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## Reimagining Indian Criminal Law through Inclusive Gender Justice

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### Abstract

Indian criminal law has always been constructed in an environment of patriarchy, colonialism and heteronormative rule that left women and gender minorities out of the mainstream of criminal law discourse and practice. The Constitution of India provides for equality, dignity, liberty and non-discrimination but in practice this has not been consistent in the criminal justice system, with exclusionary practices. In the last few decades, there have been many important changes in the law on sexual violence and domestic abuse, workplace harassment, and LGBTQIA+ issues, brought about by judicial decisions, feminist campaigns, public protest and international human rights. Despite these advances, however, the structural inequalities remain, affecting access to justice in India. The paper critically reviews the shift in the Indian criminal law in respect of inclusive gender justice. The paper, which uses qualitative review methodology, secondary sources such as statutes, judicial pronouncements, scholarly literature, committee reports, and policy documents, examines the development of the jurisprudence of gender justice in India. The results indicate that, while the rights-centred approach in the criminal law has seen a rise in dignity and autonomy, the institutional patriarchy, caste system and lack of sensitivity for procedure and exclusionary legal structures still affect substantive equality. The paper goes on to suggest that, in inclusive gender justice, transformative constitutionalism, intersectional legal approaches, victim-centred justice systems, and institutional accountability go beyond symbolic legislative change. The study argues that any criminal law reform in India must go beyond equality to substantive inclusion that could respond to the varied experiences of violence and discrimination amongst gender identities and social locations.

**Key words** - Gender Justice, Indian Criminal Law, Feminist Jurisprudence, Constitutional Morality, Criminal Justice Reform

### Introduction

Gender and criminal law are one of the most controversial aspects of modern constitutional democracies. Criminal law is not only a regulatory instrument which seeks to punish criminal behaviour; it also reflects dominant socio-political dispositions, agendas and relations. The Constitution of India had declared equality, freedom, dignity and discrimination as key principles of democracy from the time of Independence but many of the laws and legal systems of the colonial era had been based on discriminatory gender, sexual, moral and familial notions. The involvement of women and marginalised genders in criminal justice was,

therefore, often restricted, and it was found that women were the ones who were disadvantaged in processes and procedures of criminal justice (Agnes, 1992).

Feminist struggle, judicial activism, public protest and international human rights laws have brought about an enormous change in the concept of gender justice in India over the years. The Mathura custodial rape case, the Vishaka judgment and the recent Delhi gang rape case in 2012, were significant incidents that raised issues relating to institutional inadequacies in addressing sexual violence and the accountability of the State. The incidents sparked public outcry and led to a re-think of existing laws and frameworks related to

consent, the right to body autonomy, workplace related harassment and gender-based violence. The Criminal Law (Amendment) Act 2013, the Protection of Women from Domestic Violence Act 2005 and the Sexual Harassment of Women at Workplace Act 2013 were all steps towards strengthening the law and incorporating gender-specific provisions into the criminal law. But there are scholars who suggest that many reforms are still being implemented in protectionist terms which view women as subjects in need of state protection, and not as constitutional citizens (Menon, 2004).

The discourse of gender justice has also gone mainstream in recent years because of the increase in consciousness of the rights of the LGBTQIA+ community, transgenders, constitutional morality and intersectionality. The colonial criminal law is grounded on the ideas of patriarchy and heteronormativity and was challenged in cases such as *NALSA v. Union of India* (2014), *Navtej Singh Johar v. Union of India* (2018) and *Joseph Shine v. Union of India* (2018). They singled out dignity, privacy, autonomy and constitutional morality as values that will have to be at the core of respecting individual rights and exercise of popular sovereignty. However, there is still a disconnect between constitutional recognition and institutional practices, as marginalized communities are still facing discrimination, violence, and exclusion in policing, judicial and legal processes. Inclusive gender justice is more than legal equality it is the need for structural change in the legal institutions and social relations. Inclusive justice acknowledges that there are also caste class and religious, sexual, disability and geographic differences to experiences of violence and discrimination. Thus, rethinking Indian criminal law necessitates an intersectional perspective that can come up with solutions to structural inequalities instead of just using universalistic legal language. This paper is a review paper, which critically analyses the change of Indian criminal law in the perspective of inclusive gender justice. The study examines the evaluation of legal reforms, constitutional developments, feminist interventions, institutional barriers and future direction of criminal law reform in India by using qualitative review methodology and secondary data analysis.

#### Objectives of the Study

1. To examine the conceptual foundations of inclusive gender justice within Indian criminal law.
2. To critically evaluate major legal reforms and judicial developments concerning gender justice.
3. To identify the role of intersectionality in shaping access to justice for marginalized communities.

4. To evaluate the significance of constitutional morality and transformative constitutionalism in criminal jurisprudence.

#### Review of Literature

In the last few decades, the feminist movement in India has been able to gain traction in the discourse on gender justice and criminal law, under the umbrella of feminist scholarship, interpretation of the Constitution, legal reform debates and human rights advocacy. The body of literature reveals that earlier Indian laws and legislations have been patriarchal and colonial in their approach which controlled women's sexuality, meant the reinforcement of heteronormative morality and institutionalized unequal gender relations. The feminist scholars believe that criminal law is not a neutral legal system, in fact it is a reflection of the dominant socio-political structures and power hierarchies within society (MacKinnon, 1989). Thus, courts and legal structures can perpetuate structural inequities in their procedures, evidentiary requirements and decisions. Sexual violence, custodial rape, domestic violence and discriminatory evidentiary practices under the criminal law was the main arena of early feminist legal work in India. In 1992 Agnes critically examined the legislative measures that have been taken in response to violence against women and concluded that many criminal law reforms have taken a protectionist approach rather than a transformative one. Agnes commented that in law, women are often portrayed as victims to be protected by the state rather than as constitutional subjects who have agency and rights. Likewise, Baxi (2014) conducted an analysis of rape cases in India and found that the judicial processes would often hold the victim responsible, humiliate and morally question the survivor. The study found that criminal justice agencies often disregarded the dignity of the victim or survivor and substituted it with the social morality and institutional authority. The Mathura custodial rape case was a watershed moment in the feminist legal discourse as it brought the issue of assumptions about consent and victim credibility to the forefront of judicial interpretation in the context of rape. The feminist movements then called for changes in rape laws, the standards for evidence, and police accountability. It has been suggested by scholars like Menon (2004) that feminist contributions to criminal law have helped to shift the public conversation and debate about sexual violence and provided a window into the institutional opposition to substantive gender equality. Menon added that the legal reform alone was not going to bring down the patriarchal system unless along with it, there was social and institutional change.

A second thread of work has dealt with the concepts of constitutional morality and transformative constitutionalism in the struggle for gender justice. In judicial decisions, nonsense

restrictions on the right to sexual autonomy, privacy, transgender identity and the right to live in a binary world of gender have been dealt with and expanded the constitutional discussion beyond a binary understanding of gender. These judgments have been called "transformative constitutionalism," as they focus on dignity, privacy and individual autonomy over prevailing social notions of morality (Kapur, 2013). Despite the official recognition of LGBTQIA+ people, however, LGBTQIA+ people are still discriminated, harassed and rejected in social and institutional settings. Intersectionality has become another topic of interest in contemporary discourses on gender justice. Crenshaw (1989) stated that experiences of discrimination are not solely about gender, or race, since multiple systems of oppression occur at the same time. Scholars in India like Chakravarti (2003) explored how caste and patriarchy intersect to create violence towards Dalit women. The caste basis of discrimination, economic dependence, religious marginalisation and social exclusion have been shown to compound discrimination faced by marginalised communities in criminal justice systems. Feminist academics have, therefore, increasingly called for intersectional theories that can account for the multiplicity of experiences of violence and access to justice. Scholarship in recent years also has centred on the issue of gender neutrality and criminal law reform. Some scholars have suggested that gender neutral laws are needed to acknowledge that violence against men and non-binary persons exists, while others have warned that it may keep the issue of structural violence against women in patriarchal societies hidden (Menon, 2004). Likewise, recent scholarship on digital gender violence has pointed out that technological proliferation has led to novel forms of abuse like cyber-stalking, revenge pornography, online harassment and the exploitation through artificial intelligence. The current criminal law regime may not be sufficiently effective in combating technologically mediated violence due to jurisdictional complexity and poor cyber governance regimes. The review also shows that inclusive gender justice must go beyond formal equality of the sexes to intersectional, victim-centred and transformative strategies that will tackle institutional patriarchy and multiple forms of discrimination.

### Research Methodology

In this study, the researcher has adopted a critical approach to explore the progress of Indian criminal law in the context of inclusive gender justice. The research aims to examine how the law has changed, how it is interpreted, the role of feminist interventions, and institutional issues, rather than to measure statistical relationships, making a qualitative and interpretative methodology the most appropriate. The study largely uses secondary sources of information and doctrinal

analysis of law to comprehend the development of gender justice in Indian criminal jurisprudence and to locate the structural barriers to substantive equality in criminal justice systems. The research is exploratory, because inclusive gender justice is an evolving socio-legal discourse that is influenced by the constitutional morality, feminist activism, judicial interpretation and international human rights frameworks; analytical, as it involves analysing the current state of inclusive gender justice; and descriptive, because it captures the present state of inclusive gender justice. The exploratory aspect of the research allows for a discussion on the debates that are developing in relation to gender neutrality, inclusion of LGBTQIA+ in criminal law, digital gender violence, and intersectionality. The analytical dimension enables for a critical analysis of the reforms of the law and institutional practices, and the descriptive one explains the evolution of the jurisprudence of gender justice in India, historical and contemporary. The study is based on a review research design, as the study aims to examine, summarize, interpret, and critically analyse the literature, judicial decisions, legislative provisions, policy reports and scholarly debates on gender justice and the criminal law. Because review-based research design is well suited to the conceptual understanding, comparative analysis and identification of theory and institutional gaps in the existing scholarship, it is especially applicable to legal and socio-legal studies. Therefore, the analysis of the study does not involve primary empirical data collection but rather it is a secondary literature review of existing material to examine the effect of the legal reforms on the various aspects of patriarchy in legal systems. For the research, secondary data were collected from various academic and legal sources to get full analysis of the data. A selection of peer-reviewed journal articles - cited in databases like Scopus, JSTOR, HeinOnline, Web of Science, and Google Scholar - was examined and analysed to uncover key scholarly debates over criminal law reform and gender justice. The conceptual and theoretical basis of the study was set by consulting books related to feminist jurisprudence, constitutional law, queer theory, the intersectionality and gender studies. Legislative provisions pertaining to gender-based violence, such as the Indian Penal Code 1860, Criminal Law (Amendment) Act 2013, Protection of Women from Domestic Violence Act 2005 and Sexual Harassment of Women at Workplace Act 2013 were critically examined to understand the evolution of laws on the issue of institutional responsibility and gender-based violence.

Constitutional interpretation by the Supreme Court of India was also an important source of data as it has been a catalyst in broadening the gender justice discourse. The courts in *Vishaka vs State of Rajasthan* (1997); *NALSA vs Union of India* (2014); *Navtej Singh Johar vs Union of India* (2018) and *Joseph Shine vs Union of India* (2018) were

discussed to see the increasing impact of Constitutional morality, dignity, privacy and equality on criminal jurisprudence. These were added as this report offers policy level information on sexual violence, criminal law reforms and the need for procedural accountability. These were included as these reports give an insight into policy level aspects of sexual violence, criminal law reform, and procedural accountability. Thematic Analysis is used as the main method of Data Analysis in the study. Thematic analysis can be used to identify and interpret patterns, concepts, and debates that arise through the legal and scholarly literature. Key issues that emerged from the review process are the institutional culture of patriarchy, constitutional morality, sexual violence jurisprudence, LGBT rights, intersectionality, gender neutrality, digital gender violence, victim-centred justice and transformative constitutionalism. The themes were critically examined to gain insights into the correlation between the legal reform and structural inequality in Indian criminal justice systems. The theoretical framework of this study is grounded in feminist jurisprudence, intersectionality theory and transformative constitutionalism. Feminist jurisprudence offers a useful lens to analyse the way that law upholds the patriarchal power dynamic and institutional inequities (MacKinnon, 1989). Intersectionality theory highlights that violence, and discrimination is experienced differently by those from different caste, class, sexuality, disability and religion (Crenshaw 1989). Transformative constitutionalism is a concept that can help to explain the role of constitutional interpretation as a tool of social change and substantive equality.

### **Conceptual Framework: Understanding Inclusive Gender Justice**

Inclusive gender justice is a legal and constitutional system that is equal, dignifying, autonomous and protecting for people of all gender identities and social positions. Inclusive gender justice acknowledges that discrimination and violence are interrelated and function through systems of patriarchy, caste hierarchy, heteronormativity, religion, class inequality, disability and socio-economic exclusion, rather than just formal equality between men and women as traditional legal frameworks primarily have done. Feminist jurisprudence is an important component of this paradigm as it asserts that law is not neutral but rather inculcates dominant patriarchal values that tend to marginalize women and minority identities in legal discourse and practice (MacKinnon, 1989). In addition, the concept of intersectionality theory that recognises that the experiences of oppression vary across caste, class, sexuality, religion and disability (Crenshaw, 1989) also shapes the framework of inclusive gender justice in India. Inclusive gender justice must not only be formal (legal) but substantive (real) equality, therefore. It

also requires institutional change gender responsive governance, victim focused justice, constitutional morality and pluralist sensibilities in the justice domain—and calls for a recognition of multiple identities in the justice domain.

### **Historical Evolution of Gender and Criminal Law in India**

The history of the development of the Indian criminal law shows how colonial administration has introduced the patriarchal and heteronormative assumption in the legal systems. The IPC of 1860 was a Victorian document that embodied Victorian values and Victorian conceptions of social hierarchy and society which treated women as minors under the control of men as opposed to as fully-fledged citizens. The marital rape exception and laws and regulations concerning adultery highlighted women's sexual autonomy denial and their role as husbands' property. Likewise, the introduction of Section 377 led to an increase in heteronormative morality as the state regulates sexuality, in the name of criminalising 'consensual same-sex relations' (Kapur & Cossman 1996). Despite constitutional promises, though, reform of the criminal law in gender justice was slow and lagged. Feminist groups had seriously questioned criminal justice institutions' patriarchal nature following the Mathura custodial rape case where judicial victim-blaming and insensitivity to the rape were highlighted. Thus, the movement towards gender justice in India has been a gradual shift from protection to dignity, towards constitutional to rights-based, and towards equal to unequal.

### **Major Legal Reforms and Judicial Developments**

In the past few years, the criminal law in India has seen a lot of modifications through the exercise of the legislative and judicial powers to assist in combating gender related crimes and expanding upon constitutional rights. A key law passed in the wake of the 2012 Delhi gang rape case is the Criminal Law (Amendment) Act 2013. Changes in law expanded the definition of rape, introduced provisions on acid attacks and increased the severity of the punishment for voyeurism and stalking. The Protection of Women from Domestic Violence Act, 2005 extended the definition of "domestic violence" to include emotional, verbal, economic and sexual abuse. Similarly, Sexual Harassment of Women at Workplace Act, 2013 declared that Workplace Harassment is a violation of dignity and equality of the Constitution. Judicial decisions have also been successful in shaping the gender justice discourse. Judicial decisions have also been found to be transformative in the expansion of the gender justice discourse. In *Vishaka v State of Rajasthan* (1997) the Supreme Court announced that sexual harassment in the workplace is a violation of the fundamental rights. In *NALSA v. Union of India*, 2014, the Court has reiterated that transgender is a constitutionally

protected third gender and their rights to dignity, equality and identity are guaranteed. In the same manner, Navtej Singh Johar v. Union of India (2018) decriminalized consensual same-sex relations, and argued for constitutional morality, privacy and dignity over social morality.

### **Intersectionality and Marginalized Communities**

Gender-based violence and legal exclusion are increasingly seen as not being the same and are no longer addressed in the same way within the discourse of inclusive gender justice. Intersectionality theory emphasizes that caste, class, religion, disability and sexual orientation are all forms of oppression that intersect to create the experience of violence and access to justice for a person (Crenshaw, 1989). Due to entrenched socio-political hierarchies, marginalised communities are often subject to multiple discrimination in criminal justice systems in India. Caste-based sexual violence is prevalent among Dalits, which is not only a gender oppression, but also a social domination. Often the institutional response to caste-based violence is weak due to discriminatory practices in the police and judicial systems (Chakravarti, 2003). Likewise, transgender people still suffer violence, police harassment, social stigma and economic exclusion with the recognition of transgender identity in the constitution.

### **Challenges in Achieving Inclusive Gender Justice**

While there are considerable developments in legislation and judgments, many structural and institutional issues prevent the achievement of inclusive gender justice. An enduring problem is institutional culture of the police, prosecution and judiciary, which is generally patriarchal. Victim-blaming attitudes, lack of procedural sensitivity and moral judgment are common experiences in investigations and trials for survivors of sexual violence and domestic violence (Agnes, 1992). Problems with judicial delays and procedural complexity are another obstacle to justice, as survivors often face long trials and social stigma. The level of institutional accountability is still low, as the police officers and judicial officers lack gender sensitization. Secondly, discussions around gender neutrality can cause conceptual problems as a wholly gender-neutral approach can mask gender-based structural violence in patriarchal societies (Menon, 2004). The issue of digital gender violence such as cyberstalking, revenge pornography, online harassment, and the possible addition of AI generated abuse, further complicates the criminal law discourse. There are barriers with existing legal frameworks to effectively respond to technologically mediated violence which are related to jurisdictional issues and the lack of cyber governance.

### **Constitutional Morality and Transformative Justice**

The doctrine of constitutional morality has been a revolutionary approach in Indian constitutional jurisprudence, especially in respect of gender justice and rights of individual. Constitutional morality stresses that one should observe the constitutional values which include dignity, equality, liberty, privacy and non-discrimination and not standards of morality that are more prevalent in society. Supreme Court has very clearly stated that there is constitutional morality, which is more important than social morality, when it comes to protecting the rights of minorities, and individual autonomy in the case of Navtej Singh Johar v. Union of India (2018). Along with this, constitutionalism can be understood in a way that is transformative, which considers the Constitution as a means for reordering unequal social relations and fostering substantive equality. As the understanding of transgender identity has evolved and grown in visibility, the recognition of transgender people's rights to privacy, to the child they can have, and to a decent job, has become a way of changing the way the constitution is interpreted from being a tool for democratic exclusion to a tool for democratic inclusion and social justice.

### **Future Directions for Criminal Law Reform**

Multidimensional criminal law reform in India is needed to combat structural inequalities and multiple experiences of violence towards various marginalized groups and gender identities in India. The persistence of the marital rape exception underlines the unspoken patriarchal norms that impact women's autonomy of their body and constitutional equality. Another critical pathway relates to the use of intersectional and gender-inclusive laws and policies. Criminal law ought to reflect violence against people who are transgender, non-binary, and sexual minorities as well as maintain the protections for women who remain under the disproportionate structural violence of patriarchy. The need for institutional reform is also significant as it is essential that justice is guaranteed not only by law but also through its implementation, which must be gender sensitive. Digital gender-based violence is becoming increasingly common, making it crucial to update cyber laws. Such cyber harassment, deepfakes exploitation, online stalking and non-consensual digital abuse should be tackled more effectively, both in terms of technology accountability and privacy protection, within the criminal law.

### **Findings and Discussion**

The analysis shows that Indian criminal law has undergone a significant change depending on the changing perceptions on gender justice and constitutional rights. Yet, although the criminal justice system has seen some legislative change and

judicial reform, it remains a system of institutional patriarchy, social inequality and exclusionary practices which continue to have an adverse impact on substantive justice outcomes. There has been a noteworthy contribution by the protest movements and feminist campaign in the field of criminal law reform in India. The Mathura rape case and the Delhi gang rape case in 2012 brought to light the drawbacks in the police and judiciary's approach towards sexual violence. This led to legislative amendments to broaden the definition of sexual violence and toughen up penalties. Yet, a large proportion of the reforms were limited to amputating the symptoms rather than tackling the underlying culture and needs of survivors and were reactive and punitive rather than transformative (Baxi, 2014). The results also reveal that 'constitutional jurisprudence' is one of the most forward-looking modes of furthering inclusive gender justice in India. Judicial rulings on the rights, privacy, dignity and autonomy of LGBTQIA+ people called into question colonial morality and the legal assumptions of the heterosexist norm. However, violence, discrimination and institutional exclusion is still perpetrated against marginalised communities.

### Conclusion

The evolution of Indian criminal law in relation to gender justice reflects an ongoing struggle between constitutional commitments to equality and deeply entrenched structures of patriarchy, caste hierarchy, heteronormativity, and institutional exclusion. Although India has witnessed substantial legislative reforms and progressive judicial interventions concerning sexual violence, workplace harassment, domestic abuse, transgender rights, and LGBTQIA+ inclusion, the criminal justice system continues facing structural limitations that restrict substantive access to justice for marginalized communities. The present review demonstrates that inclusive gender justice cannot be achieved solely through statutory amendment or symbolic constitutional recognition. Institutional patriarchy within policing, judiciary, and legal administration continues shaping procedural practices, evidentiary standards, and survivor experiences. Consequently, meaningful reform requires structural transformation of institutions alongside legislative development. Ultimately, reimagining Indian criminal law through inclusive gender justice requires multidimensional transformation extending beyond punitive legal frameworks. It is imperative that a constitutional culture is developed in India that truly celebrates equality, dignity, autonomy and human rights for all, regardless of gender identity and social position, if the future of Indian criminal jurisprudence is to be one of equality.

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