

RETHINKING CARCERAL FEMINIST APPROACHES TO ENDING GENDER-BASED
VIOLENCE: CONSIDERING TRANSFORMATIVE JUSTICE IN KENYA.

by Vivian A. Ouya

LLM Human Rights Final Thesis

SUPERVISOR: Professor Inga Winkler

Central European University - Private University

Quellenstrasse 51-55, 1100 Vienna

Austria

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17th June, 2022.

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ABSTRACT

Feminist advocacy in Kenya has over the years emphasized policies and laws that increase criminalization as an approach for addressing gender-based violence. Such approaches have been referred to as ‘carceral’ feminist approaches. They further expand policing, prosecution and the prison industrial complex and, as a result, empower what abolitionist feminists have termed as the ‘masculinist, colonial and neoliberal’ State. This thesis will discuss the colonial history of punishment and prisons in Kenya, analyze the existence and effects of carceral approaches as advanced through feminist advocacy in Kenya predominantly by non-profit organizations, and discuss the critiques of carceral feminist approaches for addressing gender-based violence. It asserts that social movements and non-profit organizations’ pursuit for social justice should not be fundamentally etched on expanding the criminal justice system because of the structural harm it replicates to minorities. In response, the thesis proposes community-centered approaches of accountability, specifically Transformative Justice approaches.

LIST OF ABBREVIATIONS

CEDAW- Convention on the Elimination of All Forms of Discrimination Against Women

COVAW- Coalition on Violence Against Women

CREAW- Centre for Rights, Education and Awareness

GBV- Gender Based Violence

IPV- Intimate Partner Violence

KEWOPA- Kenya Women Parliamentary Association

KHRC- Kenya Human Rights Commission

LGBTQIA+ - Lesbian, Gay, Bisexual, Transgender, Queer, Intersex and Asexual

NGOs - Non-Profit Organisations

PADVA - Protection Against Domestic Violence Act

SGBV - Sexual and Gender-Based Violence

TDRM - Traditional Dispute Resolution Mechanisms

TWAIL - Third World Approaches to International Law

UDHR - Universal Declaration of Human Rights

CHAPTER ONE

INTRODUCTION

On International Women's Day in March 2019, women in Kenya took to the streets to protest the increasing cases of femicide and sexual violence in Kenya.¹ This protest, under the rallying call #TotalShutdownKenya expressed the outrage of women in Kenya at the rising cases of femicide and Intimate Partner Violence. (IPV)² At the onset of the Covid-19 pandemic, dramatic spikes in cases of gender-based violence were recorded in Kenya.³ The National Crime Research Centre reported that the total number of Gender-Based Violence Cases (GBV) cases increased by 87.7 percent during lockdown in Kenya, while a report by the Kenya National Bureau of Statistics shows that 45 percent of women and girls have experienced physical violence at least once in their life.⁴ This data indicates the magnitude of gender-based violence in Kenya.⁵ Interventions to end this violence from both the State and non-profit organisations have conventionally called for legislations that criminalize gender-based violence and tough enforcement by the police, prosecution and the courts.⁶ These approaches

¹ Rael Ombuor, 'Kenyan Women March Against Gender-Based Violence' (*Voice of America*, Kenya, 8 March 2010)

<<<https://www.voanews.com/a/kenya-women-march-against-gender-based-violence/4820241.html>> accessed June 3, 2022.

² *ibid*

³ Human Rights Watch, '*I Had Nowhere to Go: Violence Against Women and Girls During the Covid-19 Pandemic in Kenya*' (2021, September 21). << <https://www.hrw.org/report/2021/09/21/i-had-nowhere-go/violence-against-women-and-girls-during-covid-19-pandemic-kenya>>> Accessed on June 3, 2022.

⁴ UN Women, Africa, '*Where we are: Eastern and Southern Africa*'

<< <https://africa.unwomen.org/en/where-we-are/eastern-and-southern-africa/kenya>>> Accessed on June 3, 2022.

⁵ UN Women, '*Generation Equality Forum, Kenya's Roadmap for Advancing Gender Equality and Ending All Forms of Gender Based Violence and Female Genital Mutilation by 2026*'

<< https://www.icrw.org/wp-content/uploads/2021/06/GEF_Kenya_GBV_roadmap-05.21-web.pdf>> Accessed on June 3, 2022.

⁶ National Gender and Equality Commission, '*Status of SGBV Policies and Laws in Kenya*' (2016).

have also proposed community policing initiatives, patrol and other security measures that deter and prevent sexual offences from occurring.⁷ They also propose capacity building efforts which focus on empowering both the police and prosecution in handling GBV cases and expanding policing machinery through robust financial investments in the police, prosecution and judiciary.⁸ Yet even as these interventions take centre-stage in feminist advocacy, GBV still thrives in Kenya.⁹ These responses rooted in legal reform which expand policing, prosecution and punishment are increasingly referred to as carceral interventions.¹⁰ At face value, they aspire to address GBV but overwhelming evidence shows that they are ineffective in systemically addressing GBV.¹¹

The feminist anti-violence movement seeking to address the rising cases of GBV in Kenya also adopts carceral interventions as the dominant approach for survivors to find redress.¹² In this regard, feminist interventions that heighten criminalization are referred to as carceral feminism.¹³ Theoretically, the use of the term ‘carceral’ can be traced back to French philosopher and historian Michel Foucault, who used it to describe an ‘archipelago’ or network of the penal system and its interconnectedness with an oppressive criminal justice system.¹⁴ The term ‘carceral feminism’ on the other hand was first used in 2005 by sociologist Elizabeth

<<<https://www.ngeckkenya.org/Downloads/Status%20of%20SGBV%20Legislations%20in%20Kenya.pdf>>>
Accessed on June 3, 2022.

⁷ National Gender and Equality Commission, ‘*National Monitoring and Evaluation Framework towards the Prevention of and Response to Sexual and Gender Based Violence in Kenya*’ (2014, December).
<<https://www.ngeckkenya.org/Downloads/National%20M&E%20framework%20towards%20the%20Prevention%20of%20and%20Response%20to%20SGBV%20.pdf>> Accessed on June 3, 2022.

⁸ Sudbury J, ‘Introduction; Feminist Critiques, Transnational Landscapes’ (2005) *Abolitionist Visions* 45-56

⁹ Human Rights Watch, (n 2)

¹⁰ Anna Terwiel, ‘What is Carceral Feminism?’ (2020) (48)4 *Political Theory* 421-442.

¹¹ *ibid* 425.

¹² Polavarapu Aparna, ‘Global Carceral Feminism and Domestic Violence: What the West Can Learn from Reconciliation in Uganda’ (2019) 42(1) *Harvard Journal of Law and Gender* 123-176.

¹³ Elizabeth Bernstein, ‘The Sexual Politics of the “New Abolition,”’ (2007) 18 *Differences* 128, 137, 143.

¹⁴ Michel Foucault, ‘*Surveiller et Punir: Naissance de la Prison*’ (Paris, 1975), published in English as ‘*Discipline and Punish: The Birth of the Prison*’ trans. A. Sheridan (London, 1977)

Bernstein to describe feminism that considers gender justice a matter of the criminal justice system.¹⁵ Accordingly, abolitionist scholarship shows that there exists unity in the definition of carceral feminism.¹⁶ Victoria Law defines carceral feminism as a brand of feminism that champions more ‘policing, prosecution and imprisonment.’¹⁷ Other feminist theorists like Mariame Kaba, Angela Davis and bell hooks highlight quite extensively that the criminal justice system in the United States is racist because it conflates Blackness with criminality leading to high incarceration rates of Black people within a ‘prison industrial complex.’¹⁸ Because of this, Black women who are survivors of violence are caught in a loyalty trap by upholding racial solidarity in favor of protecting Black men from engaging with the criminal justice system.¹⁹ As a response to this, abolitionist feminist approaches invite social movements to adopt community-based accountability measures like Transformative Justice frameworks to minimize minorities’ interaction with the criminal justice system.²⁰

To explain this concept further, this thesis draws on the existing abolitionist literature to consider the effectiveness of carceral feminism in ending gender-based violence, and specifically, their potential for reproducing unintended harm to survivors of violence.²¹ This thesis also examines the manifestations of carceral feminism in Kenya’s anti-violence movement as advocated for by women’s rights NGOs, the effect of such advocacy on

¹⁵ Elizabeth Bernstein, (n 15)

¹⁶ *ibid.*

¹⁷ Victoria Law, ‘Against carceral Feminism’ (2014) The Anarchist Library, << <https://theanarchistlibrary.org/library/victoria-law-against-carceral-feminism>>> Accessed on June 3, 2022.

¹⁸ Angela Davis, ‘Freedom Is a Constant Struggle’ (2016) 15

¹⁹ Beth E. Richie, ‘Arrested Justice: Black Women, Violence, and America’s Prison Nation’(2012) New York University Press: New York and London 244.

²⁰ Mariame Kaba, ‘We Do This till We Free Us: Abolitionist Organizing and Transforming Justice’ (March 11, 2021) Abolitionist Papers 23

²¹ Human Rights Watch (n 2)

minorities and the possibilities for Transformative Justice as an abolitionist alternative to a carceral state and law.²²

I begin by providing an overview of the colonial origins of carcerality in Kenya, arguing that the concepts of policing and punishment are a colonial relic that disproportionately targeted Kenyans on the basis of race, class, gender, ethnicity and sexuality.²³ I assert that this colonial logic remains alive in the current criminal justice system in Kenya, and that feminist responses to ending gender-based violence which aspire to expand the criminal justice system participate in replicating harm to survivors of violence.²⁴ Next, I will explore the different manifestations of carceral feminism as proposed by different non-profit organisations and their adverse effects on survivors of violence. Here I consider the vulnerabilities of survivors at the intersection of culture, race, sexuality, class and gender upon interaction with the criminal justice system.²⁵ I conclude by proposing an abolitionist framework to ending gender-based violence. Here, I argue that transformative justice approaches for addressing violence which prioritise community engagement outside the criminal justice system offer better opportunities for addressing violence and supporting survivors of violence.²⁶ In discussing transformative justice approaches, this thesis will adopt a broad definition of community used by abolitionists to include not only the geographical and cultural ties that we have to places and people but the shared feeling among people.²⁷

²² Mimi E. Kim, 'Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle' (2020) 32(3) *Journal of Women and Social Work*, 309-326.

²³ Ngugi, Rosalia Wanjia, *'The Kenyan Woman: Her Historical Relationship with the State'* (2009). 62.

²⁴ *ibid*

²⁵ Maria Drakopoulou, 'Feminism, Governmentality and the Politics of Legal Reform' (2008) 17(1) *Griffith Law Review*, 330-336.

²⁶ Mariame Kaba, (n 20)

²⁷ Creative Interventions Toolkit: *'A Practical Guide to Stop Interpersonal Violence'*, (2016) << ("Challenging Convictions," 2016)>> Accessed on June 5, 2022.

Research Question

This thesis examines the manifestations of carceral feminism in Kenya's anti-violence movement, their effects on minorities and proposes Transformative Justice as an abolitionist alternative to a carceral state and law.

Methodology

This thesis adopts a historical analysis in discussing the development of criminal justice system in Kenya, highlighting its pathway in colonial Kenya to contemporary Kenya, as well as its manifestation in the international human rights arena. My sources for this include relevant domestic and international laws, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), its General Recommendations, the Beijing Platform for Action and the Maputo Protocol. I also highlight three main critiques of carceral feminism, and show their manifestations within the Protection Against Domestic Violence Act, 2015 (PADVA) which is the main legislation criminalizing domestic violence. I have selected the PADVA for a deeper analysis because it is the most recent legislation that specifically deals with gender-based violence and the most invoked in feminist advocacy against gender-based violence.

Additionally, in discussing the interconnection between feminist advocacy and carcerality, this thesis relies on NGO reports, publications, statements, press releases and media reports as primary sources. I focus on publications by women's rights NGOs whose advocacy will inform the content of this thesis. In selecting the specific NGO publications to assess, I consider the NGO's influence in women's rights advocacy at state level. In determining the NGO's influence, I consider the publications by The National Gender and Equality Commission (NGEC), the constitutional body mandated with mainstreaming gender equality in Kenya, and which adopts a multi-stakeholder approach in its work, including collaborations and

partnerships with NGOs, some of which are listed on their various publications. I also consider their mission alignment with feminism as indicated on their official websites or by assessing their programmatic niche. In this regard, I rely on the publications by NGOs that lobby within the Kenya Women's Parliamentary Association (KEWOPA) which is the national consortium for women legislators and which has sponsored different women's rights Bills upon continuous advocacy by NGOs. I engage with abolitionist thought critically and empirically to highlight its emancipatory potential in addressing gender-based violence.

CHAPTER TWO

The Origins of Carceral Feminism

Carceral Feminist Pathways in the International Context

Feminist interventions for addressing gender-based violence have evolved over the years into increasingly strategic and creative ways of advocacy.²⁸ Interventions that criminalize gender-based violence have gained popularity in transnational feminist movements and organizations as one of the most fundamental tools for addressing violence against women.²⁹

A glimpse at the history of the anti-violence movement in the international arena leads us to the feminist slogan ‘the personal is political.’³⁰ Women’s rights advocates in the international arena sought to eject women’s experiences of violence from the private domain to the public domain.³¹ The central argument was that violence against women was a serious political issue that required state involvement and responsibility.³² This marked the beginning of feminist campaigns for positioning women’s experiences of violence as responsibility and affairs of the state.³³

The international human rights framework shaped the development of women’s rights as human rights, particularly by focusing on expanding the criminalization of violence against women.³⁴ One of the resulting fruits of the women’s rights movement at international level after years of advocacy and political activism was the Convention on the Elimination of All

²⁸ Sally Merry Engle, ‘Punishment, Safety and Reform’ (2010.) 3, para 1.

²⁹ *ibid.*

³⁰ Palmadottir Valgerdur, ‘Perplexities of the Personal and the Political: How Women’s Liberation Became Women’s Human Rights’ (1 January, 2018)

³¹ *ibid.*

³² Charlotte Bunch, ‘Women's Rights as Human Rights: Toward a Revision of Human Rights’ (1992) 12 Human Rights Quarterly 486.

³³ Hilary Charlesworth, Christine Chinkin & Shelley Wright, ‘Feminist Approaches to International Law’ (1991) American Journal of International Law 85.

³⁴ Polavarapu Aparna (n 12)

Forms of Discrimination Against Women (CEDAW) which took effect in 1981.³⁵ Notably, CEDAW does not explicitly prohibit violence against women, although the Committee's subsequent general recommendations invite states to take necessary measures towards combatting it.³⁶ In providing for interventions against GBV, CEDAW proposes judicial remedies as the primary site for addressing violence against women (VAW).³⁷ Particularly, the Convention recommends 'gender-sensitive training of judicial and law enforcement officers and other public officials' who are stakeholders in accessing justice within the formal criminal justice system.³⁸ The use of Alternative Dispute Resolution (ADR) mechanisms is not recommended as an intervention in cases of violence except when overseen by specially trained experts and professionals.³⁹ From an abolitionist lens, the wording of this recommendation first, champions the state as guardian of rights which, for survivors of violence, can only be accessed within a formal legal process. Both abolitionist and human rights thinkers have written extensively about the limitations of criminal law upon contact with survivors of violence.⁴⁰ The assumption that the criminal justice system would be the first point of contact for survivors of violence is a critical flaw in CEDAW's recommendations.⁴¹ Most survivors turn to the people closest to them and/or shelters if available.⁴² Second, the limitations on the use of ADR mechanisms while not unfounded because of the continual manipulation of traditional dispute resolution mechanisms to advance harmful cultures and practices, position

³⁵ Fareda Banda, 'Women, Law and Human Rights, An African Perspective' (2006) 39 *Law and Politics in Africa, Asia and Latin America* 541-543.

³⁶ UN Committee on the Elimination of Discrimination Against Women, 11th Session, '*General Recommendation No.19: Violence Against Women*' (February 1, 1992) U.N Doc. A/47/38.

³⁷ *ibid* para 24.

³⁸ *ibid* para 24 (b)

³⁹ Committee on the Elimination of Discrimination against Women, '*General recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19*,' (July 14, 2017.) Para 45.

⁴⁰ Sally Merry Engle, 'Rights, Talk and the Experience of Law: Implementing Women's Human Rights to the Protection from Violence' (2003) *Human Rights Quarterly* 343-381.

⁴¹ Britton Hannah E. Place, 'Ending Gender-Based Violence: Justice and Community in South Africa' (2020) *University of Illinois Press* 47-73.

⁴² *ibid*

the state to regulate their use within the criminal justice system. This approach effectively compels survivors of violence to engage with the criminal process to access ADR.⁴³ Most survivors seek assistance ‘through informal mechanisms, including religious organizations, traditional justice systems, and community organizations.’⁴⁴

Further, the requirement for ADR mechanisms to be only carried out by professionals is selective, if not elitist, especially because survivors of violence often turn to close relationships for support.⁴⁵

The 1995 Beijing Platform also reflects a similar stance on criminalization by calling on states to ‘enact and or reinforce penal, civil, labour and administrative sanctions...to punish and redress the wrongs done to women and girls who are subjected to any form of violence.’⁴⁶

While these instruments also recommended preventive interventions, the battle cry for feminist advocates disproportionately focused on highlighting ‘the failure of the state to prosecute’ leading to an overemphasis on criminalization as the most effective method of ending violence against women.⁴⁷

Carceral Feminist Pathways in Kenya

While international norms contributed to shaping and informing the development of and codification of women’s human rights in Kenya, African women were already at the frontline of shaping their political, economic, social, cultural and spiritual realities both in pre-colonial

⁴³ Ssenyonjo Manisuli, ‘Culture and the Human Rights of Women in Africa: Between Light and Shadow’ (2007) 51(1) *Journal of African Law* 39-67.

⁴⁴ *ibid*, 71

⁴⁵ *ibid*

⁴⁶ *Fourth Conference on Women, Beijing Declaration and Platform for Action*, (1995, 5 September)

⁴⁷ Aparna (n 12)

and post-colonial Africa.⁴⁸ This sub-chapter acknowledges the important organizing role that women in colonial Kenya undertook, especially in resisting coloniality, but does not provide a deeper analysis for this activism.⁴⁹ I instead focus on feminist advocacy between 2004-2010, an important period in constitutionalizing women's rights in Kenya.⁵⁰ This analysis shows the embedded pro-criminalization stance of carceral activism in Kenya's women's rights movements, paving way for legislations such as the Sexual Offences Act.⁵¹

As feminist advocacy unfolded on the international arena, efforts on the African continent were also geared towards the adoption of the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the "Maputo Protocol" and considered a strong pillar for the protection of women's human rights in Africa.⁵² Its subsequent adoption after feminist agitation was marked as landmark success for African women because it provides legal specificity to the distinct experiences of African women by incorporating provisions against unfair inheritance practices,⁵³ sexual harassment at work both in the informal and formal sectors,⁵⁴ the impact of environmental degradation⁵⁵ on African women and broadens the meaning of women in distress to include refugees and Internally Displaced Persons.⁵⁶

⁴⁸Susan Geiger & Cora Ann Presley, 'Kikuyu Women, the Mau Mau Rebellion and Social Change in Kenya' (1992) Westview .213.

⁴⁹ Kanogo, Tabitha, 'African Womanhood in Colonial Kenya' 1900-1950,' (2005) Ohio University Press 272.

⁵⁰Nkatha Kabira, 'Constitutionalizing Travelling Feminisms in Kenya' (2019) Cornell International Law Journal 137.

⁵¹ Ibid

⁵² D'Orsi, 'Are African States Willing to Ratify and Commit to Human Rights Treaties? The Example of the Maputo Protocol' 34 *Revue Quebecoise de Droit International* 159-182.

⁵³ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, (adopted July 11 2003) art 16.

⁵⁴ Ibid art 13.

⁵⁵ Ibid art 19.

⁵⁶ Ibid art 4.

However, the Protocol also takes a criminalization stance on gender-based violence, mirroring CEDAW and the Beijing Platform for Action and calling on state parties to prosecute and punish cases of domestic and sexual violence within the criminal justice system.⁵⁷ This position is mirrored in Kenya's constitution,⁵⁸ which prescribes that any international instrument ratified by Kenya forms part of the laws of Kenya and ensuing legislations⁵⁹ discussed in Chapter 3, which prescribe punitive measures against gender-based violence.

The constitution-making process in Kenya also saw individual women and women's rights NGOs participating as delegates, commissioners in conferences, presenters in local meetings and scholars critiquing the gender injustice in the post-independence constitution of 1964. The resulting constitutional drafts, while unsuccessful during the referendum, echoed the pro-criminalization stance at international level and paved the way for the Sexual Offences Act, 2006 (later amended) which provided minimum sentences for sexual offences. ⁶⁰ Following the post-election ethnic clashes in 2008, a period that saw rising cases of sexual violence perpetrated by military personnel, grassroots and community-based organizations mobilized to document GBV cases and protect each other.⁶¹ Later, women's civil society organisations in Kenya led by the International Commission of Jurists, jointly filed a petition in Court to hold perpetrators accountable.⁶²

The Federation of Women Lawyers (FIDA) in partnership with the National Commission on Gender and Development also took lead in organizing meetings to mobilize women's support

⁵⁷ *ibid* 4 (2) (e).

⁵⁸ Constitution of Kenya, 2010, Article 2 Section 6.

⁵⁹ Government of Kenya, '*National Policy for Prevention and Response to Gender Based Violence*' (November 2014)

⁶⁰ Wanjiku Mukabi Kabira, '*Expanding the Boundaries of Law: Women Constitution Making in Kenya*' (2015) Submitted to The School of Law, University of Nairobi.

⁶¹ Kabira (n 51) 137

⁶² *Coalition on Violence Against Women and Others v. the Attorney General of Kenya and Others* (2016) H.C.K. Kenya

for the upcoming referendum.⁶³ This mobilization culminated in the National Women's Conference of 2006, which spearheaded key events leading up to the promulgation of Kenya's current Constitution.⁶⁴ Because the promulgation of the constitution required legislative backing to spearhead the implementation process of the Constitution, NGOs successfully participated in advocating for key legislations post-promulgation of the new constitution by lobbying through (KEWOPA) the national consortium for women legislators.⁶⁵ During the induction for women legislators in the 12th Parliament, KEWOPA lists one of its achievements as contributing to the drafting and development of Matrimonial Act, 2013, Marriage Act (2014) and the Protection Against Domestic Act, 2015.⁶⁶

With this brief overview of women's rights NGOs participation in constitution making and ultimately campaigning for different legislations, this next sub-chapter discusses coloniality, policing and punishment as distinctive features of criminalization.

Coloniality, Policing and Punishment.

An analysis of coloniality in relation to policing and punishment is important because it provides a discursive tool to understand and visibilize the construction and formalization of policing and prisons in Kenya.⁶⁷ At the core of carceral feminism is the advancement of policing, prosecution and punishment as legitimate responses to ending violence against

⁶³ Kabira (n 51) 139

⁶⁴ Commemorating the Third UN World Conference on Women, (Nairobi 2007) *African Woman and Child Feature Service*, <https://ke.boell.org/sites/default/files/nairobi_21_-_commemorating_the_3rd_un_world_conference_on_women.pdf> accessed June 3, 2022.

⁶⁵ Kenya Women Parliamentary Association, *12th Parliament Members Induction Training*, (January, 2018) <<<https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/175-kenya-women-parliamentary-association-12th-parliament-members-induction-training-report/file.html>>> accessed June 5.

⁶⁶ Ibid, p 14.

⁶⁷ David Killingray, 'The Maintenance of Law and Order in Colonial Africa' (July 1986) 340(85) *African Affairs* 411-437.

women.⁶⁸ I argue that feminist participation in the expansion of these features of the criminal justice system is complicit with state-sanctioned violence.⁶⁹

My starting point for this section is that prisons are a colonial relic.⁷⁰ No record exists of prisons in pre-colonial Kenya.⁷¹ An analysis of Traditional Dispute Resolution Mechanisms (TDRM) in African traditional societies shows that the objective of dispute resolution was embedded on three salient features; community, restorative justice over retributive justice and reconciliation.⁷² Because pre-colonial African societies were founded on communal ways of living, the concept of reciprocity was deeply embedded in the societal culture and it ensured that individuals acknowledged their duties to one another and in situations where harm was done, values such as ‘solidarity, respect, protection and consultation’ were prioritised for the benefit of victims.⁷³ For instance, the Akamba and Kikuyu people of Kenya were free of ‘rigid social stratification and intrusive government paraphernalia’ and dispute resolution therefore took a collaborative approach in its administration of justice by involving all parties including victims, offenders and the community in the process.⁷⁴ As Jeremy Sarkin notes, accountability in pre-colonial Kenya was victim-centred, ‘with the end goal being compensation instead of incarceration.’⁷⁵

However, these practices gradually changed with the advent of colonisation. Punishment began to take a more punitive and institutionalised form.⁷⁶ Colonial administration introduced detention and imprisonment particularly to stifle dissenters of the colonial regime, and punish

⁶⁸ Hannah (n 41)

⁶⁹ *ibid*

⁷⁰ Killingray (n 68) 415

⁷¹ William Cliffoid, ‘An Introduction to African Criminology’ (Nairobi, 1974), 189.

⁷² O.Oko Elechi, ‘Human Rights and the African Indigenous Justice System’ *A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law*, (August 8 – 12, 2004) Montreal, Quebec, Canada.

⁷³ Mutua (n 45) 232

⁷⁴ Elechi, (n 73)

⁷⁵ Jeremy Sarkin, ‘Prisons in Africa: An Evaluation from a Human Rights Perspective’ (2008) 5(9) *SUR-International Journal on Human Rights*.

⁷⁶ *ibid*

natives who ‘disobeyed’ the exorbitant colonial public order laws.⁷⁷ Imprisonment and detention were often accompanied by public caning to appease ‘settler paranoia’ of impending uprising by humiliating and instilling fear among natives.⁷⁸ Historian Daniel Branch writes that “Within 16 years of British colonialists’ arrival in Kenya in 1895, they had built 30 prisons with an average daily incarcerated population of over 1500 people.”⁷⁹ Punitive measures like forced labour and dietary restrictions were also soon introduced to accompany confinement, with the intention of systemically worsening conditions for prisoners.⁸⁰ The British District Commissioner of Tana River in 1952 was on record stating that “I should welcome anything which makes prison life less enjoyable for the Africans.”⁸¹

Policing was a key feature of imprisonment, introduced by the colonial administration to maintain a public order conducive to effective administration, and was incorporated and legitimized by law to punish dissidents of the colonial structure, including through the targeted over-policing and patrol of poor and uneducated natives who were considered threats to the colonial order.⁸² This brief glimpse into the foundational colonial rationale of policing and punishment allows us to perceive the law’s potential as an institutional tool for the maintenance of an unequal, dominative and often violent status quo, and I argue in the thesis that this colonial reality remains embedded in Kenya’s criminal justice system.⁸³

⁷⁷ David M. Anderson, ‘Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire’ (London, 2005), 314.

⁷⁸ Daniel Branch: ‘Imprisonment and colonialism in Kenya 1930-1952: Escaping the Carceral archipelago,’ (2005) 38(2) International Journal of African Historical Studies. 239-265

⁷⁹ *ibid* 245

⁸⁰ *Ibid* 246

⁸¹ The 1933 Bushe Report on the Administration of Justice in East Africa. (February 29, 1952.) *Brown DC Tana River to PC Coast Province*, KNA CA/15/35.

⁸² *ibid* 414 para 2.

⁸³ Esther Waigumo Njoki and Gacheke Gachihi, ‘Police Violence and the Criminalization of the Poor in Kenya’ (2020) << <https://www.versobooks.com/blogs/4791-police-violence-and-the-criminalization-of-the-poor-in-kenya>>> accessed June 4 2022.

Contemporarily, prisons in Kenya have maintained their colonial legacy, while also exhibiting neoliberal and capitalistic features.⁸⁴ For instance, the Kenyan government in 2018 launched the Kenya Prison Enterprise Corporation whose aim is to “unlock the revenue potential of the prisons industry, and ultimately turn it into a reformatory and financially self-sustaining entity.”⁸⁵

Consequently, feminist integration into what Foucault terms the ‘carceral archipelago’ has only expanded and empowered the masculinist State.⁸⁶ Feminist advocacy in Kenya as discussed in the previous sub-chapter, is predominantly done within formalized and registered non-profit organisations which adopt different approaches towards achieving gender justice, including shaping policy, knowledge creation and influencing legislations.⁸⁷

Feminist advocacy in Kenya has increasingly shaped the legal system by proposing more laws or amendments to laws and police empowerment programs as legitimate approaches towards addressing gender-based violence.⁸⁸ More specifically, feminist efforts to end domestic and sexual violence have focussed on expanding both policing and police resources and increasing punitive measures while advocating for less use of alternative justice approaches.⁸⁹ A 2019 report by the Centre for Rights Education and Awareness (CREAW), a feminist NGO in Kenya, lists “overreliance on cultural and religious elders” as a challenge in addressing gender-based violence cases.⁹⁰ In discussing its recommendations, the report calls for financial

⁸⁴ Arkannudin Yasin, ‘Kenya’s Prison-Industrial Complex: Check in Any Time You Like, but You Can Never Leave’ (2019) *The Elephant* << <https://www.theelephant.info/reflections/2019/06/28/kenyas-prison-industrial-complex-check-in-any-time-you-like-but-you-can-never-leave/>>>

⁸⁵ Christine Mungai, Kenya’s Prison Industrial Complex, May 2020 < >

⁸⁶ Foucault (n 14)

⁸⁷ Issa Shivji, Concept of Human Rights in Africa, *Journal of African Law*, Volume 35, 1991, p. 214-217

⁸⁸ Equality Now-Kenya, ‘Kenya Just Committed to Ending Gender Based Violence in Five Years, Here’s How They Plan to Do It,’ (August 10, 2021) <<https://www.equalitynow.org/news_and_insights/kenya_just_committed_to_ending_gbv_in_5_years_here_s_how_they_plan_to_do_it/>> Accessed on March 23, 2022.

⁸⁹ *ibid*

⁹⁰ *Report by the Center for Rights, Education and Awareness, Rapid Multisectoral GBV Assessment-Nyeri*, October 2019, <<<https://home.creaw.org/portfolio/rapid-multisectoral-gbv-assessment-report-nyeri/>>> Accessed on March 23, 2022.

investments in the National Police Service and states, ‘ the police should be adequately resourced to facilitate robust GBV prevention and response actions’⁹¹

A public statement by Equality Now, a leading women’s rights INGO recommends institutionalization of proposed GBV responses within state frameworks and departments which further cements the monopoly of the state in GBV redress.⁹²

Conclusion

The concluding observation in this chapter is that international human rights law presented a solid site for the travelling of transnational feminisms, specifically within the anti-violence movement. This chapter shows the ways in which the global movement to end GBV took a pro-criminalization stance by calling for legislations that increase conviction rates and embed redress within the criminal justice system. This stance is also reflected in Kenya’s anti-violence movement which has since influenced, different anti-violence legislations with the state as guardian of these laws. Moreover, this chapter has traced the colonial history of policing and incarceration which are key features of the criminal justice system.

⁹¹ *ibid*

⁹² Equality Now (no 119)

CHAPTER THREE

The Carceral Feminist Archipelago

While the women's rights movement in Kenya proposes different interventions towards ending domestic and sexual violence, majority of women's rights NGO's in Kenya have taken a pro-criminalization stance in their advocacy against gender-based violence.⁹³ The effectiveness of this approach remains a highly contested debate amongst feminist advocates.⁹⁴ For instance, proponents for tougher punishment and heightened policing against perpetrators of violence argue that it positions gender-based violence as a serious crime with serious ramifications thus deterring perpetrators.⁹⁵ Proponents against criminalization on the other hand, critique punitive methods of interventions on the basis that they result into an over-reliance on institutions that are 'racist, sexist, ableist and classist' therefore replicating violence against survivors of gender-based violence.⁹⁶ While drawing from existing abolitionist feminist standpoints and with the understanding that NGOs are the primary sites for campaigns against GBV, this chapter first, provides a brief theoretical framework of the Non-Profit Industrial Complex as a catalyst for carceral feminism and secondly, it explores three central critiques of carceral feminism by highlighting examples within the PAVDA.

The Non-Profit Industrial Complex

Abolitionist scholars have generally used the term 'non-profit industrial complex (NPIC)' to describe the civil society archipelago that is not only heavily dependent on external and State funding and goodwill for its sustainability, but whose dependance on a funding culture

⁹³ Banda (n 35) 541

⁹⁴ Liz Kelly, 'Inside Outsiders, Mainstreaming Violence Against Women into Human Rights Discourse and Practice' (2005) 7(4) *International Feminist Journal of Politics* 471-495.

⁹⁵ Engle (n 28) 50

⁹⁶ Kaba (n 20)

reproduces a neoliberal market logic that manifests in competition, fragmented feminist organizing and ‘individualized service delivery.’⁹⁷ This sub-chapter discusses the NPIC in Kenya in two sub-sections. First, I argue that the dominance of the state as regulator limits the democratic space for organizing forcing NGOs to conform to the dominant status-quo and second, I argue that an overreliance on external funding creates a dependency that affects both the sustainability and transformative potential of NGOs.

The State as Regulator

The state regulates the operations of both local and international NGOs through the NGO’s Coordination Act (1990).⁹⁸ The role of the state as regulator requires NGOs to ‘play by the rules of the game’ in order to continue their existence and operations.⁹⁹ The Kenya Human Rights Commission (KHRC) reports that the Kenyan government has adopted intimidation strategies like burdensome registration protocols to frustrate the formation of NGOs, surveillance, targeted harassment of NGO staff and activists, requirement to the identity of donors and a broad discretion to seize assets on suspicion of terrorism financing.¹⁰⁰

⁹⁷ INCITE, *‘The Revolution Will Not Be Funded’* (2006).

⁹⁸ Rahma Adan Jillo, *Restrictions on Foreign Funding on Civil Society: NGO Law in Kenya,* (August, 2009) 11(4) The International Journal of Not-for-Profit Law. << <https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya>>> Accessed on June 5, 2022.

⁹⁹ Payal, ‘Foreign Funding of Non-Governmental Organisations (NGOs) - A Matter of Contention?’ (2020) 17 *Supremo Amicus* 348

¹⁰⁰ The Kenya Human Rights Commission, *‘Towards a Protected and Expanded Civic Space in Kenya and Beyond: A Status Report and Strategy Paper Developed for the Civil Society Sector in Kenya,’* (2016) 14-15. < <https://www.khrc.or.ke/civic-space-publications/173-towards-a-protected-and-expanded-civic-space-in-kenya-and-beyond/file.html>> Accessed on June 5, 2022.

Due to these reasons, Kenyan NGOs relationship with the State is critical in understanding their role in expanding policing and punishment.¹⁰¹ Their historically contentious relationship which continued post-independence, required women's rights NGOs to negotiate for public space and visibility within the State, to maintain their operations.¹⁰² Combined with the state's regulatory dominance, liberal feminist thought is also rooted in the belief that legal reform can act as a catalyst for the advancement of women's rights.¹⁰³ Because of this, a significant section of feminist advocates advocate for using the law as an emancipatory tool for women.¹⁰⁴ Partnerships with the state required respectability, conformity and assimilating within state apparatus therefore limiting the achievement of meaningful structural upheavals.¹⁰⁵ Women's rights organizations today continue to partner with the state through investing their resources to provide capacity building programs for the police, prosecutors and judges.¹⁰⁶

For instance, the advocacy for gender desks at police station was led by women's rights NGOs.¹⁰⁷ Gender desks combine specialized police, health and legal officers to support survivors of gender-based violence upon reporting violent incidents at the police station.¹⁰⁸ Gender desks have however largely been ineffective because they create uncomfortable environments for survivors of violence because of the lack of privacy, corruption and solicitation by the police for sexual favors in exchange for expedited justice.¹⁰⁹ While

¹⁰¹ *ibid*

¹⁰² Maurice N. Amutabi, 'The Colonial State and Development in Kenya: Background to the NGO Work in the Country,' (September, 2013).

¹⁰³ Drakopoulou (n 25) 330-336.

¹⁰⁴ Regina G. Mwatha, 'The Women's Movement in Kenya,' (2017) 184 in 'Women's Activism in Africa,' (Balghis Badri & Aili Mari Tripp eds.)

¹⁰⁵ *ibid*

¹⁰⁶ CREAW, 'Baseline Report on GBV,' <<https://home.creaw.org/wp-content/uploads/2019/04/Baseline-Report-Meru-and-Kilifi-Counties-2017_compressed.pdf>> accessed June 5, 2022

¹⁰⁷

¹⁰⁸ *ibid*

¹⁰⁹ Institute of Economic Affairs, 'Status of Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province' (September, 2009) 22, IEA Research Series. <<<https://ieakenya.or.ke/download/status-of-gender-desks-at-police-stations-in-kenya/>>> accessed June 3, 2022.

collaborative approaches with the state are indeed attempts at improving the material conditions for survivors of violence, they have blurred the lines between state and civil society.¹¹⁰ Civil society organizations are central in advancing democracy, a role which can be fundamentally compromised when the terms of engagement are disproportionately controlled by the government, raising questions about the legitimacy and effectiveness of NGOs as sites for transformative change.¹¹¹

The dominance of the state in influencing women's rights organizing also presents a challenge for informal, radical feminist collectives, especially in forging cross-movement solidarity and creating opportunities for collaboration with state-backed civil society organisations.¹¹² Carceral feminism's focus on reformatory politics stemming from liberal feminism rather than a liberatory feminist praxis has resulted in the fragmentation of feminist movements and organizations because of fundamental ideological differences and styles of organizing.¹¹³ Proposals for abolitionist practices of accountability for example, have the capacity of being considered threatening to the system resulting to the ostracization of free radicals and further fragmentation of feminist movements.¹¹⁴ Feminists who question the emancipatory potential of law because of their view of the law as a patriarchal, colonial, racist, classist, capitalistic and imperialistic construct incapable of addressing a political rather than a legal problem.¹¹⁵

¹¹⁰ Jennifer Brass, 'Allies and Adversaries: NGOs and the State in Africa' (2016.) 16 Cambridge University Press 1196-1198

¹¹¹ Immaculate Nyawira, 'Conditional Donor Funding and its Implications on NGO Autonomy in East Africa' (2015) University of Cape Town

¹¹² Mimi Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973-1986*, 2015.

¹¹³ *ibid*

¹¹⁴ *ibid*.

¹¹⁵ Natalie Csengeri, 'Radical, Working Class, Anti-Racist, Anti-Colonial Feminism' (2016) 72 *Socialist Lawyer* 16-21

The External-Funding Model.

NGOs in Kenya are heavily reliant on donors from western countries, including charities, organizations and governments.¹¹⁶ This over-dependence on external funding, has ‘distorted their ideological vision’ and alienated them from the population they are serving.¹¹⁷ Generally, the external funding model presents a power relationship between the funder and the NGO, which can potentially erode the NGO’s independence and sustainability.¹¹⁸ Conditional funding shapes the programmatic trajectory of an NGO, even when the projects launched do not respond to the needs of the communities the NGOs serve, ultimately affecting the NGO’s autonomy.¹¹⁹ Additionally, the fundamental lines of communal accountability are blurred when NGOs direct their accountability to external donors rather than to the communities they are meant to serve, resulting in alienation and elitist cultures of organizing.¹²⁰ Dominant women’s rights NGOs are also critiqued for replicating the Western saviorhood complex and fostering beneficiary-benefactor relationships with survivors of violence and in some cases, NGOs remain alienated and elitist especially when interventions to violence culminate in discursive ‘conferences and cocktail parties.’¹²¹

¹¹⁶ Brass (n 111)

¹¹⁷ Makau Mutua, *Human Rights NGOs in East Africa: Political and Normative Tensions*, (2009) University of Pennsylvania Press. 45-78

¹¹⁸ Victoria Bernal and Inderpal Grewal, ‘Theorizing NGOs: States, Feminisms and Neoliberalism’ (2014) Duke University Press 379

¹¹⁹ Immaculate Nyawira Mugo, ‘Conditional Donor Funding and its Implications on NGO Autonomy in East Africa,’ (January 2015)

¹²⁰ Mutua (n 118) 93

¹²¹ Mutua (n 118) 109

Critiques of Carceral Feminism

This chapter provides three key criticisms of carceral feminism. I argue that its partnerships with the state through investments in police and prosecution empowerment programs connotes complicity and conformity within an oppressive system. Secondly, I engage with the critique that carceral feminism lacks intersectionality because it predominantly proposes solutions for privileged survivors of violence and lastly, I argue that embedding redress within criminal law presents violence as an individual legal problem rather than a structural social problem.

Complicit in State Sanctioned Violence

Carceral feminism's overreliance on harnessing the masculinist apparatus of the state in response to GBV is an abetment of the state's power in sanctioning violence.¹²² The inefficacies of the criminal justice system, particularly the inaccessibility to courts, fear of the police, unclear laws and policies and patriarchal cultures that consider violence as 'chastising,' all work together to compound violence for survivors who interact with this system.¹²³ This section demonstrates the ways in which feminist advocates' participation in the punitive state is complicit in expanding structural violence.¹²⁴

One of the most predominant reasons adduced by feminist advocates for advocating for criminalization as a legitimate avenue for curbing gender-based violence is the deterrence nature of criminal sanctions.¹²⁵ Feminist advocates for legal reform are persuaded that the threat of loss of personal liberty through imprisonment in uninhabitable prisons is enough to deter perpetrators of gender-based violence.¹²⁶ Abolitionist feminists on the other hand have shown

¹²² Engle (n 28) 59

¹²³ *ibid*

¹²⁴ Evelyn Rose 'Domestic Violence as State Crime: A Feminist Framework for Challenge and Change' (2021) Routledge

¹²⁵ Samantha Winter, Lena Moraa Obara, Jason Aguilar and Laura Johnson 'Breaking the Cycle: Women's Perceptions of the Causes of Violence and Crime in Informal Settlements in Nairobi, Kenya and their Strategies for Response and Prevention' (2021) *Journal of Interpersonal Violence*. 1

¹²⁶ Drakopoulou (n 25).

that criminalization does little to end gender-based violence, because it ‘does nothing to change the culture that makes this harm imaginable.’¹²⁷ Feminist participation in expanding this complex to solve the problem of gender violence is often geared towards reform and advocates for better policing, legislations and prosecuting better.¹²⁸ For example, the nationwide anti-GBV campaign tagged ‘Keeping the promise to end GBV’ rolled out by the National Gender and Equality Commission in Kenya lists out the expectations for different stakeholders.¹²⁹ For the prosecutors, the first expectation highlighted is increasing the number of GBV cases prosecuted.¹³⁰ For stakeholders in the education sector, there is an expectation to ‘refer disciplinary cases for legal action’ and whose success is assessed through ‘the number of disciplinary cases dealt with.’¹³¹ These expectations champion for immediate contact with the criminal process, with a mission to punish the offender, despite structural problems with delays, rampant corruption and inaccessibility to courts.¹³² While the anti-violence movement has taken a multi-sectoral approach, the push for criminalization has successfully branded informal and traditional justice systems as ineffective because of their incapacity to prescribe imprisonment.¹³³ A look at the National Policy on Prevention and Response to Gender-Based Violence shows that the termination of sexual offences matters can only be done by the Director of Public Prosecutions, within the criminal process.¹³⁴ The policy further recommends the

¹²⁷ Kaba, (n 20)

¹²⁸ *ibid*

¹²⁹ The National Gender and Equality Commission, ‘*Keeping the Promise, End GBV Campaign: The Duty Bearers Hand Book*’ (2015) 28-30.

¹³⁰ *ibid*.

¹³¹ *ibid*, p. 30.

¹³² Patricia Kameri-Mbote, ‘Violence Against Women in Kenya, An Analysis of Law, Policy and Institutions, International Environmental Law Research Centre’ << <https://www.ielrc.org/content/w0001.pdf>>> accessed 25 March, 2022.

¹³³ *ibid*

¹³⁴ The Office of the Director of Public Prosecutions: *The Mandate*, < <https://www.odpp.go.ke/mandate/>>> accessed 29 March, 2022. See also The National Policy on Prevention and Response to Gender-Based Violence, <<<http://psyg.go.ke/docs/National%20Policy%20on%20prevention%20and%20Response%20to%20Gender%20Based%20Violence.pdf>>> accessed March 25, 2022.

appointment of more prosecutors as part of addressing gender-based violence. In consideration that one fundamental role of prosecution is to ‘to represent the state in all criminal cases, criminal applications and appeals’ and that generally, success within the office of the prosecution is dependent on high conviction rates, feminist interventions that empower the prosecution ‘shifts focus away from the harm being done against women to the harm being done against the state.’¹³⁵ This shift results in maligning structural GBV over prosecutorial success.¹³⁶

According to the Kenya National Crime Research Center, the deterring effect of criminalization remains in question especially because cases of violence continue to rise in Kenya.¹³⁷ As of 2015, according to the World Prison Population List, ‘Kenya has incarcerated more of its citizens per 100,000 population than any other country in Eastern Africa with the exception of Rwanda and Ethiopia., with female prisoners accounting for 18 percent of the prison population.’¹³⁸ The increasing prison population has resulted in overcrowding, dietary and health concerns, poor sanitation and forced labor; conditions that amount to cruel and inhumane treatment contrary to Kenya’s international obligations.¹³⁹

Feminist non-profit organizations also play a role in police reformist programming. For instance, Equality Now-Kenya’s anti-sexual violence programme focuses on empowering both the police and the office of public prosecution to ‘work together with local NGOs and rescue centers to ensure laws against FGM and child marriage are effectively implemented with proper

¹³⁵ Aparna (n 12) 123

¹³⁶ Silvana Tapia Tapia, ‘Beyond Carceral Expansion: Survivors’ Experiences of Using Specialised Courts for Violence Against Women in Ecuador,’ (2021) 30(6) Sage Journals 848–868

¹³⁷ Susan Kendi, ‘Kenya Needs to Prepare Better to Prevent and Respond to GBV Ahead of 2022 Elections’ (2022) *International Commission of Jurists*.

¹³⁸ Prison Insider, ‘Kenya: The Dehumanisation and Exploitation of Inmates in State Prisons’ (September 2020) <<https://www.prison-insider.com/en/articles/kenya-the-dehumanisation-and-exploitation-of-inmates-in-state-prisons>> accessed 29 March, 2022.

¹³⁹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, (adopted 1985) (Ratified by Kenya in 1997)

investigation and prosecution of violations, accompanied by strong penalties.’¹⁴⁰ Similarly, the Coalition on Violence Against Women (COVAW) in their access to justice report, asserted that the impact of delayed justice “promotes alternative justice means in communities, which ultimately perpetuates a culture of impunity by fostering an environment where sexual violence is tolerated.”¹⁴¹ To avoid this eventuality, the report recommends increased capacity building for police officers, prosecutors and advocates on the handling of sexual violence cases.¹⁴² It further recommends government investment in technology to aid in expediting cases at the judiciary.¹⁴³ Reforms around technological advancements supporting judicial efficiency ultimately mean investments in state surveillance.¹⁴⁴ The expansion of state surveillance has been linked to increased policing, with detrimental effects to women, sexual and gender minorities, racial minorities, sex workers and poor people.¹⁴⁵ Police intervention in cases of domestic violence as elevated within PADVA can easily result in harm to both the survivor and the batterers.¹⁴⁶ Coupled with this, debates about whether or not feminist relationships with the punitive state are ethical have formed the basis for a critique of carceral feminism.¹⁴⁷ With the advent of neoliberal, kleptocratic and increasingly illiberal governments in Africa, feminist expansion of criminalization through police and prosecution skill trainings and advocating for stringent legislations have been deemed as paradoxical, at best and hypocritical, at worst.¹⁴⁸ Abolitionist feminists are skeptical that a punitive state can be reformed, or even has an interest

¹⁴⁰ United Nations Human Rights Office, *Featured Human Rights Story, Equality Now Report* < <https://whatson.unodc.org/whatson/en/featured-human-story-equality-now.html> >

¹⁴¹ Coalition on Violence Against Women, *Delayed. Denied. Legal and Administrative Bottlenecks to Effective and Efficient Delivery of Justice for Survivors of SGBV in Kenya*, 2022, pp. 7.

¹⁴² *ibid*

¹⁴³ *Ibid*, pp. 43.

¹⁴⁴ Kaba (n 20)

¹⁴⁵ Jane Duncan, *Stopping the Spies; Constructing and Resisting the Surveillance State in South Africa*, NYU Press, 2018.

¹⁴⁶ Mills L, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, Harvard Law Review, 1999, 550.

¹⁴⁷ Kim (n 113)

¹⁴⁸ *ibid*

in transformative change..¹⁴⁹ Feminist economists have also questioned the underfunding of social protection schemes whose increase in funding would significantly increase the material conditions for survivors of violence. A review of Kenya's 2021/2022 fiscal budget shows an allocation of 294.5 billion Kenya shillings to support operations of security agencies, including an allocation of 110.6 billion to policing and prisons and a further 10.7 billion Kenya shillings to leasing police motor vehicles.¹⁵⁰ In contrast, only 37.8 billion Kenya shillings was allocated for social protection, despite evidence that investments in social protection reduce both crime and violence.¹⁵¹ Pro-criminalization campaigns reward feminist activism with laws but lack the good faith to allocate financial resources within programmes that make it easier for survivors to escape harm.¹⁵²

While these reformist projects are collective attempts by NGOs to address gender-based violence, their continuity only empower the state and remain ineffective in addressing GBV.

A Lack of Intersectionality

Adopting an intersectional lens to discuss carceral feminism unmask the ignored axes of marginalization within the criminal justice system.¹⁵³ Forms of oppression such as racism, xenophobia, homophobia and classism overlap within the criminal justice system exposing survivors to multiplied harm.¹⁵⁴ Gender, class and sexuality presents one such intersection. In recognition that the effectiveness of law increases or reduces on the basis of race, class and

¹⁴⁹ Tapia (n 134) 848–868

¹⁵⁰ See The Treasury of Kenya, < <https://www.treasury.go.ke/wp-content/uploads/2021/06/FY-2021-22-Budget-Statement.pdf>> accessed March 26, 2022.

¹⁵¹ Beth Goldblatt & Lucie Lamarche, 'Women's Rights to Social Security and Social Protection,' (2014) Bloomsbury Publishing 309.

¹⁵² Tapia (n 134)

¹⁵³ *ibid*

¹⁵⁴ *ibid*

gender identities, I argue that carceral feminist approaches predominantly cater to the welfare of privileged survivors of violence, who can either afford lawyers or enjoy the privileges of existing within patriarchal heteronormativity.¹⁵⁵ In striking contrast, sexual and gender minorities in Kenya who exist outside the gender binary and who experience poverty disproportionately often experience targeted violence at the hands of the police, because they are not considered ‘ideal victims’ of domestic violence within the criminal process.¹⁵⁶ LGBTIQ+ survivors of violence have highlighted that they feel unsafe reporting cases of intimate partner violence to the police because they experience ‘victim blaming and shaming because of their sexual expression and orientation.’¹⁵⁷ Feminist organizations that advance the human rights of sexual and gender minorities in Kenya have rolled out programs that directly engage the police in sensitization activities about the human rights of LGBTQIA+ people with the goal of police reform.¹⁵⁸ For minorities existing outside of prescribed societal norms, the criminal justice system is by design, inherently violent to them.¹⁵⁹ Moreover, safety for survivors of violence within the PAVDA’s is premised on the survivor’s isolation from family which may not always happen because of different reasons. State-focused advocacy shifts blame and punishment to survivors of violence for failing to report to the police, press charges or completely leave.¹⁶⁰

¹⁵⁵ Engle (n 28)

¹⁵⁶ Gay and Lesbian Coalition of Kenya, *Research on the Lived Experiences of LBQ Women in Kenya*, <<https://www.galck.org/downloads/>> accessed March 25, 2022.

¹⁵⁷ Gay and Lesbian Coalition of Kenya, *Research on the Lived Experiences of Lesbian, Bisexual and Queer Women in Kenya*.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

Ignores the Structural Causes of GBV

Carceral feminism places an emphasis on individual criminal responsibility which positions gender-based violence as an individual problem occurring on a case-by-case basis, experienced by an individual complainant and suggests individual remedies.¹⁶¹ Because of this, states can take advantage of heightened advocacy for criminalization to pass ‘empty’ laws without addressing the wider societal norms that cause gender-based violence.¹⁶² Abolitionists therefore reject this individuality because it ignores the systemic power imbalances that enable a culture of violence against multiple and diverse women, men, trans and non-binary people.¹⁶³ Moreover, because of the adversarial criminal process, the focus of domestic violence trials is on proving criminal responsibility rather than seeking redress and protecting the survivor of violence, which further sidelines victims within the criminal process.¹⁶⁴ Often, carceral feminist advocacy conflates access to justice with access to litigation, which is in conflict with survivors’ vision for justice, that is, ‘the possibility of obtaining immediate, effective and durable protection from ongoing violence.’¹⁶⁵ A structural focus on the social problem of GBV considers the economic, physical and mental well-being of all survivors of violence upon contact with the criminal system.¹⁶⁶ It also considers that GBV is not caused in isolation, but by a combination of societal problems like harmful patriarchal and cultural norms, poverty, drug abuse and war and conflict.¹⁶⁷

¹⁶¹ Aparna (n 12)

¹⁶² Tapia (n 134)

¹⁶³ *ibid*

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*, p. 850.

¹⁶⁶ Whalley E and Hackett, ‘Carceral Feminisms: The Abolitionist Project and Undoing Dominant Feminisms’ (2017) 20(4) Contemporary Justice Review 456–473.

¹⁶⁷ *ibid*

Conclusion

In Kenya, attempts to reform the policing, prosecution and punishment have not been successful in addressing gender-based violence. If anything, cases of gender-based violence continue to skyrocket. An understanding of Kenya's colonial history demonstrates that the criminal justice system's failure to provide access to justice for survivors of violence is not a coincidence and was in fact, designed to operate ineffectively and oppressively despite attempts to re-tailor its fabric. These challenges have been compounded by corruption and executive frustrations of the independence of the judiciary. With the continuous enactment of legislations, feminist advocates have wrongly presumed that survivors of violence will turn to the state as the first point of access to redress. Research shows that survivors often turn to the church, civil society organizations and shelters. This is because access to formal mechanisms remain costly, technical and tedious. The reluctance to engage the state is also rooted in the fear of reporting abusers who are the sole bread winners in families.

Feminist participation and pursuit for the expansion of criminalization ignores the multiple societal nuances on the intersections of culture, class and sexuality. Abolitionist interventions acknowledge the grip that criminalization holds on the feminist movement and the ways in which it limits a collective vision for solutions that do not involve or empower the state, and therefore invite feminist movements to allow themselves to imagine 'the boundless possibilities of a more just world.'¹⁶⁸

¹⁶⁸ Kaba (n 20)

CHAPTER FOUR

Towards Abolition: Transformative Justice in Kenya

As already discussed in the second chapter, the predominant style for conflict management in traditional African societies was premised on reconciliation, compensation and maintaining relationships.¹⁶⁹ Because of these values, dispute resolution happened communally with a restorative goal rather than a retributive goal.¹⁷⁰ Scholars have over the years referred to these community-based alternatives as ‘restorative justice practices.’¹⁷¹ Some of these practices have been resilient in withstanding colonisation and are still invoked in post-colonial Africa.¹⁷² This chapter however recognizes that African communities are not timeless nor their practices stagnant and that restorative practices have evolved especially in light of globalisation and have not remained unscathed by present capitalistic and neoliberal contexts.¹⁷³ This chapter explores the practice of Transformative justice in Kenya and differentiates it from Restorative Justice practices, arguing that while both aspire to provide alternatives to prosecution, restorative justice practices are deeply embedded within state apparatuses, therefore still requiring survivors of violence to maintain their interaction with the criminal justice system.¹⁷⁴ Transformative Justice on the other hand is critically distinct from restorative justice because it aims to disrupt the power hierarchies that produce and reproduce oppression.¹⁷⁵ It is an expansion of restorative justice championed by Queer, Trans, disabled, Black and Indigenous

¹⁶⁹ Makau Mutua, ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35(2) *Virginia Journal of International Law* 339-380.

¹⁷⁰ Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems*, 2001.

¹⁷¹ Berggrund Ebba, *You Can Choose Your Friends, but Not Your Neighbours*” A Field Study of the Informal Practice of Restorative Justice and its Ties to Community Resilience in Rural Communities in Nakuru County, Kenya, 2017.

¹⁷² *Ibid.*

¹⁷³ Kim (n 113)

¹⁷⁴ Kathleen Daly, *Restorative Justice: The Real Story*, 2002.

¹⁷⁵ Nocella, A. J. II, (2011). An overview of the history and theory of transformative justice. *Peace & Conflict Review*, 6(1), 1–10.

communities to address harm without involving the police or prisons.¹⁷⁶ Transformative justice ‘goes a step further and cultivates community actors who can proactively intervene in cases of domestic violence.’¹⁷⁷ This chapter therefore explores the potential for transformative justice practices in Kenya and engages with the critiques surrounding its practice.

Towards Transformative Justice in Kenya

This sub-chapter starts by acknowledging that there are elements of restorative justice embedded in Kenya’s legal framework.¹⁷⁸ While the legislative backing of restorative justice provides a pathway for the application and practice of restorative justice, it does not always translate into its actual practice because of the dominance of penal retribution.¹⁷⁹ Due to this dominance, restorative justice practices are seldom implemented or are implemented as a last resort.¹⁸⁰ This chapter acknowledges that transformative justice in Kenya’s context is still sparsely explored and therefore only lays a theoretical framework for the practice of Transformative Justice.

Transformative justice is critically distinct from restorative justice because it aims to disrupt the power hierarchies that produce and reproduce oppression.¹⁸¹ It is an expansion of restorative justice and is championed by Queer, Trans, disabled, Black and Indigenous communities to address harm without involving the police or prisons.¹⁸² It recognizes the inherent harm reproduced within the criminal process and offers new alternatives for people who experience

¹⁷⁶ Eric A. Stanley, ‘Gender Self-Determination, Queer Abolition and Trans Resistance,’ (2011) *American Quarterly* 6.

¹⁷⁷ *ibid*

¹⁷⁸ Kenya Law, *Restorative Justice and Victims of Crime in Kenya*, < <http://kenyalaw.org/kl/index.php?id=1895> > accessed June 3, 2022.

¹⁷⁹ *ibid*

¹⁸⁰ Kariuki Muigua and Kariuki Francis, ‘ADR, Access to Justice and Development in Kenya’ (2018) Strathmore University Press.

¹⁸¹ Maja Davidovic, ‘Transformative Justice: Remediating Human Rights Violations Beyond Transition’ (June, 2018) 35.2

¹⁸² Stanley (n 171)

barriers and harm in accessing justice within the formal criminal process.¹⁸³ It has been proposed as a valid alternative to addressing cases of gender-based violence because it considers the ‘interaction of modes of domination to place individual acts of violence in a larger context of structural violence.’¹⁸⁴

At its core, transformative justice brings together the victim, offender and community to resolve the harm done and empowers community actors to identify and respond to situations of violence.¹⁸⁵ The concept of community from an abolitionist lens is broad and encompasses not just the people that constitute a geographical and cultural community but the shared feeling among people.¹⁸⁶ This broad definition allows transformative justice practices to happen despite different points of connection and also allows new communities to emerge during the process.¹⁸⁷ Abolitionists also differentiate between community and community policing, arguing that the two should not be interchangeable, as the latter, whether subtle or overt would involve interaction with police or their informers, who can include individuals, groups or community organizations.¹⁸⁸

It is premised on the belief that tangible support for survivors comes from the people closest to them, and that people experiencing violence may not always want to isolate themselves from their relationships.¹⁸⁹ Because transformative justice approaches completely divest from the criminal justice system, advocates have proposed moving beyond the binary of perpetrator and

¹⁸³ Hannah Barrie, 'No One Is Disposable: Towards Feminist Models of Transformative Justice' (2020) 33 *Journal of Law and Social Policy* 65.

¹⁸⁴ *Ibid.*, p.13.

¹⁸⁵ Barrie, (n 184)

¹⁸⁶ Joseph Erasto Jaramillo, "The Community-Building Project: Racial Justice through Class Solidarity within Communities of Color" (1996) 9:2 *La Raza LJ* 195 at 226.

¹⁸⁷ *Ibid.*

¹⁸⁸ Michael D. Reisig & Robert J. Kane, *The Oxford Handbook of Police and Policing*, 2014.

¹⁸⁹ Creative Interventions Toolkit: A Practical Guide to Stop Interpersonal Violence, < <https://www.creative-interventions.org/wp-content/uploads/2020/10/CI-Toolkit-Final-ENTIRE-Aug-2020-new-cover.pdf>> Accessed on June 5, 2022.

victim and the use of retributive language like batterer, abuser, predators, criminals, to refer to the person doing harm. This is because binary language forces the parties involved to restrict themselves to a singular identity even when they change or fall into both categories.¹⁹⁰

In guiding the accountability process, Ruth Morris identifies five core needs for survivors: ‘the need for answers, for recognition of their wrong, for safety, for restitution, and to find significance or meaning from their tragedy.’¹⁹¹ Transformative justice aims to satisfy these core needs and the needs of the family, friends and community of both the survivor and the harm doer who are all often sidelined by the criminal justice process.¹⁹²

A toolkit by INCITE provides a set of questions highlighted below, that center both the victim’s needs and offer an opportunity to identify and redress structural causes of offences.¹⁹³

Who has been hurt and what are their needs?

Who is obliged to address these needs?

Who has a stake in the situation and what is the process to involve them in making things right and avoiding future reoccurrences?

What social circumstances promote this harm?

What structural similarities exist between the situation and others like it?

What measures could prevent future occurrences?¹⁹⁴

¹⁹⁰ Pooja Gehi and Soniya Munshi, ‘Connecting State Violence and Anti-Violence: An Examination of the Impact of VAWA and Hate Crime Legislation on Asian American Communities,’ (2015) 21

¹⁹¹ Ruth Morris, *Stories of Transformative Justice* (Toronto, ON: Canadian Scholars' Press, 2000) at 248.

¹⁹² Hannah Barrie (n 189) p. 15.

¹⁹³ Creative Interventions Toolkit: ‘*A Practical Guide to Stop Interpersonal Violence*’ (2016)

¹⁹⁴ The Appeal, ‘*Episode 20: Mariame Kaba and Prison Abolition*,’ (20 March 2019) at 00h:33m:41 s, online (podcast): *Justice in America* [perma.cc/7G6A-68QR].

This approach also considers that the person doing harm may avoid accountability as the process starts. To mitigate this, accountability is viewed as a continuous, flexible process that anticipates and adapts to resistance from all the parties involved, and begins on small scale.¹⁹⁵ These accountability process can be held within circles, community conferencing and separate circles especially in cases where the victims are not willing to interact with the person doing harm.¹⁹⁶ Participation is not mandatory for either party, and the person doing harm can participate without the victim present and vice versa.¹⁹⁷ Moreover, circles are designed according to the needs of the members and does not force the participation of either member.¹⁹⁸ This counters the dominant critique of transformative justice as trying to manufacture healing by forcing unwilling parties to come together.¹⁹⁹

As the abolition movement takes off in different contexts however, criticisms have emerged as to the efficacy and sustainability of Transformative Justice approaches for addressing harm.²⁰⁰ While these reservations recognize the limitations of the criminal justice system, they also question the effectiveness of using this approach for all crimes and for all victims.²⁰¹

Abolition in Practice.

In Kenya's context, an abolitionist framework in the anti-violence movement would operate as a long-term steady project, in recognition that the deeply embedded colonial institutions cannot be overturned in haste.²⁰² Abolition involves a feminist redirection from an overreliance on the law as a tool for liberation to reinvestments in the transformative potential of communities and

¹⁹⁵ *ibid* 44.

¹⁹⁶ Emily Gaardner, 'Lessons From a Restorative Circles Initiative for Intimate Partner Violence' (2015) 3(3) *Restorative Justice Journal* 342- 347

¹⁹⁷ *ibid*.

¹⁹⁸ Bench Ansfield and Timothy Colman, 'Confronting Sexual Assault: Transformative Justice on the Ground in Philadelphia' (2012) 27:1 *Duke University Press* 41-44

¹⁹⁹ *The Appeal*, (n, 195) at 00h:42m:35s.

²⁰⁰ Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4(1) *Sage Publications* 55-79

²⁰¹ *ibid*

²⁰² Hannah Barrie (n 189) p. 15.

people.²⁰³ Mariame Kaba provides a helpful road map for identifying carceral practices as a first step towards abolition.²⁰⁴ I argue that understanding what not to do as feminist activists can inform the development of more creative solutions in addressing GBV.²⁰⁵ First, feminist activists should reject reforms that focus on increasing police budgets and reforms that advocate for increased community policing, because they expand police presence within communities, disproportionately harming marginalized groups.²⁰⁶ Second, feminist advocates should reject reforms around technological advances within the police and judiciary because they expand state surveillance, which often targets marginalized groups.²⁰⁷ Kaba also invites feminists to look out for police sanitization campaigns that falsely postures police violence as perpetrated by individual unethical police officers, rather than the product of structural oppressive violence.²⁰⁸ To counter these reforms, feminist advocates can pursue through activism, the creation of conditions that set the pace for the abolition of the police and prisons.²⁰⁹ These conditions include supporting recommendations whether through law or policy, that offer sufficient and meaningful reparations to survivors of police violence and their families, proposals to reduce police funding and invest instead in other social protection schemes like mental wellness, affordable housing and healthcare and proposals for independent civilian police accountability boards with power to investigate and discipline police officers.²¹⁰

²⁰³ Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' (1979)

²⁰⁴ Kaba (n 20)

²⁰⁵ *ibid*

²⁰⁶ Reisig (n 182)

²⁰⁷ John Palfrey, 'The Ever-Increasing Surveillance State' (March 2, 2020) Georgetown Journal of International Affairs

²⁰⁸ April Zhu, 'What Kenya's Killer Cops Reveal About Police Culture' April 6, 2022.

< <https://www.sapiens.org/culture/kenya-killer-cops/> > accessed June 3, 2022.

²⁰⁹ Davis (n 18)

²¹⁰ Kaba (n 20)

CONCLUSION

Carceral feminism is deeply embedded in the feminist organizing landscape both at international and domestic levels. In seeking to end GBV, carceral feminist approaches harness the power of the state as a deterrence strategy and takes a pro-criminalization stance in ending GBV. This strategy as discussed, has not been successful and has further empowered the masculinist arm of the state through the unyielding NGO investments into the state. Due to the popularity of carceral feminist approaches and the dominance of the neoliberal state in regulating civic space, transformative justice approaches, while urgent, can only be unhurried but still embody a liberatory vision in Kenya. Transformative justice not only offers alternatives to a system that has continually failed marginalized groups, but a chance to reconsider the emancipatory practice of feminism and therefore re-direct feminist activism from pro-criminalization to pro-liberation. This allows movements to structure their responses to interrogate and find solutions for the perennial structural causes of GBV.

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