



Webinar on the Shortcomings of Penal Policies in Addressing Sexual and Reproductive Rights Violations

***Brief summary of the discussions
October 27, 2016***

Soha Abdelaty, RESURJ: *Briefly introduced RESURJ and the work we are doing on criminalization around sexual and reproductive rights violations. Then she explained the structure of the webinar as follows: each speaker will have a couple of questions to address, after which the floor will be open for participants to make comments and ask questions.*

Soha: Our first question is addressed to Jaime: What have we learned from our work on sexual and reproductive rights violations at the international level in terms of criminalization and penal policies?

Jaime Todd-Gher: I have been working on an Amnesty International project on this subject, through which we can reach a few conclusions:

1. Women human rights defenders and activists look to the state to provide protection and remedy violations;
2. We need to release our grip on criminal provisions and donors, and ask allies to do the same. This is a big ask because there is a lot of political capital calling to criminalize-but we've come far enough that we have the space to call for different advocacy asks, including: remedies tackling gender stereotyping and achieving accountability not through the penal systems. We are now more aware of the harm that criminalization does. This is very important for marginalized identities.
3. We need to start doing a better job of working together, not disjointed advocacy. Criminalization can bring us together in finding commonalities. Criminal justice systems impact us all in similar ways.
4. International standards around criminalization are not complete.

Soha: What are some of the most common problems associated with the criminal justice system?

Sinara Gumieri: the domestic violence law in Brazil is recognized as a big win, it allows for the possibility to talk about gender but it also got us thinking about the limitations of the criminalization approach. Criminal law does not prevent, it does not change behavior-there is no evidence to support that understanding. Punishment does not change behavior automatically. In many of our complex issues, it has to do with cultural norms, women's health, economic empowerment but when addressing it through criminalization we lose sight of the other factors and how to address them.

- The way we enforce is not welcoming for minorities and women. And it's an individualizing approach, it can't challenge the norms we want to

challenge. In Brazil, the only usage of the law has been with its penalizing aspects and not the others-because it's easier and faster.

- On the other hand, the provisions stipulating and allowing us to address gender and comprehensive sexuality education (CSE) and our efforts to do so are being targeted. We have to understand this paradox, where a criminal law the provides for certain social policies cannot be used. Criminal and not transformative measures are the ones being used.

Soha: What are some of the other limitations that we have encountered through our work at the national level?

Dalia Abdel-Hameed: it's a question of how we arrive at the law, and the approach we as feminists utilize (bottom-up v top-down). There are two examples I like to use:

1. The sexual harassment law: at the beginning there was complete denial by the state of the magnitude of the problem. What changed that was the momentum created by the public against mass assaults during demonstrations based on volunteer action and a form of organization that allowed feminist voices to be heard. This ended the long-lasting denial and stigma and shame associated with SV. In 2014 the law was changed. One court case in 2008, now we have hundreds.
2. At the other end of the spectrum, the female circumcision law- this is a case in point of how laws can be a complete failure if they do not attempt to address people's convictions and thinking. The law passed in 2008, it's extremely futile: only 3 cases which reached the court, prevalence of more than 90%-and they only reach the court because the girl dies. This year the government amended the law, and it only increased the penalties. No one will report it now, especially since parents are liable and facing harsher prison sentences. We don't have space for organizing and mobilizing now as we once did, so we can only mobilize people around the law but we are trying to think more creatively of how we can do that. How to remove the stigma, and women can speak in an empowered way about their violations. Against but also through the state.

Soha: What kinds of actions/ solutions need to be explored/accelerated to resolve this issue? Are there relevant current/ongoing initiatives towards the same?

Maliha Zia: we cannot look at it only in the aftermath of the violence, we need to look at the criminal justice system as a whole from the perspective of prevention.

- You can talk about education of children, but also what are the judges and police looking at and studying. So we looked at gender-assessment tools for employment criteria in international corporations. We need to make sure that state actors are more aware and sensitive to issues at hand.

Training and understanding of SV and which can be measured at every level of employment.

- Also in Pakistan, (along with UNODC) we're looking at pre-trial measures: allowing cases to be reviewed outside of the court so that the fear and stigma and double-discrimination is taken away from the courtroom. But these also need gender training. We cannot look at it as an isolated thing, we need to look at the entire system.
- And there are other actions through which these people can be taught not to violate women: courses, house arrest – other options not imprisonment. More courts are open to this.
- There are a lot of discussion, but no clear success cases. To change the mind-set is still not at the practical level in South Asia, where not a lot of money is being spent for these issues so we're looking at cost-effective options.

Soha: What contributions can the global landscape and international human rights framework play in addressing this problem?

Jaime: the international legal framework has a lot to offer but it is mixed in that it calls for states to criminalize to meet obligations but there are other areas we can look at. There are key long-standing principles that limit the extent to which states can criminalize:

1. Principle of legality-any crime must be defined clearly – a principle which is often violated. Laws have to have a legitimate purpose and aim: public security, public health protection of rights and freedoms of others. But not to be used if society doesn't like a particular behavior which is unacceptable.
2. Principle of necessity: using criminal law should be the last resort by states, there should be other ways of changing behavior and reducing harm and they should be prioritized. Alternative dispute resolution, investing in poverty reduction and public education, sensitizing of community and law enforcement officials. We as advocates should produce evidence that it's not necessary and can be more effective to take on other approaches.
3. Principle of proportionality: really harsh criminal punishments for conduct that is questionable whether it's punishable.
4. Equality and non-discrimination. Almost every criminal law that punishes sexual conduct discriminates against minorities. Our most challenging work is convincing the wider community that taking the criminalization approach is problematic and shifting mindsets from the idea that it protects the community and reduces harm. Until we can do that, the international advocacy work will be limited.

Maliha: if I may add to this: in Pakistan and India, we have seen the negative effects of over-criminalization: reduced successful prosecutions for gang rape

because of the high penalties. Judges and police officers who are already sympathetic to the cause will hesitate even more to prosecute with such high punishments (death penalty and life imprisonment). Advocates within other women's groups as well, a lot of data collection and evidence gathering will help making the mindset change.

Soha: What role do we envision for the state in this? How much do we want it to intervene?

Dalia: when we invite the state to intervene, it's always tricky. In Egypt, we have a systematic crackdown on trans woman and gay men with heavy state monitoring and entrapment using a medieval article in the law: the debauchery article used as pretext to criminalize homosexual conduct.

- We ask the state to respect the right to privacy. But I'm also very afraid to over-emphasize the right to privacy: do we really want the state not to interfere in the private sphere? Domestic violence, female circumcision, incest and sexual abuse of children all take place in private spheres. We have to ask the state to respect people's privacy, but not just that because conservative groups use that.
- We need less state intervention specifically around LGBT but we also need to engage more and more with the concept of consent, which is under researched. And age, what the state does to minors.
- It's not only about laws however, state obligations are 3-fold: it's not only to protect, but we forget that the state has to respect and fulfill human rights. The lack of CSE is a great missed opportunity in Egypt. The state works with vertical funding on female circumcision, family planning while ignoring CSE for gender equality and GBV to allow women to make informed decisions about their bodies. Also universal access to SRH services, with the stigma attached to non-married couples accessing these services (guaranteeing privacy and confidentiality when seeking these services).
- States lack the political will to really address SRHR; its easy to pass a law and brag about it in international forums but they don't put in place measures to make it more effective.

Jaime: if I may add to that, on being mindful of confining advocacy to privacy, we don't want to create a situation where sexual autonomy is limited to the private sphere. We also need to think about sexual consent. By focusing on sexual consent we can focus the analysis on the individual. Thinking about the issue beyond advocacy. Decades of advocacy focusing on eradicating violence in private spheres and how we engage in decriminalization advocacy that doesn't take away from that. To move forward on these issues, we need to decide within our own platforms to bring together constituencies from across the board.



Soha: In advocating for a more holistic/comprehensive approach that ensures justice is upheld, what should be our main messages/components?

Sinara: one thing we need to work on to change our advocacy strategy is to actually talk about it. In Brazil, criminalization of homophobia is difficult to talk about for example and we have to list it as a last resort.

- We rely on the symbolic value of the criminal law, but it's not just the passing of the law that creates the debate and momentum but also there's movement and work on the ground around these issues that we can use.
- Developing our language when it comes to data: how criminalization is harmful. We need data to show that, strengthen our arguments using data.
- We need to first come together as movement to agree on this, but we should be able to say that this gives states permission to ignore social policies. Especially since it seems for some groups as the only solution. If it's a last resort, which it should be, you give the impression that everything else has been done which isn't the case. Remember what else were we asking for. Never talking about criminalization as an isolated issue. Develop the language so we can address the issue in a safe space where groups don't feel like we are taking away the only resort or solution they have.

Q&A

1. **Susana Fried: if criminal law is supposed to express social disapproval, then de-criminalization is social approval?**

Sinara: we got caught up in this debate and now it's hard to challenge this. But we need to think of what else are we not doing. In Brazil, we have laws that say these violations are not acceptable. But at the same time, we contradict ourselves when we ban gender discussions in schools. These ideas are very popular. When we talk about social disapproval, what else? Public campaigns and debates, isn't it important for social disapproval to say that VAW is important enough to discuss in schools and other forums? Criminalization cannot be the only way to make something socially unacceptable. Because if we stick to that, then we're feeding into this rhetoric that if a state has criminalized then it has already done everything it needs to do. But many times it hasn't even started doing anything in terms of prevention for example.

Jaime: the problem lies within the expressive function of criminal law and that's why it's been so hard to get people to release their grip on the criminal justice as an approach and solution. People do believe that when you criminalize something, you're expressing social disapproval and reducing that stigmatized conduct. That it actually works. How do we deal

with the communities who want the expressive function of criminal law, who want to express their social disapproval of certain conduct by criminal law? First we need to think of what is an alternative outlet for this expressive function. We could also use some efforts to develop evidence that the criminal law expressive function isn't working, not preventing conduct. And instead, all those other human rights violations are flowing from it.

Dalia: it's not just the social disapproval that is the expression function of the law, but sometimes pushing for a law is the way to make the state acknowledge the problem and oblige it and hold it accountable, including for state-perpetuated violence and violations.

Jaime: where it's legitimate to use criminal law by state and non-state actors is where we have the strongest evidence. When we think of states due diligence obligations, it still boils down to criminalize and punish. But there's also the obligation to prevent and address the structural systems that enable this violence. Not just focused on punishing the action, accountability needs to go deeper. I agree we cannot completely abandon criminalizing violence, it's the whole realm of other sexual and reproductive rights issues where we need to find alternatives.

2. Question: in Nepal, criminal penalties increase the younger the victim is. Will increased penalties discourage reporting?

Dalia: the increase in penalties is a huge problem. In Egypt before 2011, the laws on sexual crimes had been amended a number of times always increasing the punishment. The penalty for rape is death sentence. The problem when you have a society that doesn't see these acts as crimes. This leads to a series of problems leading to miscarriages of justice: the police not cooperating for the victims, not listening to them; the prosecutors articulating accusations sympathetically to the perpetrators; and the judges giving reduced punishments or with a suspension. The state is resorting to the easy way to say it has done its duty. There is already a law on FGC, so we have to work with it, so to encourage parents to report the incident we proposed legal amendments to suspend penalties when parents report the incident. We got a huge backlash from the pro-criminalization camp, that we're trying to de-criminalize FGC.

Diva: it's a question of do we want a system of social disapproval enforced by the state or do we want a system of accountability and healing?

3. Cynthia Rothschild: we need to move beyond the right to privacy. Connecting this to economic and social justice.

Sinara: on the domestic violence bill in Brazil, it's advanced because it has a set of measure that deal with prevention and news outlets don't reinforce stereotypes and women who seek assistance should be assisted by accessing social policies: psycho-social support, support for them and their children. But the criminal aspects have colonized this discussion. We need to stress that they need to go together. Women who need somewhere to go within the next hour and we say we can initiative a penal suit but we can't help you otherwise. Consequences of not seeing this in an intersectional manner, if they can't access social policies they will not come forth with the violence they are suffering. Develop the argument and language that they are interconnected and linked.

4. Nelly Bassily: how to move from criminalization to transformative justice within communities?

Jaime: if we had more case studies demonstrating transformative justice, community-led and a strong foundation calling for transformative justice. Indigenous communities is where we can look for those. Their handling of disputes and disagreements within communities. How to address conflict in a way that does not oppose human rights.

Sinara: we see sometimes communities' perceptions: how certain communities don't want perpetrators to go to jail for example. Sometimes that's used as an excuse not to do anything. To wash our hands clean of this, it's not even working for them. So we need to listen to communities more effectively.

5. Question: what about the function of criminal law in changing the power balance between perpetrators and victims?

Dalia: the sexual harassment law is a success story. It's a long story that helped in changing the law. When the first harassers got imprisoned, the media started picking it up more seriously. When the law changed, women's courage and rights respect changed. The more interesting articles in the law are around discussions for reducing sentences: social services, awareness-raising. Sometimes you need a strong law or grip, but after you set the tone and create that deterrence, you may need to stop and thinking about de-criminalizing the issue because you have criminalized it socially already which is more important than legal criminalization.

Soha: *Closed off the discussion with some concluding remarks, thanking the speakers and participants telling listeners that RESURJ work in this area will continue further.*