
SHORTCOMINGS OF PENAL POLICIES IN ADDRESSING SEXUAL RIGHTS VIOLATIONS

OUTCOME STATEMENT
APRIL 16-17, 2016



INTRODUCTION

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A special thanks goes to Sonia Corrêa, Associate Researcher of the [Brazilian Interdisciplinary AIDS Association \(ABIA\)](#) and co-chair of [Sexuality Policy Watch](#) who was unable to attend the meeting in person but who nonetheless contributed over Skype during one of the sessions.

A group of feminist advocates for sexual, reproductive and gender justice from across the globe, met in New York on April 16-17 2016 to identify some shortcomings and challenges of penal policies in responding to sexual and reproductive rights violations. This brief statement summarizes the findings of two days of fruitful discussions, case study presentations and debates and aims to contribute to the conversation about criminalization.

States across different regions of the world often respond to issues of sexual and reproductive rights within the framework of the criminal justice system. This approach of criminalization as a solution is not only employed by states: the dominant approach within donor agencies and feminist movements has also been to support advocacy for redressing violations of rights using criminalization. Criminalization as a solution has been invested in for decades.

However, and despite all the effort exerted in adopting laws that criminalize sexual and reproductive rights violations, the structural problems that lead to these rights violations often remain unaddressed. From our various experiences across the globe in advocating for sexual and reproductive justice, it is clear that criminal law has not adequately addressed impunity nor has it sufficiently addressed/reduced sexual and reproductive rights violations.

Furthermore, the criminalization of people's behaviors in the sexual and reproductive realms happen within the context of neoliberal economic structures such as the global care economy, the health- and prison-industrial complexes, militarization and structural violence, trafficking in persons, and states' growing use of the criminal justice system as a response to economic and social problems. Criminalization is thus promoted under the guise of providing protection (presumably for the survivors of violations) and preserving morality (often of women). These dominant narratives gain momentum from religious, ethnic, and right-wing fundamentalisms and ideologies. They operate within systems of institutionalized patriarchy, racism, and oppression that maintain and reinforce diverse forms of inequalities, including those based on race, ethnicity, class, gender identity, sexuality, sexual orientation, geographic location, legal status, ability, health status, age, and religion, among others.

It is therefore critical to expand the debate around sexual and reproductive rights violations, in order to analyze, discuss and draw a comprehensive strategy that does not rely solely on criminalization in combatting sexual and reproductive rights violations and protecting gender justice.

CHALLENGES IN ADDRESSING SEXUAL AND REPRODUCTIVE RIGHTS VIOLATIONS EXCLUSIVELY THROUGH CRIMINALIZATION²

The following challenges were identified in using the criminal justice system as a quick fix. The basis for discussions included the presentation of case studies from the different countries this group works in. The full case studies can be found in English on RESURJ's website (www.resurj.org).

- Criminalization is not an appropriate and effective response for addressing public health issues or for upholding the sexual and reproductive rights of individuals. Often times, criminalization in the context of public health issues will lead to violations of the human rights of the individuals they are supposedly seeking to protect. A case in point is the law which criminalized HIV transmission in Kenya - the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (the Act), Section 24, which came into effect on 1st of December 2010 pursuant to Legal Notice No. 180 of 2010, and which was found by a Kenyan court to be unconstitutional. The law discriminated against women who can be found liable for vertical transmission of HIV, and fails to protect or empower them to negotiate safe sex. In sum, criminalization in public health issues only exacerbates vulnerabilities and marginalization rather than creating an enabling environment in which people can make informed decisions about their sexual and reproductive health and rights.
- States resort to the use of criminal law as a quick fix for sexual and gender-based violence, with little else done to address structural violence and state-condoned violence. While the government in Egypt passed a law in 2014 penalizing sexual harassment, women detainees who were subjected to compulsory virginity testing at the hands of a military doctor in 2011 remain without redress.
- Criminal justice systems around the world primarily focus on criminalization and have not proved to be a successful deterrent to preventing individual human rights' violations. For example, in Egypt, the law criminalizing Female Genital Mutilation (FGM) was passed in 2008, and yet, according to the 2015 national health survey, Egypt still maintains an alarming rate of 87% of girls and women between the ages of 15-49 who have been circumcised, nation-wide. In 2008, before the law was passed, it was as high as 91% indicating a slow decline even after the law was passed.³ To truly combat FGM, criminalization alone will not work, a more comprehensive approach is necessary.
- The act of criminalization itself within these laws does not inherently change/influence social and cultural norms. Rather it enhances and often reinforces gender norms and stereotypes. This is the case of the gang rape law in Pakistan for example. The penalty for gang rape is the death penalty. With such a high penalty, there is reluctance to pass out convictions, which have even a little bit of doubt. The state also does not have proper investigation and forensic capacities to find perpetrators guilty: in the recent Mukhtar Mai case, the judges' own biases and patriarchal mindset was revealed through the excuses and space given to the perpetrators in the judgment. This was further exacerbated with the lack of training and resources to collect and store timely forensic evidence, which may have played a crucial role in the final decision.
- Criminalization advances a protectionist approach that sometimes reinforces gender stereotypes such as that of women being weak and unable to make decisions on their own, further enhancing situations where they could be rendered marginalized and vulnerable. This is the case with Norway's immigration laws. As per Norwegian law, any proof of forced marriage provides sufficient basis to refuse family reunification, which, in turn, has weakened rather than strengthened prevention and protection from forced marriage.

² Meeting participants were able to identify these challenges through the discussions but also by presenting case studies that reveal the shortcomings of the approach in question.

³ <http://www.dhsprogram.com/pubs/pdf/FR313/FR313.pdf>

- Criminalization imposes a limited, individualistic approach that does not take into account the root causes and multidimensional nature of the problems that led to these violations. State response to sexual and reproductive rights violations focuses on criminalization without taking into account the real and actual needs of the person whose rights have been violated. In 2006, Brazil passed a domestic violence law considered advanced as it is not limited to criminal offenses. The approach includes prosecution but also calls for urgent protective measures (safe houses, immediate financial support from the spouse) to support women whose rights have been violated within an abusive and violent relationship. However, the law is limited in that most of the new courts specialized in domestic violence have not applied any of the provisions that go beyond criminalization. Little advancement was obtained with the implementation of preventive and protective provisions of the law. Given the rise of Christian Evangelical conservatives at the National Congress, debating needed measures on gender equality and comprehensive sexuality education at schools has become even more difficult. The more complex – and often more needed – urgent protection measures, which go beyond ordering perpetrators to stay away from survivors, are the least granted by judges. Initiatives regarding alternatives to imprisonment, such as psychosocial interventions with perpetrators, have been captured by an approach focused on stabilizing families rather than protecting women. And there is also no evidence of a reduction in the incidence of violence against women and girls.
- This focus on criminalization also results in manipulation of the law, and can lead to the criminalization of sexuality and sexual rights. In this case, criminalization is often used as a tool to impose social and cultural norms and behaviors by threatening punishment if these norms are not respected. In India for example, families will abuse the law on rape and sexual assault when they don't approve consensual acts between adolescents.
- The criminal justice system is fraught with its own set of problems, and penal laws confine the state response to sexual and reproductive health and rights violations to a structure that usually does not function as it should. The criminal justice system often times disproportionately discriminates and also re-victimizes already disenfranchised groups, in particular women living in poverty, children, adolescents, sex workers, LGBTIQ groups, migrant communities, people living with HIV, and those with ethnic, racial, religious, or other minorities. This is the case of Black transgender youth in the United States. Police in New York City will stop and search these youth, and their possession of condoms could be used against them as evidence for their alleged engagement in sex work or sex trafficking. This policy specifically targets Black and Brown people and encourages actual traffickers in withholding condoms. It also prevents those who want to protect themselves from Sexually Transmitted Infections (STIs), further leaving them unprotected and vulnerable. Youth of color are now afraid of carrying condoms around.

Having the police (and ultimately prisons) as the primary entry point to the judicial system is greatly problematic. Police brutality, violence, and the proliferation of prison industries in the neoliberal system reflect the institutionalization of the punitive judicial system. This system of surveillance benefits from the increase in criminalization to the detriment of the most vulnerable communities and reinforces a status quo that glosses over the intersections of inequality and injustice.

- Criminalization laws that purportedly protect the sovereignty of countries and their geopolitical borders limit, control, and police the mobility of bodies across borders. The criminalization of sex work, the deliberate stranding of refugees at borders and their treatment upon arrival, and the war on drugs all contribute to the increase of human trafficking. At the intersection of limited mobility, disability, status, ethnic belonging, and labor, sexual and reproductive justice becomes difficult to uphold in a climate of heightened surveillance and increased xenophobia.

CONCLUSION

As stated above, resorting to criminalization and penal policies has been one of the main ways states, donors, and even civil society activists address violations of sexual and reproductive rights and justice. As a first step towards questioning this inadequate approach, the main objective behind the meeting was to create a space to share and learn about the problematic aspects arising out of it, while also raising provocative questions that will give us all the opportunity to carefully consider this approach in our daily experiences. It is a challenging task: punishment is deeply embedded in our ideals of justice, and questioning it may feel like losing yet another tool for protecting rights. However, a shared commitment to an intersectional approach to sexual and reproductive justice⁴ demands us to not be silent before the contradictions and evident failure of criminalization.

Having gained a deeper understanding of the limitations of criminalization as a solution, we find it very difficult to continue advocating - nationally, regionally, and globally - for states to resort to this approach. We commit to taking this discussion forward in order to, ultimately, design a more comprehensive advocacy strategy that seeks to establish restorative rather than punitive justice. In other words, justice for survivors that does not seek revenge of the perpetrators, but instead, ensures that the survivor's rights are respected and protected and issues some guarantees that these violations will not keep recurring. We aim for a holistic strategy that addresses the root causes and structural problems that lead to sexual and reproductive rights violations in the first place. We will resist attempts of substituting social policies for criminal ones. We will not work in silos. Instead, we would like to advance and establish the interlinkages between sexual, economic, and environmental justice and promote an approach that seeks to uphold all three.

We invite feminists and other interested actors from the different movements to engage with us in this debate, and in particular, in discussing alternatives to the criminalization approach and sharing success stories from their various socio-economical and political contexts.

4 Our concept of *sexual and reproductive justice* seeks to promote a framework that brings attention to the multiple social, political and economic inequalities among different communities that contribute to infringements of sexual and reproductive rights

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