender’s apology contributes to re-empowering them. She has a chance to be relieved of the anger and bitterness caused by the crime through the offender’s acknowledgement of their crime and the emotional hurt which has been caused to the victim.

Critics of restorative justice argue that it may lead to the ‘erasure of victimisation’ and limiting of formal justice options. There is also potential for offenders and their families to dominate the victim during the process, particularly in cases where the victim and the offender are related to each other. Therefore it may end up revictimizing the victim. However, in the present system, a large number of complainants are already turning hostile, especially in cases of child sexual abuse. This is especially due to the prolonged duration of the trial, and the fact that a majority of the perpetrators are known to the victim. Hence they

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124 An example of this in the Indian context is the controversial decision in Mahmood Farooqui v. State, 2017 SCC OnLine Del 6378 : 2018 Cri LJ 3457, ¶ 78. The Delhi High Court acquitted a film director of rape on the ground that the complainant had failed to communicate her lack of consent. “Instances of woman behaviour are not unknown that a feeble no may mean yes”.


127 Hudson, *supra* note 125.

128 Koss, *supra* note 119.

129 *Id.*, 342.

130 Crawford & Newburn, *supra* note 121.

131 *Id.*


133 Koss, *supra* note 119.

134 *Id.*
face internal psychological pressure as well as external influence to exonerate the perpetrators.\footnote{135}

If the State itself provides for a systemic restorative justice mechanism, it would be an improvement over the current situation in so far as the survivor can seek remedies without the risk of being branded ‘hostile’ or a ‘false witness’ and incurring prosecution for the same. Further, the presence of trained mediators can arguably ensure that the offender appropriately expresses remorse to the victim and is compelled to undergo additional sanctions or counselling as opposed to the present scenario where the mediation is at the behest of relatives or community leaders, takes place in a largely uncontrolled setting, and may result in mere monetary compensation without giving any psychological closure to the victim or ensuring deterrence on part of the offender.

It may be argued that this approach denies the importance of retribution to victims. However, retribution and restorative justice need not be seen as dichotomous. Jean Hampton argues that retributive punishment is not the same as a ‘revenge’ response.\footnote{136} The aim is not to denigrate the offender’s worth but to vindicate the victim.\footnote{137} Kathleen Daly extends this to show how the involvement of feminists in these conferences can safeguard against re-victimisation and provide the victim a channel to have her experiences vindicated.\footnote{138} It is not necessary that the victim and the offender should directly interact—she may choose to represent herself through a family member or next friend.\footnote{139} This flexibility in tailoring options that are suitable to the victim is another advantage which the restorative justice approach offers over the traditional criminal process.

It is important to keep in mind that the offender’s apology is not the primary goal of the restorative process.\footnote{140} Inevitably, there might be victims who do not wish to reconcile or forgive, as well as offenders who refuse to feel remorse for their actions. What is important is that the victim gets an opportunity to tell her story.\footnote{141} It must also be kept in mind that the apology is not the end, but the first step of the restorative process. It is important for conferences to impose measures

\footnote{138} See also Kathleen Daly, Restorative justice: the real story, 4(1) Punishment and Society 55-79(2002).
\footnote{139} Daly acknowledges however, that feminists must consider what are ‘more’ and ‘less serious’ forms of sexual assault and gendered harms generally, while evaluating the appropriateness of restorative justice methods. See Kathleen Daly, Sexual assault and restorative justice in Restorative Justice and Family Violence (Heather Strang and John Braithwaite ed., 2002).
\footnote{140} Hudson, supra note 125.
\footnote{141} Daly, supra note 139.
on the offender and ensure that apologies are thought through with care.\textsuperscript{142} The conference has to be part of a larger multi-systemic method which can devise specific treatment plans for sexual offenders. The advantage of this method is that community involvement can lead to more customized and effective plans than the standardized ones prepared by formal mental health experts.\textsuperscript{143} For example, for sexual offenders, such a method could include gender equality counselling, participation in workshops and specific mandatory volunteering with NGO’s helping sexual harassment victims rather than generic ‘community service’ measures.

Such a method must also be conducive to the exploration and construction of alternative masculine identities for juvenile offenders.\textsuperscript{144} The restorative justice approach can be adopted for all cases of sexual offending, by children of any age, and need not be restricted to false dichotomies of ‘heinous’ offences by sixteen to eighteen year olds.

A significant limitation to implementing this approach in India is the absence of official victimisation surveys which can inquire into victim’s expectations and disappointments with relation to the criminal justice system.\textsuperscript{145} A feminist legal method would require, as part of consciousness raising, that women share their experiences with the formal trial system and how they have been empowered or disadvantaged through the same. Surveys in Britain, United States and New Zealand have found that a majority of victims desire the opportunity to confront their offenders and seek restitution, or to reach an agreement even if there is no direct meeting.\textsuperscript{146} It is thus, necessary to evaluate whether sexual assault survivors in an Indian context would prefer such a remedy either as an alternative or a parallel proceeding to the criminal trial. In the interim, it can be explored as a post-conviction process for victims who are dissatisfied with formal criminal sanctions and juvenile offenders as part of the reformation process.

\textbf{V. CONCLUSION}

This paper sought to establish through a feminist critique that the transfer system under JJ Act 2015 is ineffective in addressing the prevalence of crimes against women and facilitating the rehabilitation of children in conflict with the law. First, the transfer system is focused only on tackling crimes at the stage of ‘heinousness’ and does not seek to serve as a solution for reducing the overall prevalence of crimes against women. A juvenile offender may commit a

\begin{itemize}
\item \textsuperscript{142} Hudson, \textit{supra} note 125, 627.
\item \textsuperscript{143} Koss, \textit{supra} note 119, 348-49.
\item \textsuperscript{144} Abrams, \textit{supra} note 97, 39.
\item \textsuperscript{146} Koss, \textit{supra} note 119, 345.
\end{itemize}
lesser ‘degree’ of sexual assault today, and escape falling within the scope of heinous offence and resultanty not be held accountable to the same amount as one who commits rape which is within the scope of heinous offence, thus fuelling lack of culpability in the former perpetrator. This can give rise to a moral hazard and may ultimately result in the commission of a more serious offence by the former offender that would then lead to their processing in the transfer system. Further, it does not account for the subjective degrees of trauma experienced by victims of ‘non-heinous’ sex offences. These failures are because the transfer system stems from a governance or carceral feminism standpoint which seeks to pin the blame for sexual offences on individual dehumanised offenders rather than addressing structural causes such as gender inequality.

Second, the transfer system is based upon assumptions about ‘hegemonic masculinity’ which treats male juvenile offenders as inherently violent and seeks to rehabilitate them through training them for acceptable occupations (such as vocational training for mechanics) rather than focusing on the specific causes of their tendency to offend, their psychological and emotional needs and the difficulty they experience in societal reintegration upon release. Therefore, in the current state of affairs, juvenile offenders are likely to experience societal alienation giving rise to chances of recidivism. Further, the transfer system, by treating them at par with adults, will lead to their socialisation with adult prisoners who may have a worse mindset. Moreover, imposition of the same disqualifications upon juvenile offenders, who are subject to the transfer system, which adult prisoners suffer can further worsen their prospects for reintegration into society. Given the current masculinist bent of reformative services, imprisonment will only mean that the offender is forced to undergo deprivation of liberty and generic vocational training which does nothing to root out socialised gender biases.

This paper therefore, proposed restorative justice as an alternative solution which addresses both the need for a system that accounts for juvenile offenders’ lack of psychosocial maturity and victims’ lack of agency in formal criminal trials. Admittedly, restorative justice is not a perfect solution. It will require sufficient resources to ensure that a system can be incorporated with necessary safeguards to allow for mediation and community conferencing. It is possible that power dynamics may prejudice outcomes in favour of offenders in such cases. However, it should be kept in mind that in spite of these failings, the restorative justice process gives the victim the agency to voice her own narrative, free from the constraints imposed by the formal adversarial trial. Since a majority of sexual assault cases are committed by acquaintances and family members, victims may also prefer the restorative approach to penal strategies. Evidently, in case of adoption of such an approach, mere admission of guilt and apologies would not be sufficient and offenders would also be required to undergo individualized treatment and explore alternate constructions of masculinity, in consultation with the community and other stakeholders. This would help reduce the rate of recidivism upon release.
For now, this paper has proposed the employment of restorative justice in the limited context of post-conviction strategies. The institution of a whole-scale restorative justice system which gives victims the option to initiate proceedings at any stage of the trial would require greater empirical research and case studies on juvenile sex offenders, their backgrounds and their post-release trajectories including recidivism. It would also require the conduct of nation-wide victimisation surveys, research on the slippery slope present in allowing non-adversarial ‘settlement’ of sexual offence cases, preliminary trials of restorative justice at different stages of the criminal process and training of counsellors and mediators. Though apparently logistically cumbersome, undertaking such an exercise is necessarily worthwhile for developing feminist alternatives to present carceral criminal justice strategies.